Criminal Charges with Too Much Bite: Why Charging and Convicting HIV-Positive Biters and Spitters of Attempted Murder is Unjustifiable

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I. INTRODUCTION

Annual surveys conducted by the Kaiser Family Foundation ("Foundation") consistently demonstrate "stubbornly persistent" ignorance about the *human immunodeficiency virus* ("HIV") and its transmission.[1] In fact, a report based upon the Foundation's 2011 Survey of Americans on HIV/AIDS ("2011 Survey") revealed that roughly one in four Americans mistakenly believed that HIV can be spread by sharing a drinking glass with an HIV-positive individual.[2] The 2011 Survey also revealed that one in six Americans incorrectly thought that HIV transmission could occur from sharing a toilet seat with an HIV-positive individual[3] and that approximately one in eight Americans wrongly believed that it was possible to seroconvert[4] after swimming in a pool with an HIV-positive individual.[5] Other surveys indicate increasing ignorance about HIV and its transmission.[6]

Given such ignorance, it is perhaps unsurprising that numerous HIV-positive individuals have been charged with and convicted of serious criminal offenses for engaging in conduct with little risk of HIV

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[1] *HIV/AIDS at 30: A Public Opinion Perspective,* KAISER FAMILY FOUNDATION (June 2011), at 6, http://www.kff.org/kaiserpolls/upload/8186.pdf.

[2] *Id.*

[3] *Id.*

[4] "Seroconversion" is the "production of antibodies in response to an antigen." MERRIAM WEBSTER, http://www.merriam-webster.com/dictionary/seroconvert (last visited Mar. 29, 2013).

[5] *HIV/AIDS at 30: A Public Opinion Perspective*, *supra* note 1, at 6.

[6] *See, e.g.*, *Worry Over Growing HIV Ignorance: People are More Ignorant of How HIV Is Transmitted Than They Were Five Years Ago*, BBC NEWS (Apr. 7, 2006), http://news.bbc.co.uk/2/hi/health/4885120.stm (explaining that a recent survey conducted in the United Kingdom found the those surveyed were more ignorant about how HIV is transmitted than in previous years); *See also HIV/AIDS at 30: A Public Opinion Perspective*, *supra* note 1, at 6 (showing that more Americans currently believe that HIV can be spread from sharing a drinking glass than in years previous).

transmission.[7] In fact, a recent report published by The Center for HIV Law and Policy suggests that, of all the prosecutions of HIV-positive individuals from 2008–2011, 22% were against HIV-positive biters and spitters.[8] This report is consistent with previous studies.[9]

Such charges and convictions are disturbing given that the Centers for Disease Control and Prevention[10] ("CDC") maintains that there is only a "remote risk of [HIV] transmission" from an HIV-positive individual biting an HIV-negative individual,[11] and given that the CDC further maintains that "there [are] no documented case[s] of [HIV] transmission from an HIV-infected person spitting on [an HIV-negative] person."[12] Although prosecutors use a variety of criminal statutes in prosecuting HIV-positive biters and spitters,[13] this article focuses on only the most flagrant abuse of prosecutorial discretion, charging and convicting HIV-positive individuals who bite and spit with attempted homicide.

This article demonstrates why there are no legal, scientific, or additional justifications for charging and convicting HIV-positive biters and spitters with attempted murder. Part II details the emergence of HIV and AIDS in the United States, explores the legislative and prosecutorial response, and concludes by giving examples of HIV-positive biters and spitters charged with and convicted of attempted homicide. Part III discusses these attempted murder convictions and asserts that such

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[7] *See Prosecutions and Arrests for HIV Exposure in the United States, 2008–2012*, THE CENTER OF HIV LAW & POLICY, http://www.hivlawandpolicy.org/resources/download/456 (last visited Mar. 29, 2013).

[8] *Id.*

[9] *See* Zita Lazzarini, Sarah Bray & Scott Burris, *Evaluating the Impact of Criminal Laws on HIV Risk Behavior*, 30 J.L. MED. & ETHICS 239, 245 (2002) (finding that some twenty-three percent of prosecutions against HIV-positive individuals between 1986 and 2001 were against biters and spitters).

[10] The CDC and Prevention is an agency within the U.S. Department of Health and Human Services, and is charged with protecting the public health and safety by providing information and direction in the prevention and control of diseases – particularly infectious diseases. The CDC issues the Morbidity and Mortality Weekly Report ("MMWR"), an epidemiological digest that summarizes reports received by the CDC from state health departments during the previous week. The MMWR is the CDC's primary means of publicizing useful public health information and recommendations. For more information about the CDC and the MMWR, visit the CDC's website, http://www.cdc.gov/mmwr (last visited Mar. 29, 2013).

[11] *HIV Transmission: Can HIV be transmitted by human bite?*, CENTERS FOR DISEASE CONTROL, http://www.cdc.gov/hiv/resources/qa/transmission.htm (last modified Mar. 25, 2010) [hereinafter *Biting*, CDC] (explaining that successful transmission would also require various aggravating factors).

[12] *HIV Transmission: Can HIV be transmitted by being spit on by an HIV-infected person?*, CENTERS FOR DISEASE CONTROL, http://www.cdc.gov/hiv/resources/qa/transmission.html (last modified Mar. 25, 2010) [hereinafter *Spitting*, CDC].

[13] *E.g.*, United States v. Moore, 846 F.2d 1163, 1168 (8th Cir. 1988) (affirming the assault with a deadly weapon conviction of an HIV-positive biter); State v. Haines, 545 N.E.2d 834, 841 (Ind. Ct. App. 1989) (reinstating the murder conviction of an HIV-positive biter); State v. Price, 834 N.E.2d 847, 848–50 (Ohio Ct. App. 2005) (affirming the felonious assault and attempted felonious assault convictions of an HIV-positive spitter); Degrate v. State, No. 05-04-00218-CR, 2005 WL 165182, at *1, *3 (Tex. App. Jan. 26, 2005) (affirming the aggravated assault conviction of an HIV-positive biter).

convictions are excessive and disproportionate to the committed offense, worthy of mitigation to a lesser offense, and unsupported by the consequentialist and retributivist justifications of punishment. Part IV concludes by offering a modest solution.

II. HISTORICAL BACKGROUND

A. The Emergence of AIDS/HIV – The First Case Reports

In June of 1981, the CDC published a Morbidity and Mortality Weekly Report ("MMWR") describing an unusual "outbreak of pneumonia in a group of homosexual men."[14] According to the report, five young males, "all active homosexuals," were treated for biopsy-confirmed *Pneumocystis carinii pneumonia* ("PCP") at three different hospitals in Los Angeles, California between October 1980 and May 1981.[15] The occurrence of PCP in these individuals was unusual because it was generally believed, at least in the United States, that such pneumonia was "almost exclusively limited to severely immunosuppressed patients."[16] Here, however, PCP had struck five young men in seemingly good health, none of whom had "a clinically apparent underlying immunodeficiency."[17]

In July 1981, the CDC reported ten additional cases of biopsy-confirmed PCP in young and seemingly healthy homosexual men – four in Los Angeles and six in San Francisco.[18] That these individuals were all homosexual males suggested an association between the illness and some aspect of the homosexual lifestyle.[19] Accordingly, "[a]s it was first described in such men, the disease was [initially] called gay-related immune deficiency or GRID."[20]

The CDC issued another unusual MMWR twenty-eight days later, this one summarizing an increase in incidents of *Kaposi's sarcoma* ("KS") – a malignancy predominantly reported in elderly men.[21] However, in July 1981, the CDC reported that twenty-six cases of KS had been diagnosed in young and middle-aged homosexual males in California and New York during the thirty-month span immediately predating issuance of the

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[14] DONALD H.J. HERMANN & WILLIAM P. SCHURGIN, LEGAL ASPECTS OF AIDS § 1:02, at 3 (Thomson Reuters/West, 1991).

[15] CDC, Pneumocystis *Pneumonia – Los Angeles*, 30 MORBIDITY & MORTALITY WKLY. REP. 1, 1 (1981), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/june_5.htm.

[16] *Id.* at 1–3.

[17] *Id.*

[18] CDC, *Kaposi's Sarcoma and* Pneumocystis *Pneumonia Among Homosexual Men – New York City and California*, 30 MORBIDITY & MORTALITY WKLY. REP. 305, 305–08 (1981), http://www.cdc.gov/hiv/resources/reports/mmwr/pdf/mmwr04jul81.pdf.

[19] CDC, *supra* note 15, at 1–3.

[20] HERMANN & SCHURGIN, *supra* note 14, § 1:02, at 3.

[21] CDC, *supra* note 18, at 305–08.

report.[22] One month later, the CDC reported that seventy additional cases of PCP and KS had been diagnosed in predominantly young and Caucasian homosexual males.[23]

Similar cases of PCP and KS were subsequently reported in other populations, including immigrants from certain countries (July 9, 1982),[24] hemophiliacs (July 16, 1982),[25] intravenous drug users (September 24, 1982),[26] blood transfusion recipients (December 10, 1982),[27] and infants (December 17, 1982).[28]

The proliferation of PCP and KS across these varied populations suggested a common underlying factor, and it soon became evident that these individuals were, as suspected, suffering from a "common immunologic deficit."[29] Shortly thereafter, this immunodeficiency was termed the *acquired immunodeficiency syndrome* ("AIDS") and its cause identified as HIV.[30] By the end of the 1980s, AIDS and HIV had become a leading cause of death in the United States among people aged twenty-five to forty-four.[31]

B. Epidemiology of AIDS/HIV from the Late-1980s to Mid-1990s

By December 1986, five years after the first reported cases in June of 1981, 29,003 individuals had been diagnosed with AIDS and reported to the CDC.[32] By December 1991, the number of reported cases had grown

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[22] *Id.* at 305.

[23] CDC, *Follow-Up on Kaposi's Sarcoma and* Pneumocystis *Pneumonia*, 30 MORBIDITY & MORTALITY WKLY. REP. 409, 409 (1981), *available at* http://www.cdc.gov/hiv/resources/reports/mmwr/pdf/mmwr28aug81.pdf.

[24] CDC, *Opportunistic Infections and Kaposi's Sarcoma among Haitians in the United States*, 31 MORBIDITY & MORTALITY WKLY. REP. 353, 353 (1982), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/00001123.htm.

[25] CDC, *Pneumocystis carinii Pneumonia among Persons with Hemophilia A*, 31 MORBIDITY & MORTALITY WKLY. REP. 365, 365 (1982), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/00001126.htm.

[26] CDC, *Current Trends Update on Acquired Immune Deficiency Syndrome (AIDS) – United States*, 31 MORBIDITY & MORTALITY WKLY. REP. 507, 507–08 (1982), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/00001163.htm.

[27] CDC, *Possible Transfusion-Associated Acquired Immune Deficiency Syndrome (AIDS) – California*, 31 MORBIDITY & MORTALITY WKLY. REP. 652, 652 (1982), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/00001203.htm.

[28] CDC, *Unexplained Immunodeficiency and Opportunistic Infections in Infants – New York, New Jersey, California*, 31 MORBIDITY & MORTALITY WKLY. REP. 665, 665 (1982), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/00001208.htm.

[29] DAVID W. WEBBER, AIDS AND THE LAW 1–5 (Aspen Publishers 4th ed. 2010).

[30] *Id.*

[31] *See* CDC, *Mortality Attributable to HIV Infection/AIDS Among Persons Aged 25–44 Years -- United States*, *1990, 1991*, 42 MORBIDITY & MORTALITY WKLY. REP. 481, 481 (1993), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/00021017.htm.

