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TWENTY-FIRST CENTURY REGRESSION: THE DISPARATE IMPACT OF HIV TRANSMISSION LAWS ON GAY MEN

ABSTRACT

This Comment outlines a new model criminal statute that could criminalize the intentional transmission of HIV but cause significantly less discrimination against gay men than current HIV criminal laws. In the late 1980s, states began enacting HIV-specific criminalization laws after panic hit the nation. However, these laws fuel the stigma surrounding HIV and disparately impact gay men. Some states have continued to advocate for these HIV-specific statutes, while others have expressed the belief that repeal would be the more appropriate approach. Rather than simply repealing these laws, this Article explores the more appropriate solution: to create a new model criminal statute with stricter intent requirements, a higher level of scrutiny, a duty to disclose one's HIV status, and with defenses, penalties, and remedies.

INTRODUCTION

“I’ve got some bad news. You are HIV positive.” That is something no one wants to hear from his or her doctor. Those nine words can invoke immense emotions: fear, panic, anger, depression, denial. When the HIV/AIDS epidemic materialized in the United States (U.S.) and internationally, these emotions invoked much more than denial, as lawmakers quickly enacted laws criminalizing the intentional transmission of HIV.¹ While the trend toward criminalization seems to be increasing, so is the discrimination against and stigma towards gay men stemming from these laws.² The history of animosity towards gay men provided a framework for a negative attitude toward sexual minorities and it has continued to grow into the twenty-first century.³ Current laws criminalizing HIV/AIDS transmission, both domestic and international, have the potential to increase both fear of and discrimination towards persons

¹ Angela Perone, *From Punitive to Proactive: An Alternative Approach for Responding to HIV Criminalization That Departs from Penalizing Marginalized Communities*, 24 HASTINGS WOMEN’S L.J. 363, 363 (2013).

² See Ralf Jürgens et al., *10 Reasons to Oppose Criminalization of HIV Exposure or Transmission*, OPEN SOCIETY FOUND. (2008), https://www.opensocietyfoundations.org/sites/default/files/10reasons_20081201.pdf. This Comment will refer to “gay men” and “homosexual men” interchangeably throughout.

³ See *infra* Part I.B.

living with HIV/AIDS⁴ and disparately impact gay men. There is a growing concern that transmission laws will be selectively enforced against gay men because HIV/AIDS affects them at higher levels.⁵ New criminal statutes are needed to combat these disparities.

This Comment analyzes U.S. legislation that criminalizes HIV transmission amongst gay men and compares these statutes to similar ones in other countries. First, this Comment discusses the history of HIV/AIDS and the historical discrimination against homosexual men in the United States. Then, this Comment examines U.S. legislation and its approach to HIV transmission laws. Then, this Comment examines international legislation and approaches to HIV transmission laws, specifically in Uganda, Australia, and Niger. Finally, this Comment poses a solution: a non-discriminatory approach to HIV transmission laws that lessens the disparate impact on HIV-positive individuals, especially gay men.

I. BACKGROUND ON THE HIV/AIDS EPIDEMIC AND THE CRIMINALIZATION OF HIV/AIDS

A. *History of HIV/AIDS in the United States*

This Part will look at the history of HIV/AIDS in the United States and ultimately, the discrimination against HIV-positive gay men that has stemmed from both our history and HIV transmission laws. According to some scholars, “homosexuality has been ‘tolerated’ in many societies, but it has never been respected or looked to as a model for sexual relations.”⁶ Sadly this remains true in 2016. AIDS went undetected until the 1970s.⁷ It seemed to be invisible and virtually impossible to detect. AIDS was first perceived as a disease infecting solely homosexual men.⁸ However, the HIV virus was around long before the disease was detected and spread amongst gay communities.⁹ The AIDS epidemic began in the United States in 1978.¹⁰

⁴ Amy M. Decker, *Criminalizing the Intentional or Reckless Exposure to HIV: A Wake-Up Call to Kansas*, 46 U. KAN. L. REV. 333, 359 (1998).

