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## Disability Law and HIV Criminalization

**ABSTRACT.** Over thirty states maintain criminal laws that expressly target people living with HIV. Thousands of people are prosecuted under these statutes, exposing them to decades of incarceration, thousands of dollars in fines, and state-sanctioned stigma. This broad pattern of discrimination based solely on HIV status—what this Note terms serodiscrimination—is not supported by scientific evidence nor public-health rationales. This Note argues that many states' HIV-specific criminal laws violate the Americans with Disabilities Act's ban on discrimination by public entities. While previous constitutional challenges to these laws have fallen short, litigation under federal disability law offers a new pathway for reform.

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## INTRODUCTION

In June 2008, Nick Rhoades had a consensual sexual encounter in Iowa.<sup>1</sup> He and his partner had condomless oral sex and anal sex with a condom,<sup>2</sup> activities that carry little to no risk of transmitting the human immunodeficiency virus (HIV) from one person to another.<sup>3</sup> Though Rhoades has HIV, his viral load was undetectable<sup>4</sup> and he was thus unable to transmit the virus even if engaged in a potentially high-risk activity.<sup>5</sup> Despite all of these factors, Rhoades was charged and convicted under Iowa's HIV-specific criminal exposure statute after his partner discovered Rhoades's HIV status and contacted the police.<sup>6</sup> Under the statute then in force, Rhoades was sentenced to twenty-five years in prison and required to register as a sex offender.<sup>7</sup>

In January 2019, Drew Schieber spat on two healthcare workers at an Indiana hospital.<sup>8</sup> For most people in Indiana, spitting on another person is a misdemeanor, punishable with up to 180 days in prison and a maximum fine of \$1,000.<sup>9</sup> But because Schieber has HIV,<sup>10</sup> a different and harsher state statute applied. Under that law, spitting on another person exposed him to a felony conviction, two-and-a-half years in prison, and a \$10,000 fine.<sup>11</sup> Solely due to his HIV status, he faced a sentence five times as long and a fine ten times as high—despite the fact that spitting cannot transfer HIV.<sup>12</sup>

Over thirty states across the country enforce similar criminal laws, imposing steep penalties on people living with HIV when they perform certain actions. These laws apply to the more than one million people with HIV living in

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1. Rhoades v. State, 848 N.W.2d 22, 25 (Iowa 2014).
  2. *Id.* at 25-26.
  3. See Ctrs. for Disease Control & Prevention, *HIV Transmission*, U.S. DEP'T HEALTH & HUM. SERVS. (Aug. 6, 2019), <https://www.cdc.gov/hiv/basics/transmission.html> [<https://perma.cc/CL8J-NLLW>].
  4. Rhoades, 848 N.W.2d at 25.
  5. See *infra* notes 46, 155-157 and accompanying text.
  6. Rhoades, 848 N.W.2d at 26.
  7. *Id.*
  8. Becca Davila, *Man with HIV Charged with Spitting in Hospital Staff's Eyes*, ABC57 (Jan. 28, 2019, 12:55 PM EDT), <https://www.abc57.com/news/man-with-hiv-charged-with-spitting-it-hospital-staff-s-eyes> [<https://perma.cc/7BXF-W4PQ>].
  9. IND. CODE. § 35-42-2-1(c) (2021); *id.* § 35-50-3-3.
  10. Davila, *supra* note 8.
  11. IND. CODE. § 35-42-2-1(f) (2021); *id.* § 35-50-2-7(b); see *id.* § 35-45-16-2(a).
  12. See *infra* Section II.B.4 (discussing transmission risk and the Americans with Disabilities Act's (ADA) direct-threat exception).

the United States today<sup>13</sup> and result in thousands of state charges under HIV-specific laws.<sup>14</sup> The statutes sweep broadly, proscribing even conduct that carries no chance of transmitting the virus to another person.<sup>15</sup> This pattern of discrimination due to HIV status—what this Note terms serodiscrimination—subjects people to arrests, fines, court fees, and incarceration based only on that status.<sup>16</sup> The statutes also carry expressive harms, singling out people living with HIV for state-sanctioned stigma.

The federal Americans with Disabilities Act (ADA), enacted to combat public and private discrimination based on disability status, provides a pathway to correct this criminalized regime. This Note offers a novel argument that the ADA's reach extends to state criminal laws that discriminate on the basis of disability, including most HIV-criminalization statutes, and precludes their enforcement. While this litigation strategy has not previously been implemented to challenge such statutes, existing ADA case law from the Supreme Court and federal courts of appeals provides a strong doctrinal foundation for its approach.

Part I describes the problem of state criminal laws that discriminate against people with disabilities. HIV-criminalization statutes reflect a long history of misinformation and stereotypes about HIV and acquired immunodeficiency syndrome (AIDS) in the United States. Dozens of states enacted HIV-specific criminal laws between the late 1980s and early 2000s. As written, they proscribe a wide range of conduct, including many forms of interaction that carry no risk of viral transmission. But despite past litigation efforts and calls from

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13. U.S. Statistics, HIV.GOV (Jan. 16, 2020), <https://www.hiv.gov/hiv-basics/overview/data-and-trends/statistics> [https://perma.cc/6MH2-95EP].

14. *HIV Criminalization: A Challenge to Public Health and Ending AIDS*, AIDSWATCH, [https://www.aidsunited.org/data/files/Site\\_18/AW2015-Criminalization\\_Web.pdf](https://www.aidsunited.org/data/files/Site_18/AW2015-Criminalization_Web.pdf) [https://perma.cc/YQ22-LFV4] (“In more than 1,000 instances, people living with HIV have faced charges under HIV-specific statutes in the U.S.”). In Missouri, for example, one in every sixty people living with HIV has been arrested under an HIV-specific law. Brad Sears, Shoshana K. Goldberg & Christy Mallory, *The Criminalization of HIV and Hepatitis B and C in Missouri: An Analysis of Enforcement Data from 1990 to 2019*, WILLIAMS INST. 3 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Criminalization-MO-Feb-2020.pdf> [https://perma.cc/U4KF-8MMN]. For further data on state enforcement rates, see *infra* note 71.

15. For a discussion of actions and circumstances in which no transmission is possible, see *infra* Section II.B.4.

16. This Note uses the terms “HIV status” and “serostatus” interchangeably to refer to the presence or absence of serological markers of HIV in an individual’s bloodstream. See Robert S. Janssen, David R. Holtgrave, Ronald O. Valdiserri, Melissa Shepherd, Helene D. Gayle & Kevin M. De Cock, *The Serostatus Approach to Fighting the HIV Epidemic: Prevention Strategies for Infected Individuals*, 91 AM. J. PUB. HEALTH 1019 (2001).

advocates for reform, these discriminatory criminal laws remain on the books in more than thirty states and continue to be enforced today.

Part II offers a solution. It develops a novel theory for litigating challenges to state HIV-criminalization statutes under federal antidiscrimination law. The ADA bans public entities from discriminating on the basis of disability, including an individual's HIV status. Most state HIV-criminalization statutes violate Title II of the ADA and are therefore unenforceable. While there are exceptions to public entities' liability when concerns about third-party health and safety exist, most HIV-criminalization statutes do not provide the individualized inquiry and risk assessment required to trigger that exception, if it were deemed applicable. As a result, these serodiscriminatory laws are straightforward violations of Title II, criminalizing a broad range of behaviors (across various levels of risk) based on an individual's disability status.

Finally, Part III discusses the merits of implementing this litigation strategy as part of broader efforts to challenge and reform existing HIV-criminalization statutes. After considering the prudence of the proposed legal arguments, the consequences that attach to possible litigation outcomes, and the interaction between litigation and legislative advocacy, the Note concludes that bringing ADA claims against state HIV-criminalization statutes offers a viable untapped pathway for reform.

## I. STATE CRIMINALIZATION OF HIV

### A. *Historical Context*

State criminal law has often functioned as a means to marginalize and control disfavored social groups. Sodomy laws, for example, used criminalization to discourage same-sex intimacy and regulate lesbian, gay, and bisexual people.<sup>17</sup> Outlawing same-sex sexual conduct had broader social and legal effects as well, as states' criminalization of sodomy served as "an invitation to subject homosexual [and bisexual] persons to discrimination both in the public and in the private spheres."<sup>18</sup> In a similar vein, states have long used criminal statutes

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17. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 576 (2003) (noting the "consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition"); WILLIAM N. ESKRIDGE, JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861-2003*, at 8, 75-76, 189 (2008).

18. *Lawrence*, 539 U.S. at 575.

to regulate and subordinate people with physical and mental disabilities.<sup>19</sup> Perhaps most famously, Pennsylvania enacted a nineteenth-century “ugly law,” which made it a crime for people with visible disabilities to appear in public spaces.<sup>20</sup>

This nexus of state criminal law and disability status also extends to HIV and AIDS.<sup>21</sup> When the first clinical reports of HIV/AIDS in the United States emerged in the 1980s, the federal government imposed aggressive restrictions on people living with HIV.<sup>22</sup> Noncitizens with HIV were banned from entering the country in 1987; this bar on immigration and travel stood for more than two decades.<sup>23</sup> People with HIV were (and remain) blocked from active de-

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19. This Note’s focus on state *criminal* law should not suggest that this is the only category of law used to target people with disabilities. Other types of state statutes have also expressly authorized discrimination against people with disabilities. *See, e.g.,* *Buck v. Bell*, 274 U.S. 200 (1927) (discussing a Virginia statute authorizing the compulsory sterilization of people with intellectual disabilities); *see also* REBECCA M. KLUCHIN, *FIT TO BE TIED: STERILIZATION AND REPRODUCTIVE RIGHTS IN AMERICA, 1950-1980*, at 15 (2009) (describing state laws authorizing the involuntary sterilization of people in institutions); WILLIAM KUBY, *CONJUGAL MISCONDUCT: DEFYING MARRIAGE LAW IN THE TWENTIETH-CENTURY UNITED STATES* 109-45 (2018) (discussing state laws denying marriage rights on the basis of physical and mental disabilities).
  20. *See* SUSAN M. SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUBLIC* 55, 294 (2009).
  21. HIV refers to the human immunodeficiency virus, a pathogen that causes acquired immunodeficiency syndrome (AIDS), a condition that involves a progressive failure of an individual’s immune system.
  22. These restrictions were not criminal; there is only one federal HIV-criminalization statute today. *See* 18 U.S.C. § 1122(a) (2018) (creating an HIV-specific criminal offense for the donation or sale of “blood, semen, tissues, organs, or other bodily fluid”); *HIV Criminalization in the United States: A Sourcebook on State and Federal HIV Criminal Law and Practice*, CTR. FOR HIV L. & POL’Y 593 (2020) [hereinafter *HIV Criminalization Report*], <https://www.hivlawandpolicy.org/sites/default/files/HIV%20Criminalization%20in%20the%20U.S.%20A%20Sourcebook%20on%20State%20Fed%20HIV%20Criminal%20Law%20and%20Practice%20050520.pdf> [https://perma.cc/8EG2-8BAE]; *see also* U.S. SENTENCING COMM’N, REPORT TO CONGRESS: ADEQUACY OF PENALTIES FOR THE INTENTIONAL EXPOSURE OF OTHERS THROUGH SEXUAL ACTIVITY TO THE HUMAN IMMUNODEFICIENCY VIRUS (1995), [https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/199503\\_RtC\\_HIV.pdf](https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/199503_RtC_HIV.pdf) [https://perma.cc/P8YL-XLA9] (declining to recommend that Congress adopt a federal HIV-specific sentence enhancement for intentional exposure through “sexual activity”).
  23. Julia Preston, *Obama Lifts a Ban on Entry into U.S. by H.I.V.-Positive People*, N.Y. TIMES (Oct. 30, 2009), <https://www.nytimes.com/2009/10/31/us/politics/31travel.html> [https://perma.cc/V99T-U8PW]; Andrew Sullivan, *The HIV Travel Ban*, ATLANTIC: DAILY DISH (Dec. 5, 2006), <https://www.theatlantic.com/daily-dish/archive/2006/12/the-hiv-travel-ban/232005> [https://perma.cc/9UAW-2X6S] (recounting the evolution of the HIV travel ban).

ployment in several branches of the military.<sup>24</sup> And, since 1983, men who have sex with men have faced significant restrictions on blood donation due to the specter of HIV transmission.<sup>25</sup>

Throughout this period, state legislators also responded to fears of transmission, invoking the states' traditional authority over criminal law. Dozens of states and territories have at some point enacted laws that criminalize certain conduct when performed by people living with HIV; of these, more than thirty still maintain HIV-specific laws today.<sup>26</sup> As a class, state HIV-specific statutes vary considerably and apply to a wide spectrum of behaviors and situations—so much so that such laws are often siloed into particular issue areas and analyzed separately.<sup>27</sup> These HIV-criminalization statutes are a legislative form of *sero-discrimination*, a term this Note invokes for the first time to describe public and private discrimination on the basis of an individual's HIV status—and especially on the basis of being HIV-positive.<sup>28</sup>

The rise of serodiscriminatory laws in the United States, despite their prevalence, is understudied in legal and historical scholarship.<sup>29</sup> While a full genea-

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24. Scott A. Schoettes, *HIV-Positive Airmen Won a Huge Victory Against Trump—and Stigma*, ADVOCATE (Mar. 5, 2020, 11:33 PM EST), <https://www.advocate.com/commentary/2020/3/05/hiv-positive-airmen-won-huge-victory-against-trump-and-stigma> [https://perma.cc/ZS6F-LMJZ].
  25. Alexandra Sifferlin, *This National Blood Drive Is Fighting the FDA Ban on Gay Donors*, TIME (July 11, 2014, 11:58 AM EDT), <https://time.com/2975958/this-national-blood-drive-is-fighting-the-fda-ban-on-gay-donors> [https://perma.cc/3FJE-4RBB].
  26. See *infra* Appendix (listing current HIV-criminalization laws). States and territories are similarly situated as to any analysis of their HIV-criminalization statutes under federal disability law.
  27. HIV-specific sexual-contact laws are especially likely to be analyzed on their own terms, rather than considered alongside the full range of HIV-specific criminal statutes. See, e.g., Paige Pflieger, *Some Push to Change State Laws that Require HIV Disclosure to Sexual Partners*, NPR (Jan. 22, 2020, 5:00 PM ET), <https://www.npr.org/2020/01/22/797359483/some-push-to-change-state-laws-that-require-hiv-disclosure-to-sexual-partners> [https://perma.cc/6X2S-332Y]. This Note takes a broader view, providing a unified legal account of HIV criminalization across various types of regulated conduct.
  28. A search of HeinOnline and JSTOR identifies no prior uses of the term “serodiscrimination.” This Note examines HIV-criminalization laws as a type of public serodiscrimination; an employee being fired by a private employer due to their HIV status would be an instance of private serodiscrimination. As a matter of terminology, serodiscrimination—the concept of discrimination on the basis of HIV status—should be distinguished from serosorting—the social practice of choosing one’s sexual partners based on their HIV status (usually based on seroconcordance to prevent transmission).
  29. For notable exceptions to this trend in sociology and American studies, respectively, see TREVOR HOPPE, *PUNISHING DISEASE: HIV AND THE CRIMINALIZATION OF SICKNESS* (2017); and Steven William Thrasher, *Infectious Blackness: “Tiger Mandingo,” Racial Compromise*

logical account goes beyond the scope of this Note, a few critical moments help to frame the steady accretion of HIV-criminalization regimes. Some of the earliest state serodiscrimination statutes were enacted in the initial wake of scientists' identification of HIV/AIDS. Florida, for example, criminalized conduct by people living with HIV in 1986,<sup>30</sup> just four years after the Centers for Disease Control and Prevention (CDC) first offered a clinical definition of AIDS.<sup>31</sup> Within two years, dozens of additional HIV-specific criminal bills had been proposed by state legislators across the country.<sup>32</sup>

Other states' HIV-criminalization laws emerged later. Colorado and Nevada first enacted their statutes in the 1990s,<sup>33</sup> during a period in which Congress tethered states' public-health funding to their efforts to reduce intentional transmission of the virus.<sup>34</sup> One Tennessee law, enacted in 1994, was based on a model statute promulgated in a 1989 report by the American Legislative Exchange Council.<sup>35</sup> That report also served as a model for at least twenty-one unsuccessful state bills between 1990 and 2004.<sup>36</sup> Some states' HIV-criminalization laws are yet more recent, enacted well after the scientific and public-health uncertainty that marked the early years of HIV/AIDS. Alaska

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in Missouri, and Criminalized HIV/AIDS in America (May 2019) (unpublished Ph.D. dissertation, New York University) (on file with author). More legal and historical work is needed to explore the ways in which HIV-criminalization statutes percolated across the United States, often deeply enmeshed with contemporary sexual and LGBTQ+ politics. See Todd Heywood, *The Crime of Being Positive*, ADVOCATE (Apr. 1, 2013), <https://www.advocate.com/print-issue/current-issue/2013/04/01/crime-being-positive> [<https://perma.cc/6E4M-5JEH>] (“[T]he history of HIV criminalization laws [is] something that to this day is not widely understood.”).

