THE CONTINUED MARGINALIZATION OF PEOPLE LIVING WITH HIV/AIDS IN U.S. IMMIGRATION LAW

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INTRODUCTION

All of the immigrants[1] I represent are HIV-positive, but some of the greatest dangers they face are ignorance and prejudice. More than half of the clients at the HIV Law Project, where I work, are foreign-born, and many of them also identify as gay or trans-

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[1] I use the term *immigrant* in this article interchangeably with *noncitizen* and *foreign-born* to describe individuals who were not born in the United States but wish to remain in the United States.

gender. Many of them come from countries where HIV is highly prevalent and HIV testing, education, and medication are minimal. We often see immigrants who were diagnosed in the late stages of infection or while receiving prenatal care. Many have experienced conditions that result in a greater risk of HIV infection, such as domestic violence, homophobia, gender inequality, racism, and economic displacement.[2] Although immigrants living with HIV are no longer excluded from the United States[3] solely on account of their HIV status, they continue to face barriers to immigration relief related to misconceptions surrounding HIV treatment and transmission that continue to pervade immigration law and adjudications.

The community I serve is extremely diverse—I represent lesbian, gay, bisexual, and transgender (LGBT) immigrants, women and men who have survived domestic abuse, crime victims, heterosexual families, and people with a history of addiction. Many clients fit into more than one of these categories. My clients come from the Caribbean, Central and South America, Africa, Asia, and Europe. My practice consists of asylum applications,[4] VAWA[5] and U visa[6] petitions, family-based green card applications,[7] naturaliza-

2 *See generally* INT'L COUNCIL OF AIDS SERV. ORG., GENDER, SEXUALITY, RIGHTS AND HIV (2007), *available at* http://www.hivlawandpolicy.org/resources/view/241 (discussing factors affecting HIV risk, transmission, and treatment, including gender inequity and homophobia; poverty; inaccurate or ineffective HIV prevention efforts and discriminatory laws; and stigma and lack of access to treatment).

3 *See generally* JAIME GUTIERREZ, GAY MEN'S HEALTH CRISIS, UNDERMINING PUBLIC HEALTH AND HUMAN RIGHTS: THE UNITED STATES HIV TRAVEL AND IMMIGRATION BAN (rev. Jan. 2010) (2009), *available at* http://www.gmhc.org/files/editor/file/GMHC_undermining_phhr_2010(1).pdf.

4 Immigrants present in the United States may be granted asylum if they prove that they suffered persecution or have a well-founded fear of future persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C.A. §§ 1101(a)(42), 1158 (West, WestlawNext through P.L. 113-57 (excluding P.L. 113-66 and 113-73)); *see also* U.S. Citizen and Immigr. Serv. (USCIS), I-589 Application for Asylum and Withholding of Removal, *available at* http://www.uscis.gov/files/form/i-589.pdf.

5 Under the Violence Against Women Act (VAWA), a battered spouse, child, or parent may self-petition to apply for immigration status without the abuser's knowledge. 8 U.S.C.A. § 1154(a)(1)(A); *see also* USCIS, I-360 Petition for Amerasian, Widow(er), or Special Immigrant, *available at* http://www.uscis.gov/files/form/i-360.pdf.

6 A U visa gives victims of certain crimes temporary legal status and work eligibility in the United States. The crime must have occurred in the United States or in a U.S. territory and the victim must cooperate with law enforcement to assist with the investigation and/or prosecution of the individual(s) that committed the crime. 8 U.S.C.A. § 1101(a)(15)(U); *see also* USCIS, I-918 Petition for U Nonimmigrant Status, *available at* http://www.uscis.gov/files/form/i-918.pdf.

7 U.S. citizens and lawful permanent residents may petition for immediate rela-

tion,[8] and relief in removal proceedings.[9] Some of my clients were placed into removal proceedings by the asylum office because they were unable to demonstrate their eligibility for an exception to the one-year filing deadline[10] or because of doubts as to their credibility. Others have been lawful permanent residents[11] of the United States for many years and are charged with removal because of criminal convictions that took place long in the past. In the past, many immigrants were placed into removal proceedings following the denial of their family-based applications for permanent residence. The enforcement priorities of the Department of Homeland Security (DHS)[12] are fluid and reflect both the shifting political landscape and pressures on the administrative adjudication system.[13]

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tives to immigrate to the U.S. *See* 8 U.S.C.A. §§ 1151(a)(1), 1153(a); *see also* USCIS, I-130 Petition for Alien Relative, *available at* http://www.uscis.gov/files/form/i-130.pdf.

8 A non-citizen may become a naturalized U.S. citizen after being a lawful permanent resident for a certain length of time, serving in the military, or by being the child of a U.S. citizen. *See* 8 U.S.C.A. §§ 1421–58; *see also* USCIS, N-400 Application for Naturalization, *available at* http://www.uscis.gov/files/form/n-400.pdf.

9 Removal proceedings, also referred to as deportation proceedings, are administrative proceedings that determine whether an immigrant may be removed from the U.S. An immigrant who is determined removable may request discretionary relief such as cancellation of removal, asylum, adjustment of immigration status, or a stay of removal. *See Immigration Benefits in EOIR Removal Proceedings*, USCIS, http://www.uscis.gov/portal/site/uscis (last visited Oct. 21, 2013) (search for "Immigration Benefits in EOIR Removal Proceedings" in upper search box; then follow "Immigration Benefits in EOIR Removal Proceedings" link).

10 Generally, an applicant must apply for asylum within one year of entry to the U.S. or he or she is ineligible. There are limited exceptions to the one-year filing deadline, including changed circumstances, which create a well-founded fear of persecution that were not present when the applicant entered the U.S. *See* 8 U.S.C.A. § 1158(a)(2). *See also* Victoria Neilson & Aaron Morris, *The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal*, 8 N.Y. CITY L. REV. 233 (2005).

11 "Lawful permanent resident" refers to the status of immigrants who are residing permanently in the U.S. 8 U.S.C.A. § 1101(a)(20).

12 DHS is the federal government agency that administers immigration laws, among other duties. Immigration and Customs Enforcement (ICE) is the principal investigative arm of DHS. *See Mission*, DEP'T OF HOMELAND SEC., http://www.dhs.gov/mission (last visited June 28, 2013); *Overview*, IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/about/overview/ (last visited June 28, 2013).

