HIV Disclosure Laws are Unjustified

TONY FICARROTTA*

I. INTRODUCTION

People living with Human Immunodeficiency Virus ("HIV") are treated differently than other people by the laws of most jurisdictions in the United States. With varying degrees of qualification, thirty-two states explicitly criminalize people living with HIV ("PLWH") when they engage in sex, share needles, or otherwise expose others to their bodily fluids.[1] HIV criminalization laws take different forms.[2] However, one common form is a statute prohibiting PLWH from engaging in sexual activity before disclosing their HIV serostatus to their prospective sexual partners ("Disclosure Laws").[3] In jurisdictions with Disclosure Laws, PLWH who have sex with otherwise willing partners risk criminal sanctions if they do so without first disclosing their serostatus. In general, however, the state has no business criminalizing the sex that willing adults choose to engage in with each other.[4] So what, if anything, justifies states' use of Disclosure Laws to override the liberty and privacy interests PLWH have in conducting their sex lives as other willing adults do?

Copyright © 2017 by Joseph Ficarrotta

* Joseph A. ("Tony") Ficarrotta is a practicing attorney at an international law firm in Washington, D.C. He holds a J.D. from Duke University School of Law, an M.A. in Philosophy from Georgetown University, and a B.A. in Philosophy from the University of Colorado, Boulder. The author would like to thank Carolyn McAllister, Director of the Duke HIV/AIDS Policy Clinic, for her initial guidance on this project, and Travis N. Rieder, Assistant Director of the Johns Hopkins Berman Institute of Bioethics, for his insightful and challenging comments. He would also like to thank the staff at DJGLP for their exceptional editorial work. This article would have been impossible without each of their generous contributions.

1. RASHIDA RICHARDSON ET AL., POSITIVE JUSTICE PROJECT, THE CTR. FOR HIV LAW & POLICY, ENDING & DEFENDING AGAINST HIV CRIMINALIZATION: A MANUAL FOR ADVOCATES: STATE AND FEDERAL LAWS AND PROSECUTIONS 278, 278 (2d ed. 2015) [hereinafter ENDING & DEFENDING].

2. *See generally id*. at 1-5.

3. *See, e.g.*, ARK. CODE ANN. § 5-14-123 (West 2015) (prohibiting PLWH who know their serostatus from engaging in "sexual penetration" unless they "first [inform] the other person of the presence of human immunodeficiency virus"); FLA. STAT. ANN. § 384.24 (West 2015) (prohibiting PLWH who know their serostatus from engaging in "sexual intercourse" with another person "unless such other person has been informed of the presence of [HIV] and has consented to the sexual intercourse"); GA. CODE ANN. § 16-5-60 (West 2015) (prohibiting PLWH who know their serostatus from engaging in sexual activity if they do not "disclose to the other person the fact [of their serostatus] prior to [sexual activity]"); 10A N.C. ADMIN. CODE 41A.0202 (2016) (requiring PLWH to "notify future sexual intercourse partners of the infection"); *see also generally* ENDING & DEFENDING, *supra* note 1.

4. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 572 (2003) ("[L]iberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.").

This Article engages with two potential justifications: (1) that Disclosure Laws are justified for public health reasons because they purport to reduce the transmission rate of HIV (the "Public Health Justification"); and (2) that Disclosure Laws are justified because they promote the sexual autonomy of PLWHs' prospective sex partners, whose consent to sex is impaired without knowledge of serostatus (the "Sexual Autonomy Justification").

Part II of this Article develops a new argument against the Public Health Justification. It begins by surveying facts about HIV to illustrate our current understanding of the public health threat that it presents. In light of those facts, it reviews the well-known position that Disclosure Laws do not actually reduce the rate of HIV transmission. Then, it presents a new general argument against Disclosure Laws: *regardless* of whether Disclosure Laws effectively reduce the rate of HIV transmission, they are unjustified in imposing criminal sanctions on PLWH because such sanctions are mismatched to conduct that, at worst, constitutes a "public welfare offense." Part II finishes by examining the constitutional implications of Disclosure Laws that raise the specter of legislative animus toward PLWH when they impose criminal sanctions on them without an adequate public health justification. It concludes that while Disclosure Laws are probably not unconstitutional under current equal protection "animus" jurisprudence, they nevertheless cannot be justified on public health grounds.

Part III addresses the Sexual Autonomy Rationale. It begins by laying out a combination of case law and hypotheticals that illustrate varying degrees of impairment to consensual sex. This will create a context for the analysis of the degree of impairment presented by a PLWH's failure to disclose serostatus. From there, Part III presents an argument that nondisclosure scenarios do not uniformly impair consent to the degree that would justify a general legal duty to disclose, such as the one created by many Disclosure Laws. It concludes that many Disclosure Laws are too broad to be supported by the Sexual Autonomy Justification.

This Article concludes that because both the Public Health and Sexual Autonomy Justifications fail to support broad Disclosure Laws, and no serious alternative justifications have been articulated, HIV Disclosure Laws are unjustified.

II. EVALUATING THE PUBLIC HEALTH JUSTIFICATION

A. The Public Health Threat Posed by HIV

HIV targets and destroys T cells, which are essential to the functioning of the human immune system.[5] If HIV destroys enough T cells in an infected person's immune system, that person will be unable to fight off other diseases and infections.[6] When HIV progresses this way, the infected person develops Acquired Immunodeficiency Syndrome (AIDS).[7] Without treatment, a person with AIDS

5. *See About HIV/AIDS*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/hiv/basics/whatishiv.html (last visited Jan. 15, 2017).

6. *Id.*

7. *Id.*

may experience a number of serious symptoms, including rapid weight loss, extreme fatigue, sores, lesions, and neurological disorders.[8] There is presently no cure for HIV infection,[9] and although not all HIV infections will lead to AIDS, the life expectancy for a person living with untreated AIDS is only one to three years.[10] In 1982, the first year the Centers for Disease Control and Prevention (CDC) used the term "AIDS,"[11] the annual mortality rate for reported AIDS cases was 41%.[12] Mortality peaked in 1986, when 24,559 of a total of 28,712 reported cases of AIDS resulted in death, representing a mortality rate of nearly 86%.[13] Since the first confirmed cases in 1981, HIV infections have led to over 650,000 deaths in the United States and over 30 million deaths globally.[14] HIV/AIDS has thus earned its reputation as "one of history's worst pandemics."[15]

The HIV/AIDS pandemic is ongoing. There are approximately 1.2 million people in the United States currently living with HIV, with about 50,000 new HIV diagnoses every year.[16] However, the health prospects for PLWH have improved dramatically as treatments have advanced. The introduction of highly active antiretroviral therapy (HAART) alone led to a 63% decrease in AIDS deaths in the United States between 1995 and 1998.[17] Presently, HIV is generally considered to be a manageable disease: with proper treatment, PLWH can keep the virus under control and live relatively healthy lives.[18] In fact, as of 2013, a properly-treated twenty-year-old PLWH in the United States is expected to live into their early seventies, which is comparable to the life expectancy of an HIV-negative counterpart.[19]

In addition to improved personal health prospects, properly-treated PLWH have a reduced risk of transmitting HIV to their sex partners.[20] Effective treatment

---

8. *HIV/AIDS 101: Symptoms of HIV*, AIDS.GOV, https://www.aids.gov/hiv-aids-basics/hiv-aids-101/signs-and-symptoms/ (last visited Jan. 15, 2017).

9. *About HIV/AIDS*, *supra* note 5.

10. *Id.*

11. *HIV/AIDS 101: A Timeline of AIDS*, AIDS.GOV, https://www.aids.gov/hiv-aids-basics/hivaids-101/aids-timeline/ (last visited Dec. 5, 2015).