30. See FLA. STAT. § 796.08(5) (2020).
31. See Ctrs. for Disease Control & Prevention, *Current Trends Update on Acquired Immune Deficiency Syndrome (AIDS) – United States*, 31 MORBIDITY & MORTALITY WKLY. REP. 507 (1982), <https://www.cdc.gov/mmwr/preview/mmwrhtml/00001163.htm> [<https://perma.cc/6BR6-QJHS>].
32. See HOPPE, *supra* note 29, at 243 n.41.
33. See COLO. REV. STAT. § 18-3-415.5 (2020); NEV. REV. STAT. § 201.205 (2021).
34. Jessica Wapner, *Why We Need to Stop Treating HIV Victims Like Criminals*, ATLANTIC (Mar. 22, 2011), <https://www.theatlantic.com/health/archive/2011/03/why-we-need-to-stop-treating-hiv-victims-like-criminals/72838> [<https://perma.cc/8C5M-TEQF>] (“[W]hen Congress passed the Ryan White Care Act in the 1990s to help HIV/AIDS patients afford medication, states receiving this funding had to take action against intentional HIV transmission.”).
35. See HOPPE, *supra* note 29, at 123, 127, 256 n.108 (describing TENN. CODE ANN. § 39-13-109 (2020)).
36. See *id.* at 256 n.108; MICHAEL TANNER & ALEC NATIONAL WORKING GROUP ON STATE AIDS POLICY, *THE POLITICS OF HEALTH: A STATE RESPONSE TO THE AIDS CRISIS* 93-94 (1989).

codified HIV-criminalization legislation in 2006,<sup>37</sup> while Nebraska passed a new serodiscriminatory statute as late as 2011.<sup>38</sup>

Across this multidecade span, the stated purposes of HIV-criminalization laws have remained remarkably consistent. Based on legislators' statements and state laws' statutory text, these laws are framed as reducing interpersonal transmission of HIV, thereby preventing new individual infections and slowing the spread of HIV/AIDS across the population.<sup>39</sup> To that end, the laws focus on regulating the behavior of people living with HIV in two primary ways. First, HIV-criminalization statutes aim to deter behavior that the state deems to carry an unacceptable risk of interpersonal transmission—for example, bans on the exchange of bodily fluids. Second, the laws aim to incentivize other behaviors by people living with HIV, like proactive serostatus disclosures to sexual partners, in order to increase the use of prophylactic measures. In practice, however, the laws' effects are less straightforward. HIV-criminalization regimes shape a complex range of behaviors, influencing the actions and beliefs of both HIV-positive and HIV-negative people.<sup>40</sup>

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37. ALASKA STAT. § 12.55.155(c)(33) (2020) (codifying an HIV-specific sentence enhancement for sexual-assault offenses).
38. NEB. REV. STAT. § 28-934 (2021) (creating an HIV-specific offense involving “assault with a bodily fluid against a public safety officer”).
39. See Patricia Sweeney, Simone C. Gray, David W. Purcell, Jenny Sewell, Aruna Surendera Babu, Brett A. Tarver, Joseph Prejean & Jonathan Mermin, *Association of HIV Diagnosis Rates and Laws Criminalizing HIV Exposure in the United States*, 31 AIDS 1483, 1486 (2017) (noting that “at least some of the rationale for implementing criminal exposure laws was to reduce HIV transmission”). Of course, this framing must be understood against a backdrop of widespread animus against people with HIV and members of social groups associated with the virus. See HOPPE, *supra* note 29, at 119-20 (discussing the punitive and stigmatizing impulses, including “anti-gay bias,” on display during legislative debate on a “painstakingly neutral” HIV-criminalization bill).
40. See Zita Lazzarini, Sarah Bray & Scott Burris, *Evaluating the Impact of Criminal Laws on HIV Risk Behavior*, 30 J.L. MED. & ETHICS 239, 239, 249-50 (2002) (noting that HIV-specific criminal laws affect behavior through punishment-based deterrence, shaping social norms, and incapacitation); Zita Lazzarini & Robert Klitzman, *HIV and the Law: Integrating Law, Policy, and Social Epidemiology*, 30 J.L. MED. & ETHICS 533, 533 (2002) (recognizing that laws structure “many of the variables that determine when and how [HIV] transmission occurs”).

## B. Statutory Framework

A majority of states still maintain and enforce their serodiscriminatory criminal laws today.<sup>41</sup> The remainder of this Section develops a three-part framework to systematically describe state HIV-criminalization statutes. This framework allows a heterogeneous array of statutes to be analyzed coherently, while distinguishing this corpus of statutes from other similar bodies of state law.

### 1. HIV Status

First, HIV-criminalization laws expressly classify based on an individual's serostatus.<sup>42</sup> To identify individuals subject to their restrictions, HIV-criminalization laws must describe the class of people to whom they apply. The statutes refer variously to HIV, AIDS, or both.<sup>43</sup> As written, these laws generally do not extend to individuals who are unaware that they have HIV. Instead, the majority of statutes apply to people with affirmative knowledge that they are living with HIV.<sup>44</sup> For most serodiscrimination statutes, the source of this

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41. Serodiscriminatory laws are only one way that American legal systems use criminal law to target people living with HIV. State courts often read general criminal laws to authorize additional criminal sanctions for people living with HIV. *See generally HIV Criminalization Report, supra* note 22 (collecting state laws and court decisions). Perhaps most glaringly, courts have held that people living with HIV (or their body parts or fluids) necessarily constitute deadly weapons in aggravating-factor analyses. *See, e.g., People v. Shawn*, 107 P.3d 1033, 1036 (Colo. App. 2004); *Mathonican v. State*, 194 S.W.3d 59, 69 (Tex. App. 2006). A Texas jury, for example, found a man living with HIV guilty of using his saliva as a deadly weapon after he spat on a police officer; the man was sentenced to thirty-five years in prison. Associated Press, *HIV-Positive Man Sentenced to 35 Years for Spitting at Officer*, N.Y. DAILY NEWS (May 15, 2008), <https://www.nydailynews.com/news/world/hiv-positive-man-sentenced-35-years-spitting-officer-article-1.329749> [<https://perma.cc/38DP-LM9L>]. Judicial reasoning of this sort reflects a related but distinct form of discrimination against people living with HIV, as compared to the legislative serodiscrimination analyzed in this Note.
  42. Other state laws cast a wider net, governing sexually transmitted, communicable, or infectious diseases more generally. *See, e.g., CAL. HEALTH & SAFETY CODE* § 120500 (West 2021). However, state laws that regulate these broader categories of disease *and* expressly identify HIV as one such disease fall within this Note's serodiscrimination analysis.
  43. *See infra* Appendix. Some older examples conflate or distinguish imprecisely between HIV, the virus that can be transmitted, and AIDS, the spectrum of medical conditions caused by the virus. *See, e.g., ALASKA STAT.* § 12.55.155(c)(33) (2020) (contemplating "test[ing] positive for . . . AIDS").
  44. *See, e.g., MISS. CODE ANN.* § 97-27-14(1) (2021) (specifying that someone must "*knowingly* expose another person to human immunodeficiency virus" to constitute a violation (emphasis added)). Some of the statutory language used to describe this knowledge is especially

knowledge is not specified. Other states, however, expressly require a positive test for HIV as a condition of liability.<sup>45</sup>

Beyond that knowledge, most HIV-criminalization statutes do not draw further distinctions within the class of individuals who know that they are HIV positive. As a result, these laws do not take account of factors that significantly affect the odds of an individual transmitting the virus to another person, including whether someone is following a treatment regime that reduces their viral load to undetectable (and thus untransmittable) levels.<sup>46</sup> One rare exception is Idaho, where personal biological considerations can constitute a defense if they reduce the likelihood of viral transmission, as when a prohibited transfer of body fluids “occur[s] after advice from a licensed physician that the accused was noninfectious.”<sup>47</sup>

## 2. Conduct

HIV-criminalization laws regulate actions taken by someone living with HIV.<sup>48</sup> These criminal laws fall into two major categories.<sup>49</sup> The first consists of *standalone* statutes that specifically criminalize certain conduct performed by a person living with HIV. For example, many states have laws that criminalize engaging in oral sex while living with HIV. For laws of this sort, the same behavior performed by someone without HIV would not constitute a criminal offense at all, as with most sexual activities. By contrast, the second category

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stigmatizing. See IDAHO CODE § 39-608(1) (2020) (referencing knowledge of being “afflicted with acquired immunodeficiency syndrome”); N.D. CENT. CODE § 12.1-20-17 (2021) (same).

45. See, e.g., ALASKA STAT. § 12.55.155(c)(33) (2020) (requiring that someone be “diagnosed as having or having tested positive for HIV or AIDS”); ARK. CODE ANN. § 5-14-123(b) (2021) (requiring that a “person knows he or she has tested positive for human immunodeficiency virus”). Nevada casts an even more targeted net, reaching only those people who both “test[] positive in a test approved by the State Board of Health for exposure to the human immunodeficiency virus and receiv[e] actual notice of that fact.” NEV. REV. STAT. § 201.205(1) (2021).
46. On the science of “undetectable equals untransmittable” frameworks for HIV, see Robert W. Eisinger, Carl W. Dieffenbach & Anthony S. Fauci, *HIV Viral Load and Transmissibility of HIV Infection: Undetectable Equals Untransmittable*, 321 J. AM. MED. ASS’N. 451, 451-52 (2019).
47. IDAHO CODE § 39-608(3)(b) (2020).
48. Other state laws criminalize HIV-related conduct that is not tied to the agent’s HIV status. See, e.g., DEL. CODE ANN. tit. 16, § 2801(c) (2021) (regulating other actors’ use of an HIV-positive donor’s organs).
49. This typology largely coheres with that suggested by the Centers for Disease Control and Prevention (CDC). See *HIV and STD Criminal Laws*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 21, 2020), <https://www.cdc.gov/hiv/policies/law/states/exposure.html> [<https://perma.cc/7K5T-27BJ>].

consists of *sentence enhancements* for underlying offenses. For example, spitting on someone else may be proscribed by law for all individuals, but the statutory offense is graded more seriously – and is subject to greater punishment – when performed by someone living with HIV. Seventeen states (and one territory) have only HIV-specific standalone offenses,<sup>50</sup> while five states (and one territory) have only HIV-specific sentence enhancements;<sup>51</sup> nine states maintain both types of laws.<sup>52</sup>

As the examples of sex and spitting suggest, state serodiscrimination laws target a wide range of interpersonal conduct by people living with HIV. These statutes attach criminal penalties to behaviors thought to enable transmission of the virus from someone with HIV to someone without HIV.<sup>53</sup> The statutes cover an array of actions, including sexual activities and other conduct involving exposure to bodily fluids like spitting, throwing, or biting.<sup>54</sup> They often specifically identify other activities that can involve transfers of bodily fluids, including sex work, needle-sharing, and donation of organs, tissues, or blood.<sup>55</sup> Several statutes expressly proscribe certain behavior in the context of interactions with correctional officers or in prison settings.<sup>56</sup>

Across these HIV-criminalization statutes, there is significant variation as to whether additional conduct elements are required for conviction. Some laws make liability contingent not only on an individual's HIV status but also on other factors like actual transmission.<sup>57</sup> Others require intent to transmit HIV as a condition of criminal liability.<sup>58</sup> However, people are often still charged

50. See *infra* Appendix (Arkansas, Georgia, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maryland, Michigan, Montana, Nebraska, North Dakota, South Carolina, South Dakota, Tennessee, the U.S. Virgin Islands, Virginia, Washington).

51. See *infra* Appendix (Alaska, California, Colorado, Guam, New Jersey, Wisconsin).

52. See *infra* Appendix (Florida, Indiana, Mississippi, Missouri, Nevada, Ohio, Oklahoma, Pennsylvania, Utah).

53. In reality, some impose criminal sanctions for conduct that potentially involves a high risk of transmitting HIV, while others criminalize behavior that carries little to no risk of transmission. See *infra* Section II.B.4.

54. See *infra* Appendix (cataloguing serodiscriminatory state criminal statutes).

55. See, e.g., S.C. CODE ANN. § 44-29-145 (2021).

56. See, e.g., GA. CODE ANN. § 16-5-60(d) (2020); 18 PA. CONS. STAT. § 2703(a)(2) (2021).

57. See, e.g., COLO. REV. STAT. § 18-3-415.5(5)(a)(II) (2020) (requiring that the “infectious agent of the HIV infection was in fact transmitted”).

58. See, e.g., GA. CODE ANN. § 16-5-60(d) (2020). Some states' intent requirements make liability contingent not on an intent to transmit, but instead on an intent to perform an underlying action like engaging in sex. See, e.g., S.D. CODIFIED LAWS § 22-18-31 (2020) (“Any person who, knowing himself or herself to be infected with HIV, intentionally exposes another person to infection by . . . [committing certain specified conduct] . . . is guilty of criminal expo-

under such laws based only on knowledge of their HIV status but without any further demonstration of intent to transmit.<sup>59</sup> Moreover, individuals in some states can be prosecuted under statutes nominally requiring intent to transmit even when their underlying activity, like spitting or biting, could not result in HIV transmission.<sup>60</sup>

Some HIV-criminalization laws also incorporate affirmative defenses, especially in statutes criminalizing sexual conduct.<sup>61</sup> The most common defense is a partner's consent to an otherwise proscribed activity while possessing knowledge of the individual's HIV status.<sup>62</sup> Some laws include a defense where prophylactic barriers like condoms are used to reduce the risk of HIV transmission;<sup>63</sup> other states, however, expressly bar condom use as a defense.<sup>64</sup>

### 3. Criminal Sanctions

The final hallmark of serodiscriminatory statutes is their criminal-law valence: they are backed by the coercive power of the state.<sup>65</sup> The punishments that HIV-criminalization statutes authorize draw from the standard arsenal of state criminal law. Many provide for a felony charge that carries greater exposure to criminal penalties, often where a comparable offense by someone with-

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sure to HIV.”); *id.* § 22-1-2(1)(b) (providing that “[t]he words, ‘intent, intentionally’” in conduct bans refer to “a specific design to engage in conduct of that nature,” “regardless of what the offender intends to accomplish”).

59. See, e.g., *HIV Criminalization Report*, *supra* note 22, at 113-17, 461-64 (cataloguing examples).
60. See, e.g., IDAHO CODE § 39-608(1) (2020) (providing for criminal liability for “[a]ny person who exposes another in any manner with the intent to infect . . . [to] any of his or her body fluid”).
61. See, e.g., LA. STAT. ANN. § 14:43.5(F) (2020).
62. See, e.g., MISS. CODE ANN. § 97-27-14 (2021) (“Prior knowledge and willing consent to the exposure is a defense to a charge brought under this subsection.”).
63. See 720 ILL. COMP. STAT. 5/12-5.01(a)(1) (2021) (making it a crime to “engage[] in sexual activity with another *without the use of a condom* knowing that he or she is infected with HIV” (emphasis added)); see also N.D. CENT. CODE § 12.1-20-17(3) (2021) (“It is an affirmative defense to a prosecution under this section that if the transfer was by sexual activity, the sexual activity took place between consenting adults after full disclosure of the risk of such activity and with the use of an appropriate prophylactic device.”).
64. See MO. REV. STAT. § 567.020(2) (2021) (“The use of condoms is not a defense to this offense.”); *id.* § 191.677(4) (“The use of condoms is not a defense . . .”).
65. Other state laws without criminal sanctions include HIV-specific public-health codes. See, e.g., NEV. REV. STAT. § 441A.300 (2021); TENN. CODE ANN. § 68-32-104 (2020).

out HIV is only a misdemeanor.<sup>66</sup> In terms of penalties, these laws authorize incarceration, with possible sentences stretching as long as twenty or thirty years—or even life.<sup>67</sup> They also impose significant fines, up to at least \$10,000.<sup>68</sup>

Convictions for criminal offenses under these statutes trigger collateral consequences as well. At least six states may require individuals convicted under HIV-specific laws to register as sex offenders as part of their punishment.<sup>69</sup> Other potential collateral consequences include civil commitment, as well as restrictions on voting, public benefits, and access to employment and education.<sup>70</sup>

### C. Harms

The central harm of HIV-criminalization laws lies in the dramatic criminal sanctions they prescribe. Thousands of charges have been filed against people under HIV-specific statutes across the country, leading to convictions that carry extended incarceration and significant fines and fees.<sup>71</sup> While proponents of

66. See, e.g., MISS. CODE ANN. § 97-27-14(2)(c) (2021) (“A violation of this subsection is a misdemeanor unless the person violating this section knows that he is infected with human immunodeficiency virus (HIV) . . . in which case it is a felony.”); OKLA. STAT. tit. 21, § 1031(B) (2021); UTAH CODE ANN. § 76-10-1309 (West 2020).

67. See, e.g., MO. REV. STAT. § 191.677(2) (2021) (making certain behaviors Class B felonies or, in case of actual transmission, Class A felonies); *id.* § 558.011(1) (specifying a maximum sentence of life imprisonment for Class A felonies and of fifteen years’ imprisonment for Class B felonies); N.D. CENT. CODE § 12.1-20-17(2) (2021) (making certain transfers of bodily fluids a Class A felony); *id.* § 12.1-32-01 (specifying a maximum penalty of twenty years’ imprisonment for Class A felonies).