13 *See* Memorandum from John Morton, Director, USCIS, to All ICE Employees (Mar. 2, 2011), *available at* http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf (prioritizing categories of immigrants for removal proceedings, including people convicted of crimes and participants in gang activities); Memorandum from John Morton, Director, USCIS, to all Field Office Directors, Special Agents in Charge, and All Chief Counsel (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf (identifying low-priority categories of immigrants for removal proceedings, such as veterans and longtime U.S. residents); Memorandum from John Morton, Director, USCIS, to All Employees

In this article, I will attempt to describe how the continuing misinformation and negative associations with HIV affect adjudications, particularly for the most vulnerable members of that population. First, I will provide an overview of the intersection of HIV with marginalized populations under the immigration law. Second, I will review the meaning of "stigma" as applied to HIV, and describe how applicants for asylum must overcome the negative associations of people living with HIV that were embedded in the immigration statute for many years. Third, I will address the continuing association of HIV with the public charge ground of inadmissibility for immigrants seeking admission to the United States from abroad. Finally, I will describe a disturbing new trend in which the collateral consequences of HIV criminalization statutes results in the termination or denial of humanitarian relief for some of the most vulnerable immigrants living with HIV.

I. The Intersection of HIV with Marginalized Populations Under the Immigration Law

"My father found out that I was HIV-positive when I took the medical exam for my green card application. That's when he also found out I was gay. There was no waiver then, and we stopped talking. All my brothers and sisters have their green cards. Is it really too late for me? Can I marry my boyfriend? What happens if I get arrested? I got pulled over recently, and I didn't have a license."

—Gay man living with HIV from Jamaica, who has lived in the United States for more than twenty-five years

The intersection of HIV with other marginalized identities is a central feature of any HIV advocate's practice, particularly so in the immigration context. The immigration law has been referred to as a "magic mirror, reflecting the fears and concerns of past Congresses,"[14] and a window "into the nation's collective con-

(June 15, 2011), *available at* http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf (directing ICE not to remove qualifying immigrants who arrived in the U.S. before the age of sixteen). *See also* Julia Preston, *Immigration Officials Arrest More Than 3,100*, N.Y. Times, Apr. 2, 2011, at A11; Andrew Rosenthall, *ICE's New Record*, N.Y. Times' Taking Note Blog (Feb. 15, 2013, 1:32 PM), http://takingnote.blogs.nytimes.com/2013/02/15/ices-new-record/.

14 Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" Into the Heart of Darkness*, 73 Ind. L.J. 1111, 1159 (1998) (quoting Lennon v. Immigr. and Naturaliz. Serv., 527 F.2d 187, 189 (1975)).

sciousness about its perceived national identity."[15] The immigration statute has historically targeted disfavored populations for exclusions from immigration benefits—most famously in the Chinese Exclusion laws of the 19th century.[16] My clients tend to fall into categories explicitly identified at one time or another as subject to exclusion from the United States. Until 1990,[17] "homosexuals" were excluded from admission to the United States.[18] The continued exclusion of people "likely at any time to become a public charge" has a disproportionate impact on immigrants who are poor or working class, and acts as a barrier to full economic and political integration by noncitizens too poor to become legal immigrants.[19]

Many of my clients are also affected by the harsh penalties for immigrants with convictions in the immigration statute. The Antiterrorism and Effective Death Penalty Act[20] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,[21]

15 Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1, 2 (2009).

16 *See id.* at 1119–28; *see also* Chae Chan Ping v. United States, 130 U.S. 581, 609–11 (1889) (upholding the exclusion of Chinese citizens from the U.S. in the interests of protecting national sovereignty).

17 In the seminal case of *Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990), the Board of Immigration Appeals established that homosexual individuals are members of a particular social group for purposes of asylum and withholding of removal.

18 Four years later, Attorney General Janet Reno designated the *Toboso-Alfonso* decision as binding "precedent in all proceedings involving the same issue or issues." 1895 Op. Att'y Gen. 94 (1994). *See also Reno Designates Case as Precedent*, 71 INTERPRETER RELEASES 859 (July 1, 1994).

19 The immigration law defines a "public charge" as someone "likely to become primarily dependent on the government for subsistence" either through the receipt of cash assistance or institutionalization for long-term medical care at government expense. Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689 (May 26, 1999), *available at* http://www.gpo.gov/fdsys/pkg/FR-1999-05-26/pdf/99-13202.pdf. The "public charge" inquiry relates to the ground of inadmissibility found at section 212(a)(4) of the Immigration and Nationality Act. This section dictates that an individual seeking admission to the U.S. or applying for permanent residence (a green card) is inadmissible if the individual "at the time of application for admission or adjustment of status . . . is likely at any time to become a public charge." *Id.* There is no waiver of inadmissibility for immigrants denied on "public charge" grounds. Refugees, asylees, VAWA beneficiaries, and certain applicants for relief from removal are exempt from the public charge ground of inadmissibility. *Id. See also* Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509 (1995); Lisa Sun-Hee Park, *Perpetuation of Poverty Through "Public Charge,"* 78 DENV. U. L. REV. 1161 (2001).

20 Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8 U.S.C.).

21 Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in various sections of 8 and 18 U.S.C.).

significantly expanded the criminal grounds for exclusion and removal of foreign nationals, and severely restricted or eliminated discretionary forms of relief for many immigrants with convictions. In particular, these laws broadened the definition of "aggravated felony" as a ground of removal in the immigration statute,[22] meaning that immigrants convicted of misdemeanor offenses for which no or very little jail time was served suddenly became deportable. Moreover, almost all controlled substance violations cause an individual to become deportable and ineligible for most forms of relief from removal.[23] Because the largest immigrant populations in New York City are black and/or Latino,[24] they are disproportionately affected by the collateral consequences of contacts with law enforcement.[25] For immigrants living with HIV, minor convictions can have deadly consequences if they are forced to return to countries of origin with substandard or discriminatory public health systems.[26]

Between 1988 and 2010, people living with HIV were excluded from admission to the United States, a law that initially targeted

22 *See* 8 U.S.C.A. § 1101(a)(43) (West, WestlawNext through P.L. 113-74 (excluding P.L. 113-66 and 113-73)). For a comprehensive discussion of the difficulties faced by immigrants with criminal convictions, see Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669 (2011).

23 A waiver is available, under limited circumstances for persons convicted of only one offense of simple possession of thirty grams or less of marijuana. 8 U.S.C.A. § 1182(h).

24 Based on 2000 U.S. Census data, eight of the ten largest foreign-born populations in New York City originated from the Dominican Republic, Jamaica, Trinidad & Tobago, Haiti, Guyana, Ecuador, Mexico, and Colombia (not in order). *See* N.Y.C. DEP'T OF CITY PLANNING, THE NEWEST NEW YORKERS, 2000 (2004), *available at* http://www.nyc.gov/html/dcp/pdf/census/newest_new_yorkers_2000.pdf.

