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## The Threat Lives On: How to Exclude Expectant Mothers from Prosecution for Mere Exposure of HIV to their Fetuses and Infants

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# THE THREAT LIVES ON: HOW TO EXCLUDE EXPECTANT MOTHERS FROM PROSECUTION FOR MERE EXPOSURE OF HIV TO THEIR FETUSES AND INFANTS

SHAHABUDEEN K. KHAN<sup>\*</sup>

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## I. INTRODUCTION

“A mother’s love for her child is like nothing else in the world. It knows no law, no pity. It dares all things and crushes down remorselessly all that stands in its path.”

—*Agatha Christie*.<sup>1</sup>

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<sup>1</sup> SEARCH QUOTES, [http://www.searchquotes.com/quotes/author/Agatha\\_Christie/](http://www.searchquotes.com/quotes/author/Agatha_Christie/) (last visited Feb. 20, 2014).

Great news: the HIV/AIDS<sup>2</sup> epidemic is changing for the better.<sup>3</sup> Bad news: do not get caught pregnant while HIV positive.<sup>4</sup> Some HIV-related criminal transmission laws have missed the boat.<sup>5</sup> If expectant mothers who are infected with HIV follow the current U.S. health care guidelines,<sup>6</sup> the risk of transmission to their fetuses/infants could be reduced significantly, in some cases to below an astonishing one percent.<sup>7</sup> Doctors and researchers are closer to finding a cure for perinatal HIV transmission.<sup>8</sup> In March 2014, reports surfaced that a baby may have been cured of the virus.<sup>9</sup> Yet in some states, laws that criminalize HIV exposure and transmission

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<sup>2</sup> See *About HIV/AIDS*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/basics/whatishiv.html#panel> (last updated Feb. 12, 2014). Human Immunodeficiency Virus, is the virus that causes AIDS, the Acquired Immune Deficiency Syndrome. They are commonly referred to as “HIV/AIDS.” HIV spreads through certain bodily fluids that affect certain cells in the body which eventually affects the immune system and could be fatal in most cases. While there is no current cure for HIV/AIDS, a person could now live almost a normal life with the disease if detected and treated in time. *Id.*

<sup>3</sup> See *infra* note 29.

<sup>4</sup> See *infra* Part III.

<sup>5</sup> See James B. McArthur, *As the Tide Turns: The Changing HIV/AIDS Epidemic and the Criminalization of HIV Exposure*, 94 CORNELL L. REV. 707, 709 (2009).

<sup>6</sup> See *Revised Recommendations for HIV Testing of Adults, Adolescents, and Pregnant Women in Health-Care Settings*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 22, 2006), <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5514a1.htm>. Early screening and testing is recommended for all pregnant women. However, screening and testing should be voluntary and not coerced. Screening and testing should be done early during the pregnancy and at various stages of the pregnancy, during labor and postpartum/newborn. Early screening and testing will enable healthcare providers to start treatment and plan accordingly. Treatments include administration of antiretroviral medications, scheduling cesarean delivery, and avoiding breastfeeding. *Id.*

<sup>7</sup> See *HIV Among Pregnant Women, Infants, and Children*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/risk/gender/pregnantwomen/facts/index.html> (last updated Jan. 10, 2014) [hereinafter *HIV Among Pregnant Women*]; see also Michael A. Tolle, MD, MPH, *Preventing Perinatal Transmission of HIV: Your Vigilance Can Pay Off*, 59 J. FAM. PRAC. 1, 1-2 (Mar. 2010), available at [http://www.jfponline.com/index.php?id=21643&cHash=071010&tx\\_ttnews\[tt\\_news\]=16537](http://www.jfponline.com/index.php?id=21643&cHash=071010&tx_ttnews[tt_news]=16537).

<sup>8</sup> In March 2013, doctors at the University of Mississippi’s Medical Center reported that they may have cured a two-and-one-half-year-old baby of the HIV. See Liz Szabo, *Doctors Report First Cure of HIV in a Child*, USA TODAY (Mar. 4, 2013, 8:35 AM), <http://www.usatoday.com/story/news/nation/2013/03/03/first-cure-hiv-child/1957943/>. But see ‘Mississippi Baby’ Now Has Detectable HIV: UMMS Immunologist Among Researchers Studying the Case, UMASS MED NOW (July 10, 2014), <http://www.umassmed.edu/news/news-archives/2014/07/Mississippi-Baby-now-has-detectable-HIV-researchers-find/>. Unfortunately, the baby may not have been cured of the HIV Virus. On July 10, 2014, it was reported that the HIV Virus had reappeared in the baby’s medical test results. Although medical doctors and scientists have voiced their disappointment, they are still continuing their quest to find a cure for childhood HIV.

<sup>9</sup> Lisa M. Larson, *Case of Second Baby Apparently Cleared of HIV Offers More Hope for Early Therapy*, UMASS MED NOW (Mar. 06, 2014), <http://www.umassmed.edu/news/news-archives/2014/03/Luzuriaga-Case-of-second-baby-apparently-cleared-of-HIV-offers-more-hope-for-early-therapy/>.

remain unchanged and untouched;<sup>10</sup> consequently, the risk of prosecution of HIV positive mothers who expose or transfer the virus to their fetuses or newborn lives on.<sup>11</sup> This Article articulates how this threat will discourage and scare women away from seeking proper medical treatment instead of encouraging HIV treatment and prevention.<sup>12</sup>

The HIV/AIDS emergence in the 1980s not only caused illnesses, injuries, and death to countless people, but it also caused widespread panic.<sup>13</sup> That panic resulted in actions by both state and federal governments.<sup>14</sup> The governments responded by legislating and enacting laws that criminalized the exposure and transmission of HIV.<sup>15</sup> To date, almost two-thirds of the states, thirty-three to be exact, have enacted specific HIV criminal exposure and transmission laws.<sup>16</sup> Some of the laws are broad, some ambiguous and vague, and some penalize mere exposure of others to the virus.<sup>17</sup> Some of the laws, in their far-reaching design, could result in the criminal prosecution of mothers for the transmission and, in some cases, exposure of HIV to their fetuses or newborn.<sup>18</sup> This Article illustrates how the threat and stigma<sup>19</sup> of prosecution associated with specific HIV criminal transmission laws could hamper and stifle the progress in prevention and treatment of vertical<sup>20</sup> transmission of the virus.<sup>21</sup>

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<sup>10</sup> See McArthur, *supra* note 5, at 709; see also *infra* Part III.

<sup>11</sup> Christina M. Shriver, *State Approaches to Criminalizing the Exposure of HIV: Problems in Statutory Construction, Constitutionality and Implications*, 21 N. ILL. U. L. REV. 319, 322, 347 (2001).

<sup>12</sup> See *infra* Part III.

<sup>13</sup> J. Stan Lehman, et al., *Prevalence and Public Health Implications of State Laws that Criminalize Potential HIV Exposure in the United States*, SCI. & BUS. MEDIA, (Mar. 15, 2014), <http://www.preventionjustice.org/wp-content/uploads/2014/03/HIV-Crim-Article-2014.pdf>.

<sup>14</sup> *Id.*; 42 U.S.C. § 201 (2012); see also Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. No. 101-381, 104 Stat. 567 (1990) (where the federal government tied financial assistance to states for HIV related care if states had proper laws to prosecute exposure and transmission of the virus).

<sup>15</sup> Lehman, et al., *supra* note 13.

<sup>16</sup> *Id.*

<sup>17</sup> André A. Panossian, et al., *Criminalization of Perinatal HIV Transmission*, 19 J. LEGAL MED. 223, 249 (1998).

<sup>18</sup> Shriver, *supra* note 11, at 349.

<sup>19</sup> See Ronald O. Valdiserri, MD, MPH, *HIV/AIDS Stigma: An Impediment to Public Health*, 92 AM. J. PUB. HEALTH 341, 341-42 (Mar. 2002), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447072/pdf/0920341.pdf>.

<sup>20</sup> The vast majority of pediatric HIV cases in the U.S. occur as a result of mother to child transmission (MTCT), also known as ‘vertical’ or ‘perinatal’ transmission. See *HIV Infections in Infants and Children*, NAT’L INST. OF ALLERGY & INFECTIOUS DISEASES, available at [http://www.niaid.nih.gov/news/newsreleases/2000/Pages/drug\\_regimen\\_backgrounder.aspx](http://www.niaid.nih.gov/news/newsreleases/2000/Pages/drug_regimen_backgrounder.aspx) (last updated Jan. 31, 2000).

<sup>21</sup> Scott Burris, et al., *Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial*, 39 ARIZ. ST. L.J. 467, 481-88 (2007).

Further, there is an unfortunate and continuous push by some states to criminalize substance abuse related injuries to children as a result of perinatal illicit drug use.<sup>22</sup> This highlights the urgent need for reform of criminal HIV transmission laws in relation to vertical or perinatal transmission of the virus. Consider, for instance, Tennessee's recent statute passed on April 29, 2014, that states: "[a] woman may be prosecuted for assault for the illegal use of a narcotic drug while pregnant, if her child is born addicted to or harmed by the narcotic drug."<sup>23</sup> Given this direction, this Article will illustrate how an HIV-positive mother or an expectant mother is at the same risk of prosecution for exposure or transmission of HIV to her fetus or newborn. The Article will also address how this problem could be remedied.<sup>24</sup>

Since the early 1990s and early 2000s, there have been conversations about the potential threat of prosecution of HIV positive expectant mothers.<sup>25</sup> To date, not much has been done to eliminate that threat. Policymakers should not wait until a case surfaces to prompt change. This one is too delicate to wait. The threat is intensified today more than before.<sup>26</sup> Some of the laws are outdated,<sup>27</sup> since most were enacted in the late 1980s and early 1990s in response to the HIV/AIDS hysteria.<sup>28</sup> HIV medical treatment and prevention measures have advanced significantly since then.<sup>29</sup> Some of the laws are over twenty years old and no longer serve a good policy, are counterintuitive, and do not promote good health care practices, especially in the fight against childhood HIV.<sup>30</sup> As discussed later in the Article, being HIV positive is not a crime and an HIV positive mother or mother-to-be should not be considered or treated as a criminal.<sup>31</sup> HIV is an illness.<sup>32</sup> The

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<sup>22</sup> See e.g., TENN. CODE ANN. § 39-13-107 (West 2012); see also Sen. Reginald Tate, et al., *Summary for S.B.1391/H.B. 1295*, TENNESSEE GEN. ASSEMB., <http://wapp.capitol.tn.gov/apps/billinfo/BillSummaryArchive.aspx?BillNumber=SB1391&ga=108> (last visited Apr. 12, 2014).

<sup>23</sup> *Id.*

<sup>24</sup> See *infra* Part V.

<sup>25</sup> Lehman, et al., *supra* note 13.

<sup>26</sup> See *In re Keara J. et al.*, 376 S.W.3d 86, 95-96 (Tenn. Ct. App. 2012), *appeal denied*, (Apr. 11, 2012) discussed in Part III (B) of the Article.