68. See, e.g., NEV. REV. STAT. § 201.358 (2021) (describing an HIV-specific offense as a category B felony and specifying the maximum fine).

69. *HIV Criminalization in the United States: An Overview of the Variety and Prevalence of Laws Used to Prosecute and Punish People Living with HIV (PLHIV) in the US*, CTR. FOR HIV L. & POL’Y (2019), <https://www.hivlawandpolicy.org/sites/default/files/CHLP%20HIV%20Crim%20Map%20030119.pdf> [<https://perma.cc/9Y3C-95VM>]. Being registered for sex-offender status can then subject people to additional enduring and compounding forms of discrimination. See Richard Tewksbury, *Collateral Consequences of Sex Offender Registration*, 21 J. CONTEMP. CRIM. JUST. 67, 78-79 (2005).

70. *HIV Criminalization Report*, *supra* note 22, at 4 n.20.

71. See, e.g., Amira Hasenbush, *HIV Criminalization in Florida*, WILLIAMS INST. 10 tbl.2 (Oct. 2018), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Criminalization-FL-Oct-2018.pdf> [<https://perma.cc/QWS6-T9S3>] (noting 874 HIV-specific charges in Florida across 614 people from 1986 to 2017); Amira Hasenbush, *HIV Criminalization in Georgia*, WILLIAMS INST. 3, 8-9 (Jan. 2018), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Criminalization-GA-Jan-2018.pdf> [<https://perma.cc/6RWD-SAK2>] (noting

the laws defend them on public-health grounds to justify these significant costs, there is a dearth of empirical evidence that the laws are effective in deterring high-risk behaviors.<sup>72</sup> Instead, serodiscriminatory laws often target conduct that carries low or no risk of viral transmission.<sup>73</sup>

These sanctions also have a disparate effect on already vulnerable communities. Certain populations, including Black communities and LGBTQ+ people, have higher rates of HIV prevalence than does the general public, such that HIV-criminalization statutes have a disproportionate impact.<sup>74</sup> Many state laws are also vague and overbroad, vesting significant discretion with law-enforcement officials and prosecutors.<sup>75</sup> As a result, HIV-criminalization statutes can be discriminatorily enforced against communities that are already overpoliced.<sup>76</sup> Because HIV is associated with marginalized and stigmatized communities, state HIV-criminalization regimes intersect with and compound other forms of structural disadvantage.

This criminalized framework has consequences even when sanctions are not imposed, in part by bringing people with HIV into contact with the crimi-

571 HIV-specific charges in Georgia across 543 people from 1988 to 2017); Amira Hasenbush, Ayako Miyashita & Bianca D.M. Wilson, *HIV Criminalization in California*, WILLIAMS INST. & CAL. HIV/AIDS RES. PROGRAM 11 (Dec. 2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Criminalization-CA-Dec-2015.pdf> [<https://perma.cc/9RTE-AJVD>] (noting that 800 people came into contact with California's criminal legal system via HIV-specific laws from 1988 to 2014); Sears et al., *supra* note 14, at 3 (noting 263 HIV-specific arrests in Missouri across 209 people from 1990 to 2019).

72. See Chris Beyrer & Robert Suttle, Opinion, *Living with H.I.V. Isn't a Crime. Why Is the United States Treating It Like One?*, N.Y. TIMES (Aug. 26, 2019), <https://www.nytimes.com/2019/08/26/opinion/criminalization-of-hiv.html> [<https://perma.cc/LH2K-CNZM>] (“[S]cientific evidence on actual harm and transmission does not support the singling out of people living with H.I.V. through the heavy hand of criminal law.”); Sweeney et al., *supra* note 39, at 1486 (finding “no association between HIV diagnosis rates and state criminal exposure laws,” which “suggests these laws have had no detectable HIV prevention effect in the United States”).
73. See Wapner, *supra* note 34. Such conduct makes up a significant proportion of prosecutions. See Zita Lazzarini, Carol L. Galletly, Eric Mykhalovskiy, Dini Harsono, Elaine O’Keefe, Merrill Singer & Robert J. Levine, *Criminalization of HIV Transmission and Exposure: Research and Policy Agenda*, 103 AM. J. PUB. HEALTH 1350, 1351 (2013) (“In three US studies, approximately 20% to 25% of cases involved spitting, biting, or external exposure to bodily fluids that pose almost no transmission risk.”).
74. See Thrasher, *supra* note 29, at 193, 199.
75. See Lazzarini et al., *supra* note 73, at 1350-51.
76. See Beyrer & Suttle, *supra* note 72 (“These laws constitute one more layer of marginalization for those whom the criminal justice system already disproportionately prosecutes, convicts and harshly sentences: black people, trans women, migrants, people who sell sex, people who inject drugs and L.G.B.T.Q. youths.”).

nal legal system and exposing them to potential liability. Law-enforcement officers, for example, may invoke the existence of HIV-criminalization laws as grounds to threaten, detain, or arrest individuals they encounter. During plea bargaining, prosecutors can also upcharge, or wield the threat of charges against, people living with HIV under serodiscriminatory statutes in order to pressure them into accepting criminal pleas.<sup>77</sup>

The laws' severe criminal sanctions also create opportunities for harassment by private actors. Because of their breadth and the severity of possible penalties,<sup>78</sup> these laws construct an environment in which people living with HIV are especially vulnerable to abuse, coercion, or blackmail from others aware of their serostatus.<sup>79</sup>

Beyond the individual level, HIV-criminalization laws have broader harmful effects. Authorizing differential—and harsher—treatment for people living with HIV enacts expressive harms. Even in states where such laws are not actively enforced, their presence in state law codes legitimizes stigma against people with HIV. Relatedly, many criminal statutes entrench misinformation about HIV, resulting in public confusion about transmission and stoking animus, harassment, and discrimination.<sup>80</sup> As a result, these laws perpetuate stereotypes and ignorance about people living with HIV, all cloaked in the legitimacy of government action.<sup>81</sup>

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77. See Victoria Law, *Michael Johnson, HIV Disclosure, and the Coercive Nature of Plea Bargains*, THEBODY (Nov. 28, 2017), <https://www.thebody.com/article/michael-johnson-hiv-disclosure-and-the-coercive-na> [<https://perma.cc/8YUL-748F>]; Carol L. Galletly & Zita Lazzarini, *Charges for Criminal Exposure to HIV and Aggravated Prostitution Filed in the Nashville, Tennessee Prosecutorial Region 2000-2010*, 17 AIDS & BEHAV. 2624, 2624 (2013).

78. See Lazzarini et al., *supra* note 73, at 1350.

79. Beyrer & Suttle, *supra* note 72 (“We don’t know how many others have been threatened or blackmailed with criminal prosecution—the law becomes a weapon in abusive relationships—but those numbers are surely considerable. In almost all cases, this all-too-real risk is greater than any (highly unlikely) risk of actual H.I.V. transmission.”).

80. See J. Stan Lehman, Meredith H. Carr, Allison J. Nichol, Alberto Ruisanchez, David W. Knight, Anne E. Langford, Simone C. Gray & Jonathan H. Mermin, *Prevalence and Public Health Implications of State Laws that Criminalize Potential HIV Exposure in the United States*, 18 AIDS & BEHAV. 997, 1004 (2014) (noting that state HIV-criminalization laws “perpetuat[e] . . . misinformation regarding modes of HIV transmission”); *infra* Section II.B.4.

81. *National HIV/AIDS Strategy (2010)*, CTR. FOR HIV L. & POL’Y (July 2010), <https://www.hivlawandpolicy.org/resources/national-hiv-aids-strategy-2010> [<https://perma.cc/3TF5-LHDN>] (“The [National HIV/AIDS Strategy (NHAS)] maintains that many state HIV-specific criminal laws reflect long-outdated misperceptions of HIV’s modes and relative risks of transmission. The NHAS also recognizes more generally the importance of addressing widespread public ignorance about HIV transmission risks, a central aspect of HIV-related criminal prosecutions.”).

Finally, HIV-criminalization laws support perverse public-health outcomes; by stoking stigma and prejudice around HIV, they deter people from getting tested for the virus.<sup>82</sup> In particular, this framework incentivizes people—especially those in high-risk or overpoliced populations—to avoid knowledge of their serostatus and thus, in many states, criminal liability.<sup>83</sup> To the extent that these laws discourage testing, they potentially generate personal and public-health risks.<sup>84</sup>

#### D. Challenging Serodiscrimination

In the past two decades, movements challenging HIV criminalization have gained traction. A growing chorus of stakeholders has weighed in, prompting both legislative and judicial change efforts. These voices include public-health and epidemiology scholars, policymakers and legislators, activists, and people with HIV directly affected by the laws.

Since 2012, six states have enacted major legislative reforms to narrow or repeal existing serodiscrimination statutes.<sup>85</sup> Most recently, Washington passed

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82. Wapner, *supra* note 34 (noting that HIV-criminalization laws “further stigmatize HIV status, ‘which in turn prevents those who are HIV-infected from getting the support they need, being honest about HIV infection, or just having a conversation about HIV risk and preventing others from infection’” (quoting Kevin Fenton, Dir., Div. of HIV/AIDS Prevention, Nat’l Ctr. for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention, Ctrs. for Disease Control & Prevention)).
83. See *HIV Criminalization Discourages HIV Testing, Disclosure and Treatment for Transgender and Third Sex Individuals*, TRANSGENDER L. CTR. (July 2, 2013), <https://www.transgenderlawcenter.org/archives/8538> [<https://perma.cc/3THF-D37Q>] (noting that “nearly 25% of HIV-positive respondents” to the 2012 National HIV Criminalization Survey reported knowing at least one person “who did not get tested for fear of criminal prosecution”); see *supra* Section I.B.1 (discussing heterogeneous statutory knowledge requirements).
84. For one example in the Canadian context, see Maya A. Kesler, Rupert Kaul, Mona Loutfy, Ted Myers, Jason Brunetta, Robert S. Remis & Dionne Gesink, *Prosecution of Non-Disclosure of HIV Status: Potential Impact on HIV Testing and Transmission Among HIV-Negative Men Who Have Sex with Men*, 13 PLOS ONE 1, 12 (2018) (finding that “7% of HIV-negative MSM in Toronto reported being less likely to undergo HIV testing, fearing prosecution” and estimating “a 7% decrease in HIV testing increased the overall HIV transmission potential by 18.5% [largely] driven by the unmet needs of HIV-positive unaware individuals”).
85. These states are Illinois (2012), Iowa (2014), Colorado (2016), California (2017), Michigan (2018), and Washington (2020). See *Timeline of State Reforms and Repeals of HIV Criminal Laws*, CTR. FOR HIV L. & POL’Y (2020), <https://www.hivlawandpolicy.org/sites/default/files/Timeline%20of%20State%20Reforms%20and%20Repeals%20of%20HIV%20Criminal%20Laws%20032420.pdf> [<https://perma.cc/93QY-6R4Q>]. A seventh, North Carolina, reformed its HIV-specific public-health regulations in 2018. *Id.* Texas also repealed its HIV-specific criminal laws in 1994. *Id.*

reforms in March 2020 at the request of state health authorities, reducing its HIV-specific intentional-exposure offense from a felony to a misdemeanor.<sup>86</sup> According to the bill's proponents, Washington's HIV-criminalization laws were "originally meant to protect people from HIV . . . [but] have only increased the stigma and led to abuse."<sup>87</sup> Across dozens of other states with serodiscriminatory laws, however, legislative reform efforts have as yet been either unsuccessful or absent.

At the federal level, the White House's National HIV/AIDS Strategy, issued in 2010, called for an end to state HIV-criminalization laws and proposed public-policy interventions.<sup>88</sup> Every Congress since 2011 has introduced the REPEAL HIV Discrimination Act, though this proposed legislation has never reached a floor vote.<sup>89</sup> In its most recent version, the bill would trigger a review of state HIV-criminalization laws and require the Attorney General and other Cabinet officials to suggest avenues for reform.<sup>90</sup>

Growing recognition of the harms of HIV criminalization has generated litigation efforts to challenge serodiscriminatory state statutes. Suits against current and former laws, however, have been unsuccessful across a range of state and federal constitutional claims.<sup>91</sup> To date, reforms to HIV-criminalization

86. See Rachel La Corte, *Washington Legislature Ease Penalties for HIV Exposure*, WASH. TIMES (Mar. 3, 2020), <https://www.washingtontimes.com/news/2020/mar/3/Washington-legislature-ease-penalties-for-hiv-expo> [<https://perma.cc/B5M7-VJZH>]; *Washington State Advocates Succeed in Reforming State's HIV Criminal Law*, CTR. FOR HIV L. & POL'Y (Mar. 19, 2020), <https://www.hivlawandpolicy.org/news/washington-state-advocates-succeed-reforming-state-s-hiv-criminal-law> [<https://perma.cc/5S5C-QPCJ>].

87. La Corte, *supra* note 86 (quoting Senator Annette Cleveland).

88. See Office of Nat'l AIDS Policy, *National HIV/AIDS Strategy for the United States: Updated to 2020*, WHITE HOUSE 1-2 (July 2015), <https://files.hiv.gov/s3fs-public/nhas-update.pdf> [<https://perma.cc/S4R3-7JTW>] ("The Nation's first comprehensive National HIV/AIDS Strategy for the United States (Strategy) was released in 2010.").

89. REPEAL HIV Discrimination Act of 2021, H.R. 1305, 117th Cong.; REPEAL HIV Discrimination Act of 2020, H.R. 6054, 116th Cong.; REPEAL HIV Discrimination Act of 2017, H.R. 1739, 115th Cong.; REPEAL HIV Discrimination Act of 2015, H.R. 1586, 114th Cong.; REPEAL HIV Discrimination Act of 2013, H.R. 1843, 113th Cong.; REPEAL HIV Discrimination Act, H.R. 3053, 112th Cong. (2011).

90. H.R. 1305, § 4.

91. See, e.g., *People v. Russell*, 630 N.E.2d 794, 795-96 (Ill. 1994) (rejecting free-speech, association, and due-process void-for-vagueness claims); *People v. Jensen*, 586 N.W.2d 748, 750, 755 (Mich. Ct. App. 1998) (rejecting constitutional overbreadth, mens rea, privacy, and compelled-speech claims); *State v. S.F.*, 483 S.W.3d 385, 386 (Mo. 2016) (rejecting free-speech and privacy claims); *State v. Batista*, 91 N.E.3d 724, 728-30 (Ohio 2017) (rejecting free-speech and equal-protection claims); *State v. Whitfield*, 134 P.3d 1203, 1211-13 (Wash. Ct. App. 2006) (rejecting equal-protection and privileges-and-immunities claims).

statutes have come exclusively through legislative efforts rather than through the courts. Though ineffective thus far, bringing lawsuits against serodiscriminatory laws adds an additional tool to reformers' arsenal, especially in states where possibilities for legislative change are limited. New litigation strategies under federal disability law—operating in a different doctrinal setting—may be successful where previous constitutional suits have failed.<sup>92</sup>

## II. LIABILITY UNDER THE ADA

Federal antidiscrimination law offers an unexplored pathway for challenging state statutes that criminalize conduct based on an individual's HIV status. In demonstrating that many states' serodiscriminatory statutes violate federal disability law, this Part develops a new theory of liability and a litigation strategy for advocates of reform.

### A. Title II

The Americans with Disabilities Act was enacted in 1990 to establish a “comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>93</sup> To that end, Congress intended “to invoke the sweep of [its] authority, including the power to enforce the [F]ourteenth [A]mendment . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities.”<sup>94</sup> The statutory text takes a wide-ranging view of disability. Its protections apply to individuals with any “physical or mental impairment that substantially limits one or more major life activities” or with a history or perception of such impairment.<sup>95</sup> By statute, these protections are “construed in favor of broad coverage of individuals . . . to the maximum extent permitted.”<sup>96</sup> In that vein, “determination[s] of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as . . . medication.”<sup>97</sup>

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92. For a more thorough examination of the merits of challenging serodiscriminatory statutes under federal disability law, see *infra* Part III.

93. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(b)(1), 104 Stat. 327, 329 (codified as amended at 42 U.S.C. § 12101(b)(1) (2018)).

94. *Id.* § 2(b)(4).

95. 42 U.S.C. § 12102(1) (2018).

96. *Id.* § 12102(4)(A).

97. *Id.* § 12102(4)(E)(i)(I).

