Exceptions: The Criminal Law's Illogical Approach to HIV-Related Aggravated Assaults

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This article identifies logical and due process errors in cases involving HIV-related aggravated assaults, which usually involve an HIV-positive individual having unprotected sex without disclosing his or her HIV status. While this behavior should not be encouraged, this paper suggests that punishing this conduct through a charge of aggravated assault—which requires a showing that the defendant’s actions were a means likely to cause grievous bodily harm or death—is fraught with fallacies in reasoning and runs afoul of due process. Specifically, some courts use the rule of thumb that HIV can possibly be transmitted through bodily fluids as sufficient evidence for finding that a particular HIV-positive defendant who had unprotected sex is likely to cause substantial harm. This leads to two due process errors: (1) the conflation of what is theoretically possible for what is likely, and (2) the use of data about a hypothetical average HIV-positive individual as proof of the effects of a particular HIV-positive individual’s behavior. By relying on the rule of thumb that HIV can possibly be transmitted through bodily fluids rather than investigating any unique features of the particular defendant on trial, these jurisdictions violate the due process clause’s requirement of “personal guilt.” And, when that rule of thumb is applied to an HIV-positive defendant whose undetectable viral load makes him an exception to the general rule, that jurisdiction commits Aristotle’s Fallacy of Accident. After explaining these concepts, this article identifies various cases from the states and the military that commit these errors. These cases are then compared to similar aggravated assault cases from Canada that do not make the same mistakes and use the kind of particularized proof that is required by logic and the due process clause. The article concludes that the errors in certain HIV-related aggravated assault cases suggest that punishing such behavior in this manner may not be effective.
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EXCEPTIONS:
THE CRIMINAL LAW’S ILLLOGICAL APPROACH TO HIV-RELATED AGGRAVATED ASSAULTS

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“Birds can fly” and “the number 13 follows the number 12” seem like truisms, statements as irrefutable as “the sky is blue.” Of course, some birds cannot fly, 13 does not follow 12 on a clock and the sky is rarely, if ever, just blue. These so-called truths are just rules of thumb, shorthand generalizations or easy-to-recall heuristics meant to simplify a complicated world. While rules of thumb are essential to daily life, they can be problematic bases for legal conclusions.

This is true because reasoning from rules of thumb results in over-inclusive conclusions. The statement “birds can fly” may be true, but it is not always true. There are exceptions: flightless birds, injured birds and birds whose feet are stuck in gum. Because of these observable exceptions, no one uses flight as a determinative factor for determining what legal protections to grant to birds. Galapagos penguins, for example, are entitled to the same legal protections due endangered migratory birds, regardless of their ability to fly. Rules of thumb, then, can be useful shorthand descriptors, but not when the generalization ignores important and defining exceptions or denies heterogeneity in a population simply for ease of use.

HIV-positive criminal defendants are perfect examples of members of a heterogeneous group that can be victimized by improper reasoning from rules of thumb. In particular, HIV-positive defendants charged with risking transmission of HIV are victims of the rules of thumb that HIV can kill and that HIV can be transmitted through bodily fluids. This article identifies

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1 Teaching Fellow, California Western School of Law; J.D., Harvard Law School; A.B., magna cum laude, Harvard College.

2 There are countless “rules of thumb” books counseling readers how to survive this or that life obstacle, including, JAY SILVERMAN, ET AL., RULES OF THUMB: A GUIDE FOR WRITERS (2009) and ALAN WEBBER, RULES OF THUMB: 52 TRUTHS FOR WINNING AT BUSINESS WITHOUT LOSING YOUR SELF (2009).

3 S. MORRIS ENGEL, WITH GOOD REASON: AN INTRODUCTION TO INFORMAL FALLACIES (6th ed. 1999). The statement that “birds can fly” has any number of categorical exceptions, like penguins and other flightless birds – ostrich, emu, cassowary, rhea, kiwi and Inaccessible Island rail being the six other non-extinct flightless birds – and conditional exceptions, like birds with broken wings, or birds with feet stuck in gum or birds that have suddenly developed aviophobia. Therefore, to look at any given bird and assume that it can fly would be a valid use of a rule of thumb heuristic, but it would not necessarily be an accurate assessment of that bird’s ability. Nor would it be fair to an injured bird, whose reparable infirmity would be ignored if observed by an obtuse generalizer. The same is true of the number example. The numeral 13 does follow the numeral 12 in sequential counting in base-10 math, but not on 12-hour clocks, in elevators in many American hotels or in airplanes. See Barbara de Lollis, Some Hotels Don’t Skip the 13th Floor Anymore, USA TODAY (Mar. 8, 2007) available at http://www.usatoday.com/money/biztravel/2007-03-08-13th-floor-usat_N.htm; Sid Fleischman, The 13th Floor: A Ghost Story, THE WASHINGTON POST (Aug. 19, 2007) available at http://www.washingtonpost.com/wp-dyn/content/article/2007/08/18/AR2007081800890.html.

4 Under the Endangered Species Act, 16 U.S.C. § 1531 et seq., the Galapagos penguin is listed as endangered, which means it is in danger of extinction within the foreseeable future throughout all or a significant portion of its range.
how courts use rules of thumb in HIV-related aggravated assault cases and, in so doing, run afoul of logic and due process.

Implicit in the concept of due process is the requirement that the state prove beyond a reasonable doubt that the particular defendant on trial committed the charged crime. To do so, prosecutors must prove every element of the crime beyond a reasonable doubt. For example, it would be sufficient to prove intent to cause serious bodily injury that the defendant slashed at his victim with a pocket knife and repeatedly punched his victim’s head.\(^5\) But, recourse to the dubious assumption that gun owners are more likely to commit gun crimes would be insufficient to prove that a defendant who held a gun intended to kill his victim for two reasons. First, guns do kill people, but there are exceptions to that rule. Unloaded, broken or plastic water guns rarely kill people, so to convict a defendant based on a general rule would ignore those exceptions. Second, the generalized assumption does not prove that the defendant’s conduct met any element of an actual crime, thus relieving the state of its burden of proving that the defendant is actually guilty of the crime with which he is charged.

Using a rule of thumb to erroneously encompass exceptions to the general rule is to fall prey to the logical fallacy *a dicto simpliciter ad dictum secundum quid* (“from a maxim without qualification to a maxim where an exception is ignored”), or “accident”\(^6\), hereinafter referred to in this article as the “Accident Fallacy” or “Fallacy”. And, using a rule of thumb about a heterogeneous class of defendants as evidence of the behavior of the one defendant on trial is to fall prey to this Fallacy, as well as a due process violation. This article identifies this common logical error in various states’ and the military’s attempts to punish the attempted transmission of HIV\(^8\) through the common law crime of aggravated assault. HIV-positive defendants are uniquely subjected to a lower standard of proof as a result of a misunderstanding of the probability prong of most aggravated assaults – namely, the *likelihood* that, under the circumstances in which it is used, the instrument of harm would cause grievous bodily harm or death.\(^9\) This article concludes that, in certain jurisdictions, state law has improperly been applied


\(^6\) The inductive Fallacy of accident is one of the thirteen fallacies identified by Aristotle in his text, *On Sophistical Refutations* (*Sophistici Elenchi*).

\(^7\) The military criminal justice system is a parallel system of justice created pursuant to the President’s executive powers. General courts-martial, the trial courts in the military, are subject to appellate review by the Courts of Criminal Appeal (CCA) of each service (though the Navy and Marine Corp. are covered by one CCA) and the Court of Appeal for the Armed Forces (CAAF), the highest court in the military. CAAF is an Article I court, with worldwide jurisdiction concurrent with the jurisdiction of the Uniform Code of Military Justice (UCMJ), the military’s governing criminal and jurisdictional code. Where possible and for ease of understanding, language unique to military criminal practice will be replaced with language familiar to civilian criminal practice.


\(^9\) While the technical definitions of the crime, and the technical requirements of the elements of the crime, vary somewhat among jurisdictions, most include a probability prong, i.e., a requirement that the means of the attack, or the weapon, be used in a manner *likely* to cause severe harm. This article does not address those attempts to criminalize the attempted transmission of HIV through other common law crimes that do not require proof of probability.
to relieve the prosecution of the burden to prove that the defendant on trial used his HIV-infection in a manner likely to cause harm or death due to a dubious interpretation of “likelihood” and recourse to generalized proof that a hypothetical defendant could use his HIV-infection in such a manner. The HIV-positive population is as varied, with respect to its HIV, as the wider population is with respect to its noses, hair colors and weight. For example, there are those who remain asymptomatic and whose conditions never progress, those who respond well to one medication but not to the most commonly used pills, those who experience symptoms for five years and then none for fifty, those whose only symptom is fatigue and those who need a complex regimen of medications to function each day. And, the scientific and medical tools to identify this heterogeneity or, more specifically, to identify deviations from the average, are readily available to the modern criminal court. To use a rule of thumb to describe this population for evidentiary purposes is illogical, unnecessary and unjust.

This error raises the foundational question of whether the criminal law is an appropriate tool for stemming the spread of HIV and deterring correlative risky and dangerous behavior. Cases like that of Philippe Padieu, who intentionally tried to infect six women with HIV, and Nushawn Williams, who exposed over one hundred women to HIV, stir a natural emotional and punitive response. Such anger has led to countless criminal transmission of HIV statutes and calls for laws that punish HIV-positive individuals who have unprotected sex. It has even led to cases where prosecutors are allowed to prove intent to kill or do harm merely by proving that the defendant had unprotected sex while aware of his HIV-positive status. But such

10 The history, genesis and impact of the criminalization of HIV exposure has been discussed at length. For an early discussion of how criminalization began, see Marvin E. Schechter, AIDS: How the Disease is Being Criminalized, 3 CRM. JUST. 6, 6-8 (1988). For a discussion of how criminalization has moved from the traditional criminal law to statutes specifically criminalizing attempted transmission, see Leslie. E. Wolf & Richard Vezina, Crime and Punishment: Is there a Role for Criminal Law in HIV Prevention Policy, 25 WHITTIER L. REV. 821 (2003-2004); Discussion, Michael L. Closen et al., Criminalization of an Epidemic: HIV-AIDS and Criminal Exposure Laws, 46 ARK. L. REV. 921 (1993-1994); James B. McArthur, As the Tide Turns: The Changing HIV/AIDS Epidemic and the Criminalization of HIV Exposure, 94 CORNELL L. REV. 707 (2008-2009); Comment, AISA as a Weapon: Criminal Prosecution of HIV Exposure, 36 HOUS. L. REV. 1787 (1999). This scholarship will not be repeated here, but it provides an important context in that it identifies other strains of injustice in using statutory regimes to punish transmission of HIV.

11 Diane Jennings, Man Who Spread HIV Gets 45 Years, DALLAS MORNING NEWS (May 30, 2009), at 1B.

12 Lynda Richardson, Man Faces Felony Charge of Exposing Girl to HIV, THE NEW YORK TIMES (Aug. 20, 1998), at B3. For a detailed summary of Mr. Williams’s story, see Wolf, supra note 10, at 821-25.

13 Numerous commentators have argued that such laws were passed in haste for political expedience. “HIV-specific statutes have been passed most often as political measures to calm the fears of the populace at the beginning of the epidemic. The hastiness of the drafting of these statutes makes them less than ideal.” Thomas W. Tierney, Comment, Criminalizing the Sexual Transmission of HIV: An International Analysis, 15 HASTINGS INT. & COMP. L. REV. 475, 511 (1992). “[P]olitical pressures on legislators to use the coercive powers of the state to combat the [AIDS] epidemic are unmistakable.” Lawrence O. Gostin, Public Health Strategies for Confronting AIDS, 261 JAMA 1621, 1629 (1989).

14 See, e.g., State v. Musser, 721 N.W.2d 734, 649-50 (Iowa 2006). The court found that Mr. Musser possessed intent to harm merely because he engaged in sex, regardless of his belief that he could or could not cause harm. Id. The limited proof of intent necessary to convict HIV-positive individuals is striking, but not the discrete subject of this article. For a discussion of intent and other considerations where the traditional criminal law is used
reactions are poor rationales for criminal retribution that ultimately captures people whose unique condition carries with it an infinitesimally small risk of transmission.

Inasmuch as identifying errors in proof in cases involving HIV-positive individuals charged with aggravated assault highlights the risks of this approach, this article does not argue that the traditional criminal law is per se inappropriate in these cases. Identifying and ameliorating certain as-applied problems, however, should help narrowly tailor the criminal law to accurately capture culpable behavior. Those jurisdictions that rely on the crime of aggravated assault must appreciate the diversity of the HIV-positive population and the availability of specific proof thanks to advancements in medical technology.

This article proceeds in five parts. Part I describes the logical Fallacy of Accident in greater detail, providing examples in other areas of law. The Fallacy occurs when a general rule of thumb is used to inappropriately describe a heterogeneous group. Therefore, this section also discusses the diversity of the HIV-positive population. Part II discusses how each step in the Accident Fallacy represents a due process violation that is common in HIV-related assault prosecutions – the use of generalized proof to prove an element of the crime and the correlative lowering of the government’s burden. Part III finds evidence of these errors in numerous jurisdictions’ attempts to use the criminal law to punish the transmission of HIV. This section also treats the special case of the military’s jurisprudence in this area, identifying two errors in its jurisprudence. Part IV looks to Canada’s use of its common law as a model for avoiding this logical and constitutional error in the future. Part V identifies the implications of these errors, cautioning those jurisdictions that remain committed to using the traditional criminal law in this area.

I. The Accident Fallacy

The Accident Fallacy occurs when a general rule is applied to a specific situation in which the rule – for reasons of unique individual facts, or “accidents” – is inapplicable. The mistake occurs because the general rule is too general; it misses salient differences in a heterogeneous population and fails to recognize exceptions where they should exist. In short, universal application of a general rule to a heterogeneous pool of subjects is to commit the Fallacy of Accident.

Plato realized this Fallacy when he identified valid exceptions to general rules. In the Republic, he states that one should pay one’s debts, except when the circumstances were such that paying your debt would be a uniquely bad thing. “Suppose that a friend when in his right mind has deposited weapons with me and he asks for them when he is not in his right mind, ought I to give them back to him?” The general rule is not wrong per se, but rather inappropriately applied when used to describe a particular case that is unique, whether those unique conditions are unknown, rare or obscure. Some Accident Fallacies are jokes (“White Men Can’t Jump”), others are negative stereotypes (“Gay men are superficial”). In either case, the Fallacy is a problematic tool for legal reasoning.

to punish the transmission of HIV, see Kathleen M. Sullivan & Martha Field, AIDS and the Coercive Power of the State, 23 HARV. C.R.-C.L. L. REV. 139, 162-172 (1988).

15 That argument has been made elsewhere. See, e.g., Wolf, supra note 10, at 869-873. But see McArthur, supra note 10, at 737-741.

