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INTRODUCTION: THE VILLAIN AND THE VICTIM

Whose life “counts”? When should the taking of the life of another person result in the extinguishing of the defendant’s life? These are questions that courts confront regularly. Sentencing decisions are far from neutral, but rather reflect societal values and biases as well as life-value judgments about individuals. These life-value judgments cannot help but reflect a society that has also done a similar calculus about the sick/the healthy and the productive/the burdensome. In this article, I am interested in how stigmatized lives—those of HIV-positive murder defendants and victims—are evaluated in the context of the crimes committed, and how HIV itself can render a life more empathetic or alienating to a judge or jury. Do the sanctions rendered in these cases comport with traditional theories of punishment, such as utilitarianism, retribution, and rehabilitation, or do they reflect more about the status of HIV in society and stereotypes about the disease?

A) In a trial for a home invasion that ended in the murder of one of the occupants, an HIV-positive defendant is confronted by a witness claiming that the defendant had “tested positive for HIV” and had said “he had nothing to lose; all he had to live was two years anyway, so there was not a damned thing you all could do to him.” The court upholds the introduction of this statement as “character evidence” countering the defendant’s claims that intoxication may have influenced his crimes and suggests that his attitude toward his HIV status demonstrated his “lack of respect for the justice system and his victims, and the words reveal[ed] a purposeful intent to commit future crimes.” The court, on appeal, finds that this statement “was

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1 Post-Graduate Research Fellow – Harvard Law School; Consultant – University of Akron School of Law. I would like to thank Jen Richelson, Kiril Kolev, and Casey Turner, my research assistants at the University of North Carolina School of Law. Lisa Peters and Cheryl Cheatham offered excellent library assistance at Case Western. Max Eichner, Joan Krause, Zanita Fenton, Hope Lewis, Ani Satz, Mark Wojcik, Carrie Leonetti, Charity Scott, Ed Richards, Meredith Carr, Jessie Hill, and Michael Benza have provided useful resources and insights in the drafting of this article. I would also like to thank the audience at the University Michigan Law School where I presented this paper in Fall 2011.


3 Id. (alteration in original).
not so prejudicial that it fatally infected petitioner's trial.\textsuperscript{4} The defendant receives a death sentence.\textsuperscript{5}

B) A traveling flea market merchant murders his HIV-positive business partner while on a business trip.\textsuperscript{6} The opinion is unclear about whether the two were lovers or just friends. During the trial, the prosecution places two bags with the words "CAUTION, AIDS" within the jury's view of the prosecution's table.\textsuperscript{7} The defendant moves for a mistrial.\textsuperscript{8} The judge orders in limine that the state remove these bags, and yet, they reappear.\textsuperscript{9} The judge overrules the motion for a mistrial stating, "Of course, as I stated to each juror that mentioned AIDS, I indicated to them that had absolutely nothing to do with this and they all agreed with that."\textsuperscript{10} While the court, on appeal, acknowledged "the specter of AIDS hovered over this case from the start," it affirmed the ruling of the trial judge that there was "no manifest necessity for declaring a mistrial, no evidence that the defendant was in any way prejudiced, and thus, no abuse of discretion."\textsuperscript{11} The defendant, who is not HIV-positive, receives a life sentence for murdering the HIV-positive victim.\textsuperscript{12}

These two cases have more than their unusual facts in common. They are also among the thirty-six cases that I located for this article by searching Westlaw and LexisNexis databases for cases including "HIV\textsuperscript{13} and murder."\textsuperscript{14} These cases became case studies of how disability status

\textsuperscript{4} Id. at 1005 (emphasis added).
\textsuperscript{5} Id. at 1010.
\textsuperscript{7} Id. at *6.
\textsuperscript{8} Id.
\textsuperscript{9} Id.
\textsuperscript{10} Id.
\textsuperscript{11} Id. (citations omitted).
\textsuperscript{12} Id. at *1.
\textsuperscript{13} I use the term "HIV" throughout this article to encompass HIV and AIDS.
and punishment intersect. Thirty-four of these cases were in death penalty jurisdictions; fifteen were cases where death was the penalty.

According to the Death Penalty Information Center, the average death penalty punishment rate for murder cases in the United States is two percent, with some small fluctuations in states with stronger commitments to capital punishment. In my set of cases, however, over forty-four percent of the defendants were sentenced to death in states where it was an option. While this disparity is startling, I was also working with a small dataset that could have been affected by selection bias due to the limited capabilities of Westlaw and LexisNexis case retrieval and the ways in which cases may be flagged in the court system, or not, as relating to HIV. A larger world of HIV–positive defendants and victims exists beyond this small set of cases, but that does not make these cases any less important if they are treated as case studies of potential patterns of stigma and silence.

A detailed inquiry into the cases sets the direction for this article, which analyzes how different lives count in the context of the criminal justice system, specifically through the lens of HIV/AIDS.

As a historically stigmatized health condition and disability, HIV and its treatment by judges, juries, prosecutors, and defendants says much

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16 Rachal, 2008 U.S. App. LEXIS at *3; Nance, 392 F.3d at 286; Tokar, 1 F. Supp. 2d at 990; Mills, 226 P.3d at 288; Smith, 68 P.3d at 312; McDermott, 51 P.3d at 885; Arias, 913 P.2d at 993; Jones, 794 So. 2d at 581; Wainwright, 704 So. 2d at 512; Nieves, 737 N.E.2d at 152; Cortes, 692 N.E.2d at 1132; Leonard, 969 P.2d at 291; Brewington, 532 S.E.2d at 499; Lemons, 501 S.E.2d at 314; Banks, 271 S.W.3d at 106.

17 I am currently drawing a random sample of murder cases in these databases to see what the average rate of death penalty sentencing is.


19 Sociologist Erving Goffman argues that the visibility of stigma results in the marginalization of the person bearing it. Stigma alters social dynamics and eventually becomes internalized.
about underlying theories of punishment in the criminal justice system and the value of both the lives of HIV-positive defendants and HIV-positive victims. Traditional punishment theorists have not explored the question of how the health status of HIV may influence sentencing outcomes and comport with or deviate from the underlying theories of punishment, consequentialist or non-consequentialist. However, this question is compelling for pragmatic and theoretical reasons. The incarcerated population with HIV continues to be 2.5 times that of the general population in the United States. While HIV/AIDS-related deaths in prison have decreased significantly, long-term treatment and health management issues are significant. Further, scholars working at the cusp of law and cognition recognize the inherent tendencies within the criminal justice system to punish individuals perceived as “immoral” or “disgusting” more than others who have committed similar transgressions. People living with HIV/AIDS could be affected by this phenomenon, as both victims and perpetrators.

I was drawn to studying how courts respond to HIV in murder cases after reading over one hundred murder cases involving defendants with various kinds of health ailments and mental and physical impairments. While the court system’s treatment of these various defendants was as diverse as the facts of the cases themselves, the HIV-related cases became memorable in their common threads: the general discomfort of the court system with discussing the condition, the quiet assumptions made about


20 See Carol S. Steiker, No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty, 58 STAN. L. REV. 751, 766 (2005) (arguing that the death penalty offends retribution principles of proportionality; “Though capital defendants have usually committed (or participated in) heinous murders, they very frequently are extremely intellectually limited, are suffering from some form of mental illness, are in the powerful grip of a drug or alcohol addiction, are survivors of childhood abuse, or are the victims of some sort of societal deprivation (be it poverty, racism, poor education, inadequate health care, or some noxious combination of the above.”).


the victims and the defendants, and the procedural missteps that seemed like more than harmless error. As I read the stories of HIV-positive murder defendants, I also began to question the status of HIV-positive murder victims in the criminal courts.

As scholars such as Anthony Alfieri and Dan Kahan have explored, through the process of sentencing, lives are being compared, weighed, and valued; stigma and social meaning are significant parts of that process. Examining criminal life or death sentences through the lens of a health condition viewed as such provides a critical window into what lives count as much, more, or less than others. This kind of inquiry may also expose resource challenges that people living with HIV/AIDS face. As Scott Burris has offered, “Even assuming that the legal system can escape the gravity of the status quo, the lack of resources brought to bear in HIV cases means that the factual record and legal analysis are very likely to be impoverished.”

While the cases I found through a keyword search for “HIV and murder” on Lexis and Westlaw became a small, but relevant, body of thirty-six, their

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26 *See* Andrias, *supra* note 25, at 499 (“Many of the HIV cases that get the most public attention are examples of either the legal system’s failure to consider accurate scientific information regarding HIV or the legal system’s failure to correctly apply accurate information.”); Burris, *supra* note 24, at 325 (“Any credible analysis of the legal system must recognize that poor, stigmatized litigants do not do as well as litigants with wealth or power, and, indeed, the research on AIDS litigation bears this out.”).

27 HIV is arguably a less sympathetic disease than other conditions, which I discuss in Part IV of this article. *See also* Andrias, *supra* note 25, at 501–02 (presenting a case of in which an HIV-positive defendant was punished severely, while the court ignored the victim’s hepatitis status, which is much easier to transmit).


30 Burris, *supra* note 24, at 325.
patterns and texts revealed something larger about criminal punishment, devaluation, stigma, and disability.

The article will proceed in four parts. Part I provides an introduction to the general theories of punishment, familiar to both students and scholars of criminal law, as well as a discussion of why the United States criminal system avoids the criminalization of status and why HIV itself may be worthy of mitigating or merciful treatment. Part II offers a history of HIV in the United States and a brief overview of the intersection of HIV status, the criminal justice system, and HIV stigma trends. In Part III, I engage the cases themselves through a combination of narrative case studies and descriptive data and suggest how theories of punishment may or may not align with the cases themselves. In this section, I am particularly interested in the interaction between HIV status and victimhood and vilification. Part IV ties these first three sections together by analyzing how additional theoretical lenses might be applied to the social and physical disability that HIV status presents in these cases. This analysis reveals that traditional theories of punishment are not entirely explanatory in these particular murder cases. In this final section, I propose an overarching theory that punishment in these cases is based on disability status—both actual health status and perceived disabilities (e.g., race, gender, and sexual orientation)—rather than merely the merits themselves. The effect of

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32 Nigel Walker, Punishment, Danger, and Stigma: The Morality of Criminal Justice, 161-62 (1980) (arguing that “the hardship of stigma is much harder to estimate than the hardship of a fine or imprisonment”).

33 Courts can consider disability in a number of ways, from a “vulnerable victims” aggravating factor approach for crimes involving victims with disabilities, to defenses and mitigating factors related to physical and mental impairments. U.S. Sentencing Guidelines Manual §3A.1.1, introductory cmt. (2010) (enhancing a sentence when a victim was targeted because of “race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation” and in the case of a victim “unusually vulnerable due to age, physical or mental condition”); see, e.g., Robert P. Mosteller, Syndromes and Politics in Criminal Trials and Evidence Law, 46 Duke L.J. 461, 508-09 (1996) (discussing the role of evidence of medical concerns and related behavioral issues in criminal trials, but suggesting that safeguards are needed to prevent the making of emotional decisions); Mark E. Olive & Russell Stetler, Using the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases to Change the Picture in Post-Conviction, 36 Hofstra L. Rev. 1067, 1072-73 (2008) (providing the importance of comprehensive, multi-generational mental health evaluations in capital cases).


disability is that it becomes part of the crime itself, combining stigma with sentencing considerations.\textsuperscript{36}

I. THEORIES OF PUNISHMENT: WHAT, HOW, AND WHY WE PUNISH

A. The “Why” of Punishment: A Primer

Punishment is the recognition of, and corresponding reaction to, violation of rules of social order and values. As I will explore further in this article, the particular rules that a person violates provide justification for the punishment, in both its form and severity. Criminal punishment serves both pragmatic and normative functions. There must be a way to contain and restrict offenders, and in doing so, there is an accompanying moral judgment.\textsuperscript{37} Theories of punishment both expose and complement the functions of the state and reflect social categories, institutional practices, and empirical and community considerations.\textsuperscript{38}

Perhaps the most interesting thing about state punishment is that, in exercising its capacity, the state is taking on a role that is otherwise morally prohibited.\textsuperscript{39} Scholars of punishment are, therefore, not only interested in state action and the reasoning for it, but also the philosophical underpinnings. Scholar Laurence Claus has argued that undergirding the system of criminal punishment is the value of antidiscrimination, as reflected in the Eighth Amendment’s protection against cruel and unusual or excessive punishments.\textsuperscript{40} According to Claus, historically a punishment had to be administered in a discriminatory fashion to be considered “unusual.”\textsuperscript{41} Punishment, as framed, becomes not only about what is done to a person who has offended social rules, but also about on what basis

\textsuperscript{36} For some examples of how disability interacts with the criminal justice system, see Michael L. Perlin & Keri K. Gould, Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines, 22 Am. J. Crim. L. 431, 457 (1995) (pointing out that some defense attorneys might encourage clients to not reveal mental disabilities “for fear of upward departures, thus diminishing the likelihood that such a defendant will receive any meaningful treatment once incarcerated”); Ellen C. Wertlieb, Individuals with Disabilities in the Criminal Justice System: A Review of the Literature, 18 Crim. Just. & Behav. 332, 334-47 (1991) (identifying problems with disability awareness and responsiveness in the criminal justice system, from the initial stage of police interrogation through incarceration and release).


\textsuperscript{38} See Paul H. Robinson & John M. Darley, Intuitions of Justice: Implications for Criminal Law and Justice Policy, 81 S. Cal. L. Rev. 1 (2007) (suggesting that intuitions about justice are widely held and reform efforts must be directed at harnessing those shared senses of right and wrong).


\textsuperscript{41} Id. at 123.
punishment determinations are made and the manner in which they are rendered.  

This search for a philosophical justification or purpose for punishment and accountability for its administration has arisen in the formation of and responses to various schools of punishment. The description of these viewpoints presented here is not exhaustive but merely intended to set the backdrop for understanding HIV's interaction with the criminal justice system through these murder case studies. As Antony Duff and David Garland have noted, any critique of punishment practices will have to be grounded in its own normative arguments, which is precisely my project in Part IV of this article.

B. Theories of Punishment: What and How

Normative theories of punishment are generally consequentialist, non-consequentialist, or a combination of both. The differences between these approaches inform not only decisions about who is punished, but how they are punished, both in form and extent. These kinds of considerations about what and how we as a society punish criminally are relevant to thinking about how perceptions of HIV might become entwined with the sentencing process.

1. Consequentialist and Nonconsequentialist.—Consequentialists look forward and view the appropriateness of any action through the lens of its overall consequences. If the consequences are as good or better than an available alternative, then the action is right, and if the consequences are worse than the alternative, then the action is wrong. What makes something right or wrong is a more nuanced question because it depends on the good that the consequentialist has identified. Certain consequentialists view the “greatest happiness of the greatest number” as the goal to be promoted, while others view dominion, autonomy, or welfare as the good to be maximized. These approaches are captured by classic utilitarians, such as Bentham, who would evaluate the appropriateness of the punishment, which might otherwise be considered evil, against the punishment’s capacity to create pleasure or alleviate pain. Here, the focus is on the good itself and “minimiz[ing] the

42 See David Garland, The Culture of Control: Crime and Social Order in Contemporary Society 139–41 (2001) (characterizing American penal policy, in the aftermath of the rehabilitation agenda, as bifurcated—adopting community partnership strategies, as well as punitive state control of offenders); William J. Stuntz, Unequal Justice, 121 Harv. L. Rev. 1969, 1971 (2008) (arguing that the startling racism and other inequalities of the criminal justice system are due to a loss of local control).
44 Id. at 6.
45 Id.
net level of suffering,” not the troubling actions that led someone to be put forth for punishment.47

Utilitarians are also responsible for advancing theories of punishment based on general and individual deterrence, incapacitation, and rehabilitation.48 Under general and individual deterrence approaches, respectively, punishment can serve to influence other potential lawbreakers to comply with the state’s rules, or the punishment itself can be directed at the offending person, encouraging him or her to avoid future violations.49 Incapacitation is the goal of removing the offending individual from the general population to ensure the safety of others and to curb future wrongdoing. Rehabilitation, while generally considered a consequentialist approach, is also a therapeutic approach, bringing together education and health services for the offending individual as part of a larger effort oriented toward crime reduction.50 The emerging field of restorative justice builds on this rehabilitative tradition by involving victims and communities affected by crime in deciding what will heal the community as a whole and perhaps also advance the ability of the offender to return to society.51 It shifts the focus away from the state versus the defendant to collaborations between the state, the victim, the offender, and the larger community.52

Non–consequentialists, usually retributivists, cast a backward glance and view actions as being independently right or wrong, regardless of their consequences.53 Punishment is then the process by which the guilty are made to suffer, and the suffering itself is what the guilty deserve.54 Negative retributivists posit that only guilty individuals may be punished, and even then, only in accordance with the principle of desert.55 Therefore, under a negative retributivist approach, not everyone would be punished because the level of desert would not call for it. Positive retributivists, however,
hold that guilty individuals “must always be punished, to the full extent of their desert.”