25 *See, e.g.*, CTR. FOR CONSTITUTIONAL RIGHTS, RACIAL DISPARITY IN NYPD STOPS-AND-FRISKS 4 (2009) (finding that "[t]he NYPD continues to disproportionately stop-and-frisk Black and Latino" people), *available at* http://ccrjustice.org/files/Report-CCR-NYPD-Stop-and-Frisk.pdf; Floyd v. City of New York, No. 08 Civ. 1034 (SAS), 2013 WL 4046209, at *7 (S.D.N.Y. Aug. 8, 2013) (finding that the City of New York "adopted a policy of indirect racial profiling by targeting racially defined groups").

26 *See* HUMAN RIGHTS WATCH, DISCRIMINATION, DENIAL, AND DEPORTATION: HUMAN RIGHTS ABUSES AFFECTING MIGRANTS LIVING WITH HIV 1, 16–19 (2009), *available at* http://www.hrw.org/sites/default/files/reports/health0609webwcover_0.pdf (discussing the human rights challenges that HIV-positive migrants face upon deportation, and the lack of continuity of treatment upon return to their country of origin); KATHERINE WILTENBURG TRODRYS, HUMAN RIGHTS WATCH, RETURNED TO RISK: DEPORTATION OF HIV-POSITIVE MIGRANTS 1–3, 13–21 (2009), *available at* http://www.hrw.org/sites/default/files/reports/health0909web.pdf (finding that post-deportation continuity of treatment mechanisms for HIV-positive deportees are often nonexistent or grossly inadequate to protect deportees' health, and may lead to illness, premature death, or the development of drug resistance).

the LGBT population but also came to bar many immigrants of color from the developing world, regardless of sexual orientation. In 1987, Congress added HIV infection to the list of excludable diseases, which at the time included conditions such as active tuberculosis, infectious syphilis, gonorrhea, and infectious leprosy.[27] No waiver of inadmissibility was available for people living with HIV until 1990.[28] The waiver required applicants seeking permanent residence to show that they were receiving adequate medical treatment, had private health insurance, had been counseled about the manner of transmission of the virus, and had a qualifying relative (typically a spouse) who would experience hardship if they were not admitted to the United States.[29] The terms of the waiver itself underscored the concern by Congress that people living with HIV would be undisciplined about their care and an unacceptable drain on scarce healthcare resources reserved for U.S. citizens. In 2009, Congress passed legislation to eliminate the statutory HIV ban,[30] which went into effect on January 4, 2010.[31]

Despite the existence of the waiver, during the period of the HIV ban, the Defense of Marriage Act (DOMA), which prohibited recognition of same-sex marriages under the immigration law, kept many gay immigrants living with HIV from applying for permanent resident status or other immigration relief requiring a qualifying relative such as a spouse. I see many potential clients that fall into this category. For them, the recent invalidation of DOMA and expansion of same-sex marriage rights throughout the United States

27 *See* 133 Cong. Rec. S6943-01 (1987) (Amendment to Supplemental Appropriations Act introduced by Senator Helms, providing that "Section 212(a)(6) of the Immigration and Nationality Act is amended by inserting . . . the following: 'or who test positively for infection with the human immunodeficiency virus'"); Supplemental Appropriations Act of 1987, Pub. L. No. 100-71, § 518, 101 Stat. 391, 475. *See also* 5 Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, Immigration Law and Procedure § 63.02[3] (rev. ed. 2011).

28 *See* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

29 Asylees were exempted from this requirement. This was fortunate for gay asylees in particular, who, due to the recently invalidated Defense of Marriage Act (DOMA), (*see generally* United States v. Windsor, 133 S. Ct. 2675 (2013)), could usually not cite a qualifying relative such as a U.S. citizen or permanent resident spouse as an anchor for the waiver. Applicants for admission as temporary visitors also had to show that they had the financial resources to pay for their own medical care while they were in the U.S., and were approved only for very short visits, while HIV-negative travelers were often granted permission to remain in the U.S. for up to six months.

30 GUTIERREZ, *supra* note 3, at 3.

31 However, an HIV-positive immigrant applying for permanent residence from abroad must still demonstrate that he or she will not rely on public funds for long-term care of their illness. *See* 9 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 40.11 N.9.1-2 (June 5, 2012), *available at* http://www.state.gov/documents/organization/86936.pdf.

may open new avenues for immigration relief. For those who have lived in the shadows for years or even decades, however, the structural and institutional inequalities of race, class, and sexual orientation may have taken a toll. If they have convictions, entered without inspection, or are unable to demonstrate that they or their spouses have the financial means to avoid becoming a "public charge," the new rights created by the decision in *United States v. Windsor* may not be easily attainable.[32]

Since the lifting of the HIV ban, the intersection of HIV with other populations affected by present or past exclusions in the immigration statute means that immigrants living with HIV are often required to navigate barriers to immigration relief that have nothing to do with HIV. However, there remain aspects of the immigration law that treat people living with HIV as a disfavored population. Misconceptions about treatment options and effectiveness, the ease of transmission, and concern about the use of public resources by people living with HIV continue to erect barriers that do not exist for immigrants that are not HIV-positive.

II. The Challenge of Representing Asylum Applicants Living With HIV

"Do they really think I'm only here for medications?"

—Asylum applicant whose HIV status was unintentionally disclosed to people in her community, and consequently suffered threats and harm to her relative

Adjudicators have recognized people living with HIV as a "particular social group" eligible for asylum since 1995,[33] even as the immigration statute continued to exclude people living with HIV from admission to the United States. In 1996, the legacy INS[34] is-

32 *See cf.* Janet Calvo, U.S. v. Windsor*'s Impact on Immigration Law*, CUNY L. Rev. Fn. Forum (Sept. 28, 2013), http://www.cunylawreview.org/?p=812. *But see* Zeleniak, 26 I. & N. Dec. 158 (B.I.A. July 17, 2013) (first immigration adjudication ruling that DOMA "is no longer an impediment to the recognition of lawful same-sex marriages and spouses" under the INA).

33 The Board of Immigration Appeals has defined a social group as membership in a group of persons, all of whom share a common immutable characteristic such as sex or kinship. *See* Matter of Acosta, 19 I. & N. Dec. 211 (B.I.A. 1985), 1985 WL 56042; Matter of [name not provided], File No. A71-498-940 (IJ Oct. 31, 1995) (New York, N.Y.), *reported in* 73 Interpreter Releases 901 (July 8, 1996) (granting asylum to a man from Togo on the basis of his membership in the particular social group of individuals infected with HIV).

34 The Immigration and Naturalization Service (INS), an agency of the Department of Justice, was formally dissolved as of March 1, 2003. Its functions and authority

sued a memorandum authorizing adjudicators to recognize HIV-based social groups for the purpose of considering asylum claims by people fleeing harm on account of their HIV status.[35] Asylum adjudicators have recognized that a recent HIV diagnosis may also be an aggravating circumstance justifying an exception to the one-year filing deadline for asylum.[36] Although these decisions recognize that HIV-based persecution exists, there has been no precedential decision opining as to what factors distinguish a successful asylum claim based on persecution motivated by animus towards people living with HIV.