⁵ Karen E. Lahey, *The New Line of Defense: Criminal HIV Transmission Laws*, 1 SYRACUSE J. LEGIS. & POL’Y 85, 87 (1995).

⁶ ROBERT F. MEIER & GILBERT GEIS, CRIMINAL JUSTICE AND MORAL ISSUES 135 (2006).

⁷ *Id.* at x.

⁸ R. Brian Leech, *Criminalizing Sexual Transmission of HIV: Oklahoma’s Intentional Transmission Statute: Unconstitutional or Merely Unenforceable?*, 46 OKLA. L. REV. 687, 690 (1993).

⁹ MIRKO D. GRMEK, HISTORY OF AIDS: EMERGENCE AND ORIGIN OF A MODERN PANDEMIC, at x (1990).

¹⁰ *Id.* at 119.

In the 1980s, physicians discovered a new illness.¹¹ They surmised that a new or mutated contagion was the cause.¹² At the end of 1979, Joel Weisman, a Los Angeles physician, noticed an increase of mononucleosis-like symptoms such as weight loss and swollen lymph nodes.¹³ He found two commonalities amongst his patients: they were both young and from California's growing gay community.¹⁴ Tests started to show that gay American men had been infected by cytomegalovirus (CMV), a virus belonging to the herpes family.¹⁵ After linking CMV to herpes, the fact that the majority of those patients affected were homosexual was publicized in a negative context.¹⁶ It was later discovered that ninety-four percent of the gay community in California had been infected.¹⁷ The virus could cause fatal lesions in newborn babies, but posed less of a danger to adults.¹⁸ The first patient suffering from CMV died in March 1981.¹⁹ American experts concluded there was a possible immune disorder that predisposed individuals to HIV/AIDS.²⁰ When the disease appeared on the East Coast, rumors started to spread that a "rare malignant disease" had appeared in the gay community of New York.²¹ The disease became known as "gay cancer," "gay pneumonia," and even a "gay plague."²² Some people started using the acronym GRID: Gay-Related Immune Deficiency.²³ The gay population quickly became known as the "sexual third world."²⁴ The disease was finally named in 1982, and AIDS became the

¹¹ *Id.* at 3.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*; see also Edmund C. Tramont, *Learning From History: What the Public Health Response to Syphilis Teaches Us About HIV/AIDS*, 26 J. CONTEMP. HEALTH L. & POL'Y 253, 254 (2010) (stating that reports of HIV were found in homosexual men in Los Angeles as well as New York City and San Francisco).

¹⁵ GRMEK, *supra* note 9, at 3–4; cf. Tramont, *supra* note 14, at 254 ("By 1983, scientists had identified the cause of HIV/AIDS: the human retrovirus, HIV-1.")

¹⁶ GRMEK, *supra* note 9, at 10.

¹⁷ *Id.* at 4.

¹⁸ *Id.*; see also William Jordan, *Physicians Who Negligently Failed to Provide Obstetrical Treatment That Was Designed to Prevent Harm to Future Fetuses May Be Liable Later*, 39 PROF. LIABILITY REP. (2014) (citing *Troxel v. A.I. Dupont Inst.*, 450 Pa. Super. 71 (1996), in which the plaintiff contracted CMV and gave birth to a child who died from the disease).

¹⁹ GRMEK, *supra* note 9, at 5.

²⁰ Elizabeth B. Cooper, *Testing for Genetic Traits: The Need for a New Legal Doctrine of Informed Consent*, 58 MD. L. REV. 346, 394 n.230 (1999).

²¹ GRMEK, *supra* note 9, at 6.

²² *Id.* at 9.

²³ Perone, *supra* note 1, at 389 n.200.