If desert is of importance to understanding retribution, then how is desert defined? That question has proven to be slippery in the study of punishment. Desert serves as a justification, connecting the crime and punishment. It has been described as an intuition that the guilty deserve punishment. Other scholars have not grappled with defining desert, as much as they have described how it serves a necessary societal function. Perhaps the best definition of desert is “proportionate punishment,” with all of the baggage that the ill-defined parameters of this definition import.

These characterizations of punishment are necessarily stripped of their complexities and points of overlap. They may also fail to take into account the role of the punisher as an individual. As Leo Zaibert has offered, the punisher may cause suffering to the wrongdoer simply to offset any wrongdoing done to them, without taking into consideration principles of proportionality.

2. Expressive Function.—A third approach to punishment is educative, communicative, or expressive theory. Unlike consequentialist and retributivist schools of thoughts, these theories fuse punishment with a specific goal, such as a moral teaching or education. Rather than seeing the purpose of punishment fulfilled by punishment itself (retributivist) or linking punishment and purpose in a contingent fashion (consequentialist), this approach frames punishment as the inherently correct tool for pursuing the identified goal—even if that goal is never reached.

One critique of the expressive school is that this form of orientation may result in punishment that sends a social message or rehabilitates a particular offender through education, but it can end up looking like law without teeth. This concern is particularly relevant if the expression’s

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56 DUFF & GARLAND, supra note 38, at 7.
60 See DUFF & GARLAND, supra note 37, at 6–7.
61 Kyron Huigens, Rethinking the Penalty Phase, 32 ARIZ. ST. L.J. 1195, 1221 (2000) (defining “proportional punishment” as apportioning punishment in each case with respect to the person’s desert).
62 ZAIBERT, supra note 54, at 28–29.
63 Id. at 38.
65 DUFF & GARLAND, supra note 38, at 8.
66 See, e.g., Sara Sun Beale, Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool
ideal and its real consequences do not align. Further, if the orientation of
the public is toward retributivist or utilitarian goals, expression alone may
undermine societal support of legal institutions. Still, when combined
with other, more familiar forms of punishment, expressionist goals may
serve to strengthen the function of each approach.

C. The Challenge of HIV as a Consideration in Punishment

This background in punishment theories sets a useful context for the
focus of this paper—HIV’s interaction with punishments in murder cases—
but theories of punishment do not directly address the question of why
HIV should even be a consideration in these cases. In making punishment
determinations, courts might treat HIV in three distinct ways: as a neutral
factor, as an aggravating factor, or as a mitigating factor. How these various
treatments could unfold regarding the HIV status of the defendant or
victim is important to examine before undertaking any case analysis.

1. Neutral, Aggravating, and Mitigating.—Neutrality would mean excising
the HIV status and its social implications from the judgment and sentencing
processes. In fact, many of the courts in these cases gloss over HIV or say
something to the effect that it could go either way as a consideration and
that they are better off ignoring it. The focus of punishment then becomes
on the offense itself, not the offender and his or her health status. However,
the challenge is that HIV can always linger in the background of a case.
As this article will discuss, the social stigma of HIV may quietly inform
the punishment even if the court does not name it as a mitigating or
aggravating factor.

Courts could treat HIV as an aggravating factor, as is the case in many
sexual assaults involving the actual or attempted transmission of HIV.
Here, HIV poses an additional threat beyond the elements of the offense.
Retributivists might characterize this threat as being deserving of more
punishment, while utilitarians may want to contain a defendant with HIV
who is willing to use that as a tool of crime. Even if HIV is not part of

\[\text{See Richard Elliott, UNAIDS, Criminal Law, Public Health, and HIV Transmission: A}\]
the crime itself, it may pose additional costs in the prison process, such as health care and pharmaceutical expenses, that could be lessened if the HIV-positive defendant’s life was shorter. If the victim has HIV, however, the courts may want to impose additional sentencing to respond to his or her status as a vulnerable victim. Courts here can use sentencing to make statements about the value of all lives, while protecting ill populations from being the victims of hate-based or “mercy killings.”

Finally, courts could treat HIV as a mitigating factor that makes a defendant and his crimes more sympathetic in the sentencing process. This approach, in the context of HIV-positive defendants, is very compelling in a society and court system where HIV stigma can influence judgments to be reactionary to the disease, as well as to the crime. The mitigating approach recognizes and adjusts for the potential influence of both social stigma and the effects of the disease, weighing the fact that defendants living with HIV may have very difficult lives. HIV can be a debilitating and stigmatized illness that brings with it its own forms of punishment and suffering. This is not to imply that HIV is a death sentence, but merely to recognize the ways in which it shapes the lives of defendants even before their crimes and during and after incarceration. It comes with its own social backlash separate from the crimes committed. Scholars interested in retribution could see HIV as lessening the culpability of the defendant, while utilitarians might conclude that society’s interests are better served by reducing the severity of the sentence and perhaps offering some additional treatment services, either in prison or the community.

This kind of approach may also be guided by principles of mercy in which the humaneness of the punishment is considered in conjunction with the suffering that the HIV-positive person may be experiencing because of

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73 Criminal sentencing codes at the state and federal levels provide for sentence enhancements when a defendant knew or should have known that a victim was particularly vulnerable or incapable of resistance because of impaired capacity or diminished health. HIV-positive victims would fall within this list, depending on the severity of their illness. They also could be targets for bias crimes. See Lu-in Wang, Recognizing Opportunistic Bias Crimes, 80 B.U. L. Rev. 1399, 1428–29 (2000).

74 See Jeffrey L. Kirchmeier, A Tear in the Eye of the Law: Mitigating Factors and the Profession Toward a Disease Theory of Criminal Justice, 83 Ore. L. Rev. 631, 657–58 (2004) (reiterating that mitigating factors can be any evidence about character, record, or the offense itself that the defendant asserts is relevant for showing the appropriateness of a sentence less than death).
the disease. Those guided by mercy considerations are concerned about the moral implications of punishing people severely when they are already struggling with significant health concerns. A merciful approach places the HIV-positive defendant in a compassionate context that takes into account the hurdles imposed by the disease itself. And in considering the lives of HIV-positive victims, a merciful approach might also extend to the defendants in those cases, raising some complicated concerns about who deserves mercy and what that looks like. Should mercy killings, for example, be recognized and accommodated? Or is mercy simply a principle that reintroduces humanity into the distancing process of sentencing, regardless of the victim or the defendant's health status?

If courts, however, were to treat the murder of HIV-positive victims as a mitigating factor for defendants, they would be suggesting that those victims' lives count less than others in determining desert, or that perhaps there is something socially desirable or pragmatic about ending the lives of people with HIV. One sentiment behind treating the murders of HIV-positive victims as mitigating the severity of the crime and the corresponding punishment would be that the lives of HIV-positive victims are already compromised by the disease. While treatment of HIV has advanced dramatically since its identification, HIV-positive people may face shortened life-spans and high medical costs while they are living. These costs could be equated to a social drain. This line of argument is indeed disturbing, but considerations and misjudgments about quality of life have guided other policy considerations about disability and health status in the United States' history, such as with the sterilization of people with disabilities and the eugenics movement. In the same way that it may seem merciful to allow HIV status as a mitigating factor in sentencing of an HIV-positive defendant, the mercy argument could extend to ending the


77 HIV stigma feeds into this perception of deservedness for the disease, moral judgment, and social distancing. See e.g., Rachel S. Lee, et al., Internalized Stigma Among People Living with HIV/AIDS, 6 AIDS & BEHAV. 309, 309–10 (2002) (illuminating the moral judgment aspects of the disease, as well as the perception of it as a death sentence).

78 While survival rates have improved dramatically since the beginning of the disease's identification, associated health maintenance costs are very expensive ranging from $11,000 to over $40,000/year at the individual level. K.A. Gebo, et al., Contemporary Costs of HIV Healthcare in the HAART Era, 24 AIDS 2705 (2010).

79 See generally A CENTURY OF EUGENICS IN AMERICA: FROM THE INDIANA EXPERIMENT TO THE HUMAN GENOME ERA (Paul A. Lombardo ed., 2011) (discussing eugenics as a way to describe and justify cultural shifts and law in the United States).
suffering of an HIV-positive victim, even though that may not have been his or her wish.

2. The Punishment of Status.—What is most interesting about this inquiry into how courts could view and respond to HIV is how the disease could be acting as a form of status in the criminal justice system. Related to approaches to punishment is the underlying question of whether we, as a society, can punish other undesirable behavior that may not be criminal unto itself—drinking and promiscuity, as chief examples—or morally questionable statuses, such as drug addiction. Because of the consequences of criminal punishment and the modern system's focus on mens rea for crimes, the Supreme Court, through its Eighth Amendment jurisprudence, has held that the punishment of status alone is cruel and unusual punishment.80 The groundbreaking Robinson v. California case in 1962 prompted the examination of how status may be punished, if at all, by the criminal courts. Robinson involved a jail sentence of ninety days to one year for a man whose crime was being “addicted to the use of narcotics.”81 After Robinson, Powell v. Texas addressed the issue of status in the context of alcoholism and public drunkenness, reinforcing Robinson's holding.82

In the wake of Robinson, legal scholars speculated as to how status might be handled in the criminal law system. Herbert L. Packer suggested that if legislatures could no longer “make it a ‘crime’ to be ‘sick,’” criminal law might see its “demise.”83 Others suggested, perhaps more pragmatically, that Robinson would shift responses to addiction from punishing it to treating it.84 Almost fifty years after Robinson, the ban on punishment of mere status remains a central tenet of American criminal law doctrine. An understanding of why this is the case is enriched by viewing Robinson and Powell not as mere status cases, but also as implicating doctrines about the proportionality of punishment.85

While a discussion of Robinson and Powell may seem unusual in the context of an article about HIV and murder, I contend that given the

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83 Herbert L. Packer, Mens Rea and the Supreme Court, 1962 SUP. CT. REV. 107, 147 n. 144.
history of public attitudes and policies toward HIV, the question of the relationship of status to punishment cannot be ignored. Lives have been taken in the cases that I will present and some form of punishment was due, but an issue lingering in the background is whether or not the focus has in some way shifted to status in determining the proportionality of the punishment. HIV as a status issue, even in the face of serious crimes, might raise Robinson and Powell concerns about disproportionate punishment.

Status needs to be considered along with the underlying punishment theory and the criminal behavior itself. When HIV did not cause the crime itself or even amplify or aggravate the crime, the relevant question is to what extent it has been treated as a crime in itself and has served, arguably, in a non-neutral, stigmatizing capacity in sentencing. Potential answers to that question are as complicated as the disease itself, its social treatment, and the case studies to be discussed in Part III.

II. HIV, Disease Stigma, and the Criminal Justice System

Examining the issue of how HIV status becomes enmeshed with sentencing requires an understanding of what HIV has come to mean over time, both as a disease and a social phenomenon. The construction of HIV's meaning is not a passive process. It has become shaped not only by dominant social actors who are HIV-negative, as most judges and juries are, but also by advocacy groups responding to the epidemic as a health concern and locus of stigma.

A. The Historical Context of HIV and HIV Stigma

The punishment of HIV in the criminal justice system is closely tied to its historical and social context. The legal and social science literature involving HIV and AIDS in the criminal context revolves around the criminalized transmission of the disease, disease transmission and health care during incarceration, and more strikingly, in international law—punishing intentional HIV transmission with the death penalty.

86 See discussion infra at Part II.
87 See Harris, supra note 23.
90 Uganda has attempted to pass a bill that would impose the death penalty on homosexuals transmitting HIV. Philip Webster, Uganda Proposes Death Penalty for HIV Positive Gays, THE TIMES (Nov. 28, 2009, 12:01 AM), http://www.thetimes.co.uk/tto/news/world/africa/article2594435.ece. The legislature may consider the bill again in 2011. See Reports Suggest that Uganda's New Parliament Will Consider the Notorious Anti-Homosexuality Bill, DEATH PENALTY
What these various articles have in common is their approach to HIV as a disease for containment and possible sanction. HIV becomes the threat and the criminal justice system responds with either protective or punitive measures. To understand the system's approach to HIV is to understand the history of HIV itself and societal responses to it.

When compared to other diseases that have experienced changed social dynamics and medical responses, such as smallpox, the plague, and polio, HIV has a relatively recent history. Though the first case of HIV was not reported in the United States until the early 1980s, medical cases indicating the features of AIDS were reported as many as ten years earlier. The global pandemic probably began in the 1970s.

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The disease became associated with stigmatized communities and behaviors from its onset. Even when the source of the transmission was unknown, researchers and the public largely attributed the disease to homosexual activity, intravenous drug use, and other perceived “deviant” sexual behavior. In 1981, Dr. Curran of the Center for Disease Control was quoted in The New York Times as saying, “No cases have been reported to date outside the homosexual community or in women.” AIDS became known also as gay compromise syndrome, gay cancer, GRID (Gay-Related Immune Deficiency), AID (Acquired Immune Deficiency), and acquired immune dysfunction.

By 1983, when heterosexual monogamous women were reporting cases of AIDS, anxiety grew about the risk that the disease posed outside of perceived deviant communities. People without HIV or AIDS began to feel more vulnerable and could no longer view the issue as something that only happened to others. With anxiety came prejudice and civil rights violations concerns. Even with additional information, the public seemed to continue to react based on a sentiment that the disease was self-caused because of moral failings, rather than treating it as a growing public health issue. By 1987, researchers and the public had a better grasp on the illness and the associated transmission risk factors.

HIV/AIDS is no longer the death sentence that it once posed thanks to effective antiretroviral medications, but barriers to health care access and

100 Id.
103 See Larry O. Gostin, Public Health Strategies for Confronting AIDS: Legislative and Regulatory Policy in the United States, 261 JAMA 1621, 1621 (1989) (emphasizing that the main groups tending to have HIV are “disfavored populations,” making society less accepting of the disease and those people living with it).
civil rights concerns remain in place. The focus of the 2010 International AIDS Conference was “Rights Here, Right Now,” highlighting the need for access to health care and treatments for people living with HIV. Not until 2009, for example, did President Obama lift the travel ban for people living with HIV/AIDS who wished to visit the United States. Discrimination in health care, particularly in the refusal to provide treatment and discrimination in employment, are among the most tangible forms of civil rights violations against people living with HIV. At the same time, what the disease itself means in terms of medical prognosis and social costs has changed over time. While HIV is a manageable illness today, it comes with the new medical costs of long-term treatment and the social costs of living with an illness that some members of society still associate with reckless, immoral, or aberrant behaviors.

107 Gregory M. Herek, AIDS and Stigma, 42 AM. BEHAV. SCIENTIST 1106, 1106 (1999).
B. HIV in the Criminal Justice System Today

The interplay between HIV and the U.S. criminal justice system dates back at least to 1987 when the Alabama courts considered whether attempted HIV transmission could be criminalized.111 In Brock v. State, an HIV-positive inmate living on an AIDS ward of an Alabama prison allegedly became aggressive toward a police officer and bit him.112 He was charged with attempted murder and two counts of assault. The officer did not test positive for HIV.113 The jury acquitted Brock of the attempted murder charge, but convicted him of first-degree assault.114 That charge requires “intent to cause serious physical injury to another person . . . by means of a deadly weapon or dangerous instrument.”115 On appeal, Brock’s conviction was downgraded to third-degree assault when the court found that, contrary to the prosecutor’s argument, Brock’s mouth and teeth were not dangerous weapons merely because he was HIV-positive. Even though the CDC disputes the likelihood of transmitting HIV by biting someone, several states116 continue to prosecute and criminalize HIV exposure due to spitting or biting.117

At least thirty-six states have laws criminalizing certain forms of behavior of people living with HIV, including spitting, biting, and consensual sexual activity.118 Scholars and advocates have argued, and the Obama Administration has adopted as policy, that all efforts to criminalize the unintentional transmission of HIV run counter to the public health

112 Id. at 286.
113 Id.
114 Id.
agenda of encouraging HIV testing, prevention, and treatment. Even though they have garnered some attention, intentional cases are rare.