**Holt Civic Club v. City of Tuscaloosa**\(^{17}\) is a good example of the Accident Fallacy at work in the law. In that case, residents of an unincorporated section on the outskirts of town sought city voting rights, arguing that they have long been subjected to city obligations, but enjoyed none of the correlative rights.\(^{18}\) They defined voting rights as concomitant with the imposition of police and sanitary regulations, criminal court jurisdiction and the city’s professional licensing power. But, the Supreme Court denied their requested relief. It was, the Court said, impossible to restrict the influence of a city’s actions,\(^{19}\) but it was entirely rational for a state to delineate geographic boundaries for the purposes of voting and deny voting rights to those living outside those boundaries.\(^{20}\)

In so holding, the Court unveiled a neat linguistic trick. For the purposes of explaining the broad reach of a city’s extraterritorial reach, the city’s boundary line was “imaginary”; for the purposes of establishing voting rights, the boundary was a “physical” or “geographic” one that defined “the government entity.”\(^{21}\) It was also a logical fallacy. As Justice Brennan noted in his dissent, it may be true that the Court had previously based the extension of city franchise on geographical residency in other cases, but the application of that general rule made no sense in this case. Never before had the Court been faced with a situation in which an unincorporated community, just on the farther side of a city’s technical border, had been denied voting rights but subject to the city’s police, sanitary and licensing powers.\(^{22}\) The “accidents” of this case—the unique and well established relationship between the city and this community—made the application of the general rule unsound.

Courts face this situation every time a party asks that an exception to a general rule be carved out, and almost as often, they do not commit the Accident Fallacy. The plain error doctrine is one among a myriad of common examples. The general rule is that “a contemporaneous objection to jury instructions must be made at trial,”\(^{23}\) but the plain error doctrine recognizes that some errors, regardless of the quality of defense counsel or a strategic decision not to object, are so abhorrent to principles of justice that the general rule must be put

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\(^{17}\) 439 U.S. 60 (1978).

\(^{18}\) Id. at 69.

\(^{19}\) Id. (“The imaginary line defining a city’s corporate limits cannot corral the influence of municipal actions. A city’s decisions inescapably affect individuals living immediately outside its borders. The granting of building permits for high rise apartments, industrial plants, and the like on the city’s fringe unavoidably contributes to problems of traffic congestion, school districting, and law enforcement immediately outside the city.”).

\(^{20}\) Id. at 66-68.

\(^{21}\) Id. at 69, 68.

\(^{22}\) Id. at 87 (Brennan, J., dissenting) (“The criterion of geographical residency is thus entirely arbitrary when applied to this case. [The Court] fails to explain why, consistently with the Equal Protection Clause, the ‘government unit’ which may exclude from the franchise those who reside outside of its geographical boundaries should be composed of the city of Tuscaloosa rather than of the city together with its police jurisdiction. It irrationally distinguishes between two classes of citizens, each with equal claim to residency (insofar as that can be determined by domicile or intention or other similar criteria), and each governed by the city of Tuscaloosa in the place of their residency.”).

aside. This exception permits an appellate court to remand for a new trial where “a highly prejudicial error affect[ed] substantial rights,” but only where a miscarriage of justice has occurred or where the court must “preserve the integrity and the reputation of the judicial process.” Where the defense failed to object to a judge’s failure to instruct the jury on self-defense, for example, the very centrality of that element to the defense’s case and the resulting gravamen of the judge’s error may amount to plain error and may warrant a new trial.

The plain error doctrine can exist because a judge can distinguish between errors – some are harmless, some are plain, while some seem like errors but are not errors at all. Trial level errors are, therefore, heterogeneous and universal application of general rules would be inappropriate. Where heterogeneity makes it is possible to distinguish among members of a group – like birds, legal errors and HIV-positive criminal defendants – reasoning from general rules results in specious, illogical and unjust conclusions.

Heterogeneity also describes the HIV-positive community. In fact, the only sense in which HIV-positive individuals are fungible is in their classification as a community distinct from HIV-negative individuals. In that regard, HIV is like pregnancy; the status of being pregnant is binary in that a woman is either pregnant or not pregnant. And clinicians have tests to determine both pregnancy and HIV status with accuracy. But once an individual is HIV-positive, his or her particular condition – its gestation, physical manifestation, susceptibility to infection and risk of transmission, to name just a few – takes a unique track that requires more narrowly tailored classifications.

Just like there are stages of pregnancy, there are stages of HIV, which include gestation periods where antibodies are not present in bodily fluids. There are highly sensitive viral load

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24 United States v. Giese, 597 F.2d 1170, 1199 (9th Cir. 1979).
25 United States v. Smith, 962 F.2d 923, 935 (9th Cir. 1992).
26 Virgin Islands, 949 F.2d at 683.
27 See, e.g., Neder v. United States, 527 U.S. 1, 7 (1999) (harmless error review presumptively applies to all errors where objection is made); Fed. R. Crim. P. 52(a).
30 One of those tests, an enzyme-linked immunosorbent assay (ELISA) that can detect exceedingly low levels of the placenta-secreted hormone human chorionic gonadotropin (HCG) in a woman’s blood, can also be used to detect the presence of HIV antibodies. See, e.g., E. G. Armstrong, et al., Use of a Highly Sensitive and Specific Immunoradiometric Assay for Detection of Human Chorionic Gonadotropin in Urine of Normal, Nonpregnant and Pregnant Individuals, 59 JOURNAL OF CLINICAL ENDOCRINOLOGY AND METABOLISM 867-874 (1984); CECIL MEDICINE § XXIV (L. Goldman & D. Ausiello eds., 2007); Joon-Sup Yeom, Evaluation of a New Third-Generation ELISA for the Detection of HIV Infection, 36 ANNALS OF CLINICAL & LABORATORY SCIENCE 73-78 (2006).
31 There are at least four stages of HIV: (1) initial diagnosis, (2) clinically asymptomatic, (3) symptomatic, and (4) progression from HIV to AIDS. ROBERT L. MURPHY ET AL., CONTEMPORARY DIAGNOSIS AND MANAGEMENT OF HIV/AIDS INFECTIONS 14-17 (3rd ed. 2009). Those stages can be subdivided based on the particular symptoms or lack thereof. For example, one who is classified in the clinically asymptomatic second stage may be entirely asymptomatic or experience various minor symptoms. Also, within any stage, the individual’s viral
tests that monitor the status of an HIV infection. Both of these factors speak directly to the likelihood that a given HIV-positive individual’s actions could transmit the virus. There are two commonly used tests that track HIV progression. The CD4+ cell count – more commonly known as the T-cell count – has traditionally been the best marker. CD4+ tests measure the number of T-cells containing the CD4+ receptor. They do not check the presence of HIV, but assess the patient’s immune system response; when a CD4+ count reaches a new low point, an HIV-positive patient may have progressed to a different stage of the disease or may require more aggressive treatment therapies. On the other hand, HIV-positive persons who are able to keep viral replication at low levels and maintain high CD4+ T-cell counts over a prolonged period of time are considered “long-term nonprogressors.” Approximately 2 to 5 percent of the HIV-positive population meets this definition. In between a symptomatic HIV-positive patient’s low CD4+ cell count and a long-term nonprogressor’s high cell count, there is a varied range of CD4+ cell counts that impact treatment, risks and prognosis.


A common threshold is 350 cells per microliter. When a patient has less than 200 cells per microliter, he or she has progressed to AIDS.


Murphy, supra note 31, at 13. Because they maintain high CD4+ cell counts over many years, long-term nonprogressors deviate from the hypothetical average HIV-positive individual, whose CD4+ cell count drops upon infection, increases shortly thereafter and then begins a mostly gradual decline.

Presentation by Miguel Goicoechea, M.D., Antivirals for Starters (January 2009), University of California, San Diego, at 6.

Murphy, supra note 31, at 13.

According to Dr. Miguel Goicoechea of the University of California, San Diego, HIV-positive individuals fall into at least four categories with respect to their CD4+ cell count and its implications for treatment. If a patient is symptomatic, treatment is indicated regardless of his CD4+ cell count. If a patient is asymptomatic, but with a CD4+ cell count below 200 cells per microliter, treatment is indicated. If a patient is asymptomatic, with a
The other type of HIV marker is viral. In an HIV-positive person, the immune system and the virus exist in a balance; the T-cell count marks the immune system, while a viral RNA count marks the virus itself.\(^{37}\) A viral load test measures the amount of a virus present in the blood by measuring the amount of HIV-specific RNA. This is a more accurate, direct way to measure the virus. Studies have shown that HIV viral RNA levels are highly correlated with response to therapy and can predict progression to AIDS. They also can assess the extent to which the HIV virus poses a risk to the patient and his or her sexual partners; the lower a patient’s viral load, the healthier the patient, the lower the chance of progression from HIV to AIDS and the lower the probability of transmission.\(^{38}\)

For example, a low viral load is usually between 40 to 500 copies/mL. This result indicates that HIV is not actively reproducing and that the risk of disease progression and transmission is low. Patients with low viral loads who adhere to their antiretroviral therapies have been shown to reduce their viral loads further, slow disease progression and lower the risk of transmission through sexual intercourse. One study even determined that such patients could never transmit the disease,\(^{39}\) but those conditions have yet to be replicated.

Viral load tests can also indicate an “undetectable” viral load, i.e., lower than 40 copies/mL.\(^{40}\) A subset of long-term nonprogressors have undetectable levels of HIV RNA.\(^{41}\) While an undetectable viral load does not mean that the patient is cured, it may mean that either the HIV RNA is not present in his or her blood or that the level of HIV RNA is below the threshold needed for detection. Studies indicate that the risk of transmission varies directly with the viral load at all levels.\(^{42}\) The test is cheap, available, highly sensitive and, therefore, can efficiently distinguish among HIV-positive individuals as to the likelihood that their actions could transmit the disease.

That risk of transmission is of paramount legal significance. HIV status often becomes an issue at trial specifically because an HIV-positive defendant committed an act that risked the

\(^{37}\) Viral RNA molecules are actually tiny pieces of the virus’s genetic material, and viral load tests count the number of these RNA pieces.


\(^{40}\) MURPHY, supra note 31, at 13.

\(^{41}\) Id.

\(^{42}\) Susanna Atia et al., supra note 38, at 1401-2.
transmission of the virus. The most common charge – aggravated assault – makes that clear; the crime is incumbent upon the likelihood of harm through a particular means, not the harm itself. That the victim remains HIV-negative after the alleged attack is irrelevant to prosecution’s case. But, if the likelihood of harm varies with a defendant’s viral load, and a viral load test is readily available, there is no need to rely on a general rule of thumb that HIV could possibly be transmitted through bodily fluids. The viral load test, as well as the T-cell count before it, can distinguish among the heterogeneous HIV-population and find the exceptional cases to which the general rule does not apply.

And yet, jurisdictions that use the traditional criminal law to criminalize the attempted transmission of HIV have a tendency to rely on just such generalized evidence. Some take only the first step toward an Accident Fallacy – namely, reliance upon a general rule of thumb. Generalized information that applies to all HIV-positive individuals should not fulfill a state’s due process obligation to prove that the defendant on trial, not those like him, committed the charged crime. Others take both steps and commit the Accident Fallacy – namely, taking a general rule of thumb and applying it to a case they know is unique. This occurs because certain jurisdictions have taken the approach that the likelihood prong of aggravated assault means nothing more than “possible”. Since anything is possible, the particular “accidents” or unique circumstances of the defendant’s situation are irrelevant.

II. Logical “Accident” as a Due Process Problem

“All things are possible” cannot survive constitutional scrutiny as a basis for criminal conviction. That makes logical sense. The statement that “anyone could have grabbed the gun from me in the dark before the gun went off” is neither a reason to exclude anyone as a suspect nor a reason to charge everyone else with the crime. If it were, everyone would be charged with everything, no one would be convicted of anything and the reasonable doubt standard would have no meaning.

In many HIV-related aggravated assault cases, then, there are two due process problems. One concerns what the state must prove and the other concerns how to prove it. The first error is the lowering of the state’s burden to prove likelihood to mere possibility, absent any instruction from the legislature. The Anything is Possible Theory raises due process and vagueness concerns. As we have seen, defendants in these cases often concede most of the elements of the crime. They almost universally concede an offensive touching or attack and often cede any arguments on intent and the foundational question of whether HIV qualifies as an instrument of harm. If all that remains is a question of likelihood vis-à-vis the manner of use and the risk of harm, permitting conviction on a standard of likelihood so low as to accept mere possibility is to elevate hypothetical possibility to likelihood otherwise defined.

The second due process error is in the manner in which the state proves likelihood. If In re Winship means anything, it requires the state to prove the defendant’s conduct meets each element of the crime beyond a reasonable doubt. It necessarily forces the state to distinguish between the defendant and a class of persons to which he belongs because generalizations as to the behavior of that class cannot logically speak to the allegedly culpable behavior of one of its

41 Clue (Paramount Pictures 1985) (paraphrased).

members unless, that is, membership in that class is presumptively criminal. But, while the Supreme Court has accepted certain limitations on the Winship doctrine, this Impersonal Guilt Theory stereotypes an entire class and, therefore, cannot establish criminal culpability.

A. “Anything is Possible” as a Legal Standard

In Winship, the Supreme Court explicitly held that “the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”

Likely because the principle had always been part of the bedrock of the criminal law, the Court never had the occasion to weigh in on something so foundational and well-established. The Court had various rationales for making the principle explicit in Winship, one of which was the need to balance the gravamen of a criminal conviction against the possibility of fact-finding error. Justice Brennan noted that what is at stake in any criminal trial is the defendant’s “transcendent” interest in his liberty. Given the nature of that interest, the reasonable doubt standard ensures that his liberty is not taken away because of a mere mistake. But when the burden of persuasion is lowered to the point where a scintilla of evidence would satisfy the government’s burden, a court allows errors of fact and logic to become irrelevant. It obviates the need for a reasonable doubt standard: there can be no reasonable doubt of anything since anything is possible.

Consider the opposite context – namely, what constitutes “reasonable” doubt. It seems clear that “anything is possible” has never been a reasonable doubt. Judge Posner, in affirming a conviction for an accountant who thought that embezzled funds were tax exempt, found that while it is possible for an experienced accountant to be so willfully obtuse, the possibility was too remote and implausible.

After all, “[a]nything is possible; there are no metaphysical

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46 Justice Felix Frankfurter’s dissent in Leland v. Oregon, 343 U.S. 790 (1952) came close. Leland upheld a state law requiring defendants to prove insanity beyond a reasonable doubt. Id. at 799. Justice Frankfurter believed that the reasonable doubt standard, which imposed an obligation on the state to prove guilt, was inconsistent with that approach. Id. at 802-3 (“from the time that the law which we have inherited has emerged from dark and barbaric times, the conception of justice which has dominated our criminal law has refused to put an accused at the hazard of punishment if he fails to remove every reasonable doubt of his innocence in the minds of jurors. It is the duty of the Government to establish his guilt beyond a reasonable doubt.”) (Frankfurter, J., dissenting).

47 Note, supra note 45, at 1093-95. The Note points to three rationales: (1) bringing meaning to the presumption of innocence, (2) embodying the moral weight we give to erroneous convictions, and (3) leveling the playing field between a defendant and the government. There is a fourth rationale, highlighted in Justice Brennan’s majority opinion and Justice Harlan’s concurrence – namely, the appreciation of the gravamen of a criminal conviction.

48 Winship, 397 U.S. at 364 (“There is always in litigation a margin of error, representing an error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value – as a criminal defendant his liberty – this margin of error is reduced as to him by the process of placing on the other party the burden of … persuading the factfinder … of his guilt beyond a reasonable doubt.”) (quoting Speiser v. Randall, 357 U.S. 513, 525-26 (1958)).

49 United States v. Ytem, 255 F.3d 394, 395, 397 (7th Cir. 2001).
certainities accessible to human reason; but a merely metaphysical doubt … is not a reasonable doubt for the purposes of the criminal law.”