The ADA's antidiscrimination protections extend to people living with HIV or AIDS. In *Bragdon v. Abbott*, decided in the same term the Supreme Court first interpreted the ADA, the Court recognized living with HIV as a "physical impairment which substantially limits a major life activity, as the ADA defines it."<sup>98</sup> The *Bragdon* Court held that "HIV infection satisfies the statutory and regulatory definition of a physical impairment during every stage of the disease."<sup>99</sup> More specifically, HIV constitutes "a physiological disorder with a constant and detrimental effect on the infected person's hemic and lymphatic systems from the moment of infection."<sup>100</sup> Living with HIV thus falls within the ADA's protected categories even when an individual is asymptomatic or has an undetectable viral load.<sup>101</sup>

Title II of the ADA applies to public entities, "protect[ing] qualified individuals with disabilities from discrimination on the basis of disability . . . by State and local government entities."<sup>102</sup> Its antidiscrimination mandate extends broadly and reaches state statutes, including criminal laws. Indeed, "[T]itle II applies to anything a public entity does . . . includ[ing] activities of the legislative and judicial branches of State and local governments."<sup>103</sup> That is, "[a]ll governmental activities of public entities are covered."<sup>104</sup> Title II "authorizes private suits against public entities to enforce its provisions," as well as enforcement by the Department of Justice.<sup>105</sup>

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98. 524 U.S. 624, 641 (1998); see 42 U.S.C. § 12102(1)(A) (defining "disability" as "a physical or mental impairment that substantially limits one or more major life activities"). The relationship between HIV and the ADA was discussed even before the bill was enacted. See 136 CONG. REC. 13,051-52 (June 6, 1990) (statement of Sen. Harkin) (discussing the transmissibility of AIDS); see also *Sharing the Dream: Is the ADA Accommodating All?*, U.S. COMM'N ON CIV. RTS., <https://www.usccr.gov/pubs/ada/ch1.htm> [<https://perma.cc/QKX4-JSQR>] (discussing the Chapman Amendment, House Amendment 450 to H.R. 2273, 101st Cong. (1990)).

99. *Bragdon*, 524 U.S. at 637.

100. *Id.*

101. See *id.* at 647.

102. Civil Rights Div., *State and Local Governments (Title II)*, U.S. DEP'T JUST., [https://www.ada.gov/ada\\_title\\_II.htm](https://www.ada.gov/ada_title_II.htm) [<https://perma.cc/N37U-WX7J>].

103. 28 C.F.R. pt. 35, app. B (2021).

104. *Id.*

105. *Toledo v. Sanchez*, 454 F.3d 24, 31 (1st Cir. 2006) (citing 42 U.S.C. § 12133 (2018)); see Disability Rights Section, Civil Rights Div., *Questions and Answers: The Americans with Disabilities Act and Persons with HIV/AIDS*, U.S. DEP'T JUST. (Feb. 25, 2020), [https://www.ada.gov/hiv/ada\\_qa\\_hiv.htm](https://www.ada.gov/hiv/ada_qa_hiv.htm) [<https://perma.cc/R5HM-9ZLP>] ("Individuals are also entitled to bring private ADA lawsuits against State and local governments and seek injunctive relief, monetary damages (in some instances), and reasonable attorney's fees and costs.").

Title II supersedes state laws that conflict with its antidiscrimination protections, even when those laws sit at the core of states' police powers to regulate public health and safety.<sup>106</sup> This dynamic coheres with antidiscrimination doctrine in other contexts, where federal protections trump discriminatory state laws.<sup>107</sup> In *Hargrave v. Vermont*, for example, the Second Circuit held that a state law violated Title II and prevented enforcement of its discriminatory provisions.<sup>108</sup> The statute at issue allowed healthcare professionals to override power-of-attorney designations by people deemed mentally ill while imprisoned or civilly committed.<sup>109</sup> The court held that Vermont's law "facially discriminate[d] against mentally disabled individuals in violation of the ADA" and so could not be enforced.<sup>110</sup>

### B. HIV Criminalization as Disability Discrimination

Title II expressly bars states from discriminating on the basis of disability status. Section 12132 provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."<sup>111</sup> This statutory proscription applies to the actions of "any State or local government."<sup>112</sup>

HIV-criminalization statutes facially violate Title II by singling out people with a particular disability for adverse treatment.<sup>113</sup> An individual challenging

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106. See *Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 163-64 (2d Cir. 2013) ("Title II would preempt facially discriminatory laws in pursuit of its broad purpose . . .").

107. See *Quinones v. City of Evanston*, 58 F.3d 275, 277 (7th Cir. 1995) (holding that the Age Discrimination Employment Act supersedes conflicting state law because a "discriminatory state law is not a *defense* to liability under federal law; it is a *source* of liability under federal law"); see also *Barber ex rel. Barber v. Colo. Dep't of Revenue*, 562 F.3d 1222, 1233 (10th Cir. 2009) (contemplating a conflict between state law and the Rehabilitation Act and noting that "[r]eliance on state statutes to excuse non-compliance with federal laws is simply unacceptable under the Supremacy Clause").

108. 340 F.3d 27, 39 (2d Cir. 2003).

109. *Id.* at 31.

110. *Id.* at 30.

111. 42 U.S.C. § 12132 (2018).

112. *Id.* § 12131(1)(A) (defining "public entity" to include "any State or local government"); see *id.* § 12131(1)(B) (defining "public entity" to include "any department, agency . . . or other instrumentality of a State or States or local government").

113. While certain state statutes may be redeemable based on the regulatory exception for direct threats to public health, the vast majority are drawn too broadly to fit within that exception. See *infra* Section II.B.4 (discussing the direct-threat exception).

serodiscriminatory state laws can make out a claim under the ADA when three statutory criteria are satisfied. Namely, a litigant must

- (i) be excluded from participation in a public entity's services, programs or activities *or* be otherwise discriminated against by a public entity ("adverse treatment");
- (ii) suffer such exclusion or discrimination due to their disability ("causality"); and
- (iii) be a qualified individual with a disability within the meaning of the statute ("qualified individual").<sup>114</sup>

This Section considers each statutory element in turn, before analyzing the applicability of the direct-threat exception, a health-based regulatory carveout to the category of qualified individuals. Because states have framed HIV-criminalization laws as public-health measures, the analysis identifies four ways in which serodiscriminatory laws can fall outside this narrow exception to state liability, if it were deemed applicable.

### 1. *Adverse Treatment*

Section 12132 creates two distinct forms of adverse treatment that render public entities liable under the ADA.<sup>115</sup> First, states violate Title II by excluding an individual from, or denying an individual the benefits of, their services, programs, or activities.<sup>116</sup> A vast number of Title II cases are litigated under this provision, which attaches liability to discriminatory exclusions or denials. Separately, however, states violate Title II through any other form of discrimination based on an individual's disability status.<sup>117</sup> This final "catch-all" clause

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114. See *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 503 (4th Cir. 2016); *Hargrave v. Vermont*, 340 F.3d 27, 34-35 (2d Cir. 2003) (citing 42 U.S.C. § 12132).

115. See *Crowder v. Kitagawa*, 81 F.3d 1480, 1483 (9th Cir. 1996) ("Section 12132 of the ADA precludes (1) exclusion from/denial of benefits of public services, as well as (2) discrimination by a public entity. Due to the insertion of 'or' between exclusion from/denial of benefits on the one hand and discrimination by a public entity on the other, we conclude Congress intended to prohibit two different phenomena.").

116. See *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210-12 (1998) (interpreting Section 12132 so broadly as to reach activities in prisons and activities in which one's participation is involuntary, while emphasizing that the scope of the ADA is not restricted by Congress's intent in the face of unambiguous statutory text); *Gorman v. Bartch*, 152 F.3d 907, 912-13 (8th Cir. 1998).

117. See *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1773 (2015) (describing two types of liability under Section 12132); *Haberle v. Troxell*, 885 F.3d 170, 180 (3d Cir. 2018) ("[Section] 12132 is framed in the alternative and we can look instead to the second phrase,

extends the provision's antidiscrimination mandate to a much wider range of actions by state and local governments, "regardless of the context."<sup>118</sup>

HIV-criminalization statutes trigger this second form of liability.<sup>119</sup> States subject people living with HIV to discrimination by maintaining a set of separate statutory provisions that apply only to them.<sup>120</sup> Moreover, these laws do not merely single out people living with HIV, but do so in order to allocate specific criminal penalties against them. Under the "comprehensive view of . . . discrimination advanced in the ADA" that the Supreme Court has recognized,<sup>121</sup> these facts are sufficient to make out a presumptive claim of discrimination against most HIV-criminalization laws under Title II, even without comparator evidence.<sup>122</sup>

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namely, to whether the arrestee was 'subjected to discrimination' by the police."); *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1084-85 (11th Cir. 2007) (noting that a plaintiff can "show an ADA claim under the final clause in the Title II statute: that he was 'subjected to discrimination' by a public entity"); *Parker v. Universidad de P.R.*, 225 F.3d 1, 5 (1st Cir. 2000) (noting that plaintiffs must establish "either" of the Section 12132 disjuncts); *Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000) ("A disabled plaintiff can succeed in an action under Title II if he can show that, by reason of his disability, he was . . . otherwise 'subjected to discrimination by any such entity.'"); *Gohier v. Enright*, 186 F.3d 1216, 1220 (10th Cir. 1999) (recognizing "the second basis for a Title II claim"); *Bledsoe v. Palm Beach Cty. Soil & Water Conservation Dist.*, 133 F.3d 816, 821-22 (11th Cir. 1998) ("[T]he prohibition in the final clause of the section . . . is not tied directly to the 'services, programs, or activities' of the public entity."); *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 44-45 (2d Cir. 1997) ("Title II's anti-discrimination provision does not limit the ADA's coverage to conduct that occurs in the 'programs, services, or activities' of the City. Rather, it is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context . . .").

118. *Innovative Health Sys., Inc.*, 117 F.3d at 45.

119. See 42 U.S.C. § 12132 ("[N]o qualified individual with a disability shall, by reason of such disability . . . be subjected to discrimination by any [public] entity."). This Note does not take a position as to whether public entities might *also* be liable under a theory of denial of benefits or access for maintaining and enforcing serodiscriminatory criminal laws.

120. See, e.g., GA. CODE ANN. § 16-5-60(c), (d) (2020) (regulating "HIV infected person[s]"); MISS. CODE ANN. § 97-27-14(2)(c) (2021) (regulating "person[s] . . . infected with human immunodeficiency virus (HIV)"); OHIO REV. CODE ANN. § 2921.38(C) (West 2020) (regulating a "person [who] is a carrier of the virus that causes acquired immunodeficiency syndrome").

121. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 598 (1999). While *Olmstead* concerned claims about the segregation of people with disabilities in institutions, the Court's analysis emphasized that government policies that "perpetuate[] unwarranted assumptions" about people with disabilities are cognizable as discrimination under the ADA. *Id.* at 600; see *id.* (emphasizing the stigmatizing effects of government discrimination).

122. See *id.* at 598 n.10.

In many states, however, it is even more evident that HIV-criminalization laws subject individuals to discrimination. Often, states proscribe behavior like spitting or biting for people of all serostatuses but require harsher criminal sanctions for people living with HIV than for all others who perform identical conduct.<sup>123</sup> Where a public entity's laws target people living with HIV for different and less favorable treatment, they subject HIV-positive individuals to discrimination. Georgia's HIV-criminalization law demonstrates this dynamic well.<sup>124</sup> Of all people in that state who spit on law-enforcement officers, only those living with HIV can be charged with a felony that carries a minimum five-year prison sentence.<sup>125</sup> An individual without HIV who performs the same act would instead be charged with assault or battery—misdemeanors that carry a maximum prison sentence of twelve months.<sup>126</sup>

Federal courts have recognized Title II violations where public entities use HIV status to single out certain individuals for less favorable treatment.<sup>127</sup> In a Pennsylvania case, for example, the Third Circuit considered a public foster-care agency's policy that required extra rounds of consent protocols before placing foster children in homes where someone with HIV was living. The court held that the policy violated the ADA:

[The agency's] policy requires notification of and consent from the biological or custodial parents of HIV-negative foster children when placing those children in homes with HIV-positive individuals. The policy therefore treats John and Mary Doe differently during the foster parent application process solely on the basis of [their son] Adam's HIV and

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123. See, e.g., Emily S. Rueb, *He Emerged from Prison a Potent Symbol of H.I.V. Criminalization*, N.Y. TIMES (July 14, 2019), <https://www.nytimes.com/2019/07/14/us/michael-johnson-hiv-prison.html> [<https://perma.cc/SJQ8-7E6N>] (“We don’t charge people with other incurable diseases . . . with a criminal offense for exposing others.” (quoting Eric M. Selig)).

124. See GA. CODE ANN. § 16-5-60(d) (addressing conduct by “HIV infected person[s]”).

125. *Id.* The statute also applies to “hepatitis infected person[s].” *Id.* Insofar as hepatitis is cognizable as a disability under the ADA, the statute facially discriminates on this count as well.

126. See GA. CODE ANN. § 16-5-20(a)-(b) (defining simple assault as a misdemeanor); *id.* § 16-5-23(e) (defining simple battery against law-enforcement officers as a “misdemeanor of a high and aggravated nature”); *id.* § 17-10-3(a) (establishing penalties for misdemeanors); *id.* § 17-10-4(a) (establishing penalties for aggravated misdemeanors). State law also authorizes a fine of up to \$5,000. *Id.* § 17-10-4(a); see *id.* § 17-10-3(a)(1).

127. See, e.g., T.E.P. v. Leavitt, 840 F. Supp. 110, 111 (D. Utah 1993) (invalidating Utah’s ban on marriage for people with HIV/AIDS and permanently enjoining enforcement).

AIDS. As a facial matter, then, the policy constitutes disability discrimination against the Does under the ADA.<sup>128</sup>

Though the *Doe* court evaluated a Title II claim about “be[ing] excluded from participation in . . . [a] program[],”<sup>129</sup> its analysis is instructive as to claims about “be[ing] subjected to discrimination” under state HIV-criminalization laws.<sup>130</sup> Just as the county’s foster-care policy constituted adverse treatment of people living with HIV, so too do state serodiscriminatory statutes, insofar as they criminalize conduct based on an individual’s HIV status and, in some instances, maintain harsher penalties for people who are HIV-positive as compared to those who are HIV-negative.<sup>131</sup>

## 2. Causality

To establish liability under Title II, an individual’s adverse treatment must occur “by reason of [their] disability.”<sup>132</sup> This causal element requires a more substantive inquiry when adverse treatment is established through an exclusion or denial. In those cases, a litigant need only show that they were excluded from some particular program to satisfy the adverse-treatment criterion; the separate causal criterion then allows courts to distinguish between, for example, a state employee fired because of her narcolepsy and a state employee fired because she embezzled (who also happens to be narcoleptic).

But where an individual’s adverse treatment takes the form of otherwise “be[ing] subjected to discrimination,”<sup>133</sup> rather than exclusion or denial, the

128. *Doe v. Cty. of Centre*, 242 F.3d 437, 447 (3d Cir. 2001); *see id.* at 451 (“[T]he County’s blanket policy discriminates against the Does because of Adam’s HIV positive status even though the probability of HIV transmission, and consequently the risk, is next to zero.”).

129. *Id.* at 446 (quoting 42 U.S.C. § 12132 (2018)); *see id.* at 441 (considering “whether Centre County violated the appellants’ civil rights by excluding them from participation in the County’s foster care program”).

130. 42 U.S.C. § 12132.

131. Title II does not condition a public entity’s liability on a showing of animus against people with disabilities. *See Theriault v. Flynn*, 162 F.3d 46, 55 (1st Cir. 1998) (Lipez, J., concurring) (“[I]n a facial challenge to a regulation under Title II of the ADA the intent of the public entity that promulgated the regulation is not at issue.”). Nonetheless, the legislative records—and even the statutory text—of certain states’ serodiscriminatory laws reflect hostility toward people living with HIV. *See, e.g.*, Ga. H.R. Daily Rep., 2003 Reg. Sess. No. 37 (describing people living with HIV as bringing “new danger” to “unsuspecting enforcement personnel”).

132. 42 U.S.C. § 12132.

133. *Id.*

causal element is necessarily satisfied. HIV-criminalization statutes subject people living with HIV to discrimination precisely by classifying them based on their disability status. That is, their HIV status is a but-for cause of the adverse treatment they face under these laws.<sup>134</sup> When a statute expressly targets a particular disability status, its impact on affected individuals always occurs by reason of their disability.

Of course, some HIV-criminalization laws only apply when an individual has performed an underlying action separately forbidden by statute, like biting a corrections officer. While this might seem to disrupt the causal chain, the Supreme Court has embraced a broad construction of the ADA and has recognized that Title II's causal element can be satisfied even where multiple factors contribute to an individual's adverse treatment.<sup>135</sup> For these serodiscriminatory laws, the HIV-specific sentence enhancements that constitute adverse treatment are triggered precisely by the individual's HIV status. While criminal sanctions for the underlying offense are not tied to the individual's disability, the punitive enhancement would not be administered but for their living with HIV.

### 3. "Qualified Individual"

Title II's antidiscrimination protections apply to "qualified individual[s] with a disability."<sup>136</sup> The statute defines that term as any "individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."<sup>137</sup> As with the causal element, applying the "qualified individual" criterion

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134. See *Haberle v. Troxell*, 885 F.3d 170, 179 (3d Cir. 2018) (stating that but-for causation is satisfied where an individual's disability "ha[s] a determinative effect" on their treatment (internal quotation marks omitted)). If an individual's disability status is a but-for cause of their adverse treatment under a serodiscriminatory law, such status is necessarily a motivating factor in that treatment as well. There is thus no need to wade into the circuit split as to whether Section 12132 requires but-for or motivating-factor causation. See *Brown v. District of Columbia*, 928 F.3d 1070, 1098-99 (D.C. Cir. 2019) (Wilkins, J., concurring) (noting the existence of a circuit split and collecting cases).