The more pragmatic problem is not the criminal transmission of the HIV virus, but the treatment of incarcerated individuals with HIV. In 2005, the Department of Justice estimated that almost two percent of state inmates and one percent of federal inmates are HIV-positive—a rate of infection two and a half times higher than the general population. In 1997, between approximately twenty–two to thirty–one percent of people living with HIV/AIDS passed through the incarceration system. Among the concerns that HIV-positive inmates face, regardless of the crimes they committed, are inadequate access to health care, violations of their civil rights, and stigmatization. In a 2008 study, U.S. psychologists working in the South reported that fellow inmates and prison staff regarded people living with HIV/AIDS more negatively than inmates with other diseases, such as cancer, heart disease, or diabetes. Narratives of how HIV was acquired through intravenous drug use or homosexual sex clouded the HIV-negative inmates' and staff members' perceptions of the HIV-positive inmate population. Some of these HIV-negative people had fears about the transmission of HIV through casual contact. The researchers noted in a subsequent article that a culture of stigma guided decisions among all inmates to not receive HIV testing, not disclose positive status, and not seek treatment.

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125 Id. at 262.

126 See Valerian Derlega, et al., Inmates with HIV, Stigma, and Disclosure Decision-making, 15 J. Health Psychol. 258, 266 (2010).
C. The Endurance of Stigma

Negative public reactions to HIV as a deadly threat have not been quashed after three decades of experience with the illness.127 Stigma is one of the defining aspects of living with HIV/AIDS.128 As I will discuss in the context of the cases in Part III, stigma, whether in prison environments, courts, or local communities, is potentially related to causal stories about how the disease is acquired: homosexual sex, unsafe sex, promiscuity, and intravenous drug use.129

In a 2000 survey of 5641 people on questions related to HIV knowledge and stigmatizing attitudes within the United States, approximately forty percent of respondents thought that HIV could be acquired by sharing a glass or being sneezed or coughed on by people with HIV. Almost nineteen percent of respondents believed that people who acquired the disease through sex or drug use “have gotten what they deserve.”130 Men, whites, people fifty–five or older, those with only a high school education, those with an income less than $30,000, and people in poorer health than others were more likely to hold stigmatizing attitudes toward people living with HIV/AIDS, with the most significant clustering among those in poorer health (23.6%) and people fifty–five or older (30%).131 People correctly informed about HIV transmission (14%) were less likely to give a stigmatizing response than those who were not (25%).132 There was little difference between geographic regions in the representation of people with stigmatizing responses, with all regions having a range between approximately eighteen and twenty–percent: Northeast (18.1%), Midwest (19.9%), South (17.9%), and West (19%).133

The most obvious problem with the survey was its reliance on just one question to capture the presence of HIV stigma. Stigma has broader meaning and effects.134 The study highlighted that cultural meanings are closely related to the view of HIV as a life–threatening disease, the

127 See Samuel R. Bagenstos, Subordination, Stigma, and “Disability”, 86 Va. L. Rev. 397, 484–86 (2000) (arguing that HIV is one of the most stigmatized categories of disability).
128 Ctrs. for Disease Control and Prevention, HIV Related Knowledge and Stigma, 49 MORBIDITY AND MORTALITY WKLY. REP. 1062, 1062 (2000).
130 HIV Related Knowledge and Stigma, supra note 128, at 1062.
131 Id.
132 Id.
133 Id. at 1063.
134 Lawrence O. Gostin et al., Disability Discrimination in America: HIV/AIDS and Other Health Conditions, 281 JAMA 745, 746 (1999) (finding that HIV’s “social stigma transforms the way a person is seen in the family, at work, and in the community; and the person’s health and life span potentially are severely impacted”).
association of HIV with other stigmatized behaviors (e.g., homosexuality, drug addiction, prostitution, and promiscuity), and inaccurate information about transmission. Stigma is also linked to religious or moral beliefs attributing HIV to a lack of personal responsibility or moral failings and deviance. These ideas about the disease itself and the individual's role in acquiring it permeate work places, health care, government, and policy. In the United States, for example, the UNAIDS 2008 Report on the global AIDS pandemic reported that twenty-seven percent of people surveyed would not want to work closely with a woman infected with HIV. Issues surrounding stigma are further complicated by community size and gender differences, as well as whether or not HIV stigma is measured from the perspective of people living with the illness or people who are HIV-negative.

In conducting a meta-analysis of the HIV stigma literature from 2000–2007, researchers noted that high experienced stigma levels were positively correlated with low social support, poor physical and mental health, and with low income for people living with HIV/AIDS. The researchers then suggested that one of the barriers to understanding the interplay of HIV stigma and social, economic, and physical wellness factors was the lack of conceptually consistent methods of defining and researching stigma. This lack of consistency makes capturing stigma's effects, say in the courts and prisons, difficult.

D. HIV, Stigma, and Sentencing

Perhaps most telling about the social stigma of HIV is its effect on criminal sentencing. As a health condition, HIV generally has not been accepted as grounds for downward departure in sentencing in U.S. federal courts when applying the “extraordinary physical impairment” language of §5H1.4 of the United States Sentencing Guidelines. The

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138 C. Logie & Tahany M. Gadalla, Meta-Analysis of Health and Demographic Correlates of Stigma Towards People Living with HIV, 21 AIDS CARE 742, 749 (2009).
139 Id. at 750.
sentencing guidelines themselves were guided by desires to reduce disparities in sentencing by implementing a “grid” system of sentencing possibilities that provided a range.\textsuperscript{142} They replaced a more rehabilitative approach to sentencing with one oriented toward desert, incapacitation, and deterrence.\textsuperscript{143} The grid-system is based on a study of community sentencing patterns, as well as considerations about a defendant’s criminal history and the crime itself.\textsuperscript{144} Once a judge determines the offense level on the vertical axis and the criminal history on the horizontal axis of the grid, the judge may go above or beyond that sentencing range—a departure—but only if he or she provides a justification. The system, while striving toward uniformity in sentencing and assuming that the average sentence is appropriate in most cases, allows for “departures” based on specific offender characteristics, such as physical condition, where such a departure may distinguish the “case from the typical cases covered by the guidelines,” reduce costs associated with incarceration in unusual cases, or “accomplish a specific treatment purpose.”\textsuperscript{145} These departures, however, are made only in extraordinary situations, supporting the goal of the Guidelines in eliminating the kind of ad hoc individualization of sentences that was formerly part of the system.\textsuperscript{146} While resistance to individualizing sentences or departing downward for all HIV-positive murder defendants is understandable to some extent, HIV is arguably the very definition of an extraordinary physical impairment.

In state courts that examine HIV as a potential mitigating factor, the reception has been similarly chilly. For example, of the thirty-six cases that I examined, only the court in \textit{State v. Banks} seemed willing to consider it as a mitigating factor, and that was in the context of a claim that the HIV caused serious mental illness for the defendant and had resulted in suicidal tendencies.\textsuperscript{147} The court noted that Banks had “difficulties” when he discovered at age sixteen that he was HIV-positive, but it also made much of the fact that he never told his former girlfriend about his status or took his HIV medication with regularity.\textsuperscript{148} The latter point was made in a paragraph of aggravating factors, leading with a statement about his criminal

\textsuperscript{144} Id. at 693–94 (“Horizontal and vertical axes on the sentencing grid . . . generate an intersection in the body of the grid. Each such intersection designates, not a specific sentence, but a sentencing range expressed in months.”).
\textsuperscript{146} Bowman, \textit{supra} note 143, at 700.
\textsuperscript{147} State v. Banks, 271 S.W.3d 90, 132–33 (Tenn. 2008).
\textsuperscript{148} Id. at 164.
record of assault, battery, and domestic violence.\textsuperscript{149} Banks countered, on appeal, that the prosecutor committed reversible error and violated his due process rights when she made a slippery slope argument about his HIV status. The prosecutor argued: "If I give weight to the fact that he's HIV [positive], what else do I give weight to those that have cancer and other diseases and tumors and high blood pressure?"\textsuperscript{150} The Court sentenced Banks to death.\textsuperscript{151}

\textbf{E. HIV–Positive Community’s Responses to Stigma}

Reactions to such social and legal barriers have not been passive on the parts of people living with HIV and advocates for HIV health equity and justice. The Positive Justice Project of the Center for HIV Law and Policy, for example, directs its efforts toward addressing the creation of a “viral underclass” and preventing further marginalization. The mission is to generate a “truly community–driven, multidisciplinary collaboration to end government reliance on an individual's positive HIV test result as proof of intent to harm, and the basis for irrationally severe treatment in the criminal justice system.”\textsuperscript{152} Similar efforts are underway, led by the American Bar Association’s AIDS Coordinating Committee, to examine the ways in which HIV has been criminalized in the United States.\textsuperscript{153}

Human Rights Watch has been involved in efforts to end prison segregation based on HIV–status.\textsuperscript{154} In South Carolina and Alabama, inmates have been forced to wear armbands or other identifications marking them as HIV–positive and have been housed only with other HIV–positive inmates.\textsuperscript{155} While these conditions are characterized as "segregation" by a number of scholars and the Department of Justice, they simply reflect an ongoing, however troubling, dynamic of HIV stigmatization in society at large.\textsuperscript{156}

\begin{itemize}
  \item \textsuperscript{149} Id.
  \item \textsuperscript{150} Id. at 135.
  \item \textsuperscript{151} Id. at 106–07.
  \item \textsuperscript{155} Id. at 26.
  \item \textsuperscript{156} In June 2010, the Department of Justice’s Civil Rights Division sent a letter to South Carolina prison directors demanding an end to segregation policies based on HIV. Greg Collard, JUSTICE DEPARTMENT DEMANDS SC PRISON SYSTEM ENDS SEGREGATION OF HIV INMATES, WFAE
In the past decade, a significant portion of the research related to stigma has seemed to shift toward a global focus, with particular energies directed toward Sub-Saharan Africa, Central and South America, and, to a lesser extent, Asia. This recognition of HIV stigma as a global pandemic in itself brings with it both positive effects and the unfortunate implication that the United States has somehow effectively addressed HIV as a disease and any associated stigma. Some advocates have suggested that the decline in interest and research in AIDS in the United States is related to the loss of members of the activism community from the disease itself, as well as the rise of effective antiretroviral medications that seemed to address part of the medical issue and eased some fears (and attention) among heterosexual people.

Efforts such as the People Living with HIV Stigma Index ("Index") shift the conversation back to examining and charting stigma patterns comprehensively, and include European and North American countries. The Index directs its efforts toward people living with HIV to understand the experience of stigma and to combat negative public attitudes toward the disease, while increasing resources for care and support. This initiative and others are laudable and keep stigma at the center of a discussion about how society addresses HIV care and treatment as well as the inclusion of people living with HIV/AIDS. However, even more research on stigma is needed in the United States. No similar index breaks down stigma state-by-state in a comprehensive way, which could be one critical area of research development in understanding its effects, if any, on courts' decision-making and sentencing trends in particular jurisdictions.


158 See Elizabeth Pisani, AIDS into the 21st Century: Some Critical Considerations, 8 Reprod. Health Matters 63, 65 (2000) (suggesting interest has declined because people do not like to recognize behaviors that spread the virus).
159 Partnership, The People Living with HIV Stigma Index, http://www.stigmaindex.org/31/partnership/partnership.html (last visited Jan. 15, 2013). The Index is a collaboration of the United Kingdom Department for International Development, the International Planned Parenthood Federation, UNAIDS, the Global Network of People Living with HIV (GNP+), and the International Community of Women Living with HIV (ICW).
161 See Mahajan et al., supra note 157, at S74 (suggesting that much of the research about stigma in the United States was conducted by college students and directed at disseminating factual information about HIV that might reduce barriers to living in the community for people living with HIV/AIDS).
III. HIV AS PUNISHMENT AND THE PUNISHMENT OF HIV: CASES AS STUDIES

In this Part, I will use some of the most interesting, and a bit perplexing, cases from my study as case studies to suggest potential relationships between sentencing outcomes and HIV status and stigma. I treat these cases qualitatively and provide some statistics, but only to describe and condense overall phenomena. The use of cases as studies unto themselves to provide windows into underlying phenomena is a staple of legal scholarship and pedagogy. As Emerson Tiller and Frank Cross have cautioned, reducing cases to mere variables fails to capture the role of doctrine in judicial decision-making. In heeding this warning, I use the cases as windows into the interaction of HIV and murder sentencing by probing the attitudes, ideologies, and legal doctrines embedded in them. The cases reveal themes not only about punishment, but also about what are appropriate sanctions for actors that possess certain perceived characteristics and lifestyles.

Adding yet another layer of nuance to this analysis is the issue of disability in these decisions. As disability studies scholars Vicki Lewis and Paul Longmore have explored in their work, people with illnesses and disabilities, such as HIV, are often cast in the roles of “victims and villains” in society. This thread of victimization runs throughout the cases and results in disparate sentencing outcomes for HIV-positive criminal victims and defendants. Some common themes emerge, however, and cases that

162 But see David A. Hoffman et al., Docketology, District Courts, and Doctrine, 85 Wash. U. L. Rev. 681, 684–85 (2007) (arguing that the new legal realists have missed the opportunity to be methodical in case analysis and suggesting that they begin to examine entire court dockets, also known as “docketology”); Kay L. Levine, The Law is Not the Case: Incorporating Empirical Methods into the Culture of Case Analysis, 17 U. Fla. J. L. & Pub. Pol’y 283, 285 (2006) (warning that teaching students to extrapolate to what the law is based on one case misses the complexities of law and judicial decision-making).


seem divergent initially end up together, providing an explanation of the possible role of HIV in the criminal courts. In an effort to recognize that any theory about HIV may be affected by an individual's role in the case, I present both case studies of HIV-positive defendants and victims. Both perspectives assist in understanding the ways in which HIV is handled by the courts and potentially punished by the courts as well, as explored fully in the final section of this article.

A. Overview of the Cases: Descriptive Data

While this project is not empirically quantitative, it benefits from an overall description of the case data and trends. I present this information in text and in the accompanying Tables to offer a general picture of the defendants and victims as populations; the cases themselves will add another layer of detail and nuance. Like other murder cases, these cases generally involve people with difficult, tumultuous lives, financially and socially. The cases were split relatively equally between HIV-positive defendants and victims. Most of the cases discussed a history of substance use by the defendant, victim, or both. The cases that stand in contrast are those involving a cheating spouse or heterosexual sexual partners where fears about the transmission of HIV fueled the murder.

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The differences between the HIV-positive victim and defendant populations come out in the sentencing patterns. Around sixty–percent of the HIV-positive defendants received death sentences where death sentences were applied in less than twenty–five percent of the cases involving HIV-positive victims. Simply put, the majority of death penalty outcomes involved HIV-positive defendants, whereas the majority of cases with sentences for life or a matter of years involved HIV-positive victims. However, a substantial number of the life sentences involved cases where both the victim and the defendant were HIV-positive.

Death penalty sentences, as might be expected, were more common in cases involving more than murder alone. Defendants were more likely to get a death sentence in cases involving murder with a sex crime, in comparison to murder with a crime not of a sexual nature. In the two cases where murder, a sex crime, and another crime happened, the defendants received the death penalty; a third case was pending appeal at the time of conducting this study.