This principle does not only exclude the fanciful (“It is possible that I will burst into flames”) but also the realistic, yet remote. In a case involving the unlawful selling of a motor vehicle inspection sticker, testimony of a forgetful witness at trial left open the possibility that the defendant did not sell the sticker even though direct evidence showed the defendant had the sticker in his custody from the beginning. The possibility was too remote for acquittal; “it is possible to have doubts that are not reasonable.”

If mere possibility cannot survive as a reasonable doubt, it cannot survive as proof beyond a reasonable doubt. After all, there can be no reasonable doubt that anything is possible. That anything is possible, however, is exactly what certain states and the military courts have accepted as proof beyond a reasonable doubt in cases involving HIV-related aggravated assault. By lowering the burden on the government to prove only that HIV could possibly be transmitted, these jurisdictions have obviated the need for a reasonable doubt standard. There can be no scintilla of doubt, let alone a reasonable one, that HIV can theoretically be transmitted through

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50 Id. at 397 (emphasis in original).

51 United States v. Williams, 216 F.3d 1099, 1103 (D.C. Cir. 2000).

52 United States v. Delpit, 94 F.3d 1134, 1148 (8th Cir. 1996).

53 A different case is posed by statutes, like the one at issue in State v. Whitfield, 134 P.3d 1203 (Ct. App. Wash. 2006), see infra note 129 - 133, in which the legislature has specifically made “anything is possible” the governing standard for proof of criminal activity. By way of further example, in State v. Musser, 721 N.W.2d 734 (Iowa 2006), Iowa passed a statute that criminalized “the intentional exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of the human immunodeficiency virus.” Id. at 745. The Iowa Supreme Court interpreted “could” to mean “possible.” Id. In Musser, the defendant argued that the statute as written was overbroad and facially vague, but the court rejected those arguments. A statute will likely be deemed overbroad if it could interfere with constitutionally protected behavior. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). He argued that the low “could” threshold meant that the statute impinged on HIV-positive individuals’ freedom of association because it banned conduct, like sweating on others during a game of basketball or kissing another person, that bears no relation to HIV transmission. The court found the state’s compelling need to stop the spread of HIV overshadowed any marginal imposition on minor freedoms of association. Id. at 746. Other courts have rejected this argument because the statutes did not involve free speech. See, e.g., People v. Russell, 630 N.E.2d 794, 796 (Ill. 1994) (finding not “even the slightest connection” between the case and free speech).

As to the void for vagueness argument, Mr. Musser argued that the statute’s failure to define the modes of transmission that are captured by the law means that “anything is possible” is the standard. The court rejected that interpretation, finding the statute clarified by “reference to common knowledge and related statutes.” Id. It is common knowledge, the court said, that blood, semen and other bodily fluids can transmit HIV and other statutes referred to those bodily fluids listed by the Centers for Disease Control as further clarification. Id.

Musser involved a statute in which the legislature explicitly created a low possibility standard. In Weeks v. State, 834 S.W.2d 559 (Tex. Crim. App. 1992), the court interpreted the statute’s phrase, “tends to”, as meaning “could” without any specific instruction from the legislature. And, in United States v. Dacus, 66 M.J. 235 (C.A.A.F. 2008), the military courts took an explicit standard, the “natural and probable consequence” test, and lowered it to the “fanciful, speculative and remote possibility” standard in contravention of the MCM’s instruction. A vagueness challenge may have more success against the statute in Weeks. This article does not address this argument because many states have already rejected such arguments. See, e.g., People v. Dempsey, 610 N.E.2d 208, 222-23 (Ill. App. Ct. 1993) (rejecting vagueness challenge to aggravated assault statute because even though the statute did not specifically list prohibited activities, it need only be sufficiently certain “to give a person of ordinary intelligence fair notice” that his conduct was forbidden); Russell, 630 N.E.2d at 796 (rejecting a vagueness challenge to a statute with a possibility threshold – prohibiting conduct that “could result in the transmission of HIV” – because it was “pure speculation and conjecture” that the statute could prohibit innocent conduct).
sexual intercourse; for that matter, HIV can theoretically be transmitted by oral sex, spitting, biting or getting scratched by a monkey, but each is less likely than the one before it.

B. Guilt is Personal

The possibility of conviction pursuant to a mistake is overshadowed by the “certainty that [the defendant] would be stigmatized by the conviction.” This was another rationale for the Winship decision. The reasonable doubt standard reduces the margin for fact-finding error and places the burden of persuasion on the government in order to protect the defendant from two independent errors – mistakes and stigmatization – both of which are anathematic to due process.

Stigmatization is evident in two ways. First, by making it easier to convict HIV-positive defendants on aggravated assault, conviction pursuant to nonspecific proof devalues Winship’s due process concern for the gravamen of a criminal conviction. Second, permitting the factual mistake necessarily stigmatizes HIV-positive individuals as presumptive criminals. If one HIV-positive individual is just as infectious as another and all are subsumed under the average transmission rate and that is sufficient to prove likelihood of transmission for the purposes of aggravated assault, then merely being HIV-positive is an element of the crime. This stigmatization is not only a product of assigning criminal culpability to the status of being HIV-positive, but it speaks to a salient rationale of the Winship Court – namely, the idea inherent in due process that guilt must be “personal.”

The reasonable doubt standard “provides concrete substance for the presumption of innocence” and animates the correlative moral assumption of the criminal law that conviction cannot be based on being a bad guy or being a member of a certain group. Guilt, after all, is

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54 Winship, 397 U.S. at 363.

55 Id. at 363-64. A closely related rationale is the principle summarized by Justice Harlan’s oft-quoted statement that “it is far worse to convict an innocent man than to let a guilty man go free.” Id. at 372 (Harlan, J., concurring). Justice Harlan built on significant common law history here. See WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 352 (1769) (“the law holds that it is better that ten guilty persons escape, than that one innocent suffer“); Coffin v. United States, 156 U.S. 432, 456 (1895) (stating “it must be very warily pressed, for it is better five guilty persons should escape unpunished than one innocent person should die”) (quoting 2 John Hale, P. C. 290 (1678)); Jon O. Newman, Beyond “Reasonable Doubt”, 68 N.Y.U. L. REV. 979, 981 n.6 (1993) (stating “I should, indeed, prefer twenty guilty men to escape death through mercy, than one innocent to be condemned unjustly”) (quoting SIR JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE 65 (Chromes ed., 1942) (1471)); id. at 981 n.7 (reading “it is better that ninety-nine ... offenders shall escape than that one innocent man be condemned”) (quoting THOMAS STARKIE, EVIDENCE 756 (1724)). But see JEREMY BENTHAM, A TREATISE ON JUDICIAL EVIDENCE (1825) (“At first it was said to be better to save several guilty men, than to condemn a single innocent man; others, to make the maxim more striking, fixed on the number ten, a third made this ten a hundred, and a fourth made it a thousand. All these candidates for the prize of humanity have been outstripped by I know not how many writers, who hold, that, in no case, ought an accused to be condemned, unless the evidence amount to mathematical or absolute certainty. According to this maxim, nobody ought to be punished, lest an innocent man be punished.”).

56 Id. at 363.

“personal” and not based on affiliation with a certain group. Defendants are guilty not because they know, or are related to, known criminals or because they share a common identity with disfavored groups. In *Bridges v. Wixon*, for example, the Court faced a challenge to a statute that ordered deportation of all aliens affiliated with groups that advocated the violent overthrow of the government. The Court stopped Bridges’ deportation, but declined to address the constitutional issues. Justice Murphy would have declared the statute unconstitutional: “The deportation statute completely ignores the traditional American doctrine requiring personal guilt rather than guilt by association… The doctrine of personal guilt is one of the most fundamental principles of our jurisprudence.”

Similarly, in *Scales v. United States*, though it upheld a statute criminalizing membership in the Communist Party, the Court saw personal guilt as a mandate of due process. “Guilt is personal” and the only way vicarious conspiracy liability met the requirements of due process was where the *mens rea* of a particular defendant could be implied from the extent of his participation in the Party’s criminal activity.

The personal guilt doctrine embodied in the reasonable doubt standard does not only protect those whose associations engage in criminal activity. Nor does it only have meaning as a counterweight to legislative attempts to criminalize membership in such organizations, as in *Bridges* and *Scales*. It represents a broader standard that culpability cannot be based on who you are, but rather on what you have done. Evidence of who you are – your identity as a member of the Students for a Democratic Society (SDS), for example, or your status as one of millions of Americans who are HIV-positive – is not evidence admissible to prove you committed a crime. The SDS may have been a radical anti-war group and it may have organized most of the anti-war university protests in the late 1960s, but mere membership did not prove the elements of

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59 Templeton v. United States, 151 F.2d 706, 707 (6th Cir. 1945) (“We think that the evidence adduced by the cross-examination of appellant and the witnesses supporting his alibi that they were related to Hawk Carter, ‘the notorious bootlegger of Sumner County’ was not only inadmissible but prejudicial. The fact that appellant and his witnesses were related to Hawk Carter, a reputed bootlegger, was irrelevant not only to the issues, but to the subject matter of their examination. Carter was not shown to have had any connection with the case. The sole purpose of this testimony was to degrade the witnesses in the minds of the jury.”).

60 326 U.S. 135 (1945).

61 Id. at 163 (Murphy, J., concurring).


63 Id. at 227-28. This theory of personal guilt has been extended by lower courts in areas outside the criminal law. See St. Ann v. Palisi, 495 F.2d 423, 426 (5th Cir. 1974) (striking down a school regulation that suspended students if their parents misbehaved in parent-teacher conferences); Tyson v. New York City Housing Auth., 369 F. Supp. 513, 518-19 (S.D.N.Y. 1974) (voiding agreements that terminated tenants’ public housing leases for the acts of the tenants’ adult children); United States v. One 1971 Ford Truck, 346 F. Supp. 613, 619 (C.D. Cal. 1972) (applying the notion of “personal guilt” to a case involving the Takings Clause, in which the federal government seized a truck because of the illegal activities of the owner’s son). More recently, in *Humanitarian Law Project v. United States Dep’t of Justice*, 352 F.3d 382 (9th Cir. 2003), the doctrine of personal guilt has been revived to declare unconstitutional statutes prohibiting “material support” to certain terrorist organizations.
assaulting a police officer for those particular members charged in confrontations with police during California’s Stop the Draft week.  

Similarly, HIV-positive individuals charged with aggravated assault for risking transmission of HIV face both factual mistake and stigmatization when the elements of the crime can be proved with non-specific proof. The average risk of transmission posed by the average HIV-positive man who has a sexual encounter with the average HIV-negative woman does not speak to the particular risk posed by a particular defendant’s sexual encounter. The defendant may have an exceedingly low viral load that places him far afield from the hypothetical average. He may have none of the risk factors for making transmission more likely whereas any calculation of the average transmission rate necessarily accounts for the average prevalence of such factors. To ignore these circumstances and convict on averages and hypotheticals would be factual and logical error.

Nevertheless, defendants charged with aggravated assault for having unprotected sex while HIV-positive face this very due process error. Granted, being HIV-positive is nothing like being an anti-war protestor; but, by allowing the likelihood element of aggravated assault to be proved by evidence about the average risk HIV transmission without reference to a defendant’s perhaps unique situation is to subject an individual defendant to guilt by association. For example, some courts have merely sought evidence of the average infection rate of uninfected women having unprotected sex with infected men. Others looked only to evidence as to the likelihood that HIV will develop into AIDS. Still others affirmed convictions for aggravated assault despite the defendant’s undetectable viral load because they assumed that HIV would kill. This evidence helped meet the government’s burden on the likelihood prong of aggravated assault, but had little to do with the defendants’ actual conduct. It did not prove “personal guilt.” The evidence described general characteristics attributable to a hypothetical person and symbolic of an entire class. And, if such evidence could prove an element of a crime, then mere membership in that class – regardless of any unique facts that could distinguish a particular individual from the crowd – was itself part of the crime.

64 Fred Halstead, Out Now! A Participant’s Account of the Movement in the U.S. Against the Vietnam War (2001).


67 This analysis survives the modern limits that have been placed on the Winship doctrine. For a discussion of the narrowing reasonable doubt standard, see Note, supra note 45, at 1095-1109; Irene Merker Rosenberg, Winship Redux: 1970-1990, 69 Tex. L. Rev. 109, 114-117 (1990-1991). By way of example, the Court arguably eroded the reasonable doubt standard in Patterson v. New York, 432 U.S. 197 (1977) and Martin v. Ohio, 480 U.S. 228 (1987) by deferring to legislatures on what constituted an element of the offense and what constituted an affirmative defense. Under Winship, as limited by Patterson and Martin, the government only had to prove beyond a reasonable doubt those elements specifically prescribed by the legislature. But that would not have helped Dacus, for example. In Dacus, CAAF used a low “merely a fanciful, speculative or remote possibility” standard even though the MCM explicitly stated that likelihood means “the natural and probable consequences” of conduct.

Patterson also erodes Winship’s anti-formalism. Winship saw through an attempt to arbitrarily distinguish burdens of proof based on whether the defendant was charged as a juvenile or an adult. Due Process applied to proceedings that for all intents and purposes were the same. Winship, 397 U.S. 365-67. To relax the proof beyond a reasonable doubt standard based on formal and rather arbitrary lines drawn by state legislatures in Patterson and Martin seems like a striking departure from Winship’s substantive holding.
III. Logical “Accident” and Due Process Errors in the Criminalization of HIV Transmission Through the Traditional Criminal Law

It has been almost thirty years since HIV and acquired immunodeficiency syndrome (AIDS) first came to the attention of the criminal law.68 The prevalence of the disease has raised questions of whether a defendant may be compelled to submit to HIV testing for the purposes of criminal prosecution,69 whether HIV test results must be disclosed,70 whether evidence regarding a defendant’s HIV status is admissible during sentencing,71 and whether a sexual partner can consent to relations with an HIV-positive individual without knowledge of the latter’s HIV status,72 to name just a few issues. Nor has there been a single preferred manner of criminalizing HIV-transmission. Some states state legislatures have created a “criminal transmission of HIV” crime,73 other jurisdictions have taken recourse to common law crimes, such as attempted

68 It is beyond the scope of this article to provide a detailed history of how HIV and AIDS have affected and changed the criminal law in the last thirty years. For informative summaries, please see Damien Warburton, “Critical Review of English Law in Respect of Criminalising Blameworthy Behavior by HIV Individuals,” 68 J. CRIM. L. 55 (2004) (with respect to the laws of Great Britain) and Winifred H. Holland, “HIV/AIDS and the Criminal Law,” 36 CRIM. L.Q. 279 (1993-1994) (with respect to the United States and Canada).

69 See, e.g., Love v. Superior Court, 226 Cal. App. 3d 736 (Cal. Ct. App. 1991) (upholding the constitutionality Penal Code Section 1202.6, which required defendants convicted of solicitation or prostitution to undergo HIV testing based on the “special need” of law enforcement to stop the spread of AIDS epidemic); People v. Adams, 597 N.E.2d 574 (Ill. 1992) (similar). But see State v. Farmer, 805 P.2d 200, corrected, 812 P.2d 858 (Wash. 1991) (reversing an order requiring defendant, convicted of soliciting and sexually exploiting two juveniles, to submit to HIV testing before sentencing for the purpose of corroborating that he had AIDS at the time he committed the crime since the test results could not relate back to the point at which the defendant committed the crime and were, therefore, of no corroborative value).