<sup>27</sup> Sen. Chris Coons, *Outdated Laws Preserve HIV Stigma*, HUFFINGTON POST (Dec. 10, 2013, 11:23 AM), [http://www.huffingtonpost.com/chris-coons/outdated-laws-preserve-hi\\_b\\_4419360.html](http://www.huffingtonpost.com/chris-coons/outdated-laws-preserve-hi_b_4419360.html); see also *infra* Part III.

<sup>28</sup> Lehman, et al., *supra* note 13.

<sup>29</sup> See *HIV Prevention: Progress to Date*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nchstp/newsroom/docs/HIVFactSheets/Progress-508.pdf> (last visited Jan. 27, 2014).

<sup>30</sup> Chris Johnson, *HIV/AIDS Returning to the Spotlight?*, WASH. BLADE (Dec. 10, 2013), <http://www.washingtonblade.com/2013/12/12/is-hiv-aids-set-to-re-emerge-as-a-gay-issue/>.

<sup>31</sup> See *HIV is Not a Crime: A Community Discussion on HIV Criminalization*, CTR. FOR HIV LAW & POL'Y, <http://new.hivlawandpolicy.org/news/hiv-not-a-crime-a-community-discussion-hiv-criminalization> (last visited Mar. 12, 2014).

<sup>32</sup> See *About HIV/AIDS*, *supra* note 2.

emphasis should be prevention, proper health care, and cure, not fear, stigma, prosecution, or incarceration.<sup>33</sup> This Article advocates for the removal of these antiquated laws for normative reasons. The laws were passed based on outdated, hostile views on HIV and ultimately discourage the prevention that will most help the infants the laws were aimed at protecting.<sup>34</sup>

There is a renewed interest in HIV/AIDS issues given that better treatment is available.<sup>35</sup> The Department of Justice (DOJ), Civil Rights Division, recently published best practice guidelines to reform HIV-specific criminal laws to conform to modern science.<sup>36</sup> The DOJ's latest guidelines urge states to "reform and modernize" the laws to reflect modern science.<sup>37</sup> There is a lot of unfinished work regarding the ineffectiveness and stigma associated with HIV criminal transmission laws as a whole.<sup>38</sup> These laws are "no good" and counterintuitive in the fight against this unfortunate disease.<sup>39</sup> There have been calls to repeal these laws in their entirety.<sup>40</sup> That is not necessary. This Article re-emphasizes the gravity of this problem and suggests that one critical step forward is to amend the laws to remove any threat of prosecution of mothers who are HIV positive. Part II of the Article addresses the medical advances in HIV/AIDS treatment and prevention.<sup>41</sup> Part III examines certain laws criminalizing HIV exposure and transmission and how these laws pose undue and unwise risks to HIV-positive expectant mothers. Part IV of the Article addresses how prosecution or the threat of prosecution of expectant mothers under HIV specific criminal law would harm rather than help society.<sup>42</sup> Finally, Part V proposes a model for change in addressing these specific HIV criminal transmission statutes, particularly to remove any threat of criminal sanctions against HIV positive women who are pregnant or desire to become pregnant.

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<sup>33</sup> Roberto H. Potter & Jeffrey W. Rosky, *The Iron Fist in the Latex Glove: The Intersection of Public Health and Criminal Justice*, 38 AM. J. CRIM. JUST. 276, 281-82 (June 12, 2012), available at <http://new.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/The%20Iron%20First%20in%20the%20Latex%20Glove%20-%20The%20Intersection%20of%20Public%20Health%20and%20Criminal%20Justice%20%28Roberto%20Hugh%20Potter%20and%20Jeffrey%20W.%20Rosky%29.pdf>.

<sup>34</sup> See *infra* Part IV(A).

<sup>35</sup> *Best Practices Guide to Reform HIV-Specific Criminal Laws to Align with Scientifically-Supported Factors*, U.S. DEP'T OF JUSTICE, CIVIL RTS. DIV. (July 15, 2014), available at <http://aids.gov/federal-resources/national-hiv-aids-strategy/doj-hiv-criminal-law-best-practices-guide.pdf>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See Burris, et. al., *supra* note 21, at 515-16.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See *infra* Part II.

<sup>42</sup> See *infra* Part IV.

## II. MEDICAL ADVANCES IN HIV/AIDS TREATMENT AND PREVENTION

An estimated 36 million people globally have died from HIV/AIDS since its formal discovery in the early 1980s.<sup>43</sup> Almost the same number, 35.3 million, are living with HIV globally as of 2012.<sup>44</sup> Recent Centers for Disease Control and Prevention (CDC) estimates suggest that about 50,000 people become infected with HIV each year in the U.S.<sup>45</sup> This number is down from 130,000 annually during the mid-1990s.<sup>46</sup> Although more than 1.1 million people are living with HIV in the U.S.,<sup>47</sup> there has been tremendous success in the treatment and prevention of HIV.<sup>48</sup> On July 21, 2014, Temple University researchers announced they have eliminated the HIV virus from cultured human cells for the first time.<sup>49</sup> “More Americans are being tested for HIV than ever before,” more are seeking proper treatment and following prevention measures, and substantially less are getting infected.<sup>50</sup> One of the most recent medical studies conducted by researchers from the U.S. and Canada concluded: “A 20-year-old HIV-positive adult on antiretroviral therapy (ART) in the U.S. or Canada is expected to live into their early 70s, a life expectancy approaching that of the general population.”<sup>51</sup>

According to the CDC, “since the mid-1990s, HIV testing and preventive interventions have resulted in more than a 90% decline in the number of children

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<sup>43</sup> See *HIV/AIDS, Fact Sheet N360*, WORLD HEALTH

ORG., <http://www.who.int/mediacentre/factsheets/fs360/en/> (last updated July 2014).

<sup>44</sup> *Id.*

<sup>45</sup> See *HIV in the United States: At a Glance*, CTNS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/statistics/basics/ataglance.html> (last visited Mar. 6, 2014).

<sup>46</sup> See *HIV Prevention*, *supra* note 29.

<sup>47</sup> See *HIV in the United States*, *supra* note 45.

<sup>48</sup> See *HIV Prevention*, *supra* note 29. The CDC

estimates that that there are only four transmissions per year for every 100 people living with HIV in the United States, which means that the vast majority (at least 95 percent) of people living with HIV do not transmit the virus to anyone else. This represents an 89 percent decline in the transmission rate since the mid-1980s, reflecting the combined impact of testing, prevention counseling, and treatment efforts targeted to those living with HIV infection.

*Id.*

<sup>49</sup> See Wenhui Hu, et al., *RNA-Directed Gene Editing Specifically Eradicates Latent and Prevents New HIV-1 Infection*, PROCEEDING OF THE NAT'L ACAD. OF SCIS. (June 19, 2014), available at <http://www.pnas.org/content/early/2014/07/17/1405186111.full.pdf+html?sid=3221fd6e-d3d7-44ed-9136-682d258c8c2a>.

<sup>50</sup> *Id.*

<sup>51</sup> Hasina Samji, et al., *Closing the Gap: Increases in Life Expectancy Among Treated HIV-Positive Individuals in the United States and Canada*, PLOS ONE (Dec. 18, 2013), <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0081355>.

perinatally infected with HIV in the United States.”<sup>52</sup> A study that surveyed HIV positive urban women in the U.S. concluded that fifty-nine percent desired to have a child.<sup>53</sup> The vast majority of pediatric HIV cases in the U.S. occur as a result of mother-to-child transmission (MTCT), also known as *in utero*, vertical, or perinatal transmission.<sup>54</sup> As of 2010, approximately 217 children younger than the age of 13 years were diagnosed with HIV in the U.S.<sup>55</sup> An astounding seventy-five percent of those children were infected perinatally.<sup>56</sup> Mother-to-child transmission can occur during the duration of the pregnancy, delivery or after delivery, and by breastfeeding.<sup>57</sup> According to medical studies, if there is no intervention or proper treatment, the risk of HIV transmission from mother to fetus/infant is fifteen to thirty percent.<sup>58</sup> These studies also estimate about seventy percent of transmission may occur before delivery of the child (about twenty percent transmission before 36 weeks of pregnancy, about fifty percent from 36 weeks through labor), and about thirty percent of transmission occurs during child-birth.<sup>59</sup> The risk of transmission through breastfeeding is about five to twenty percent.<sup>60</sup> The CDC reports indicate approximately forty percent of HIV-infected infants in the U.S. are born to mothers who did not know they were infected with the virus.<sup>61</sup> As noted earlier, if expectant mothers who are infected with HIV follow the current U.S. health care guidelines, the risk of transmission to their infants could be reduced significantly, in some cases to below one percent.<sup>62</sup>

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<sup>52</sup> See *HIV Among Pregnant Women, Infants, and Children in the United States*, CTFRS. FOR DISEASE CONTROL & PREVENTION (Dec. 2012), [http://www.cdc.gov/hiv/topics/perinatal/PDF/HIV\\_WIC\\_US.pdf](http://www.cdc.gov/hiv/topics/perinatal/PDF/HIV_WIC_US.pdf).

<sup>53</sup> Sarah Finocchiaro-Kessler, et al., *Understanding High Fertility Desires and Intentions Among a Sample of Urban Women Living with HIV in the United States*, 14 *AIDS & BEHAVIOR* 1106 (Oct. 2010), available at <http://www.ncbi.nlm.nih.gov/pubmed/19908135>.

<sup>54</sup> See *HIV Infections in Infants and Children*, *supra* note 20; see also *Preventing Mother-To-Child Transmission of HIV Strategic Vision 2010-2015*, WORLD HEALTH ORG. (Feb. 2, 2010), available at [http://www.who.int/hiv/pub/mtct/strategic\\_vision/en/](http://www.who.int/hiv/pub/mtct/strategic_vision/en/). Globally, approximately 430,000 children were newly infected with HIV in 2008 alone. Amazingly, more than 90% were a result of mother to child transmission (MTCT). Without any treatment, an appalling 50% of these infected children will die before their second birthday. *Id.*

<sup>55</sup> See *HIV among Pregnant Women, Infants, and Children in the United States*, *supra* note 52.

<sup>56</sup> *Id.*; see also Michael A. Grizzi, *Compelled Antiviral Treatment of HIV Positive Pregnant Women*, 5 *UCLA WOMEN'S L.J.* 473, 480 (1995).

<sup>57</sup> See *HIV Among Pregnant Women*, *supra* note 7.

<sup>58</sup> Tolle, *supra* note 7, at 2-3.

<sup>59</sup> *Id.* at 1.

<sup>60</sup> *Id.*

<sup>61</sup> See *HIV Among Pregnant Women*, *supra* note 7.

<sup>62</sup> See *id.*; see also Tolle, *supra* note 7, at 1-2.