### Table 1:
**Likelihood of Death Sentence Based on the Nature of the Charges**

<table>
<thead>
<tr>
<th>Level</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Most Likely</td>
<td>Murder accompanied by a sex crime and another crime not of a sexual nature</td>
</tr>
<tr>
<td>2nd Most</td>
<td>Murder accompanied by a sex crime</td>
</tr>
<tr>
<td>3rd Most</td>
<td>Murder and another crime, not of a sexual nature</td>
</tr>
<tr>
<td>Least Likely</td>
<td>Murder alone</td>
</tr>
</tbody>
</table>

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169 Quarterman, 265 Fed. App’x at 374; Bowersox, 1 E. Supp. 2d at 990; People v. Smith, 68 P.3d 302, 312 (Cal. 2003); Moore, 794 So. 2d at 581; Wainwright, 704 So. 2d at 512; Cortez, 692 N.E.2d at 1132; Leonard, 569 P.2d at 291; Brewington, 532 S.E.2d at 499; Lemons, 501 S.E.2d at 314; Banks, 271 S.W.3d at 106.

170 Norris, 392 F.3d at 286; Mills, 226 P.3d at 288; People v. McDermott, 51 P.3d 874, 886 (Cal. 2002); Arias, 913 P.2d at 994; Nieves, 737 N.E.2d at 152.

171 This aspect of the data suggests some of the complications of HIV in the sentencing process, including desires to protect victims, humanitarian efforts to provide health care in prison, and questions about the value of HIV-positive people’s lives as viewed through the eyes of juries and judges.

172 People v. Smith, 68 P.3d 302 (Cal. 2003); Wainwright v. State, 704 So.2d 511 (Fla. 1997).

173 Caraballo v. State, 39 So. 3d 1234 (Fla. 2010).
In terms of social trends, no homosexual defendants were sentenced to death; all homosexual defendants were sentenced to life.\textsuperscript{174} Put another way, death sentences were reserved for heterosexual defendants, or, with the exception of two cases,\textsuperscript{175} for heterosexual victims.

In the fifteen death sentence cases, the races of the defendants were almost equally divided between white\textsuperscript{176} and African American\textsuperscript{177} defendants, with Hispanic and Native Americans constituting the remaining third.\textsuperscript{178} Black defendants, however, were more likely to receive a life sentence than any other racial group of defendants.\textsuperscript{179} White defendants were more likely to receive a sentence of a matter of years over a death or a life sentence,\textsuperscript{180} while black defendants were more likely to be sentenced to life than death or a sentence of a matter of years.\textsuperscript{181}

Understanding the picture when it comes to victims is also important. Cases involving black victims often resulted in life sentences, rather than death sentences or sentences of durations shorter than life.\textsuperscript{182} Defendants in cases involving white victims often received the death penalty.\textsuperscript{183} When it came to victims in the death penalty sentences, there were eight white

\textsuperscript{174} United States v. Lightfoot, 483 F.3d 876, 878 (8th Cir. 2007); United States v. Wilk, 366 F. Supp. 2d 1178 (S.D. Fla. 2005), aff'd, 452 F.3d 1208 (11th Cir. 2006); Coney, 845 So. 2d at 132; Divers, 681 So. 2d at 327; Jordan, 728 So. 2d at 956; Cruz, 877 S.W.2d at 864.

\textsuperscript{175} See People v. McDermott, 51 P.3d 874 (Cal. 2002) (sentencing a homosexual defendant to the death penalty); People v. Arias, 913 P.2d 980 (Cal. 1996) (same).

\textsuperscript{176} Norris, 392 F.3d at 284; Bowersox, 1 F. Supp. 2d at 999; Mills, 226 P.3d at 293; McDermott, 51 P.3d 874; Wainwright, 704 So. 2d at 514.

\textsuperscript{177} Quarterman, 265 Fed. App'x 371; Smith, 68 P.3d at 341; Jones v. Moore, 794 So. 2d 579 (Fla. 2001); Leonard, 969 P.2d at 294; Lemons, 501 S.E.2d at 325; Banks, 271 S.W.3d at 110. I use African American and black interchangeably in this article.

\textsuperscript{178} Arias, 913 P.2d at 1025; Nieves, 737 N.E.2d at 153; Cortez, 692 N.E.2d at 1134; State v. Brewington, 532 S.E.2d 496 (N.C. 2000).


\textsuperscript{180} See Norris, 392 F.3d at 286; Bowersox, 1 F. Supp. 2d at 990; Mills, 226 P.3d at 288; McDermott, 51 P.3d at 885; Wainwright, 704 So. 2d at 512.

\textsuperscript{181} See Lightfoot, 483 F.3d at 878; Wong, 641 F. Supp. 2d at 1112, 1118; Gallon, 2003 Cal. App. Unpub. LEXIS 7827, at *1; Spell, 2002 Del. Super. LEXIS 46, at *1; Coney, 845 So. 2d at 131, 140; Divers, 681 So. 2d at 327; Jordan, 728 So. 2d at 956; Young, 569 So. 2d at 571; Vinson, 1999 Tex. App. LEXIS 938, at *1.


\textsuperscript{183} Norris, 392 F.3d at 286, 287; Bowersox, 1 F. Supp. 2d at 990; Mills, 226 P.3d at 288; McDermott, 51 P.3d at 885; Arias, 913 P.2d at 993, 996; Wainwright, 704 So. 2d at 512; Leonard v. State, 969 P.2d 288, 291 (Nev. 1998); State v. Lemons, 501 S.E.2d 309, 314, 315 (N.C. 1998).
victims, three Hispanic victims, one black victim, one Native American victim, one Asian victim, and one Middle Eastern victim.

Table 2:
Likelihood of Types of Sentences Based on Characteristics of the Defendant or Victim

<table>
<thead>
<tr>
<th></th>
<th>Death Sentences</th>
<th>Life Sentences</th>
<th>Sentences of Less Than Life</th>
</tr>
</thead>
<tbody>
<tr>
<td>HIV-positive defendants</td>
<td>Cases involving HIV-positive victims</td>
<td>Cases involving HIV-positive victims and defendants</td>
<td>Cases involving HIV-positive victims</td>
</tr>
<tr>
<td>Heterosexual defendants</td>
<td>Homosexual defendants</td>
<td>Heterosexual defendants</td>
<td></td>
</tr>
<tr>
<td>Cases involving</td>
<td>Cases involving homosexual victims</td>
<td>Cases involving homosexual victims</td>
<td></td>
</tr>
<tr>
<td>heterosexual victims</td>
<td>Black defendants</td>
<td>Minority defendants from varied backgrounds</td>
<td></td>
</tr>
<tr>
<td>No clear racial</td>
<td>Cases involving black victims</td>
<td>Cases with victims from a variety of racial backgrounds</td>
<td></td>
</tr>
<tr>
<td>connection for defendants</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cases involving</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>white victims</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Finally, in ten cases, the prosecutor used the defendant or victim's HIV status as part of the case. These cases were fairly equally divided

184 Norris, 392 F.3d at 286-87; Bowersox, 1 F. Supp. 2d at 990; Mills, 226 P.3d at 288; McDermott, 51 P.3d at 885; Arias, 913 P.2d at 993, 996; Wainwright, 704 So. 2d at 512; Leonard, 969 P.2d at 291; Lemons, 501 S.E.2d at, 314, 315.
185 Jones v. Moore, 794 So. 2d 579, 581 (Fla. 2001); People v. Nieves, 737 N.E.2d 150, 152 (Ill. 2000); People v. Cortes, 692 N.E.2d 1129, 1132, 1134 (Ill. 1998).
between those involving defendants \(^1\) and victims with HIV.\(^2\) In sixty-
percent of the cases where the prosecutor made use of the HIV status, the
defendant received the death penalty.\(^3\) With the exception of one of these
cases,\(^4\) they all involved situations where the defendant was HIV-positive
and the victim was not.

This brief overview of the cases provides a sketch of their contours. As noted, this dataset is small and may represent issues of selection bias. These descriptive statistics, however, offer some way of grasping the entire set as a whole without making claims about HIV in murder cases in general. As tempting an argumentative shortcut as it might be, I cannot assume that these descriptive data prove or disprove larger theoretical arguments about race, sexual orientation, HIV status, victimhood, or prosecutorial ethics. The overall picture is both supplemented and complicated by delving into some of the facts and controversies of the cases themselves.

### B. Defendants and Villains

I begin the analysis of the cases themselves by looking at the sixteen cases involving HIV-positive defendants;\(^5\) in the next section, I will change perspective and examine the dimensions of the cases involving HIV-positive victims.\(^6\) One additional case was unclear but seemed to

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1. Bowersox, 1 F. Supp. 2d at 1001; Smith, 68 P.3d at 337; Wainwright, 704 So. 2d at 512; Lemons, 501 S.E.2d at 325; Banks, 271 S.W.3d at 113.
3. Bowersox, 1 F. Supp. 2d at 990; Smith, 68 P.3d at 312; McDermott, 51 P.3d at 883; Wainwright, 704 So. 2d at 512; Lemons, 501 S.E.2d at 314; Banks, 271 S.W.3d at 106.
imply that the defendant had HIV. These cases largely involved racial minority, heterosexual defendants acting against heterosexual victims in jurisdictions where the death penalty was available. The crimes committed were generally murder along with another crime that was not of a sexual nature. Defendants, perhaps not surprisingly, were more likely to get death if their crime involved more than one victim (n=5, four out of five of those cases went for death). Death sentences were not given in any cases in the dataset where the victim was also HIV-positive.

Most relevant to this study was the way in which the defendant treated his HIV status in relation to the case. In five of the cases, the defendant attempted to argue that his HIV status made him suicidal or mentally ill. In all but one of those cases, the defendant received the death penalty. In only one case did the court consider the HIV to be a mitigating factor—State v. Banks. In that case, the defendant also argued that he was suicidal. The prosecutor used the HIV status as part of his case. The court viewed Banks as being secretive about the HIV and noted his risky behavior as evidenced by the HIV, and claimed that the defendant was using the HIV to gain the court's sympathy. Banks received the death penalty. HIV was not a strong enough mitigating factor given the defendant's background and familial-like relationship with the victim.

Smith, 68 P.3d at 337.

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In one case, People v. Cortes, the victims engaged in sodomy and sexual play with the defendant on previous occasions, but it is clear from the facts of the case that the defendant Cortes did not identify as being a homosexual and the brothers who paid him for sex may not have either. Cortes, 692 N.E.2d at 1136.

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Wilk, 366 F. Supp. 2d at 1183; Bowersox, 1 F. Supp. 2d at 1000; Brewington, 532 S.E.2d at 513; Lemons, 501 S.E.2d at 334; Banks, 271 S.W.3d at 133.

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The exception was United States v. Wilk.

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Banks, 271 S.W.3d at 133.

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Id. at 113, 164.

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Id. at 166.

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Id. at 164–65.
TABLE 3: DESCRIPTIVE SENTENCING DATA FOR HIV-POSITIVE DEFENDANTS

<table>
<thead>
<tr>
<th>Number, out of the 15 HIV+ Defendants in Death Penalty Jurisdictions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentenced to death</td>
</tr>
<tr>
<td>Sentenced to life</td>
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<tr>
<td>Sentenced to a matter of years</td>
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<tr>
<td>Sentence pending</td>
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<tr>
<td>Racial minorities</td>
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<tr>
<td>Homosexual (all sentenced to life)</td>
</tr>
</tbody>
</table>

1. Death.—I begin with a case involving the death sentence that is not all that unusual in its facts if one were to remove HIV from the picture. Anthony Wainwright and Richard Hamilton escaped from a North Carolina prison, stole a car and guns, and drove to Florida. There they decided to steal another car from a young mother, raping, strangling, and killing the woman. They then drove to Mississippi, engaged in a shootout with police, and were subsequently arrested.

When he was arrested, Wainwright shared with officers that he had AIDS and then later admitted to having kidnapped and raped the victim. At the trial phase, as one piece of mitigating evidence, Wainwright’s mother provided testimony that he was a bed-wetter until age fourteen. The court found six aggravating factors, but no statutory or non-statutory mitigators. The court convicted him on charges of first-degree murder, robbery, kidnapping, and sexual battery, and sentenced him to death. On appeal, Wainwright claimed that the court had erred by allowing his statement to police about his AIDS status to come in as evidence. The court found Wainwright’s claim about his health status to be without merit and upheld the death sentence.

What is unusual about this case then? Along with Wainwright’s claim about the prosecutor making his HIV status an important issue in the case, he also contended that his status was contrasted with that of the image of a young mother with two children who, before her untimely death, routinely

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206 Wainwright v. State, 704 So.2d 511, 512 (Fla. 1997).
207 Id.
208 Id.
209 Id. at 512-13.
210 Id. at 513.
211 Id.
212 Id. at 516.
transported them to preschool. One could argue that HIV was not a factor in this case—that the details alone were enough to trigger the death penalty in Florida. However, the court refused to address the ways in which the contrast between the murderous HIV villain and the victimized mother could have affected the finding of mitigating and aggravating factors, and ultimately, the sentencing outcome.

While Wainwright, like the other cases involving death penalty outcomes, may do much to support an argument about the idiosyncrasies of murder cases as a whole, these cases hang together in an important way. In all of the death penalty cases, the courts show a reluctance to consider HIV as a potential mitigating factor or to analyze how HIV might color a sentencing outcome. This failure to discuss the illness provides as much concern as a soliloquy on HIV as a dirty disease would be because of the role of courts in sentencing, the high stakes in these murder cases, and the inability to discern whether or how HIV affected the outcome. When defendants are successful in having courts consider, and briefly discuss, HIV and its potentially negative influence on the case or on the defendant’s life, courts are apt to rush in and disclaim that HIV had any effects. In essence, we are seeing two approaches to HIV—a failure to engage it, as well as a redefining of its social meaning.

Take, for example, State v. Tokar, summarized at the beginning of this article. Tokar burglarized a home, but the occupants came home in the process of his invasion. Realizing that he had been discovered, Tokar killed the young father of the family by shooting him twice while his children were nearby. Prior to the trial, Tokar’s counsel attempted to have the court consider his mental health issues related to HIV, claiming that the HIV had induced dementia and that a continuance was needed to adequately address his fitness for trial. The court eventually granted a continuance, but the defense attorney never submitted any medical reports concerning those issues or raised the issue of competency to stand trial after that continuance hearing.

On appeal, Tokar raised several issues including ineffective representation, failure to consider mitigating circumstances, and error in admitting “extremely inflammatory evidence” during the penalty phase about AIDS. As to the effect that AIDS may have had on the trial, Tokar

213 Id. at 512–13.
214 See id. at 512–16.
216 Id. at 756.
217 Id. at 757.
218 Id.
219 Id. at 759.
220 Id. at 761.
contended that “having the disease is regarded as disgraceful” and that AIDS results in “greater loathing than murder does.” Tokar argued that the prosecutor’s introduction of evidence regarding his diagnosis in the penalty phase was “irrelevant, prejudicial, and a violation of his Eight Amendment rights” that allowed jurors to employ “unconstitutional factors in determining his sentence.” Drawing on case law involving the reversal of sentences where pimps and adulterers were concerned, the appellate court determined that Tokar did not have a claim for reversal. The defense had earlier argued that alcohol influenced Tokar’s behavior and the court based its claim on the appropriateness of the AIDS information as factually relevant to show that perhaps more than alcohol had influenced his actions. The court noted, “A defendant’s character is always relevant in the sentencing context. The fact that Tokar said he had nothing to lose because he had the AIDS virus demonstrates his lack of good character and that alcohol was not the only cause of Tokar’s crimes.” The court went on to conclude: “the mere fact that the prison-mate’s testimony included information of Tokar’s infliction with the AIDS virus did not render the testimony excessively prejudicial. The trial court did not err.”

Both Tokar and Wainwright seem to be cases involving retributive action on the part of the state. Both courts used the HIV status of the defendant to suggest something about their accompanying character and the risk they presented to society. HIV was a mark on the defendants. However, at the same time, the negative aspect of living with HIV is not examined for the influence it might have had on the objectivity of the judgments themselves or on the lives of the defendants. Perhaps knowing about the HIV status does provide a piece in a larger puzzle of who the defendant is as a person. Still, the larger concern remains that even under a retributive approach, the punishment meted out may be excessive because the nuances of the cases defy the simplistic categorization of HIV as evil and threatening.

Ending a defendant’s life accomplishes some of the goals of utilitarianism by removing a future potential criminal threat, while also accomplishing the objective of maximizing social well-being by eliminating the carrier of a potentially fatal virus. Rehabilitation does not appear to be part of the consideration of the courts in the cases I studied; rather, defendants with the status of HIV who exhibit other behaviors such as drug use seem to be treated as being beyond any therapeutic interventions.