70 See, e.g., Scroggins v. State, 401 S.E.2d 13 (Ga. Ct. App. 1990) (concluding that where a defendant places his medical status at issue, such as biting an officer and threatening to transmit HIV, the defendant’s medical privacy is waived, thus permitting admission of evidence regarding the defendant’s HIV-positive status). Notably, some jurisdictions have found that HIV test results could be admitted under the business record exception to the hearsay rule, without a chain of custody, where the defendant had been tested voluntarily for the purposes of diagnosis and treatment, rather than for the purposes of prosecution. See, e.g., Ex parte Dep’t of Health and Environmental Control, 565 S.E.2d 293 (S.C. 2002). But see People v. C.S., 583 N.E.2d 726 (Ill. App. Ct. 1991) (HIV positive test results should not have been disclosed to all attorneys in the county’s criminal division in anticipation of bringing appropriate criminal charges against defendant in the future).


72 See, e.g., United States v. Johnson, 27 M.J. 798 (A.F.C.M.R. 1988) (holding that a victim’s consent was no defense to charges of aggravated assault arising out of a sexual encounter between a teenager and an HIV-positive Air Force sergeant).

murder or some form of aggravated assault.\textsuperscript{74} In the latter case, the specific elements of the crime vary across jurisdictions, but they usually involve some combination of the (1) use of a dangerous weapon (2) in a physical attack (3) in a manner that (4) is likely (5) to cause serious harm or death. It is when considering the likelihood element of the crime that certain courts may commit an Accident Fallacy.

This article studies proof of the likelihood element in HIV-related aggravated assaults in two radically different contexts. The first series of cases involve biting, where a belligerent HIV-positive individual bites another, usually a law enforcement officer. The second series of cases involve consensual sexual intercourse between an HIV-positive individual and an HIV-negative individual unaware of his or her partner’s HIV status. In some of these cases, courts commit only the first step of the Accident Fallacy, i.e., using general rules of thumb as evidence. This occurs when the likelihood element is satisfied by recourse to general data about HIV infections without determining if the defendant differs from the norm in some way. In other cases, the court commits the Accident Fallacy by taking a general rule of thumb and inappropriately applies it to a unique situation. This occurs when the defendant proves he deviates from the norm and yet the court still applies the general rule to his case. In both scenarios, due process errors accompany the logical errors.

A. The Biting Cases

\textit{Brock v. State}\textsuperscript{75} was one in a series of “biting” cases, where an HIV-positive individual bit his victim.\textsuperscript{76} It was also one of a series of cases where the court sought generalized proof of the likelihood prong of the crime, potentially misapplying a rule of thumb to a particular case in the process. These cases represent potential Accident Fallacies, but real violations of due process.

Brock was a prisoner confined to the AIDS Unit of an Alabama correctional facility where, during a routine search for contraband, he bit a prison guard on the arm.\textsuperscript{77} As a result,

\begin{itemize}

\textsuperscript{74} There are numerous variations to the crime of aggravated assault, including aggravated assault with a deadly weapon, aggravated assault with intent to murder and aggravated sexual assault.
\textsuperscript{75} 555 So. 2d 285 (Ala. Crim. App. 1989).
\textsuperscript{76} There have apparently been two suspected cases of HIV transmission resulting from biting. In these particular cases, severe tissue tearing and damage were reported in addition to the presence of blood. HIV Transmission – Frequently Asked Questions, AVERT (Aug. 3, 2010), http://www.avert.org/hiv-aids-transmission.htm#q15. In spite of this rarity, biting cases persist. \textit{See, e.g.}, State v. Smith, 621 A.2d 493 (N.J. Super. Ct. App. Div. 1993); United States v. Sturgis, 48 F.3d 784 (4th Cir. 1995); State v. Bird, 692 N.E.2d 1013 (Ohio 1998).
\textsuperscript{77} Id. at 286.
Brock was charged with attempted murder by biting the guard while being infected with AIDS and knowing that the AIDS virus is transmitted “through bodily fluids secreted through the mouth.” He was found guilty of the lesser-included offense of first degree assault. In Alabama at the time, the first degree assault statute required the government to prove, in relevant part, that the defendant “cause[d] serious physical injury to any person by means of a deadly weapon or a dangerous instrument.” At issue was the “dangerous instrument” prong, which was defined as anything that “under the circumstances in which it is used[,] … is highly capable of causing death or serious physical injury.”

This language is common to many aggravated assault statutes. In the case of Alabama, the “capability” of the weapon to cause great harm is modified or delimited by “highly” and by “the circumstances in which it is used” in the particular case at hand. Therefore, in order to prove this element of the crime beyond a reasonable doubt, the government must put forth specific evidence that whatever weapon was used in this case was actually used in a way that was highly capable of causing serious harm or death. And, of course, it has to be that way. If the legislature had intended it any other way, it could have crafted a first degree assault statute that read as follows: “An individual commits an aggravated assault where, with the intent to cause serious bodily harm or death, the individual uses a deadly weapon that is capable of causing serious bodily harm or death.” Here, the word “weapon” modifies the word “capable”, implying that the proof of capability must be about the weapon itself. In the Alabama statute at issue in Brock, the “circumstances” in which the weapon was used modified the phrase “highly capable”, suggesting a qualitatively different source of proof.

Even the Brock Court recognized this distinction when it noted that Alabama follows the minority view that “depending upon the circumstances of their use”, fists could constitute “deadly weapons” or “dangerous instruments” for the purposes of first degree assault. Therefore, the specific circumstances that gave rise to the indictment are salient.

To the court’s credit, it found that the state failed to prove that Brock used his bite in a way that was highly capable of causing serious physical injury. In stating what evidence would have sufficed, however, the court ignored the language of the statute and, were it not for the state’s ineptitude, would have committed the Accident Fallacy. In Brock, the state presented zero evidence about HIV and AIDS, neither expert testimony nor scientific evidence. The record

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78 Id. at 286-87.

79 Id. at 287 (citing Ala. Code 1975 § 13A-6-20(a)(1)).

80 Id. (citing § 13A-1-2(12)).

81 This interpretation has long been standard across jurisdictions. See, e.g., Medford v. State, 216 S.W. 175, 177 (Tex. 1919) (“The element of the manner of use of such weapon must always be taken into consideration. A shotgun [fired at such] range as to make it reasonably apparent that death or serious bodily injury could not result from its use would not be legally a deadly weapon.”).

82 This aggravated assault formulation is arguably void for vagueness. See infra note 53.


84 Id.
was simply devoid of any proof, let alone proof beyond a reasonable doubt or proof that Brock had conducted himself in a particular way. Therefore, the court concluded that “[w]hile AIDS may very well be transmitted through a human bite, there was no evidence to that effect at trial.”\(^8^5\) It also stated that “before this court, there was absolutely no evidence of the capacity of a human bite to cause … serious physical injury.”\(^8^6\) But if evidence that a hypothetical human bite could transmit HIV or AIDS would have sufficed for the purposes of meeting the “highly capable” prong of first degree assault, “the circumstances in which it is used” become irrelevant. The court would have accepted generalized proof, if any existed, of the rule of thumb that HIV can be transmitted through a human bite. Had it applied that general rule to this case, the court might have committed the Fallacy of Accident and lessened the prosecution’s burden by narrowing an essential element of the crime of assault in the first degree.

This has two implications. First, the sentence would have changed dramatically. Had the state submitted even some generalized evidence as to the possible relationship between a bite and HIV transmission, Brock would have been convicted of first-degree assault rather than second-degree assault.\(^8^7\) The former is a class B felony, which carries with it a sentence of not less than two years and not more than twenty years imprisonment in the state penitentiary, along with a fine not to exceed $10,000.\(^8^8\) The punishment for second degree assault is half that.\(^8^9\) Dumb luck saved Brock from a misapplication of the law.

Second, HIV was treated differently than other “deadly instruments” in \textit{Brock}. The court recognized the importance of the particular circumstances in which the defendant used the weapon when it noted that fists could be considered dangerous instruments. In Alabama, fists may only constitute deadly weapons “depending upon the circumstances and manner of their use.”\(^9^0\) But those circumstances were ignored in \textit{Brock} where an HIV-positive defendant’s bite was the weapon. Whatever the reason for this unsubstantiated distinction between how different “weapons” or “instruments” of harm are treated, the discrimination resulted in a \textit{de facto} lower burden for the prosecution in HIV cases, but no others.

A similar error occurred in \textit{Scroggins v. State}.\(^9^1\) During a violent fracas at a domestic disturbance in which officers had to forcibly restrain the defendant, a still belligerent Scroggins brought up saliva into his mouth and bit an officer on the forearm. The bite tore through the

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85 Id. at 288 (emphasis added).

86 Id. (emphasis added).

87 The other elements of the crime of first degree assault were not in serious dispute.


89 Id. By comparison, violating Alabama’s criminal transmission of HIV statute, codified at Ala. Code 1975 § 22-11A-21(c), is a class C misdemeanor, which carries with it a sentence of up to three months imprisonment in the county or municipal jail, or both. The statute states as follows: “Any person afflicted with an sexually transmitted disease who knowingly transmits, assumes the risk of transmitting, or does any act which will probably or likely transmit such disease to another person is guilty of a class C misdemeanor.” HIV is included among STDs. \textit{See} Ala. Admin. Code r. 420-4-1-.03.

90 Brock, 555 So. 2d at 287.

officer’s shirt and left distinct bite marks on the skin.\textsuperscript{92} A jury convicted him of aggravated assault with intent to murder, but Scroggins argued on appeal that “there was no evidence the HIV virus can be transmitted by human saliva, … [as] there is at best only a “theoretical possibility” the virus can be transmitted” this way.\textsuperscript{93}

Scroggins identified the potential for not one, but two logical fallacies. At trial, a medical expert testified that there had been no documented cases of HIV transmission through saliva and only two “reports” of it; however, he conceded it was theoretically possible given the state of HIV research.\textsuperscript{94} Scroggins argued, therefore, that he was the victim of an illogical double whammy where a hasty generalization\textsuperscript{95} — creating a general rule from insufficient facts — was erroneously applied to the unique circumstances, or “accidents”, of his case. Even if it were possible to transmit the disease this way, his particular bite could not.

Unfortunately for Scroggins, he misread the Georgia statute. The operative section of the Georgia criminal code states that “[a] person commits the offense of aggravated assault when he assaults: … (1) With intent to murder, to rape, or to rob; or … (2) With a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury.”\textsuperscript{96} Evidence that HIV could be transmitted via human saliva was unnecessary if the state could prove Scroggins’s guilt under clause (1). Only his intent mattered. The court found the jury’s finding of intent supported by the evidence,

\textsuperscript{92}Id. at 15.

\textsuperscript{93}Id.

\textsuperscript{94}Id.

\textsuperscript{95}The formulation of a general rule from insufficient or special facts is to commit the Fallacy of hasty generalization or converse accident. See Copi, supra note 16, at 82. Professor Copi’s provides a classic example: “observing the value of opiates when administered by a physician to alleviate the pains of those who are seriously ill, one may be led to be led to propose that narcotics be made available to everyone.” Id. Such reasoning is erroneous because it creates a general rule from too few and unrepresentative examples. A more common example comes from political polling, where polls based on narrow or unrepresentative cross-sections of the population commit this error. Nate Silver of FiveThirtyEight.com highlighted a September 2010 example in polling for California’s gubernatorial contest between Republican Meg Whitman and Democratic Attorney General and former Governor Jerry Brown. One poll that showed Mr. Brown extending his lead drew fire from Ms. Whitman’s polsters as based on an unrepresentative sampling that overemphasized traditionally Democratic voters. Nate Silver, Analyzing Whitman’s Questions About California Poll, THE NEW YORK TIMES FIVETHIRTYEIGHT BLOG (Sept. 27, 2010, 10:37 AM), http://fivethirtyeight.blogs.nytimes.com/2010/09/27/ analyzing-whitmans-questions-about-california-poll/.

Hasty generalizations are common in the courtroom testimony of lackluster medical experts. In O’Connor v. Commonwealth Edison Co., 807 F. Supp. 1376 (D. Ill. 1992), for example, an ophthalmologist testified that the plaintiff’s cataracts were caused by exposure to nuclear radiation in the course of his employment at a nuclear power plant. He based this “binding universal rule” on his past treatment of five patients whose cataracts looked similar to the plaintiff’s. Id. at 1391. The trial judge recognized the error and disqualified the expert from delivering certain testimony under Fed. R. Evid. 702. Id. at 1392. The expert was like those, “observing the value of opiates when administered by a physician to alleviate the pains of those who are seriously ill, … [who] may be led to propose that narcotics be made available to everyone.” Id. at 1391 (quoting Copi at 68).

\textsuperscript{96}Ga. Code Ann. § 16-5-21(a)(1)-(2) (partially cited in Scroggins, 401 S.E.2d at 16 (emphasis in original)).
including the deliberate act of sucking up excess sputum, bragging about his recent HIV-positive diagnosis and laughing when the officer asked whether he had AIDS.  

Responding to the merits of Scroggins’s argument in dicta, the court concluded as Scroggins feared. The expert had testified that even though there were only two unconfirmed reports of transmission through biting, he would not French kiss an HIV-positive woman and that standard medical procedure required physicians to wear protective gloves when dealing with any bodily fluids. After this and other testimony from the expert, the court concluded that “hardly anything [could be] ruled out as ‘impossible’” and, therefore, the jury could rationally “consider the human bite of a person infected with the AIDS virus” to be deadly. That recourse to a hypothetical person was not a linguistic oversight. The court made clear its willingness to accept generalized proof of likelihood of infection from the bite of some hypothetical person rather than from Scroggins when it used risk assessments in evidence to define the word “deadly” in the aggravated assault statute:

The expert testified that the “risk” of transmitting the virus via saliva was somewhat less than the documented risk of transmitting the virus into the blood stream via a needle prick, which was one in 250. From this, we think a reasonable juror could conclude, in common wisdom, that the statistical “risk” of contracting AIDS from an infected person via a needle prick is in actuality a random risk, which alike applies to each and every one of the 250 persons, or to all of them if a large enough theory group is considered, i.e., the total population; and that therefore every needle prick introducing the blood of an infected person is as potentially deadly as the next, and therefore, in the most reasonable common sense of the word, every one is deadly. The same may be said of the supposed much-reduced “risk” of transmitting the virus through saliva.

Every needle prick, like every sample of saliva, the argument goes, carries the same risk across all HIV-positive needles and salivas, respectively. That may indeed suffice as a neat heuristic or rule of thumb for the purposes of discouraging needle sharing or spitting on people, but it cannot survive as a logical rule of law for two reasons, both of which were also true in Brock. First, it assumes homogeneity in the HIV-positive population. If the blood of one HIV-positive person is “as potentially deadly” as the blood of any other HIV-positive person, HIV-positive persons become fungible. If that were true, recourse to the general assumption that saliva can transmit HIV in some hypothetical case would have merit; just as generalized proof of a hypothetical bite in Brock would suffice to prove the elements of first degree assault in Brock. But, of course, that was never true. Even as early as 1990, when Scroggins stood trial, medical science could determine the relative infectiousness of HIV-positive patients. As discussed earlier, the HIV

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97 Scroggins, 401 S.E.2d at 18.