In March 2013, for the first time, doctors at the University of Mississippi Medical Center reported they may have cured a two and half year old baby of HIV.<sup>63</sup> The baby contracted the virus at birth from her HIV-positive mother who did not receive any prenatal HIV treatment.<sup>64</sup> Antiretroviral therapy (ART) treatment was started 30 hours after the birth of the baby.<sup>65</sup> The ART treatment continued until the baby was 18 months old.<sup>66</sup> At 30 months of age, the virus was undetectable in the baby.<sup>67</sup> Unfortunately, at almost four years old now, recent tests showed the baby still has the virus.<sup>68</sup> Treatment has resumed, the baby is tolerating the treatment, and the virus is decreasing.<sup>69</sup> In March 2014, news broke that a second baby may be cured of the virus.<sup>70</sup> This baby too contracted the virus from her HIV-positive mother. The baby is still being treated.<sup>71</sup> There is no report that the virus reappeared in the second baby. Doctors and researchers are following these two babies closely with the hope of understanding why the virus returned in the first baby.<sup>72</sup>

In any event, these two cases evidence the substantial medical progress in treatment and prevention of childhood HIV. Most importantly, even in the absence of any cure, the risk of transmission from mother to fetus/infant could be reduced significantly to below one percent with proper medical treatment.<sup>73</sup> It is crucial to capitalize on this incredible progress and not stunt or underuse such promising medical advances. Criminal threats to HIV-positive pregnant mothers will do a tremendous disservice to them and their babies by discouraging them from accessing the cutting edge available medical treatment.<sup>74</sup> The next section of the Article focuses on why criminal law is not the best means to control the spreading of HIV, especially to children.

### III. LAWS CRIMINALIZING HIV EXPOSURE OR TRANSMISSION ARE POOR WEAPONS IN THE WAR AGAINST CHILDHOOD HIV

If criminal law could really control or prevent the transmission of HIV, what a potion it would be. When people think of criminal law, they think of crimes,

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<sup>63</sup> Deborah Persaud, M.D., et al., *Absence of Detectable HIV-1 Viremia After Treatment Cessation in an Infant*, NEW ENG. J. MED. 3 (Mar. 4, 2013), available at <http://www.nejm.org/doi/full/10.1056/NEJMoa1302976#t=article>.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See Monte Morin, *Girl who was declared 'functionally cured' of HIV now has active virus*, L.A. TIMES (July 10, 2014, 4:36 P.M.), available at <http://www.latimes.com/science/sciencenow/la-sci-sn-hiv-baby-mississippi-functional-cure-sick-20140710-story.html>.

<sup>69</sup> See 'Mississippi Baby' Now Has Detectable HIV, *supra* note 8.

<sup>70</sup> Larson, *supra* note 9.

<sup>71</sup> *Id.*

<sup>72</sup> See 'Mississippi Baby' Now Has Detectable HIV, *supra* note 8.

<sup>73</sup> See *HIV Among Pregnant Women*, *supra* note 7; see also Tolle, *supra* note 7, at 1-2.

<sup>74</sup> See *infra* Part IV(A).

innocence, guilt, punishment, prison, justification, fairness, and morality to name a few. Rarely does the thought of being afflicted with a life-threatening disease cross people's minds. According to Professor Henry Hart, criminal conduct incurs a formal and solemn pronouncement of moral condemnation of the community.<sup>75</sup> Certain conduct should not be criminal simply because a legislature says it is so.<sup>76</sup> It is criminal because the community and society morally condemns it.<sup>77</sup> In essence, then, the criminal HIV exposure and transmission laws are morally condemning those who are unfortunate enough to be afflicted with HIV/AIDS.

The two dominant theories of punishment in criminal law are utility and retribution.<sup>78</sup> Utilitarian principles of punishment foster deterrence from future crimes, and also encourage rehabilitation and reformation, and hence a reduction in crimes.<sup>79</sup> On the other hand, retributive theories serve to punish for the sake of punishment.<sup>80</sup> If someone commits a criminal offense, he or she should be punished simply because he or she deserves it;<sup>81</sup> in other words, "an eye for an eye."<sup>82</sup> Arguably, the HIV criminal exposure and transmission laws would fit the latter theory of punishment, which in principle serves no good public policy and is therefore pointless. In essence, retributive justice would be the justification for such laws.<sup>83</sup>

Three professors and two research scientists with a grant from the CDC conducted an empirical study to determine whether criminal law influences certain sexual behaviors of HIV-positive individuals.<sup>84</sup> The study evaluated individuals from New York and Illinois.<sup>85</sup> New York has no specific criminal HIV transmission law even though New York uses its general criminal law to prosecute HIV related criminal behaviors.<sup>86</sup> Illinois does have a specific criminal HIV exposure/transmission statute.<sup>87</sup> The study's findings did not show that people's

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<sup>75</sup> JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW 2-3* (West, 5th ed. 2009).

<sup>76</sup> *Id.* But see ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW 12* (3d ed. 1982). These criminal law scholars defined a crime as "any social harm defined and made punishable by law." *Id.* This definition arguably fits the current HIV criminal exposure and transmission laws, and fails to account for the moral condemnation component of a crime. *Id.*

<sup>77</sup> DRESSLER, *supra* note 75, at 2-3.

<sup>78</sup> *Id.* at 31-34.

<sup>79</sup> *Id.* at 33-34.

<sup>80</sup> *Id.* at 38-39.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 38; Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 *VAND. L. REV.* 2157, 2158, 2176-80 (2001).

<sup>83</sup> See Markel, *supra* note 82, at 2158-67 (for extensive discussion of retributive justice and theories of punishment see the late Professor Dan Markel's work).

<sup>84</sup> Burris, et al., *supra* note 21, at 468-70.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

beliefs about risky sexual conduct are influenced by criminal law that proscribes unsafe sex or that which requires disclosure of HIV.<sup>88</sup> The study concluded that “criminal law is not a clearly useful intervention for promoting disclosure by HIV-positive people to their sex partners.”<sup>89</sup> “Given concerns about possible negative effects of criminal law, such as stigmatization or reluctance to cooperate with health authorities, our findings suggest caution in deploying criminal law as a behavior change intervention for seropositives.”<sup>90</sup> The study further found that criminal law “does not have a disease control function . . . .”<sup>91</sup> The authors concluded with the following statement, which is very expressive:

The criminalization of HIV has been a strange, pointless exercise in the long fight to control HIV. It has done no good; if it has done even a little harm the price has been too high. Until the day comes when the stigma of HIV, unconventional sexuality and drug use are gone, the best course for criminal law is to follow the old Hippocratic maxim, ‘first, do no harm.’<sup>92</sup>

Empirical studies need to be conducted particularly regarding the influences of criminal HIV transmission statutes on HIV-positive mothers and HIV-positive women who plan to become pregnant. The Illinois/New York study, however, does shed some light on the question of whether criminal law is the best way to manage and prevent the spread of HIV. It is not. The next section of the Article examines the different types of criminal laws that could be used to punish maternal-fetal exposure or transmission of HIV and how these laws pose undue burdens and risks to HIV-positive expectant mothers.

*A. Types of Laws that Could be Used to Punish Maternal-Fetal Exposure or Transmission of HIV*

Since the discovery of HIV/AIDS in the early 1980s, almost two-thirds of the states have enacted laws to criminalize the transmission of HIV.<sup>93</sup> “Transmission” is actually misleading, as most of the statutes only require exposure to the virus.<sup>94</sup> Globally, more than 30 countries have enacted legislation that criminalizes HIV exposure and/or transmission.<sup>95</sup> The stated purpose of these laws was to help reduce the risk of spreading the virus.<sup>96</sup> There are several categories of criminal laws in the

<sup>88</sup> *Id.*

<sup>89</sup> Burris et al., *supra* note 21, at 468-75.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 507.

<sup>92</sup> *Id.* at 516.

<sup>93</sup> Lehman et al., *supra* note 13.

<sup>94</sup> Carol L. Galletly & Steven D. Pinkerton, *Toward Rational Criminal HIV Exposure Laws*, 32 J.L. MED. & ETHICS 327, 328 (2004).

<sup>95</sup> *Vertical HIV Transmission Should Be Excluded From Criminal Prosecution*, THE FREE LIBRARY, available at <http://www.thefreelibrary.com/Vertical+HIV+transmission+should+be+excluded+from+criminal...-a0224990503> (last visited Mar. 9, 2014).

<sup>96</sup> See Galletly & Pinkerton, *supra* note 94, at 328.

U.S. that have been used to criminalize HIV exposure and/or transmission.<sup>97</sup> Three of the most popular are: 1) HIV specific laws that apply to the conduct of those who have HIV;<sup>98</sup> 2) public health laws that prohibit the spread of Sexually Transmitted Diseases (STDs),<sup>99</sup> and 3) traditional criminal laws that cover child abuse and neglect, assault, battery, and in some cases attempted murder.<sup>100</sup>

About two-thirds of the states have enacted HIV-specific criminal transmission statutes.<sup>101</sup> The majority of the states' HIV criminal transmission statutes specify the conduct prohibited.<sup>102</sup> For instance, sexual contact, intercourse, exposing certain bodily fluids, sharing medical equipment (needles/syringes), and donating blood and organs are prohibited if the person is HIV-positive.<sup>103</sup> A small minority of the states require a specific intent to infect, while the others require some form of general intent.<sup>104</sup> About half of the states provide affirmative defenses, particularly consent of the other person.<sup>105</sup> A handful of the states also criminalize low risk behaviors such as spitting, biting, and throwing of feces.<sup>106</sup> The majority of the states prohibit "exposure" of HIV; actual transmission is not necessary.<sup>107</sup> Almost all of the states classify exposure/transmission as a felony, with prison sentences between one to ten years, and in some cases up to 30 years.<sup>108</sup> The next subsection illustrates how some of the states' specific criminal transmission statutes, because of their design, pose unnecessary risks to HIV-positive expectant mothers or HIV-positive women who want to get pregnant.

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<sup>97</sup> Lehman et al., *supra* note 13.

<sup>98</sup> See, e.g., ARK. CODE ANN. § 5-14-123 (1987); CAL. HEALTH & SAFETY CODE § 1621.5 (1988); FLA. STAT. ANN. § 384.24 (West 1997); GA. CODE ANN. § 16-5-60; IDAHO CODE ANN. § 39-608 (1988); 720 ILL. COMP. STAT. 5/12-5.01 (LexisNexis 2011); IND. CODE ANN. § 16-41-7-1; IOWA CODE ANN. § 709D.3 (West 2012); LA. REV. STAT. ANN. § 14:43.5 (1987); MD. CODE ANN., HEALTH-GEN. § 18-601.1. (LexisNexis 1989); MICH. COMP. LAWS ANN. § 333.5210 (West 1989); MINN. STAT. ANN. § 609.2241 (West 1995); MISS. CODE ANN. § 97-27-14 (2007); MO. REV. STAT. § 191.677 (1988); NEV. REV. STAT. ANN. § 201.205(1) (LexisNexis 1993); S.D. CODIFIED LAWS § 22-18-31 (2005); TENN. CODE ANN. § 39-13-109 (West 2012); WASH. REV. CODE ANN. § 9A.36.011(1) (LexisNexis 1987). Thirty-three states have enacted statutes to date that criminalize the exposure and transmission of HIV. Several of these statutes are the focus of this Article. See Lehman et al., *supra* note 13, for a complete listing and comprehensive discussion of all thirty-three state statutes.