221 Id. at 770.
222 Id.
223 Id.
224 Id. at 770 (citation omitted).
225 Id.
226 See id. at 757–58; Wainwright v. State, 704 So.2d 511, 516 (Fla. 1997).
2. Life.—Of the four cases involving HIV-positive defendants sentenced to life in a death penalty jurisdiction, there are several trends. Half of them involved cases of murder alone, while the others involved other crimes, none of a sexual nature. One case involved two murders committed by the defendant. Three out of the four cases involved homosexual victims, and all of the cases involved homosexual defendants. Two of the cases involved both homosexual and HIV-positive defendants and victims. Three defendants were black and one was white, while three victims were white and one was black. The murders were equally split between defendants and victims of the same race and black defendants and white victims. Three of the cases involved defendants and victims with ongoing sexual relationships and one involved the killing of a police officer when he was trying to serve an arrest warrant for child pornography.227

The cases involving intimates may shed some light on issues, such as the potential role of HIV in valuing these lives or on the influence of intimate relationships in sentencing. Consider State v. Jordan, where the defendant killed his same-sex lover.228 The opinion makes much of the fact that upon first being interrogated by the police, Jordan claimed to not be gay, but bisexual and celibate. Jordan proceeded to tell the police that the victim was gay and that early on in their relationship they “might have engaged in oral sex” but then “denied that they were lovers.”229 Only after the discussion of sex does the opinion go into the whiskey drinking and the crack cocaine use of the defendant and the victim.230 Both the defendant and the victim were black.

Jordan attempted to tell a narrative of his own victimization by the deceased, claiming that the victim Hudson had given him Soma, a muscle relaxant.231 Jordan then proceeded to make subsequent statements that were in conflict— that Hudson had drugged him, but yet he was still coherent enough to attempt to steal Hudson’s VCR, and that when Hudson discovered him, they got into a physical struggle and Hudson died.232 In a later statement, Jordan contended that Hudson had drugged him against his will by putting “white stuff” in his drink and that when he got sleepy, Hudson tried to take sexual advantage of him by opening the zipper of his pants.233 Jordan claimed to refuse the advances and then argued that rejected and angry, Hudson asked him to leave.234 According to his version of the events, Jordan left the apartment, but his car broke down due to tire

229 Id. at 957.
230 Id.
231 Id.
232 Id. at 957–58.
233 Id. at 958.
234 Id.
When he returned to the apartment, he became ensnared in a verbal fight with Hudson after Hudson admitted to drugging him. Jordan was enraged and hit Hudson with a tire wrench, leading to an escalation, in which he strangled and stabbed Hudson.

Jordan was convicted of first-degree murder, with the state seeking the death penalty. The jury was deadlocked on the appropriate punishment and the court decided to impose a sentence of life with hard labor and no probation. At trial, Jordan had shared his stories of being sexually pursued by Hudson over the course of their acquaintance, claiming that Hudson disrobed, mounted him, and tried to take off Jordan’s clothes. He also claimed that Hudson had pinned him to the wall, “trying to kiss me . . . and trying to get into my pants again.” His story at trial was that he had used the crowbar to protect himself from Hudson’s sexual aggressions and then he must have strangled him during the struggle. Jordan did not remember strangling Hudson and admitted that he had stolen some of the victim’s electronics. He claimed that earlier statements to the police were incorrect because “he had been drinking gin all morning.”

Jordan also claimed that the detective had screamed at him during the interrogation and had sat very close and attempted to force his thighs apart between statements. The detective denied this behavior and rather claimed that Jordan had told him that he was HIV-positive and had some “type of infection in the genital areas.” The detective recounted that he had likely put his knee between Jordan’s legs, but only at the tip of the knee and barely inside Jordan’s legs. He claimed he did this to keep Jordan’s eyes focused on his. The detective also admitted “he feared contracting AIDS and denied getting very near Jordan.” The court used this information to dismiss Jordan’s complaints about police misconduct.

On appeal, the court upheld Jordan’s life sentence with hard labor, granting no leniency merely because Jordan was HIV-positive. The court clarified that “hard labor” referred not to the kind of work that Jordan

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235 Id.
236 Id.
237 Id.
238 Id.
239 Id.
240 Id.
241 Id.
242 Id.
243 Id.
244 Id. at 962.
245 Id.
246 Id.
247 Id.
248 Id. at 965.
might be expected to do as an inmate, but to his "status as a prisoner." It further emphasized that some inmates might be incapable of contributing to the work of the Department of Corrections and that medical care is provided by the state.

What is most striking about this case is the way in which Jordan himself enforces norms of heterosexuality and depicts both Hudson and the police officer as attempting to abuse or seduce him. The court does not seem very sympathetic to either Hudson or Jordan. They are both black and drug users. They have engaged in questionable sexual practices, which the court spends a noticeable amount of the opinion discussing. In responding to the claims that it had not considered how HIV might affect Jordan while incarcerated, the court seems to suggest that the state will provide for him by offering health care.

Perhaps Jordan's taking of Hudson's life does not merit the full punishment powers of the state. They are both figures that seem difficult for the court to relate to as people, and the actions between them may amount to somewhat of a wash in terms of social interests. Under a retributive approach, if desert is measured in part by the value of the victim's life, then sentencing Jordan to life may be consistent with a sense of proportionality and justice. Alternatively, this murder case, or its defendant, have not proven to be so alarming or heinous in the run of murder cases as to trigger punishment beyond a life sentence. Utilitarian values may also be realized through the provision of health care and the containment of the virus and the criminal dangerousness of Jordan. Some citizens and policymakers, for example, might argue that the state is responding in a charitable or benevolent way by providing a safe home for Jordan during the course of his illness where he can be away from the influences of drugs and the streets and receive adequate medical attention. The pattern, however, of meting out life sentences for cases involving intimates where the defendant has HIV does raise some question as to what other factors might be influencing the courts' decisions.

Feminist legal theorists have drawn important attention to the issues of gender and intimate relationships relative to levels of punishment for murder. Women who kill their spouses are more likely to get charged with first-degree murder than men who do the same. Some scholars have argued that this situation reflects not only lingering sexism in the criminal

249 Id.
250 Id. at 966.
251 Id. at 959.
252 Id. at 966.
justice system, but differences in context. The criminal law’s approach to the provocation doctrine, for example, tends to mitigate murders that men commit against women that appear to be “heat of the moment” or passion killings. Murders committed by women, in contrast, are often the result of long-standing domestic violence and the factors leading up to them may be more subtle or drawn out over time, resembling something closer to premeditation than provocation.

In the case of same-sex intimates, scholars simply have not done as much research as they have on gender and heterosexual relationships to explain how this kind of violence is viewed or addressed by the courts. Same-sex relationships may involve the same levels of abuse as heterosexual relationships. Adding further complication, it is unclear whether or not male–on–male violence that ends in death would be treated the same as male–on–female violence or female–on–male violence. Some scholars suggest that in this situation, judges and juries are likely to apply stereotypes about male sexuality and homosexuality and treat men who murder their male intimates like women who kill. In this set of cases, however, the courts are not being clear as to whether provocation–based arguments are more successful or they simply see the threat as being limited to the encounters between the defendant and the victim. Perhaps, since that personal dispute is extinguished with the victim’s life, then the problem does not rise to the level of being death–worthy for the defendant.

3. A Matter of Years.—The lone case involving an HIV–positive defendant sentenced to a matter of years was People v. Baca. There is some factual uncertainty surrounding this case—I am not sure if Baca was homosexual, but the victim was. Both the victim and the defendant were Hispanic. Baca claimed that the victim made sexual advances toward him, motivating him to act in self-defense to kill and then rob him. He was convicted of second–


256 Taylor, supra note 254, at 1695–96.

257 See Joan H. Krause, Of Merciful Justice and Justified Mercy: Commuting the Sentences of Battered Women Who Kill, 46 Fla. L. Rev. 699, 703 (1994) (arguing that battered women often have a difficult time convincing the court they were acting in self-defense).


degree murder and appealed, claiming among other things that the court failed to consider his HIV status in sentencing.261

The trial court jury had been informed that neither sympathy nor prejudice should influence the verdict.262 In addressing whether HIV should have been a mitigating factor in the sentencing, the court recognized that while HIV is a “condition which is a precursor to AIDS,” a sentencing court has “broad discretion” and an appellate court “must focus on the nature of the offense, the character of the offender, the public interest in safety and deterrence, and evaluate whether the sentence actually imposed represents a fair accommodation of society’s interest and the interest of the offender.”263 Noting that Colorado had no cases on the books addressing HIV as a mitigator, the court examined cases from other jurisdictions, holding that an “affliction with AIDS or HIV does not, by itself, warrant a reduction of an otherwise appropriate sentence.”264 The Baca court cited the comparison in United States v. DePew of AIDS to cancer and “other terminal or life-threatening conditions” and noted that prisons have staff and infrastructure to provide “necessary care and treatment.”265

While the court had discretion to impose a sentence ranging from sixteen to forty-eight years, it settled on forty-five years, noting the “defendant’s psychological problems, his alcohol and drug use,” and “high risk to the community”—not explaining whether that risk was related to his illness, his drug use, or his criminal history.266 The lower court also noted that the sentence could be reevaluated if Baca’s health deteriorated “to a point such that he was no longer a threat to society.”267 The appellate court upheld the sentence, agreeing that the defendant could not be rehabilitated and that society needed to be “protected.”268

Here, the court appears to be treating Baca as a risk, but the perceived source of that risk remains unclear. Is Baca a risk because he has HIV? His sentence, framed as a number of years, will allow him to continue to live, albeit incarcerated, and to receive care during that time in prison—facts that the court seems to take into account. At the same time, this sentence could end up being a lifetime for him if his health is compromised. Baca is presented as someone who is deviant and has some significant personal issues that are beyond rehabilitation and repair.269 The language of the court is not focused on what the incarcerated time might offer to Baca in

261 Id. at 1302.
262 Id. at 1308.
263 Id. at 1309.
264 Id. (emphasis added).
265 Id. (citing United States v. DePew, 751 F. Supp. 1195 (E.D. Va. 1990)).
266 Id. at 1309–10.
267 Id. at 1310.
268 Id.
269 Id. at 1309–10.
making him into a person who could be reintegrated into society. I find it difficult to tell from this opinion if the court is housing Baca until his demise or if the court extended some leniency based on the fact that he was defending sexual advances from a homosexual man.

While Baca has taken a life, perhaps the nuances of the situation dictate a lesser form of punishment according to principles of desert. An alternative or accompanying goal might be the utilitarian goal of quarantining the HIV disease and his criminal behavior until he is debilitated and dependent enough, health-wise, to no longer pose a threat to society. The court’s focus is not on improving or maintaining Baca’s health, but rather on allowing the HIV to run its course, perhaps as a lesson and form of punishment in itself.

C. Distancing Victims

Seventeen of the thirty-six cases involved HIV–positive victims; an additional four cases involved victims where HIV–positive status was implied. In only two of the seventeen cases was the defendant also HIV–positive. Seven of the HIV–positive victims were also homosexual and four of the defendants in the seventeen cases were homosexual. Of the seventeen cases, four were cases where both victim and defendant were homosexual. Most of the seventeen victims were white and most of the defendants in those cases were racial minorities (black, Hispanic, and Native American). Only one of the seventeen cases came from outside a capital punishment jurisdiction, leaving sixteen cases eligible for a maximum punishment of death. Of the remaining sixteen cases, only three resulted in death sentences for the defendant. Nine were life sentences and the remaining four were sentences ranging from fifteen to twenty-eight years.

1. Death.—What is telling about the three death sentences in this population of cases? Additional factual and demographic information is in order. Even with additional data as enhancement, the small number of cases in this category and the nuanced treatment of HIV–positive victims thwart any effort to arrive at general conclusions. Two of the cases involved murder and another crime, one a sex crime and the other a robbery. The defendants were not HIV–positive, nor homosexual. One of the victims was homosexual. Two of the defendants were Hispanic and one was white and two of the victims were Hispanic and one was white.

If judges and juries can relate to defendants and victims that remind them of themselves, then these cases involving HIV–positive victims may turn on the issue of the victim’s health status or on other factors, or both. *People v. Nieves* raises this question.\(^{270}\) It challenges some conventional notions about the predictability of death sentences given certain factors,

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\(^{270}\) *People v. Nieves*, 737 N.E.2d 150 (Ill. 2000)
such as the notion that the death sentence is more likely in traditional felony murder cases or cases involving white victims and minority perpetrators.\textsuperscript{271} Nieves committed murder alone, had one victim (also Hispanic), and neither man was homosexual.\textsuperscript{272} Nieves killed the defendant Rafael Cuevas (a.k.a. “Pookie–Pookie”) by administering at least six blows to the head.\textsuperscript{273} Police found Cuevas’ body in an abandoned retail building in Chicago, where he was living as a squatter, on a “bloodstained mattress” along with drug paraphernalia. Cuevas tested positive for alcohol use and HIV, but drug tests on the body returned clean.\textsuperscript{274}

Nieves, who had also been squatting in the abandoned building, had known Cuevas for three months and claimed that one night, the victim asked to die: “Man I tell you this shit you know. I want to die.”\textsuperscript{275} When Nieves asked what the “shit” was, the victim responded: “Drugs and alcohol and things like that” and then told Nieves that he was going to sleep.\textsuperscript{276} The defendant went outside, retrieved a two–by–four board, and struck the victim in the head up to ten times.\textsuperscript{277}

Family members of the victim testified that he was never upset or depressed, that he did have a drinking problem and was HIV–positive but seemed to manage the illness and its effects well.\textsuperscript{278} They were not aware of any desire on his part to end his life.\textsuperscript{279} Nieves brought a witness named Rabbit, who testified as to his statements about Cuevas’ desire to die and reiterated that Nieves had called Cuevas “his street friend” and claimed that Cuevas “frequently complained that he wanted to die.”\textsuperscript{280}

The defendant appealed his conviction for first–degree murder and his sentence for death by arguing that his attorney had not argued a “mercy killing” defense.\textsuperscript{281} The court, on appeal, was not convinced by Nieves’ mercy killing argument, given the facts of the case.\textsuperscript{282} Nieves had also

\textsuperscript{271} Nieves, 737 N.E.2d at 150; see Seth Kotch & Robert P. Mosteller, The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina, 88 N.C. L. Rev. 2031, 2097–99 (2010) (showing that most cases involving the death penalty involve crimes committed by minorities against white victims, even though most crimes involve perpetrators and victims of the same race).

\textsuperscript{272} Id.

\textsuperscript{273} Id. at 152.

\textsuperscript{274} Id.

\textsuperscript{275} Id. at 153.

\textsuperscript{276} Id.

\textsuperscript{277} Id.

\textsuperscript{278} Id.

\textsuperscript{279} Id.

\textsuperscript{280} Id. at 153–54.

\textsuperscript{281} Id. at 152.

\textsuperscript{282} Id.
been convicted of killing another man on a separate occasion. The death sentence was upheld. 283

Several possible explanations help to frame Nieves' punishment. What strikes me is that this case is not so much about its particular facts, but more about Nieves having killed on another occasion. If we assume arguendo that Cuevas as a homeless person has less life value than someone who is gainfully employed and then murdered, we are not entirely at the point of grasping this case. Valuing heterosexual victims' lives more than homosexual victims' lives does not explain what prompted the sentence, either, here. Nieves' victim's life could have been similarly undervalued. Both defendant and victim match one another in race and in undesirable traits, such as itinerancy, drug use, and criminal backgrounds. Nieves, therefore, seems to be a case about retribution for two murders and the utilitarian elimination of any future homicidal behavior on the defendant's part, just as the other cases in this category may say something more about the appropriateness of punishment if a murder is accompanied by another crime.

2. Life.—If the death sentences involved cases where defendants were perceived to be seriously violent and dangerous, the life sentence cases only serve to muddle any potential understanding of the relationship of the severity of violence to sentencing. This set of cases involves same-sex relationships that have soured, gay bashing, secret affairs with homosexual partners, and in one case, a stepson taking the life of his terminally ill father. Of these nine cases, at least three had hate-related motives or features. In two of the nine cases, the defendant was also HIV-positive, and in four of the cases, the defendant was homosexual. In six of the cases, the victims were homosexual. The vast majority of the defendants were minorities (n=7, six black, one Hispanic) and the victims were largely black, too (at least five of them, with a sixth victim of unknown minority race). Along their contours, these cases represent crimes committed against homosexual, minority, and HIV-positive men—four of them by black men against black men, two by black men against white men, two of white men against minority men, and one of a Hispanic man against a white man.