12. Ctrs. for Disease Control and Prevention, *Current Trends Update on Acquired Immune Deficiency Syndrome (AIDS) – United States*, MORBIDITY AND MORTALITY WKLY. REP. 507, 507–08 (1982).

13. *See Thirty Years of HIV/AIDS: Snapshots of an Epidemic*, AM. FOUND. FOR AIDS RESEARCH, http://www.amfar.org/thirty-years-of-hiv/aids-snapshots-of-an-epidemic/ (last visited Dec. 5, 2015).

14. Ronald O. Valdiserri, *Commentary: Thirty Years of AIDS in America: A Story of Infinite Hope*, 23 AIDS EDUC. & PREVENTION, no. 6, 2011, at 479, 479–80; *HIV in the United States: At A Glance*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/hiv/statistics/overview/ataglance.html (last visited Jan. 15, 2017).

15. Kevin M. De Cock et al., *Reflections on 30 Years of AIDS*, EMERGING INFECTIOUS DISEASES 1044, 1044 (2011).

16. *See Basic Statistics*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/hiv/basics/statistics.html (last visited Jan. 15, 2017).

17. *See* Valdiserri, *supra* note 14, at 480.

18. *Newly Diagnosed: What You Need to Know*, AIDS.GOV, https://www.aids.gov/hiv-aidsbasics/just-diagnosed-with-hiv-aids/overview/newly-diagnosed/ (last visited Dec. 5, 2015).

19. CTR. FOR HIV LAW & POLICY, ROUTES, RISKS AND REALITIES OF HIV TRANSMISSION AND CARE: CURRENT SCIENTIFIC KNOWLEDGE AND MEDICAL TREATMENT 2 (2015) [hereinafter ROUTES, RISKS, AND REALITIES].

20. Valdiserri, *supra* note 14, at 481.

with HAART, in tandem with condom use, reduces the risk of HIV transmission in many circumstances to near-zero.[21] Even without the mitigating effects of HAART and condom use, HIV transmission rates are lower than one might imagine. While the risk of an HIV-negative person contracting HIV from sex with a PLWH depends on the PLWH's viral load and the kind of sex they have, transmission risks range, per exposure, from 0% when the PLWH performs fellatio on an HIV-negative partner to 1.38% when the PLWH is the insertive partner for anal sex (the highest-risk sexual contact for HIV transmission).[22]

However, most Disclosure Laws currently on the books were enacted before the medical community understood the true routes and risks of HIV transmission and before HAART was available to treat HIV infections.[23] That fact has led some to decry Disclosure Laws as a form of outdated "HIV Criminalization"[24] that ignores both the medical facts about the routes and risks of HIV transmission and the current realities of HIV treatment.[25] This raises serious questions about whether Disclosure Laws have an adequate public health justification in light of our best understanding of the risks associated with HIV. However, in light of the fact that HIV is "one of history's worst pandemics[,]"[26] there is a *prima facie* case that states are justified in responding aggressively to combat the pandemic with all of their tools and resources, including the coercive power of criminal sanctions. Nonetheless, there are a number of considerations that undermine the *prima facie* justification the Public Health Rationale provides for Disclosure Laws.

B. The Public Health Justification does not Support Disclosure Laws

One well-developed criticism of Disclosure Laws is that they are simply ineffective from a public health perspective.[27] And, if they do not effectively reduce the rate of HIV transmission, the corresponding burden they place on PLWH to disclose their serostatus is hard to justify on public health grounds. Further, there is evidence that Disclosure Laws actively undermine efforts to reduce transmission rates by creating a disincentive for people to get tested for HIV.[28] Because Disclosure Laws require PLWH to disclose their serostatus to their sexual partners only when they *know* they are HIV-positive, that creates a reason for people to avoid knowing their serostatus by foregoing HIV testing. Because 30%

---

21. POSITIVE JUSTICE PROJECT, CTR. FOR HIV LAW & POLICY, WHY ARE WE PUTTING PEOPLE IN JAIL FOR HAVING HIV? A GRASSROOTS GUIDE TO HIV CRIMINALIZATION: FACTS, FOOLISHNESS AND SOLUTIONS 2 (2015) [hereinafter GRASSROOTS GUIDE].

22. *See HIV Risk Behaviors*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/hiv/risk/estimates/riskbehaviors.html (last visited Feb. 15, 2017).

23. POSITIVE JUSTICE PROJECT, CTR. FOR HIV LAW & POLICY, CONSENSUS STATEMENT ON THE CRIMINALIZATION OF HIV IN THE UNITED STATES 3 (2012) [hereinafter CONSENSUS STATEMENT].

24. "HIV Criminalization" is broadly understood as "the prosecution and imprisonment of people living with HIV . . . for things that either are [otherwise] perfectly legal (like consensual sex) or are minor crimes (like fighting with someone) that are treated like serious felonies when done by people living with HIV[.]" GRASSROOTS GUIDE, *supra* note 21, at 1.

25. CONSENSUS STATEMENT, *supra* note 23, at 1.

26. De Cock et al., *supra* note 15, at 1044.

27. *See Animus and Sexual Regulation*, 127 HARV. L. REV. 1767, 1781 (2014).

28. *Id*.

of new HIV infections are transmitted by people who do not know their serostatus, any disincentive to get tested could be dangerous and counterproductive.[29] Due to these considerations, there is broad consensus among public health researchers that Disclosure Laws, assuming they are intended to reduce the rate of HIV transmission, fail to have their intended effect.[30]

However, this kind of criticism of Disclosure Laws is limited in one important respect: it leaves open the question of whether Disclosure Laws, when drafted differently, or applied in different factual circumstances, might turn out to be justified on public health grounds. For example, the disclosure laws of some states are sensitive to actual risks of transmission because they require disclosure only if the PLWH does not use a condom.[31] At least in theory, this deters only the riskiest behaviors and promotes condom use. These variations in drafting invite a debate about how to widen or narrow the scope of conduct criminalized by Disclosure Laws to maximize any public health benefit. Put another way, just because some Disclosure Laws are bad in fact does not mean that all Disclosure Laws are bad in principle.

However, a more general criticism of Disclosure Laws is available: states that impose criminal sanctions to deter behavior that might lead to HIV transmission inappropriately condemn sick people as criminals. According to this criticism, even if a state's use of coercive means to reduce the transmission of HIV were effective, *criminal* sanctions would be an inappropriate mechanism for accomplishing that goal. Even carefully crafted Disclosure Laws would still be bad in principle to the extent they employ criminal sanctions in reliance on the Public Health Justification. This criticism relies on two main premises. First, that there is a meaningful distinction between public welfare offenses and common law crimes; and second, that the expressive function of criminal punishment (*i.e.*, to condemn) is inappropriate for public welfare offenses.

From a public health perspective, a PLWH's failure to disclose their serostatus is best characterized as a "public welfare offense," as opposed to a classic common law *crime*.[32] According to the United States Supreme Court (the "Supreme Court") in *Morissette v. United States*, public welfare offenses "result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize. . . . [P]enalties commonly are relatively small, and conviction does no grave damage to an offender's reputation."[33] Paradigm public welfare offenses include regulations for traffic or food and drug safety that are not designed to respond to an offender's "conscious wrongdoing" with a punishment, but rather, to protect the public from the risk of harm presented by otherwise blameless conduct.[34]

---

29. *HIV Testing*, CTRS. FOR DISEASE CONTROL AND PREVENTION (June 20, 2016), https://www.cdc.gov/hiv/testing/.