98 Id. at 19.

99 Id. at 20 (emphasis added).

100 Id. (emphasis added).

101 See supra pp. 8 - 10 & notes 30 - 42.
population is not homogeneous. Variety comes from the stage of infection, CD4+ T-cell count, viral load, symptom manifestation, and aggravating infections, to name just a few.\textsuperscript{102} To consider one HIV-positive individual just like any other is to ignore science and common sense.

Second, it alleviates the state’s burden of persuasion on the likelihood prong. Like the Alabama statute at issue in \textit{Brock}, the Georgia aggravated assault statute includes a circumstances-contingent element that clarifies the object, device or instrument used as those objects, devices or instruments used “offensively against a person”. If statistical analysis from a hypothetical bite or saliva is sufficient for determining likelihood, then the particular manner in which either was used becomes irrelevant. Allowing this type of proof to satisfy the state’s evidentiary burden, therefore, would be tantamount to ignoring the words of the legislature.\textsuperscript{103}

\textit{Scroggins} also illustrates the second due process error common to many HIV-related aggravated assault cases. The statute required “an instrument which, when used offensively against a person, is likely to … result in serious bodily injury.”\textsuperscript{104} As evidence of likelihood, the court noted that it would have accepted the medical conclusion that “hardly anything is impossible.”\textsuperscript{105} In doing so, the court lowered the state’s burden from proving that something is likely to proving that anything is possible. It is difficult to imagine what proof would not be sufficient under an “anything is possible” standard.

By way of further illustration, \textit{Weeks v. State}\textsuperscript{106} both mirrors and differs from the defects in \textit{Brock} and \textit{Scroggins}. In \textit{Weeks}, the defendant spit in a prison officer’s face as part of a belligerent tantrum during a prison transfer. The saliva covered the guard’s glasses, lips and nose.\textsuperscript{107} Weeks was convicted of attempted murder, which in Texas, requires the specific intent to commit murder, as well as an overt act that “tends but fails to effect the commission” of the murder.\textsuperscript{108} On appeal and in his habeas proceeding, Weeks argued that the state failed to prove

\begin{itemize}
  \item \textsuperscript{102} See \textit{Murphy}, \textit{supra} note 31, at 13-16, 67, 72-76, 105-111.
  \item \textsuperscript{103} Courts have a duty “to give effect, if possible, to every clause and word of a statute.” \textit{Duncan v. Walker}, 533 U.S. 167, 174 (2001) (\textit{quoting} \textit{United States v. Menasche}, 348 U.S. 528, 538-539 (1955)).
  \item \textsuperscript{104} Ga. Code Ann. § 16-5-21(a)(1)-(2).
  \item \textsuperscript{105} Scroggins, 401 S.E.2d at 20.
  \item \textsuperscript{106} 834 S.W.2d 559 (Tex. Crim. App. 1992). Biting and spitting cases continued well into the 1990s, even though scientific research had all but conclusively shown that such actions could not transmit HIV under any circumstances. Even the lion’s share of federal courts to address the issue had conceded as much. \textit{See, e.g.}, \textit{Glick v. Henderson}, 855 F.2d 536, 539 n. 1 (8th Cir. 1988) (“You won’t get AIDS from saliva, sweat, tears, urine or a bowel movement.” \textit{quoting} U.S. Dep’t of Health and Human Services, Pub. No. HHS-88-8404, \textit{Understanding AIDS}, p. 2 (1988)); \textit{Chalk v. United States Dist. Ct.}, 840 F.2d 701, 706 (9th Cir. 1988) (“Although HIV has been isolated in several body fluids, epidemiological evidence has implicated only blood, semen, vaginal secretions, and possibly breast milk in transmission. Extensive and numerous studies have consistently found no apparent risk of HIV infection to individuals exposed through close, non-sexual contact with AIDS patients.”); \textit{Thomas v. Atascadero Unified Sch. Dist.}, 662 F. Supp. 376, 378 (C.D. Cal. 1986) (“The overwhelming weight of medical evidence is that the AIDS virus is not transmitted by human bites, even bites that break the skin.”).
  \item \textsuperscript{107} \textit{Id.} at 561. The tantrum also included loud cursing, complaining about his restraints, threats to “cut one of the boss’s heads off”, banging his head against a van wall. For the purposes of proving intent, the state also proved that Weeks yelled that he was “medical now” and that he was “going to take somebody with him when he went.” \textit{Id.}
  \item \textsuperscript{108} \textit{Id.} (\textit{quoting} Tex. Penal Code § 15.01(a)).
\end{itemize}
an element of the offense because it offered insufficient evidence to prove that his spit “tend[ed] to” cause death. On direct appeal, the Texas Court of Criminal Appeals equated “tends to” with “could”, significantly easing the state’s burden, and found the evidence sufficient to convict where the medical experts testified that the possibility of transmission was low, “but certainly not zero.” Like the court in Scroggins, the Weeks Court accepted the “anything is possible” standard.

Notably, the Texas Court of Criminal Appeals cites an inapposite case, Flanagan v. State, for the proposition that “tends to” means “could”. When Weeks’s case reached the Fifth Circuit on habeas review, the court found other sources – namely, Garcia v. State113 and Staley v. State. Staley relied on Garcia; but Garcia relied on nothing at all when it defined “tends to” as “could”. Therefore, there seems to be no basis for Texas’s arguably over-inclusive definition of “tends to” other than the unsupported words of the court in Garcia.

Lowering the state’s burden to require proof of possibility rather than some level of probability doomed Weeks’s case even though, in contrast to Brock and Scroggins, the medical testimony went well beyond “anything is possible” to specific testimony as to the capacity of Weeks’s saliva to transmit the disease. Five medical experts testified and their testimony described Weeks’s particular saliva in the following three ways. First, one expert discussed a study showing that HIV developed in saliva in three out of fifty-five instances and that the chances of HIV being in saliva increased if there was blood present. Another expert examined Weeks and found evidence of gingivitis and tartar on his gums. Gingivitis and the irritation caused by tartar, the expert noted, can result in blood in the saliva. In addition, Weeks’s medical records showed that his HIV was moderately advanced and that he experienced nausea, vomiting and diarrhea near the time of the incident, increasing the likelihood that Weeks had lesions in his mouth or blood in his saliva. Second, three experts agreed that the degree of probability of infection through saliva depended upon where the spit landed, and one stated that the eyes and nasal cavity were “exceptionally” bad places for contact. Weeks’s spit landed on

109 Id.; Weeks v. Scott, 55 F.3d 1059, 1062 (5th Cir. 1995).
110 Weeks, 834 S.W.2d at 561-62.
111 Id. at 562.
113 541 S.W.2d 428, 430 (Tex. Crim. App. 1976) (“It follows that to prove an ‘attempted murder’ it is sufficient if the accused has the intent to cause serious bodily injury and commits an act ‘amounting to more than mere preparation’ that could cause the death of an individual but fails to do so.”).
114 888 S.W.2d 45, 48 (Tex. Crim. App. 1994) (“To prove attempted murder, the evidence must be sufficient to show that Appellant intended to cause serious bodily injury, that he committed an act that amounted to more than ‘mere preparation,’ and that the act could have caused the death of an individual.”).
115 Weeks, 834 S.W.2d at 562.
116 Id. at 562, 564.
117 Id. at 564.
118 Id. at 563.
the victim’s glasses, lips and nose. Third, an expert explained that the chances of transmitting the virus increase as the stage of the infection progresses, HIV-4 being more contagious than HIV-3, and so forth. Another expert testified that Weeks’s medical records showed that he was HIV-4 one week before he spit on the prison officer, thus distinguishing the risk of contagion from Weeks’s blood as compared to that of another HIV-positive individual whose condition had not progressed as far. Under the low standard set by the Texas courts, this testimony sufficiently proved that HIV was likely to — or could — be present in Weeks’s saliva, not possibly present in the saliva of a hypothetical HIV-positive individual.

The salient difference between Weeks, on the one hand, and Brock and Scroggins, on the other hand, is the specificity of proof. In Weeks, expert testimony on the risk of HIV transmission directly related to the likelihood that Weeks’s particular actions could have transmitted HIV; in Brock and Scroggins, the expert testimony spoke only to a hypothetical risk of transmission that could apply to any case involving any HIV-positive defendant, regardless of his or her unique “accidents” or circumstances. Reasoning from such generality is not only illogical and contrary to due process; Weeks shows that it is also unnecessary. But, Weeks and Scroggins share one problem — namely, the erroneous “anything is possible” standard to prove the risk of transmission. This second due process error will recur, most commonly in the military courts.

B. The Sex Cases

Aggravated assault charges against HIV-positive individuals who have unprotected sex without informing their partners of their HIV status have been more common than similar charges for biting. Whether these acts occur more often or simply are charged more often is

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119 Id. at 561.
120 Id. at 563.
121 Id.
122 See, e.g., Robert Mackey, German Pop Singer on Trial for Concealing H.I.V. Status From Sexual Partners, The New York Times The Lede Blog (Aug. 16, 2010, 4:23 PM), http://thelede.blogs.nytimes.com/2010/08/16/german-pop-singer-on-trial-for-concealing-h-i-v-status-from-sexual-partners/?scp=1&sq=nadja%20benaissa&st=cse (German pop singer Nadja Benaissa charged with aggravated assault for biting a woman without telling him she was HIV-positive); Brian Rogers, When HIV Is Deemed a Deadly Weapon, Houston Chronicle, Mar. 20, 2010, § B (Kevin Lee Sellars charged with aggravated assault of a 15-year-old boy); Bill Vidonic, Inmate Charged in Jail Sex Incident, Beaver County Times, Sept. 23, 2009 (Jeffrey Sloppy charged with aggravated assault after allowing another inmate to perform oral sex on him); Diane Jennings, Man Who Spread HIV Gets 45 Years, Dallas Morning News, May 30, 2009, at 1B (Philippe Padieu found guilty of six counts of aggravated assault with a deadly weapon for having unprotected sex with women without telling them he was HIV-positive); Matt Gagne, Local briefs, Bellingham Herald, Aug. 30, 2006, at 3A (Michelle Pauline Whonnock charged with aggravated assault after having unprotected sex without disclosing she is HIV-positive); Main Again Faces Assault Charge, Associated Press, May 5, 2006, available at 5/5/06 APALERTCRIM 01:16:19 (Edward Kelly, recently released from prison, charged with aggravated sexual assault for unprotected sex with a woman unaware of his HIV-positive status); HIV-Positive Man Found Guilty of Knowingly Spreading HIV to Sexual Partners, Associated Press, Dec. 14, 2005, available at 12/14/05 APALERTCRIM 02:53:07 (Adrian Nduwayo charged with aggravated sexual assault in Ontario); Man with HIV is Charged with Sexual Assault, Buffalo News, Dec. 9, 2005, at D3 (Patrick Green charged with aggravated sexual assault in Ontario); Laurie Mason, HIV-Positive Man Admits Sex Assaults, Bucks County Courier Times, Mar. 16, 2004, at 4C (Michael Silverman pleaded no contest to committing aggravated sexual assault); Man with HIV
unclear. What is clear is that certain jurisdictions tackling this behavior through aggravated assault continue to alleviate the state’s logical and constitutional burden to prove that a given defendant’s particular behavior satisfied the likelihood prong of the crime.

_Guevara v. Superior Court_123 involved an HIV-positive man who had unprotected sex with a minor female without disclosing his HIV-positive status.124 California charged him with two counts of assault “by means of force likely to produce great bodily injury.”125 Despite the intermediate appellate court’s decision to set aside the conviction on the assault counts, the court nevertheless was prepared to commit the Accident Fallacy had the prosecution proffered a modicum of evidence.

The court found insufficient evidence that the defendant’s bodily fluids were likely to infect the victim with HIV.126 The type of evidence that would have been sufficient, however, is reminiscent of the Alabama court’s decision in _Brock_. Here, the court would have accepted some evidence of the risk of transmission when a hypothetical HIV-positive man had unprotected sex with a hypothetical uninfected female.127 But, having sex once only describes one small part of Guevara’s conduct. In a striking example of the Fallacy of Accident, the court admitted that the likelihood “the charged acts would result in transmission of HIV” was disputed. The phrase “charged acts,” by virtue of its reference to the conduct described in Mr. Guevara’s indictment, suggests specificity. But, as evidence of the dispute on risk, a footnote cites studies published in Epidemiology and in the Journal of Acquired Immune Deficiency Syndromes suggesting that the infection rate for female partners of infected males who never

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124 Though the victim’s age factors into the crime charged and punishment levied, the fact that Mr. Guevara’s victim was a minor, while deeply unfortunate, is irrelevant to the more narrow point of this article.

125 Guevara, 62 Cal. App. 4th at 867, 868 (quoting Cal. Pen. Code § 245(a)(1)). Guevara’s original indictment charged him with two counts of assault “with a deadly weapon, to wit, bodily fluids, and by means of force likely to produce great bodily injury.” _Id._ at 867. At trial, the defendant moved to set aside the information as to the assault counts based in part on the fact that no so-called “deadly weapon” had been used and the government’s failure to assert that HIV was a “deadly weapon” for the purposes of aggravated assault. _Id._ at 868. While the court denied the motion, it ordered the words “deadly weapon” removed after the prosecutor conceded that she was only proceeding on the theory that the defendant had committed an assault “by means of force likely to produce great bodily injury.” _Id._

126 _Id._ at 869.

127 _Id._
used condoms was somewhere between 5.7 and 10 percent. Therefore, either the court intended the phrase “charged acts” to refer to anytime an HIV-positive man has unprotected sex with an uninfected female – a not unlikely assumption given the type of proof it would have deemed sufficient, but also exceedingly broad and dangerous in its potential application – and court could see no difference between this defendant and the few hundred other HIV-positive men studied, or the court illogically applied a general rule to a specific case. The court gave no indication that anything more specific than a general average based on studies of a few hundred uninfected females was required to convict Mr. Guevara. If that were enough, there appears to be nothing an HIV-positive individual can do – other than universal use of safe sex practices – to protect him or herself from a potential aggravated assault charge.

State v. Whitfield represented a slightly different problem. In that case, the defendant was convicted of seventeen counts of assault in first degree for having unprotected sex with seventeen women and not informing them of his HIV-positive status. Dr. Diana Yu, a medical expert, testified at trial that HIV and AIDS are incurable, that HIV eventually leads to AIDS, that the statistical risk of a female getting infected from unprotected vaginal intercourse with an HIV-positive male is 4 percent and that who becomes infected and who does not is unpredictable. Dr. Yu also testified that “every incidence of sexual activity would be a period of exposure,’ although no every exposure would necessarily transmit HIV’.

The stage of Whitfield’s condition, his response to medication and his symptoms did not factor into the decision. The court found this testimony sufficient for conviction. Washington State defined assault in the first degree as “with intent to inflict great bodily harm … [a person] exposes, or transmits to … another … the human immunodeficiency virus.” Under that standard, any form of sexual contact represents exposure, so even if the court had sought specific proof as to the nature of Whitfield’s condition and his unique risk of transmission, that information would likely have been of little help. Washington State had adopted the “anything is possible” standard as sufficient grounds for conviction.

Guevara’s and Whitfield’s crime, and the resulting legal problems, have popped up in the military courts, as well. Aggravated assault in the military is governed by Article 128,

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128 Id. at n.2.