135. See *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 598 (1999) ("The State argues that L.C. and E.W. encountered no discrimination 'by reason of' their disabilities because they were not denied community placement on account of those disabilities . . . . We are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA.").

136. 42 U.S.C. § 12132.

137. *Id.* § 12131(2).

varies depending on the type of adverse treatment an individual experiences. Under the statutory definition, the eligibility-requirement analysis is only substantively applicable to Title II claims based on an individual's being "excluded from participation in or be[ing] denied the benefits of the services, programs, or activities."<sup>138</sup>

By contrast, when an individual brings a claim based on being "subjected to discrimination by" a public entity, as under the theory of liability developed in this Note, they are a qualified individual under the statute so long as their disability is covered under the ADA. For example, the Tenth Circuit structured its examination of a Title II claim into two distinct lines of inquiry, asking whether a public entity, "by reason of [plaintiff's] disability, either (1) exclude[d] him from participating in or den[ie]d him the benefits of services, programs, or activities whose essential eligibility requirements he met, or (2) otherwise subject[ed] him to discrimination."<sup>139</sup> This framework coheres with Section 12132's express contemplation of liability based on discrimination that occurs outside of services, programs, and activities.<sup>140</sup>

So too here. Any individual living with HIV who has been subject to discrimination under an HIV-specific statute is qualified to make out a facial challenge.<sup>141</sup> Because there are no essential eligibility requirements to meet, such a person is a "qualified individual with a disability" for purposes of Title II. Indeed, with respect to a discrimination-based challenge to a state's criminal laws, any regulated individual with a disability is presumptively a "qualified individual" under the statute.<sup>142</sup>

#### 4. *Direct Threat to Health*

Beyond essential eligibility requirements, third-party considerations can also affect whether an individual is "qualified." Per Title II's implementing regulations, those who pose a direct threat to the health or safety of others are gen-

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<sup>138</sup> *Id.* § 12132.

<sup>139</sup> *Gohier v. Enright*, 186 F.3d 1216, 1219 (10th Cir. 1999).

<sup>140</sup> *See supra* notes 115-118 and accompanying text.

<sup>141</sup> *See T.E.P. v. Leavitt*, 840 F. Supp. 110, 111 (D. Utah 1993) (assuming without further inquiry that litigants with HIV were qualified individuals in a subjected-to-discrimination claim under Section 12132).

<sup>142</sup> *See Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1083 (11th Cir. 2007) (accepting without discussion of eligibility requirements that a deaf man was a "qualified individual with a disability" as to his arrest).

erally not qualified individuals under the third prong of Section 12132.<sup>143</sup> States defending serodiscriminatory laws are likely to appeal to this regulatory carve-out to liability by arguing that these statutes defend against health risks—namely, the transmission of HIV.

However, there are several reasons why the direct-health exception does not exclude a would-be serodiscrimination litigant from the category of qualified individuals. To begin, it is not clear that the direct-threat exception obtains for challenges against a state’s criminal law. Some courts doubt that this carveout applies throughout the ADA, instead limiting its reach to employment discrimination based on the relevant regulatory text.<sup>144</sup> If the direct-threat exception is restricted to employment or to liability stemming from programs, services, and activities, then litigants challenging HIV-criminalization laws under a “subjected to discrimination” theory face no obstacle in demonstrating that they are qualified individuals under Title II. They would thus satisfy the three statutory elements necessary to succeed on an ADA claim.

But even if the direct-threat exception applies more broadly across Title II, there is no sufficient threat that would legitimate HIV-criminalization laws’ conflict with the ADA’s antidiscrimination protections. The direct-threat exception requires “a significant risk to the health or safety of others that cannot be eliminated or reduced to an acceptable level by the public entity’s modification of its policies, practices, or procedures, or by the provision of auxiliary aids or services.”<sup>145</sup> Crucially, a state’s “determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability.”<sup>146</sup>

HIV-criminalization laws are based on sweeping stereotypes about the contagiousness of HIV and methods of viral transmission. The direct-threat excep-

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143. 29 C.F.R. § 1630.2(r) (2021); 28 C.F.R. § 35.104 (2021); *id.* § 35.139; *see* Sch. Bd. of Nassau Cty. v. Arline, 480 U.S. 273, 288 (1987) (holding that whether a teacher with tuberculosis was “otherwise qualified” to teach depended in part on the extent to which she posed a risk of harm to third parties).

144. *See, e.g.,* Hargrave v. Vermont, 340 F.3d 27, 36 (2d Cir. 2003) (“It is unclear whether the ‘direct threat’ defense applies outside of the employment context.”); *see also* 29 C.F.R. § 1630.2(r) (stipulating that the direct-threat exception “shall be based on an individualized assessment of the individual’s present ability to safely perform the essential functions of the job”).

145. *The Americans with Disabilities Act: Title II Technical Assistance Manual*, U.S. DEP’T JUST. § II-2.8000 [hereinafter *Technical Assistance Manual*], <https://www.ada.gov/taman2.html> [<https://perma.cc/RVA4-H7MN>]; *see* 42 U.S.C. § 12111(3) (2018) (“The term ‘direct threat’ means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.”).

146. *Technical Assistance Manual*, *supra* note 145.

tion is only available where a public entity “conduct[s] a rigorous and individualized inquiry into the risk of HIV transmission.”<sup>147</sup> Relevant “[m]edical guidance may be obtained from public-health authorities, such as the U.S. Public Health Service, the Centers for Disease Control, and the National Institutes of Health.”<sup>148</sup> As the Supreme Court recognized with respect to the Rehabilitation Act, the predecessor to the ADA:

The fact that *some* persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act *all* persons with actual or perceived contagious diseases. Such exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were “otherwise qualified.” Rather, they would be vulnerable to discrimination on the basis of mythology—precisely the type of injury Congress sought to prevent.<sup>149</sup>

The vast majority of state HIV-criminalization statutes provide no information about the duration or severity of the risk an individual with HIV poses to others nor about the probability that transmissible harms will occur at all.<sup>150</sup> Because these laws do not provide for *any* individualized inquiry as to threat levels nor limit their adverse treatment based on individual risk, a state cannot appeal to this exception to justify what would otherwise be illegal disability discrimination (again, if the exception even applies beyond employment). Mis-

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147. *Doe v. Cty. of Centre*, 242 F.3d 437, 448 (3d Cir. 2001); see *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998); *Holiday v. City of Chattanooga*, 206 F.3d 637, 643-44 (6th Cir. 2000); *Doe v. Dekalb Cty. Sch. Dist.*, 145 F.3d 1441, 1445-46 (11th Cir. 1998); *Technical Assistance Manual*, *supra* note 145 (predicating the direct-threat exception on “an individualized assessment that relies on current medical evidence, or on the best available objective evidence” that considers the “nature, duration, and severity of the risk” and the “probability that the potential injury will actually occur”).

148. *Technical Assistance Manual*, *supra* note 145; see *Bragdon*, 524 U.S. at 650 (“[T]he views of public health authorities, such as the U.S. Public Health Service, CDC, and the National Institutes of Health, are of special weight and authority.”).

149. *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 285 (1987); see *id.* at 287 (stating that whether a teacher with tuberculosis was “otherwise qualified” required an “individualized inquiry”).

150. See *Lehman et al.*, *supra* note 80, at 1004 (“[M]any laws do not distinguish between behaviors that pose higher, lower, or negligible HIV transmission risk and rarely take into account factors that alter transmission risk, such as condom use, ART, or PrEP.”).

souri's fluid-exposure law is representative, not undertaking any individualized assessment of actual health risk before imposing adverse treatment.<sup>151</sup>

Serodiscriminatory laws generally take an individual's HIV status and treat that disability as a per se threat to the health and safety of third parties, assuming that anyone living with HIV is necessarily a health risk. As such, these laws sweep far too broadly on four fronts, criminalizing behavior that carries no risk of transmitting the virus to other people—let alone a “significant” one—because of individual and situational circumstances.<sup>152</sup> Even when the default assessment of risk would be correct as to a particular individual and particular situation, however, these laws still do not generally satisfy the procedure required under the ADA. Before the direct-threat exception can be invoked to justify otherwise violative conduct, the discriminating entity—here, a state—must have “conduct[ed] the ADA-mandated individualized determination” and concluded that there is a significant risk of third-party harm.<sup>153</sup> Instead, the statutes make a blanket assumption that living with HIV necessarily poses a threat of transmission and do not demonstrate the existence of an individualized and significant risk.<sup>154</sup>

*a. Individualized Inquiry*

First, HIV-criminalization laws apply to people whose viral loads are undetectable. For such individuals, their bodily fluids will contain only trace amounts, if any, of the virus—and their ability to transmit the virus to additional people is no greater than that of people without HIV.<sup>155</sup> The CDC has affirmed this position as to penetrative sex, noting that “[w]hen [antiretroviral therapy] results in viral suppression, defined as less than 200 copies/ml or un-

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151. See MO. REV. STAT. § 191.677 (2021).

152. See *Cty. of Centre*, 242 F.3d at 442 (“[T]he probability of HIV transmission through sexual activity varies depending on the activity involved, the specific roles of the infected and uninfected persons in the sexual activity, and the viral load of the infected person.”); *id.* at 448 (noting Congress’s “intent that analysis of the ADA’s direct threat exception should involve an individualized inquiry into the significance of the threat posed”).

153. *Id.* at 451.

154. Indeed, “[t]o the extent the [State] enacts a policy based on the belief that HIV, as a general matter,” is at all times transmissible, it “controverts the ADA-mandate of individualized determination” required to trigger the direct-threat exception to liability under Title II. *Id.* at 452.

155. See Eisinger et al., *supra* note 46.

detectable levels, it prevents sexual HIV transmission.”<sup>156</sup> Because individuals with an “undetectable viral load have effectively no risk of sexually transmitting the virus to an HIV-negative partner,”<sup>157</sup> their liability under HIV-criminalization laws solely by virtue of their serostatus does not reflect an individualized consideration of possible risk to third parties.

Second, the laws do not take sufficient account of people who bear the risk of potential transmission, nor of factors that affect their likelihood of acquiring HIV. When a party is HIV-negative and on a preventative antiretroviral medical regime, like preexposure prophylaxis (PrEP), their probability of getting HIV is significantly diminished.<sup>158</sup> Alternatively, where that person is already living with HIV and on antiretroviral therapy, there is no risk of a new viral infection.<sup>159</sup> No HIV-criminalization statute, however, considers factors that render acquisition unlikely or impossible based on the characteristics of people presumed to bear the risk of transmission.<sup>160</sup> As such, these laws fail to provide the fact-bound and individualized inquiry required under the ADA.

### *b. Significant Risk of Harm*

Third, these statutes often apply to types of conduct unable to transmit the virus. Biting and spitting, for example, are widely recognized by scientific authorities as nontransmissible behaviors when performed by someone living with

156. Letter from Jonathan Mermin, Assistant Surgeon Gen., U.S. Pub. Health Servs. & Eugene McCray, Dir., Div. of HIV/AIDS Prevention, Nat’l Ctr. For HIV/AIDS, Viral Hepatitis, STD, and TB Prevention, Ctrs. for Disease Control & Prevention (Sept. 27, 2017), [https://www.cdc.gov/nchhstp/dear\\_colleague/2017/dcl-092717-National-Gay-Mens-HIV-AIDS-Awareness-Day.html](https://www.cdc.gov/nchhstp/dear_colleague/2017/dcl-092717-National-Gay-Mens-HIV-AIDS-Awareness-Day.html) [https://perma.cc/Z4GL-WQ37]; see Savas Abadsidis, *CDC Officially Admits People with HIV Who Are Undetectable Can’t Transmit HIV*, HIV PLUS (Oct. 22, 2017, 3:25 PM EDT), <https://www.hivplusmag.com/undetectable/2017/9/27/breaking-cdc-officially-recognizes-undetectable-untransmittable-hiv-prevention> [https://perma.cc/7P7V-3AD4].

157. Letter from Mermin & McCray, *supra* note 156.

158. See Graham White, *Pre-Exposure Prophylaxis (PrEP) and Criminal Liability Under State HIV Laws*, 126 YALE L.J.F. 77, 78 (2016) (“PrEP is a pill taken daily that, when used correctly, allows HIV-negative individuals to nearly eliminate their risk of acquiring the virus.”).

159. While it is possible for someone living with HIV to become infected with a second strain of the virus, such superinfections are “vanishingly unlikely” for people on antiretroviral therapy. William Wells, *Whatever Happened to HIV Superinfection?*, THEBODY (Apr. 30, 2020), <https://www.thebody.com/article/hiv-superinfection-subtype-1> [https://perma.cc/RJ7G-FBD5].

160. This does not include those statutes that require actual transmission as a condition for criminal liability. For an example of acquisition-based factors in a state administrative code, see *infra* note 179 and accompanying text.

HIV; they pose no risk to the health or safety of others, much less a significant risk. The CDC states that “HIV isn’t transmitted . . . [t]hrough saliva, tears, or sweat that is not mixed with the blood of an HIV-positive person.”<sup>161</sup> In considering whether someone can “get HIV from being spit on or scratched by a person with HIV,” the CDC answers in the negative, noting that “HIV isn’t spread through saliva.”<sup>162</sup> Courts recognized this scientific consensus regarding spitting and biting as early as 1989, well before many serodiscriminatory laws were enacted.<sup>163</sup> Indeed, even with far riskier behavior, including condomless penetrative sex without a reduced viral load, courts have found that people living with HIV do not pose a reasonable threat of transmission.<sup>164</sup>

Even some states with HIV-criminalization laws do not consistently treat proscribed behaviors as significant health risks. Georgia’s serodiscriminatory statute, for example, criminalizes spitting while living with HIV.<sup>165</sup> Another Georgia law authorizes mandatory HIV testing after certain “crime[s] which involve[] significant exposure” to situations where HIV transmission is possible.<sup>166</sup> However, that law defines “significant exposure” as

contact of the victim’s ruptured or broken skin or mucous membranes with the blood or body fluids of the person arrested for such offense,

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161. Ctrs. for Disease Control & Prevention, *supra* note 3.

162. *Id.*; see also F.V. Cresswell, J. Ellis, J. Hartley, C.A. Sabin, C. Orkin & D.R. Churchill, *A Systematic Review of Risk of HIV Transmission Through Biting or Spitting: Implications for Policy*, 19 HIV MED. 532, 538 (2018) (“[B]eing spat on by an HIV-positive individual carries no possibility of transmitting HIV.”).

163. See *Doe v. Cty. of Centre*, 242 F.3d 437, 442 (3d Cir. 2001) (“Bodily fluids such as sweat, tears, or saliva, while containing minute amounts of HIV, pose little to no risk of infection.”); *Henderson v. Thomas*, 913 F. Supp. 2d 1267, 1277 (M.D. Ala. 2012) (“A person would have to drink a 55-gallon drum of saliva [from a person living with HIV] in order for it to potentially result in a [viral] transmission.”); *Brock v. State*, 555 So. 2d 285, 288 (Ala. Crim. App. 1989) (declining to “take judicial notice that biting is a means capable of spreading AIDS” and noting that “evidence for the role of saliva in the transmission of virus is unclear” (quoting U.S. DEP’T OF HEALTH & HUM. SERVS., MORBIDITY AND MORTALITY WEEKLY REPORT: GUIDELINES FOR PREVENTION OF TRANSMISSION OF HUMAN IMMUNODEFICIENCY VIRUS AND HEPATITIS B VIRUS TO HEALTH-CARE AND PUBLIC-SAFETY WORKERS 9, 15 (1989))).

164. See *United States v. Gutierrez*, 74 M.J. 62, 66 (C.A.A.F. 2015) (noting in an aggravated-assault case that the likelihood of HIV transmission via unprotected oral sex “does not clear any reasonable threshold of probability”); *id.* at 67 (“HIV transmission is not the likely consequence of unprotected vaginal sex. This is so because, in law, as in plain English, an event is not ‘likely’ to occur when there is a 1-in-500 chance of occurrence.”).

165. See GA. CODE ANN. § 16-5-60(d) (2020) (criminalizing conduct by an “HIV infected person” in law-enforcement settings).

166. *Id.* § 17-10-15(b).