State v. Knight284 presents a striking example of the life sentence cases. Knight involved what is best described as a hate crime or "race and gay bashing." 285 The victim Stoner was black, homosexual, and HIV-positive, and the defendant was white, straight, and HIV-negative. The defendant and victim met after Stoner walked past a party that Knight was attending in Winston-Salem. 286 At first, partygoers and Stoner exchanged heated words, but eventually, Stoner was invited inside the house where the

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283 Id.
285 Id. at 497.
286 Id. at 485.
party was being held and had a drink.287 After he left the party, Knight and three others followed him in a truck.288 They convinced Stoner to get in the car with them and proceeded to a convenience store to buy beer.289 At some point, an intoxicated Stoner attempted to get out of the car, but Knight placed his hand on his shoulder.290 The men drove to a clearing in a greenway area near the city, turned off the truck, and forced Stoner out of the vehicle.291 After beating him, they proceeded to stab him, with Knight administering thirteen or fourteen strikes with a knife.292 Leaving Stoner on the ground, the men decided to return to the party, making a pact never to tell anyone about the murder.293

After about an hour at the party, Knight asked another man for a ride to his house, where he retrieved an eleven-inch hunting knife.294 He wanted to return to the greenway to ensure that Stoner was dead.295 The driver, later a witness in the case, circled the park and Knight returned to the victim.296 The driver testified that Knight had returned to the car and stated that Stoner had been alive, begging for help, but Knight responded by kicking him in the head and sticking the knife in the victim's neck and twisting it, a "trick his father had learned in Vietnam."297 Knight told Stoner, "Fuck you, nigger.298 You don't deserve help."299 Then he slashed open Stoner's rib cage and castrated him, shoving his penis in his mouth.300

After the crime, Knight told the driver-witness that he did not feel anything and that he "wanted to go back and kill another one the next night."301 The two men returned to the party. Later that night, the driver reported the crime to the police.302

An autopsy revealed that Stoner had been stabbed more than twenty-seven times and that several of his wounds would have been fatal

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287 Id. at 486.
288 Id.
289 Id.
290 Id.
291 Id.
292 Id.
293 Id.
294 Id.
295 Id.
296 Id.
297 Id. at 486–87.
298 I have only included this word because it was what the defendant said and it provides some insight into the defendant's thoughts.
299 Knight, 459 S.E.2d at 487.
300 Id.
301 Id.
302 Id.
One knife wound extended from the skull into the brain stem. The coroner further testified that Stoner’s heart was still beating at the time that he received this trauma to the head. Stoner also had a very large wound in his chest, approximately seven inches by three inches, and his rib cage had been split open, exposing his heart and right lung. Stoner was most likely alive when he received this wound. Smaller wounds in his body leaked blood slowly, and death from these wounds could have taken more than an hour.

The defendant, through the mother of his children and his friends, introduced evidence of his alcoholism and argued that he could have not been aware of his actions that night. The court sentenced Knight to life.

On appeal, Knight challenged what he perceived as a lack of opportunity to ascertain through voir dire how prospective members of the trial court’s jury would have felt about the victim’s homosexuality and HIV status. The state had originally made a motion to have those facts excluded at trial, which the court refused to address in a ruling. The trial court ruled that questions about homosexuality were relevant to assist in identifying jurors who might be sympathetic to “gay bashing,” but questions relating to HIV should not be part of jury selection. HIV did not arise as an issue during voir dire and “little evidence” appeared at trial. The appellate court decided that the possibility of juror prejudice based on the victim’s HIV status did not amount to “fundamental unfairness” in the case.

At first glance, perhaps the sentence in Knight reflects a system willing to accept the powerful influence of alcohol in shaping criminal behavior. But the situation is more complicated than that. Hate and bias tensions run through the case. Knight’s statement about wanting to kill “another one” confuses the reader. Does he mean a black person, a man, a homosexual, an itinerant person, or just any other person? The victim is black, gay, and living on the street. His various identities are difficult to untangle from one another as we try to figure out Knight’s motivations and his sources

303 Id. at 485.
304 Id.
305 Id.
306 Id.
307 Id.
308 Id. at 498.
309 Id.
310 Id. at 497.
311 Id.
312 Id.
313 Id.
314 Id. at 498.
315 Id. at 487.
of hatred. Perhaps one of them alone was enough; perhaps they all were. The court did not allow Knight to go free, but the sentence strikes me as mild in light of the threats and hatred that fueled Knight that evening.\footnote{Id. at 498.} Knight’s risk to society may be limited by a lifetime of incarceration, but the sentence seems relatively weak in deterring others from acting on their biases. Principles of desert were not served in this case unless one accepts that the lives of minority victims are somehow less valued in this criminal system than those of white, heterosexual victims.

As a whole, Knight and the other cases in my study seem to reveal a system struggling with relating to both the defendant and the victim for various reasons—race, sexual orientation, poverty, and HIV status. Courts frame the disputes in these cases largely as private ones, fueled by passion, bigotry, family dynamics, or adultery. In searching for a thread that links them, I see another potential explanation. For the most part, these cases involve “bad blood”\footnote{While the origins of “bad blood” date back to times of bloodfeuds, here, I also recognize the nature of HIV and its connection to concerns about our public blood supply. See \textit{Bad Blood: A Cautionary Tale} (Necessary Films 2010) (a documentary directed by Marilyn Ness).} between the parties, brought on through brief interactions or developed over time. The courts could be reacting to a sense that the problems guiding the defendants have been resolved through the victims’ deaths, but that still is not a satisfactory explanation for Knight, for example. Given the clustering of life sentences in cases involving HIV–positive victims, I would posit that there might be additional barriers to the courts seeing the taking of these lives as death sentence–worthy. I cannot hope to unravel the psyches of judges or juries, but I offer some potential theoretical grounds for further exploration infra Part IV.

3. A Matter of Years.—In the four cases of HIV–positive victims with the least amount of punishment for the defendants, three involved murder alone, and the fourth involved murder and robbery. The defendants were not HIV–positive, nor homosexual. One of the victims was potentially homosexual, but the facts of the case were ambiguous as to that point. The defendants were white in two cases and black and Native American in the remaining cases. Two victims were white and two were of minority backgrounds. Three of the cases involved preexisting relationships where the defendant claimed that the HIV–positive victim was a threat. Of those cases, two involved heterosexual romantic relationships—one a woman killing her cheating husband, the other a male lover arguing provocation for killing his female lover because he found out that the lover and her husband were HIV–positive. The other two cases involved a manslaughter argument pertaining to the threatening nature of the victim’s HIV status,
and the killing of an AIDS patient over concerns that he would report previously stolen medication to the authorities.

I have already addressed this thread of the private resolution of domestic disputes and romantic relationships; that theme is as strong here as in other situations involving intimate conflict, as evidenced by the doling out of shorter sentences. The most perplexing case from this subset of HIV-positive victims cases, however, is State v. Cook and does not involve intimates at all.\textsuperscript{318} The facts are the most troubling to me of these victims’ cases and the court only sentenced the defendant for fifteen years to life.\textsuperscript{319} Both the victim and the defendant were white. The defendant was straight, while the victim’s sexual orientation was uncertain. The murder arose after defendant Cook’s common law wife stole painkiller medication from the victim, Duty, while he was unable to leave his hospital bed at home. Fearing that Duty would turn them into the police, Cook shot him twice in bed and then attempted to dispose of the body in a way that would prevent later identification. He mutilated the corpse by removing teeth and cutting tattoos from Duty’s skin. Cook then dumped the body in a river outside Topeka, Kansas, where authorities later discovered it.

While the court referred to Duty as a “defenseless AIDS patient,” it did not subject Cook to the death penalty and it overturned an earlier sentence of forty years without the possibility of parole on the basis that the murder was not especially heinous or cruel.\textsuperscript{320} In examining Kansas law, the court determined that deaths caused by shooting are not “heinous, atrocious, or cruel.”\textsuperscript{321} The court then remanded the case for resentencing with the recommendation of fifteen years before the possibility of parole.\textsuperscript{322}

This case could be an anomaly guided by a technicality, but I suggest that it is worth exploring further. Did the court consider that Duty was on death’s bed? And how did the value of his life, as one that may have been coming to a close, figure into viewing the harshness of Cook’s actions? I am struck by how gruesome the facts are in this opinion, yet Kansas’ interpretation of what constitutes cruelty is overly simplified as to not reach this crime. Provided with the opportunity to sentence Cook to life without parole or death, the appellate court might have still opted for the same sentence as it did here. In isolation, it is difficult to tell how much the value of Duty’s life as a person living with HIV/AIDS figured into the calculation of Cook’s sentence. Perhaps State v. Cook represents a situation where the victim’s HIV status served to mitigate the defendant’s culpability and punishment.

\textsuperscript{318} State v. Cook, 913 P.2d 97 (Kan. 1996), aff’d, 135 P.3d 1147 (Kan. 2006).
\textsuperscript{319} Id.
\textsuperscript{320} Id. at 118–19.
\textsuperscript{321} Id. at 118.
\textsuperscript{322} Id. at 119.
Cook's punishment seems to defy most applications of theories of punishment. He murdered someone who could not defend himself and mutilated the body, all in an effort to avoid detection for being involved in stealing medication. His actions are well outside the bounds of social and legal rules, and in my mind, he seems to not be an easy candidate for rehabilitation. The trial judge suggested that a sentence of fifteen years may have been appropriate.\textsuperscript{323} A matter of fifteen years does little to honor desert, deterrence, or incapacitation desires.

\textbf{D. When Victim and Villain Meet}

Two cases among the thirty-six in the study involve both an HIV-positive defendant and victim; in both of these cases, the defendants and victims are homosexual. Both of those cases resulted in life sentences. In \textit{State v. Coney}, an incarcerated prisoner who was serving a 420-year sentence for child rape set his inmate lover on fire.\textsuperscript{324} The victim Southworth had spurned him by becoming involved with another inmate. Coney tried to discredit Southworth's dying declaration that Coney had set him on fire by claiming that his attorney should have offered evidence at the trial of Southworth's HIV-positive status and his belief that Coney had given it to him. The response of the trial court was that it "may be good fiction, but it has no relevance to the facts of this case. Here, the victim was dying because he was being burned alive, not because he was dying from AIDS."\textsuperscript{325}

The sentence in \textit{Coney} proves to be a difficult one for explanation. He acted on vengeance and had a history of abusing the most vulnerable members of society—children—and yet the court gave him a life sentence. Constructively, his life sentence may just be another way of keeping him behind bars until he dies. But keeping him incarcerated for the years to come proves to be confusing in some respects. He has taken a life while incarcerated. In many ways, the prison cannot contain his cunning and deviant behavior; he has made guards complicit in giving him the materials for arson and murder. He is among the most dangerous of people in a very dangerous place.

In \textit{United States v. Lightfoot},\textsuperscript{326} the defendant paid to have his HIV-positive girlfriend murdered.\textsuperscript{327} His girlfriend was a transsexual man and a witness in a case involving bank robbery charges against Lightfoot.\textsuperscript{328} The defendant was not allowed to testify about his own HIV-positive status. In the course of the case, Lightfoot claimed that his HIV status is what had

\begin{itemize}
\item \textsuperscript{323} Id. at 114.
\item \textsuperscript{324} \textit{State v. Coney}, 845 So.2d 120, 124 (Fla. 2003).
\item \textsuperscript{325} Id. at 136.
\item \textsuperscript{326} United States v. Lightfoot, 483 F.3d 876 (8th Cir. 2007).
\item \textsuperscript{327} \textit{See id.} at 878, 884. 
\item \textsuperscript{328} Id. at 887, n.2.
\end{itemize}
motivated the robberies\textsuperscript{329} because he was compelled by a desire to garner money before the illness left him incapacitated.\textsuperscript{330} The court would only allow Lightfoot to testify that he had an unspecified health condition which put “pressure” on him financially.\textsuperscript{331} Lightfoot received a life sentence.

*Lightfoot* presents its own complexities. One might expect the court to punish severely a person willing to have a federal witness against him murdered. He enlisted assistance in the murder, perhaps making his own hands cleaner in some ways to the court. The court seemed to struggle, however, with what to allow into the trial about HIV, limiting Lightfoot’s ability to present his actual diagnosis. There is no explanation in the opinion for why this is so and I am left to conjecture about what HIV may have done to the sentencing process. Could the court have been concerned that HIV would have resulted in an even lighter sentence? Or was the court’s concern the opposite in that it assumed that HIV may have made Lightfoot an easier defendant to put to death—a perceived charitable hastening of an already present death sentence?

An alternative explanation that I offer for both cases is that I am missing a piece of critical information about the health status of the defendants. Their HIV/AIDS may have progressed to the point where more severe sentencing was pointless because their deaths were inevitable or state resources could be conserved by limiting capital-related appeals.

I note, though, that these defendants and victims are both potentially distancing to the courts, which may have resulted in a cancellation effect of some kind when it came to the consideration of the death penalty. It is possible that neither victim evoked compassion; one is transsexual and the other a prisoner, both are homosexual and have HIV. The defendants are equally distancing in their propensities for criminal violence, their HIV status, and their homosexuality. They were presented as dangerous, but their victims were not painted in the most favorable light, either.

Judges and juries might be interested in providing care for the defendants as they live with the disease or they might simply have struggled with how to assess the gravity of these murders, given how different the defendants’ and victims’ experiences were from their own lives. If HIV-negative and heterosexual lives are valued within society and are the norms, circumstances involving HIV-positive lives or homosexuality challenge decision-makers’ sense of familiarity and comfort.\textsuperscript{332} It is precisely this

\textsuperscript{329} Id. at 884.

\textsuperscript{330} See id.

\textsuperscript{331} See id. at 884.