130 Id. at 1207.

131 Id. at 1209.

132 Id. at 1214.

133 Id. (quoting Wash. Rev. Code Ann. 9A.36.011(1)(b)) (emphasis in original).

134 See, e.g., Matthew Barakat, Navy Chaplain Gets Two Years for Sex Crime, WASHINGTON POST, Dec. 6, 2007, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/12/06/AR2007120601332.html; Estes Thompson, Authorities: Soldier Who Didn’t Disclose HIV Faces Assault Charges, ASSOCIATED PRESS, available at 7/18/07 APALETNC 03:01:56 (Private First Class (Pfc) Johnny Lamar Dalton charged with assault with a deadly weapon for having unprotected sex with an 18-year-old civilian unaware of his HIV status); HIV-Positive Army Private Pleads Guilty to Assault, ASSOCIATED PRESS, Jan. 20, 1999, available at 1/20/99 ASSOCPR 00:00:00 (Private Gerland Squires charged with aggravated assault for not telling eight sexual partners of her HIV-positive status); Fort Carson Soldier Guilty in AIDS Case, DENVER ROCKY MOUNTAIN NEWS, Jan. 14, 1994, at 8A (Army Specialist Quincey Mason guilty of aggravated assault and other counts); Soldier with AIDS Virus Gets Two
Uniform Code of Military Justice (UCMJ), which states that anyone under UCMJ jurisdiction who “commits an assault with a dangerous weapon or other means … likely to produce death or grievous bodily harm” is guilty of aggravated assault. This language is similar to the language in Brock, Weeks and Guevara in that both clearly use likelihood as a way to describe how the weapon or other instrument is used in the assault. In the ordinary aggravated assault case, then, satisfying this formulation beyond a reasonable doubt requires answering four questions: First, what weapon or means of force did the defendant use? Second, how was that instrument of harm used? Third, does that mode of use make serious harm likely? And, fourth, what level of probability qualifies as likely? The Manual for Courts-Martial (MCM) lays this out in detail as follows:

[A] bottle, beer glass, a rock, a bunk adaptor, a piece of pipe, a piece of wood, boiling water, drugs, or a rifle butt may be used in a manner likely to inflict death or grievous bodily harm. On the other hand, an unloaded pistol, when presented as a firearm and not as a bludgeon, is not a dangerous weapon or a means of force likely to produce grievous bodily harm, whether or not the assailant knew it was unloaded.

Therefore, the particular manner in which the defendant uses his or her weapon is essential to proving aggravated assault. And so is the likelihood that that particular use could cause harm. For the purposes of aggravated assault, the MCM defines “likely” as where “the natural and probable consequence of a particular use of any means or force would be death or grievous bodily harm.” This language is notable for two reasons: First, it appears to set the military apart from jurisdictions like Texas and Georgia, which, as discussed in Weeks and Scroggins, accepts mere possibility as sufficient evidence of likelihood. The military requires a higher threshold of likelihood. Second, it makes clear the need for specific proof. Likelihood can only be determined from a defendant’s “particular use” of whatever means he has deployed. The Court made this clear in United States v. Outhier. Distinguishing between circumstances that could make a weapon qualify as a “means likely” to cause harm with those circumstances that could not, the Court noted that there is always a

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137 Established by Executive Order No. 12473 (1984), the MCM is detailed guide to the conduct and procedure for courts-martial.


139 Id. (emphasis added).

140 See supra pp. 24 & note 110.

lynch-pin between a means that is used in a manner “likely” to produce death or grievous bodily harm and one that is not. … [Some] “means” … [a]re unique for an aggravated assault case, i.e., a fist. In this case, the “means” were also distinctive in that the manner of assault was binding another’s hands and feet and then permitting the person to jump into the deep end of a swimming pool. Regardless, the standard remains the same. The question is whether the means were “used in a manner likely to produce death or grievous bodily harm.” Thus, in this instance, the circumstances define whether the means used were employed in a manner likely to cause grievous bodily harm or whether appellant’s actions were performed in such a manner that the natural and probable consequences were necessarily death or grievous bodily harm.\footnote{142} In the standard aggravated assault case involving deadly weapons, therefore, the Court took the MCM’s explanation to heart. Circumstances matter and likelihood is contingent upon the natural and probable consequences of using a weapon under those circumstances. This would appear to disqualify the kind of generalized evidence familiar in \textit{Brock, Scroggins} and \textit{Guevara}.

The UCMJ, MCM and CAAF’s precedents thus offer military prosecutors clear instructions on how to indict and prove the elements of aggravated assault for an HIV-positive service member who has sex without informing his partner of his HIV-positive status. The particular nature of the defendant’s condition and its correlative risk of transmission are essential elements of that calculus because both factor into determining the consequences of the sexual act and whether those consequences were “natural and probable”. But, as the cases suggest,\footnote{143} these instructions were ignored in two distinct ways.

First, the military courts, like the courts in \textit{Brock, Scroggins} and \textit{Guevara}, ignored the particular circumstances of the HIV-positive defendant on trial. In \textit{United States v. Johnson},\footnote{144} for example, a general court-martial convicted the appellant, in relevant part, of aggravated assault for engaging in oral sodomy while HIV-positive and attempted aggravated assault for

\footnote{142} Id. at 329 (emphasis in original) (internal citations omitted).

\footnote{143} Aggravated assault cases in the military are unique in part because of the military’s heightened health and wellness requirements. This important interest has given rise to a host of Department of Defense and service regulations governing HIV-positive service members. For example, upon testing positive for HIV in the military, medical officers counsel the service member about the possibility of transmitting the virus. Dep’t of Defense Dir. 6485.1, at Enclosure 9. § E9.1.1. He is prohibited from donating blood. He is instructed to warn future partners of his medical status and ordered not to engage in any sexual activity without the use of a condom. Service members with HIV are also ordered to inform sexual partners that the use of a condom cannot completely eradicate the risk of transmission. \textit{Id.} at § 9.1.2. \textit{See also, e.g.}, \textit{United States v. Klauk}, 47 M.J. 24, 25 (C.A.A.F. 1997). In 2004, the Department of Defense updated the military’s HIV testing program to require testing at intervals of two years at most. \textit{See Memorandum, Dep’t of Defense, William Winkenwerder, Jr., MD to Asst. Sec’y of the Army, Asst. Sec’y of the Navy, Asst. Sec’y of the Air Force} (Mar. 29, 2004).

A commander’s order to engage in safe sex is not only relevant as a matter of public health, but also a tool of the criminal law. If a service member so ordered engages in unprotected sex, the service member will be charged with – and mostly likely found guilty of – one specification of violating a lawful order, regardless of the fate of other charges against him under the Uniform Code of Military Justice (UCMJ). Most military cases discussed in this article include such a specification next to an aggravated assault charge.

\footnote{144} 30 M.J. 53 (C.M.A. 1990).
attempting to engage in anal sodomy with another man.\textsuperscript{145} A physician with the Air Force Medical Corp testified that there was a 35 percent chance that an HIV-positive individual will develop AIDS and that mortality rates were currently 50 percent. Notably, the Court felt compelled to cite other evidence stating that nearly 99 percent of those infected with HIV will develop AIDS. The physician also testified that intravenous drug use and unprotected sex represented the greatest risk for transmission, and that the risk increased with anal intercourse or if either partner has “genital ulcers” or other abrasions. He admitted that fellatio is an “unlikely” means of transmission of HIV.\textsuperscript{146} The only evidence of Sergeant Johnson’s conduct was that he performed oral sex on another man and intended to engage in anal sodomy before his partner objected. There was no indication that Johnson had any genital ulcers or exhibited any risk enhancement factors. Nor was intravenous drug use at issue. Still, the court found the physician’s testimony sufficient to prove the likelihood prong of aggravated assault.\textsuperscript{147}

The court’s evident gloss over the explanatory language in the MCM is one striking feature of this case. The other is its inexplicable ignorance about HIV given the extent of military regulations governing HIV-positive service members. CAAF made its decision unaware of whether Johnson conformed to a rule of thumb – that HIV can be transmitted through sexual intercourse – or was unique in some way. After all, the Accident Fallacy only occurs when a general rule of thumb is applied to a particular case that is somehow unique, different or outside the general rule. In Johnson and a series of similar cases, the court must have assumed that differentiation among HIV-positive individuals was impossible. The court believed that “any time” one person exposed another to a deadly disease, it could be an aggravated assault, as if there were no differences between diseases, patients or circumstances.\textsuperscript{148} But, as early at 1991, when the Department of Defense issued Directive 6485.1 governing the military’s policy toward HIV and AIDS, it was clear that the military could distinguish between types of HIV-positive individuals.\textsuperscript{149} It is also clear that at the time of Johnson’s case, CD4+ cell testing could quickly

\textsuperscript{145} Id. at 54.

\textsuperscript{146} Id. at 55.

\textsuperscript{147} Id. at 57.


\textsuperscript{149} Military policy identified six distinct stages of HIV, each with particular characteristics, only some of which are summarized in the following chart:

<table>
<thead>
<tr>
<th>Stage</th>
<th>HIV-1 Antibody Isolation</th>
<th>Chronic Lymphadenopathy</th>
<th>T-Helper Cells per Cubic Millimeter (mm³)</th>
<th>Delayed Hypersensitivity</th>
<th>Thrush</th>
<th>Opportunistic Infection</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>+</td>
<td>-</td>
<td>GT400</td>
<td>WNL</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>+</td>
<td>+</td>
<td>GT400</td>
<td>WNL</td>
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<tr>
<td>3</td>
<td>+</td>
<td>+/-</td>
<td>LT400</td>
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<td>4</td>
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<td>+/-</td>
<td>LT400</td>
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<td>5</td>
<td>+</td>
<td>+/-</td>
<td>LT400</td>
<td>P/C</td>
<td>+</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>+</td>
<td>+/-</td>
<td>LT400</td>
<td>P/C</td>
<td>+/-</td>
<td>+</td>
</tr>
</tbody>
</table>

(GT = greater than; LT = less than)

Dep’t of Defense Dir. 6485.1, Enclosure 2, at § E2.2.1.
and easily distinguish between types of HIV infections and how they manifested in a particular individual. Why such distinctions could not be used to classify HIV-positive criminal defendants is unclear.

*Johnson*, therefore, is a pure example of the Accident Fallacy and its correlative due process violation. The unique activity that gave rise to the assault change should have distinguished Johnson from the average. The court in *Johnson* operated from the general rule that unprotected sex, in whatever form, could transmit a deadly disease. Blind to any unique “accidents” in Sergeant Johnson’s case and relying on medical testimony that only tended to validate a general rule of thumb rather than its particular applicability to this case, the court erroneously used a broad generalization as proof of criminal activity. What made that due process violation possible, however, was a second parallel due process error that lowered the government’s burden of proof as to likelihood from the MCM’s “natural and probable consequences” standard to the simple and clearly lower requirement of “more than merely a fanciful, speculative or remote possibility.” In doing so, CAAF transformed the MCM’s meaningful definition of “likelihood” into an “anything is possible” standard similar to the one in *Scroggins, Weeks* and *Whitfield*.

Lowering the government’s burden is the second way in which the military courts have ignored the plain language of the UCMJ and MCM and, in so doing, violated the due process rights of HIV-positive criminal defendants. To see the contours and gravity of both of these errors, consider the case of *United States v. Dacus* and the jurisprudential history on which it stands. Dacus was HIV-positive, and had known about his condition since 1996. Since then, he received various briefings from commanders and medical professionals concerning his virus, the disease’s possible effects and transmission, and his responsibility to inform all prospective sexual partners of his HIV status. During his providence inquiry, Appellant admitted that he knew he should have discussed his HIV status before engaging in sexual activity, that he knew wearing a condom could not always prevent transmission and that he understood he could transmit the virus through pre-ejaculate fluid. In July 2004, Dacus had sex with Staff Sergeant (SSG) HG on one occasion; in August and September of that year, he had sex with SSG CH eleven times. He failed to inform both partners of his HIV-positive status, and though he

150 Johnson, 30 M.J. at 57.

151 See *supra* notes 129 - 133. *Whitfield* is different in that the lower standard was actually written into the statute by the legislature, rather than created by judicial fiat.

152 66 M.J. 235 (C.A.A.F. 2008). *Dacus* came to CAAF based on a guilty plea, so the court never had occasion to address legal sufficiency of the proof of Dacus’s guilt. Instead, the court analyzed whether the plea had a substantial basis in law and fact. This does not change the analysis that follows, however.

153 Trial Transcript, United States v. Dacus (Mark L. Toole, Military Judge), vol. 1, 26, Mar. 25, 2005.

154 A providence inquiry is similar to a plea hearing. During a providence inquiry, a military judge must hear the defendant’s plea and determine whether he offers facts sufficient to prove every element of the crime to which he pleaded guilty. See CHARLES A. SHANOR & L. LYNN HOGUE, NATIONAL SECURITY AND MILITARY LAW IN A NUTSHELL 286-89 (2003).

allegedly wore a condom when having sex with SSG HG, he never wore a condom with SSG CH. 156

During his sentencing hearing, Dacus presented the testimony of Dr. Mark Wallace, an expert in AIDS and infectious disease. 157 Dr. Wallace testified that the likelihood of transmission of HIV from one person to another is a direct function of the viral load, which is a measure of the extent of the virus’s presence in an individual’s system. 158 According to a recent study out of Rakai, Uganda, Dr. Wallace noted, a person with a viral load of 38,000 would have a 1 in 450 chance of transmitting the HIV virus for every heterosexual act of sexual intercourse, whereas a person with a viral load with 1,700 would have a 1 in 10,000 chance of doing so. 159 When a person uses a condom, the risk of transmitting the HIV virus falls by an additional eighty to ninety percent. 160 Dr. Wallace also examined Dacus, noting that Dacus’s viral load was undetectable by existing technology, putting the figure somewhere between one and fifty. 161 As such, using the Rakai numbers, Appellant had a maximum 1 in 612,000 chance of transmitting the HIV virus to SSG HG if there was any pre-ejaculate fluid present and a maximum 1 in 440,000 chance of transmitting HIV to SSG CH. Dacus was in fact “a unique” HIV-positive individual whose immune system could suppress replication of HIV without medication. 162 While Dr. Wallace noted that Dacus could still transmit the HIV virus despite his low viral load, the likelihood of Appellant doing so was “extremely low” or “very, very unlikely.” 163

This case had one promising feature: the evidence at trial as to Dacus’s viral load and the particular type and frequency of sexual contact with two staff sergeants went directly to the unique “accidents” of Dacus’s case. His single sexual act with one of his victims made transmission less likely and his exceedingly low viral load put him on the fringe of transmission risk in all cases. However, even though Dacus was able to offer specific evidence of his unique situation, the Air Force Court of Criminal Appeal (AFCCA) found the evidence consistent with a plea of guilty to aggravated assault 164 because, according to CAAF precedents, the risk of transmission need only be “more than merely a fanciful, speculative or remote possibility.” 165

156 Id. at 26, 27, 29.
157 Id. at vol. 2, 92.
158 Id. at 97.
159 Id. at 98-100.
160 Id. at 100-01.
161 Id. at 96-97. Since Dacus was sentenced in 2005, viral load tests have become increasingly sensitive, lowering the “undetectable” threshold to 40. See supra pp. 10 & note 42.
162 Id. at 96.
163 Id. at 101-2.
164 Dacus argued on appeal that his statements during his providence inquiry did not adduce sufficient facts to warrant conviction of aggravated assault because Dr. Wallace’s testimony defeated a finding of likelihood. Dacus, 66 M.J. at 236.
165 Id. at 238.
This was two errors in one. By virtue of his undetectable viral load and the infrequency of sexual contact, Dacus’s case was indeed unique. Yet, the “anything is possible” standard allowed the court to ignore these “accidents.” But, as noted above, the MCM requires a showing that likelihood of death or serious bodily harm be the “natural and probable consequence” of the defendant’s conduct in aggravated assault cases. The threshold used to convict Dacus seems considerably lower than the standard approved in the MCM.