For an asylum claim based in whole or in part on HIV status to be successful, we find that it is important to explain to adjudicators how animus against people living with HIV is expressed. To do so, we have to unpack the meaning of a word commonly used to describe attitudes towards people living with HIV: "stigma." The United Nations (UN) defines stigma as a "dynamic process of devaluation that significantly discredits an individual in the eyes of others."[37] Fear of death and disability contribute to the expression of stigma against marginalized groups. According to the Joint UN Programme on HIV/AIDS,

> Since the beginning of the epidemic, the powerful metaphors associating HIV with death, guilt and punishment, crime, horror, and "otherness" have compounded and legitimized stigmatization. . . . Images of people living with HIV in the print and visual media may reinforce blame by using language that sug-

were allocated primarily to the new DHS. *See* Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135; *see also* Stanley Mailman & Stephen Yale-Loehr, *Immigration in a Homeland Security Regime*, N.Y.L.J., Dec. 23, 2002, at 3, *reprinted in* 8 BENDER'S IMMIGR. BULL. 1 (Jan. 1, 2003) (describing the new DHS as a "behemoth" made up of more than twenty federal agencies).

35 David A. Martin, General Counsel, INS, Memorandum to All Regional Counsel, *Legal Opinion: Seropositivity for HIV and Relief from Deportation* (Feb. 16, 1996), *reproduced in* 73 INTERPRETER RELEASES 909 (July 8, 1996).

36 *See* USCIS REFUGEE, ASYLUM, AND INTERNATIONAL OPERATIONS DIRECTORATE (RAIO), GUIDANCE FOR ADJUDICATING LGBTI REFUGEE AND ASYLUM CLAIMS, OFFICER TRAINING MODULE 48 (2011), *available at* http://www.immigrationequality.org/wp-content/uploads/2012/01/Microsoft-Word-RAIO-Trng_LGBTI_LP_Final-2011-12-27-_2_.pdf (noting that "an individual may qualify for a one-year exception based upon serious illness, for example being diagnosed as HIV-positive").

37 UNAIDS, *HIV-Related Stigma, Discrimination and Human Rights Violations: Case Studies of Successful Programmes* 7, U.N. DOC. UNAIDS/05.05E (Apr. 2005) (internal quotation omitted), *available at* http://data.unaids.org/publications/irc-pub06/jc999-humrightsviol_en.pdf; *see also* RICHARD PARKER & PETER AGGLETON, POPULATION COUNCIL, HIV/AIDS-RELATED STIGMA AND DISCRIMINATION: A CONCEPTUAL FRAMEWORK AND AN AGENDA FOR ACTION (2002), *available at* http://pdf.usaid.gov/pdf_docs/Pnacq832.pdf (proposing a framework for understanding stigmatization with respect to HIV/AIDS).

> gests that HIV is a "woman's disease," a "junkie's disease," an "African disease," or a "gay plague." Religious ideas of sin can also help to sustain and reinforce a perception that HIV infection is a punishment for deviant behaviour.[38]

Stigma against people living with HIV/AIDS manifests as discrimination in both public and private spheres. Examples of stigma in family and community settings include

> ostracization, such as the practice of forcing women to return to their kin upon being diagnosed HIV-positive, following the first signs of illness, or after their partners have died of AIDS; shunning and avoiding every day contact; verbal harassment; physical violence; verbal discrediting and blaming; gossip; and denial of traditional funeral rites.[39]

In some countries, discrimination in institutional settings such as workplaces, healthcare services, prisons, and educational institutions may be sanctioned by the government. Discrimination on the basis of HIV/AIDS violates existing international human rights standards.[40] The impact of stigma and discrimination on the health of people with compromised immune systems can be severe. Unequal treatment, dismissal from employment, and/or the denial of necessary care may lead to the rapid worsening of the health of individuals living with HIV/AIDS and increase the vulnerability of people living with HIV to harm by family and community.

Despite the damage that can result from HIV-based stigma, we frequently encounter skepticism from adjudicators about the true intentions of our clients in seeking asylum, even when their claims are based on a different characteristic, such as sexual orientation. This attitude is a legacy of the HIV ban and its association of HIV with untenable public health costs. Recently, my office represented a well-educated, middle-class woman who claimed that while she was visiting the United States, her HIV status had been inadvertently revealed to a family friend who subsequently informed mu-

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38 UNAIDS, *supra* note 37, at 7 (quotations and punctuation altered).

39 *Id.* at 9.

40 *Id.* at 11. *See also* UNAIDS, *HIV and AIDS-Related Stigmatization, Discrimination and Denial: Forms, Contexts and Determinants* 7, U.N. DOC. UNAIDS/00.16E (June 2000), *available at* http://data.unaids.org/Publications/IRC-pub01/jc316-uganda-india_en.pdf ("Resolution 49/1999 of the UN Commission on Human Rights reaffirms that . . . [d]iscrimination on the basis of HIV or AIDS status, actual or presumed, is prohibited by existing international human rights standards, and that the term 'or other status' in non-discrimination provisions in international human rights texts should be interpreted to cover health status, including HIV/AIDS." (certain internal quotations omitted)).

tual friends and acquaintances in her country of origin.[41] The friend, with whom she was staying, evicted her from the apartment following the disclosure. She was then forced to stay in a homeless shelter. During this time, she learned that people in her country were harassing her relatives and threatening her with harm if she returned. Our client made her way to New York, where she obtained housing and resumed her medical treatment. She had been receiving antiretroviral treatment in her country of origin, and had letters from her doctor attesting to her treatment plan in case she needed medical care during her stay in the United States.

Before we filed her application for asylum, our client learned that a relative had been severely beaten during an argument about her HIV status with another member of her community. We obtained evidence of the attack and submitted it along with other materials in support of her application. At the asylum interview, the adjudicator repeatedly pressed our client as to her intentions in traveling to the United States. Despite our client's evidence of medical treatment in her home country and her obvious capacity for gainful employment, the adjudicator demanded additional evidence of her prior medical treatment. Our client was ultimately granted asylum. The experience revealed, however, that even a sophisticated applicant who is fluent in English and submits corroborating evidence of her claim may face a searching inquiry into her credibility where the claim is based on a fear of persecution motivated by animus against people living with HIV as opposed to a characteristic that does not require ongoing medical treatment in the United States.