²⁴ GRMEK, *supra* note 9, at 9.

accepted reference.²⁵ After 1982, especially in the United States, the AIDS epidemic spread quickly.²⁶ There were approximately one hundred new cases diagnosed every week in 1984.²⁷

Gay men were quickly linked to and stereotyped by the disease, leading to both oppression and hardship. The link between AIDS and criminals similarly did not help the homosexual male stereotype associated with the disease.²⁸ AIDS in prisons was on the rise, as was the imprisonment of drug addicts and gay sex in prisons.²⁹ This fueled prejudice against persons affected by the disease. For instance, one woman in an interview stated “[t]his disease . . . affects homosexual men, drug users, Haitians, and hemophiliacs—thank goodness it hasn’t spread to human beings yet.”³⁰ A male subject said, “if it spreads to the general public, it would be a medical crisis, demanding immediate government response.”³¹ When the journalist asked for his view on the disease he replied, “[i]t’s God punishing homos.”³² As the link between AIDS and homosexuality became increasingly apparent, so too did vulgar prejudices towards gay men.

Cultural stigma surrounding HIV/AIDS is still prevalent today. In many societies worldwide, people living with HIV are subject to both stigma and discrimination.³³ For gay and bisexual individuals diagnosed with HIV/AIDS, life became even more difficult.³⁴ The public’s response to the disease led to increased attacks on homosexuals,³⁵ and gay men became frequent victims of violence.³⁶ In a 1999 study, researchers found that one in five gay men

²⁵ See James F. Baxley, *Rehabilitating AIDS-Based Employment Discrimination: HIV Infection as a Handicap Under the Vocational Rehabilitation Act of 1973*, 19 SETON HALL L. REV. 23, 23 (1989); *30 Years of HIV/AIDS Timeline*, AIDS.GOV, <https://www.aids.gov/pdf/aidsgov-timeline.pdf> (last visited Feb. 9, 2016).

²⁶ GRMEK, *supra* note 9, at 41.

²⁷ *Id.*

²⁸ Craig W. Stedman, *The Constitution, the Military, and Homosexuals: Should the Military’s Policies Concerning Homosexuals Be Modified?*, 95 DICK. L. REV. 321, 345 (1991) (stating that a D.C. Circuit court explained that because states are allowed to criminalize behavior that *defines* the class of homosexual men, the discrimination was “invidious”) (emphasis added).

²⁹ GRMEK, *supra* note 9, at 41; see also Joseph L. Bierwirth, Jr., *Judicial Doctrines in Federal Civil Rights Litigation: Striking the Proper Balance*, 38 BOS. B.J. 9, 14 (1994).

³⁰ GRMEK, *supra* note 9, at 40.

³¹ *Id.*

³² *Id.*

³³ Ellen M. Walker, *The HIV/AIDS Pandemic and Human Rights: A Continuum Approach*, 19 FLA. J. INT’L L. 335, 386 (2007).

³⁴ B.R. SIMON ROSSER, *MALE HOMOSEXUAL BEHAVIOR AND THE EFFECTS OF AIDS EDUCATION: A STUDY OF BEHAVIOR AND SAFER SEX IN NEW ZEALAND AND SOUTH AUSTRALIA*, at xiv (1991).

³⁵ Leech, *supra* note 8, at 690.

³⁶ ROSSER, *supra* note 34, at 200.

reported being physically attacked; fifty-six percent reported verbal threats, harassment and abuse; sixty-four percent experienced homophobia in the course of their employment; and ninety-three percent experienced homophobic jokes in their workplace.³⁷ This kind of violence against and prejudice towards gay men can lead to not only a damaged self-image but also anxiety and depression.³⁸ Furthermore, society's prejudice towards gay men could actually contribute to the spread of HIV and other STDs³⁹ because gay men will live in reclusive fear instead of seeking necessary and often aggressive medical attention. People affected by HIV/AIDS feel vulnerable and sometimes embarrassed, especially when they are gay.⁴⁰ If they feel that they are going to be discriminated against when seeking help, they will be less likely to do so.⁴¹ This hesitance to seek treatment could lead to worsening health for these individuals.⁴² Discrimination towards gay men still exists today. Thus, it is likely that gay men affected by HIV/AIDS will be less likely to seek the help and medical attention they need because they live in constant fear. With this fear comes the inevitable spread of HIV/AIDS, as HIV-infected individuals will go about their lives without being diagnosed and/or seeking treatment. Further, they may be less likely to disclose their status to their partner for fear of being ostracized or rejected.⁴³ This lack of disclosure could further spread the virus to others who are otherwise uninformed.