[32] CDC, *AIDS Weekly Surveillance Report: United States Cases Reported to CDC* (Dec. 29, 1986), *available at* http://www.cdc.gov/hiv/pdf/statistics_surveillance86.pdf.

to 206,392.[33] And by December 1995, some fifteen years after those first reported cases, the cumulative number of reported AIDS cases in the United States surpassed half a million; 513,486 individuals had been diagnosed with AIDS and reported to the CDC by state and territorial health departments.[34] Of those individuals, some 319,840 had died – a fatality rate of roughly 62 percent.[35] An additional 77,302 individuals were known to be living with HIV.[36]

The number of deaths attributable to HIV increased steadily during the 1980s and 1990s.[37] In 1988, HIV infection was the third leading cause of death among men twenty-five to forty-four years of age.[38] In 1989, HIV infection became the second leading cause of death in such men, surpassing heart disease, cancer, suicide, and homicide.[39] And by 1993, HIV infection was the leading cause of death among men twenty-five to forty-four years of age.[40]

A similar trend occurred in women. In 1988, HIV infection was the eighth leading cause of death among women twenty-five to forty-four years of age.[41] By 1994, HIV infection was the third leading cause of death in such women, specifically, the fifth leading cause of death among Caucasian women (6% of deaths), and the leading cause of death among African-American women (22% of deaths).[42]

By the early 1990s, HIV infection in women had become particularly noteworthy, as it was projected that the estimated 80,000 HIV-infected women alive in 1992 would leave roughly 125,000 to 150,000 children orphaned when their mothers died sometime during the 1990s.[43] By 1995,

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[33] CDC, *HIV/AIDS Surveillance: U.S. AIDS Cases Reported Through December 1991* (Jan. 1992), at 6, *available at* http://www.cdc.gov/hiv/topics/surveillance/resources/reports/pdf/surveillance91.pdf.

[34] CDC, *HIV/AIDS Surveillance Report: U.S. HIV and AIDS Cases Reported Through December 1995* (1995), at 4, *available at* http://www.cdc.gov/hiv/topics/surveillance/resources/reports/pdf/hivsur72.pdf.

[35] *Id.* at 19.

[36] *Id.* at 28. "These data provide a minimum estimate of the number of persons known to be HIV infected in states with confidential HIV infection reporting." *Id.* at 35.

[37] CDC, *Current Trends: Mortality Attributable to HIV Infection/AIDS – United States, 1981–1990*, 40 MORBIDITY & MORTALITY WKLY. REP. 41, 41 (1991), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/00001880.htm.

[38] *Id.*

[39] *Id.*

[40] CDC, *Update: Mortality Attributable to HIV Infection Among Persons Aged 25–44 Years – United States*, *1994*, 45 MORBIDITY & MORTALITY WKLY. REP. 121, 121 (1996), *available at* http://www.cdc.gov/mmwr/PDF/wk/mm4506.pdf.

[41] CDC, *supra* note 37, at 41–44. However, "[i]n both New York State and New Jersey [in 1988], HIV infection/AIDS [was] the leading cause of death among black women [fifteen to forty-four years] of age; [and] in New Jersey, the number of deaths among this population from HIV infection . . . was nearly equal to the number of deaths from the second and third causes combined (cancer and unintentional injuries) . . . ." *Id.*

[42] CDC, *supra* note 40, at 121.

[43] *Id.* at 123 (emphasis added).

approximately 13,000 additional cases of HIV infection in women had been reported to the CDC by state and territorial health departments, further increasing the number of prospective orphans.[44]

By December 1995, AIDS and HIV had spread throughout the United States.[45] Approximately 84% of infected individuals – some 433,000 people – lived in metropolitan areas of 500,000 individuals or greater, with New York City (81,604), Los Angeles (31,095), and San Francisco (22,835) reporting the highest cumulative totals.[46] Other large metropolitan areas, Miami (16,372), Washington, D.C. (14,640), and Chicago (14,335), for example – reported similar cumulative totals.[47]

Of the fifty states, Florida reported the third highest cumulative total of individuals diagnosed with AIDS (51,838), while Texas (35,114) and New Jersey (29,327) reported the fourth and fifth highest cumulative totals, respectively.[48] Connecticut experienced the largest percentage increase in the number of individuals diagnosed with AIDS between 1994 and 1995 (80.9 percent), while Virginia (39.4 percent) and Kansas (37.3 percent) likewise experienced double-digit percentage increases.[49] By the mid-1990s, AIDS and HIV had become a national crisis.

C. The Legislative Response – Enactment of HIV-Specific Statutes

Partially in response to political pressures on legislatures "to do something" to curtail the growing AIDS/HIV epidemic,[50] and partially in response to the then-perceived difficulties with using traditional criminal statutes to prosecute conduct posing a risk of transmission,[51] numerous states enacted HIV-specific statutes throughout the late-1980s and into the

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[44] *See* CDC, *supra* note 34, at 30 (reporting 4,195 new HIV infection cases in women in 1995); CDC, *HIV/AIDS Surveillance Report: U.S. HIV and AIDS Cases Reported Through December 1994*, (1994), at 30, *available at* http://www.cdc.gov/hiv/topics/surveillance/resources/reports/pdf/hivsur62.pdf (reporting 4837 new HIV infection cases in women in 1994); CDC, *HIV/AIDS Surveillance Report: U.S. HIV and AIDS Cases Reported Through December 1993* (1993), at 23, *available at* http://www.cdc.gov/hiv/topics/surveillance/resources/reports/pdf/hivsur54.pdf (reporting 3870 new HIV infection cases in women in 1993).

[45] CDC, *supra* note 34, at 6.

[46] *Id.* at 7–8.

[47] *Id.*

[48] *Id.* at 6. Unsurprisingly, California and New York reported the highest cumulative totals.

[49] *Id.*

[50] WEBBER, *supra* note 29, at 7–45; *See also* Larry O. Gostin, *Public Health Strategies for Confronting AIDS: Legislative and Regulatory Policy in the United States*, 261 J. AM. MED. ASSOC. 1621, 1629 (1989) ("[P]olitical pressures on legislators to use the coercive powers of the state to combat the epidemic were unmistakable.").

[51] WEBBER, *supra* note 29, at 7–45; *See* Lori A. David, *The Rights and Responsibilities of People with HIV or AIDS: The Legal Ramifications in Criminal Law of Knowingly Transmitting AIDS*, 19 L. & PSYCHOL. REV. 259, 269 (1995) (stating that HIV-specific criminal statutes are "aimed at reducing the spread of HIV/AIDS by penalizing certain conduct.").

mid-1990s.[52] Many of these statutes remain in effect today.[53]

Although these statutes vary greatly in content, they can be separated into several general types: (1) statues prohibiting exposure to various communicable diseases; (2) statutes enhancing penalties for specific conduct if engaged in by an HIV-positive individual; and (3) HIV-specific criminal statutes.[54]

States commonly utilize a variety of statutes to combat HIV-related offenses. For example, California has a general communicable disease exposure statute that is likely applicable to HIV-positive individuals,[55] a statute enhancing the penalty for specified sexual offenses when committed by an HIV-positive individual (e.g., sexual intercourse with a minor),[56] and an HIV-specific criminal statute barring HIV-positive individuals from donating bodily fluids and other tissues.[57] Simply stated: "Never before has a single disease been the focus of such a panoply of serious criminal laws."[58]

1. *General Communicable Disease Exposure Laws*

At least twenty-four states and one territory have general provisions in their public health codes making it a misdemeanor, usually punishable by less than a year in jail, to expose another person to a communicable or sexually transmitted disease.[59] Although a few statutes are broadly written

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[52] *See, e.g.*, 1988 Idaho Sess. Laws 271–72 (adopting a statute that criminalized intentional or attempted HIV exposure); 1993 Nev. Stat. 1943 (adopting a statute that criminalized willful conduct that was likely to transmit HIV to another person); 1989 N.D. Laws 507–10 (adopting a statute that criminalized knowing HIV exposure).

[53] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 120291 (West 2006) (criminalizing undisclosed sexual intercourse between an HIV-positive individual and an HIV-negative individual). *But see* TEX. PENAL CODE ANN. § 22.012, *repealed by* Act effective Aug. 3, 1993, ch. 900, 1993 Tex. Gen. Laws 3619.

[54] *See* Lazzarini, Bray & Burris, *supra* note 9, at 240 (explaining that HIV-related statutes can be broken into several general categories).

[55] *See* CAL. HEALTH & SAFETY CODE § 120261(d) (West 2006) (defining "communicable disease" as "any disease that was transferable through the exposure incident, as determined by the certifying physician"); CAL. HEALTH & SAFETY CODE §120290 (West 2006) (making it a misdemeanor for anyone afflicted with a "communicable disease" to willfully expose themselves to another person).

[56] *See* CAL. PENAL CODE § 12022.85 (West 2006 & Supp. 2012).

[57] *See* CAL. HEALTH & SAFETY CODE § 1621.5 (West 2006).

[58] WEBBER, *supra* note 29, at 7–45.

[59] *See* Adeline Delavande, Dana Goldman, & Neerja Sood, *Criminal Prosecutions and Human Immunodeficiency Virus-Related Risky Behavior*, 53 J.L. & ECON. 741, 749 (2010) (explaining that "a majority of communicable disease or STD laws make exposure a misdemeanor punishable by less than [one] year of jail"). These states and territories are Alabama, Arizona, California, Colorado, Florida, Indiana, Iowa, Louisiana, Maryland, Minnesota, Montana, Nevada, New Jersey, New York, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, and the Virgin Islands. *See* ALA. CODE § 22-11A-21(c) (LexisNexis 2006); ARIZ. REV. STAT ANN. § 36-631 (2009); CAL. HEALTH & SAFETY CODE § 120290 (West 2006); COL. REV. STAT. § 25-4-401 (2011); FLA. STAT. ANN. § 384.28 (West 2007); IND. CODE ANN. § 16-41-91.5 (West 2007); IOWA CODE ANN. § 139A.20 (West 2005); La. Rev. Stat. Ann. § 40:1062 (2008); MD. CODE ANN., HEALTH-GEN. § 18-602 (LexisNexis 2009); MINN. STAT. ANN. § 145.36 (West 2011);

to prohibit exposure to any communicable, infectious, or contagious disease,[60] many of the statutes are more narrowly written to only prohibit exposure to sexually transmitted diseases or infections.[61]

While HIV is sexually transmitted, the virus is generally not considered to be a sexually transmitted disease.[62] Accordingly, whether these statutes cover HIV exposure "depends upon how the relevant terms are defined [by] state law."[63] Of those states and territories with communicable disease exposure laws in their public health codes, several include, or appear to include, HIV by statutory definition or administrative regulation.[64]

2. *Statutes Enhancing Penalties for Certain Behavior*

Numerous states have enacted statutes pertaining to conduct that is already criminal but which provide enhanced penalties or a higher grade of offense when engaged in by HIV-positive individuals.[65] Numerous states, for example, impose greater penalties on prostitutes or persons soliciting prostitutes when either the prostitute or solicitor knows of their HIV

MONT. CODE. ANN. § 50-18-112 (2011); Nev. Rev. Stat § 441A.180 (2011); N.J. STAT. ANN. § 26:4-42 (West 2007); N.Y. PUB. HEALTH LAW § 2307 (McKinney 2012); N.D. CENT. CODE § 23-07-21 (2002); OKLA. STAT. ANN. tit. 21, § 1199 (West 2002); R.I. GEN. LAWS § 23-11-1 (2008); S.C. CODE ANN. § 44-29-60 (2002); S.D. CODIFIED LAWS § 34-22-5 (2011); TENN. CODE ANN. § 68-10-107 (2011); UTAH CODE. ANN. § 26-6-5 (LexisNexis 2007); VT. STAT. ANN. tit. 18, §§ 1091–1096 (2002); WASH. REV. CODE § 70.54.050 (West 2011); W. VA. CODE ANN. § 16-4-20 (LexisNexis 2011); V.I. CODE ANN. tit. 14, § 886 (1996).

[60] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 120290 (West 2006) (prohibiting the willful exposure of any person afflicted with any "contagious, infectious, or communicable disease"); MINN. STAT. § 145.36 (2011) (prohibiting the willful exposure of anyone affected with a "contagious or infectious disease" in a public place); NEV. REV. STAT § 441A.180 (1993) (prohibiting exposure of any person with a "communicable disease in an infectious state").

[61] *See* Lazzarini, Bray & Burris *supra* note 9, at 241 (explaining that nineteen communicable disease exposure statutes refer explicitly to STDs); *e.g.*, ALA. CODE § 22-11A-21(c) (LexisNexis 2006) (prohibiting any person afflicted with a "sexually transmitted disease" from knowingly transmitting that infection); COL. REV. STAT. ANN. § 25-4-401 (West 2006) (prohibiting any person afflicted with a "sexually transmitted infection" from willfully exposing another person to that infection); W. VA. CODE ANN. § 16-4-20 (LexisNexis 2006) (prohibiting any person afflicted with a "venereal disease" from exposing another person to that infection).