In general, asylum claims based on HIV succeed best when they contain some traditional indicia of persecution, such as intentional physical harm explicitly related to the applicant's HIV status.[42] In claims where the applicant can credibly demonstrate that he or she was subject to past persecution in their country of origin, there is a presumption that they have a well-founded fear of perse-

41 To preserve our client's privacy, identifying details such as her country of origin are omitted.

42 I addressed the status of HIV-based asylum claims in a chapter co-authored with Professor Stephen Yale-Loehr of Cornell Law School last year in the American Bar Association's *HIV & AIDS Benchbook*. In it, I surveyed the current state of the adjudications as reflected in federal circuit court of appeals decisions, as well as those issued by immigration judges granting asylum based primarily or in part on the basis of the applicant's membership in the particular social group of people living with HIV/AIDS. *See* Cristina Velez & Stephen Yale-Loehr, *Administrative Proceedings: HIV/AIDS Issues in Immigration Proceedings*, *in* HIV & AIDS BENCHBOOK 198 (Joshua Bachrach & Cynthia B. Knox eds., 2d ed. 2012).

cution upon their return.[43] Many asylum claims made by HIV-positive immigrants, however, do not assert past persecution. This is because so many immigrants are not diagnosed with HIV until they are already in the United States and show signs that the virus has progressed to AIDS. Some immigrants may be infected in the United States; others may have been infected in their home countries but did not consider themselves at risk for contracting HIV or would not get tested because of associations between HIV and disfavored populations, such as gays, sex workers, and injection-drug users, as well as lack of confidentiality protections. This means that many claims involving HIV are based on the "pattern and practice" of persecution against people living with HIV/AIDS.[44] Because the fear of mistreatment is prospective, it is necessary to copiously document the country conditions affecting people in the applicant's social group.[45]

The decision to grant asylum is discretionary, and some adjudicators consider HIV-positive status to be a sympathetic factor in favor of granting asylum, so long as other criteria are met. This is helpful to asylum applicants whose claims are based on other recognized grounds. Treating HIV primarily as a sympathetic factor,

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43 *See* 8 C.F.R. § 208.13(b)(1) (2013).

44 To establish a "pattern and practice" of persecution, the applicant for asylum must show there is systemic, pervasive, or organized persecution against a particular group, sufficient to establish a fear of future persecution. *See* NAT'L IMMIGRANT JUSTICE CTR., WINNING ASYLUM, WITHHOLDING AND CAT CASES BASED ON SEXUAL ORIENTATION, TRANSGENDER IDENTITY AND/OR HIV-POSITIVE STATUS 25 (2006), *available at* http://www.immigrantjustice.org/sites/immigrantjustice.org/files/NAPSM%20Manual%20-%20June%202006.pdf. *See also* Bridget Tainer-Parkins, *Protection from A Well-Founded Fear: Applying the Disfavored Group Analysis in Asylum Cases*, 65 WASH. & LEE L. REV. 1749 (2008).

45 In my experience, "pattern and practice" claims featuring HIV as basis of persecution fare best when we emphasize the intersectionality of our client's identities, and the resulting higher risk of persecution they face upon return to their countries of origin. For example, many asylum applicants explain that HIV status is so closely entwined with stereotypes of homosexuality in their home countries that seeking medical treatment could make them significantly more vulnerable to adverse treatment from homophobic medical personnel or the public at large, as a result of poor or nonexistent confidentiality protections for people living with HIV. Similarly, claims citing both gender and HIV status as characteristics making applicants more vulnerable to persecution are successful when there is sufficient documentation of country conditions detailing violence against women and the denial of medical treatment for women living with HIV in their home countries. *See* Boer-Sedano v. Gonzales, 418 F.3d 1082, 1091 (9th Cir. 2005) (holding that a gay Mexican man living with AIDS could remain in the U.S. since he would suffer serious harm if forced to relocate back to Mexico, where he could not acquire necessary treatment and would face persecution). For a discussion of intersectionality and immigration, see generally Johnson, *supra* note 15 and Peter Margulies, *Asylum, Intersectionality, and AIDS: Women with HIV as a Persecuted Social Group*, 8 GEO. IMMIGR. L.J. 521 (1994).

however, obscures the very real harm that HIV stigma wreaks on the lives of many immigrants and encourages adjudicators to resort to the perception of HIV-positive immigrants as economic migrants who do not experience persecution on account of their HIV status.

III. HIV AS A BARRIER TO ADMISSION AT U.S. CONSULATES ABROAD

"Please help me—I thought the HIV ban was lifted. Why are they asking my husband about his HIV at the consulate?"

—U.S. citizen wife whose spouse was confronted about his HIV status at his immigrant visa interview, within earshot of other visa applicants

In January 2010, the HIV ban was finally lifted for immigrants and travelers to the United States.[46] Currently, HIV-positive immigrants and travelers are not required to disclose their HIV status to immigration authorities. Nevertheless, all applicants for permanent residence in the United States must submit a medical examination from a physician certified by U.S. Citizenship and Immigration Services (USCIS)[47] to perform such examinations. As part of the examination, the applicant is asked to provide a medical history, including whether they have ever been diagnosed with a sexually transmitted disease. Many HIV-positive applicants who contracted HIV through sexual contact self-report their HIV status in answering this question. This typically does not result in any adverse consequences for applicants for permanent residence who are already in the United States and attend an adjustment of status interview at

46 *See* Christopher Van Buren, *Obama Announces End of HIV Travel Ban,* PBS NEWSHOUR (Oct. 30, 2009, 2:18 PM), http://www.pbs.org/newshour/updates/politics/july-dec09/travel_10-30.html; GUTIERREZ, *supra* note 3.

47 *Cf. supra* note 34. Within the DHS, the former INS functions relating to such immigration benefits and services as the processing of visa petitions and applications for adjustment of status and naturalization were allocated to what is now called U.S. Citizenship and Immigration Services (USCIS). Interior enforcement and detention issues were primarily allocated to ICE. Border inspections are the province of Customs and Border Protection (CBP). *See* 68 Fed. Reg. 9,824 (Feb. 28, 2003) (amending various parts of 8 C.F.R., triggering the transfer of functions, and allocating them within DHS agencies). In discussing current functions throughout, we usually refer to the government, the immigration agency, the agency, the DHS, ICE, CBP, or the USCIS, even though the INS initiated the underlying regulations or other action. Where it seems important to indicate the earlier source of the action as the INS, the text so states. To add more complications, the statutes and regulations often still refer to the Attorney General or Department of Justice instead of the Secretary of Homeland Security or DHS.

their local USCIS field office. For applicants outside the United States, however, disclosure of HIV status may result in additional inquiry for which few are prepared at the time of their visa interview at the local U.S. consulate.