30. *See* Kim Shayo Buchanan, *When is HIV a Crime? Sexuality, Gender and Consent*, 99 MINN. L. REV. 1231, 1241 n.31 (2015) (collecting public policy evidence that HIV should not be criminalized).

31. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 120291 (West 2016) (excluding from its scope, among other things, fellatio with a condom, which presents only a theoretical risk of transmission).

32. Morissette v. United States, 342 U.S. 246, 255 (1952).

33. *Id.* at 256.

34. *See* Joseph Edward Kennedy, *The Story of* Staples v. United States *and the Innocent Machine Gun*

From a public health perspective, a PLWH's failure to disclose their serostatus seems to fit the bill for a public welfare offense because the sexual activity they engage in presents their partner with only a *risk* of HIV transmission, and may not result in actual transmission. As noted earlier, different kinds of sexual conduct present different risks of HIV transmission, with the riskiest kind of sexual contact (*i.e.*, when a PLWH is the insertive partner for penile-anal intercourse) presenting the HIV-negative partner with a transmission risk of approximately 1.38% per exposure.[35] Assuming a PLWH does not in fact transmit HIV to their partner (as will be the case, statistically speaking, 98.62% of the time) they have not caused any "direct or immediate injury" to their partner, but rather have created only the "danger or probability" of harm.[36]

As the Supreme Court stated in *Morissette*, the consequences for committing a public welfare offense should be minor relative to common law crimes, and commission of such an offense should have no significant effect on an offender's reputation.[37] Such consequences may be understood as mere penalties, like the requirement to pay a parking ticket, and not as *punishments* for criminal wrongdoing, which are characterized by "hard treatment" by the state, such as imprisonment.[38] Beyond the difference in severity of the state's treatment of people who commit public welfare offenses and those who commit common law crimes, punishment for common law crimes also "[expresses] attitudes of resentment and indignation, and of judgments of disapproval and reprobation . . . . Punishment, in short, has *symbolic significance* largely missing from other kinds of penalties."[39] Whereas the consequences of a public welfare offense represent merely an "instrumental response to an instrumental problem,"[40] punishment for truly criminal offenses is a form of *condemnation* of the criminal and her conduct.[41] The Supreme Court has recognized this aspect of criminal punishment even for minor crimes like misdemeanors, highlighting the "stigma" of criminal punishment and the impact that stigma has on the dignity of the person charged with a crime, characterizing criminal punishment as "state-sponsored condemnation."[42]

One might question how weighty the "symbolic" significance of a state sanction is, or the importance of its effect on a person's dignity, when the sanction in question may be important to slowing a deadly global pandemic. However, even assuming (contrary to fact) that Disclosure Laws were effective at reducing HIV transmission rates,[43] focusing on the symbolic and dignitary effects of a sanction does not mean that the state's hands are tied. The state's use of quarantine

---

Owner: The Good, The Bad and The Dangerous, at 5 (UNC Legal Studies Research Paper No. 1596222, 2010).

35. *See HIV Risk Behaviors*, *supra* note 22.

36. *Morissette*, 342 U.S. at 256.

37. *Id*.

38. *See* Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 398 (1965) (making a distinction between punishment and other kinds of penalties).

39. *Id*. at 400.

40. Kennedy, *supra* note 34, at 5.

41. Feinberg, *supra* note 38, at 403.

42. Lawrence v. Texas, 539 U.S. 558, 575–76 (2003).

43. *See* Buchanan, *supra* note 30.

is a prime example. Quarantine conditions could be very similar to detention or imprisonment for a criminal offense, and may be rightly characterized as "hard treatment" by the state. The key difference is that quarantine lacks the expressive force of state condemnation, whereas imprisonment is the conventional way of expressing that very condemnation.[44]

As an illustration of the difference, consider the case of Laura Skrip, a Yale public health student who was quarantined by the state of Connecticut after returning from Liberia during the Ebola epidemic of 2014.[45] While in Liberia, Ms. Skrip had been assisting Liberia's Health Ministry with its computer systems, and had not come into contact with Ebola patients. Further, when she returned to the United States, she tested negative for the Ebola virus. Nonetheless, upon her return, she was quarantined alone in her apartment for two weeks while a police officer patrolled outside her building, a scenario Ms. Skrip described as her "worst nightmare . . . [i]t was incredibly hard just getting through that."[46] Because Connecticut's actions exceeded the CDC) guidelines, and because of the harshness of her quarantine conditions, Connecticut's actions were criticized as excessive in relation to the risk of Ebola transmission Ms. Skrip posed.[47] This kind of "hard treatment" at the hands of the state is at least comparably *coercive* to arrest and imprisonment for a criminal offense, but it does not express the state's *condemnation* for Ms. Skrips' decision to travel to Liberia, expose herself to a heightened risk of Ebola infection, and then return to the United States, exposing others to that risk.[48] However excessive and unfair it was, Ms. Skrip's quarantine was still merely "an instrumental response to an instrumental problem[.]"[49]

An important caveat is needed at this point: this line of argument should not be taken to suggest that states ought to consider adopting quarantine, isolation, or other coercive programs to control HIV transmission rates in lieu of criminal Disclosure Laws. The argument's only aim is to draw a distinction between two aspects of criminal punishment: (1) hard treatment; and (2) the state's expression of condemnation. Regardless of whether any public health program is justified in using coercive or "hard" measures, it does not appear to be justified in using the second.

This Part of the Article has developed the argument that, insofar as public health is the rationale for Disclosure Laws, criminal sanctions are inappropriate because they expresses the state's condemnation for nondisclosure of serostatus, which goes beyond the merely instrumental response that is called for to deal with a purely public health threat.

44. *See* Feinberg, *supra* note 38, at 418–19.

45. Sheri Fink, *Ebola Crisis Passes, but Questions on Quarantines Persist*, N.Y. TIMES, Dec. 2, 2015, at A1.

46. *Id*.

47. *Id*.

48. *Cf.* Feinberg, *supra* note 38, at 418–19.

49. Kennedy, *supra* note 34, at 5.

C. Without the Public Health Justification, do Disclosure Laws Violate the 14th Amendment?

We should not overlook the possibility, perhaps even the probability, that Disclosure Laws were passed by state legislators that did not simply elide the distinction between public welfare offenses and criminal offenses. Instead, they may have intended to condemn the conduct of PLWH independent of any public health risk presented by their conduct, setting it apart from the sexual conduct of others.

If state legislators did intend to single out PLWH for special condemnation and the stigma of criminal punishment because of their HIV serostatus, their choice to do so is constitutionally suspect.[50] If a state legislature's purpose in passing a Disclosure Law is to condemn and stigmatize PLWH independent of any public health reason, that could constitute an impermissible government motive, resulting in constitutionally cognizable harm to PLWH prosecuted under a Disclosure Law.[51] The fact that the sexual activities some Disclosure Laws prohibit swing completely free of actual HIV transmission risks supports an inference of improper legislative purpose.[52] Such an inference is particularly compelling when disclosure statutes outlaw sex that does not pose *any* known risk of transmission, for example when a PLWH performs fellatio on an HIV-negative partner who is using a condom.[53]

However, the fact that animus toward PLWH may have been (or even likely was) a driving force behind the passage of Disclosure Laws is probably not enough to render those laws unconstitutional under the Supreme Court's current jurisprudence on animus. The leading case on animus is *Romer v. Evans*.[54] In *Romer*, the court held that a Colorado state constitutional amendment violated the Fourteenth Amendment[55] when it prohibited any legislation protecting people

50. The idea that the motivation of legislators in passing disclosure laws may not have been purely in the interest of public health has been explored elsewhere. Commentators have pointed out that "media reports of HIV-infected sexual predators ignited hysteria and rage, creating political demand for a legislative response." *Animus and Sexual Regulation*, *supra* note 27 at 1777; *see also* Buchanan, *supra* note 30, at 1238 (pointing out that "HIV was largely ignored by criminal law until well-publicized allegations that black men had infected white women . . . . HIV nondisclosure starts to look and feel like a racialized crime that matters most when men do it to women").