<sup>99</sup> See Lehman et al., *supra* note 98 and accompanying text.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

*B. Some HIV-Specific Criminal Transmission Statutes Pose Undue and Unwise Risks to HIV-Positive Expectant Mothers*

The threat of prosecution of HIV-positive mothers for vertical exposure or transmission of the virus is more heightened today than ever before.<sup>109</sup> This is evidenced through the renewed movement by some states to criminalize prenatal substance abuse.<sup>110</sup> As noted earlier, just this past April, after a failed attempt in 2013, Tennessee enacted a law that calls for the prosecution of a mother for assault if the mother uses an illegal drug during pregnancy and her child is born addicted or harmed as a result of the mother's illegal drug use.<sup>111</sup> That is not only a step backwards, it renews and reinforces the need for urgent reform of criminal HIV exposure and transmission laws in relation to how these laws could affect HIV-positive expectant mothers. The Article next illustrates how some of the HIV criminal exposure and transmission laws are vague and ambiguous and, as result, do not provide proper notice to HIV-positive expectant mothers. This section of the Article also considers recent cases that could have been prosecuted using HIV-specific criminal transmission laws. The next section also discusses how some of the laws are overbroad and could cover vertical HIV exposure or transmission.

1. They are Vague/Ambiguous

Although claims on the unconstitutionality of these statutes have been largely unsuccessful,<sup>112</sup> it is reasonable to still conclude that statutes like Tennessee's are vague and ambiguous in the sense that they do not sufficiently convey what specific conduct is prohibited. Tennessee's HIV criminal transmission statute is a prime example of how vague and ambiguous some of these laws are.<sup>113</sup> Tennessee's law, and others like it, arguably would leave a reasonable HIV-positive mother guessing

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<sup>109</sup> See Patricia R. Congdon, *Prenatal Prosecution: Taking A Stand for the State and the Well-Being of Its Soon-to-Be Citizens*, 5 CHARLESTON L. REV. 621, 632 (2011) (arguing that all states "should criminalize the prenatal use of alcohol, illegal drugs and tobacco").

<sup>110</sup> *Id.* at 638-40.

<sup>111</sup> See TENN. CODE ANN. § 39-13-107 (West 2012); see also Tate, et al., *supra* note 22; see also *State v. McKnight*, 576 S.E.2d 168, 172 (2003). In 2003, the Supreme Court of South Carolina upheld a homicide conviction of a mother for homicide by child abuse. The mother gave birth to a stillbirth baby girl. Pathology results showed presence of a substance from cocaine in the child. *Id.*

<sup>112</sup> See *People v. Dempsey*, 610 N.E.2d 208, 222 (Ill. App. 5th Dist. 1993). The defendant who was charged with aggravated sexual assault and criminal transmission of HIV claimed that Illinois criminal HIV transmission statute was vague. The defendant claimed that "bodily fluids" and "intimate contact with another" were insufficiently defined and therefore vague. The defendant claimed that it is not clear whether biting or spitting could be considered bodily fluids. The court held the statute was not unconstitutionally vague as applied to the defendant who ejaculated semen into the victim's mouth. The court further held that the defendant lacked standing to assert that other parts of the statute were vague because those parts did not apply to the defendant's conduct. *Id.*; see also *State v. Keene*, 629 N.W.2d 360, 366 (Iowa 2001) (Iowa's criminal HIV transmission statute not vague as applied to defendant); *State v. Stark*, 832 P.2d 109, 115 (Wash. App. Ct. 1992) (Washington State's criminal HIV transmission statute not unconstitutionally vague).

<sup>113</sup> See TENN. CODE ANN. § 39-13-109 (West 2012).

as to whether she is covered by the language of the statute and whether she could be prosecuted for vertical HIV exposure. This is an unfortunate and unnecessary fear to HIV-positive mothers.

It is well established that due process requires a defendant be given sufficient notice of what conduct is prohibited by a statute.<sup>114</sup> The U.S. Supreme Court articulated very clearly in its 1926 decision in *Connally* that:

The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.<sup>115</sup>

Some of the states' specific criminal HIV statutes are vague and do not provide the proper due process and notice delineated in *Connally*.<sup>116</sup> Consider Tennessee's HIV criminal exposure law, which is twenty years old as of May 2014.<sup>117</sup> It states, in relevant parts:

A person commits the offense<sup>118</sup> of criminal exposure<sup>119</sup> of another to human immunodeficiency virus (HIV) . . . when, knowing that the person is infected with HIV . . . the person knowingly: (1) *Engages in intimate contact with another*; (2) Transfers, donates, or provides blood, tissue, semen, organs, or other potentially infectious body fluids or parts for transfusion, transplantation, insemination, or *other administration to another in any manner that presents a significant risk of HIV* . . .

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<sup>114</sup> *Connally v. Gen. Const. Co.*, 269 U.S. 385, 393 (1926).

<sup>115</sup> *Id.*; *see also* *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964) (re-emphasizing the constitutional due process requirements of fair notice to the defendant through the statute itself of what is prohibited by the statute).

<sup>116</sup> *See id.*

<sup>117</sup> *See* 1994 Tenn. Pub. Acts 952.

<sup>118</sup> *See* TENN. CODE ANN. § 39-13-109(e)(1) (West 2012) (criminal exposure of HIV is a Class C felony).

<sup>119</sup> *See* TENN. CODE ANN. § 39-13-109(d)(1) (West 2012) ("Nothing in this section shall be construed to require the actual transmission of HIV in order for a person to have committed the offense of criminal exposure of another to HIV."); *see also* *State v. Bonds*, 189 S.W.3d 249, 258-60 (2005). An HIV infected defendant raped the victim, and was charged with aggravated rape and criminal HIV exposure to the victim. The defendant claimed that there is no exposure because there is no evidence of any of his bodily fluids on victim. The court held that there is exposure as long as the defendant subjected the victim to the risk of exposure; no transfer of bodily fluids is necessary. *Id.*

transmission . . . .<sup>120</sup> Intimate contact with another means the exposure of the body of one person to a bodily fluid of another person in any manner that presents a significant risk of HIV . . . transmission . . . .<sup>121</sup>

Tennessee defines “another” or “another person” in its homicide statutes to include “a viable fetus of a human being . . . .”<sup>122</sup> Under Tennessee’s law, a newborn or a viable fetus exposed to HIV from the mother could result in a charge against the mother. There are four different levels of mental states used in Tennessee: 1) intentional; 2) knowing; 3) reckless; and 4) criminal negligence.<sup>123</sup> “Knowing refers to a person who acts when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person’s

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<sup>120</sup> See TENN. CODE ANN. § 39-13-109(a)(2) (West 2012); cf. S.D. CODIFIED LAWS § 22-18-31 (2005). South Dakota’s criminal HIV transmission statute is very similar to that of Tennessee’s in this regard. It states it is a felony for “Any person who, knowing himself or herself to be infected with HIV, intentionally exposes another person to infection by (2) Transferring, donating, or providing blood, tissue, semen, organs, or other potentially infectious body fluids or parts for transfusion, transplantation, insemination, or *other administration to another in any manner that presents a significant risk of HIV transmission*” (emphasis added). *Id.*

<sup>121</sup> See TENN. CODE ANN. § 39-13-109(b)(2) (West 2012); cf. IOWA CODE § 709C.1 (2012). Iowa’s former HIV criminal transmission statute was almost identical to that of Tennessee’s (emphasis added).

A person commits criminal transmission of the human immunodeficiency virus if the person, knowing that the person’s human immunodeficiency virus status is positive, does any of the following: a. Engages in intimate contact with another person. b. Transfers, donates, or provides the person’s blood, tissue, semen, organs, or other potentially infectious bodily fluids for transfusion, transplantation, insemination, or *other administration to another person*. “Intimate contact” means “the intentional exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of the human immunodeficiency virus.

IOWA CODE § 709C.1(2)(b). Iowa recently amended its HIV criminal transmission law and in doing so specifically excluded HIV positive expectant mothers from criminal prosecution. It is discussed later in the Article as a model to change existing statutes like Tennessee’s. See Iowa Code Ann. § 709D.3 (2012).

<sup>122</sup> TENN. CODE ANN. § 39-13-107(a) (West 2012); see also TENN. CODE ANN. § 39-13-107(c)(1) amended by 2014 Tenn. Pub. Acts 820 (West 2012).

Nothing in subsection (a) shall apply to any *lawful* act or *lawful* omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant, or to any lawful medical or surgical procedure to which a pregnant woman consents, performed by a health care professional who is licensed to perform such procedure.

*Id.* (emphasis added). The legislative intent indicates that this exception is for abortion. See Tenn. B. Summary, 2012 Reg. Sess. (H.B. 3517). Reading the statute defining “another” or “another person” *in pari materia* with the HIV statute suggest vertical exposure may be covered. The Model Penal Code [hereinafter MPC], § 210.0 (1) defines a “human being” to mean “a person who has been born and is alive.” Even under the MPC definition of a “person”, a baby that is born and alive who is exposed to HIV from the mother could result in a charge against the mother under Tennessee’s law. *Id.*

<sup>123</sup> State v. Page, 81 S.W.3d 781, 786 (2002).

conduct when the person is aware that the conduct is reasonably certain to cause the result.”<sup>124</sup> First, if a pregnant woman knows she is HIV-positive, it is not clear if she is knowingly engaging in intimate contact with her fetus. Or, if a woman who knows she is HIV-positive and decides she wants to get pregnant, and does, it is not clear if she is knowingly engaging in intimate contact with her fetus and exposing the fetus to the virus. Or, how about a mother who knows she is HIV-positive and is breastfeeding? Is she then knowingly engaging in intimate contact with her child and potentially exposing the child to the virus? She is certainly knowingly administering breast milk to her child, which presents a significant risk of HIV exposure and/or transmission.

Both ways of criminal exposure established by Tennessee’s statute may cover mother-to-child exposure. The meaning of “intimate contact” is not clear either. Tennessee states, “[i]ntimate contact with another means the exposure of the body of one person to a bodily fluid of another person in any manner that presents a significant risk of HIV . . . transmission.”<sup>125</sup> That definition could mean “sexual contact” or “intercourse.” It could also mean the innermost contact between a mother and her fetus or newborn. Reasonable minds could differ as to the meaning of intimate contact here. Therefore, “intimate contact”<sup>126</sup> is ambiguous as used in Tennessee’s criminal HIV exposure statute. The general rule is the plain meaning of a statute controls “unless this leads to an unreasonable result or a result contrary to legislative intent.”<sup>127</sup> If a mother voluntarily gets pregnant knowing she is HIV-positive, there is no question the mother engages in intentional intimate contact with her fetus/child. A mother exposes, and, in fact, transfers her bodily fluids to her fetus

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<sup>124</sup> See TENN. CODE ANN. § 39-11-302(b) (West 2012).