There are four possible reasons for this, all of which fail to justify the lower standard. First, the military courts may have interpreted the MCM this way in all aggravated assault cases, much like Texas did when it interpreted “tends to” to mean “could” in that state’s aggravated assault statute. That is not the case, however. For example, in United States v. Coralez, where the defendant placed a knife to his victim’s head and threatened to cut her face with broken glass, the AFCCA made a clear distinction between mere possibility and the governing standard in aggravated assault cases. The court noted that “likely” means “more than a mere possibility that death or … harm will occur. Death or grievous bodily harm must be the ‘natural and probable consequence’ before it can be said that the use of a weapon, means, or force was likely to cause death or grievous bodily injury.” In fact, the only cases in which “natural and probable” is equated with the kind of simple possibility embraced by the “fanciful, speculative or remote” standard are those involving HIV-positive defendants. Unless there is some other justification, this seems like obvious discrimination – an entire class of defendants, those who allegedly use their HIV as an instrument of harm, are subject to a lower standard of proof than every other defendant charged with aggravated assault.

Second, the military may have confused risk of transmission with risk of harm. If aggravated assault under the UCMJ requires a means likely to cause grievous bodily harm or death, a judge could interpret “likely” as modifying “cause”. This suggests that given an attack by the particular weapon or means used, what is important for the likelihood prong is the probability of death or serious injury once the weapon is used. And, since HIV causes AIDS and AIDS in incurable, death is the natural and probably consequence of contracting HIV. There is some indication that CAAF has adopted this interpretation. In United States v. Joseph, another aggravated assault case involving HIV, the Court analogized HIV to a rifle bullet, stating that “the question would be whether the bullet is likely to inflict death or serious bodily harm if it hits the victim, not the statistical probability of the bullet hitting the victim.”

166 See supra pp. 24 & note 110.
168 Id. at 742.
170 Id. at 396-97 (emphasis in original). In United States v. Stewart, 29 M.J. 92 (C.M.A. 1989), furthermore, CAAF addressed the foundational question of whether HIV qualifies as a means likely to produce death or grievous bodily harm if, at the time, HIV developed into AIDS only thirty to fifty percent of the time. A thirty to fifty percent likelihood of developing AIDS satisfied the Court that AIDS was the natural and probable consequence of contracting HIV. Id. at 93.
As CAAF explained in Outhier, “likely” modifies “means.” The question in Outhier was whether “the means were ‘used in a manner likely’” to cause harm.¹⁷¹ Fists could cause sufficient harm if used a certain way, whereas a gun, if an attacker loads it with bubblegum and pulls the trigger, could not. To narrow the likelihood prong to the consequential harm, therefore, ignores the saliency of a particular weapon’s use. What is more, since there can be no harm without a risk of transmission of HIV, any aggravated assault conviction must assess whether the particular means employed— unprotected sex by an HIV-positive man with an undetectable viral load—would naturally and probably transmit HIV.¹⁷²

Third, CAAF might have justified the low risk of transmission standard on its assumption that an HIV infection is an unquestioned death sentence. In other words, if the gravity of the harm is so great, the risk of transmission of HIV need not be. Indeed, that is what United States v. Weatherspoon¹⁷³ appears to suggest. Weatherspoon was a traditional aggravated assault case involving choking and repeated kicks to the head. CAAF cited LeFave for the proposition that the “concept of likelihood … has two prongs: (1) the risk of harm and (2) the magnitude of the harm. … [L]ikelihood … is determined by measuring both prongs, not just the statistical risk of harm. Where the magnitude of the harm is great, there may be an aggravated assault, even though the risk of harm is statistically low.”¹⁷⁴ Mathematicians call that an inverse variation, but CAAF arrived at it speciously. Not only is this calculus not universally applied,¹⁷⁵ but it is nothing more than a post hoc justification for the military courts’ unequal treatment of HIV-positive criminal defendants charged with aggravated assault. Weatherspoon accepts the “fanciful, speculative or remote” standard as given, relying on various CAAF precedents that neither discussed LeFave nor indicated a reliance on an inverse variation to determine likelihood.

¹⁷¹ Outhier, 45 M.J. at 329.

¹⁷² Even if the Joseph standard were correct, and that the only applicable question was harm to the body as a result of an HIV infection, the prosecution should still have to prove that serious bodily injury or death were “natural and probable consequences” of contracting HIV. The court in Johnson, Joseph and Klauck accepted this as true, but given current medical treatments, the point is debatable. Though a comprehensive summary of the status of HIV treatments is beyond the scope of this paper, suffice it to say things have changed. Recent clinical trials, reported by the Department of Health and Human Services, found that patients receiving two drug combinations of AIDS drugs had up to fifty percent increases in time from HIV to AIDS progression and in survival when compared to people receiving single-drug therapy. Three drug combinations, first prescribed in any widespread form in the early 2000s, produced another fifty to eighty percent improvement in progression from HIV to AIDS and in survival when compared to two-drug regimens. See CDC, Diagnosis of HIV Infection and AIDS in the United States and Dependent Areas, vol. 20 (2008). Use of now-available anti-HIV combination therapies has also contributed to dramatic reductions in the incidence of AIDS and AIDS-related deaths in the country and in other populations where the drugs are readily accessible to the point where life expectancy of HIV-positive individuals is only slightly below average. See, e.g., Frank J. Palella et al., Declining Morbidity and Mortality Among Patients with Advanced Human Immunodeficiency Virus Infection, 338 NEW ENGLAND JOURNAL OF MEDICINE 853-860 (1998); Mocroft et al., AIDS Across Europe, 1994-98: The EuroSIDA Study, 352 LANCET 1725-30 (Nov. 28, 1998); Vittinghoff et al., Combination Antiretroviral Therapy and Recent Declines in AIDS Incidence and Mortality, 179 J. INFECTIOUS DISEASE 717-20 (Mar. 1999); Schwarcz et al., Impact of Protease Inhibitors and Other Antiretroviral Treatments on AIDS Survival in San Francisco, California, 1987-1996, 152 AM. J. EPIDEMIOLOGY 178-85 (2000).


¹⁷⁴ Id. at 211 (citing 1 W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW, § 3.7 at 328 (1986)).

¹⁷⁵ See, e.g., Coralez, supra note 167, at 742.
In those cases, the magnitude of harm was assumed to be great because HIV/AIDS is incurable. But death by side effects from an HIV infection is no more grave than death by gun shot or death by repeated blows to the head. Yet, CAAF uses the MCM’s “natural and probable consequence” standard for standard aggravated assaults and LeFave’s inverse variation for HIV-related assaults.

Since CAAF created its “fanciful, speculative or remote” standard long before Weatherspoon’s use of LeFave’s inverse variation to justify it, it would seem that there is a fourth possibility – namely, that the military courts have continued to perpetuate a mistake made long ago, when judges were scared and ignorant of HIV. The precedents upon which the “more than merely a fanciful, speculate or remote possibility” standard is based are unsubstantiated and Weatherspoon’s post hoc justification for it does not suggest otherwise. The cases bear this out. In Dacus, CAAF cites its previous decisions in United States v. Klauk, Joseph and Johnson for support; Klauk cites Joseph, which in turn relied on Johnson. Johnson relied on United States v. Stewart and United States v. Womack, but that is

176 This made it easy for Weatherspoon to rely on the MCM’s “natural and probable consequences” standard for the magnitude of harm prong. See Weatherspoon, 49 M.J. at 212. The cases relied on by Weatherspoon – Joseph and Johnson – were also decided in 1989 and 1990, at the height of the HIV/AIDS pandemic and paranoia.

177 Even the court in Johnson conceded rampant stigmatization of HIV-positive criminal defendants, noting that judges at the time had moved “sentencing proceedings to the courthouse parking lot, stating that ‘lots of space and sunshine’ would reduce the risk of the defendant’s infecting court personnel with AIDS” and also required defendants with AIDS to enter pleas and receive sentences over the phone. Johnson, 30 M.J. at 58 n9.

Stigmatization and discrimination was, in fact, much more rampant. During the 1980s, for example, many states mandated screening and testing, compulsory notification of AIDS cases, restrictions of the right to anonymity, prohibition of HIV-infected individuals from certain occupations, and even medical isolation and detention. Tomasevski, K. et al., AIDS and Human Rights, in AIDS IN THE WORLD (J. Mann et al., eds. 1992). Discrimination against HIV-positive children included exclusion from collective activities or expulsion from school.

180 37 M.J. at 396-97 (citing Johnson for same).

181 30 M.J. at 57 (“Based upon our holdings in Stewart and Womack, [‘likely’] must at least be more than merely a fanciful, speculative or remote possibility.”).

182 29 M.J. 92 (C.M.A. 1989).

where the trail ends. Moreover, neither *Stewart* nor *Womack* provide any reason for lowering the MCM’s natural and probable consequences standard other than judicial fiat. *Stewart* employed the MCM’s standard, without mentioning the words fanciful, speculative and remote.  

And *Womack* is even less helpful and more far afield, as it never even addressed the natural and probable consequences standard. In *Womack*, the appellant neither pleaded to nor was charged with aggravated assault; instead, he pleaded guilty to forcible (oral) sodomy and violating the military’s safe sex order. The appellant challenged the validity of the safe sex order based on overbreadth, intrusiveness and a lack of military necessity, but the court rejected those claims. In doing so, the court neither mentioned aggravated assault nor its requirement of a means likely to produce death or grievous bodily harm. To say that *Womack* and *Stewart* required *Johnson* to adopt the low “fanciful, speculative, or remote possibility” standard is to read into the cases that which is simply not there.

Even the Court’s language in *Dacus* indicates awareness of this problem. In tracing this history, CAAF is uneasy with its precedents, noting only that “in explaining [the likelihood prong], we relied upon the ‘risk of harm’ definition developed in several HIV assault cases” and that those earlier cases relied “on language from an earlier HIV assault case.”  

As if punting responsibility for the precedential quagmire in which it found itself, CAAF never affirmed a standard, merely noting that it has for years been relying on certain precedents that rely on certain precedents.

This jurisprudential quicksand doomed Sergeant Dacus’s appeal. Even though his undetectable viral load made him significantly less likely than a hypothetical HIV-positive individual to transmit HIV, the fact that anything is possible satisfied the “fanciful, speculative or remote possibility” standard. *Dacus* represents two problems. In *Dacus*, specific proof was available and before the military judge, yet the general rule of thumb was still applied to unique case. That is the Accident Fallacy. What made it possible was the second error, i.e., the bar for proving likelihood had been previously set well below the instructions of the MCM to the lowest “anything is possible” standard. Therefore, even specific proof as to the qualitative and quantitative unlikelihood that Dacus could transmit HIV was insufficient to rebut the government’s case. If all the government had to prove was a mere possibility that was more than “fanciful, speculative or remote,” even the medical reality that “anything is possible” would suffice. After all, the testifying physicians in *Dacus, Johnson, Klauck* and *Joseph* all stated that the likelihood of transmission was relatively low; but they had to concede the possibility. But, proof of possibility is not proof beyond a reasonable doubt.

**IV. Canada’s Use of its Criminal Law**

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184 Stewart, 29 M.J. at 93.

185 Womack, 29 M.J. at 88.

186 Dacus, 66 M.J. at 238.

187 Concurring in the result in *Dacus*, Judges Baker and Ryan suggested that had Dacus not pleaded guilty, they were prepared to look critically at the case history. *Id.* at 240-41 (Ryan, J., concurring).

188 *Id.* at 239-40.
These due process errors are not inherent in aggravated assaults, that is, there is no reason why charges for aggravated assault will always result in the use of generalized proof and exceedingly low thresholds for proof of guilt. The Weeks Court and the military courts may have adopted the “Anything is Possible” standard and Dacus may be an example of the erroneous use of generalized rules of thumb as evidence of guilt, but such errors were products of interpretation rather than the governing regime itself. Canada has used its common law crime of aggravated sexual assault to punish the criminal transmission of HIV and it has generally avoided these mistakes. If American jurisdictions took the Canadian example to heart, aggravated assault could survive as traditional criminal law tool against this bad behavior.

Aggravated sexual assault is governed by Section 273(1) of Canada’s Criminal Code: “Everyone commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims disfigures or endangers the life of the complainant.”\footnote{Canada Criminal Code [hereinafter CCC], R.S.C. 1985, c. C-46, s. 273.} The government must prove beyond a reasonable doubt that the accused’s actions endangered the life of the complainant and that the accused intentionally used force without consent.\footnote{R. v. Mabior, 2008 CarswellMan 406, at para. 9 (Man. Q.B.) (WL).} Consent can be vitiated by proof of fraud, but given the severity of the crime in comparison to simple assault, “only a significant risk of harm … will suffice”\footnote{R. v. J.A.T., 2010 CarswellBC 1342, at para. 54-55 (B.C.S.C.) (WL) (quoting Regina v. Cuerrier, (1998) D.L.R. 513 (Can.), at para. 132).} to vitiate consent. Therefore, the sexual acts must have exposed the victim to a significant risk of harm.

There have been three HIV cases to come before the Canadian Supreme Court since 1993. 

Regina v. Thornton\footnote{(1993) 2 S.C.R. 445 (S.C.C.). Regina is usually abbreviated “R.”} was a product of its time, early as it was in the HIV epidemic, and provides little help to the modern adjudication of the crime.\footnote{See, e.g., J.A.T., 2010 CarswellMan 1342, at para. 30.} Thornton was HIV-positive when he donated his blood to the Red Cross. He was not charged with assault, but rather committing a common nuisance and thereby endangering the public under Section 180 of the Canadian Criminal Code. As sufficient proof of the statute’s “endangering” element, the Ontario Court of Appeal took judicial notice that the presence of HIV antibodies indicates an AIDS infection and that AIDS is a grave and contagious illness.\footnote{R. v. Thornton, (1991) 1 O.R. (3d) 480, 481 (Ont. C.A.) (stating “[a]ll of this is well known”). It is not clear from the decision how the court concluded that those statements were “well-known.” Even in 1991, the medical community agreed that the presence of HIV antibodies in a person’s blood did not necessary mean that the person had AIDS.} It seems that the endangerment element is synonymous with an assessment of the risk to the body upon contraction of HIV. In \textit{R. v. Cuerrier},\footnote{(1998) D.L.R. 513 (S.C.C.). Aggravated assault has the same basic elements as aggravated sexual assault except for the required sexual act. Section 268 of the Canadian Criminal Code states that “[e]very one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.” CCC, R.S.C. 1985, c. C-46, s. 268.} the defendant was charged with aggravated assault for having unprotected sexual intercourse with two victims, but even though the Court required a “significant risk to the lives
of the complainants occasioned by the act of unprotected intercourse,” it found “no doubt” that the defendant endangered his victims’ lives by exposing them to HIV. The Court did not discuss the basis for determining a significant risk, but considered risk in terms of the risk of harm. The Court was so certain the defendant’s conduct met the standard because “[t]he potentially lethal consequences of infection permit no other conclusion.”