[62] WEBBER, *supra* note 29, § 7.03[G], at 7-43–44.

[63] Lazzarini, Bray & Burris, *supra* note 9, at 241.

[64] *Id.* (explaining that nine states "appear to cover HIV by statutory definition, regulation, or case law"); *e.g.*, ALA. ADMIN. CODE r. 420-4-1.03 (2011) (designating HIV infection as a sexually transmitted disease covered by the communicable disease statute); MONT. CODE ANN. § 50-18-101 (2011) (designating HIV infection as a sexually transmitted disease covered by the communicable disease statute); WASH. REV. CODE ANN. § 70.24.017 (West 2011) (mandating that the Washington State Board of Health include HIV infection in its list of sexually transmitted diseases); N.Y. State Soc'y of Surgeons v. Axelrod, 572 N.E.2d 605, 606–07 (N.Y. 1991) (affirming decision of Commissioner of Health not to add HIV to the list of communicable and sexually transmitted diseases).

[65] *See* Lazzarini, Bray & Burris, *supra* note 9, at 244 (explaining that fifteen states have enacted statutes that "deal specifically with acts that are already crimes . . . but [which] are punished more severely when the perpetrator knows he or she has HIV.").

infection.[66] Other states provide enhanced penalties for specified sexual offenses when HIV exposure is involved.[67] Still other states have adopted statutes providing enhanced penalties for assaults directed at law enforcement officers or prison personnel.[68]

3. *HIV-Specific Exposure or Transmission Laws*

At least thirty-two states and territories have enacted HIV-specific criminal statutes.[69] Although these statutes "vary in breadth, specificity, and severity,"[70] all are aimed at reducing HIV transmission by penalizing certain conduct.[71] The penalized conduct often includes sexual acts,[72] the

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[66] *Compare* COLO. REV. STAT.ANN. § 18-7-201.7 (West 2012) (deeming it a felony to engage in prostitution with knowledge of being HIV-positive), *and* COLO. REV. STAT. ANN. § 18-7-205.7 (West 2012) (making it a felony to patronize a prostitute with knowledge of being HIV-positive), *with* COLO. REV. STAT.ANN. § 18-7-201 (West 2012) (making it a misdemeanor to engage in prostitution), *and* COLO. REV. STAT. ANN. § 18-7-202 (West 2012) (making it a misdemeanor to solicit a prostitute). Florida, Georgia, Missouri, Montana, Nevada, Ohio, Pennsylvania, South Carolina, Tennessee, and Utah similarly punish HIV-negative prostitutes and solicitors less severely. *See HIV Criminalization: State Laws Criminalizing Conduct Based on HIV Status*, LAMBDA LEGAL, http://www.lambdalegal.org/publications/fs_hiv-criminalization (last updated July 12, 2010).

[67] *See* Lazzarini, Bray & Burris, *supra* note 9, at 244 (explaining that "[f]ive states enhance penalties for various sex crimes when knowing HIV exposure is involved"); *e.g.*, ALASKA STAT. ANN. § 12.55.155(c)(33) (West 2012) (allowing imposition of a sentence above the presumptive range when the defendant has been diagnosed as HIV-positive and commits sexual assault, sexual abuse of a minor, incest, online enticement of a minor, or the unlawful exploitation of a minor); CAL. PENAL CODE § 12022.85 (West 2012) (specifying a mandatory three-year enhancement when the defendant knows they are HIV-positive and commits rape, rape of a minor, rape of a spouse, sodomy, or oral copulation); TENN. CODE ANN. § 40-35-114(21) (2012) (allowing sentencing enhancement when the defendant knew or should have known that he or she was HIV-positive and commits aggravated rape, rape, rape of a child, or statutory rape); WIS. STAT. § 973.017(4) (West 2012) (specifying HIV to be an "aggravating factor" during the commission of a "serious sex crime").

[68] Lazzarini, Bray & Burris, *supra* note 9, at 244. *See, e.g.*, IND. CODE § 35-42-2-6(e) (2012) (making it a Class D felony to place bodily fluids on a law enforcement officer, a Class C felony if the bodily fluids are infected with HIV, and a Class A felony if the offense results in the transmission of HIV to the law enforcement officer).

[69] These states include Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, Guam, and the U.S. Virgin Islands. *See State-by-State Criminal Laws Used to Prosecute People with HIV*, THE CENTER OF HIV LAW & POLICY, http://hivlawandpolicy.org/resources/view/763 (last accessed Apr. 4, 2013). Other states, such as Minnesota, have criminal statutes that may be applicable to HIV, although the virus is not specifically mentioned. *See* MINN. STAT. ANN. § 609.2241 (West 2012).

[70] Lazzarini, Bray & Burris, *supra* note 9, at 244; *See* WEBBER, *supra* note 29, § 7.03[H], at 7–48 (explaining that "[t]hese statutes vary greatly in content").

[71] *See* David, *supra* note 51, at 269.

[72] *E.g.*, FLA. STAT. ANN. § 384.24 (West 2012) (making it unlawful for an individual who, knowing himself or herself to be HIV-positive, and knowing that HIV can be transmitted through sexual intercourse, to have sexual intercourse with another person without informing the other person of his or her HIV status); MICH. COMP. LAWS § 333.5210 (2012) (making it a felony for an individual who, knowing himself or herself to be HIV-positive, to engage in sexual intercourse, cunnilingus, fellatio, or anal intercourse with another person without informing the other person of his or her HIV status); VA. CODE ANN. § 18.2-67.4:1(A) (2012) (making it a felony for an individual to engage in "sexual intercourse, cunnilingus, fellatio, anallingus or anal intercourse with the intent to transmit the infection to another person").

sharing of injection equipment,[73] and donating blood, blood products, and other bodily tissues.[74] Exposure is considered a felony in all but one of the states with an HIV-specific criminal statute, and such exposure is "punishable by an average maximum penalty of [eleven] years imprisonment."[75]

D. The Prosecutorial Response – Continued Use of General Criminal Laws

In compliance with the Ryan White Comprehensive AIDS Resources Emergency Act of 1990,[76] all fifty states have certified that their general criminal statutes are "adequate to prosecute individuals infected with HIV who intentionally or knowingly infect or expose others to HIV."[77] Therefore, even if a state has enacted an HIV-specific criminal statute, prosecutors are often able to use general criminal statutes – e.g., "felonious assault" or "assault with a deadly weapon" – in prosecuting HIV-positive individuals who intentionally expose HIV-negative individuals to the virus.[78] In fact, prosecutors often indict HIV-positive individuals using the general criminal statutes at their disposal, and particularly when prosecuting HIV-positive individuals for biting or spitting.[79]

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[73] *E.g.*, MO. REV. STAT. § 191.677 (2012) (making it a felony for an HIV-positive individual to recklessly exposes another person to HIV through the sharing of needles without first obtaining that person's informed consent); N.D. CENT. CODE § 12.1-20-17 (2011) (making it a felony for an individual, knowingly that he or she is afflicted with HIV, "to permit the reuse [sic] of a hypodermic syringe, needle, or similar device"); S.D. CODIFIED LAWS § 22-18-31 (2012) (making it a felony for an individual, knowing that he or she is infected with HIV, to share intravenous drug paraphernalia).

[74] *E.g.*, CAL. HEALTH & SAFETY CODE § 1621.5 (2012) (making it a felony for an individual, knowing that he or she is HIV-positive, to donate "blood, body organs, or other tissue, semen . . . or breast milk"); IDAHO CODE. ANN. § 39-608 (West 2012) (making it a felony for an individual who, knowing her or she is afflicted with HIV, to transfer or attempt to transfer any of his or her body fluid, body tissue or organs to another person); OHIO REV. CODE. ANN. § 2927.13 (Lexis Nexis 2012) (making it a felony to sell or donate "blood, plasma, or a product of the person's blood" when the donor or sellers knows that he or she is HIV-positive).

[75] *See* Adeline Delavande, Dana Goldman & Neeraj Sood, *Criminal Prosecutions and Human Immunodeficiency Virus-Related Risky Behavior*, 53 J. L. & ECON. 741, 749 (2010). *But see* MD. CODE ANN., HEALTH–GEN. § 18-601.1 (West 2012) (making it a misdemeanor to knowingly transfer or attempt to transfer HIV to another).

[76] Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. No. 101-381, § 2647(c), 104 Stat. 576, 603 (1990), *amended* by Ryan White Care Act Amendments of 2000, Pub. L. No. 106-345, § 301(a), 114 Stat. 1319, 1345 (2000).

[77] Delavande et al., *supra* note 75, at 748.

[78] *See, e.g.*, United States v. Moore, 846 F.2d 1163, 1168 (8th Cir. 1988) (affirming the assault with a deadly and dangerous weapon conviction of an HIV-positive biter); State v. Price, 834 N.E.2d 847, 850 (Ohio Ct. App. 2005) (affirming the felonious assault conviction of an HIV-positive spitter).

[79] *See Price,* 834 N.E.2d at 850. The use of general criminal statutes to prosecute HIV-positive biters and spitters is hardly surprising, for only three states – Louisiana, Missouri, and Pennsylvania – have enacted criminal statutes explicitly prohibiting HIV-positive biting and spitting, and such statutes are often limited in applicability. *See* LA. REV. STAT. ANN. § 14:43.5(B)-(C) (2012) (making it unlawful to intentionally expose another to HIV through biting or spitting); MO. REV. STAT. § 191.677 (West 2013) (making it unlawful to knowingly expose another to HIV through biting); 18 PA. CONS. STAT. ANN. §§ 2703–2704 (West 2012) (making it a felony to intentionally or knowingly cause another

The CDC maintains that there is only a "remote risk of [HIV] transmission" from biting, and that successful transmission would require numerous aggravating factors, including severe trauma, extensive tissue damage, and the presence of blood in the mouth.[80] The CDC also maintains that "[c]ontact with saliva alone has never been shown to result in transmission of HIV, and there are no documented cases of transmission from an HIV-infected person spitting on [an HIV-negative individual]."[81]

Despite such assertions by the CDC, HIV-positive biters and spitters have been charged with and convicted of a breadth of criminal offenses.[82] Although prosecutors use a variety of criminal statutes to prosecute HIV-positive biters and spitters, this article focuses on only the most flagrant abuse of prosecutorial discretion, charging and convicting HIV-positive biters and spitters with attempted homicide.

1. State v. Haines

In *State v. Haines*,[83] an HIV-positive Indiana man slashed his wrists in an apparent suicide attempt.[84] After police and emergency medical technicians arrived, Haines screamed that he had AIDS and should be left to die from his self-inflicted wounds.[85] As police attempted to restrain Haines, Haines threatened to use his wounds against the officers to infect

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"to come into contact with blood, seminal fluid, [or] saliva" by spitting, but limiting the applicability of the statute to incarcerated individuals.). While another three states – Georgia, Mississippi, and Utah – criminalize such conduct indirectly, these statutes are likewise limited in applicability. *See* GA. CODE ANN. § 16-5-60(d) (2012) (making it a felony to commit an assault with the intent to transmit HIV by use of saliva against a peace or correctional officer during the performance of his or her official duties); MISS. CODE ANN. § 97-27-14(2) (2012) (making it a felony to knowingly cause or attempt to cause a corrections employee, a visitor to a correctional facility, or other prisoner to come into contact with HIV-positive saliva); UTAH CODE ANN. § 76-5-102.6 (West 2012) (making it a felony for an incarcerated HIV-positive person, knowing they are afflicted with HIV, to propel his or her saliva onto a peace or correctional officer's face or open wound).

[80] *Biting*, CDC, *supra* note 11.

[81] *Spitting*, CDC, *supra* note 12.