While there is evidence that public disapproval of homosexuality is declining in broad terms,⁴⁴ the hatred, violence, and stigma towards homosexuality remains prevalent today, particularly among religious Christian groups.⁴⁵ The stigma that gay men are forced to live with in today's society, especially those infected with HIV/AIDS is not surprising, especially given the

³⁷ *Id.*

³⁸ Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 PSYCHOL. BULL. 674, 688 (2003).

³⁹ Margaret A. Chesney & Ashley W. Smith, *Critical Delays in HIV Testing and Care: The Potential Role of Stigma*, 42 AM. BEHAV. SCIENTIST 1162, 1163 (1999).

⁴⁰ *See id.*

⁴¹ *See id.*

⁴² Cristina Velez, *The Continued Marginalization of People Living with HIV/AIDS in U.S. Immigration Law*, 16 CUNY L. REV. 221, 230 (2013).

⁴³ *See* Hongmei Yang et al., *HIV-Related Knowledge, Stigma, and Willingness to Disclose: A Mediation Analysis*, 18 AIDS CARE 717, 718 (2006).

⁴⁴ MEIER & GEIS, *supra* note 6, at 116.

⁴⁵ *Id.* at 117; *see also* John V. Harrison, *Peeping Through the Closet Keyhole: Sodomy, Homosexuality, and the Amorphous Right of Privacy*, 74 ST. JOHN'S L. REV. 1087, 1113 (2000).

large number of Americans who believe that homosexuality is a sin.⁴⁶ This disapproval towards gay men creates an environment where they feel the need to hide their homosexuality.⁴⁷ Reinforcing this notion is the sense that infection is inevitable.⁴⁸ Some gay men feel so much anxiety over contracting HIV that they feel like they should just go ahead and “get it over with.”⁴⁹ This further suggests that heterosexuals are secure with their own identity, while homosexual men are forced to prove that they are “normal” everyday.⁵⁰ Having to prove “normalcy” in 2016 suggests how truly regressive our “modern” society is.

B. Criminalization of Intentional Transmission

Legislation criminalizing the transmission of HIV started after panic swept the nation in the 1980s and early 1990s.⁵¹ Because of widespread misinformation relating to HIV, some people started to believe that HIV was “invariably fatal” and states began to enact criminalization laws as a result.⁵² Many state legislatures adopted criminal “exposure” laws after a significant number of gay men started contracting HIV in the late 1980s and people started associating the disease with societal sin.⁵³ Those who had HIV/AIDS, particularly gay men, were seen as sexual predators, and as hysteria pervaded the media, a legislative response was demanded.⁵⁴ The public was concerned with protecting society from people with HIV who *knowingly* exposed others to the virus and did not disclose their status to their partner before having sex.⁵⁵

In September 1987, President Ronald Reagan created the Presidential Commission on the Human Immunodeficiency Virus Epidemic (“Presidential Commission on the HIV Epidemic”), which advised White House personnel on

⁴⁶ MEIER & GEIS, *supra* note 6, at 117 (discussing a poll of Americans where seventy percent of the sample responded that homosexuality was a sin).

⁴⁷ *Id.* at 124.

⁴⁸ *See id.*

⁴⁹ Erin McCormick, *Strengthening the Effectiveness of California’s HIV Transmission Statute*, 24 HASTINGS WOMEN’S L.J. 407, 419 (2013).