51. *See Animus and Sexual Regulation*, *supra* note 27, at 1785.

52. *See id.* at 1786 ("[T]he criminalization of non-risky activities may impermissibly use government powers to advance the moral and emotional prerogatives of the body politic, divorced from legitimate health or safety concerns.").

53. *See* ROUTES, RISKS, AND REALITIES, *supra* note 19, at 1. Arkansas' disclosure law is an example of a disclosure law that prohibits this essentially riskless conduct, since it requires disclosure for any "sexual intercourse," including "fellatio," and has no carve-out for condom use. *See* ARK. CODE ANN. § 5-14-123 (West 2016). In contrast, California's disclosure law applies only to sex acts that have more than a theoretical risk of HIV transmission, *i.e.*, unprotected vaginal or anal sex. *See* CAL. HEALTH & SAFETY CODE § 120291 (1998).

54. 517 U.S. 620 (1996).

55. U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

from discrimination on the basis on sexual orientation.[56] The court stated:

> We cannot say that [the Colorado constitutional amendment] is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.[57]

Without a rational relation to some legitimate government purpose, the court made the "inevitable inference" that the amendment was "born of animosity" to non-heterosexual people and represented a "bare desire to harm a politically unpopular group."[58] It was therefore held to violate the Fourteenth Amendment.[59]

However, even Disclosure Laws that are insensitive to transmission risk are probably not sufficiently similar to the Colorado amendment to fall under the *Romer* holding. While *Romer* may have expanded the reach of the Fourteenth Amendment by providing an example of what counts as impermissible animus, it did not change the fundamental test applied to laws that *are* tied to a legitimate purpose: so long as a fundamental right or suspect class is not implicated, laws that bear a "rational relation" to that legitimate purpose will be upheld.[60]

Because (1) states have a legitimate government interest in protecting public health;[61] (2) preventing HIV transmission is a public health issue; and (3) the purpose of Disclosure Laws is at least *ostensibly* to prevent HIV transmission, it follows that a *Romer* challenge to Disclosure Laws would likely turn not on whether they are directed toward a legitimate government interest (public health), but whether they bear a rational relation to that interest. Such a challenge is unlikely to fare well. Even if we accept the criticisms of Disclosure Laws discussed above (*i.e.*, even if Disclosure Laws fail to reduce transmission rates and instead create a disincentive for people to get HIV tests), laws directed at legitimate government interests do not run afoul of equal protection just because "the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous."[62] Disclosure laws, even if "unwise" and "work[ing] to the disadvantage" of PLWH, still bear a rational relation to the public health.[63] A *factual* relation is not required.

Even if they are not constitutionally defective, this Part of the Article has argued that criminal Disclosure Laws are not supported by the Public Health Justification because (1) as a matter of fact, they do not reduce the rate of HIV transmission; and (2) even if they did reduce transmission rates, they mismatch condemnatory criminal sanctions with what is, at worst, a public welfare offense.

56. *See Romer*, 517 at 624.

57. *Id*. at 635.

58. *Id*. at 634 (citing Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

59. *Id*. at 635.

60. *See id*. at 631.

61. *See* Castaways Backwater Café, Inc. v. Fla. Dep't of Bus. & Prof'l Regulations Div. of Alcoholic Beverages & Tobacco, 214 Fed. Appx. 955, 956 (11th Cir. 2007).

62. *See Romer*, 517 U.S. at 632.

63. *See id*. at 635.

This Article turns now to a different rationale for Disclosure Laws, which may offer a form of justification independent from public health.

III. EVALUATING THE SEXUAL AUTONOMY JUSTIFICATION

Even if the Public Health Justification fails to justify some Disclosure Laws as they stand (as it appears to do), there is another justification on offer. The idea underpinning the Sexual Autonomy Justification is that when a PLWH discloses their serostatus, they promote the sexual autonomy of their potential sex partners by promoting informed consent; but when they fail to disclose, they impair the sexual autonomy of their partners by undermining their informed consent. In short, the Sexual Autonomy Justification gets off the ground by recognizing that disclosure of serostatus promotes effective and informed consent. This is not an original observation: In *When is HIV a Crime?*,[64] Kim Shayo Buchanan undertook a thorough and lucid analysis of the Sexual Autonomy Justification and laid important groundwork for the analysis undertaken in this Part of the Article. And, while this Part draws on some of her insights, it also departs from some of her conclusions, as explained later.

The main issue raised by the Sexual Autonomy Justification – informed consent – is illustrated by the following scenario: Taylor and Peyton meet at a party and, after some flirtation, they leave together. When they are alone, their contact grows more intimate, and as it does, they communicate openly about what they are doing and what they are going to do next. Taylor and Peyton are, so far, a model for robustly consensual sex. However, unbeknownst to Peyton, Taylor is HIV-positive. Further, assume that if Peyton knew Taylor's serostatus, Peyton would have disengaged from sex with Taylor, and would not have consented to any further sexual contact. Nonetheless, Taylor does not disclose their serostatus and the pair ends up having sex. To better isolate the issue, assume also that Taylor did not transmit HIV to Peyton. Nonetheless, Peyton's sexual autonomy is impaired in this scenario because their consent was not fully informed. In some sense, Peyton did not consent to the kind of sex they ended up having with Taylor, *i.e.*, sex with a PLWH.

But does the impairment of Peyton's sexual autonomy in the above scenario justify criminal sanctions against Taylor for failure to disclose their serostatus? The answer to this question could be independent of the Public Health Justification for Disclosure Laws, since competent adults should be free to grant or withhold their consent to sex for any reason, or no reason. Even if Taylor posed no meaningful risk of transmission to Peyton, Peyton would still be entitled to withhold consent based on Taylor's serostatus. So when Taylor does not provide Peyton the opportunity to do so, Taylor has arguably impaired Peyton's consent. Notice, however, that when one person pursues sex with another person whose consent is in some way impaired, there are different ways to characterize that conduct based on the severity of impairment. When consent is absent from the start, or completely vitiated by fraud or misinformation, it constitutes rape or sexual assault. However, consent can also be impaired to varying degrees by a lack of information that at least *seems* to fall short of rape. No consent can be perfectly

64. *See* Buchanan, *supra* note 30, at 1262–94.

informed, and, depending on the kind of undisclosed fact at issue, later learning a fact about a sexual partner of which one was initially unaware might lead to regret, anger, resentment, disgust, and a range of other feelings. Further, if the non-disclosing partner knew, or should have known, that the undisclosed fact was material to consent-in-fact, they are a deserving target of those feelings. But the lack of perfectly informed consent does not necessarily *vitiate* consent, and hence might not constitute rape or sexual assault in all cases.

A pair of cases from the Canadian High Court illustrate some of the difficulties raised by trying to draw the line between impaired consent and sexual assault for serostatus. First, in *R. v. Cuerrier*.[65] the accused was an HIV-positive man who was instructed by his health care providers to always use condoms during sexual intercourse and to disclose his serostatus to his potential sexual partners.[66] Notwithstanding his health care providers' instructions, he had sex with the complainants without using a condom and without disclosing his serostatus.[67] The complainants testified that, had they known of the accused's serostatus, they would not have consented to the sex they had with him, *i.e.* unprotected intercourse.[68] Fortunately, and despite having unprotected sex, the accused did not transmit HIV to the complainants.[69] Nonetheless, the accused's failure to disclose his serostatus led to charges of sexual assault against him.