[82] To illustrate the breadth of criminal charges brought against HIV-positive biters and spitters, consider the following:

In October 2009, an HIV-positive Michigan man was charged with various forms of assault after allegedly biting another man's finger during a physical altercation. During the November 2009 arraignment, the prosecutor announced that his office would bring additional charges against the HIV-positive defendant under Michigan's anti-terrorism law. The bioterrorism provision of the law upon which the prosecutor's office relied provides: "A person shall not manufacture, deliver, possess, transport, place, use, or release any of the following for an unlawful purpose: (a) A harmful biological substance or a harmful biological device. . . ." *See* Brief for LAMBDA Legal Defense and Education Fund et al. as Amicus Curiae Supporting Appellant at 1, People v. Allen, No. 09-004960-FH (Macomb Cnty. Ct. Mich. Cir. Ct. Mar. 31, 2010). Although the Judge eventually dismissed the bioterrorism charge, the charge is at least illustrative of the breadth of charges being brought against HIV-positive bitters and spitters. *See* Tammy Stables Battaglia and Zlati Meyer, *Man with HIV No Terror Threat*, METRO, June 4, 2010, at A9, *available at* http://www.omsj.org/issues/man-with-hiv-no-terror-threat.

[83] State v. Haines, 545 N.E.2d 834 (Ind. Ct. App. 1989).

[84] *Id.* at 835.

[85] *Id.*

the officers with AIDS.[86] Haines then began to bite, scratch, and spit at the officers.[87] Haines was subsequently convicted on three counts of attempted murder, but the trial judge dismissed the convictions because, *inter alia*, "the State failed in its burden of establishing . . . that spitting, biting or throwing blood at the [officers and medical technicians] is a method of transmitting AIDS."[88]

In reinstating the attempted murder convictions, the appellate court reasoned that the state was not required to prove that Haines' conduct could have actually killed.[89] Rather, "[i]t was only necessary for the State to show that Haines did all he believed necessary to bring about [the] intended result, *regardless* of what was *actually possible.*"[90] On remand, Haines was sentenced to thirty years in prison.[91]

2. *State v. Smith*

In *State v. Smith*,[92] an HIV-positive New Jersey inmate precipitated a struggle with two county jail guards.[93] Smith bit one of the guards during the struggle.[94] Although the bitten guard never tested positive for HIV,[95] Smith was convicted of attempted homicide and related charges and sentenced to twenty-five years in prison.[96] In affirming, the appellate court stated that Smith could "properly be found guilty [of attempted murder] without a concomitant finding that the bite would more probably or likely than not spread HIV . . . [if Smith subjectively] believed he could cause death by biting . . . and intended to do so."[97]

The reviewing court thus sustained Smith's attempted homicide conviction finding that there was sufficient evidence in the record from which the jury could have reasonably concluded that Smith did all that he believed was necessary to infect the guard,[98] regardless of the objective validity of that belief[99] and despite Smith's many avowals that he knew

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[86] *Id.*
[87] *Id.*
[88] *Id.* at 837.
[89] *Haines*, 545 N.E.2d at 837.
[90] *Id.* at 839.
[91] *See* Ann LoLordo, *New Tool for Prosecutors: Attempted Murder by HIV Infected Suspects are Called a 'Loaded Gun,'* BALTIMORE SUN, Aug. 2, 1993, *available at* http://articles.baltimoresun.com/1993-08-02/news/1993214028_1_hiv-immunodeficiency-virus-charge-of-attempted/2.
[92] State v. Smith, 621 A.2d 493 (N.J. Super. Ct. App. Div. 1993).
[93] *Id.* at 497.
[94] *Id.* at 497–98.
[95] *Id*. at 498.
[96] *Id.* at 500.
[97] *Id.* at 502.
[98] *Smith,* 621 A.2d at 505.
[99] *Id.* (explaining "the objective probability or likelihood of infection was irrelevant.").

that HIV could not be spread in such a manner.[100]

3. *Weeks v. State*

In *Weeks v. State*,[101] an HIV-positive Texas inmate spat in the face of a prison guard.[102] A jury convicted Weeks of attempted homicide and, after realizing that Weeks had two prior felony convictions, assessed punishment at confinement for life.[103] The appellate court affirmed Weeks' conviction based upon questionable expert testimony presented by the prosecution that spitting poses *some* risk of HIV transmission.[104]

4. *Contemporary Charges and Convictions*

Unfortunately, such charges and convictions are not merely a vestige of an ignorant past. In 2008, an HIV-positive Kentucky woman was charged with attempted homicide after biting a convenience store clerk.[105] In 2009, an HIV-positive Florida man was charged with attempted homicide after biting a law enforcement officer.[106] That same year, an HIV-positive South Carolina man was charged with "assault and battery with and intent to kill" after allegedly biting his neighbor.[107] These charges and convictions are troubling for a variety of reasons and "illustrate the danger that in an atmosphere of AIDS hysteria, draconian criminal sanctions may be imposed for conduct that, in fact, poses no significant risk of HIV transmission."[108]

The remainder of this article is focused on explaining why there are no

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[100] *Id.* at 506. In fact, Eugene Niblack, a mental health worker who counseled Smith in jail, testified that he had told Smith that HIV could not be transmitted through spitting or biting. *Id.* Nonetheless, the reviewing court found that Smith's "venomous harangues before, during and after biting [the guard], all justified an inference that he bore the requisite criminal state of mind under [the New Jersey criminal attempted statute]." *Id.* at 505.

[101] Weeks v. State, 834 S.W.2d 559 (Tex. App. 1992).

[102] *Id.* at 561.

[103] *Id.* at 560.

[104] *Id.* at 564–65. However, as explained by David Webber, the prosecution's evidence was "contrary to mainstream scientific opinion" and based upon "junk science," and the jury's decision to believe the prosecution's expert witness "illustrates the danger that in an age of AIDS-phobia, juries may be inclined to convict defendants" for harmless conduct." WEBBER, *supra* note 29, §7.03[A], at 7–23.

[105] *See HIV-Positive Robber Receives 12 Year Prison Sentence*, WKYT-TV (Apr. 8, 2008), http://www.wkyt.com/home/headlines/17382524.html.

[106] CENTER FOR HIV LAW AND POLICY, ENDING AND DEFENDING AGAINST HIV CRIMINALIZATION – A MANUAL FOR ADVOCATES: STATE AND FEDERAL LAWS AND PROSECUTIONS 38 (1st ed. 2010), *available at* http://www.hivlawandpolicy.org/resources/view/564 ("In August 2009, a 35-year-old, HIV-positive man in Florida was charged with attempted murder when he allegedly yelled that he had HIV and threatened to kill a police officer with HIV before biting him in the shin and leaving a permanent bruise.").

[107] *Id.* at 180. In South Carolina, charging an individual with assault and battery with intent to kill is equivalent to charging the individual with attempted murder. *See* 2010 S.C. Acts 1949–50 (explaining "wherever . . . reference is made to assault and battery with intent to kill, it means attempted murder as defined in Section 16-3-29.").

[108] WEBBER, *supra* note 29, §7.03[A], at 7–15.

legal, scientific, or other valid justifications for charging and convicting HIV-positive biters and spitters of attempted murder. At bottom, such charges and convictions merely propagate a general misunderstanding of the virus and the efficacy of such conduct in transmitting the disease.

III. ATTEMPTED MURDER CHARGES AND CONVICTIONS

A. The Punishment is Excessive and Disproportionate to the Committed Offense

The CDC maintains that there is only a "remote" possibility of HIV transmission through biting and that successful transmission requires various aggravating factors.[109] The CDC further maintains that contact with saliva alone has never been shown to result in HIV transmission and that there are zero documented cases of transmission occurring from an HIV-positive individual spitting on an HIV-negative individual.[110] Even so, HIV-positive individuals have been charged with and convicted of serious criminal offenses for engaging in precisely such low-risk conduct, often without even a concomitant finding of the above specified aggravating factors and have been sentenced to lengthy incarcerations.[111] Strangely, many HIV-positive individuals would have been punished less severely for engaging in higher-risk behavior.

For example, New Jersey adopted a general communicable disease exposure statute in the late 1970s.[112] Although subsequently amended, the statute at the time of Gregory Dean Smith's conviction made it a "petty disorderly person" offense for an individual, knowing that he is infected with a venereal disease, to commit an act of sexual penetration without obtaining the informed consent of the other individual.[113] In New Jersey, petty disorderly person offenses are punishable by a maximum of six months incarceration.[114]

Thus, Smith would have likely received a lesser sentence had he, afterlooking for a casual sexual partner at a neighborhood bar, had unprotected and undisclosed intercourse with an otherwise willing

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[109] *See Biting*, CDC, *supra* note 11; *See also* Chris M. Tsoukas et al., *Lack of Transmission of HIV Through Human Bites and Scratches*, 1 J. ACQUIRED IMMUNE DEFICIENCY SYNDROME 505, 505–07 (1988) (conducting a research study and finding that none of the health care workers routinely bitten by HIV-positive patients subsequently tested HIV-positive).

[110] *See Spitting*, CDC, *supra* note 12.

[111] *See* State v.Smith, 621 A.2d 493,502 (N.J. Super. Ct. App. Div. 1993) (explaining that Smith could "be found guilty without a concomitant finding that the bite would more probably or likely than not spread HIV.").

[112] *See* 1978 N.J. Laws 608.

[113] *Id*., *amended by* 1979 N.J. Laws 722, *and by* 1997 N.J. Laws 1164-65. Recall that Gregory Dean Smith was convicted of attempted murder for biting a prison guard. *See generally* State v. Smith, 621 A.2d 493 (N.J. Super. Ct. App. Div. 1993).

[114] *See* N.J. STAT. ANN. § 2C:43-8 (West 2012).

participant.[115] Despite the *more serious* nature of the theoretical conduct,[116] Smith would have been punished *less severely* for the behavior.[117] Moreover, petty disorderly person offenses are not crimes within the meaning of the New Jersey Constitution.[118] Thus, in both substance and form, Smith was punished more harshly for conduct that *did not* and *virtually could not* result in HIV transmission.[119] Similar comparisons demonstrate the absurdity of other HIV-positive biting and spitting convictions.[120]

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[115] Admittedly, given that HIV is generally not considered to be a venereal disease, it is somewhat uncertain whether the un-amended statute—which was a *general* communicable disease exposure law—would have applied to an undisclosed act of sexual penetration by an HIV-positive individual. *See* WEBBER, *supra* note 29, §7.03[G], at 7–44 (explaining that although HIV is sexually transmitted, the virus is generally not considered to be a sexually transmitted disease, whereby general communicable disease exposure statutes may consequently be inapplicable to HIV exposure). Accordingly, whether Smith's theoretical conduct would have been punishable under the unamended statute would have "depend[ed] upon how the relevant terms [were] defined in state law." Lazzarini, Bray & Burris, *supra* note 9, at 241; *See, e.g.*, ALA. ADMIN. CODE r. 420-4-1-03 (2011) (designating HIV infection to be a sexually transmitted disease); MONT. CODE ANN. § 50-18-101 (West 2013) (designating HIV infection to be a sexually transmitted disease and thereby covered by Montana's general communicable disease statute). Although lacking a comparable statute, subsequently enacted legislation suggests that the New Jersey Legislature considers HIV to be a sexually transmitted disease and may have thus intended the unamended statute to apply to Smith's theoretical conduct. *See, e.g.*, N.J. STAT. ANN. § 18A:35-4.20 (West 2002) (stating that "[a]ny sex education that is given as part of any planned course . . . shall stress that abstinence from sexual activity is the only completely reliable means of eliminating the sexual transmission of HIV/AIDS and *other* sexually transmitted diseases." (emphasis added)).

[116] That is, the increased risk of HIV transmission. *Compare HIV Transmission: Can I Get HIV From Vaginal Sex?*, CDC, http://www.cdc.gov/hiv/resources/qa/transmission.htm (last modified Mar. 25, 2010) (stating that vaginal intercourse "is the most common way the virus is transmitted."), *and HIV Transmission: Can I Get HIV From Anal Sex?*, CDC, http://www.cdc.gov/hiv/resources/qa/transmission.htm (explaining that anal intercourse "is considered to be very risky behavior."), *with Biting*, CDC, *supra* note 11 (explaining that there is only a "remote possibility of [HIV] transmission" through biting), *and Spitting*, CDC, *supra* note 12 (explaining that there is zero risk of HIV transmission through spitting).