⁵⁰ MEIER & GEIS, *supra* note 6, at 125.

⁵¹ Chelsey Heindel, *Medical Advances, Criminal Disadvantages: The Tension Between Contemporary Antiretroviral Therapy and Criminal HIV Exposure Laws in the Workplace*, 9 WASH. J.L. TECH. & ARTS 35, 41 (2013).

⁵² *Id.*

⁵³ *See* Christina M. Shriver, *State Approaches to Criminalizing the Exposure of HIV: Problems in Statutory Construction, Constitutionality and Implications*, 21 N. ILL. U.L. REV. 319, 320–21 (2001).

⁵⁴ *Chapter Four: Animus and Sexual Regulation*, 127 HARV. L. REV. 1767, 1777 (2014).

⁵⁵ Sandra Young, *Imprisoned Over HIV: One Man’s Story*, CNN (Nov. 9, 2012, 8:42 PM), <http://www.cnn.com/2012/08/02/health/criminalizing-hiv/index.html>.

the risks associated with HIV/AIDS.⁵⁶ The Commission issued a report, which encouraged states to explore the use of criminal law in the face of the HIV/AIDS epidemic.⁵⁷ It argued that merely using traditional criminal laws was not sufficient and that there was a need for criminal statutes that were HIV-specific.⁵⁸ The report further noted that using the legal standard of assault to penalize HIV transmission would prove to be too lenient because the penalties would not be sufficient to deter intentional transmission.⁵⁹ It concluded that the only way to show that HIV transmission was unacceptable was to create and implement HIV-specific statutes. Not only were the penalties too lenient under simple assault, but the diseases were also too difficult to address under homicide laws.⁶⁰ One of the main goals of the report was to create a “strong national policy” against HIV discrimination.⁶¹ Yet, it seems that today, almost thirty years after the Commission’s report, the criminal laws aimed at HIV/AIDS transmission are as discriminatory as ever.

Three years after the Commission issued its report, the Ryan White Comprehensive AIDS Resources Emergency (CARE) Act was enacted, providing incentives for states to criminalize the intentional transmission of HIV.⁶² The CARE Act provided emergency AIDS grants to states with statutes prosecuting individuals who intentionally transmitted HIV to another person.⁶³ States could choose to fulfill the federal requirement by either “amending . . . public health statutes to include HIV on their list of sexually transmitted diseases; using traditional criminal law statutes to punish HIV transmission; or enacting specific criminal statutes targeted at HIV transmission.”⁶⁴ Some states defined intentional transmission as “failing to disclose” positive HIV/AIDS

⁵⁶ Alexandra McCallum, *Criminalizing the Transmission of HIV: Consent, Disclosure, and Online Dating*, UTAH L. REV. 677, 679 (2014).

⁵⁷ James B. McArthur, *As the Tide Turns: The Changing HIV/AIDS Epidemic and the Criminalization of HIV Exposure*, 94 CORNELL L. REV. 707, 713 (2009).

⁵⁸ *Id.* at 714.

⁵⁹ *Id.*

⁶⁰ Amy L. McGuire, Comment, *AIDS as a Weapon: Criminal Prosecution of HIV Exposure*, 36 HOUS. L. REV. 1787, 1796 (1999).

⁶¹ Lawrence O. Gastin & David W. Webber, *Discrimination Based on HIV/AIDS and Other Health Conditions: “Disability” As Defined Under Federal and State Law*, 3 J. HEALTH CARE L. & POL’Y 266, 305 (2000).

⁶² Jodi Mosiello, *Why the Intentional Sexual Transmission of Human Immunodeficiency Virus (HIV) Should Be Criminalized Through the Use of Specific HIV Criminal Statutes*, 15 N.Y. L. SCH. J. HUM. RTS. 595, 599 (1999).