<sup>125</sup> See TENN. CODE ANN. § 39-13-109(b)(2) (West 2012); cf. S.D. CODIFIED LAWS § 22-18-31 (2005). South Dakota’s criminal HIV transmission statute is very similar to that of Tennessee’s in this aspect also. It states it is a felony for “Any person who, knowing himself or herself to be infected with HIV, intentionally exposes another person to infection by: (1) Engaging in sexual intercourse or other *intimate physical contact* with another person”. *Id.* (emphasis added); see also IDAHO CODE ANN. § 39-608(1) (1988).

Any person who exposes another in any manner with the intent to infect or, knowing that he or she is or has been afflicted with acquired immunodeficiency syndrome (AIDS), AIDS related complexes (ARC), or other manifestations of human immunodeficiency virus (HIV) infection, transfers or attempts to transfer any of his or her body fluid, body tissue or organs to another person is guilty of a felony . . . .

*Id.*

<sup>126</sup> See *Intimate Definition*, MERRIAM-WEBSTER DICTIONARY ONLINE, <http://www.merriam-webster.com/dictionary/intimate> (last visited Sept. 22, 2014). Intimate defined as “belonging to or characterizing one’s deepest nature”, or “marked by very close association, contact, or familiarity”, or “marked by a warm friendship developing through long association”, or “suggesting informal warmth or privacy of a very personal or private nature.” *Id.*

<sup>127</sup> See *State v. Bonds*, 189 S.W.3d 249, 257 (2005). Courts resort to the rules or canons of statutory construction. There is nothing in the legislative history or intent to discern the true meaning of intimate contact in the Tennessee HIV transmission statute. Some courts look at the title of the statute; that is no help here. Some courts examine the purpose of the statute to try to discern the meaning of any vague or ambiguous parts of the statute. Here, Tennessee’s statute suggests that it is designed to punish and try to prevent the spread of HIV. *Id.*



and newborn in a manner that presents a significant risk of HIV transmission.<sup>128</sup> As discussed earlier, it is well established that HIV could be exposed and transferred to a fetus during pregnancy, delivery, and after delivery through breastfeeding.<sup>129</sup> Further, a mother provides, or, at least, could provide her breast milk to her child, satisfying the second prohibited conduct. Although Tennessee provides a defense to the offense of HIV exposure, it is not applicable to vertical transmission.<sup>130</sup> It is simply that the other person exposed to the virus knew the infected person was infected and consented to contact with the infected person.<sup>131</sup>

Tennessee is moving very fast and further in the wrong direction.<sup>132</sup> Given that Tennessee recently enacted a law that provides “a woman may be prosecuted for assault for the illegal use of a narcotic drug while pregnant, if her child is born addicted to or harmed by the narcotic drug.”<sup>133</sup> Nothing stops an overzealous prosecutor from using the HIV criminal exposure law to prosecute an expectant mother.<sup>134</sup> No mother, whether HIV-positive or not, should have to live with the fear of prosecution if she gets pregnant. That would very likely affect her decision whether to seek proper medical care.<sup>135</sup> Consider the case of *In re Keara J.*<sup>136</sup> In this 2012 Tennessee case, a mother and father’s parental rights were terminated because

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<sup>128</sup> A mother will need an excellent and crafty defense counsel to argue: 1) the court could invoke the “Golden Rule” here if it deems that prosecuting mothers for vertical transmission is unreasonable, unjust, or produce a ridiculous result; or 2) the court should invoke the Rule of Lenity—where if a statute is ambiguous, and leads to different interpretations, the ambiguity must be resolved in favor of the accused; or 3) that penal statutes must be strictly construed. But, as seen in the past, these canons of statutory construction have not been invoked in cases that they probably should have been. See *McBoyle v. U.S.*, 283 U.S. 25, 26-27 (1931) (the Supreme Court did not explicitly invoke the canons, but narrowed the meaning of Vehicle not to include airplanes on the principles of fair play. “[I]t is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed”).

<sup>129</sup> Tolle, *supra* note 7 at 1.

<sup>130</sup> TENN. CODE ANN. § 39-13-109(c)(1) (West 2012).

<sup>131</sup> *Id.*

<sup>132</sup> See 2011 Tenn. Pub. Acts 185 (West 2012) (amending its HIV Criminal Exposure statute in 2011 to include the hepatitis B virus (HBV) and hepatitis C along with HIV, but making no effort to clarify or exclude HIV positive mothers from its coverage).

<sup>133</sup> See TENN. CODE ANN. § 39-13-107(c)(1) (West 2012); see also Tate, et al., *supra* note 22.

<sup>134</sup> See e.g., George Kent, *The Tysons' Missing Testimony* 1-7 (Nov. 20, 1999), <http://www2.hawaii.edu/~kent/tysons.pdf>. George Kent, an expert witness for the mother and father (Tysons), restated testimony in an Oregon case, where the HIV positive mother was ordered to start AZT treatment and not to breastfeed after she gave birth to the healthy child. The Tysons refused the treatment and refused to stop breastfeeding. The Tysons were then prosecuted for “intent to harm” the child. The court ordered that the treatment be complied with, it took legal custody of the child but allowed the Tysons physical custody but prohibited breastfeeding. *Id.*

<sup>135</sup> See *HIV Among Pregnant Women*, *supra* note 7.

<sup>136</sup> See *In re Keara J. et al.*, 376 S.W.3d 86, 102 (Tenn. Ct. App. 2012), *appeal denied*, (Apr. 11, 2012).

of alleged severe child abuse and neglect to their infant.<sup>137</sup> The facts showed that the 17-month-old infant was not fed properly, lacked vital nutrition, and her growth rate was essentially stunted.<sup>138</sup> The court found the child was severely abused because the parents neglected the nutritional and physical needs of the child.<sup>139</sup> That is understandable and a reasonable decision by the court; however, the mother was HIV-positive, and the child was exposed to the virus (although the child did not develop HIV).<sup>140</sup> For unknown reasons,<sup>141</sup> the mother did not disclose her HIV status to her doctors so the child was not treated with proper antiretroviral medication.<sup>142</sup> The appellate court affirmed the trial court's findings that the:

[Mother] . . . did knowingly expose this child to a substantial risk of great bodily harm or death by means of her willful and knowing failure to disclose her HIV positive status in the course of her prenatal care, which failure caused . . . the child to be unnecessarily exposed to the HIV disease, a disease . . . [Mother] placed the child's very life in danger.<sup>143</sup>

It is remarkable to also note the appellate judge stated in the opinion that:

I just find that that act is atrocious, and I do believe it lines up squarely with the decisions we've made around here and across the state for years about drug use while pregnant. [H]ere you're not telling that you have a very serious disease so that the medical people can do something about it. And I believe that's severe abuse against the Mother.<sup>144</sup>

That is a revealing statement from the judge. It certainly underscores the threat and stigma mothers are faced with. Such statements and positions would certainly not encourage mothers to seek proper care. It would rather do just the opposite and drive them away from the critical care they need.<sup>145</sup> This case was in the context of a termination of parental rights based on Tennessee's child abuse laws.<sup>146</sup> This mother could have been prosecuted for exposure of HIV to her child under Tennessee's HIV criminal exposure described earlier. Such prosecution or threat of prosecution serves no good policy. It is likely that the mother would be more reluctant to report her HIV status for fear of criminal charges and thus affect the well-being of the child.

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<sup>137</sup> *Id.* at 101-102.

<sup>138</sup> *Id.* at 88.

<sup>139</sup> *Id.* at 96-97.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 93. The foster care case manager stated she "believed that the parents lack the mental and emotional capacity to understand and provide basic medical, nutritional, developmental care for the kids". *Id.* One can speculate that the mother's apparent illnesses could have been blamed in part for her not reporting that she was HIV positive.

<sup>142</sup> *See id.* at 96-97.

<sup>143</sup> *Id.* at 95.

<sup>144</sup> *Id.*

<sup>145</sup> *See infra* Part IV(A).

<sup>146</sup> *See In re Keara J. et al.*, 376 S.W.3d at 95-96.

Take the following Florida case as another telling example. In 2008, the first criminal prosecution of a mother for mother-to-child transmission of HIV was reported.<sup>147</sup> The Florida mother of Manatee County had two sons. The mother knew she was HIV-positive before she had her children. Her first son was born in 2001 and received proper medical preventive treatments and fortunately did not contract the virus.<sup>148</sup> Three years later she had a second son who unfortunately acquired the virus. The mother claimed she feared and did not want the child's father to know of her HIV status; hence, she did not report nor seek the necessary medical care for her second child.<sup>149</sup> The mother was charged with felony child neglect for failure to seek the necessary medical services to help prevent transmission of HIV to her child. The mother pled guilty to felony child neglect. She could have faced up to 15 years imprisonment for transmitting the virus to the child and not seeking care.<sup>150</sup> Fortunately, prosecutors agreed to two years of probation instead, so she could care for the child.<sup>151</sup>

It was reported that one of the officers of the Manatee County Sheriff's Office stated: "Mothers should be told early on that criminal charges are possible if appropriate care is not provided."<sup>152</sup> That is an unfortunate statement of fear and threat. This case as a whole was troubling. No one seemed to be concerned about the mother's fears. It is very reasonable for this mother and other mothers alike to be afraid of criminal prosecution, and, therefore, be afraid to report their HIV status and seek appropriate care for their fetus or newborn.<sup>153</sup> This case was prosecuted using Florida's child neglect laws.<sup>154</sup> Fortunately, Florida's criminal HIV transmission statute is specific to certain sexual conduct or offenses.<sup>155</sup> If Florida's criminal HIV transmission statute was similar to that of Tennessee's, however, a prosecutor could

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<sup>147</sup> Frank Gluck, *Mother Who Gave HIV to Newborn Gets Probation*, HERALD TRIBUNE (Oct. 2, 2008), <http://criminalhivtransmission.blogspot.com/2008/10/us-florida-woman-guilty-of-mother-to.html>.

<sup>148</sup> Michael A. Scarcella, *Officials: Woman with HIV Didn't Seek Care for Baby*, HERALD TRIBUNE (Jan. 11, 2008), <http://criminalhivtransmission.blogspot.com/2008/10/us-florida-woman-guilty-of-mother-to.html>.

<sup>149</sup> *Id.*

<sup>150</sup> Gluck, *supra* note 147.

<sup>151</sup> *Id.*

<sup>152</sup> Scarcella, *supra* note 148.

<sup>153</sup> *Cf. In re Welfare of Child of J.M.*, No. A13-0992, 2013 WL 5778225, at \*6-7 (Minn. Ct. App. Oct. 28, 2013). The court affirmed that a child who tested positive for HIV shortly after birth needed protective services. The mother was diagnosed with HIV when she was 3-months old. The mother received antiretroviral treatment but developed severe leg pains so her parents discontinued the HIV treatment. The mother, now an adult, became pregnant in 2012. She did not disclose her HIV status to her medical service providers because she did not believe the HIV treatments were effective. The mother did not keep follow up appointments for treatment of her child. *Id.*

<sup>154</sup> Scarcella, *supra* note 148.