When HIV infection becomes known during the visa application process at a U.S. consulate abroad, the consular officer is instructed to inquire about the applicant's ability to pay for medical treatment under the guise of assuring that the intending immigrant will not become a "public charge." The Department of State, which is responsible for issuing visas to applicants outside of the United States (as opposed to the Department of Homeland Security, which adjudicates immigration applications inside the United States), produces a Foreign Affairs Manual (FAM)[48] containing guidance to Consular Officers stationed at U.S. embassies abroad as to the criteria for granting immigrant and temporary visas to foreign nationals. The FAM imposes an additional burden on intending immigrants who report that they are HIV-positive to show that they are not likely to become a "public charge" once they enter the United States. In other words, they have to prove that they will not become reliant on public assistance in the United States. It is an unfair burden, not shared by intending immigrants with other chronic health disorders, and reflects the persisting stigma and misinformation surrounding HIV that the rescission of the HIV ban sought to ameliorate.

In 2011, USCIS updated its "Public Charge Fact Sheet," which clarified the standard and the benefits to be included in the public charge analysis.[49] The fact sheet specifies that immigration officers must consider the totality of the circumstances and that "[n]o single factor, other than the lack of an affidavit of support, if required, will determine whether an individual is a public charge."[50] To determine whether someone is likely to become a public charge, adjudicators are instructed to look at their age, health, family status, assets, resources, financial status, education, and skills. Perhaps most importantly for immigrants living with HIV/AIDS, Medicaid and other supplemental health insurance benefits not intended for long-term institutional care are excluded from public charge consideration. Specifically, the USCIS states that

48 *See generally Foreign Affairs Manual*, U.S. DEP'T OF STATE, http://www.state.gov/m/a/dir/regs/fam/ (last visited Oct. 29, 2013).

49 *Public Charge Fact-Sheet*, USCIS (Apr. 29, 2011), http://www.uscis.gov/ (search for "public charge fact sheet" in the "What are you looking for?" box) (last visited Oct. 29, 2013).

50 *Id.*

"public assistance for immunizations and for testing and treatment of symptoms of communicable diseases, use of health clinics, short-term rehabilitation services, prenatal care and emergency medical services" are not to be included in the public charge analysis.[51]

In contrast with the Fact Sheet used by USCIS to adjudicate applications for permanent residence in the United States, the FAM explicitly asks consular officers to consider an applicant's HIV in the public-charge analysis, and suggests that applicants living with HIV/AIDS may not be able to overcome the barrier to admission. The relevant language states:

> Under section 212(a)(4) of the INA, an immigrant visa (IV) applicant must demonstrate that he or she has a means of support in the United States and that he or she, therefore, will not need to seek public financial assistance. *It may be difficult for HIV-positive applicants to meet this requirement of the law because the cost of treating the illness can be very high and because the applicant may not be able to work or obtain medical insurance.* You must be satisfied that the applicant has access to funds sufficient for his or her support. You need to consider the family's income and other assets, including medical insurance coverage for any and all HIV-related expenses, availability of public health services and hospitalization for which no provision for collecting fees from patients are made, and any other relevant factors in making this determination.[52]

This language implies that an HIV-positive visa applicant is at a higher risk of becoming a public charge than persons who are not diagnosed with HIV at the time of entry. Widely recognized scientific findings conclude, however, that early treatment for HIV sharply reduces the need for long-term institutional care and reduces transmission of the virus by up to ninety-six percent.[53] Although inconsistent with scientific evidence, consular officers are still bound by the FAM and will conduct the heightened public charge inquiry if an immigrant visa applicant reveals that they are HIV-positive.

This section of the FAM can cause difficulties for people applying for immigrant visas at consulates abroad. Last year, a woman who sponsored her husband for an immigrant visa from another

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51 *Id.*

52 9 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL (FAM) § 40.11 n.9.1-2 (June 5, 2012), *available at* http://www.state.gov/documents/organization/86936.pdf (emphasis added).

53 Donald G. McNeil, Jr., *Early H.I.V. Therapy for HIV Sharply Curbs Transmission*, N.Y. TIMES (May 12, 2011), http://www.nytimes.com/2011/05/13/health/research/13hiv.html.

country contacted my office. Both of them were HIV-positive, and their relationship had grown through steady communication and visits to one another such that they were committed to spending their lives together. He was receiving HIV treatment in his country, which has a high-quality public health system, and had a low viral load and high CD4 count because of his adherence to anti-retroviral medication. Thus, he was not likely to require long-term hospitalization at government expense, provided that he could continue his treatment in the United States. His wife in the United States had arranged for him to receive treatment at the same HIV clinic as she did.

At his consular visa interview, the applicant—our client's husband—was interviewed at a windowed station in a large waiting area. Imagine a large bank in the United States, with tellers stationed at windows throughout a large room, or a waiting area ringed by windows such as the Department of Motor Vehicles. Many consular offices are quiet. In some consular offices, the acoustics allow for those waiting to hear what is said during interviews. In our client's husband's interview, the officer stated loudly enough for others to hear, that he was HIV-positive and couldn't be approved for the visa because of additional questions related to his possible inadmissibility as a public charge. He was terribly embarrassed by this disclosure of his HIV status. His wife, who had been an advocate for people living with HIV/AIDS for many years, reached out to us to complain about his treatment at the interview.

In our response to the request by the consulate, we emphasized our position that this section of the FAM violated the principles underlying the rescission of the HIV travel ban, and was inconsistent with scientific evidence of the beneficial effect of long term antiretroviral treatment on people living with HIV. In the event that the consular office denied the visa, we were ready to embark on a litigation and advocacy campaign to challenge the imposition of this additional burden on intending immigrants living with HIV/AIDS, and its attendant violation of the confidentiality rights of visa applicants living with HIV/AIDS. The visa was ultimately approved, and the clients are now living together as a married couple in the United States.

It is significant that the clients in this case were able to locate competent counsel to represent them in this visa application. Many immigrant visa applicants proceed without counsel and lack the resources or professional networks to obtain counsel familiar with the arguments necessary to overcome the inquiry mandated by this

section of the FAM. We don't know how many people have been denied the ability to join their families in the United States because of their HIV status, even after the HIV ban was lifted. The use of any HIV-related inadmissibility criteria by the Department of State—that it suggests HIV-positive applicants will be unable to meet—functions as a de facto HIV ban and perpetuates the perception of people living with HIV as a drain on public resources.

IV. The Collateral Immigration Consequences of HIV Criminalization

Of growing concern to HIV advocates are criminal laws that subject people living with HIV to penalties for transmission or potential transmission of HIV.[54] The prosecution of HIV-based crimes is referred to by advocates as "HIV criminalization" as it conflates the alleged failure to disclose HIV status or other actions by individuals living with HIV with criminality. Such offenses have not been explicitly addressed in the immigration statute, but we are starting to see the impact of HIV-based prosecutions in immigration adjudications.