⁶³ *Id.*; see also Raymond C. O’Brien, *A Legislative Initiative: The Ryan White Comprehensive AIDS Resources Emergency Act*, 7 J. CONTEMP. HEALTH L. & POL’Y 183, 191 (1991).

⁶⁴ Mosiello, *supra* note 62, at 599.

status to their sexual partner.⁶⁵ However, the requirement that states criminalize the intentional transmission of HIV/AIDS was removed when the CARE Act was reauthorized in 2000.⁶⁶

By the summer of 2014, twenty-four states had criminal statutes in place that were HIV-specific. In general, these statutes target individuals who have HIV, are aware of their HIV status, and “knowingly engage” in consensual sex.⁶⁷ Fourteen states require a lack of consent, which the prosecutor must prove.⁶⁸ In eight states, the prosecutor simply needs to prove that the HIV-positive person knew that he or she was infected and then intentionally engaged in sexual relations with another.⁶⁹ Most statutes require the HIV-positive individual prove that the person they exposed to HIV knew that they were infected with HIV prior to having sex, and consented to sex nevertheless.⁷⁰ However, statutes in Maryland and Washington make no reference to consent or disclosure.⁷¹ In these states a person can be prosecuted for having sex even if their partner is fully informed of his or her HIV status and consents to sex.⁷²

When Congress was considering civil rights legislation for those with disabilities, the Presidential Commission on the HIV Epidemic asked for all-inclusive federal anti-discrimination legislation that included HIV-positive individuals because HIV was considered a disability.⁷³ President George H. W. Bush instructed Congress to pass a law within the Americans with Disabilities Act (ADA), which prohibited discrimination against those with HIV and AIDS.⁷⁴ Today, people living with HIV/AIDS are protected under the ADA,⁷⁵ so discrimination based on HIV or AIDS status is not tolerated.⁷⁶

⁶⁵ Young, *supra* note 55.

⁶⁶ *Id.*

⁶⁷ McCallum, *supra* note 56, at 679.

⁶⁸ *Id.*

⁶⁹ *Id.* at 680.

⁷⁰ Michael L. Closen & Jeffrey S. Deutschman, *A Proposal to Repeal the Illinois HIV Transmission Statute*, 78 ILL. B.J. 592, 594, 600 (1990).

⁷¹ Md. Code Ann., Health-Gen. § 18-601.1 (West 2014); *see also* Wash. Rev. Code Ann. § 9A.36.011 (West 2014).

⁷² *See id.*

⁷³ *See* Runnebaum v. NationsBank of Maryland N.A., 123 F.3d 156 (4th Cir. 1997).

⁷⁴ Michael D. Carlis & Scott A. McCabe, *Are There No Per Se Disabilities Under the Americans with Disabilities Act? The Fate of Asymptomatic HIV Disease*, 57 MD. L. REV. 558, 560–61, 579 (1998).

⁷⁵ U.S. DEP'T OF JUSTICE, QUESTIONS AND ANSWERS: THE AMERICANS WITH DISABILITIES ACT AND PERSONS WITH HIV/AIDS 1 (2012), http://www.ada.gov/aids/ada_q&a_aids.pdf.

⁷⁶ *Id.*

Nevertheless, laws criminalizing intentional HIV transmission were consistent with the ADA's protections for HIV-positive persons. After CARE was implemented, the federal funding for state HIV/AIDS prevention programs became dependent on how effective the state criminal laws were at prosecuting the "knowing" transfer of HIV.⁷⁷ CARE pressured states to criminalize the transmission of HIV or risk losing federal funding for HIV/AIDS prevention programs.⁷⁸ By 1993, almost half of U.S. states had criminal statutes for the intentional HIV transmission.⁷⁹