[117] *Compare* N.J. STAT. ANN. § 2C:43-8 (West 1978) (explaining that punishment for a "petty disorderly persons offense" is not to exceed six months), *with Smith*, 621 A.2d at 493, 516 (affirming the attempted homicide conviction and twenty-five year prison sentence of an HIV-positive biter).

[118] *See* N.J. STAT. ANN. § 2C:1-4 (West 2012).

[119] *See* State v. Smith, 621 A.2d 487, 497 (N.J. Super. Ct. App. Div. 1993) (explaining that the bitten victim did not test positive for HIV); *Biting*, CDC, *supra* note 11 (explaining that there is only a "remote possibility of transmission" through biting).

[120] For example, in 2009, an HIV-positive South Carolina man was charged with assault and battery with intent to kill after allegedly biting his neighbor. *See* CENTER FOR HIV LAW AND POLICY, *supra* note 106, at 180. In South Carolina, charging an individual with assault and battery with intent to kill is equivalent to charging the individual with attempted murder. *See* 2010 S.C. Acts 1949–50 (explaining that "wherever . . . reference is made to assault and battery with intent to kill [in the criminal code], it means attempted murder as defined in Section 16-3-29."). Although the case is currently pending trial, the man would be facing a lesser potential prison sentence had he engaged in unprotected and undisclosed intercourse with an otherwise willing individual, even though such conduct poses a much greater risk of HIV transmission than biting. *Compare* S.C. CODE ANN. REGS. 44-29-145 (1990) (making it a felony to for an HIV-positive person to "knowingly engage in sexual intercourse" without the informed consent of the penetrated person, and punishing such conduct by a maximum fine of $5000 or sentence of ten years imprisonment), *with* S.C. CODE ANN. REGS. 16-3-29 (2010) (making attempted murder punishable by a maximum sentence of thirty years imprisonment).

If more serious offenses warrant more punishment than less serious offenses, it is absurd to punish HIV-positive biters and spitters *more severely* for engaging in *less risky* conduct simply because the precise conduct at issue falls into a gap in the law. After all, most individuals would agree that there should be some correlation between the gravity of the crime committed and the punishment imposed; that more serious crimes are to be punished more severely than less serious crimes.[121] Proportionality, the notion that the punishment should fit the crime, is a fundamental part of our concept of "just punishment;"[122] a precept that is "deeply rooted and frequently repeated in [our] common-law jurisprudence."[123]

Given that the punishments imposed on HIV-positive biters and spitters often exceed the punishment the individuals would have received for engaging in higher-risk behaviors, there is sufficient reason to conclude that such punishments are not proportionate to the offense in question. As Professor R.A. Duff explains: "An offender's punishment must be proportionate *relative* to those imposed on other offenders . . . those who commit more serious crimes must be punished more severely than those who commit less serious crimes."[124] Consequently, charging and convicting HIV-positive biters and spitters of attempted homicide is unjustifiable, given that conduct with a *greater risk* of HIV transmission is often punished *less severely*.

B. The Conduct Should Constitute an "Obviously Impossible" Attempt

A criminal attempt occurs when an individual, intending to commit an offense, performs "[an] act . . . towards carrying out the intent."[125] Under the Model Penal Code, a person is guilty of an attempt when, "acting with the kind of culpability otherwise required for commission of the crime . . . does or omits to do [some act] with the purpose of causing or with the belief that it will cause [the desired] result."[126] The only relevant consideration in determining an actor's liability for an attempt is "the actor's subjective perception[s] of the attendant circumstances, and not the

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[121] *See* Ian P. Farrell, *Gilbert & Sullivan and Scalia: Philosophy, Proportionality, and the Eighth Amendment*, 55 VILL. L. REV. 321, 321 (2010) ("Most people would agree that punishment should be proportional to the gravity of the crime committed: there should be some correlation between the moral gravity of the crime and the suffering imposed via punishment, and more serious crimes should be punished more severely than less serious crimes.").

[122] *Id.* at 321 (quoting Ewing v. California, 538 U.S. 11, 31 (2003) (Scalia, J., concurring)).

[123] Solem v. Helm, 463 U.S. 277, 284 (1983).

[124] R.A. DUFF, *Punishment*, *in* THE OXFORD HANDBOOK OF PRACTICAL ETHICS 331, 349 (Hugh LaFollette ed., 2005).

[125] Edwin R. Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464, 468 (1954).

[126] MODEL PENAL CODE § 5.01(1).

objective reality of those circumstances."[127]

Following this subjectivist approach, the reviewing courts have found sufficient grounds for affirming the attempted murder convictions of HIV-positive biters and spitters. Consider *State v. Haines*, wherein the court explained that:

> It is not necessary that there be a present ability to complete the crime, nor is it necessary that the crime be factually possible. When the defendant has done all that he believes necessary to cause the particular result, regardless of what is actually possible under existing circumstances, he has committed an attempt.[128]

Thus, although it is nearly impossible to transmit HIV through biting and spitting,[129] the appellate court reasoned that because "Haines carried the AIDS virus, was aware of the infection, believed it to be fatal, and [manifested an intent] to inflict others with [it] by spitting [and] biting,"[130] such circumstances indicated that Haines *subjectively believed* that he could transmit HIV through his conduct. Ignoring whether transmission was actually possible, the reviewing court determined that Donald Haines' misconceptions were sufficient to sustain his attempted murder conviction and twenty-five year prison sentence.[131]

In *State v. Smith*, the reviewing court similarly reasoned that, under New Jersey's criminal attempt statute, an individual may "properly be found guilty without a concomitant finding that [a] bite would more probably or likely than not spread HIV," so long as the individual believed that he or she could "cause death by biting his victim and intended to do so."[132] Based upon the testimony and evidence presented at trial, the appellate court thus affirmed Smith's attempted murder conviction, determining that the jury had reasonably concluded that Smith "did all that he believed . . . necessary to infect [the officer]," despite the improbability of transmitting HIV through such conduct.[133]

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[127] Kyle S. Brodie, *The Obviously Impossible Attempt: A Proposed Revision to the Model Penal Code*, 15 N. ILL. U. L. REV. 237, 241 (1995).

[128] State v. Haines, 545 N.E.2d 834, 838 (Ind. Ct. App. 1989) (citation omitted).

[129] *See Biting*, CDC, *supra* note 11; *See also Spitting*, CDC, *supra* note 12.

[130] *Haines*, 545 N.E.2d at 838.

[131] *See id.* at 839 ("[T]he State was not required to prove that Haines' conduct could actually have killed. It was only necessary . . . to show that Haines did all that he believed necessary to bring about an intended result, *regardless* of what was *actually possible*."); *Id.* at 841 ("From the evidence in the record . . . we can only conclude that Haines had knowledge of his disease and . . . that he took a substantial step towards killing [the police personnel and emergency medical technicians] by his conduct *believing that he could do so*.")(emphasis added).

[132] State v. Smith, 621 A.2d 493, 502 (N.J. Super. Ct. App. Div. 1993).

[133] *Id.* at 505. Of course, there is reason to doubt whether Smith actually believed that HIV could be transmitted through biting and spitting. Smith allegedly knew that AIDS/HIV could not be transmitted through biting and spitting, and although Smith conceded at trial that he repeatedly

Both the *Haines* and *Smith* courts affirmed the attempted murder convictions and lengthy incarcerations after reasoning that both men believed that it was possible to spread HIV through biting.[134] That it was nearly impossible for their actions to affect their alleged intentions was of no moment. In fact, individuals are often convicted of a criminal attempt even though it is "factually impossibl[e]" to commit the intended crime.[135]

Factual impossibility occurs when the intended end is proscribed by the legal system, but where a circumstance unknown to the actor prevents him from bringing about the intended result.[136] Classic examples include the thief who picked an empty pocket, or the hired-killer who, believing that the intended victim slumbered therein, shot into an empty bed.[137] Claiming that the end was "factually impossible," because the pocket was empty or because the intended victim was sleeping in another bed, will not exculpate the would-be thief or would-be killer.[138]

Even so, there are "certain situations, both hypothetical and real, [that] lead to incongruous results without the use of an impossibility defense."[139] These situations generally occur when an individual's conduct is "so utterly without prospect of success"[140] that an individual of ordinary understanding would view the conduct as a "totally inappropriate" means for bringing about the intended result.[141] Traditional examples include a witch-doctor who attempts murder by means of voodoo or an individual who attempts to sink a battleship with a pellet-gun.[142] Such conduct is commonly described as an instance of "obvious impossibility" or as an "inherently impossibl[e]" attempt.[143] In short, it is the absurdity of the expectation entertained by the actor that is stressed in an instance of

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threatened to kill various officers by biting them, testified that he did so only to "take advantage of the ignorance and fear of his jailors." *Id.* at 505–06. In fact, a defense witness testified that he had told Smith that "transmission by a bite was unlikely." *Id.* at 511. Such testimony seriously undermines the court's assertion that Smith subjectively believed that his conduct was capable of transmitting HIV.

[134] *Haines*, 545 N.E.2d at 841; *Smith*, 621 A.2d at 531.

[135] *See, e.g.*, State v. Lopez, 669 P.2d 1086, 1091 (N.M. 1983) (holding that an individual who sold a white powdery substance represented as cocaine could be charged with attempt to distribute a controlled substance, even though the substance was not cocaine, because the individual manifested the requisite intent).

[136] *See* State v. Logan, 656 P.2d 777, 778 (Kan. 1983) ("Factual impossibility denotes conduct where the objective is proscribed by the criminal law but a circumstance unknown to the actor prevents him from bringing it about.").

[137] *See id.*

[138] *See id.* (researching factual impossibility and concluding that "[o]ur research has not revealed an instance where an American court has ever recognized factual impossibility as a defense to an attempt charge.).

[139] *See* Brodie, *supra* note 127, at 244.

[140] HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 219 (1979).

[141] John F. Preis, *Witch Doctors and Battleship Stalkers: The Edges of Exculpation in Entrapment Cases*, 52 VAND. L. REV. 1869, 1898 (1999); *See also* Brodie, *supra* note 127, at 244.

[142] *See* Preis, *supra* note 141, at 1870 (giving similar examples).

[143] *Id.* at 1898.

obvious or inherent impossibility.[144]

Because the actor's expectation is absurd, the conduct presents no threat of the completed crime and should not qualify as attempt liability.[145] Consider the following example:

> Strongly believing in the efficacy of magical words and spells, water is charged with a satanic incantation and then added to whiskey, and served by someone wishing to kill the person to whom it is given.[146]

Although death is admittedly most unlikely, it is possible. The individual given:

> [T]he diluted whiskey m[ay] have acute gastritis that would cause [the individual] to regurgitate the undiluted drink, but because of the water with which it is taken, the alcohol is tolerated and . . . combines in effect with the barbiturates . . . to put [the individual] in a fatal coma.[147]

Accordingly, severe harm is possible. Even so, it seems reasonable to assume that most individuals would assert that the server should not be charged with attempted murder, no matter how zealously the server believed in the efficacy of the incantation. Attempt liability thus contains a reasonableness component.[148]

But who decides whether conduct is "reasonable enough" for the imposition of criminal attempt liability? Or – perhaps more appropriately stated – who decides whether conduct is so "patently unreasonable" as to preclude imposition of criminal attempt liability? According to Professor Hyman Gross:

> It is often the case that informed opinion . . . is well in advance of popular notions, and that conduct still regarded as . . . dangerous under prevailing [communal] views may be regarded as harmless in more enlightened circles. . . . [H]owever, it is proper for the law to be responsive *only to enlightened views in deciding questions of attempt liability* and to reject ill-founded beliefs, even when they are widely held. Only if enlightened views will sustain his [or her] expectations does [an] actor have reason to believe that . . .

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[144] *See* GROSS, *supra* note 140, at 218–19.

[145] *Cf. id*. (stating that if an act presents no threat of the completed crime, the action "*does not* qualify for attempt liability") (emphasis added).

[146] *Id.* at 219.

[147] *Id.* at 220.