The third HIV case from the Supreme Court of Canada was R. v. Williams. In Williams, like Cuerrier, the accused had unprotected sexual intercourse with the complainant at a time when he was HIV-positive. The unique feature in Williams is that the accused may already have infected the complainant with HIV before he knew that he was HIV-positive. To prove aggravated assault, the Crown had to establish the concurrence of the accused’s intent and the consequences that made the conduct aggravated assault, i.e., the endangerment. The prosecution failed because if the accused endangered the complainant’s life by the acts of unprotected sexual intercourse, there was no intent. When he continued to have unprotected sexual intercourse with the complainant after he knew he was HIV-positive, the Crown could not show that the sexual conduct “harmed the complainant, or even exposed her to a significant risk of harm, because at that point she was possibly, and perhaps likely, already infected with HIV.” There were, then, two holdings in Williams: as to the sexual acts before the defendant knew he was HIV-positive, there could be no intent to harm; as to any subsequent sexual acts, there could be no risk to the victim since she had already been exposed to and contracted HIV.

None of these three cases spoke to the question of what kind of conduct risked transmission of HIV in order to pose a significant risk of harm. It was simply not at issue in Cuerrier or Williams, but it is relevant because there can be no substantial harm without conduct that risked transmission. It was not at issued in Williams because the parties signed a safe-sex agreement in which they conceded that “a single act of unprotected vaginal intercourse carries a significant risk of HIV transmission.” Most lower courts that have interpreted Cuerrier have agreed and argue that advances in medical knowledge as to the risks of transmission


197 Id.


199 Id. at para. 34.


201 See, e.g., R. v. Wright, 2009 CarswellBC 3776 (B.C.C.A.) (WL) (risk of transmission relevant to determining risk of significant bodily harm to complainant and finding a jury could rationally find that a 5 in 1,000 risk was sufficient); R. v. S.(F.), 2006 CarswellOnt 1539 (Ont. C.A.) (WL) (similar); R. v. Mabior, 2008 CarswellMan 406 (noting that risk of transmission is essential threshold question and finding that an undetectable viral load plus the use of a condom will never constitute a “substantial risk” of transmission). It can be argued that these courts misinterpreted Cuerrier in that by only discussing the gravity of harm to the body upon infection, like CAAF did Joseph, supra note 170, the “substantial risk” did not refer to risk of transmission. That reading is plausible, but myopic. The risk of transmission was not at issue in Cuerrier and because the defense conceded that sex is one way to transmit HIV, the court could assume a risk of transmission without deciding it. The lower courts in various provinces have concluded that since there can be no harm to the body without a risk of transmission, the “substantial risk” standard applies to both the risk of transmission and gravity of the harm. This distinguishes Canadian courts from American military courts, which have used a “fanciful, speculative or remote possibility”
necessarily require an investigation into transmission risks as well as the potential for grave harm.\textsuperscript{202} Nor did \textit{Cuerrier} establish an evidentiary rule that all unprotected sex constituted a substantial risk and all protected sex constituted an insubstantial risk.\textsuperscript{203} All \textit{Cuerrier} did was establish that a significant risk of harm will vitiate consent when combined with deceit. Otherwise, risk had to be “a matter of fact to be assessed on the evidence in each and every case.”\textsuperscript{204} Lower courts were empowered by \textit{Cuerrier} to use case-specific evidence to prove the level of risk, thus ensuring that “personal guilt” would be a feature of any conviction for an HIV-related aggravated assault.

In \textit{R. v. J.A.T.},\textsuperscript{205} for example, the defendant engaged in unprotected anal intercourse with his same-sex partner at various times throughout their relationship.\textsuperscript{206} He knew he was HIV-positive before they met, but never disclosed his status until he faked a positive HIV test about nine months later.\textsuperscript{207} The government charged him with aggravated sexual assault and since his partner had consented to every incident of intercourse, the government also had to prove a substantial risk of harm. The court read \textit{Cuerrier} as establishing the basic principle that a substantial risk was necessary to vitiate consent and since there could be no harm without a risk of transmission, sufficient evidence was necessary to prove a substantial risk of both transmission and harm. Two physician experts in infectious disease testified at trial. The first concluded that the risk of transmission in this case was 4 in 10,000 per incident of anal intercourse. He took into account the defendant’s low viral load, which decreased the risk of transmission; that the HIV-positive defendant was the receptive, rather than insertive, sexual partner, which also decreased the risk of transmission; and that the complainant was uncircumcised, which increased the risk.\textsuperscript{208} This evidence typifies the kind of specific proof absent from cases like \textit{Weeks, Scroggins, Johnson, Guevara} and others. Whereas the general rule of thumb is that unprotected anal intercourse carries a 1.4 percent risk of transmission,\textsuperscript{209} the unique “accidents” of the defendant’s case in \textit{J.A.T.} distinguished it from the norm. His viral load and his sexual position served to lower the risk, whereas the fact that his HIV-negative partner was uncircumcised increased the risk. Specific proof, therefore, will not always absolve

\begin{footnotesize}

\begin{enumerate}
\item J.A.T., 2010 CarswellBC 1342, at para. 21.
\item \textit{Id.} at para. 19-20.
\item J.A.T., 2010 CarswellBC 1342, at paras. 41 – 53 (finding that a review of all the evidence and the credibility of the witnesses suggests that there were three incidents of unprotected sexual intercourse during the defendant’s and the complainant’s 10-month relationship).
\item \textit{Id.} at paras. 32 – 53.
\item \textit{Id.} at para. 12.
\item \textit{Id.} at para. 29.
\end{enumerate}
\end{footnotesize}
a defendant of culpability by reducing the risk of transmission; certain “accidents” can increase the risk over and above the average, making proof of a substantial risk of transmission that much easier.

As to risk or gravity of the harm upon infection, a second medical expert testified that HIV is no longer synonymous with death. She noted that an HIV-positive individual can lead “a normal life” with antiretroviral drugs and new treatments that are reducing the incidence of side effects. Treatment can also lower the viral load of an HIV-positive person to undetectable levels, thus allowing for extended periods in which the individual is asymptomatic. Although the court noted that there is still no cure for HIV or AIDS, it is no longer a simple matter of common sense that HIV and AIDS kill and do so always. Given the testimony of both physicians and the unique circumstances of the case, the court found that the government could not prove beyond a reasonable doubt that the defendant exposed his partner to a substantial enough risk.

In other cases, Canadian courts have distinguished between those defendants whose actions did not carry a substantial risk of transmission – for example, those with undetectable viral loads who used condoms – and those defendants with high viral loads who had unprotected sex on multiple occasions. At a minimum, these individuals are different and the criminal law can treat them as such. Notwithstanding emotional and retributive reactions to any occasion in which a sexual partner hides his or her communicable disease, HIV-positive criminal defendants have unique characteristics, whether in the form of their behavior, their disease or the sexual act at issue, that distinguish them from one another. Canada’s approach in J.A.T. suggests that a court can make these classifications and still use the criminal law to punish admittedly bad behavior without recourse to rules of thumb, exceedingly low standards of proof and violations of long-standing principles of due process.

V. Conclusions and Implications

The success of a “personal guilt” approach in J.A.T. shows that the traditional criminal law can punish transmission of HIV without errors in logic and violations of due process. But it is a risky recipe. Problematic cases like Brock, Scroggins, Weeks, Johnson and Dacus show a tendency toward error that even more specific drafting could not resolve. Even if legislatures were clear about what “tends to” or “likelihood” means, for example, the military courts could still have created the “fanciful, speculative or remote possibility” standard in spite of the MCM’s “natural and probable consequences” instruction. Inasmuch as this difficulty highlights a risk in using the crime of aggravated assault to punish transmission of HIV, perhaps the traditional criminal law is not the best tool for this purpose. While this undoubtedly constitutes a public health concern – the spread of HIV and AIDS, regardless of current treatments that may make the diseases management, is something the state has a compelling interest in stopping – the aggravated assault approach has proven over-inclusive, reaching HIV-positive individuals with low viral loads whose only crime is being afflicted with the same condition as people like Nushawn Williams and Philippe Padieu, men who maliciously planned to infect as many


211 Id. at 88.


213 See supra note 12.
women as possible with HIV. At a minimum, then, jurisdictions that continue to use the traditional criminal law in this context should recognize the potential logical fallacies and due process errors and guard against them. Still, three troubling wider implications remain.

First, these jurisdictions assume the criminal law is an effective deterrent of behavior that risks spreading HIV, but that is a dubious assumption. Unlike battery or violent crimes, consensual sex actually serves a positive social purpose, creating interpersonal connections for pleasure, intimacy and procreation. As a result, many scholars have argued that criminal sanctions are ill-conceived because they are bound to encompass too much behavior and, in any event, ineffective in proscribing and limiting bad sexual behavior. As one Canadian court noted in comparison, the crime of knowingly transmitting a venereal disease was repealed in 1985, but there had not been a prosecution under the section since 1922. Similarly, before the United States Supreme Court overturned state anti-sodomy laws as violating due process, studies showed that for every twenty sodomy convictions, six million acts went undetected. If the purpose of using the aggravated assault statute is to stop the spread of HIV, the problem of detection is fatal to its success. In 1986, the Surgeon General’s Report on AIDS estimated that over 1.5 million people showing no HIV or AIDS-related symptoms may be infected with HIV and capable of infecting others; in 2008, Professor Kenneth Mayer found that more than 20 percent of Americans with HIV do not know they are infected. Assault provisions could not capture these individuals who may be having unprotected sex with various partners because there could be no finding of the requisite intent. A public health approach, like the one taken by various governments to counteract the spread of syphilis, may be a more effective response to the problem.

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214 See supra note 11.


218 Sullivan & Field, supra note 14, at 176 & n. 103.


221 Stephen Kenney, Criminalizing HIV Transmission: Lessons from History and a Model for the Future, 8 J. CONTEMP. HEALTH L. & POL’Y 245 (1992). Professor Kenney concluded that non-coercive responses by governments, including voluntary HIV testing, education and counseling may be the most beneficial approach. “A review of the public health response to syphilis indicates that the coercive elements were unsuccessful in comparison with noncoercive programs. Several of the noncoercive programs initiated in the syphilis era have achieved some early success in the fight to control HIV infection. If these programs are to continue to be successful, their objectives must not be thwarted by the use of criminal statutes that perpetuate the public’s fears that HIV can be transmitted by casual contact or make knowledge of HIV infection an element of the offense. Statutes that
Criminalization may be a more effective deterrent than imposing tort liability, though. Victims of sexual partners who did not disclose their HIV-positive status have sought and obtained money damages for pain and suffering after exposure to the virus. Those damages have ranged from $25,000\textsuperscript{222} to $12.5 million.\textsuperscript{223} But, it is unlikely that monetary damages for intentional infliction of emotional distress would stop the spread of HIV, and to conclude otherwise from a smattering of HIV-related tort liability cases ignores the reality of HIV transmission.\textsuperscript{224} Those groups most at risk for HIV and most likely to transmit the disease – gay men, teenagers, sex workers, intravenous drug users and low-income minorities (the fastest growing group) – are unlikely to change their behavior based on the potential imposition of tort liability. Nor is it clear that tort liability would alter the behavior of relatively low risk populations – upper middle class Caucasian couples, for example – who could still transmit the disease, especially when unsafe sex practices are commonly accompanied by drug or alcohol use that compromises an individual’s ability to think rationally or think ahead to future consequences.

Second, while adjudicating HIV-related aggravated assault cases, in general, and the risks of transmission and gravity of harm elements, in particular, courts must be willing to account for advances in medical knowledge and treatment regimes.\textsuperscript{225} It is beyond doubt that scientific knowledge of HIV/AIDS, its pathogenesis, its progression and its prognosis, is strikingly different today than when the first aggravated assault cases shocked state legislatures in the late 1980s. We now know that any number of factors determine risks of transmission of HIV, including viral load, other injuries or abrasions, sexual positions, and the stage of the HIV-positive partner’s disease. New treatments can also reduce an HIV-positive individual’s viral load, thus reducing his risk of transmitting the virus to another as compared to a non-treated individual.\textsuperscript{226} We also know that HIV will not necessarily develop into AIDS, a progression that criminalize virtually any act by persons who know of their HIV infection discouragement participation in HIV testing and treatment programs.

“AIDS-specific statutes that impose liability only for behavior medically proven to transmit HIV and incorporate a defense of informed consent are the preferred means of criminalizing the intentional transmission of HIV. However, even the most narrowly drafted HIV criminal statute may prove to be counterproductive in the fight against HIV infection. A statute that requires defendants to know of their HIV infection at the time of the criminal act will discourage persons from determining their HIV status and entering education and treatment programs. The social and economic cost of this strategy outweighs any benefit likely to result from prosecuting the few individuals who use the intentional transmission of HIV as a means of causing serious injury or death to another person.” \textit{Id.} at 272-73.


\textsuperscript{224} And is an example of the Fallacy of hasty generalization. \textit{See supra} note 95.

\textsuperscript{225} \textit{See generally} McArthur, \textit{supra} note 10, at 725-31 (discussing the changing medical picture of HIV and AIDS and its implications for questions of culpability).

depends on the strength of the immune system, the HIV stage, the viral load and any anti-retroviral treatment. And this only scratches the surface. Legal standards crafted at the height of public hysteria or simply before HIV and AIDS became more manageable illnesses force modern judges into antiquated judgments when it comes to risk of transmission and severity of harm. To guard against that eventuality, the best medical knowledge should be used to update the criminal law’s approach.

Third, the implications of a criminal conviction do not end with jail. The resulting stigmatization may be the most troubling. By charging HIV-positive individuals with a crime like aggravated assault, prosecutors associate HIV with a “weapon” or “instrument of harm”. HIV-positive individuals already suffer indignant stigmatization without the criminal law’s attempt to fit a novel incident with the language of a traditional crime. To suggest that HIV is a weapon is dangerous as a matter of justice, but also as a means of perpetuating a culture that discriminates against HIV-positive individuals in the workplace, in healthcare, and in the provision of medical services, to name just a few. If aggravated assault charges do not work effectively as deterrents to risky sexual behavior, it is not worth the added stigma that it thrusts upon individuals whose conduct could hardly be considered risky in the first place.

At best, the problem is one of over-inclusiveness – using general rules of thumb to describe too many peculiar and unique cases. At worst, it is one of stereotyping, which is itself a product of ignorance. The average voter, prosecutor or judge may think that sex transmits HIV, that HIV leads to AIDS and that HIV kills, but there is just as much truth to those statements as other rules of thumb. Birds do fly, but not all of them; sexual intercourse can transmit HIV, but not when an undetectable viral load is combined with anti-retroviral treatment and condom use. Rules of thumb may be useful when deciding what to say during a job interview or how to keep your cholesterol low, but they often fail as rationales for legal rules.

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228 See generally MURPHY et al., supra note 31.


230 See, e.g., Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674 (8th Cir. 1996) (§ 501(c) of the Americans with Disabilities Act allows a healthcare policy obtained through an employer to offer different caps or coverage limits for a specific condition, like HIV/AIDS).

231 See, e.g., Bragdon v. Abbott, 524 U.S. 624 (1998) (dentist refused to fill cavity of an HIV-positive patient unless it was done in a hospital at the expense of the patient).