*other than tears, saliva, or perspiration*, of a magnitude that the Centers for Disease Control and Prevention have epidemiologically demonstrated can result in transmission of the human immunodeficiency virus.<sup>167</sup>

That is, Georgia’s own law specifically recognizes that spitting or other contact with saliva is not likely to transmit HIV – and that CDC assessments of transmissibility can be embedded in statutes to narrowly focus on high-risk conduct. Nonetheless, the state’s criminal code continues to authorize prosecutions for spitting while living with HIV.<sup>168</sup>

Fourth, many state criminal laws do not account for situational elements that lower or eliminate any risk of HIV transmission. For example, condom usage for penetrative sexual activity substantially reduces any risk of transferring the virus from one person to another.<sup>169</sup> Indeed, “correct use of a condom,” whether internal or external, “during sex means HIV transmission is not possible.”<sup>170</sup> Yet states like Florida have seen individuals charged under HIV-criminalization laws when a condom was worn in every sexual encounter.<sup>171</sup> Even for condomless sex, withdrawal prior to ejaculation also significantly lowers (but does not eliminate) the chance of viral transmission from an insertive partner to a receptive partner.<sup>172</sup> State HIV-criminalization laws, however, do not generally account for behavioral factors that significantly alter the possibility of transmission when prescribing criminal sanctions.<sup>173</sup>

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Across these factors, HIV-criminalization laws overreach considerably, authorizing adverse treatment against people living with HIV without an affirma-

167. *Id.* § 17-10-15(f) (emphasis added).

168. *Id.* § 16-5-60(d).

169. Françoise Barré-Sinoussi, Salim S. Abdool Karim, Jan Albert et al., *Expert Consensus Statement on the Science of HIV in the Context of Criminal Law*, 21 J. INT’L AIDS SOC’Y 1, 3-4 (2018).

170. *Id.* at 3.

171. See, e.g., Jeff Weiner, *HIV-Positive Man Charged with Having Sex Without Alerting Partner*, ORLANDO SENTINEL (Aug. 6, 2014), <https://www.orlandosentinel.com/news/os-xpm-2014-08-06-os-hiv-sex-arrest-orange-county-inmate-20140806-story.html> [https://perma.cc/GZ2P-NHM4].

172. See *HIV Risk Reduction Tool: Can I Get or Transmit HIV from . . . ?*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 28, 2020), <https://hivrisk.cdc.gov/can-i-get-or-transmit-hiv-from> [https://perma.cc/HB9L-9FJ3].

173. See, e.g., *State v. Wilson*, 256 S.W.3d 58, 64 (Mo. 2008) (“[T]he statute does not contemplate that withdrawal is in itself a complete defense.”).

tively demonstrated risk of harm to anyone's health or safety. Many statutes are overbroad on all four factors;<sup>174</sup> most overreach on at least one, which is sufficient to foreclose the direct-threat exception, if it is applicable. Because these serodiscriminatory laws do not provide for the individualized threat inquiry required under the ADA, the direct-threat exception cannot preclude a finding that the people challenging HIV-criminalization laws are "qualified individual[s]."<sup>175</sup> Having relied on outdated assumptions about the transmissibility of HIV in constructing their serodiscriminatory statutes, states "cannot now claim to have made an individualized assessment based on objective medical or other evidence that [an HIV-criminalization law] was necessary to protect against a 'direct threat.'"<sup>176</sup>

One state's HIV-criminalization laws suggest a narrower framing that might fall within the direct-threat exception, if a court accepts that the carveout is potentially available. In 2016, Colorado updated its serodiscrimination statutes to require actual transmission of HIV in order for liability to attach.<sup>177</sup> Previously, exposure alone was sufficient to trigger a sentence enhancement for someone living with HIV.<sup>178</sup> By tethering criminal liability to viral transmission, Colorado improves its statutes' chances of surviving a challenge under Title II. Rather than taking an individual's disability status as a proxy for a threat to public health, a statutory regime that requires actual transmission (instead of mere seropositivity) provides for a more individualized inquiry and a demonstration not just of risk, but of actual harm.<sup>179</sup> To be clear, however, such tailored laws still enact many of the harms associated with HIV-criminalization

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174. See, e.g., ALASKA STAT. § 12.55.155(c)(33) (2020); ARK. CODE ANN. § 5-14-123 (2021); CAL. PENAL CODE § 12022.85 (West 2021); FLA. STAT. § 775.0877(3) (2020).

175. 42 U.S.C. § 12132 (2018).

176. *A Helping Hand, LLC v. Balt. Cty.*, No. CCB-02-2568, 2006 WL 2067942, at \*1 (D. Md. July 14, 2006).

177. Act of June 6, 2016, ch. 230, 2016 Colo. Sess. Laws 895, 916-18 (making sentencing contingent on actual transmission of HIV); see COLO. REV. STAT. § 18-1.3-1004(1)(d) (2020) (effective July 1, 2016); *id.* § 18-3-415.5(5)(a)(II) (effective July 1, 2016).

178. See COLO. REV. STAT. § 18-1.3-1004(1)(d) (2015); *id.* § 18-3-415.5(5)(a); S.B. 16-146, 70th Gen. Assemb., 2d Reg. Sess. (Colo. 2016).

179. Elsewhere, North Carolina's state administrative code is responsive to several of the individualized factors that affect whether an interaction between two people poses a risk of HIV transmission. See 10A N.C. ADMIN. CODE 41A.0202(1)(a) (2020) (expressly taking into account, for example, (i) whether an individual with HIV "has been virally suppressed for at least 6 months (HIV levels below 200 copies per milliliter)"; (ii) whether condoms are used; and (iii) whether the partner is "taking HIV Pre-Exposure Prophylaxis" or is already living with HIV).

regimes and subject people living with HIV to adverse treatment,<sup>180</sup> even as they considerably narrow the pool of people that could actually be charged or convicted.<sup>181</sup>

In sum, even if the direct-threat exception applies outside the scope of employment law, it cannot salvage the majority of state HIV-criminalization laws that authorize discrimination based on HIV status alone and do not require an individualized inquiry as to significant risk. These statutes violate Title II's disability-law protections by discriminating against people living with HIV who are "qualified individuals" under the terms of the statute.

### C. Injunctive Relief

If successful, litigation under the ADA could provide significant results for those challenging HIV-criminalization statutes. A favorable decision could secure declaratory and injunctive relief, with a court recognizing that a given serodiscriminatory law violates the ADA and is therefore unenforceable.<sup>182</sup>

Under such a holding, as the Third Circuit has recognized, "[t]he only way to alter a facially discriminatory ordinance [that violates the ADA] is to remove the discriminating language."<sup>183</sup> For HIV-criminalization laws, the discriminatory portion is generally coextensive with the laws themselves (for HIV-specific criminal offenses) or with portions of the laws focused on grading (for HIV-specific sentence enhancements). There would be no need for a plaintiff to seek a less intrusive remedy, namely reasonable modification to the statute.<sup>184</sup> Instead, they can ask a court to invalidate and permanently enjoin enforcement.<sup>185</sup> A court would also be able to grant, where appropriate, monetary

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180. See *supra* Section I.C.

181. Although most state HIV-criminalization laws straightforwardly violate Title II, there may be some serodiscriminatory statutes that ADA litigation is not well positioned to challenge. Other tools, including policy-reform efforts, may be used to reach any such statutes. See *infra* Section III.C (describing the benefits of pursuing ADA litigation alongside legislative advocacy).

182. See *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 308 (3d Cir. 2007) ("The Pennsylvania statute is facially invalid under the ADA . . . . Because of that, the individual plaintiffs' standing has no impact on the issue of injunctive relief.").

183. *Id.* at 303; see *Hargrave v. Vermont*, 340 F.3d 27, 39 (2d Cir. 2003) (upholding an "injunction prohibiting enforcement of certain provisions" of a state law).

184. See *New Directions*, 490 F.3d at 305 ("[I]t is inappropriate to apply the 'reasonable modification' test to facially discriminatory laws.").

185. See *T.E.P. v. Leavitt*, 840 F. Supp. 110, 111 (D. Utah 1993) (declaring a law "void and invalid" under Title II and granting injunctive relief).

damages and attorney's fees.<sup>186</sup> Punitive damages are not available for private suits under Title II.<sup>187</sup>

#### D. Overcoming Defenses

Not every public action that meets the three statutory criteria gives rise to liability under Title II. This Section considers three recognized defenses in ADA doctrine,<sup>188</sup> none of which is sufficient to salvage a state HIV-criminalization statute that otherwise violates Title II.

##### 1. Sovereign Immunity

States generally enjoy sovereign immunity and cannot be sued without their consent by private individuals.<sup>189</sup> However, the Supreme Court has reaffirmed that sovereign immunity is unavailable when plaintiffs seek declaratory or injunctive relief. In *Board of Trustees of the University of Alabama v. Garrett*, the Court held that “Congress did not validly abrogate the States’ sovereign immunity from suit by private individuals for money damages under Title I” of the ADA.<sup>190</sup> But sovereign-immunity doctrines do not leave “persons with disabilities [with] no federal recourse against discrimination.”<sup>191</sup> Instead, “Title I

186. See *United States v. Georgia*, 546 U.S. 151, 154 (2006) (“Title II authorizes suits by private citizens for money damages against public entities that violate § 12132.” (citing 42 U.S.C. § 12133 (2018) (incorporating by reference 29 U.S.C. § 794a (2018)))); Disability Rights Section, Civil Rights Div., *supra* note 105 (“The Department of Justice is authorized to investigate complaints and to bring lawsuits to enforce the ADA. The Department may seek injunctive relief (such as having the State or local government correct its discriminatory practices) or monetary damages. . . . Individuals are also entitled to bring private ADA lawsuits against State and local governments and seek injunctive relief, monetary damages (in some instances), and reasonable attorney’s fees and costs.”); see also *Conklin v. Espinda*, No. 19-00087 JMS-RT, 2019 WL 2397802, at \*5 (D. Haw. June 6, 2019) (“The Eleventh Amendment does not bar . . . monetary damages claims against official capacity Defendants under Title II of the ADA.” (emphasis omitted)).

187. *Barnes v. Gorman*, 536 U.S. 181, 189 (2002) (“[P]unitive damages may not be awarded in private suits . . . brought under § 202 of the ADA.”).

188. See, e.g., Craig Konnoth, *Medicalization and the New Civil Rights*, 72 STAN. L. REV. 1165, 1214 & n.253, 1218 n.277 (2020) (identifying ways that a “state actor [may] show that it should be exempted” from Title II, including the fundamental-alteration exception).

189. See U.S. CONST. amend. XI; *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001) (“The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court.”); *Hans v. Louisiana*, 134 U.S. 1, 15 (1890).

190. 531 U.S. at 374 n.9.

191. *Id.*

of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*.<sup>192</sup>

The litigation strategy developed in this Note aims at securing injunctive relief to prevent the enforcement of serodiscriminatory state laws and can thus overcome sovereign-immunity defenses. As the Court noted in 1985, *Ex parte Young* “held that the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law.”<sup>193</sup> As with Title I under *Garrett*, such relief is available to plaintiffs litigating ADA claims under Title II and is not foreclosed by sovereign immunity.<sup>194</sup> Two years after *Garrett* restricted the availability of private claims for monetary damages under the ADA, the Second Circuit considered and granted a request for injunctive relief under Title II against the state of Vermont without any mention of sovereign immunity or the Eleventh Amendment.<sup>195</sup> Sovereign immunity, then, does not pose a bar to securing injunctive relief through Title II litigation against state executives, attorneys generals, and other law-enforcement officials implementing state HIV-criminalization laws.<sup>196</sup>

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192. *Id.* (citing *Ex parte Young*, 209 U.S. 123 (1908)).

193. *Green v. Mansour*, 474 U.S. 64, 68 (1985) (citing *Ex parte Young*, 209 U.S. at 155-56, 159); see *id.* (“[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.”).

194. See *Nat’l Ass’n of the Deaf v. Florida*, 945 F.3d 1339, 1352 (11th Cir. 2020) (permitting an ADA suit for “declaratory and prospective injunctive relief against state officials in their official capacities for their ongoing violation of Title II” and noting that the suit “falls squarely under the doctrine set forth in *Ex parte Young*”); *Cody v. Slusher*, No. 17-3764, 2018 WL 3587003, at \*3 (6th Cir. Mar. 8, 2018) (“[T]he Eleventh Amendment does not prevent Cody from seeking prospective injunctive relief from [state] officials, acting in their official capacities, for alleged violations of the ADA.” (citing *Garrett*, 531 U.S. at 374 n.9)); see also *Sholes v. Anesthesia Dep’t*, No. CV 119-022, 2020 WL 1492175 at \*4 (S.D. Ga. Mar. 23, 2020) (“*Garrett* left open the possibility that a plaintiff could seek injunctive relief against the state under the ADA in federal court.”); *Powell v. Illinois*, No. 18 CV 6675, 2019 WL 4750265 at \*14-15 (N.D. Ill. Sept. 30, 2019) (“Title II suits for prospective equitable relief remain available without regard to the *Boerne* abrogation analysis, which is concerned with claims for money damages.” (referencing *City of Boerne v. Flores*, 521 U.S. 507 (1997))).

195. *Hargrave v. Vermont*, 340 F.3d 27, 39 (2d Cir. 2003); see *United States v. Georgia*, 546 U.S. 151, 160 (2006) (Stevens, J., concurring) (“[S]tate defendants have correctly chosen not to challenge the Eleventh Circuit’s holding that Title II is constitutional insofar as it authorizes prospective injunctive relief against the State.”).

196. Because this Note focuses on reforming HIV-criminalization laws through equitable remedies, it brackets further examination of individual plaintiffs’ access to monetary damages.

## 2. *Fundamental Alteration*

The ADA's implementing regulations also contain a fundamental-alteration exception to liability. More specifically, "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."<sup>197</sup> The terms of the regulation allow a public entity to avoid making alterations so major as to be fundamental to its "service[s], program[s], or activit[ies]."<sup>198</sup> Thus, states might argue that any modification to a serodiscriminatory law would fundamentally alter its nature, such that the law should be upheld.

However, this exception is not available for facial challenges to laws that expressly "subject[] [individuals] to discrimination,"<sup>199</sup> as with the Title II claims that this Note contemplates. As multiple courts of appeals have recognized, applying this regulatory exception to litigation challenging facially discriminatory laws or policies would be untenable in practice. Indeed, if the fundamental-alteration exception were applicable in cases involving facial discrimination, public entities "could easily evade the strictures of the ADA by making statutes expressly discriminatory" — and then arguing that invalidating a law or policy would necessarily work a fundamental alteration.<sup>200</sup> Given that serodiscriminatory laws facially discriminate against people living with HIV, fundamental alterations are compelled by the ADA's statutory provisions.

## 3. *Undue Burden*

Title II's implementing regulations provide another way for public entities to avoid liability for discriminatory conduct. Per their guidance, the statute's antidiscrimination protections do not "[r]equire a public entity to take any ac-

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197. 28 C.F.R. § 35.130(b)(7)(i) (2021); *see id.* § 35.150(a)(3) (2021) (establishing a similar fundamental-alteration exception).

198. *Id.* § 35.130(b)(7)(i); *see id.* § 35.150(a)(3).

199. 42 U.S.C. § 12132 (2018).

200. *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 734 (9th Cir. 1999); *see MX Group, Inc. v. City of Covington*, 293 F.3d 326, 345 (6th Cir. 2002) (noting that, when a policy is "discriminatory on its face," "it would make little sense . . . to require . . . an accommodation, when the only accommodation, a fundamental change to the ordinance, could not be considered reasonable"); *Bay Area Addiction*, 179 F.3d at 734 ("Surely this is not what Congress intended when it enacted § 12132 as an absolute prohibition against discrimination.").

tion that it can demonstrate would result . . . in undue financial and administrative burdens.”<sup>201</sup>

Like the fundamental-alteration exception, this regulation applies on its terms to ADA claims based on the “service[s], program[s], or activit[ies]” that a public entity operates.<sup>202</sup> It does not speak to a public entity’s liability when a claim alleges that an individual has been otherwise subject to discrimination.

Even if this regulation were to apply to the claims proposed in this Note, however, understanding an HIV-criminalization statute as violative of the ADA would not cause an undue financial or administrative burden for a state. Indeed, stopping the implementation of these laws would reduce the resources currently used to enforce them and to prosecute individuals living with HIV. Any further burden incurred by voiding laws that facially discriminate against people living with HIV would not be “undue,”<sup>203</sup> as the ADA’s statutory anti-discrimination protections require nothing less.

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Title II of the ADA contains a broad ban on disability-based discrimination by public entities. While HIV-criminalization statutes have not yet been challenged under this provision, analysis of Section 12132’s statutory criteria and relevant case law suggests that many such statutes violate the protections of federal disability law. HIV-criminalization laws subject people living with HIV to discrimination (“adverse treatment”) on the basis of that disability (“causality”), and such people are “qualified individuals” under the statute. States have recourse to certain lines of defense, whether through the direct-threat exception to Title II’s qualified-individual criterion or through constitutional immunity and regulatory carveouts. But these defenses are surmountable or inapposite, and litigants can lay out a strong case to secure permanent injunctive relief that renders serodiscriminatory laws unenforceable.

### III. LITIGATION AS STRATEGY

Having outlined a new pathway for challenging state HIV-criminalization laws under the ADA, it is worth examining how this analysis might apply to representative statutes and assessing the prudence of this litigation approach.

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<sup>201</sup>. 28 C.F.R. § 35.150(a)(3).

<sup>202</sup>. *Id.* § 35.150(a).

<sup>203</sup>. *Id.* § 35.150(a)(3).