[148] *See* Preis, *supra* note 141, at 1900 ("[I]f [an individual] acted with an extremely *unreasonable* belief in the efficacy of her act, then it should be considered an inherently impossible attempt.") (emphasis added).

he [will be] properly subject[ed] to liability for an attempt.[149]

Accordingly, because mainstream scientific opinion – that is, "enlightened circles" – asserts that biting poses only a marginal risk of HIV transmission and spitting no risk of transmission,[150] it is erroneous to sustain the attempted murder convictions and incarcerations of HIV-positive biters and spitters based upon their misunderstanding the efficacy of their conduct in transmitting the virus or upon the general misperceptions of the dangerousness of the conduct. The idiosyncratic mistaken belief of an individual does not make conduct dangerous, nor does a mistaken belief that is widely held in the community. In either instance, the harm is not threatened, and because the harm, that is HIV transmission and eventual death, "is not expectable, liability ought not to be of the attempt variety."[151]

Granted, an HIV-positive individual's biting or spitting does pose a greater risk of harm than an individual who endeavors to sink a battleship with a toy gun.[152] Even so, if HIV-positive biters and spitters were positioned along a spectrum ranging from conduct that is inherently impossible[153] to that which fails only because of some intervening circumstance,[154] biting and spitting would be positioned more toward the former than the latter. After all, there is zero risk of HIV transmission from spitting and a negligible risk of transmission from biting.[155]

Consequently, it is not some intervening circumstance that distinguishes successful HIV transmission from unsuccessful, but the biology of the virus itself;[156] scientific fact, not fortune. Thus, surely in the legal context, the possibility of HIV transmission by biting or spitting

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[149] GROSS, *supra* note 140, at 222 (emphasis added).

[150] *See supra* notes 11–12.

[151] GROSS, *supra* note 140, at 221. At least one court agrees. In Brock v. State, the Court of Criminal Appeals of Alabama set aside the assault in the first degree conviction – a lesser included offense of attempted murder – of Brock, an HIV-positive individual. *See* Brock v. State, 555 So. 2d 285, 288 (Ala. Crim. App. 1989). According to the court, "the possibility of AIDS transmission by means of a bite [was] too remote" to support the conviction. *Id*.

[152] *See* MINN. STAT. ANN. § 609.17 (West 2013)(discussing inherent impossibility and citing, as illustrative, an individual who attempts to sink a battleship with a toy gun.

[153] For example, attempting to sink a battleship with a toy gun.

[154] For example, a bird flying into the path of a bullet and thus saving the life of the intended victim.

[155] *See* K.S. Richman & L.S. Rickman, *The Potential for Transmission of Human Immunodeficiency Virus Through Human Bites*, 6 J. ACQUIRED IMMUNE DEFICIENCY SYNDROME 402, 404 (1993) (finding that the risk of HIV transmission by biting to be "unlikely" and "epidemiologically insignificant") (citing summary); *Biting,* CDC, *supra* note 11 (stating that biting poses only a "remote risk of [HIV] transmission"); *Spitting*, CDC *supra* note 12 (explaining that there is no risk of HIV transmission through spitting).

[156] *See supra* note 155.

is simply too remote to support an attempted homicide conviction.[157]

Accordingly, because the threatened harm of HIV transmission and eventual death is so utterly without the prospect of success, liability ought not be of the attempt variety. Rather, the conduct should constitute an occurrence of inherent impossibility worthy of mitigation to a lesser offense. In fact, inherent impossibility is recognized as a statutory defense in at least one state.[158] Even the Model Penal Code allows for mitigation if the conduct is so inherently unlikely as to result in the commission of a crime that neither the conduct nor the actor presents a public danger warranting the charged offense.[159]

C. The Charges and Convictions Are Not Supported by the Justifications of Punishment.

The criminal law is aimed at deterring undesirable conduct.[160] Individuals who engage in such conduct are punished. But what justifies punishment? The numerous normative theories of punishment seek to answer this question.[161]

There are two mainstream theories of punishment: consequentialism and retributivism.[162] Consequentialists "justify punishment on the basis of the good consequences promoted by [the] punishment:"[163] that is, deterring members of society and the offender from committing similar future

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[157] *Cf.* United States v. Moore, 846 F.2d 1163, 1165 (8th Cir. 1988) (explaining that "[w]hile . . . 'in medicine everything is conceivable,' in a legal context the possibility of AIDS transmission by means of a bite is too remote to support a finding that the mouth and teeth may be considered a deadly and dangerous weapon"). The *Moore* court further explained that: "Although there is sufficient evidence in the record that the human mouth and teeth may be used as a deadly and dangerous weapon, we nevertheless . . . wish to emphasize that the medical evidence . . . was insufficient to establish that AIDS may be transmitted by a bite. The evidence established that there are no well-proven cases of AIDS transmission by way of a bite; that contact with saliva has never been shown to transmit the disease; and that in one case a person who had been deeply bitten by a person with AIDS tested negative several months later." *Id.* at 1167–68.

[158] *See* MINN. STAT. ANN. § 609.17(2) (West 2007) (providing an impossibility defense if "such impossibility would have been clearly evident to a person of normal understanding").

[159] *See* MODEL PENAL CODE § 5.05(2). Any discussion of *mens rea* is beyond the scope of this section. This section is intended to demonstrate, *inter alia*, that the possibility of HIV transmission from biting or spitting is so remote that such conduct should constitute an instance of obvious impossibility worthy of mitigation regardless of the actor's *mens rea* – much like a shaman who, vehemently believing in the efficacy of his religion, attempts murder by means of voodoo.

[160] *See* Robert Leikind, *Regulating the Criminal Conduct of Morally Innocent Persons: The Problem of the Indigenous Defendant*, 6 B.C. THIRD WORLD L.J. 161, 161 n.1 (1986) ("Legislatures and other law-making bodies usually justify their assignment of punishment on the basis of an interest in deterring undesirable conduct.").

[161] *See* C. L. Ten, *Crime and Punishment*, *in* A COMPANION TO ETHICS 366, 366 (Peter Singer ed., 1991) (explaining that the normative theories of punishment seek to answer the question "[w]hat justifies the punishment" of offenders).

[162] *See id.* (explaining that consequentialism and retributivism are the main theories of punishment).

[163] Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 856 (2002).

crimes, incapacitating the offender during the period of incarceration, or rehabilitating the offender by means of the many services available to the offender during the term of incarceration.[164] Consequentialists thus view punishment as a "necessary evil" warranted by its ability to reduce future misconduct to the benefit of society.[165]

Retributivists are unconcerned with the effects of punishment.[166] Rather, retributivism is the belief that the punishment of wrongdoers is justified solely because the wrongdoers deserve to be punished for their misbehavior.[167] However, retributivists also believe that individuals should suffer in proportion to their culpable wrongdoing.[168]

Despite the numerous consequentialist and retributivist theories of punishment, such theories ultimately fail to support the attempted homicide convictions and lengthy incarcerations of HIV-positive biters and spitters.

1. *Consequentialism – General Deterrence*

Of the multiple consequentialist theories of punishment, the most influential justifies punishment based on the *general deterrent* effect punishment is believed to have on discouraging members of society from engaging in similar misconduct.[169] Punishment is meant to serve an "object lesson" to members of the community, instilling the fear of similar punishment in would-be offenders.[170] Accordingly, proponents of general deterrence would justify the attempted homicide convictions and lengthy incarcerations of HIV-positive biters and spitters as a means of discouraging other HIV-positive individuals from similarly biting and spitting.

Although there appears to be logic to this approach, evidence suggests that this "classical approach" to deterring crime is unsuccessful and that the threat of punishment may not actually deter individuals from engaging in criminal behavior.[171]

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[164] *See id.* at 856–59 (listing deterrence, rehabilitation, and incapacitation as the main consequentialist theories or punishment).

[165] *See* David Dolinko, *Punishment*, *in* THE OXFORD PHILOSOPHY OF CRIMINAL LAW 403, 411–12 (John Deigh & David Dolinko eds. 2011).

[166] *See* Christopher, *supra* note 163, at 859 ("Retributivism most broadly may be understood as a justification of punishment that does not rely on the good consequences stemming from punishment."); Ten, *supra* note 161, at 366 (explaining that retributivists believe that "[w]rongdoers deserve to suffer for what they have done, whether or not the suffering produces and good consequences").

[167] *See* Dolinko, *supra* note 165 at 412 ("[R]etributive theories characteristically . . . claim that, regardless of its consequences, punishment is what wrongdoers *deserve*.").

[168] *See* Christopher, *supra* note 163, at 860 (explaining that retributivists believe that "[i]t is morally fitting that an offender should suffer in proportion to [his or] her . . . culpable wrongdoing").

[169] *See id*. at 857 n.62 (explaining that "deterrence has always been the mainstay" of punishment).

[170] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 15 (5th ed., 2009).

[171] *See e.g.*, STEVEN M. COX ET AL., JUVENILE JUSTICE: A GUIDE TO THEORY, POLICY, AND PRACTICE 85 (6th ed., 2008) (explaining that the premise "that the threat of punishment deters crime . . . is inaccurate."); Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 173 (2004) (stating that punishment does not

For punishment to influence behavior, individuals must *rationally balance* the perceived benefits of the conduct against its risks – i.e., engage in rational calculation.[172] However, there is reason to suspect that individuals "do not always rationally calculate rewards and costs."[173] An individual committing what is commonly referred to as a "crime of passion" – e.g., murdering a spouse caught in an adulterous act – is not likely to contemplate the consequences of his conduct before pulling the trigger or plunging the knife.[174] If an individual fails to consider the consequences of his conduct before acting, then no threat of punishment is going to deter the individual from misbehaving.[175]

As explained by Professors Paul H. Robinson and John M. Darley: "[Even a] well known rule carrying a credible threat of punishment that exceeds the benefit of the offense nonetheless will be ineffective in deterring a person caught up in rage . . . ."[176] Nor are impulsive behaviors deterred by the threat of punishment.[177] Given that HIV-positive individuals tend to bite and spit only if enraged or when acting impulsively, it is doubtful whether convicting HIV-positive biters and spitters of attempted homicide serves any deterrent purpose.

Consider the circumstances surrounding Donald J. Haines' arrest and conviction. Haines was HIV-positive and, rather than living with knowledge of the virus, decided to take his own life.[178] To that end, Haines slashed his wrists.[179] The arrival of police personnel and emergency medical technicians thwarting his suicide attempt enraged Haines who screamed that he should be left to die from his wounds.[180] It was only after police personnel intervened that Haines began to bite and spit.[181] To assume that, after his suicide attempt, Haines was in a rational

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deter criminal conduct); L. Amede Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275, 354 (1997) (explaining that the high recidivism rate among criminal offenders "bear[s] out the tenuousness of the deterrence argument.").

[172] *See* COX, *supra* note 171, at 85–86 (explaining that for punishment to serve its deterrent purpose, people must "rationally calculate rewards and costs"); Robinson & Darley, *supra* note 171, at 205 (explaining that unless an individual "perceiv[es] the threat of punishment to exceed the benefit of the offense," the threat of punishment will not actually deter the individual).

[173] *See* COX, *supra* note 171, at 85–86.

[174] *See* Robinson & Darley, *supra* note 171, at 205 ("[Even a] well known rule carrying a credible threat of punishment that exceeds the benefit of the offense nonetheless will be ineffective in deterring a person caught up in rage . . . .").

[175] *Id.* at 205 (explaining that the absence of rational calculation is "fatal to a deterrent effect").

[176] *Id.*

[177] 1 ENCYCLOPEDIA OF VICTIMOLOGY AND CRIME PREVENTION 279 (Bonnie S. Fisher & Steven P. Lab eds., 2010) [hereinafter ENCYCLOPEDIA] (explaining that impulsive behaviors are not deterred by the threat of punishment).

[178] *State v. Haines*, 545 N.E.2d 834, 835 (1989).