<sup>155</sup> *See* FLA. STAT. ANN. § 775.0877 (West 2010); *see also* FLA. STAT. ANN. § 384.24(2) (West 1997) (outlawing transmission through sexual conduct).

have brought the same charge using the HIV statute, which would have only served to enhance the mother's fears as opposed to encouraging proper treatment.

A rare case where the judiciary got it right is *N.J. Div. of Youth & Family Servs. v. L.V. & C.M.*<sup>156</sup> New Jersey's Division of Youth and Family Services (DYFS) filed a complaint against a mother for child abuse and neglect of her newborn.<sup>157</sup> The mother was infected with HIV and did not want to take recommended medication during pregnancy to reduce the risk of transferring HIV to the child.<sup>158</sup> The mother found out she was HIV-positive while pregnant.<sup>159</sup> She refused to take the recommended medication because she was in disbelief of her HIV-positive status.<sup>160</sup> The court held that the mother's refusal to take the recommended medication during pregnancy was not abuse or neglect.<sup>161</sup> The mother had a constitutional right to refuse such treatment even at risk to the unborn child.<sup>162</sup> There was no evidence the child had HIV or would get HIV, or that the child would not get HIV because of the treatment *in utero*.<sup>163</sup> The court focused on whether there was any injury to the child after birth and concluded there was no injury to the child as a result of refusal to take the medications.<sup>164</sup> The mother also agreed to present and future medical treatment so no future injury would be likely.<sup>165</sup> The child abuse and neglect statute in New Jersey requires that the parent caused injury to the child and, if not, is likely to do so in the future.<sup>166</sup> The court held "DYFS cannot, therefore, interfere with a competent woman's control of her body and fetus by holding the Act's provisions over her head as a 'sword of Damocles.'<sup>167</sup> The decisions she makes as to what medications she will take during her pregnancy (as compared to controlled dangerous substances) are left solely to her discretion after consultation with her treating physicians.<sup>168</sup> The right to make that decision is part of her constitutional right to privacy, which includes her right to control her own body and destiny.<sup>169</sup> Those rights include the ability to refuse medical treatment, even at the risk of her death or the termination of

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<sup>156</sup> *N.J. Div. of Youth & Family Servs. v. L.V. & C.M.*, 889 A.2d 1153, 1153 (N.J. Super. Ct. Ch. Div. 2005).

<sup>157</sup> *Id.* at 1154.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 1155.

<sup>160</sup> *Id.*

<sup>161</sup> *N.J. Div. of Youth & Family Servs.*, 889 A.2d at 1155.

<sup>162</sup> *Id.* at 1158.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 1159.

<sup>166</sup> *Id.* at 1157.

<sup>167</sup> *Id.* at 1158.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

her pregnancy.”<sup>170</sup> The outcome of this case, very likely, would have been different in a Tennessee court.

## 2. They are Overbroad

Maryland’s criminal HIV transmission statute is a prime example of an overbroad law.<sup>171</sup> It is not only overbroad, it is mind-boggling.<sup>172</sup> It was enacted in 1989 and never changed since.<sup>173</sup> The statute states: “An individual who has the human immunodeficiency virus may not knowingly transfer or attempt to transfer the human immunodeficiency virus to another individual.”<sup>174</sup> If convicted, a person could face a fine of up to \$2,500 or a prison term of up to three years, or even both.<sup>175</sup> Interestingly, Maryland does not even provide an affirmative defense to this offense.<sup>176</sup> The majority of the thirty-three states provide consent as a defense.<sup>177</sup> The only optimistic news about Maryland’s HIV criminal transmission statute is the offense is classified as a misdemeanor, not a felony like many other states.<sup>178</sup> Nevertheless, up to three years imprisonment still does not justify the all-encompassing and unclear language of the statute. Although Maryland’s law requires a heightened mental state of “knowingly” transferring or “attempt”<sup>179</sup> to transfer, it

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<sup>170</sup> *Id.*

<sup>171</sup> MD. CODE ANN., HEALTH-GEN. § 18-601.1. (LexisNexis 2014).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> § 18-601.1.(a); *cf.* MONT. CODE ANN. §§ 50-18-112, 101 (2014). Montana’s criminal HIV transmission law is similarly vague and is found within the state’s sexually transmitted disease prohibition that states: “A person infected with a sexually transmitted disease may not knowingly expose another person to infection.” HIV is included in the definition of sexually transmitted diseases. *Id.*; MISS. CODE ANN. § 97-27-14(1) (2014). Mississippi’s criminal HIV transmission law is as vague. It provides “It shall be unlawful for any person to knowingly expose another person to human immunodeficiency virus (HIV) . . . . A violation of this subsection shall be a felony.” *Id.*; WASH. REV. CODE § 9A.36.011(1) (2014). Washington State’s is similarly vague. It states “A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: (b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus . . . .” *Id.*; NEV. REV. STAT. § 201.205(1) (2014). Nevada’s is also vague, stating

A person who, after testing positive in a test approved by the State Board of Health for exposure to the human immunodeficiency virus and receiving actual notice of that fact, intentionally, knowingly or willfully engages in conduct in a manner that is intended or likely to transmit the disease to another person is guilty of a category B felony . . . .

*Id.*

<sup>175</sup> § 18-601.1.(b).

<sup>176</sup> Sara Klemm, *Keeping Prevention in the Crosshairs: A Better HIV Exposure Law for Maryland*, 13 J. HEALTH CARE L. & POL’Y 495, 520 (2010).

<sup>177</sup> *Id.*

<sup>178</sup> *See* § 18-601.1.(b).

<sup>179</sup> Criminal attempt is a specific intent offense. *See Bruce v. State*, 566 A.2d 103, 104 (Md. App. Ct. 1989).

does not define the means of “transfer.”<sup>180</sup> Transfer could mean more than simply transfer through sexual contact. It could include contact as with a mother and her fetus or newborn. The interpretation and speculation should not be left solely to a prosecutor willing to bring such a case against a HIV-positive pregnant woman who knows she is HIV-positive.

Illinois’ HIV criminal transmission statute is another example of an overbroad law.<sup>181</sup> Illinois amended its HIV criminal transmission statute in 2012.<sup>182</sup> It is moving in the right direction, but more needs to be done. The 2012 amendment made two very important changes. First, it made HIV criminal transmission a specific intent crime.<sup>183</sup> It was a general intent crime prior to the amendment.<sup>184</sup> Consider the exchange below between two Illinois State Representatives during the debates regarding the 2012 amendments:

Representative Franks: And this is my concern in the drafting. I think there may be an error in the drafting and maybe I'm wrong, but I want you to . . . I want you to look at this. Where it says a person commits Criminal Transmission of HIV when he or she with the specific intent to commit the offense, which is a specific intent crime presently it is a general intent crime. So, this would be increasing the burden of proof to a specific intent crime which would actually make it harder to prosecute. Wouldn't it be better to leave this as a general intent crime?<sup>185</sup>

Representative Sacia: It makes it specific, I'm being advised by counsel, Representative, but also, maybe if . . . let . . . let me share this with you. It also cleans up and modernizes the language for transmission of HIV to reflect what science tells us are methods of transmission; that is, spitting on someone is not a method of transmission. I think you would agree, Representative Franks, years ago when HIV started becoming an issue that was kind of the belief.<sup>186</sup>

Representative Sacia’s comments about modernizing the language for HIV criminal transmission laws to conform to the scientific development of treatment and prevention of HIV speaks volumes as to what needs to be done regarding updating and reforming the HIV specific criminal laws across the nation.<sup>187</sup> Remarkably, the 2012 amendment deleted criminal transmission through “intimate contact with another.”<sup>188</sup> The new language criminalizes HIV transmission through “sexual

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<sup>180</sup> See *supra* Part II. HIV could be transferred from mother to fetus/child during pregnancy, labor and delivery and afterbirth through breast milk.

<sup>181</sup> 720 ILL. COMP. STAT. ANN. 5/12-5.01. (LexisNexis 2011).

<sup>182</sup> See 2012 Ill. Legis. Serv. P.A. 97-1046 (S.B. 3673) (West 2012).

<sup>183</sup> Ill. House Transcript, 2012 Reg. Sess. No. 143 (West May 25, 2012).

<sup>184</sup> *Id.* at 127.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> See 2012 Ill. Legis. Serv. P.A. 97-1046 (S.B. 3673) (West 2012).

activity with another without the use of a condom knowing that he or she is infected with HIV.”<sup>189</sup> This amendment reduces the threat of prosecution of an HIV-positive mother and moves away from the ambiguous language that remains in the Tennessee statute. It is a pity, though, that another arguably vague aspect of the Illinois statute was not clarified. A person could still expose or transmit HIV when he or she provides his or her blood “or other potentially infectious bodily fluids for transfusion . . . or other administration to another . . . .”<sup>190</sup> The new version of the statute reads, in part:

A person commits criminal transmission of HIV when he or she, with the specific intent to commit the offense . . . transfers, donates, or provides his or her blood, tissue, semen, organs, or other potentially infectious body fluids for transfusion, transplantation, insemination, or *other administration to another knowing that he or she is infected with HIV.*<sup>191</sup>

HIV-positive mothers are still at risk of prosecution even with the changes. Prosecutors will have to prove specific intent. “Belief on the part of an actor that certain results would follow his conduct is sufficient to show a specific intent for that result to occur.”<sup>192</sup> A mother provides her “bodily fluids”<sup>193</sup> to her fetus *in utero* and after birth. If a woman is HIV-positive, knows she has the virus, and voluntarily becomes pregnant, she is administering bodily fluids to the fetus or newborn. She also knows such administration of bodily fluids to her fetus or newborn is very likely to expose or transmit HIV to the fetus or newborn. Illinois’ amendments are a step in the right direction, but still not foolproof.

#### IV. PROSECUTION OF, OR THE THREAT OF PROSECUTION OF EXPECTANT MOTHERS UNDER HIV-SPECIFIC EXPOSURE AND TRANSMISSION LAWS WOULD HARM RATHER THAN HELP SOCIETY

Prosecution or just the mere threat of prosecution of expectant mothers under HIV specific exposure and transmission laws would harm, instead of help, society.<sup>194</sup> As noted earlier, the CDC reported that approximately forty percent of HIV-infected infants in the U.S. are born to mothers who did not know they were infected with the virus.<sup>195</sup> Further, if expectant mothers who are infected with HIV follow the current U.S. health care guidelines, the risk of transmission to their infants could be reduced significantly, in some cases to below one percent.<sup>196</sup> That is incredible progress;

<sup>189</sup> *Id.*

<sup>190</sup> 720 ILL. COMP. STAT. 5/12-5.01 (2014).

<sup>191</sup> *Id.* (emphasis added); *see also* 12-5.01(c). “Nothing in this Section shall be construed to require that an infection with HIV has occurred in order for a person to have committed criminal transmission of HIV.” *Id.*; 12-5.01(d) (consent is an affirmative defense); 12-5.01(e) (criminal transmission is a Class 2 felony).