Consider one of Idaho's serodiscriminatory laws, which creates an HIV-specific criminal offense.<sup>204</sup> The statute subjects people living with HIV to discrimination insofar as it applies to "[a]ny person . . . afflicted with" HIV, singling them out for adverse treatment in the form of conduct restrictions and the threat of carceral and financial punishment for knowingly "transfer[ing] or attempt[ing] to transfer any of [their] body fluid," including "saliva."<sup>205</sup> Individuals encounter this adverse treatment because of their HIV status; that is, living with HIV is a but-for cause that triggers the statute's disparate treatment. Idahoans living with HIV are "qualified" individuals with respect to this statute, in part because the law would not fall within the direct-health exception to liability. Because the law's exposure restrictions are so broad, encompassing behaviors that carry varying levels of risk of transmission, it cannot satisfy the exception's requirement of an individualized assessment of significant risk. Given that a challenge to Idaho's law could satisfy the three statutory criteria under Section 12132, a court would likely invalidate it and enjoin its enforcement.<sup>206</sup>

Or consider an HIV-specific sentence enhancement embedded in Guam's criminal ban on sex work.<sup>207</sup> While a person convicted under the statute is ordinarily "guilty of a misdemeanor," someone who is convicted under the statute while knowingly "infected with either HIV or AIDS" at the time of the underlying act is guilty of a first-degree felony.<sup>208</sup> This disparate criminalization based on an individual's HIV status subjects them to discrimination and constitutes adverse treatment. As with the Idaho statute, an individual is subject to this adverse treatment precisely because of their disability status. Guamanians with HIV are "qualified" individuals with respect to the enhancement, and because the statute does not tie its adverse treatment to any objective or individualized assessment about the risk of viral transmission—instead relying solely on disability status as a proxy—the direct-health exception cannot apply. Here, too, Title II's nondiscrimination provision would support a challenge to Guam's serodiscriminatory law.

Even if many HIV-criminalization laws violate the ADA, however, litigation does not proceed in a vacuum—and not every legally meritorious strategy should be pursued. The remainder of Part III evaluates the merits of challeng-

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204. IDAHO CODE § 39-608 (2020).

205. *Id.*

206. The ADA claims developed in this Note could be raised as a preemptive challenge in federal court or in response to particular criminal charges in state court.

207. 9 GUAM CODE ANN. § 28.10 (2020).

208. *Id.* § 28.10(b)(1), (3).

ing HIV-criminalization laws under federal disability law, with attention to the content of this strategy's legal arguments, the possible consequences a court's decision could trigger, and the role of litigation and legislation as distinct but complementary tools for legal reform.

### A. Legal Claims

Previous legal challenges to serodiscriminatory laws have advanced constitutional claims in state courts. These challenges have been unsuccessful, with courts repeatedly holding in equal-protection contexts that HIV-criminalization laws receive—and survive—rational-basis review.<sup>209</sup> State courts have also rejected free-speech challenges to mandatory-disclosure laws, holding that such statutes regulate conduct rather than speech,<sup>210</sup> and to other HIV-criminalization laws without disclosure requirements.<sup>211</sup> Litigants in these and similar cases unsuccessfully raised a number of other state and federal constitutional claims as well.<sup>212</sup>

While HIV-criminalization laws have repeatedly survived rational-basis scrutiny based on states' interests in restricting interpersonal viral transmission, stepping outside the constitutional landscape makes available more rigorous standards of review. The ADA's "require[ment of] an individualized determination as to the significance of risk" by the entity seeking to avoid liability cannot be satisfied by merely offering a blanket post hoc justification for differential treatment of people living with HIV.<sup>213</sup> Instead, that standard requires an individualized and objective assessment of possible harms to third parties based on scientific evidence before otherwise illegal discrimination can be excused.<sup>214</sup> Past litigation failures in challenging HIV-criminalization statutes are thus not instructive as to the viability of claims under Title II.

Further considerations touch on the prudence of bringing certain types of claims against serodiscriminatory laws, including arguments highlighting these

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209. See, e.g., *State v. Batista*, 91 N.E.3d 724, 729 (Ohio 2017) ("The valid state interest is curbing HIV transmission to sexual partners who may not be aware of the risk."); *State v. Whitfield*, 134 P.3d 1203, 1212 (Wash. Ct. App. 2006) ("[T]he classification . . . bears a reasonable relationship to a legitimate state objective—to stop the transmission of a deadly disease.").

210. See, e.g., *People v. Jensen*, 586 N.W.2d 748, 758–59 (Mich. Ct. App. 1998); *Batista*, 91 N.E.3d at 728–29.

211. See, e.g., *People v. Russell*, 630 N.E.2d 794, 796 (Ill. 1994) ("Neither the statute nor the cases before us have even the slightest connection with free speech.").

212. See cases cited *supra* note 91.

213. *Doe v. Cty. of Centre*, 242 F.3d 437, 448 (3d Cir. 2001).

214. See *supra* Section II.B.4.

laws' effect on people with undetectable viral loads. Some advocates of reform worry that emphasizing "that people who are virally suppressed cannot transmit HIV and therefore should not be criminalized . . . impl[ies] that people who are not suppressed should be criminalized."<sup>215</sup> Reform efforts that reify this "viral divide" risk narrowing but entrenching HIV-criminalization regimes, restricting the pool of people to whom they apply but still legitimizing serodiscriminatory criminal laws as a project.<sup>216</sup> The harms of this framing accrue to individuals with unsuppressed viral loads, allowing criminal exposure to turn, in part, on access to appropriate healthcare—a factor often beyond individual control and deeply inflected by structural barriers like class and race.<sup>217</sup>

These concerns are important, and the harms of HIV-criminalization laws cannot be fully addressed by a shift to no longer punishing people with undetectable viral loads.<sup>218</sup> However, the litigation strategy developed in this Note is not predicated on reifying the viral divide. Instead, it highlights HIV-criminalization statutes that do not provide sufficient individualized consideration or risk assessment to excuse their otherwise violative provisions under the ADA. While one way a law may fail to fall within the direct-threat exception involves punishing behavior by people unable to transmit the virus, many state laws overreach in ways that are applicable to people with unsuppressed viral loads as well.<sup>219</sup> Indeed, unlike earlier litigation challenging particular convictions under HIV-specific statutes, pursuing ADA claims need not entrench a viral divide as to HIV-criminalization regimes.<sup>220</sup>

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215. S. Mandisa Moore-O'Neal, *What Does Abolition Have to Do with HIV Decriminalization and Modernization?*, POSITIVELY AWARE, Sept.-Oct. 2020, at 13.

216. *Id.*

217. See Linda Beer, Heather Bradley, Christine L. Mattson, Christopher H. Johnson, Brooke Hoots & Roy L. Shouse, *Trends in Racial and Ethnic Disparities in Antiretroviral Therapy Prescription and Viral Suppression in the United States, 2009-2013*, 73 J. ACQUIRED IMMUNE DEFICIENCY SYNDROME 446, 450-52 (2016); Angela D. Thrasher, Jo Anne L. Earp, Carol E. Golin & Catherine R. Zimmer, *Discrimination, Distrust, and Racial/Ethnic Disparities in Antiretroviral Therapy Adherence Among a National Sample of HIV-Infected Patients*, 49 J. ACQUIRED IMMUNE DEFICIENCY SYNDROME 84, 91-92 (2008).

218. See *supra* Section I.C (describing the harms of HIV-criminalization laws, including stigmatic harms due to the laws' existence).

219. See *supra* Section II.B.4.

220. See, e.g., *Rhoades v. State*, 848 N.W.2d 22, 32-33 (Iowa 2014) (reversing the district court's conviction in part because the defendant had a "nondetectable" viral load during the time period at issue).

In addition, this strategy has the potential to generate broader benefits within antidiscrimination law.<sup>221</sup> Challenging discriminatory state criminal laws under Title II brings visibility to the intersection of criminalization and disability and the ways in which the criminal legal system disproportionately harms people with disabilities. Framing serodiscrimination as a disability-law issue offers a framework for rebutting a core rationale underpinning HIV-criminalization laws—namely, that criminal sanctions are warranted to protect public health and safety. Because demonstrating liability may require showing that the direct-threat exception does not apply, Title II litigation offers the opportunity to reframe HIV to courts and to the public in ways that previous constitutional suits did not.

Litigating under Title II also requires conceptualizing HIV as a disability. While HIV has been recognized as a disability under the ADA since the 1990s,<sup>222</sup> some people living with HIV might resist this characterization.<sup>223</sup> Importantly, though, framing serodiscriminatory laws as a form of disability discrimination underscores their core harms, emphasizing states' disparate treatment of people living with HIV and the perpetuation of stigma and stereotypes surrounding the virus. Insofar as disability-law claims capture these power dynamics,<sup>224</sup> they may speak to individuals' experience of HIV criminalization in a way that earlier constitutional claims about compelled speech, for

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221. See Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 953-56 (2011) (describing “a variety of important benefits that litigation—from the mere act of litigating to a favorable judicial decision—produces”).

222. See *Bragdon v. Abbott*, 524 U.S. 624, 641 (1998); *T.E.P. v. Leavitt*, 840 F. Supp. 110, 111 (D. Utah 1993); Ruth Colker, *Homophobia, AIDS Hysteria, and the Americans with Disabilities Act*, 8 J. GENDER RACE & JUST. 33, 36-50 (2004).

223. Such resistance may be linked to a fear that disability-law claims reinforce an outdated notion of HIV as a debilitating condition. Of course, the ADA's definition of disability sweeps broadly and its protections apply to a wide array of circumstances and lived experiences. Indeed, HIV qualifies as a disability under the statute even when asymptomatic or fully managed with antiretrovirals. See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(2), 122 Stat. 3553, 3554 (recorded at 42 U.S.C. § 12101 note (2018)) (rejecting “the requirement . . . that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures”). Moreover, legal arguments challenging HIV-criminalization laws under the ADA are predicated in part on HIV being a manageable chronic condition. See *supra* Section II.B.4.

224. See Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 436 (2000) (framing “[d]isability rights law . . . as providing members of that subordinated class [of people with disabilities] with the means . . . to challenge the practices that enact and enforce their subordinated status”).

example, do not. Moreover, “claiming” disability can also carry practical and social benefits at the individual level.<sup>225</sup>

This theory of liability under the ADA has broader applications as well. The ADA’s ban on discrimination by public entities has traditionally been used to hold local and state governments to the same standard as private actors with respect to discrimination based on ability status, in domains like employment or access to facilities. But there are modes of behavior that are unique to public entities—legislation, prosecution, arrests, civil confinement, incarceration—especially within the ambit of criminal law.<sup>226</sup> Title II’s prohibition on public discrimination against people with disabilities thus goes further than the ADA’s regulation of private conduct, limning new contexts as sites of actionable discrimination.<sup>227</sup>

In particular, the litigation strategy proposed in this Note expressly names state criminal law as a site of disability discrimination. In doing so, it offers a roadmap for Title II litigation opposing other instances of public discrimination that may be cognizable under the ADA. Since 2019, for example, several states have introduced bills that target transgender youth and criminalize providing assistance as they medically transition.<sup>228</sup> To the extent that such

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225. See Katie Eyer, *Claiming Disability*, 101 B.U. L. REV. (forthcoming 2021) (manuscript at 40-48) (on file with author) (discussing the “liberatory potential” of claiming disability); see *id.* (manuscript at 63) (“Claiming a positive disability identity is a good that should be encouraged for all who might fall under the disability rubric . . .”). Questions about using disability law to advance civil-rights claims arise in the LGBTQ+ context as well. See Kevin Barry & Jennifer Levi, *Blatt v. Cabela’s Retail, Inc. and a New Path for Transgender Rights*, 127 YALE L.J.F. 373 (2017). But see Rabia Belt & Doron Dorfman, *Reweighting Medical Civil Rights*, 72 STAN. L. REV. ONLINE 176, 184 (2020) (discussing drawbacks to litigating trans-rights claims under disability law).

226. Many issues affecting people with disabilities generally also arise in the context of contact with the criminal legal system, often with distinctive constraints. See, e.g., Jamelia N. Morgan, *The Paradox of Inclusion: Applying Olmstead’s Integration Mandate in Prisons*, 27 GEO. J. ON POVERTY L. & POL’Y 305, 312-15 (2020).

227. In developing new litigation theories under Title II that turn the lens of disability law toward harms perpetuated by the criminal legal system, this Note joins other recent scholarship. See Jamelia Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. (forthcoming 2021); Benjamin C. Hattem, Note, *Carceral Trauma and Disability Law*, 72 STAN. L. REV. 995, 1038 (2020).

228. See, e.g., H.B. 20-1114, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020); H.B. 1365, 2020 Leg. Sess., Reg. Sess. (Fla. 2020); H.B. 321, 2020 Gen. Assemb., Reg. Sess. (Ky. 2020); H.B. 2051, 100th Gen. Assemb., 2d Reg. Sess. (Mo. 2020); S.B. 1819, 57th Leg., 2d Sess. (Okla. 2020); H.B. 1057, 95th Leg. Sess. (S.D. 2020); H.R. 3515, 101st Gen. Assemb., Reg. Sess. (Ill. 2019).

bills, if enacted, would discriminate based on an individual's gender dysphoria,<sup>229</sup> they may also be challengeable through claims under the ADA.<sup>230</sup>

### B. Potential Outcomes

Employing a new litigation strategy is an uncertain endeavor. Even with a strong case, there is no guarantee how a court will rule on a particular legal claim nor how other actors will react to a litigation outcome.<sup>231</sup>

Advancing claims under federal antidiscrimination legislation could, if successful, upset state HIV-criminalization laws' consistent track record of surviving legal challenges. This possibility carries important consequences for broader efforts to reform serodiscriminatory laws. When HIV-specific statutes survive legal challenges, other states take notice and are emboldened to pass new HIV-criminalization laws themselves.<sup>232</sup> Successful challenges on ADA grounds may thus be an effective deterrent for other states contemplating new HIV-criminalization legislation – or even a boost for states considering reforming or repealing existing laws.

Perhaps paradoxically, litigation success carries potential downsides as well. Enjoining HIV-specific criminal laws might be ineffective, or even net harmful, if states react by instead enforcing criminal laws focused on sexually transmit-

229. Gender dysphoria is a clinical diagnosis describing psychological distress caused by the juxtaposition between an individual's gender identity and their sex assigned at birth. To be sure, not all people who experience gender dysphoria are transgender – and not all transgender people necessarily experience gender dysphoria, though many do. See *Gender Dysphoria*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/symptoms-causes/syc-20475255> [<https://perma.cc/7U77-RAWD>].

230. There is potentially unfavorable language as to gender identity in the ADA's statutory text. See 42 U.S.C. § 12211(b)(1) (2018) (excluding "transvestism" and "transsexualism" from the ADA's definition of "disability"). However, one federal district court has recognized that claims about gender-dysphoria discrimination are nonetheless cognizable under the ADA. See *Blatt v. Cabela's Retail, Inc.*, No. 5:14-CV-04822, 2017 WL 2178123, at \*4 (E.D. Pa. May 18, 2017). Where medical professionals are the criminalized parties, they may have standing to bring Title II claims insofar as they encounter adverse treatment via their association with people with gender dysphoria. See *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 46-48 (2d Cir. 1997) (discussing nondisabled parties' standing to bring Title II claims).

231. See NeJaime, *supra* note 221, at 943 (noting that litigation "produces winners and losers – often in very public ways").

232. See HOPPE, *supra* note 29, at 128 (discussing one state law's survival of past litigation challenges as an "important justification" in developing a new law in another state).

ted infections and general criminal laws against people living with HIV.<sup>233</sup> Since Texas repealed its HIV-criminalization law in 1994, for example, prosecutors have charged and convicted people living with HIV under aggravated-assault statutes on the theory that their bodies constitute deadly weapons.<sup>234</sup> Such prosecutions occur with respect to conduct like spitting and biting that does not transmit HIV.<sup>235</sup> When these statutes impose criminal liability on people with HIV in situations where there is no direct threat to health or safety, however, they are subject to as-applied ADA challenges under Title II as well. Striking down HIV-specific criminalization laws has independent value, too, even beyond decreasing criminal prosecutions against people with HIV. Removal lessens the expressive and epistemic harms of singling out HIV-positive people in a state's law code, which include the tacit assumption that people living with HIV are categorically dangerous and should be subject to different laws than the rest of the population.<sup>236</sup> Of course, states might also respond to an injunction by amending the relevant statutory language in an attempt to cure any defect, though the impact of any such change would depend on the specific details of a court's ADA analysis.

Other concerns attach to the possibility of litigation losses. While challenging HIV-criminalization laws under the ADA carries advantages as compared to earlier constitutional suits,<sup>237</sup> novel litigation strategies are not guaranteed to succeed. Just as past unsuccessful litigation emboldened states to maintain or enact serodiscriminatory laws, so too might new setbacks undermine current efforts to modernize and repeal these statutes. To the extent that this Note's arguments under Title II might be used to challenge other anti-disability state criminal laws and other conduct by public entities, a loss could also limit new pathways for ADA litigation more broadly. However, even if this approach were unsuccessful, the process of litigating—and even losing, specifically—could still have positive effects on reform efforts. Litigation losses can mobilize

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233. See *HIV Criminalization Report*, *supra* note 22, at 1; Moore-O'Neal, *supra* note 215, at 12, 14 (“We did not ‘win’ if [people living with HIV] are still targeted by the system, even if that system did not use an HIV-specific statute to do so.”).