[179] *Id.*

[180] *Id.*

[181] *Id.*

enough state of mind to balance the expected benefits of the conduct (death) against its risks (incarceration) – is simply absurd, especially given that Haines was unconscious and lying in a pool of blood when law enforcement and medical technicians first arrived.[182] Rather, Haines was likely enraged and reacted impulsively when he bit and spat at his subduers,[183] whereby no threat of punishment would have deterred Haines from acting otherwise.[184]

Other altercations involving HIV-positive biters and spitters suggest that the individuals were acting during a similarly enraged or impulsive mental state.[185]

If HIV-positive individuals bite and spit only if enraged or when acting impulsively, then convicting HIV-positive biters and spitters of attempted homicide is unlikely to deter other HIV-positive individuals from similarly biting or spitting. Rather than instilling the fear of similar punishment in other would-be offenders, such charges and convictions function merely to incarcerate individuals for relatively low-risk behaviors. Although it is quite acceptable for society to punish individuals for impulsive behaviors, it borders on hypocrisy to assert that such convictions serve any deterrent purpose. It is the impulsivity of biting and spitting that undermines general deterrence as a valid justification for charging and convicting HIV-positive biters and spitters of attempted homicide.

2. *Consequentialism: Specific Deterrence*

Compared to general deterrence, which is an outwardly-focused doctrine aimed at discouraging would-be offenders in the community from future misbehavior, specific deterrence is an inward-focused doctrine aimed at deterring the punished individual from reoffending.[186]

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[182] *Id.*

[183] *See* Harold V. Hall, *Overview of Lethal Violence*, *in* LETHAL VIOLENCE: A SOURCEBOOK ON FATAL DOMESTIC, ACQUAINTANCE, AND STRANGER VIOLENCE 1, 24, 34 (Harold V. Hall ed. 1999) (stating that biting is a "primitive" form of assault, and that bite marks indicate an "[u]ncontrolled preservation response[]").

[184] *See* RICHARD J. DAVIDSON ET AL., HANDBOOK OF AFFECTIVE SCIENCES 817 (2003) (explaining that when conduct is "emotionally charged and highly impulsive . . . [the individuals involved] might not think of the possible long-term consequences of their violence – the possibility of punishment is not apparent to them at that time – and they strike at their victim more or less impulsively"); Robinson & Darley, *supra* note 171, at 205 (explaining that the absence of rational calculation is "fatal to a deterrent effect").

[185] *See e.g.*, State v. Smith, 621 A.2d 493, 496–97 (N.J. Super. Ct. App. Div. 1993) (explaining that an HIV-positive individual bit a correctional officer after receiving what he perceived to be inadequate medical care motivated by racial bias); *Charges Upgraded Against HIV Positive Man After Fight*, WSOCTV.COM (July 23, 2009), http://www.wsoctv.com/news/news/charges-upgraded-against-hiv-positive-man-after-fi/nGw4Y/ (stating that an HIV-positive man bit his neighbor after allegedly catching the neighbor peeping at him through a window).

[186] *See* COREY LANG BRETTSCHNEIDER, PUNISHMENT, PROPERTY, AND JUSTICE: PHILOSOPHICAL FOUNDATIONS OF THE DEATH PENALTY AND WELFARE CONTROVERSIES 27 (2001) (explaining that "[s]ingular deterrence is the principle that punishment is justified because it prevents recidivism").

Incorporating the basics of rational choice theory, specific deterrence theory assumes that man is a reasonable actor whose future conduct is shaped by prior experiences.[187] Individuals who engage in prohibited conduct are thus punished in order to deter further illicit behavior, for, once convinced that the pains of punishment outweigh the benefits of the misconduct, the individual may willingly abstain from further misbehavior.[188]

However, punishment alone is unable to induce law-abiding behavior,[189] and correctional programs founded on the principles of specific deterrence theory are "notoriously ineffective" at reducing recidivism.[190] Rather, inducing law-abiding behavior requires convincing the offender that "life in freedom has something to offer [him or her]."[191] Stated differently, a prerequisite for law-abiding behavior is that an individual must have "something to live for" outside of the correctional institution.[192]

For HIV-positive individuals convicted of attempted homicide and sentenced to lengthy terms of incarceration, the concept of "life in freedom" is often meaningless, because even brief periods of incarceration may function as *de facto* life sentences for HIV-positive individuals whose life-expectancy is reduced by their illness.[193] Effectively stripped of

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[187] *See* Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 209 (2003) ("Specific deterrence assumes that the offender is a (sufficiently) rational actor to weigh the costs and benefits of committing crime and that the imposition of painful consequences such as imprisonment will tip his cost-benefit analysis against future offending.").

[188] *Id.*

[189] *See* Maurice Cusson, *Situational Deterrence: Fear During the Criminal Event*, 1 CRIME PREVENTION STUD. 55, 56 (1993) (explaining that "deterrence does not come from legal punishment alone"); Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL. 219, 224 (1997) (stating that "seeking to control public behavior by threatening punishment is insufficient to gain widespread public compliance with the law").

[190] Francis T. Cullen, *Rehabilitation and Treatment Programs*, *in* CRIME: PUBLIC POLICIES FOR CRIME CONTROL 253, 287 (James Q. Wilson & Joan Petersilia eds., 2004); *See also* LARRY J. SIEGEL, INTRODUCTION TO CRIMINAL JUSTICE 95 (12th ed., 2010) (explaining that specific deterrence theory does not "deliver the crime control promised," and that offenders typically "repeat their criminal acts soon after returning to society"); Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2159 (2001) ("The recent scholarly and policymaking interest in retributivism stems in part from negative reactions to problems associated with recidivism, which indicate the failure of theories based on the specific deterrence . . . .").

[191] JOHN P. MARTIN & DOUGLAS WEBSTER, THE SOCIAL CONSEQUENCES OF CONVICTION 216 (1971).

[192] *Id.*

[193] *See* WEBBER, *supra* note 29, § 7.03(C), at 7-32.2 n.118 (explaining that "short prison sentence[s] can amount to a life term for someone living with HIV because of shorter life expectancy") (internal quotation marks omitted). Gregory Dean Smith was sentenced to twenty-five years imprisonment for biting, but died from HIV infection with fifteen years remaining on his sentence. *See Gregory Dean Smith, HIV-Positive Political Prisoner, Dies at Age 40*, PHILLYIMC, http://www.phillyimc.org/es/node/32953 (last accessed July 14, 2012). Donald J. Haines was

"something to live for," that is, an opportunity at "life in freedom," the HIV-positive individual has little incentive to act in a law-abiding manner during the term of incarceration.[194] In point of fact, several HIV-positive individuals convicted of attempted homicide for biting and spitting did sowhile incarcerated.[195]

Such conduct is not illogical. By convicting HIV-positive biters and spitters of attempted murder and sentencing them to *de facto* life terms, the state becomes powerless to further punish the individual – that is, the state is stripping itself of its "stick." Although the state could impose additional punishment for misbehavior occurring during the initial period of incarceration, the additional punishment would be nominal to an individual serving what he or she already perceives as an effective life sentence. Consequently, having been convicted of attempted murder and sentenced to a *de facto* life sentence, the HIV-positive individual has little incentive to act in a law-abiding manner while incarcerated.[196]

Furthermore, to assume that such convictions are warranted by their ability to induce law-abiding behavior by the HIV-positive individual upon his or her release from prison is to ignore the very real possibility that the individual is likely to die during the term of incarceration.[197] It is thus facile to maintain that such convictions are intended to deter HIV-positive biters or spitters from reoffending upon rejoining society.

In brief, convicting HIV-positive biters and spitters of attempted homicide is unlikely to induce future law-abiding conduct by the punished individual. Such convictions may actually induce HIV-positive biters and spitters to misbehave *more often* than punishments with shorter attendant prison sentences, which provide the incarcerated HIV-positive individual with a *more real opportunity* at freedom, that is, "something to live for."[198]

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sentenced to thirty years imprisonment for biting and spitting, but died from HIV infection with twenty-seven years remaining on his sentence. *See* LoLordo, *supra* note 91.

[194] *See* MARTIN & WEBSTER, *supra* note 191; *See also supra* note 193.

[195] *See* State v. Smith, 621 A.2d 493, 495 (N.J. Super. Ct. App. Div. 1993) ("Defendant was a county jail inmate at the time of this criminal episode . . . ."); Weeks v. State, 834 S.W.2d 559, 561 (Tex. Ct. App. 1992) (explaining that Weeks was "being transferred from the Coffield Prison Unit to the Ramsey Prison Unit" when he spit on the prison guard).

[196] Even assuming that lengthy terms of incarceration do not function as *de facto* life sentences for HIV-positive individuals, there is abundant reason to doubt whether convicting HIV-positive individuals of attempted murder for biting and spitting will deter the punished individual from reoffending. *See, e.g.*, SIEGEL, *supra* note 190, at 95 (stating that specific deterrence theory does not "deliver the crime control promised," and that offenders typically "repeat their criminal acts soon after returning to society"); ENCYCLOPEDIA, *supra* note 177, at 279 (explaining that impulsive behaviors are not deterred by the threat of punishment).

[197] *See* KC Goyer, *Monograph 79: HIV/AIDS in Prison, Problems, Policies and Potential*, INSTITUTE FOR SECURITY STUDIES, 33 (2003), http://www.issafrica.org/uploads/Mono79.pdf ("[I]ncarceration cuts in half the life expectancy of those with HIV seropositivity." (quoting C. Greene, *HIV-Positive in Prison: The Shadow of Death Row*, SONOMA CNTY FREE PRESS, *available at* http://www.sonomacountyfreepress.com/welcome/welhiv.html) (last revised Mar. 9, 1997)).

[198] MARTIN & WEBSTER, *supra* note 191, at 216.

3. *Consequentialism – Incapacitation*

Incapacitation theory is premised on a simple observation: "A thug in prison cannot mug your sister."[199] In this regard, incapacitation is the most direct means of reducing future criminal conduct by prior offenders.[200] As explained by Professor Herbert L. Packer:

> [Unlike] general deterrence, about whose empirical basis there is . . . disagreement, the empirical basis for incapacitation is clear . . . . So long as we keep a man in prison he will have no opportunity at all to commit certain kinds [of crimes] . . . . And his opportunities to commit certain other kinds . . . are greatly diminished . . . .[201]

Incapacitation theory thus justifies the incarceration of HIV-positive biters and spitters given that incarceration prevents the individual from inflicting "further harm to society."[202]

However, as Professor Paul H. Robinson explains: "If the dangerousness of two people is the same . . . the degree of incarceration justified under a purely incapacitative rationale would be the same."[203] Under an incapacitative rationale then, HIV-positive spitters should receive the same amount of punishment (e.g., same length of incarceration) as HIV-negative spitters,[204] and HIV-positive biters should receive the same amount of punishment as HIV-negative biters. Of course, because HIV-positive biters are *marginally* more dangerous than HIV-negative biters,[205] it would be permissible for such individuals to receive a *marginally*

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[199] GENNARO F. VITO & JEFFREY R. MAAHS, CRIMINOLOGY: THEORY, RESEARCH, AND POLICY 53 (3d ed. 2012).

[200] PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH? 8 (2008) (explaining that "[t]he most direct means of preventing future offenses is through incapacitation of offenders by imprisoning, executing, or in some other way making impossible their commission of another offense").

[201] HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 48 (1968).

[202] RONALD G. BURNS, THE CRIMINAL JUSTICE SYSTEM 62 (2007) (explaining that the goal of incapacitation is the prevention of "further harm to society").

[203] ROBINSON, *supra* note 200, at 8.

[204] *See Spitting*, CDC *supra* note 12 (explaining that HIV-positive spitters are no more dangerous than HIV-negative spitters because "[c]ontact with saliva alone has never been shown to result in transmission of HIV, and there [are] no documented case[s] of transmission from an HIV-infected person spitting on another person").