<sup>192</sup> *People v. Olbrot*, 435 N.E.2d 1242, 1250 (Ill. App. Ct. 1982).

<sup>193</sup> Illinois has not defined “bodily fluids.” However, “bodily fluids” may include blood and breast milk, among other fluids. *See supra* Part II.

<sup>194</sup> *See infra* note 205.

<sup>195</sup> *See Tolle, supra* note 7, at 2.

<sup>196</sup> *Id.* at 2-3.

however, if an expectant mother is concerned she may be HIV-positive, she may be reluctant to get tested for fear of prosecution. That lack of testing will inevitably result in the absence of necessary treatment and, in turn, deprive a child of the more than ninety-eight percent chance of not contracting the virus from the mother.<sup>197</sup> The subsections below further discuss how criminalization is ineffective in the prevention and treatment of vertical HIV transmission and, as a consequence, harms rather than helps the fetus *in utero*. Additionally, prosecution or threat of prosecution under these laws would undoubtedly have a disparate impact on minority women.

*A. Criminalization Is Ineffective and Likely Medically Harmful to the Child In Utero*

Take a lesson from what is already known about criminal sanctions against mothers who use illicit drugs during pregnancy.<sup>198</sup> Most of the medical community in the U.S. agrees that criminal prosecution, the threat of criminal prosecution, or threat of incarceration of pregnant women does not deter the use of illicit drugs, but rather alienates women from proper medical treatment.<sup>199</sup> Such alienation affects both the health of the mother as well as the child.<sup>200</sup> The United States Supreme Court acknowledged the “near consensus” in the medical community that programs with a threat of criminal prosecution discourage “women who use drugs from seeking prenatal care, harm, rather than advance, the cause of prenatal health.”<sup>201</sup> According to the American Medical Association, “Pregnant women will be likely to avoid seeking prenatal or other medical care for fear that their physicians’ knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment.”<sup>202</sup> Similarly, the American Academy of Pediatrics stated, “The [Academy] is concerned that [arresting drug addicted women who become pregnant] may discourage mothers and their infants from receiving the very medical care and social support systems that are crucial to their treatment.”<sup>203</sup> Law enforcement maintains prosecution, or threat of prosecution, is an effective mechanism to dissuade pregnant women’s illicit drugs use;<sup>204</sup>

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<sup>197</sup> *Id.*

<sup>198</sup> See *infra* note 199.

<sup>199</sup> Criminal sanctions will alienate pregnant women who use illicit drugs during pregnancy from seeking proper medical treatment. See *Legal Interventions During Pregnancy*, REP. AM. MED. ASS’N. BD. TR., 264 JAMA 2663, 2667 (1990), available at <http://jama.jamanetwork.com/article.aspx?articleid=384076>; *Drug Exposed Infants*, AM. ACAD. PEDIATRICS, COMM. SUBSTANCE ABUSE, 86 PEDIATRICS 639, 641 (1990), available at <http://pediatrics.aappublications.org/content/86/4/639.full.pdf>; *Committee Opinion 321 Maternal Decision Making, Ethics and the Law*, AM. C. OBSTETRICIANS AND GYNECOLOGISTS, COMM. ETHICS, 106 OBSTETRICS & GYNECOLOGY 1127 (2005), pp. 1-8, available at <http://www.acog.org/~media/Committee%20Opinions/Committee%20on%20Ethics/co321.pdf?dmc=1>.

<sup>200</sup> *Legal Interventions During Pregnancy*, *supra* note 199.

<sup>201</sup> *Ferguson v. City of Charleston*, 532 U.S. 67, 84 n.23 (2001).

<sup>202</sup> *Legal Interventions During Pregnancy*, *supra* note 199.

<sup>203</sup> *Drug Exposed Infants*, *supra* note 199, at 641.

<sup>204</sup> Jeanne Flavin & Lynn M. Paltrow, *Punishing Pregnant Drug-Using Women: Defying Law, Medicine, and Common Sense*, 29 J. ADDICTIVE DISEASES 231, 234 (Apr. 20, 2010), available at



however, “in reality, these measures are more likely to discourage pregnant women from seeking prenatal care or from being completely forthcoming with their health care providers.”<sup>205</sup> “There is no evidence that dealing with this issue via the criminal justice system does anything to help the fetuses these women are carrying or the babies they bear.”<sup>206</sup> Others have also argued that allowing the criminal justice system to deal with pregnant women’s substance abuse will trigger a slippery slope for prosecutors.<sup>207</sup>

Analogously, the threat of or prosecution of pregnant mothers who are HIV-positive could very likely cause those mothers to avoid seeking or to refuse proper medical care. This would in essence prevent both the mother and the fetus or child from receiving proper medical care. It would inevitably prevent the child from receiving the benefits of proper treatment. Lack of proper treatment will hurt the child. The child will no longer have access to the less than one percent chance of contracting the virus from his or her mother. That is ruthless, irrational, and just bad policy that does not promote proper health care for a pregnant HIV-positive mother or her child.

*B. Prosecution Under These Laws Would Have a Disparate Impact on Minority Women*

For about two decades, white gay males were associated with HIV and AIDS.<sup>208</sup> For the past decade, African Americans have taken that spot.<sup>209</sup> African Americans, more than any other racial or ethnic group, have the highest rate of HIV infections in the U.S.<sup>210</sup> Although blacks account for approximately fourteen percent of the U.S. population, almost half, forty-four percent to be exact, of all new HIV infections in 2010 were among blacks.<sup>211</sup> Hispanics make up the second largest ethnic group of the population with the highest HIV infections in the U.S. as of 2010.<sup>212</sup> In terms of

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[http://advocatesforpregnantwomen.org/publications/Flavin\\_Paltrow2010\\_Journal%20of%20Addictive%20Diseases.pdf](http://advocatesforpregnantwomen.org/publications/Flavin_Paltrow2010_Journal%20of%20Addictive%20Diseases.pdf).

<sup>205</sup> *Id.*; see also Linda C. Fentiman, *Pursuing the Perfect Mother: Why America's Criminalization of Maternal Substance Abuse Is Not the Answer—A Comparative Legal Analysis*, 15 MICH. J. GENDER & L. 389, 409 (2009). “Most physicians and public health authorities agree that threatening drug-abusing pregnant women with criminal prosecution, rather than providing them with social and economic support and effective drug rehabilitation, will drive women away from treatment, out of fear that they could lose their babies or be imprisoned.” *Id.*

<sup>206</sup> Seema Mohapatra, JD, MPH, *Unshackling Addiction: A Public Health Approach to Drug Use During Pregnancy*, 26 WIS. J.L. GENDER & SOC'Y. 241, 244 (2011).

<sup>207</sup> Fentiman, *supra* note 205, at 410.

<sup>208</sup> Gloria J. Browne-Marshall, *A Cautionary Tale: Black Women, Criminal Justice, and HIV*, 19 DUKE J. GENDER L. & POL'Y 407, 407 (2012).

<sup>209</sup> *Id.*

<sup>210</sup> See *HIV Among Pregnant Women*, *supra* note 7.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

gender, women have a higher rate of HIV infection in the U.S than men.<sup>213</sup> One out of every four people infected with HIV in the U.S. is a woman.<sup>214</sup> Black and Hispanic women continue to be among the highest number of women infected in the U.S.<sup>215</sup> One very important fact to note is “only about half of women who are diagnosed with HIV are in care, and even fewer (4 in 10) have the virus under control.”<sup>216</sup>

The CDC suggested there are certain factors that account for these disparities among the black and Latino populations in the U.S.<sup>217</sup> One main factor is that an already high number of HIV-positive individuals live among these populations and communities, so logically a high chance of spreading the disease exists, especially through sexual conduct.<sup>218</sup> The CDC also cited factors including economic hardship,<sup>219</sup> lack of proper health care and health insurance, and therefore a lack of testing, prevention, and treatment measures.<sup>220</sup> Other factors included the stigma associated with HIV and AIDS and how it may lead to not seeking testing, prevention, and proper treatment.<sup>221</sup>

Given this background, it is only logical to conclude that minorities as a whole, especially minority women,<sup>222</sup> who are at a higher risk of being infected with HIV,

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<sup>213</sup> *Id.*; see also *HIV Among Women*, CTRS. FOR DISEASE CONTROL & PREVENTION, Mar. 6, 2014, available at [www.cdc.gov/hiv/pdf/risk\\_women.pdf](http://www.cdc.gov/hiv/pdf/risk_women.pdf) (the majority of the women are infected as a result of heterosexual contact).

<sup>214</sup> See *HIV Among Women*, *supra* note 213.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> See *New HIV Infections in the United States*, CTRS. FOR DISEASE CONTROL & PREVENTION (December 2012), [www.cdc.gov/nchhstp/newsroom/docs/2012/hiv-infections-2007-2010.pdf](http://www.cdc.gov/nchhstp/newsroom/docs/2012/hiv-infections-2007-2010.pdf).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*; see also Joanne E. Brosh & Monica K. Miller, *Regulating Pregnancy Behaviors: How the Constitutional Rights of Minority Women Are Disproportionately Compromised*, 16 AM. U. J. GENDER SOC. POL'Y & L. 437, 447 (2008) (introducing studies that show “personal characteristics, such as education or income level, have a significant influence on the decisions minority women make about pregnancy behavior and could increase the probability that they will be affected by legal regulation of pregnancy.”).

<sup>220</sup> See *New HIV Infections in the United States*, *supra* note 217.

<sup>221</sup> *Id.*; see also Browne-Marshall, *supra* note 208, at 416-18 (noting that because a high number of black men are incarcerated, many contract HIV while in prison. Upon their release and return to their homes, they engage in relationships and sexual conduct which spreads the disease without the knowledge that they are HIV positive).

<sup>222</sup> See Mary Anne Bobinski, *Women and HIV: A Gender-Based Analysis of A Disease and Its Legal Regulation*, 3 TEX. J. WOMEN & L. 7, 18-27 (1994) (discussing how medical policies discriminate against women and pregnant women); see also Brook Kelly, *The Modern HIV/aids Epidemic and Human Rights in the United States: A Lens into Lingering Gender, Race, and Health Disparities and Cutting Edge Approaches to Justice*, 41 U. BALT. L. REV. 355, 355-56 (2012).

would be most vulnerable to prosecution under the states' criminal HIV transmission statutes.<sup>223</sup> Unfortunately, the threat of prosecution will continue to propel these groups away from proper HIV related education, screening, testing, diagnosis, treatment, and prevention.