An essential element of the charge was that the sex the accused had with the complainants was "without the consent of the complainants."[70] Under Canadian law, consent to sex can be vitiated by fraud. Therefore, if the accused obtained consent through fraud, he could be guilty of sexual assault.[71] The driving question, then, is whether the accused's failure to disclose his serostatus worked a fraud on the complainants. To answer that question, the court turned to "principles which have historically been applied in relation to fraud," especially those in commercial criminal fraud, such as "dishonesty, which can include non-disclosure of important facts."[72] The court concluded that failure to disclose serostatus "is a type of fraud which may vitiate consent to sexual intercourse . . . . Without disclosure of HIV status there cannot be a true consent. The consent cannot simply be to have sexual intercourse. Rather, it must be consent to have intercourse with a partner who is HIV-positive."[73]

The view thus expressed by the *Cuerrier* court represents a strong view about the significance of nondisclosure. A weaker view might have resulted in a holding that outright lying or deception about serostatus is required to constitute fraud capable of vitiating consent. Under the weaker view, if an individual cares enough to specifically ask her sex partner about serostatus, there is an obvious inference to the materiality of that fact to her decision to consent to sex. But in *Cuerrier*, the

65. R. v. Cuerrier, [1998] 2 S.C.R. 371 (Can.).

66. *See id*. at 371.

67. *Id*.

68. *Id*.

69. *See id*.

70. *Id*.

71. *See id*.

72. *Id*. at 372.

73. *Id*.

fact that the accused did not *volunteer* his serostatus before having sex with the complainants – even though they didn't ask about it or insist on condom use – was sufficient for a finding that the complainant obtained their consent through fraud. However, the *Cuerrier* court qualified its conclusion by reminding us of the general principle that the "nature and extent of the duty to disclose, if any, will always have to be considered in the context of the particular facts presented."[74]

Indeed, an application of that principle led to a different outcome in the second Canadian case we will consider. *R. v. Mabior* also involved an HIV-positive man who did not disclose his serostatus before having sex with the complainants.[75] Also like in *Cuerrier*, the accused did not actually transmit HIV to any of the complainants.[76] In *Mabior*, however, unlike in *Cuerrier*, the accused was found to be (1) undergoing antiretroviral therapy; (2) to have undetectable viral loads; and (3) to have used a condom with at least some of the complainants.[77] Based on those findings, the court held that there was no fraud vitiating consent to sex, because the accused did not expose the complainants to "a realistic possibility of transmission of HIV," and hence did not expose them to "a significant risk of serious bodily harm."[78]

The approach the court took in *Mabior* seems more sensible, at least from a public health perspective. In particular, and unlike many Disclosure Laws, it employed a framework that is sensitive to the actual risk of HIV transmission presented when a PLWH has sex without disclosing their serostatus to a partner. However, as the *Mabior* court recognized, this approach raises some thorny problems of its own: using a fact-specific approach makes the criminality of certain conduct "uncertain, failing to draw a clear line between criminal and noncriminal conduct[.]"[79] We can imagine the kinds of questions future prosecutions based on nondisclosure will invite in Canadian courts: what result if an accused's viral load is detectable, but he still used a condom? What result if the accused did not use a condom, but the complainant was using preexposure prophylaxis (PrEP)?[80] The result in these and many other scenarios is unclear from the *Mabior* holding. While recognizing that the framework may be difficult to apply, the court still endorsed the "wisdom of the common law that not every deception that leads to sexual intercourse should be criminalized, while still according consent meaningful scope."[81] To define this "meaningful scope," the *Mabior* court identified two elements that, in tandem, are sufficient for vitiating consent in HIV-nondisclosure cases: (1) a dishonest act (*i.e.*, failure to disclose) that (2) deprives the complainant knowledge which would have led to withdrawal of consent *to an act that exposed the complainant to a significant risk of bodily harm*.[82] That leaves it for the fact finder

74. *Id*. at 373.

75. *See* R. v. Mabior, [2012] 2 S.C.R. 584, 585 (Can.).

76. *Id*.

77. *Id*. at 584–85.

78. *Id*. at 586.

79. *Id*. at 585.

80. *See Pre-Exposure Prophylaxis (PrEP)*, AIDS.GOV, https://www.aids.gov/hiv-aids-basics/prevention/reduce-your-risk/pre-exposure-prophylaxis/ (last visited Dec. 14, 2015).

81. Mabior, [2012] S.C.R. at 586.

82. *Id*. at 585 (emphasis added).

to decide whether the complainant was exposed to a "significant risk" of bodily harm. Depending on the instincts of the judge or jury, as the case may be, we are left wondering what non-zero chance is high enough to count as significant. Should it be 0.01%? Or 1.0%?

There are further limitations to the "bodily harm" approach employed by the *Mabior* court. First, it does not square with paradigm cases where the criminal law has long recognized "rape by deception."[83] Indeed, there are only two long-recognized circumstances where lack of informed consent constitutes rape: impersonation of a spouse and therapeutic fraud.[84] Neither necessarily involves a significant risk of bodily harm of the kind contemplated by the *Mabior* court (*e.g.*, disease transmission).

Arizona provides an example of a spousal deception law. It makes it a crime for a person to have sex with someone when "the victim is intentionally deceived to erroneously believe that the person is the victim's spouse."[85] Colorado law provides an example of a therapeutic deception (generally understood as "deceiving a victim by purporting to engage in a sexual act for therapeutic reasons"),[86] stating "[a]ny actor who knowingly inflicts sexual penetration or sexual intrusion on a victim commits aggravated sexual assault on a client if . . . the actor is a psychotherapist and the victim is a client and the sexual penetration or intrusion occurred by means of therapeutic deception."[87]

83. *See, e.g.*, Buchanan, *supra* note 30, at 1273.

84. *See id.*; *see also generally* John F. Decker & Peter G. Baroni, *"No" Still Means "Yes": The Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law*, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1133–41 (2011).

85. *See* ARIZ. REV. STAT. ANN. § 13-1401(A)(7)(d) (2015). *See also, e.g.*, COLO. REV. STAT. ANN. § 18-3-402(1)(c) (West 2015) ("Any actor who knowingly inflicts sexual intrusion or sexual penetration on a victim commits sexual assault [if the] actor knows that the victim submits erroneously, believing the actor to be the victim's spouse[.]"); OHIO REV. CODE ANN. 2907.03(A)(4) (West 2015) ("No person shall engage in sexual conduct with another [when] the offender knows that the other person submits because the other person mistakenly identifies the offender as the other person's spouse."); UTAH CODE ANN. § 76-5-406(7) (West 2015) ("An act of sexual intercourse . . . is without consent of the victim [when] the actor knows that the victim submits or participates because the victim erroneously believes that the actor is the victim's spouse[.]"); WYO. STAT. ANN. § 6-2-303(a)(iv) (West 2015) ("Any actor who inflicts sexual intrusion on a victim commits sexual assault . . . if . . . The actor knows or should reasonably know that the victim submits erroneously believing the actor to be the victim's spouse[.]").

86. Decker & Baroni, *supra* note 84, at 1139.

87. COLO. REV. STAT. ANN. § 18-3-405.5(1)(a)(II). *See also, e.g.*, GA. CODE ANN. § 16-6-5.1(c) (West 2015) ("A person who is an actual or purported practitioner of psychotherapy commits sexual assault when he or she engages in sexual contact with another individual who the actor knew or should have known is the subject of the actor's actual or purported treatment or counseling or the actor uses the treatment or counseling relationship to facilitate sexual contact between the actor and such individual."); MINN. STAT. ANN. § 609.344(j) (West 2015) ("A person who engages in sexual penetration with another person is guilty of criminal sexual conduct [if] the actor is a psychotherapist and the complainant is a patient or former patient and the sexual penetration occurred by means of therapeutic deception.").