\textsuperscript{332} See, e.g., Kevin McGruder, *Pathologising Black Sexuality: The United States Experience, in BLACK SEXUALITIES: PROBING POWERS, PASSIONS, PRACTICES, AND POLICIES* 101, 113 (Juan Battle & Sandra L. Barnes eds., 2010) (discussing the privileging of heterosexuality and HIV-negative status in the black community); Catherine Waldby, *AIDS and the Body Politic: Biomedicine and Sexual Difference* 13 (1996) (extending this argument to encompass...
question of how difference and distance affect sentencing outcomes that has guided many of the inquiries into discrimination in the criminal justice system, particularly in matters such as race.\textsuperscript{333}

IV. PUNISHING DISABILITY?

Part of the punishment of HIV seems to reflect the privileging and punishing of certain disabilities over others. Scholar Melissa Cole has described a "hierarchy of disability" in which different kinds of impairments and limitations are marked as more disabling or less desirable than others.\textsuperscript{334} Given the extensive literature on HIV stigma in the social sciences and the history of public response to the epidemic, as described in Part I, my argument that HIV itself holds a low status, if not the lowest status position among disabilities, is not a leap of logic.\textsuperscript{335}

But social punishment is indeed different from criminal punishment, though criminal punishment both acts as a form of social punishment and embodies social attitudes and norms.\textsuperscript{336} The cases presented in Part III offer two interrelated approaches to the punishment of disability: procedure and status. In this Part of the article, I suggest potential explanations of the function or dysfunction of the HIV disability in the criminal justice system and additional theoretical approaches for understanding the trends and the cases themselves.\textsuperscript{337}

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\footnotesize
334 Melissa Cole, The Mitigation Expectation and the Sutton Court’s Closeting of Disabilities, 43 HOW. L.J. 499, 515 (2000) (elaborating that this hierarchy creates schisms in the disability community, making organizing around disability as a socio-political experience even more difficult); see also Arthur S. Leonard, Discrimination, in AIDS LAW TODAY: A NEW GUIDE FOR THE PUBLIC 297, 297 (Scott Burris, et al. eds., 1993) (describing HIV as having two epidemics—one of the disease itself and another of fear).
335 See John Bronsteen et al., Happiness and Punishment, 76 U. CHI. L. REV. 1037, 1043 (2009) (arguing that the realities of the physical effects of HIV in prison are not to be overlooked because HIV is a disease that complicates adaptation to prison life, making the experience of punishment different from someone who does not have the disease).
336 See Anne M. Coughlin, Excusing Women, 82 CALIF. L. REV. 1, 9 (1994) (arguing that utilitarianism, however, focuses on the positive individual and social consequences that punishment offers).
337 See Lynn S. Branham, AIDS Before the Bench: The ABA Guidelines Can Help You, 29 JUDGES J., Spring 1990, at 47, 50 (presenting ABA guidelines recommending full voir dire on the issue of the HIV-positive status of the defendant as to avoid stigma in the courtroom).
\end{flushleft}
A. HIV Disability as a Procedural Impediment

By procedurally punishing disability, I am referring to the mechanisms by which disability as a generic category can result in barriers in the procedural administration of justice.338 To understand some of these barriers, we will also have to consider the substantive issue of what disability status is in this particular situation and how it affects just punishment.339 For now, let us work under the assumption that the case studies presented are no more egregious than a typical random sample of murder cases, if that could be ordained, or that one of the largest facts that sets them apart is the presence of disability in the sentencing process.340

Procedurally speaking, disability could be treated as a mitigating factor.341 While none of the courts in the thirty-six cases studied for this article recognized HIV as causing a physical or mental anomaly that spurred the murder or made the murder itself less egregious, sentencing does not merely work to look at the facts of the crime itself. It also takes into consideration personal characteristics of victims342 and defendants. Desert might be affected by the difficult life of an HIV-defendant; perhaps some courts perceive that the defendant knows suffering to a greater extent than others not living with the disease. Issues of mercy may be implicated, as well, if society is interested in extending kindness and compassion to people living with serious illnesses. Consequentialists, too, might be interested in HIV as a mitigator in that there may be better ways of providing for defendants with HIV than rendering unusually harsh sentences. Status issues such as drug addiction, family abuse,343 cancer,344 polio,345 pregnancy,346 and joint conditions347 have been recognized as valid bases for mitigating criminal sentences for defendants. In fact, according to

341 See discussion supra Part I.C. and III.D.
342 On retributive grounds, the law might seek to punish defendants preying on vulnerable victims, such as HIV-positive people, by extending harsher punishment to those kinds of crimes.
343 See Canaan v. McBride, 395 F.3d 376, 386–87 (7th Cir. 2005) (holding that failure to present evidence of defendant’s history of family abuse and drug addiction was ineffective assistance of counsel).
principles of due process, a sentencer cannot be precluded from considering any mitigating circumstances in death penalty cases. These mitigating factors do not need to be causally related to the crime, rather, they are presented to provide compassion and to recognize the “diverse frailties of humankind.”

Further, some state sentencing guidelines as well as the American Law Institute (ALI) in its Model Penal Code Commentary have considered health status as a potential mitigator or trigger for deviation from “standard” sentencing. In 1999, the ALI initiated a project to revisit the sentencing provisions in the Model Penal Code “in light of the many changes in sentencing philosophy and practice that have taken place in the more than 40 years since the Code was first developed.” In the ALI’s discussion of revisions to the Model Penal Code and the subsequent drafts, there are several compelling openings for treating HIV as a mitigating factor or grounds for a downward departure. These grounds are linked to achieving punishment goals and providing humane incarceration options. A sentence may be reduced, for example, when it does not meet the retributive or utilitarian purposes of criminal law. Personal characteristics of the defendant may be considered in sentencing “when indicative of hardship, deprivation, vulnerability, or handicap, but only as grounds to reduce the severity of sentences.”

ALI’s 2007 revisions relevant to this project have taken the form of three drafts focused on reforms in sentencing commissions, sentencing guidelines, and the courts’ role in sentencing. The drafters of the 2007 sentencing provisions were concerned about a growing prison population. The 2009 draft (Draft 2) considered the need to provide health care or intervention for physically ill inmates in the system. Perhaps most notably, in 2009, the ALI Council voted to eliminate the MPC’s capital punishment provisions.

Section 6B.06 of the 2007 Draft and 6B.09 of Draft 3 (2010) are of the most import to this article. Section 6B.06 allows for “the personal characteristics of offenders” to “be included as considerations within the

350 See, e.g., TENN. CODE ANN. §39–13–204(c) (2010) (allowing evidence of “physical condition” to be introduced as a mitigating factor); UTAH CODE ANN. §76–3–207(2)(a) (LexisNexis 2008) (allowing evidence of “physical condition” to be introduced as a mitigating factor).
352 MODEL PENAL CODE: SENTENCING § 1.02(2) cmt. b (Tentative Draft No. 1 2007).
353 Id. at § 6B.06(4)(a).
355 See MODEL PENAL CODE: SENTENCING § 305.7 (Tentative Draft No. 2, 2009).
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guidelines when indicative of circumstances of hardship, deprivation, vulnerability, or handicap, but only as grounds to reduce the severity of sentences that would otherwise be recommended.”

In 2010, the drafters attempted to revisit some of the 2007 discussion and respond to the need to provide appropriate sentences given incarceration conditions. The Draft’s discussion focused on abolishing the death penalty and also reconsidering the appropriateness of life without parole. The drafters’ reluctance to recommend unqualified natural life sentences revolved around several key issues, two of which are relevant to this article: the failure of sentencing regimes to account for prisoners’ health changes over time and the inability of the prison system to respond to the needs of inmates with fatal diseases.

Draft 3 proves extremely relevant to my study in its suggestions regarding the appropriateness of sentencing modifications based on physical or mental “infirmity.” Section 6B.09 is of particular interest because it could potentially affect the outcome of cases involving HIV-positive defendants. It renews the Commission’s focus on rehabilitation by directing it to “develop, and update as necessary, instruments or processes, based on the best available research, to assess the needs of offenders for rehabilitative treatment, and to assist the courts in judging the amenability of individual offenders to specific rehabilitative programs in confinement or in the community.” This set of provisions allows sentencing commissions to consider the risk posed to society by a particular defendant and set sentences outside mandatory minimums. While the defendants in my set of cases have been convicted of murder, their health trajectories over time may reduce the risk they pose to society or demand more therapeutic correctional settings.

Mechanisms exist, therefore, to allow for deviations from normal sentencing. In this article’s study, the cases demonstrate harsh outcomes beyond the range of what one might expect to see in an “average” murder case and seem to indicate either procedural issues and disparities in the system or sampling problems. Certainly, there is no definition of an average murder case or a typical murder. Simple comparisons between this study’s core group of HIV-positive offenders and the general murder sentencing statistics are admittedly rudimentary, but they are not presented for empirical purposes. These comparisons do suggest a way, however, to

358 MPC Draft 3, § 6B.09.
359 MPC Draft 3, §305.7.
advance the argument that awareness of the role of HIV in the sentencing process would be valuable. Thus, if only one–percent of felony cases result in life sentences and the average murder sentence is about 250 months,\textsuperscript{364} it seems anomalous and perhaps worrisome that in the thirty–six cases presented in my study, fifteen resulted in life sentences (two of them in jurisdictions where life was the maximum penalty) and another fifteen in death sentences. That is approximately forty–two percent of the cases going for life or death respectively.

Beyond the issue of a small dataset with potential selection bias, there are several potential explanations for why, procedurally, this group’s set of punishments may be at the maximum, or to some minds, seem harsh. The first potential factor, as mentioned, is the facts of the particular crime—its extreme violence or disregard for human life, for example.\textsuperscript{362} Murders accompanied by other crimes, such as those for financial gain or sex crimes, are punished more severely by our criminal justice system.\textsuperscript{363} In this article’s study, nineteen cases fell into this category. Similarly, crimes involving more than one victim could demand a greater level of punishment.\textsuperscript{364} Here, eight cases fell into that pattern and they were equally divided between life and death sentences.

Another potential factor to distinguish these cases from the “average” murder case and sentence would be the criminal history of the defendant, including his or her history of violent crime or repeat offender status.\textsuperscript{365} In this article’s cases, however, the criminal backgrounds of the defendants reveal something not terribly outside the range of other offenders. Most of the defendants appeared to have some criminal history, ranging from drug offenses to violent crimes. Some of the defendants had no criminal history at all and had been motivated to murder based on a personal relationship that went awry.

One trait that the defendants do share, beyond having been accused of murder, is minority racial status; twenty–five of the thirty–six cases involve minority defendants. National studies of murder defendants and victims have shown that approximately fifty–percent of murder defendants are black and that most murders are within racial groups, with black people being six times more likely to be homicide victims than whites.\textsuperscript{366} Only


\textsuperscript{362} Mary Sigler, Contradiction, Coherence, and Guided Discretion in the Supreme Court’s Capital Sentencing Jurisprudence, 40 AM. CRIM. L. REV. 1151, 1189–92 (2003).

\textsuperscript{363} Id.

\textsuperscript{364} Id.


eight of the cases studied for this article involve victims who are not also minorities; one of these cases has two victims—one a minority and the other white. Out of all thirty-six cases, eighteen victims are minorities and an additional two are of unknown race.

This set of cases includes a substantial number of minority defendants and a fairly equal divide between minority victims and white victims, but the sentences themselves, relative to race, offer additional perspectives. Eight of the fifteen death penalty sentences are in cases involving white victims; of these cases, three of the defendants were minorities. These are largely cases, therefore, of death sentences involving both white defendants and white victims. However, only sixteen of the thirty-six cases involve white victims at all, making death the punishment in half of all cases with white victims.

It is uncertain what the numbers from these cases mean, but they might reflect other patterns that scholars have observed. Studies examining the effects of race on criminal sentencing abound. Jurors are more likely to recommend capital punishment in cases involving white victims. They also assess defendants in terms of how much they are like themselves. This kind of approach to justice poses a problem in a system where racial representation on juries has not been achieved with any uniformity.

While six defendants (and a potential seventh) and eleven victims (with a potential twelfth) in the cases analyzed for this article were homosexual, no study, to my knowledge, examines the effect of the defendant's sexual orientation on murder sentencing. It would be difficult to assess. In contrast, the law anticipates that victims may be targeted because of sexual orientation and provides procedural compensation mechanisms such as hate crime statutes and aggravated sentencing for vulnerable populations. Like race, sexual orientation can be a source of stigma in


368 See supra note 271.

369 See Id.

370 See William W. Barry, III, Ending Death by Dangerousness: A Path to the De Facto Abolition of the Death Penalty, 52 ARIZ. L. REV. 889, 900–03 (2010) (implying that juries are overwhelmingly white, and arguing that juries therefore identify with white victims).

the courts and the system anticipates that hurdle for victims, yet there has been no systematic study of the relational barrier presented by sexual orientation for defendants.\footnote{Prejudice based on sexual orientation can be a factor considered in at least one state’s courts in assessing trial fairness, however. See Timothy V. Kaufman–Osborn, *Capital Punishment, Proportionality Review, and Claims of Fairness (with Lessons from Washington State)*, 79 Wash. L. Rev. 775, 810, app. A (2004) (providing a judicial questionnaire about a case and any potential bias posed by such factors as race, gender, and sexual orientation).}

A multitude of additional factors can affect sentencing, such as the judge or jury’s temperament and background, jurisdiction, and access to effective representation.\footnote{Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 Law & Hum. Behav. 337, 339–40 (2000) (attributing information overload to the development of heuristic “shortcuts” that may influence the decision–making process); Kenneth Miller & David Niven, *Mixed Messages: The Supreme Court’s Conflicting Decisions on Juries in Death Penalty Cases*, Crim. L. Brief Spring 2010, at 69, 74 (noting that personal biases affect juries’ applications of mitigating factors); Richard L. Wiener, *Death Penalty Research in Nebraska: How Do Judges and Juries Reach Penalty Decisions?* 81 Neb. L. Rev. 757 (2002) (examining the cognitive psychology behind death penalty determinations in Nebraska).} Therefore, it is not surprising that an attempt to break apart a case and a process into its respective segments, lines of influence, and potential outcomes could be a harrowing, and misplaced, exercise. Indeed, these cases are complicated by the fact that they are from different jurisdictions and represent a small number of defendants and victims flagged as HIV–positive through the limited search capabilities of Westlaw and Lexis Nexis. The process of analysis is, in some ways, frustrated by the limited discussion of health status in criminal cases. Many of these cases are from hotspots of HIV/AIDS viral activity and may present more of a slice of local demographics embedded in an already atrocious crime, although the courts do not address these dynamics.\footnote{Nat’l Minority Quality Forum, *U.S. HIV/AIDS Index*, MAPHIV.org, http://www.maphiv.org/ (last visited Jan. 15, 2013).}

B. Disability as Status and Crime

If the procedural influences are difficult to draw definitively, perhaps the question becomes one of what HIV means substantively as a form of status. What does HIV mean in society and represent in a case and its process? I am focusing on how definitions of “categories” of people may define the cases themselves. The cases, in fact, seem substantively unjust from some perspectives because people living with a chronic and terminal illness are being put to death. Even those defendants with life sentences may face earlier deaths than the average inmate because of lack of access to adequate health interventions. From other perspectives, these cases may be regarded as procedurally just because the courts are punishing murder with indifference to health status. Or there may be a concern that by not
punishing swiftly and severely, the spread of HIV by this person or the continuation of the criminal activities is likely.

But I contend that the more interesting question is what HIV is in these cases, what it represents. At first glance, HIV is a disability, but I offer that HIV can come to mean more than a physical or mental impairment. HIV can also easily become a proxy for race, gender, and sexual orientation in ways that bring along the perceived “social disabilities” and stereotypes of those categories, too. For example, the black man living with HIV might be perceived as deserving his condition because a court assumes it came from IV-drug use or homosexual prostitution. Similarly, the HIV-positive victim who was murdered by the heterosexual, HIV-negative defendant can come to be perceived as the real threat if there were any intimations of sexual interest or defensiveness on his or her part. Even HIV alone, as a category, is stigmatized within the hierarchy of traditional disability categories (e.g., mobility impairments, sensory impairments, mental illness, cognitive impairments) as the morally laden, unsympathetic disability, ultimately distancing judges and juries from the victims and defendants in these cases.

1. HIV as a Proxy for Race Status.—As noted earlier in this article, the defendants in these murder cases are largely racial minorities. Scholars working on race issues outside of the HIV context have made significant contributions to American jurisprudence by questioning the interplay of socioeconomic status and legal outcomes and pointing to the political and hierarchical nature of law itself. Arguably, people living with HIV, and the defendants in these cases, do not often have much power within the legal system because of both their HIV status and their race. Furthermore, if the narrative of HIV is one of a failure of personal responsibility in preventing the contraction and transmission of HIV, then that narrative may carry over into how we, as a society, make people living with HIV responsible for other actions unrelated to their disease. This perspective might help to explain the general lack of empathy for HIV-positive minority victims in these cases.

Scholars such as Dekera Greene and James Forman, Jr. have challenged the account of personal responsibility for HIV by suggesting that other factors may be at play in the epidemic—population density, poor access to health services, and class and racial gentrification that tend to exclude those people living at the margins. As Forman suggests, legal theorists need to consider race in trying to craft theories about how communities respond to social problems. Even the notion of “linked fates”—supposing that marginalized groups are cohesive in responding to problems affecting

376 Dekera Greene, Ain't No Peace Until We Get a Piece, THE MODERN AM., Spring 2009, at 3, 4 n. 12.
their members—may erode in the face of crime or in public health crises such as HIV. Forman has built on Cathy Cohen's work regarding the black community's response to HIV as a "cross-cutting" rather than a "consensus" issue, asserting that HIV has the power to divide the community rather than bring it together. Those divides tend to create clusters of people who are similarly marginalized and disenfranchised. Therefore, if we are dealing with a largely diverse population of defendants facing HIV stigma, it is not surprising that they may not find a source of support within their own racial communities to confront and address potential HIV stigma in the justice system.

Richard Delgado has suggested that a rearrangement of systems of power and the daily institutions of living that will result in greater justice for minorities. Complicating the push for greater justice for HIV-positive defendants in these cases, however, is the relative weight of each identity in producing stigma. Kimberlé Crenshaw has warned that a focus on one perceived aspect of identity may obscure the actual experience of identity. Advancing a theory of "intersectionality," Crenshaw has explored the ways in which multiple identities—race, sexual orientation, and gender, among them—may interact to create both marginalization and meaning within society. People labeled as different or diverse are not passive instruments in this process. They create identities and explanations of their own, enriching and complicating our understandings of discrimination and bias in societal institutions such as the criminal courts.