#### V. A MODEL FOR CHANGE

This Article does not contend that all HIV criminal exposure and transmission laws are debauched or useless. Indeed, states do need to regulate certain criminal conduct and high-risk activities, such as sexual conduct, where the virus could be transferred. There is no call to completely repeal these states' statutes. Rather, these laws need to be amended to be more precise in their language in order to remove any criminal threat against an expectant mother who is HIV-positive. Comprehensive amendment to the statutes should consider the following factors. First, the amendment should explicitly and completely exclude mother-to-child exposure or transmission of the virus, whether during pregnancy, delivery, or after birth by breastfeeding. Second, low risk behaviors should also be excluded.<sup>224</sup> For instance, biting, spitting, and other behaviors that have little or no risk of exposing or transmitting the virus should not be criminalized.<sup>225</sup> Third, the mens rea required by the statutes should be limited to a heightened standard, perhaps that of specific intent as recently adopted by Illinois.<sup>226</sup> Fourth, the punishment should be proportional to the offense.<sup>227</sup> And fifth, appropriate defenses should be included.<sup>228</sup> The remainder of this Article focuses on the first point and articulates how to specifically exclude mother-to-child exposure or transmission of the virus from criminal HIV transmission statutes.

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The HIV epidemic is driven by the same social and structural factors that perpetuate current inequalities found in the United States, and as the epidemic shifted from a majority white, gay male disease to a disease that permeates the black community, the public health, policy, and legal response has not kept pace. As a result, new incidence rates are highest among poor people of color in the United States who also have the worst health outcomes, including a disproportionate number of AIDS-related illnesses and high mortality.

*Id.*; see also Marcie S. Rubin et al., *Examination of Inequalities in HIV/AIDS Mortality in the United States from a Fundamental Cause Perspective*, 100 AM. J. PUB. HEALTH 1053, 1053-54 (June 2009), available at [www.ncbi.nlm.nih.gov/pmc/articles/PMC2866621/pdf/1053.pdf](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2866621/pdf/1053.pdf). Researchers found a higher disparity in HIV/AIDS mortality when considering socioeconomic status and comparing Blacks to Whites during and after the highly active antiretroviral therapy (HAART). The mortality rates had the greatest decline among Whites. *Id.*

<sup>223</sup> See Lisa M. Keels, "Substantially Limited:" *The Reproductive Rights of Women Living with HIV/Aids*, 39 U. BALT. L. REV. 389, 389 (2010) ("Women living with HIV/AIDS are frequently marginalized because of gender, health status, and, often, socioeconomic class.").

<sup>224</sup> See Margo Kaplan, *Rethinking HIV-Exposure Crimes*, 87 IND. L.J. 1517, 1548-50 (2012).

<sup>225</sup> *Id.* at 1552.

<sup>226</sup> *Id.* at 1544-46; see also *supra* Part III(B)(2).

<sup>227</sup> See Kaplan, *supra* note 224, at 1551.

<sup>228</sup> *Id.*

Oklahoma and, most recently, Iowa's criminal HIV transmission statutes are good models to start with.<sup>229</sup> Oklahoma's is not perfect, but it does reflect the first point of amendment recommended above. The statute, in relevant parts, states:

It shall be unlawful for any person knowing that he or she has Acquired Immune Deficiency Syndrome (AIDS) or is a carrier of the human immunodeficiency virus (HIV) and *with intent to infect* another, to engage in conduct reasonably likely to result in the transfer of the person's own blood, bodily fluids containing visible blood, semen, or vaginal secretions into the bloodstream of another, or through the skin or other membranes of another person, *except during in utero transmission of blood or bodily fluids . . .*<sup>230</sup>

Although it does not address potential exposure or transmission after birth, it recognizes *in utero* transmission.<sup>231</sup> Oklahoma amended this law in 1991.<sup>232</sup> Prior to the amendment, the statute read: "It shall be unlawful for any person to engage in any activity with the intent to infect or cause to be infected any other person with the human immunodeficiency virus."<sup>233</sup> Although no reports in the legislative history of the Oklahoma's statute confirm this, it is evident the lawmakers recognized the concern that these laws posed a threat of criminal prosecution to HIV-positive mothers, and that is not good policy, hence the amendment.

An improved, more comprehensive model to follow is that of Iowa's recently enacted Contagious or Infectious Disease Transmission Act (Transmission Act).<sup>234</sup> As discussed earlier, Iowa's former criminal HIV transmission law was almost identical to Tennessee's.<sup>235</sup> On May 30, 2014, Iowa enacted its Transmission Act and repealed its predecessor, section 709C.<sup>236</sup> Iowa's Transmission Act addresses other contagious diseases including HIV.<sup>237</sup> It also limits exposure to conduct that "poses a substantial risk of transmission."<sup>238</sup> Further, it provides for different degrees of felonies and punishment depending on whether the virus was actually transmitted and on the level of mens rea by the defendant.<sup>239</sup>

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<sup>229</sup> See OKLA. STAT. ANN. tit. 21, § 1192.1(A) (West 2014); IOWA CODE ANN. §§ 709D.1-3 (West 2014).

<sup>230</sup> OKLA. STAT. ANN. tit. 21, § 1192.1(A) (West 2014) (emphasis added).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> 1988 Okla. Sess. Laws 153. Oklahoma's former HIV criminal transmission statute is very similar to Maryland's present statute. See MD. CODE ANN., HEALTH-GEN. § 18-601.1. (LexisNexis 1989).

<sup>234</sup> IOWA CODE ANN. § 709D.1 (West 2014).

<sup>235</sup> See *supra* note 121.

<sup>236</sup> § 709D.1.

<sup>237</sup> § 709D.2(1).

<sup>238</sup> § 709D.2(2).

<sup>239</sup> § 709D.3.

Most important and relevant to this Article is that Iowa recognized the threat its former law posed to HIV-positive pregnant women and explicitly removed it.<sup>240</sup> Iowa included the following provision in its new Transmission Act: “*The act of becoming pregnant while infected with a contagious or infectious disease, continuing a pregnancy while infected with a contagious or infectious disease, or declining treatment for a contagious or infectious disease during pregnancy shall not constitute a crime under this chapter.*”<sup>241</sup> This provision should encourage HIV-positive expectant mothers to seek treatment for themselves and their fetuses/infants and not force them to shy away since there is no longer a threat of prosecution in Iowa. This change promotes good public health policy and attempts to remove the stigma associated HIV.<sup>242</sup> States should adopt this language, as it will eliminate the threat of prosecution against HIV-positive expectant mothers.

It is worth noting portions of the debate on the bill<sup>243</sup> that became Iowa’s new Transmission Act. The debate reaffirms the need to update outdated HIV criminal transmission laws and to not stigmatize those who are afflicted with HIV. Consider the statements of Iowa Senators Robert Hogg and Matt McCoy on Iowa’s former criminal HIV transmission statute and the urgent need for the new Transmission Act:

Senator Hogg: Iowa has a badly outdated and draconian law on the books right now, section 709C. What it says is that if somebody has HIV . . . and engages in conduct that has any potential to transmit HIV, that person can be charged with and convicted of a class B felony of up to 25 years in prison regardless of whether the person intended to transmit the disease, regardless of whether the disease is transmitted, regardless of what the person has done to control the transmission of the disease, that is a badly outdated and draconian law. Modern medicine has changed, our understanding of HIV has improved, and our law needs to be updated to reflect these changes.<sup>244</sup>

Senator McCoy: I believe that today we are taking a step forward, from a public health standpoint we are sending a message that we will no longer stigmatize one particular group of individuals in our state . . . we want to secondly encourage testing and taking responsibility for one’s health.<sup>245</sup>

Iowa’s Bill 2297 passed unanimously in both the House and Senate.<sup>246</sup> It was a bi-partisan effort that could and should be replicated by other states. Bill 2297 also

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<sup>240</sup> § 709D.3(5).

<sup>241</sup> *Id.* (emphasis added).

<sup>242</sup> *See infra* note 247 and accompanying text.

<sup>243</sup> *See* SF 2297, 85th Gen. Assemb., Reg. Sess. (Iowa 2014).

<sup>244</sup> *Deb. SF 2297* (Iowa Senate Video Archive, Feb. 27, 2014), <http://coolice.legis.iowa.gov/Cool-ICE/default.asp?Category=senate&Service=ArchiveBill&vid=924&offset=1174&iDate=2014-02-27&hbill=SF2297>.

<sup>245</sup> *Id.*

<sup>246</sup> Iowa Legislature, *Bill History for SF 2297* (May 30, 2014), available at <http://coolice.legis.iowa.gov/Cool-ICE/default.asp?Category=BillInfo&Service=DspHistory&var=SF&key=0815B&GA=85> (last visited July 23, 2014).

received tremendous support from independent advocacy groups.<sup>247</sup> There is political support for such changes. Iowa's new Transmission Act also confirms to the recent DOJ guidelines.<sup>248</sup> States with outdated, far-reaching, and ambiguous HIV-specific criminal transmission laws should consider Iowa's new Transmission Act as a model.

#### VI. CONCLUSION

The stakes are too high for HIV-positive mothers and HIV-positive women who want to become pregnant. HIV is not a crime. It is a life-threatening disease. A mother living with HIV lives with stigma and fear.<sup>249</sup> That is enough as it is. To live with HIV, stigma, fear, and the threat of criminal prosecution is beyond comprehension.<sup>250</sup> States need to act and act now, especially because of the incredible positive medical advancement in HIV treatment and prevention. States also need to act now because of the new drive to prosecute mothers for injury to children as a result of perinatal substance abuse.<sup>251</sup> It may be a matter of time before a mother is prosecuted for exposure of the virus to her fetus or child using these HIV criminal transmission statutes. States should amend and reform their HIV-specific criminal exposure and transmission laws to remove the risk of prosecuting HIV-positive mothers. These laws should not be left to a prosecutor's speculation and potential unequal application. Focus on what is actually important, that is, to advance and encourage proper education, screening, testing, treatment, and prevention, both for the mother and fetus/infant. The next step in this process is to educate mothers, both with HIV and not, about this threat of criminal prosecution and retrieve their opinions on this troubling issue so they can get involved in addressing the problem and allow their voices to be heard.

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<sup>247</sup> See Dominic Trombino, *Bill Introduced to Reform Iowa's HIV Criminalization Law*, KWWL NEWS, <http://www.kwwl.com/story/24755264/2014/02/18/bill-introduced-to-reform-iowas-hiv-criminalization-law> (last updated Feb. 18, 2014). Tami Haught of the Community HIV/Hepatitis Advocates of Iowa Network (CHAIN) was instrumental in the enactment of the new legislation, and the American Civil Liberties Union (ACLU) were among advocacy groups that supported the efforts that resulted in the repeal of section 709C and enactment of Iowa's new Transmission Act. *Id.*

<sup>248</sup> See *Best Practices Guide to Reform HIV-Specific Criminal Laws to Align with Scientifically-Supported Factors*, *supra* note 35. The DOJ recommends

[f]or states that choose to retain HIV-specific criminal laws or penalty enhancements beyond these two limited circumstances, the best practice would be to reform and modernize them so that they accurately reflect the current science of risk and modes of transmission, the quality of life and life span of individuals who are living with HIV, account for circumstances where the failure to disclose is directly related to intimate partner violence, and ensure they are the desired vehicle to achieve the states' intended purpose in enacting them initially or retaining them in modernized form.

*Id.*

<sup>249</sup> See Shriver, *supra* note 11, at 247.

<sup>250</sup> *Id.*

<sup>251</sup> See *supra* Part IV(A).