Both spousal deception and therapeutic deception differ from the serostatus nondisclosure issues the Canadian high court grappled with in *Cuerrier* and *Mabior*, because neither kind of deception necessarily involves significant risk bodily harm, at least as the *Mabior* court understood the term. Rather, the issues are identity of the sexual partner (spousal deception) and nature or purpose of the sexual contact (therapeutic deception). When unscrupulous people deceive their way into sexual contact with their victims by pretending to be someone they are not, or by using their position of authority or as a caregiver as pretext, the kind of harm they do may be primarily to the dignity and autonomy of their victims. Autonomous persons get to choose *who* gets access to their bodies and *for what purpose.* It is not necessary to risk some further, independent bodily harm, like the transmission of disease, for consent to be destroyed.

Buchanan points out, however, that these narrow exceptions for fraud vitiating consent in American jurisprudence exist against a backdrop where there is no requirement that consent to have sex be informed, and where obtaining sex by deception is not generally considered a crime.[88] Buchanan lists "age, health, fertility, wealth, ethnicity, employment, feelings, intentions, fidelity, [and] marital status" as examples of things people can fail to disclose, or even actively deceive about, and commit no crime in most United States jurisdictions.[89] Nonetheless, these are facts about a person one might consider material when deciding whether to have sex with them. Acknowledging that these facts are not usually considered to vitiate informed consent, we can ask for purposes of developing the Sexual Autonomy Justification: should they be so recognized?

After all, some of the examples Buchanan lays out are deceptions involving very important facts that may be material to consent-in-fact. Take marital status, for example. Returning to Taylor and Peyton, suppose instead that the fact Taylor kept private was not serostatus, but marital status. In this scenario, suppose Peyton is single and joined a dating website with the intention of finding a long-term relationship with a mutually-monogamous partner. Peyton clearly represents this intention on their profile, and avoids those who do not share that intention. Now enter Taylor. In this scenario, Taylor is monogamously married, but surreptitiously seeks sex partners on the same dating website that Peyton joined. Taylor finds Peyton's profile, and, impressed with their picture, messages them to ask for a date. Taylor understands perfectly well the kind of partner Peyton is seeking, but nonetheless deceives Peyton into thinking they are also seeking a monogamous, long-term relationship. After a few pleasant dates, Taylor and Peyton have sex. But afterwards, Taylor withdraws from the courtship and Peyton never hears from them again. Peyton is disappointed, and thinks that Taylor is a jerk. However, Peyton never directly asked after Taylor's marital status and Taylor never volunteered it (*i.e.*, Taylor "failed to disclose" their marital status). But if Peyton had known Taylor's marital status, Peyton never would have agreed to sex. Taylor's marital status was therefore material to Peyton's consent. Further, Taylor believed that it was material to Peyton when they chose not to disclose it (they saw Peyton's profile, after all). Notwithstanding the fact that this kind of conduct is not considered "rape by deception" in U.S. jurisdictions,

88. *See* Buchanan, *supra* note 30, at 1274.

89. *See id*.

Taylor's failure to disclose their marital status still impaired Peyton's sexual autonomy to some degree. As the *Cuerrier* court might have put it, this is a case of "non-disclosure of important facts."[90] Peyton's consent was not fully informed because Taylor deceived Peyton by withholding a fact known to be material, and Taylor is therefore, at least, a culpable jerk. All of that said, are we prepared to say further that Taylor should be subject to criminal liability for sexual assault?

To help us approach that question, we have before us a number of data points: Canadian courts have held that nondisclosure of an important fact, when accompanied by significant risk of bodily harm, is enough for a legally cognizable harm to consent. In U.S. jurisdictions, bodily harm is not necessary, but some facts are more important than others: identity of a sex partner and purpose of sexual contact are important enough facts standing alone, while marital status is not. The best explanation for these data points must be something more general than risk of significant *bodily* harm (or it fails to capture, *e.g.*, spousal impersonation), but also specific enough to capture nuanced distinctions between "important fact" scenarios. Spousal impersonation, intuitively, does not only *impair* sexual autonomy, but straightforwardly vitiates consent resulting in sexual assault; but failure to disclose marital status, while involving an important fact, may not entirely vitiate consent.

One way to explain these data points and to capture the nuanced distinctions missed by the Canadian "bodily harm" criteria is to acknowledge that, although a fact may be material to consent-in-fact, some such facts are more *subjective* and others are more *objective*. Subjectively, one might have a laundry list of "dealbreakers"[91] that, while personally important, are both impossible and inappropriate for the law to attempt to cope with. It would be difficult to justify a view that the police should get involved after you learn that your most recent sex partner failed to disclose the fact that they belong to your dis-preferred political party, although that has always been a "dealbreaker" for you. Even if this partner knew it was a dealbreaker, and failed to disclose in light of that knowledge, it is hard to believe this crosses the line from culpable to criminal.

Without trivializing the potential seriousness of failure to disclose serostatus, this Part has discussed a spectrum of scenarios involving failure to disclose facts ranging from more subjective (political affiliation of a partner) to much more objective (identity, as with spousal impersonation). On the subjective extreme, we doubt that the level of impairment to consent, though *subjectively* material, outright vitiates consent; while on the objective extreme, there are particularly egregious examples like spousal impersonation where the impairment to consent is complete. That said, we may not know exactly where to place marital status: it is certainly an important fact that many people would find material to consent-in-fact, but failure to disclose it does not seem to rise to the level of sexual assault.

With this spectrum in mind, and before turning to serostatus's place on it, this Part of the Article will explore one more important class of disclosure cases: contraceptive frauds. In cases of contraceptive fraud, one sex partner represents to the other that effective contraceptive measures like condom use, hormonal birth

90. R. v. Cuerrier, [1998] 2 S.C.R. 371, 372 (Can.).

91. Buchanan, *supra* note 30, at 1263.

control, vasectomy, or tubal ligation have been taken when in fact they have not.[92] These sorts of cases can have profound, life-altering consequences for any sex partners capable of conception.

In *Stephen K. v. Roni L.*, for example, the defendant in a paternity action cross-claimed for damages, claiming that the child's mother had secured his consent to have unprotected sex by fraudulently representing that she was on hormonal birth control.[93] The court held that the mother was not liable for damages, explaining that if the court were to "supervise the promises made between two consenting adults as to the circumstances of their private sexual conduct [it would] encourage unwarranted governmental intrusion into matters affecting the individual's right to privacy."[94] The court also took pains to point out that hormonal birth control is not "100 percent effective" and that the defendant could have taken further precautions (like condom use) himself.[95]

The facts of *Stephen K. v. Roni L.* involve a woman deceiving her male partner, but contraceptive fraud is equally a problem for women who are deceived by male partners. There are cases involving men surreptitiously removing condoms during intercourse, intentionally poking secret holes in condoms while representing that they were using the condom properly, or simply lying about their fertility.[96] An unplanned pregnancy resulting from such deceit could lead at least to a "distressful life and future,"[97] but also to life-threatening complications.