234. See *HIV Criminal Law Reform: Before & After: Texas*, CTR. FOR HIV L. & POL'Y (2020), <https://www.hivlawandpolicy.org/sites/default/files/HIV%20Criminal%20Law%20Reform%20Before%20and%20After%20Texas%2C%20CHLP%202020.pdf> [https://perma.cc/58RR-5YT2]; *HIV Criminalization Report*, *supra* note 22, at 489-94 (collecting additional cases).

235. *E.g.*, Campbell v. State, No. 05-08-00736-CR, 2009 WL 2025344 (Tex. Ct. App. July 14, 2009); Degrate v. State, No. 05-04-00218-CR, 2005 WL 165182 (Tex. Ct. App. Jan. 26, 2005).

236. See Craig Konnoth, *An Expressive Theory of Privacy Intrusions*, 102 IOWA L. REV. 1533, 1559-60 (2017).

237. See *supra* Section III.A.

social movements by provoking outrage and underscoring the need for policy change.<sup>238</sup> A public loss might also prompt other state actors, including lawmakers, to act in light of courts' failure to do so;<sup>239</sup> legislators are not a monolith, so a loss may galvanize support for policy changes among some, even as it reassures others that HIV-criminalization regimes are secure.

### C. Law and Policy

Recent efforts to challenge HIV-criminalization laws have centered on legislative, rather than legal, advocacy.<sup>240</sup> Litigation under the ADA can complement other methods of resisting HIV criminalization, including policy reform, with various approaches implemented simultaneously to spur change on multiple fronts. Because litigation is plaintiff-driven, it has the potential to reach HIV-criminalization laws in states where the prospects of legislative reform are limited.<sup>241</sup> For advocates of reform, filing a facial challenge to a law may also require fewer resources than drafting legislative amendments and lobbying enough state legislators to secure a majority.

More broadly, litigation and policy advocacy can be mutually supportive when pursued at the same time. Filing a well-pled lawsuit may render state lawmakers more willing to reform existing statutes to avoid an adverse legal decision and the public expense of litigation. Legal victories in one state can also incentivize legislators in other states to reassess their own statutes in order to avoid future lawsuits themselves.<sup>242</sup> Litigation thus presents an attractive strategic choice on its own terms, as well as a useful tool in conjunction with policy-reform efforts.

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<sup>238</sup>. See NeJaime, *supra* note 221, at 984, 987.

<sup>239</sup>. See *id.* at 998.

<sup>240</sup>. See *supra* Section I.D.

<sup>241</sup>. Such limitations include legislators' significant opposition to HIV-criminalization reform in certain states. See, e.g., James MacPherson, *Lawmakers Likely Unwilling to Overhaul HIV-Transmission Law*, ASSOCIATED PRESS (Jan. 12, 2021), <https://apnews.com/article/legislature-sexually-transmitted-diseases-legislation-crime-north-dakota-61bocco566588b127fdd1527e1efce8> [<https://perma.cc/NTL5-V8UB>].

<sup>242</sup>. State courts hearing challenges to HIV-criminalization statutes often look to case law on similar laws in other states. See, e.g., *State v. Batista*, 91 N.E.3d 724, 728-29 (Ohio 2017) (citing Illinois and Missouri cases).

These various considerations surface important points, which must be contextualized against the harms that HIV-criminalization statutes enable. Given the criminalized status quo, the previous failure of state and federal constitutional challenges, and the intractability of legislative reform in many states, the ADA exists as an important but untapped vehicle for challenging state serodiscrimination laws.

## CONCLUSION

There is a crisis of HIV criminalization across the United States. Laws in a majority of states impose dramatic criminal liability on people living with HIV, singling them out for discriminatory treatment and social stigma on the basis of their serostatus. As a result, they are rendered vulnerable to lengthy prison sentences, sizable fines, and the full range of collateral consequences that accompany contact with the criminal legal system.

The federal Americans with Disabilities Act provides an unexplored approach for challenging these serodiscriminatory statutes in dozens of states. Under the litigation strategy this Note develops, most state criminal statutes that target people living with HIV violate Title II of the ADA, which forbids public entities from discriminating against individuals on the basis of their disability status. While the ADA's protections contain a carveout that allows states to discriminate based on disability when there is a direct threat to the health and safety of third parties, most serodiscriminatory statutes are not carefully tailored to fall within that exception by imposing liability only after an individualized demonstration of significant risk.

The ADA's ban on discrimination by public entities is wide-ranging. In this moment of energy for criminal legal reform, disability law offers a new pathway to challenge discriminatory HIV-criminalization statutes and a powerful tool for reframing many harms enacted in the public sphere.

## APPENDIX

This Appendix catalogues state and territory serodiscrimination laws that attach criminal sanctions to an individual's conduct based on their HIV status.<sup>243</sup> It was compiled based on statutory research on Westlaw and LexisNexis, as well as through a Freedom of Information Act request to the federal Centers for Disease Control and Prevention. It also draws from previous compilations of HIV-criminalization laws, including efforts by legal advocates,<sup>244</sup> the federal government,<sup>245</sup> and scholars.<sup>246</sup> This Appendix offers a comprehensive catalogue of serodiscriminatory state laws, taking account of recent successful reform efforts and correcting omissions and infelicities in earlier sources.

**TABLE 1.**  
U.S. STATES AND TERRITORIES WITH HIV-SPECIFIC CRIMINAL LAWS, APRIL 2021<sup>247</sup>

State, District, or Territory	Statute	Criminalized Conduct for People with HIV	Type of Criminal Statute
Alabama	—	—	—
Alaska	ALASKA STAT. § 12.55.155(c)(33) (2020)	Assault	HIV-Specific Sentence Enhancement
American Samoa	—	—	—
Arizona	—	—	—

243. See *supra* Section I.B (examining this tripartite framework).

244. *HIV Criminalization Report*, *supra* note 22.

245. *HIV and STD Criminal Laws*, *supra* note 49.

246. HOPPE, *supra* note 29, at 216-20; Lehman et al., *supra* note 80, at 1004-05.

247. The eight categories of criminalized behavior listed in Table 1 refer respectively to (i) introducing one's bodily fluids to another person; (ii) having sexual contact with another person; (iii) sharing needles or drug paraphernalia with another person; (iv) engaging in sex work; (v) committing assault, whether sexual or nonsexual; (vi) donating organs or other body tissue; (vii) generalized exposure not in any other category; and (viii) exposure or assault as to law-enforcement officials or in correctional contexts. Where state laws regulate communicable diseases or sexually transmitted infections and expressly identify HIV as one such disease, the more general law is included and the statutory reference to HIV is noted.

State, District, or Territory	Statute	Criminalized Conduct for People with HIV	Type of Criminal Statute
Arkansas	ARK. CODE ANN. § 5-14-123 (2021)	Fluids, Sex	HIV-Specific Offense
	ARK. CODE ANN. § 20-15-903 (2021)	Exposure	HIV-Specific Offense <sup>248</sup>
California	CAL. PENAL CODE § 12022.85 (West 2021)	Assault	HIV-Specific Sentence Enhancement
Colorado	COLO. REV. STAT. § 18-1.3-1004(1)(d) (2020)	Assault	HIV-Specific Sentence Enhancement
	COLO. REV. STAT. § 18-3-415.5 (2020)	Assault	HIV-Specific Sentence Enhancement
Connecticut	—	—	—
Delaware	—	—	—
District of Columbia	—	—	—
Florida	FLA. STAT. § 381.0041(11)(b) (2020)	Donation	HIV-Specific Offense
	FLA. STAT. § 384.24(2) (2020)	Sex	HIV-Specific Offense, HIV- Specific Sentence Enhancement <sup>249</sup>
	FLA. STAT. § 775.0877 (2020)	Sex Work, Assault, Donation	HIV-Specific Offense
	FLA. STAT. § 796.08(5) (2020)	Sex Work	HIV-Specific Offense

<sup>248</sup> The offense concerns an obligation to disclose one's HIV-positive status to a physician or dentist.

<sup>249</sup> See FLA. STAT. § 384.34(1), (5) (2020) (providing that an HIV-specific offense is a third-degree felony while parallel offenses are first-degree misdemeanors).

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State, District, or Territory	Statute	Criminalized Conduct for People with HIV	Type of Criminal Statute
Georgia	GA. CODE ANN. § 16-5-60(c) (2020)	Sex, Needles, Sex Work, Donation	HIV-Specific Offense
	GA. CODE ANN. § 16-5-60(d) (2020)	Law Enforcement	HIV-Specific Offense
Guam	9 GUAM CODE ANN. § 28.10(b)(3) (2020)	Sex Work	HIV-Specific Sentence Enhancement
Hawaii	—	—	—
Idaho	IDAHO CODE § 39-601 (2020)	Exposure	HIV-Specific Offense
	IDAHO CODE § 39-608 (2020)	Fluids, Sex, Needles, Donation	HIV-Specific Offense
Illinois	720 ILL. COMP. STAT. 5/12-5.01 (2021)	Sex, Needles, Donation	HIV-Specific Offense
Indiana	IND. CODE § 16-41-7-1 (2021)	Sex, Needles	HIV-Specific Offense
	IND. CODE § 16-41-14-17 (2021)	Donation	HIV-Specific Offense
	IND. CODE § 35-42-2-1(f) (2021)	Fluids	HIV-Specific Sentence Enhancement
	IND. CODE § 35-42-2-1(h) (2021)	Fluids, Law Enforcement	HIV-Specific Sentence Enhancement
	IND. CODE § 35-45-16-2 (2021)	Fluids	HIV-Specific Sentence Enhancement
	IND. CODE § 35-45-21-1 (2021)	Donation	HIV-Specific Offense

State, District, or Territory	Statute	Criminalized Conduct for People with HIV	Type of Criminal Statute
Iowa	IOWA CODE § 709D.3 (2020)	Exposure	HIV-Specific Offense <sup>250</sup>
Kansas	—	—	—
Kentucky	KY. REV. STAT. ANN. § 311.990(30)(b) (West 2020)	Donation	HIV-Specific Offense
	KY. REV. STAT. ANN. § 529.090(3), (4) (West 2020)	Sex Work	HIV-Specific Offense
Louisiana	LA. STAT. ANN. § 14:43.5 (2020)	Sex, Exposure, Law Enforcement	HIV-Specific Offense
Maine	—	—	—
Maryland	MD. CODE ANN., HEALTH-GEN. § 18-601.1 (West 2021)	Donation	HIV-Specific Offense
Massachusetts	—	—	—
Michigan	MICH. COMP. LAWS § 333.11101 (2020)	Donation	HIV-Specific Offense
	MICH. COMP. LAWS § 333.5210 (2020)	Sex	HIV-Specific Offense
	MICH. COMP. LAWS § 777.13k (2020)	Sex	HIV-Specific Offense
Minnesota	—	—	—

250. See IOWA CODE § 139A.2(5) (2020) (defining “[c]ontagious or infectious disease” to include HIV).

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State, District, or Territory	Statute	Criminalized Conduct for People with HIV	Type of Criminal Statute
Mississippi	MISS. CODE ANN. § 97-27-14(1) (2021)	Exposure	HIV-Specific Offense
	MISS. CODE ANN. § 97-27-14(2) (2021)	Fluids, Law Enforcement	HIV-Specific Sentence Enhancement
Missouri	MO. REV. STAT. § 191.677 (2021)	Fluids, Sex, Needles, Donation	HIV-Specific Offense
	MO. REV. STAT. § 567.020(2) (2021)	Sex Work	HIV-Specific Sentence Enhancement
	MO. REV. STAT. § 575.155(3) (2021)	Law Enforcement	HIV-Specific Sentence Enhancement
	MO. REV. STAT. § 575.157(3) (2021)	Law Enforcement	HIV-Specific Sentence Enhancement
Montana	MONT. CODE ANN. § 50-18-112 (2021)	Exposure	HIV-Specific Offense <sup>251</sup>
Nebraska	NEB. REV. STAT. § 28-934 (2021)	Law Enforcement	HIV-Specific Offense
Nevada	NEV. REV. STAT. § 201.205 (2021)	Exposure	HIV-Specific Offense
	NEV. REV. STAT. § 201.358 (2021)	Sex Work	HIV-Specific Offense, HIV-Specific Sentence Enhancement

251. See MONT. CODE ANN. § 50-18-101 (2021) (defining “sexually transmitted diseases” to include HIV).

State, District, or Territory	Statute	Criminalized Conduct for People with HIV	Type of Criminal Statute
New Hampshire	—	—	—
New Jersey	N.J. STAT. ANN. § 2C: 34-5(b) (West 2020)	Sex	HIV-Specific Sentence Enhancement
New Mexico	—	—	—
New York	—	—	—
North Carolina	—	—	—
North Dakota	N.D. CENT. CODE § 12.1-20-17 (2021)	Fluids, Sex, Needles	HIV-Specific Offense
Northern Mariana Islands	—	—	—
	OHIO REV. CODE ANN. § 2903.11(B), (D) (West 2020)	Sex, Law Enforcement	HIV-Specific Offense
	OHIO REV. CODE ANN. § 2907.24(B), (C) (West 2020)	Sex Work	HIV-Specific Sentence Enhancement
	OHIO REV. CODE ANN. § 2907.241(B), (D) (West 2020)	Sex Work	HIV-Specific Sentence Enhancement
Ohio	OHIO REV. CODE ANN. § 2907.25(B), (C) (West 2020)	Sex Work	HIV-Specific Sentence Enhancement
	OHIO REV. CODE ANN. § 2921.38(C), (D) (West 2020)	Fluids	HIV-Specific Offense, HIV- Specific Sentence Enhancement <sup>252</sup>
	OHIO REV. CODE ANN. § 2927.13 (West 2020)	Donation	HIV-Specific Offense

252. See OHIO REV. CODE ANN. § 2921.38(A) (West 2020) (creating a generally applicable fluid-based offense).

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State, District, or Territory	Statute	Criminalized Conduct for People with HIV	Type of Criminal Statute
Oklahoma	OKLA. STAT. tit. 21, § 1031 (2021)	Sex Work	HIV-Specific Sentence Enhancement
	OKLA. STAT. tit. 21, § 1192.1(a) (2021)	Fluids	HIV-Specific Offense
Oregon	—	—	—
Pennsylvania	18 PA. CONS. STAT. § 2703(a)(2) (2021)	Fluids, Law Enforcement	HIV-Specific Offense
	18 PA. CONS. STAT. § 2704 (2021)	Fluids, Law Enforcement	HIV-Specific Offense
	18 PA. CONS. STAT. § 5902(a.1)(4), (e.1)(4) (2021)	Sex Work	HIV-Specific Sentence Enhancement
Puerto Rico	—	—	—
Rhode Island	—	—	—
South Carolina	S.C. CODE ANN. § 44-29-145 (2021)	Sex, Needles, Sex Work, Assault, Donation	HIV-Specific Offense
South Dakota	S.D. CODIFIED LAWS § 22-18-31 to -34 (2020)	Fluids, Sex, Needles, Donation	HIV-Specific Offense
Tennessee	TENN. CODE ANN. § 39-13-109 (2020)	Sex, Needles, Donation	HIV-Specific Offense
	TENN. CODE ANN. § 39-13-516 (2020)	Sex Work	HIV-Specific Offense
Texas	—	—	—

State, District, or Territory	Statute	Criminalized Conduct for People with HIV	Type of Criminal Statute
Utah	UTAH CODE ANN. § 26-6-5 (West 2020)	Exposure	HIV-Specific Offense <sup>253</sup>
	UTAH CODE ANN. § 76-3-203.12 (West 2020)	Assault	HIV-Specific Sentence Enhancement
	UTAH CODE ANN. § 76-5-102.6 (West 2020)	Law Enforcement	HIV-Specific Sentence Enhancement
	UTAH CODE ANN. § 76-10-1309 (West 2020)	Sex Work	HIV-Specific Sentence Enhancement
U.S. Virgin Islands	V.I. CODE ANN. tit. 14, § 888(a), (b) (2020)	Sex, Needles, Donation	HIV-Specific Offense
Vermont	—	—	—
Virginia	VA. CODE ANN. § 18.2-67.4:1 (2020)	Sex	HIV-Specific Offense
	VA. CODE ANN. § 32.1-289.2 (2020)	Donation	HIV-Specific Offense
Washington	WASH. REV. CODE § 9A.36.011(1)(b) (2020)	Exposure	HIV-Specific Offense
West Virginia	—	—	—
Wisconsin	WIS. STAT. § 973.017(4) (2021)	Assault	HIV-Specific Sentence Enhancement
Wyoming	—	—	—

<sup>253</sup> See UTAH. CODE ANN. § 26-6-3.5(3) (West 2020) (defining “communicable and infectious diseases” to include HIV).