In the past six months, my office has learned of two cases in which immigrants who qualified for humanitarian relief after suffering persecution in their home countries were ordered removed on the grounds that their convictions for sex work made them dangerous to the community at large. Both immigrants experienced difficulty and marginalization in the United States prior to being placed into removal proceedings, and in both cases, the risk of transmission of HIV with the use of prophylactic measures was low or nonexistent. These cases reveal the persistence of outdated attitudes about people living with HIV and HIV transmission and illustrate the collateral immigration consequences of HIV criminalization.

A study by the Center for HIV Law & Policy found 186 cases involving the prosecution and/or arrest of individuals for HIV-ex-

54 The Center for Interdisciplinary Research on AIDS at Yale University noted that laws criminalizing HIV exposure have not kept pace with scientific advances and often reflect antiquated beliefs about the risk of HIV transmission associated with specific activities such as spitting and oral copulation. *See* Zita Lazzarini et al., *Criminalization of HIV Transmission and Exposure: Research and Policy Agenda*, 103 Am. J. Pub. Health 1350, 1350–53 (2013). *See also* Ctr. for HIV Law & Policy, Ending and Defending Against HIV Criminalization: A Manual For Advocates, Vol. 2 (2012), *available at* http://www.aidseducation.org/documents/EndingandDefendingAgainstHIVCriminalization.pdf.

posure related offenses nationwide.[55] Such offenses include the alleged failure to disclose one's HIV status to consensual partners or others to whom disclosure is required under the law, regardless of the precautions taken to avoid transmission or the likelihood of transmission.[56] Many states also authorize enhanced penalties for the violation of certain criminal statutes where the defendant is diagnosed with HIV. In California, sentencing enhancements for prostitution "may be applied regardless of the defendant's viral load, whether condoms or other protection were used, or whether HIV could have been transmitted during the acts in question."[57] In many states, disclosure of one's HIV status is an absolute defense to prosecution, but it is not always easy to prove that disclosure was made in the absence of third party witnesses. In the immigration context, we have recently seen HIV-based convictions be classified as "particularly serious crimes" barring receipt of asylum or withholding of removal.[58]

Under the immigration statute, persons convicted of a "particularly serious crime" are considered to be dangerous to the public.[59] For the bar to apply, DHS, represented by counsel for ICE, must prove by a preponderance of the evidence that an offense is a "particularly serious crime." In determining if an offense is a "par-

55 *Prosecutions for HIV Exposure in the United States 2008–2014 (List)*, CTR. FOR HIV LAW & POLICY, *available at* http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/Chart%20of%20U.S.%20Prosecutions%20for%20HIV%20Exposure.pdf (last visited Mar. 18, 2014).

56 *Id.*

57 CTR. FOR HIV LAW & POLICY, ENDING AND DEFENDING AGAINST HIV CRIMINALIZATION: A MANUAL FOR ADVOCATES, VOL. 1, at 17 (2010), *available at* http://www.abdgn.org/files/vol%201.pdf.

58 "Withholding of removal" is a form of relief available to persons in removal proceedings who are not eligible for asylum if, for example, they failed to comply with the one-year filing deadline for asylum. *See supra* note 9. Persons granted withholding of removal are permitted to remain in the United States indefinitely, to maintain employment, and to receive certain means-tested benefits, but they are not eligible for travel authorization or permanent residence (although they may apply for permanent residence upon marriage to a U.S. citizen, or to some other immigrant visa). Individuals convicted of a "particularly serious crime" are barred from receiving asylum and presumed to be barred from receiving withholding of removal. 8 C.F.R. § 208.16(d)(2) (2013). Persons convicted of an "aggravated felony" are presumed to be ineligible for withholding of removal. 8 U.S.C.A. §§ 1253(h)(2)(B), 1253(h)(3) (West, WestlawNext through P.L. 113-74 (excluding P.L. 113-66 and 113-73)); Q-T-M-T, 21 I. & N. Dec. 639 (B.I.A. 1996) (holding that immigration reforms enacted in 1996 dictate that a person convicted of one or more aggravated felonies for which the aggregate sentence is at least five years is considered to have been convicted of a particularly serious crime and barred from receiving withholding of removal).

59 8 U.S.C.A. § 1231(b)(3)(B)(ii) (West, WestlawNext through P.L. 113-57 (excluding P.L. 113-66 and 113-73)); 8 C.F.R. § 1208.24(f) (2013).

ticularly serious crime," the relevant factors are "the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community."[60] Ultimately, the question before the court is whether the circumstances and underlying facts of the conviction indicate that the person presents a "danger to the community."[61]

In one recent case, an immigration judge concluded that the respondent, a gay man living with HIV from Mexico, had committed a particularly serious crime when he solicited an undercover police officer for oral sex.[62] The immigrant, who was living in Los Angeles after previously being granted withholding of removal based on his experience of severe past persecution by law enforcement authorities in Mexico, had been struggling with unemployment, mental illness, and homelessness when the arrest occurred. He received an extended sentence under California's HIV-enhancement statute.[63] Despite his problems, at the removal hearing it was undisputed that the respondent disclosed his HIV status to the undercover officer and assented to the use of condoms in the encounter. Upon his release, DHS commenced removal proceedings against him, arguing that his grant of withholding of removal should be terminated on the grounds that he had committed a "particularly serious crime."

The immigration judge agreed with DHS, reasoning that the

60 Frentescu, 18 I. & N. Dec. 244, 245–47 1982 WL 190682, *1–3 (B.I.A. 1982).

61 *See* 8 U.S.C.A. § 1231(b)(3)(B)(ii) (providing that an alien is ineligible for withholding of removal if "the Attorney General decides that . . . the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States"); Alphonsus v. Holder, 705 F.3d 1031, 1041 (9th Cir. 2013) (citation and alteration omitted) ("[A] crime is particularly serious if the nature of the conviction, the underlying facts and circumstances and the sentence imposed justify the presumption that the convicted immigrant is a danger to the community.").

62 *See* Brief for American Academy of HIV Medicine & Association of Nurses in AIDS Care, et al. as Amicus Curiae Supporting Respondent, Jose Luis Ramirez, Unpublished Board of Immigration Appeals Decision (B.I.A. May 31, 2013), *available at* http://www.lambdalegal.org/in-court/legal-docs/ramirez_ca-amicus-brief [hereinafter Lambda Legal Brief].