In *Barbara A. v. John G.*, for example, the plaintiff at first insisted on condom use to prevent pregnancy before having sex with the defendant, but after the defendant assured her he "couldn't possibly get anyone pregnant," she acquiesced.[98] The defendant's representation was false, and the plaintiff suffered an ectopic pregnancy, which she had to undergo surgery to resolve.[99] While the surgery saved her life, it also left her sterile.[100] The court held that the plaintiff had stated a cause of action for sexual battery because her consent to the intercourse was fraudulently induced.[101]

The contraceptive fraud cases are particularly illuminating because, like the Canadian serostatus cases, their outcomes are not entirely consistent. There was no liability in *Stephen K. v. Roni L.*,[102] but there was in *Barbara A. v. John G.*[103] While the circumstances of the cases were different in important ways, the fact is still that

---

92. *See id*. at 1285.

93. *See* 164 Cal. Rptr. 618, 618–19 (Cal. Ct. App. 1980).

94. *Id*. at 620.

95. *Id*. at 621.

96. *See* Nickeitta Leung, Comment, *Education Not Handcuffs: A Response to Proposals for the Criminalization of Birth Control Sabotage*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 146, 152 (2015).

97. Roe v. Wade, 410 U.S. 113, 153 (1973).

98. 193 Cal. Rptr. 422, 426 (Cal. Ct. App. 1983).

99. *Id*.

100. *Id*.

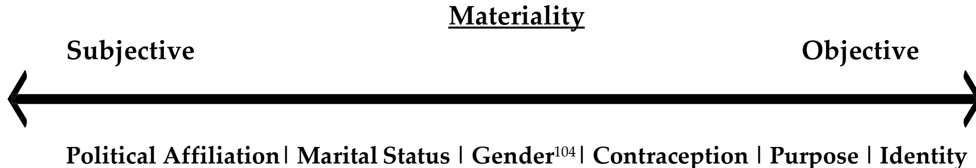
101. *Id*.

102. 164 Cal. Rptr. 618, 620 (Cal. Ct. App. 1980).

103. 193 Cal. Rptr. at 426.

contraceptive fraud was found capable of vitiating consent in one case, but not the other.

Aided by the context provided by the cases and scenarios discussed above, we begin to get a better sense of where serostatus might lie along a spectrum of subjective vs. objective materiality for purposes of informed consent. Consider the following chart:



This spectrum is intended to be illustrative only, and the author is not committed to its precise shape. For example, it is possible that the purpose of sexual contact is more objective than the identity of the person with whom you are having sexual contact. Or maybe they are tied. Nonetheless, contraceptive use is almost certainly more objective than political affiliation. So with the basic shape of this spectrum in mind, where should serostatus fall along it?

Serostatus seems, at first blush, to be most akin to contraceptive use, which would place it on the more objective end of the spectrum. Serostatus and contraceptive use share several important features. First, they both involve only a *risk* of an adverse outcome.[105] The problem in both cases is not necessarily that the sexual contact itself actually leads to an adverse outcome (*e.g.*, an unwanted pregnancy, or an HIV infection), but that one party was denied information the other party held, and hence could not deliberate about the importance of the risks before consenting. There is a degree of moral luck[106] involved in both as well: in *Barbara A. v. John G.*, the outcome would likely have been different if the plaintiff had not become pregnant as a result of her encounter with the defendant. Similarly, the importance of failing to disclose serostatus may be tied to whether HIV transmission actually occurs. Further, when the adverse outcome being risked is realized, it is highly consequential.

---

104. Depressingly, though not surprisingly, the gender cases deal **not** with cases where, *e.g.*, a man fraudulently induces a homosexual woman to have sex with him by pretending to be a woman, but instead with cases where cisgender individuals regretted that their sex partners, while of their preferred gender, turned out to be transgender. *See generally* Aeyal Gross, *Gender Outlaws Before the Law: The Courts of the Borderland*, 32 HARV. J.L. & GENDER 165 (2009) (reviewing prosecutions of transgender people in various jurisdictions).

105. This is unlike spousal impersonation, since, presumably, the fact of having sex with someone other than your spouse under those circumstances is itself the harm. There need not be any risk of a further adverse outcome.

106. Dana Nelkin, *Moral Luck*, STANFORD ENCYCLOPEDIA OF PHIL., Apr. 10, 2013, https://plato.stanford.edu/entries/moral-luck/ ("Moral luck occurs when an agent can be correctly treated as an object of moral judgment despite the fact that a significant aspect of what she is assessed for depends on factors beyond her control.") Here, whether sexual contact leads to pregnancy, or transmission of an STI, is ultimately outside the actors' control.

For example, while HIV infection is no longer a "death sentence,"[107] it is still a chronic and serious health condition that may be life-altering socially, economically, sexually, and otherwise. The gravity of the outcome will also depend on the characteristics of the person who contracts HIV. A person of relatively high socio-economic status, education, and access to quality health care may suffer far fewer consequences from an HIV infection than someone without those benefits. Despite how far treatment has come, without *access* to proper treatment, HIV infection is far more likely to result in AIDS, and in some cases, may still be fatal.

Pregnancy is also highly consequential. Particularly if the pregnancy is unwanted (as will almost certainly be the case for one party in cases of contraceptive fraud), those consequences may be predominantly negative. Pregnancy and child-rearing can have long-term repercussions to health, economics, social status, and myriad other aspects of life. The gravity of these consequences also depends greatly on the characteristics of the person who becomes pregnant and/or raises any resulting children: access to healthcare, access to timely abortion (if desired), and many other factors will affect the consequences of an unwanted pregnancy. As *Barbara A. v. John G.* illustrated, the health consequences of a complicated pregnancy can be up-to and including death.

There is yet another important way that failure to disclose serostatus is akin to contraceptive fraud: the un-disclosed-to-party still retains a degree of control over the kinds of risks they are exposed to. As the court in *Stephen K. v. Roni L.* pointed out, the deceived father could have "taken any precautionary measures" of his own to prevent pregnancy instead of relying solely on his sex partner.[108] Similarly, it is not clear why the onus, in the eyes of the law, should not be on the party that is concerned about HIV transmission (or other sexually transmitted infections) to insist on condom use in some circumstances.

In sum, deception (either through failure to disclose or outright lying) about both use of contraception and serostatus present variable risks of an adverse outcome, and that outcome, if realized, is often highly consequential. However, presuming both parties are otherwise competent and consenting adults, both parties retain a degree of control over the risks they are exposed to.

One further point on degree of control. In view of the evolution of sexual mores in the United States, especially the norms of contemporary "hookup culture,"[109] it is not clear that anyone should simply assume their partner's serostatus in lieu of a definitive disclosure, to say nothing of other sexually transmitted infections, use of contraception, marital status, or any number of other possibly material facts that inform robust consent. The "rise of casual sex" means that sex partners tend to

> "know a lot less about each other than in the past," with "sex outside of relationships and [within] concurrent relations . . . becoming normalized. . . . [P]eople now do not know their sexual partners as well and have scant relational repercussions to fear if unfortunate discoveries are made the morning after – or a

107. *Animus and Sexual Regulation*, *supra* note 27, at 1781.

108. 164 Cal. Rptr. 618, 621 (Cal. Ct. App. 1980).

109. *See* Mary D. Fan, *Decentralizing STD Surveillance: Toward Better Informed Sexual Consent*, 12 YALE J. HEALTH POL'Y L. & ETHICS 1, 15 (2012).

> few months after . . . The traditional constraint of relational or social repercussions is thus dramatically diminished.[110]

At least in a "hookup culture" thus described, waiting for a sex partner to disclose serostatus, or volunteer contraception, may not be the prudent choice.[111] At least for cases of pure non-disclosure (as opposed to active deception or lying), sexual mores and norms may play a role in what facts are assumed to be material to consent-in-fact. These norms could work to shift the burden of disclosure, such that the party to whom, for example, contraceptive use, serostatuts, marital status, or gender *are* material must affirmatively inquire about them, as they would not be entitled to an expectation of disclosure of those facts.