[205] *See* Richman & Rickman, *supra* note 155, at 402–405 (explaining that the risk of HIV transmission through biting is both "unlikely" and "epidemiologically insignificant"); *Biting*, CDC *supra* note 11 (stating that HIV-positive biters pose only a "remote risk of transmission," and that transmission requires various aggravating factors); *Common Myths*, NATIONAL AIDS TRUST, http://www.hivaware.org.uk/be-aware/common-myths.php (last visited April 20, 2013) (explaining that "there have only ever been four *possible* reports of HIV being transmitted through biting, all of which occurred in extremely specific and unusual circumstances").

greater amount of punishment.[206]

Even so, HIV-positive biters and spitters are typically punished *much more severely* than HIV-negative biters and spitters despite the relative equality of their dangerousness.[207] For that reason, incapacitation theory is unable to justify the heighted punishments imposed on HIV-positive individuals.[208]

4. *Consequentialism – Rehabilitation*

The rehabilitative theory of punishment is founded upon an assumption that individuals tend towards moral and law-abiding behavior, and that "committing crimes is an aberration . . . attributable to some type of behavior deficiency that can be remedied."[209] Incarceration provides that remedial opportunity.[210] Those in favor of rehabilitation accordingly seek to use the corrections system to reeducate criminally-minded individuals so that they can reenter society as "moral, upstanding, [and] law-abiding citizen[s]."[211] The rehabilitative theory of punishment thus presupposes that incarcerated individuals will have an *actual* opportunity to re-enter society.[212]

However, charging and convicting HIV-positive individuals of attempted homicide often results in *de facto* terms of life incarceration.[213] Since the rehabilitative theory of punishment presupposes that incarcerated

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[206] *See* CRAIG HEMMENS ET AL., CRIMINAL COURTS: A CONTEMPORARY PERSPECTIVE 339 (2010) (explaining that incapacitation warrants punishment in an "amount . . . proportionate to the risk posed by the offender").

[207] *Compare* State v. Smith, 621 A.2d at 493, 516 (N.J. Super. Ct. App. Div. 1993) (affirming the attempted homicide conviction and twenty-five year prison sentence of an HIV-positive biter), *with* State v. Pichardo, 2011 N.J. Super. LEXIS 278, at *18–19 (N.J. Super. Ct. App. Div. Feb. 8, 2011) (affirming the assault conviction and seven-year prison sentence of an HIV-negative biter who *bit off* the finger of a police officer); *compare* State v. Haines, 545 N.E.2d 834, 841 (Ind. Ct. App. 1989) (affirming the attempted murder conviction of an HIV-positive biter), *and* LoLordo, *supra* note 91 (explaining that Haines was sentenced to a thirty-year prison sentence), *with* Birtsas v. State, 297 N.E.2d 864, 867 (Ind. Ct. App. 1973) (affirming the assault conviction and *one-dollar fine* of HIV-negative biter who bit the hand of a law enforcement officer); *compare* Weeks v. Texas, 834 S.W.2d 834, 560 (Tex. Ct. App. 1992) (affirming the attempted murder conviction and life sentence of an HIV-negative spitter), *with* Kaminsky v. State, No. 14-94-00951-CR, 1997 WL 59330, at *1 (Tex. Ct. App. Feb. 13, 1997) (affirming the misdemeanor assault conviction and one year prison sentence of an HIV-negative spitter who was a repeat offender).

[208] *See* ROBINSON, *supra* note 200, at 8 (explaining that "[i]f the dangerousness of two people is the same . . . the degree of incarceration justified under a purely incapacitative rationale [is] the same."); HEMMENS, *supra* note 206, at 339 (explaining that incapacitation warrants punishment in an "amount . . . proportionate to the risk posed by the offender").

[209] CONSTANTINOS E. SCAROS, UNDERSTANDING THE CONSTITUTION 286 (2011).

[210] *See* HANDBOOK OF CORRECTIONAL MENTAL HEALTH 8 (Charles L. Scott ed., 2d ed. 2010) [hereinafter HANDBOOK] (explaining that "[a]ccording to the rehabilitative theory of punishment, individuals are incarcerated so they have an opportunity to learn alternative behaviors").

[211] SCAROS, *supra* note 209, at 286; *See also* HANDBOOK, *supra* note 210, at 8 (stating that "[c]orrections . . . is a system designed to correct those traits that result in criminal behavior").

[212] *See* CYNDI BANKS, CRIMINAL JUSTICE ETHICS: THEORY AND PRACTICE 117 (2004) (stating that "rehabilitation can be accomplished only if criminals re-enter society").

[213] *See supra* Part III.C.2 and therein contained discussion.

individuals will have an actual opportunity to reenter society reformed,[214] and since charging and convicting HIV-positive biters and spitters of attempted homicide often denies the HIV-positive individual this opportunity, the rehabilitative theory of punishment fails to justify the attempted homicide convictions of HIV-positive biters and spitters.

5. *Retributivism*

Retributivism is the principal justification of criminal punishment in the United States.[215] Unlike the numerous consequentialist theories of punishment, retributivism does not focus on the various "good consequences" that result from punishment.[216] Rather, retributivism is the belief that "morally culpable wrongdoing . . . deserves, merits, [and] warrants punishment."[217] Thus, as compared to consequentialism, the "distinctive aspect of retributivism is that the moral desert of an offender is perceived as a *sufficient* reason to punish him or her . . . ."[218]

However, retributivists are equally committed to the principle that punishment should be proportioned to the offense.[219] The retributivist theory of punishment is thus unable to justify the attempted homicide convictions of HIV-positive biters and spitters.

HIV-positive biters are only *marginally* more dangerous than HIV-negative biters,[220] and HIV-negative spitters are only as dangerous as HIV-positive spitters.[221] Even so, HIV-positive biters and spitters are typically punished much more severely than HIV-negative biters and spitters.[222]

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[214] *See generally* BANKS, *supra* note 212.

[215] *See* David Dolinko, *Retributivism, Consequentialism, and the Intrinsic Goodness of Punishment*, 16 L. & PHIL. 507, 507 (1997) ("The retributive theory is . . . the most influential philosophical justification for the institution of criminal punishment in present-day America.").

[216] *See* Ten, *supra* note 161, at 366 (explaining retributivism is the belief that "[w]rongdoers deserve to suffer for what they have done, whether or not the suffering produces any good consequences"); Christopher, *supra* note 163, at 859 ("Retributivism most broadly may be understood as a justification of punishment that does not rely on the good consequences stemming from punishment.").

[217] Christopher, *supra* note 163, at 859–60.

[218] MICHAEL S. MOORE, PLACING BLAME: A THEORY OF CRIMINAL LAW 88 (1997)

[219] *See id.* (stating that retributivists "are committed to the principle that punishment should be graded in proportion to desert"); Christopher, *supra* note 163, at 860 (explaining that retributivists believe that "[i]t is morally fitting that an offender should suffer in proportion to [his or] her . . . culpable wrongdoing").

[220] *See supra* note 205.

[221] *See Biting,* CDC, *supra* note 11.

[222] *Compare* State v. Smith, 621 A.2d 493, 516 (N.J. Super. Ct. App. Div. 1993) (affirming the attempted homicide conviction and twenty-five year prison sentence of an HIV-positive biter), *with* State v. Pichardo, 2011 N.J. Super. LEXIS 278, at *18–19 (N.J. Super. Ct. App. Div. Feb. 8, 2011) (affirming the assault conviction and seven-year prison sentence of an HIV-negative biter who *bit off* the finger of a police officer); *compare* Weeks v. State, 834 S.W2d 559, 560 (Tex. Ct. App. 1992) (affirming the attempted murder conviction and life sentence of an HIV-negative spitter), *with* Kaminsky v. State, No. 14-94-00951-CR, 1997 WL 59330, at *1 (Tex. Ct. App. Feb. 13, 1997) (affirming the misdemeanor assault conviction and one year prison sentence of an HIV-negative spitter who was a repeat offender).

Such a *substantial* increase in punishment for conduct that is only *marginally* more dangerous strongly suggests that the punishments imposed on HIV-positive biters and spitters are not proportionate to the offense. Rather, punishment is proportionate only if the punishment is "equal to the harm *typically* caused by [the] act . . . the culpable wrongdoer performed."[223]

Because the harm typically caused by HIV-positive biters and spitters is *typically* equal to the harm caused by their HIV-negative counterparts – that is, the biting results in bleeding and the spitting in offense, but neither results in HIV transmission – HIV-positive biters and spitters should be given the same amount of punishment as HIV-negative biters and spitters. Nevertheless, HIV-positive biters and spitters are often incarcerated for periods *greatly exceeding* those imposed upon their HIV-negative equivalents.[224]

As such, HIV-positive biters and spitters are not being punished proportionately, whereby the retributivist theory of punishment fails to justify the attempted homicide convictions and lengthy incarcerations imposed on HIV-positive biters and spitters.[225]

IV. CONCLUSION

Charging and convicting HIV-positive biters and spitters of crimes of greater severity than HIV-negative biters and spitters is neither legally nor scientifically justifiable.

This is not to suggest that HIV-positive biters and spitters are to escape liability for their conduct. Rather, individuals who engage in assaultive behaviors deserve to be punished for their illicit behavior. To the extent that any traditional or general criminal statute is to be used in prosecuting HIV-positive individuals who bite and spit, the most appropriate choice is a *simple assault statute*.[226] After all, HIV-negative biters and spitters are often convicted of simple assault, and HIV-negative individuals who bite and spit are equally as dangerous as HIV-positive individuals who bite and spit.[227]

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[223] STEPHEN KERSHNAR, DESERT, RETRIBUTION, AND TORTURE 173 (2001) (emphasis added).

[224] *See supra* note 207 and accompanying text.

[225] *See* MOORE, *supra* note 218, at 88 (explaining retributivists "are committed to the principle that punishment should be graded and proportioned to desert").

[226] *Cf.* LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 228 (2000) (asserting that, from a public health perspective, HIV-positive individuals who engage in low-risk conduct such as biting should not be convicted of "serious offenses" like aggravated assault or attempted murder, because the "prevention of negligible risk [is] a low priority"); *cf.* WEBBER, *supra* note 29, § 7.03(C), at 7-32.2 (asserting that "[t]o the extent that any criminal statute is to be used to prosecute those whose conduct creates a *serious* risk of HIV transmission, [a reckless endangerment] statute would be the best choice" (emphasis added)).

[227] *See, e.g.*, *Kaminsky*, 1997 WL 59330, at *1 (affirming the misdemeanor assault conviction of an HIV-negative spitter); Ray v. United States, 575 A.2d 1196, 1200 (D.C. 1990) (affirming the

Accordingly, convicting HIV-positive biters and spitters of simple assault would be a fair and proportionate response, and the shorter accompanying prison sentence may actually induce HIV-positive biters and spitters to act in a law-abiding manner during the period of incarceration – that is, the shorter prison sentence would afford HIV-positive individuals a more meaningful opportunity at "life in freedom" and would provide the individual with "something to live for."[228] Consequently, several of the normative theories of punishment support charging and convicting HIV-positive individuals who bite and spit of simple assault.

On the other hand, by continuing to charge and convict HIV-positive biters and spitters of attempted homicide, the mistaken perception that such conduct is dangerous is reinforced, perpetuating a "cycle of ignorance." To wit, juries convict HIV-positive biters and spitters of attempted homicide mistakenly believing that such conduct is dangerous; the convictions reinforce the erroneous perception that the conduct is, in fact, dangerous; this results in the continuing conviction of HIV-positive biters and spitters of attempted homicide.

Moreover, such chargers and convictions do nothing to educate individuals about those behaviors that *actually do* create a risk of transmission.[229] Rather, such charges and convictions perpetuate misconceptions about the virus and incarcerate individuals for low-risk behaviors at a time when ignorance about HIV and its transmission is increasing.[230]

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common law assault conviction of an HIV-negative spitter); Birtsas v. State, 297 N.E.2d 864, 867 (Ind. Ct. App. 1973) (affirming the simple assault conviction of an HIV-negative biter).

[228] MARTIN & WEBSTER, *supra* note 191, at 216.

[229] WEBBER, *supra* note 29, at § 7.03(A), at 7–15.

[230] *See Critics Assail Criminal Laws Aimed at People with HIV*, ASSOCIATED PRESS, Jan. 2, 2012, http://www.usatoday.com/news/nation/story/2012-01-02/hiv-crime-laws/52338228/1 (stating that a recent survey shows one in three Americans have a basic misunderstanding of HIV); *Worry Over Growing HIV Ignorance*, BBC NEWS (Apr. 7, 2006), http://news.bbc.co.uk/2/hi/health/4885120.stm (explaining that a recent survey found fewer people realize that HIV can be spread through unprotected sex or sharing drug needles).