63 *See* CTR. FOR HIV LAW & POLICY, ENDING AND DEFENDING HIV CRIMINALIZATION: STATE AND FEDERAL PROSECUTIONS 18 (updated Mar. 2013) (2010), *available at* http://www.hivlawandpolicy.org/resources/view/564. ("Under § 647F of the California Penal Code, if an individual is (1) found guilty of either soliciting or engaging in prostitution, (2) has previously been convicted of a sex offense, and (3) tested positive for HIV following a previous sex offense conviction, she/he is guilty of a felony and may be imprisoned for up to three years.").

respondent's intentions in practicing safe sex and disclosing his status do "not mitigate the danger Respondent's behavior posed to the subsequent sexual partners of his client."[64] She further held that he posed a danger to the community because of "the highly communicable nature of AIDS, its lethality, and the continued risk of exposure to multiple individuals arising from Respondent's behavior."[65] On appeal, HIV Law Project and Lambda Legal submitted an amicus brief on behalf of several organizations representing medical providers and HIV/AIDS specialists to correct the inaccuracies pervading the immigration court's decision.[66] The brief refuted the misconceptions cited by the judge about the lethality of an HIV diagnosis in light of current treatment options and the allocation of responsibility shared by consenting adults with respect to the onward transmission of HIV, and surveyed the scientific community's conclusion that the risk of oral transmission of HIV is slim to none.[67] Instead of opposing the appeal, DHS withdrew its argument that he was convicted of a "particularly serious crime" and moved to remand the proceedings back to the immigration court so that the grant of withholding of removal could be reinstated. The Board of Immigration Appeals promptly issued an order remanding the case with instructions that the respondent's immigration relief be restored.[68] Despite the positive result, this case underscores the need for active and persistent advocacy before adjudicators and education regarding the realities of HIV transmission.

Although the client's immigration status was ultimately restored, the removal proceedings caused a worsening of his already dire circumstances. Shortly before he was transferred to the custody of ICE, the client had been accepted into a long-term residential program that provided psychotherapy and job training and placement, along with probation support. The criminal court, which was to oversee his placement and release, had not yet completed this process when he was taken into ICE custody. Because ICE declined to transport him back for his next required appearance, the criminal court deemed him a "no show" and a bench warrant was issued for his arrest. Following his release from ICE

64 *Id.* at 2.

65 *Id.*

66 *See generally* Lambda Legal Brief, *supra* note 62.

67 *Id.* at 5–18.

68 *See* Ramirez, File No. A075986662, slip op. (B.I.A. May 31, 2013), *available at* http://www.lambdalegal.org/in-court/legal-docs/in-re-ramirez_us_20130531_decision.

custody, the residential program option was resurrected. However, by this point, the client had become ineligible for Social Security benefits, which would have paid for his treatment and care. With the help of his very supportive case managers, he was able to have his benefits restored so that he could participate in the program. Over the course of the year that he remained in removal proceedings, his mental health suffered as well, as a consequence of his non-therapeutic treatment while in ICE custody.

In seeking to terminate his withholding of removal status by labeling him "dangerous" to the public for having committed a "particularly serious crime," ICE essentially overruled the criminal court's judgment that, with the appropriate treatment and support, the client could reintegrate into society. By seeking to deport him to Mexico, where it was acknowledged that he suffered unspeakable violence on account of his sexual orientation, ICE sought to impose a far worse penalty on him than that contemplated by the criminal statute under which he was convicted. In choosing to pursue termination of his status, ICE communicated its disregard for this gentleman's life.[69]

These cases demonstrate that the equation of HIV with "dangerousness" was not eliminated from the immigration law when the HIV ban was lifted in 2010. With the introduction of HIV-based offenses into immigration adjudications, we see a dangerous trend that could eliminate access to relief for some of the most vulnerable immigrants living with HIV.

CONCLUSION

We have come a long way since the dark days chronicled in the recent Oscar-nominated documentary *How to Survive a Plague*.[70]

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69 In a second case, also proceeding in California, a different immigration judge found that a transgender woman from Mexico living with HIV was barred from receiving withholding of removal because her conviction for sex work was a "particularly serious crime" in light of her HIV status. On appeal, the Center for HIV Law and Policy submitted an amicus brief on behalf of AIDS service organizations and scientific experts. Brief for the Center for HIV Law and Policy et al. as Amici Curiae Supporting Respondent, Lopez-Roque, Unpublished Board of Immigration Appeals Decision (B.I.A. Aug. 7, 2013), *available at* http://hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/Redacted%20Perla%20Lopez-Roque%20Amicus%20Brief%20FINAL.pdf. On August 7, 2013, the Board of Immigration Appeals remanded the proceedings to the Immigration Court for further fact-finding as to whether the respondent's arrest was for a "particularly serious crime." *See* Roque-Lopez, File No. [redacted], slip op. (B.I.A. Aug. 7, 2013), *available at* http://hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/Matter%20of%20Lopez%2008.16.13.pdf.

70 This film follows two coalitions, the AIDS Coalition to Unleash Power (ACT UP) and Treatment Action Group (TAG), at the start of the U.S. AIDS epidemic during

Although HIV is now treated as a chronic condition in the United States—controllable with medication—and many believe that stigma and discrimination against people living with HIV/AIDS is no longer as prominent, people living with HIV/AIDS continue to face explicit and/or institutional discrimination rooted in misconceptions about the treatment and transmission of HIV.[71]

As an advocate for people living with HIV, I have become immersed in the basic science of treatment and transmission. Daily conversations with clients and colleagues in my office include references to viral loads and white blood cell counts and concerns about confidentiality and discrimination. Having done this work for several years, I sometimes forget how little the general public, including immigration adjudicators, know about these realities. In the absence of knowledge often comes the misperceptions that underlie the continued stigma against people living with HIV and AIDS. Fortunately, most adjudicators in our jurisdiction have been kind and fair. Nevertheless, immigration law and policy guidance continues to discriminate against people living with HIV. The association of people living with HIV with dangerousness and high public costs remains a battle that must be fought on behalf of immigrants living with HIV, one crucial to achieving full equality and respect for people living with HIV.

the 1980s and 1990s when AIDS was a death sentence. The coalitions battled to transform AIDS into a manageable condition by infiltrating the pharmaceutical industry and identifying promising drugs. They engage in activism and innovation, which help the new drugs move faster from the trial stages and directly to patients. *See* How to Survive a Plague (Public Square Films 2012).

71 Although less acute, stigma and discrimination continues to be a barrier to prevention and treatment in the United States. *See* Jonathan Rochkind, Samantha DuPont & Amber Ott, Public Agenda, Impressions of HIV /AIDS in America: A Report on Conversations with People Throughout the Country (2009), *available at* http://www.hivlawandpolicy.org/resources/view/420 (finding that HIV stigma persists in the United States due to misinformation about transmission risks and stereotypes about people living with HIV/AIDS).