When the courts in the cases featured in this article explored drug use, other "risky behavior," and poverty in the context of HIV-positive minority defendants, for example, their discussions suggested that race is wrapped up with other forms of identity and status that can marginalize and segregate defendants. Efforts to assess and counteract bias must focus

377 James Forman, Jr., The Black Poor, Black Elites, and America's Prisons, 32 CARDOZO L. REV. 791, 795–98 (2011) (emphasizing the tension between wanting crime control in black neighborhoods and worrying about how policies and punishments might ultimately affect citizens of those neighborhoods).


379 Id.


382 Id. at 1296–99.

383 Id.
on both the context of individual identities (victims, defendants, judges, juries) and an almost archaeological mining of institutions themselves. It is not enough to say that race, sexual orientation, or HIV status are empty categories or that they are rich ones, replete with bias. Rather, any project must consider the ways in which HIV and other forms of status and identity interact with and influence the court system. If courts refuse to discuss race or HIV directly, they hamper this endeavor of making stigma transparent.

2. HIV as a Proxy for Gender Identity and Sexual Orientation.—As I explored earlier in this article when discussing HIV stigma, “gayness” and HIV are often paired in the social imagination. Part of the reason why HIV has long been perceived by some communities as deserved is because of the accompanying belief that it is a gay disease. Of course, straight men can also acquire the disease, but there is an underlying attitude that straight people get HIV from having deviant sexual intercourse—such as men who have sex with men. In this way, these men are not behaving in traditionally masculine ways and are perceived as deserving of some of the questioning and stigma that may come from their outlying behaviors. Sexual orientation and gender identity, unlike race, do occupy the text of these cases and there seems to be far more speculation about the sexual proclivities and identities of both defendants and victims than discussions of their racial status. These are murder cases, yet discussions of sex abound as courts sort through fact situations involving otherwise “straight-acting” men behaving vulnerably and “unmanly” by having sex with gay men, transgendered witnesses being murdered, and straight men fearing that their wives would learn about their affairs with men.

What is so interesting about the issue of sexual orientation and gender identity is that it offers a potential theoretical bridge between race and disability by challenging the stability of such constructed social categories as gay/straight, black/white, and healthy/"handicapped."384 Opinions where the defendants or victims have not assimilated but have acted in ways outside the comfort zones of judges and juries seem to result in a range of penalties, from the cancellation effect that I discussed in cases where both the defendant and victim are HIV—positive and homosexual men, to more life sentences in general among the cases involving homosexual defendants and victims. Heterosexual men are, perhaps, easier for judges and juries to relate to, but they tend to receive death sentences in these cases. They get punished “as real men” would. Cases involving heterosexual victims dominate the death sentence cases studied in this article, too.

If we step back for a moment and pretend that every HIV—positive defendant and victim in the cases studies was also homosexual, we see that these courts are more willing to consider life sentences or less—than—life sentences in cases where HIV—positive victims died. It may not be

that HIV has its own separate meaning for the courts, but rather that HIV
denotes a certain kind of lifestyle—a gay lifestyle—that is far outside of the
experience of most judges and juries.385 Who are these men who have sex
with men or change their biological sex? They are not us, and in not being
us, perhaps it is easier to see their lives as impoverished and their crimes
as less reprehensible than those committed by “dangerous” HIV-positive
heterosexual defendants or against HIV-negative heterosexual victims.386

Sexual orientation, or even a failure to perform in a recognized,
traditionally male capacity as a defendant or a victim, may result in a social
disability that in turn clouds sentencing. For example, in considering the
cases involving male intimate relationships that ended in murder, we see
that sexual orientation and gender identity may produce strange mitigating
effects within the system. The ineluctable barrier then is assisting judges and
juries with thinking outside their own sexual comfort zones and removing
psycho–cognitive barriers to pathos, when deserved, for defendants and
victims from minority sexual orientations.387 Part of the work of courts is
to decide cases in which the participants may not be expert on all matters,
particularly those of identity.388 While it is not possible to determine the
precise role that sexual orientation, sex, or gender identity played in this
set of murder cases, or run the risk of essentializing,389 we can examine the
stories within the cases and what they say about disability.

3. HIV as Disability: What Disability Studies Might Offer.—When is HIV just
a disability? While disability, as a category, is presented as the final lens
of focus for grasping these cases in a richer way, it has been a prominent
theme in the narratives and my analysis in this article. Disability rears itself
in interesting ways in these cases. It appears in both its traditional form of
a physical or mental impairment390 as well as in the sociological forms of

385 See generally JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX”
(1993) (arguing that heterosexuality shapes what bodies and genders are of significance in
society).

386 Francisco Valdes, Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,”
“Gender,” and “Sexual Orientation” in Euro–American Law and Society, 83 CALIF. L. REV. 1, 23–27,

387 In his article, Valdes quotes Judge Richard Posner’s acknowledgment that “judges know
next to nothing about [sex and sexuality] beyond their own personal experience,” and “people
with irregular sex lives are pretty much . . . screened out of the judiciary.” Id. at 7 (quoting
RICHARD A. POSNER, SEX AND REASON 1 (1992)).

388 Kenji Yoshino, Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays, 96

389 Janet Halley, Sexual Harassment, in LEFT LEGALISM/LEFT CRITIQUE 80 (Wendy Brown &
Janet Halley eds., 2002).

390 The Americans with Disabilities Act, 42 U.S.C. § 12102, defines disability as “a physical
or mental impairment that substantially limits one or more major life activities,” “a record of
such an impairment,” or “being regarded as having such an impairment.” 42 U.S.C. § 12102(1)
(Supp. 2011).
race, class, sexual orientation, and criminal status as "disabilities" of some kind. From a civil rights perspective, disability as a category is a catch-all of sorts for conditions of marginalization, stigma, and deviance. Disability is something not medically indicated but socially produced, and as such, its effects are pervasive.

Disability studies, an interdisciplinary field examining the social, cultural, and political nature of disability, adds another layer of analysis to how society in general and the criminal courts in particular might view HIV as a disability and punish it as such. Scholars working in the field have contended that people with disabilities are often individually punished for the structural deficits in society, whether they be in communities, families, or government, and that the failure to be "normal" or "accepted" is then an individual problem or failure. This kind of stigma and oppression is often referred to as ableism when it relates to physical differences, and sanism when it relates to mental ones.

In the thirty-six cases studied for this article, a defendant’s being disabled by HIV did not make one a more sympathetic character and did not evoke arguments about mercy. Rather, it showed perhaps dangerousness, recklessness, or menace. The treatment of HIV in these cases resonates with the history of disability, where perspectives evolved from the view that disability was "a sin (a punishment from God forgiven through divine intervention)" to a "pathology (a physical, sensory, or cognitive failing that tragically ‘handicaps’ those afflicted)." Disability, in general, is a category overlaid with moral judgments about character, fitness, and worth. The history of disability is one in which people and their deviant bodies and minds have been punished as a matter of containing that perceived deviance. "Ugly laws" were common in America in the late nineteenth

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391 See, e.g., Zanita E. Fenton, Disabling Racial Repetition, 31 J.L. & INEQUALITY 79, 85 (noting that race has been a "disabling factor in education and in most other areas of life"); D. Kim Reid & Michelle G. Knight, Disability Justifies Exclusion of Minority Students: A Critical History Grounded in Disability Studies, 35 EDUC. RESEARCHER, Aug./Sept. 2006, at 18, 18-19 (warning about the conflation of race and disability). Even with this contribution to make to the construction of disabilities in society, disability studies, like critical legal theory, has been critiqued, perhaps rightfully so, as being too "white." See CHRISTOPHER M. BELL, BLACKNESS AND DISABILITY: CRITICAL EXAMINATIONS AND CULTURAL INTERVENTIONS 3 (Christopher M. Bell ed., 2011).

392 See generally, Arlene S. Kanter, The Law: What’s Disability Studies Got to Do With It or An Introduction to Disability Legal Studies, 42 COLUM. HUM. RTS. L. REV. 402 (2011) (supporting the omnipresence of disability in legal issues and the need for disability studies as a considered part of the law schools’ curricula).


394 Id.


396 Sharon Snyder & David Mitchell, Afterword: Regulated Bodies: Disability Studies and the Controlling Professions, in SOCIAL HISTORIES OF DISABILITY AND DEFORMITY 175, 181 (David M.
and early twentieth centuries and kept people with disabilities out of public
sight. The eugenics movement and state sterilization of people with
disabilities continued well into the mid-twentieth century. People with
different bodies have long posed both a puzzle and a threat to institutions
where normalcy is a key virtue, just as the HIV-positive defendants and
victims in this article’s case studies are outsiders to the courts.

What distinguishes HIV from most traditional forms of disability
is society’s perception of it as being self-inflicted. While the what-
happened—to—you? question may be ever-present in the lives of all disabled
people, many narratives of impairment arouse empathy, especially when
they are related to war service, accidents, or birth defects. The primary
view of HIV has been that it is self-caused; to some people, that can mean
that the disease and its effects—both physical and social—are deserved.
Therefore, if being an HIV-positive defendant results in relatively harsh
sentencing for a crime such as murder, hardly anyone will have a problem
with this outcome. Moral judgments about the disease itself become
wrapped up with judgments about the crime. For better or worse, the act of
sentencing is an overall assessment of the person. HIV-positive defendants
may be judged to be “bad” people. They are punished for their crime
and for their HIV disability.

In the context of the cases studied, victims and defendants with
HIV are both bad, but for different reasons, and are treated accordingly.
Defendants are bad actors not only because they pose a risk to society in

398 A CENTURY OF EUGENICS IN AMERICA: FROM THE INDIANA EXPERIMENT TO THE HUMAN
GENOME ERA, supra note 79 at 1, 2, 4–5.
399 Karolynn Siegel, et al., Stigma Management Among Gay/Bisexual Men with HIV/AIDS, in
DEVIANT BEHAVIOR: A TEXT-READER IN THE SOCIOLOGY OF DEVIANCE 263, 263 (Delos H. Kelly
& Edward J. Clarke eds., 6th ed. 2002) (characterizing societal reactions to HIV/AIDS to be
negative due to perceptions that it is a “self-inflicted” disease because of “lifestyle choices”
and the performance of “disapproved behaviors, especially homosexuality, and illicit drug
use”).
400 See RICHARD M. GARGIULO, SPECIAL EDUCATION IN CONTEMPORARY SOCIETY: AN
INTRODUCTION TO EXCEPTIONALITY 131–32 (2010) (discussing how different cultures perceive
and react to causes of disability).
(describing the ostracism of people living with HIV and judges’ negative reactions to HIV–
positive people). That kind of stigma still exists, in part, today.
402 For a parallel to other kinds of disability-related situations concerning quality of life
judgments, see Martha A. Field, Killing “The Handicapped”—Before and After Birth, 16 HARv.
WOMEN’S L.J. 79, 84–89 (1993) (identifying the problems and biases of substituted decision-
making when it comes to life and death choices for newborns with disabilities).
Liberties, 49 OHIO ST. L.J. 1017, 1038 (1989) (using the term “incorrigibles”); McArthur, supra
note 88, at 730 (recognizing the “stigma associated with having the disease”).
their willingness to commit murder, but also because their health status poses a risk of murder in itself. HIV is associated with secrecy, deviance, and a disregard for social order; therefore, it is not surprising that judges and juries, consciously or unconsciously, would want to contain both the individual and the disease by giving HIV-positive defendants a death sentence or life imprisonment. As noted in the case in the Introduction, the “specter” of HIV/AIDS is omnipresent.405

Jurors and judges bring more to bear on the sentencing process than their individual values and senses of identity. In being confronted with the issue of HIV and its accompanying stigma, they might also bring their norms of identifying with certain social groups.406 To identify with a social group means also having to internalize its norms. For example, if a judge or juror is only able to see himself or herself as part of the “normal,” healthy, or HIV-negative members of society, he or she could end up meting out harsher punishment for people who are different. These reactions can be based on perceived values, intergroup stereotypes, and fears about what these differences mean.

When sentencers are confronted with HIV-positive victims, they tend to shift focus from containment of the virus and “viral” behavior (e.g., violence, aggression, addiction, sexual deviance) to consideration of the value of the deceased’s life. Here, the theme of life-value is not drastically different. We punish the murder, but we may not have the same worries about contagion that we do when dealing with an HIV-positive defendant. Alternatively, the trend of lighter sentencing for these murders may be explained by the courts’ refusal to attribute the same value to the HIV-positive victim’s life as they do to an HIV-negative person’s life. Regardless of the severity of the crime, as demonstrated in the hate-filled murder in Winston-Salem,407 courts offer a matter of years or life as the punishment. Perhaps these lives are more difficult to relate to than HIV-negative ones, or maybe the behaviors associated with HIV—drug use, sexual wantonness, and a failure to avoid disease—trigger a “hierarchy of disability” in which HIV sits at the bottom of all disabilities that might arouse compassion and empathy.408 Society views people with HIV differently from people


408 While it has not been as much of a concern for legal theorists, humanities theorists have referred to and written about a “hierarchy of disabilities.” See, e.g., Christopher Krentz, A “Vacant Receptacle”? Blind Tom, Cognitive Difference, and Pedagogy, 120 PMLA 552, 555 (2005)
with other sympathy-evoking disabilities who are “not to blame” for their
diseases (whatever their sources), or from people who have no health
differences. In the end, for both HIV-positive victims and defendants,
we have a system that punishes HIV by giving harsher sentences to HIV-
positive defendants and misunderstanding the value of the lives of both
victims and defendants with HIV.

CONCLUSION

These cases offer a small set of windows into how HIV operates in the
criminal justice system. As such, they are flawed in their ability to support a
broader basis for generalization, but their study is not a fatal enterprise. As
a whole, they show a system struggling with the role of HIV in sentencing
and also public health concerns, strained prison medical care, and disease
contagion vis-à-vis sentencing. In the complexities of the defendants
and the victims, the details of the cases themselves, and the potential
stigmatized reactions by judges and juries, we see that nothing is so neatly
reduced to a spreadsheet of variables and outcomes. HIV is embedded
in the facts of the cases and the associated stigmatized social statuses of
defendants and victims. To the extent, however, that HIV operates as a
disability—socially and medically defined—its effect on the outcomes in
the cases is far from neutral.

If nothing else, these cases reveal a glimmer of the reality that the
outcomes of our criminal justice system cannot be explained by logical and
moral theories of punishment alone. The failure to be able to point clearly
to where the law is operating versus where perceptions of HIV and the
people who have it are in play calls for further study of HIV stigma in
the courts. This article's research agenda prompts follow-up by formally
tracking HIV and related stigma in the judgment and sentencing phases, as
well as training judges and juries on disability and HIV issues. These lines
of inquiry must come with the acknowledgment that HIV is not a single
experience, immutable across times and places, as these cases themselves

(locating cognitive disabilities below blindness in a “hierarchy of disabilities”).

409 McArthur, supra note 88, at 740 (drawing a parallel between the disability experience of
HIV and blindness or the loss of a limb).

410 Lawrence O. Gostin, et al., The Law and the Public's Health: A Study of Infectious Disease Law
reform are intertwined in important ways; policies toward communicable diseases such as
HIV need to be considered along with approaches to the administration of justice).

411 Ange-Marie Hancock, When Multiplication Doesn’t Equal Quick Addition: Examining
Intersectionality as a Research Paradigm, 5 PERSPS. ON POLS. 63, 63-64 (2007) (suggesting that an
intersectional approach to research is both a normative and empirical approach).

412 See discussion supra Part III.

413 MacGillis, supra note 141, at 231–32 (1996) (advocating for greater education of the courts
about HIV as an infection and as the basis for downward departures in sentencing).
demonstrate so aptly. It can serve as a proxy for other forms of disability. Initiatives directed at addressing HIV as a public health problem must also take into consideration its relationship with the criminal justice system. In doing so, the focus should not only be on what services are provided to ill inmates, but also what HIV means in the search for and commitment to just punishments.414