Given the concurrence of variable risks, moral luck, outsized consequences, and shared responsibility discussed above, it is not surprising that courts have struggled with uniformity when dealing with the nuances of both serostatus nondisclosure and contraceptive fraud. It is also evidence that they are akin in how *objective* the materiality of serostatus and contraceptive use are for purposes of consent to sex. Without committing to a definitive ranking on the spectrum above, use of contraception and disclosure of serostatus do seem to be in the same "neighborhood" of objectivity. A fact like political affiliation is intuitively less objective than both, while identity and purpose are more objective. However, it is still not clear whether the neighborhood of objectivity they both inhabit is objective *enough* to vitiate consent to sex in the eyes of the criminal law in every case, as it is with purpose and identity.

Buchanan has also grappled with some of these nuances, and, faced with the apparent inconsistencies in what kinds of deception vitiate consent as a matter of law under the current regime,[112] concludes that concerns about sexual autonomy cannot explain Disclosure Laws.[113] If *sexual autonomy* is what state legislators cared about, Buchanan notes, they would have *also* criminalized the many other forms of deception that similarly impair consent, some of which are discussed above.[114] She concludes that, in light of these inconsistencies, the best approach would be to "ratchet down" Disclosure Laws, resulting in decriminalization of serostatus nondisclosure and making it akin, from a legal perspective, to nondisclosure of marital status or political affiliation.[115] However, the discussion above shows that different kinds of sexual deception inhabit different levels of objectivity. As such, there is reason to believe that some, though not all of them, could support a legal

110. *Id.* at 16–18.

111. Unfortunately, many people do not have the power to insist on the use of prophylaxis or contraception, especially victims of domestic violence. *See generally* Leung, *supra* note 96, at 146–47. Relatedly, vulnerable populations, including victims of domestic violence and sex workers, may not be at liberty to safely disclose their serostatus, even if required to do so by law. *See generally* Buchanan, *supra* note 30, at 1257.

112. *See* Buchanan, *supra* note 30, at 1274 (pointing out, *e.g.*, that some states prohibit spousal impersonation, but not any other form of intimate partner impersonation).

113. *See id.* at 1276.

114. *Id.* (arguing "a rape law whose primary objective was to vindicate sexual autonomy 'would not limit rape-by-deception cases to the two old scenarios'").

115. Buchanan, *supra* note 30, at 1338–42.

duty to disclose. It is not clear, as Buchanan suggests, that one size should fit all. While it may not be plausible to "ratchet up" marital status non-disclosure, for example, it is more plausible to "ratchet up" contraceptive fraud because the materiality of contraceptive use is more objective.

So is Buchanan's "ratchet down" approach the right one for Disclosure Laws, or is the materiality of serostatus objective enough to support a broad duty to disclose?

To answer that question, we first recognize that for many people, serostatus is material to consent-in-fact. For those people, a PLWH's failure to disclose serostatus will impair their sexual autonomy because they would not have consented to sex had they known the PLWH's serostatuts.

Nonetheless, the impairment to consent caused by nondisclosure in those circumstances does not appear to justify broad Disclosure Laws. For whether the Sexual Autonomy Justification supports broad Disclosure Laws turns on the level of objectivity of serostatus to the extent it is material for consent-in-fact. *If* serostatus were a consideration as highly objective as identity (spousal impersonation) or nature or purpose of sexual contact (therapeutic fraud), the broad Disclosure Laws currently on the books in many states would have a plausible justification grounded in sexual autonomy. It would, in those circumstances, be sensible to make serostatus material to consent as a matter of law.

Serostatus, however, does *not* seem to be as objectively material to consent as identity. Rather, as discussed above, it seems to be most closely akin to contraceptive fraud, as both are characterized by an admixture of variable risks, outsized consequences, shared responsibility, and moral luck. And, unlike spousal impersonation and therapeutic fraud, nothing about the sexual contact *itself* is necessarily harmful. Rather, it is the risks and uncertainties related to the consequences of the sexual contact (*e.g.*, an unwanted pregnancy, or an HIV infection). But these characteristics make both contraceptive fraud and serostatus nondisclosure poor candidates for materiality as a matter of law because the facts and circumstances of each particular case are too important for a blanket disclosure requirement to make sense.

For example, suppose a male PLWH who is (1) undergoing HAART; (2) has an undetectable viral load; and (3) is properly using a condom, has intercourse with an HIV-negative woman without disclosing his serostatus. Nonetheless, for his partner, HIV-positive serostatus is still a "dealbreaker." Suppose further that, from past experience where he had disclosed serostatus, he believes that his serostatus will be material to his partner's consent-in-fact. By failing to disclose his serostatus in these circumstances, he has impaired his partner's sexual autonomy, because he did not disclose information he believed to be, and was, material to her consent to sex. However, in these circumstances, the materiality of his serostatus to his partner's consent does not appear to be *objective enough* to warrant materiality as a matter of law, because the actual risk of HIV transmission in that scenario is practically non-existent.[116] This is not to say that the HIV-negative partner in this scenario is not entitled to her estimation of serostatus as a "dealbreaker": again, autonomous people are free to withhold their consent for

116. *See supra* § II.A.

any reason, or no reason. It is just to say that the PLWH in this scenario may not have crossed the line from some amount of moral culpability for impairing his partner's fully informed consent, to legal liability for sexual assault.

In contrast, a similar kind of sexual encounter takes on a very different character if the facts and circumstances surrounding the encounter are different. Suppose instead that a PLWH has not received consistent treatment; does not know his viral load; does not use a condom with his partner; and that they engage in anal intercourse. In these circumstances, the risk of transmission may be up to 1.4%.[117] While this may sound like a relatively low risk of transmission (or may not, depending on your perspective), the materiality of serostatus to the HIV-negative partner is *more objective* than in the first scenario above because there is a real risk of transmission. Further, if the HIV-negative partner does not have access to quality healthcare, the health consequences of acquiring an HIV infection could be dire. Without committing to the position that failing to disclose serostatus in this scenario completely vitiates consent, it is more plausible that a disclosure law narrowly tailored to just this kind of scenario could be justified by sexual autonomy considerations.

Disclosure Laws, however, are generally not so carefully tailored. They are overbroad when they cover very-low and essentially no-risk conduct because the materiality of that conduct to consent is too subjective. Therefore, broad Disclosure Laws are not fully supported by the Sexual Autonomy Justification. It may be possible for carefully crafted statutes to stay within the bounds of the Sexual Autonomy Justification, but even a narrowly tailored statute should be approached skeptically because the particular facts of each scenario matter. Without going as far as Buchanan, who concludes that Disclosure Laws do not promote "any legitimate interest in . . . sexual autonomy,"[118] the analysis in this section shows that, while serostatus nondisclosure does implicate sexual autonomy concerns, broad Disclosure Laws are not fully justified by those concerns.

IV. CONCLUSION

The two leading rationales for Disclosure Laws, the Public Health Justification and the Sexual Autonomy Justification, both fail to support broad Disclosure Laws in their current form. The first justification fails for two reasons: first, because Disclosure Laws are in fact ineffective public health measures; and second, because they inappropriately employ criminal condemnation as a response to a public health issue. The second fails for overbreadth. Disclosure Laws cover too much low-risk or essentially no-risk conduct to support the materiality of serostatus as a matter of law, and hence are not justified in what they actually require: a legal duty for PLWH to disclose serostatus in all cases. Considered from either the Public Health or the Sexual Autonomy perspective, broad HIV Disclosure Laws are unjustified.

117. *HIV Risk Behaviors*, *supra* note 22.

118. Buchanan, *supra* note 30, at 1342.