C. *How the Laws Discriminate*

Various countries and most states within the United States have imposed laws criminalizing the transmission of HIV.⁸⁰ These laws allow for the prosecution of individuals who are HIV-positive and engage in any behavior that could potentially transmit the disease.⁸¹ However, these laws have dangerous consequences because they have the potential to be used as tools of oppression and discrimination against gay men,⁸² they simply reinforce the animus and moral disapproval directed at gay men. Further, it can be argued that these transmission laws have the potential to be selectively enforced against gay men because HIV/AIDS affects them at higher levels than other groups.⁸³

Gay men are at the highest risk of any group for contracting HIV.⁸⁴ Thus, these AIDS-specific laws are targeted *at* them rather than being used as a tool to further social objectives. Such social objectives include preventing the transmission of HIV to uninfected people and educating the public about issues surrounding HIV/AIDS.⁸⁵

⁷⁷ McCallum, *supra* note 56, at 679.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS (UNAIDS), CRIMINALISATION OF HIV NON-DISCLOSURE, EXPOSURE AND TRANSMISSION: BACKGROUND AND CURRENT LANDSCAPE 6–7, 9 (2012), http://www.unaids.org/sites/default/files/en/media/unaids/contentassets/documents/document/2012/BackgroundCurrentLandscapeCriminalisationHIV_Final.pdf.

⁸¹ McArthur, *supra* note 57, at 719–20.

⁸² UNAIDS, *supra* note 80, at 9.

⁸³ Lahey, *supra* note 5, at 87.

⁸⁴ NAT'L CTR. FOR HIV/AIDS, VIRAL HEPATITIS, STD, AND TB PREVENTION, ESTIMATED HIV INCIDENCE IN THE UNITED STATES 2007–2010, in 17 HIV SURVEILLANCE REPORT 1, 6 (2012).

⁸⁵ Thomas W. Tierney, *Criminalizing the Sexual Transmission of HIV: An International Analysis*, 15 HASTINGS INT'L & COMP. L. REV. 475, 487 (1992).

However, rather than furthering such social objectives, these HIV-specific laws could instead lead to the harassment and punishment of gay men based solely on their sexual orientation rather than for having actually committed any crime.⁸⁶ This has the potential effect of criminalizing gay men or women even in those jurisdictions that no longer have sodomy laws.⁸⁷ Furthermore, these laws could deter at-risk gay men from coming forward for testing and treatment, since simply knowing you have HIV and having sex with others puts you at risk for prosecution.⁸⁸

A major issue with laws criminalizing the intentional transmission of HIV/AIDS is that they fuel the stigma already attached to having HIV or AIDS by sending the message that having sex with an HIV-positive person is always harmful.⁸⁹ It is almost impossible to prove that intentional transmission of the disease was in fact the infected individual's ultimate goal.⁹⁰ Not being able to prove such intent is another problem that arises from these laws. Discrimination is fueled by the criminal charge and accusation, irrespective of guilt or innocence.

Leaving the HIV-specific criminal statutes and laws in place leads to HIV-positive individuals losing their right to engage in any sexual contact. Thus, what is actually being criminalized is "having sex while HIV positive."⁹¹ Furthermore, prosecutors could enforce the law in a discriminatory fashion by targeting gay men and "juries may be more likely to convict members of unpopular groups."⁹² While well-crafted laws can mitigate these problems, they cannot completely eliminate them. Both the United States and other countries would benefit from realizing that statutes criminalizing the transmission of HIV/AIDS, as they are currently written, are counterproductive.

Anti-discrimination protection has proven to be the most effective tool to combat the transmission of HIV. Human rights legislation exists to protect citizens from unfair discrimination on "arbitrary aspect[s] of a person's life,

⁸⁶ *Id.* at 489.

⁸⁷ *See id.*

⁸⁸ Mona Markus, *A Treatment for the Disease: Criminal HIV Transmission/Exposure Laws*, 23 NOVA L. REV. 847, 874–75 (1999).

⁸⁹ *See* Sarah J. Newman, *Prevention, Not Prejudice: The Role of Federal Guidelines in HIV-Criminalization Reform*, 107 NW. U.L. REV. 1403, 1431 (2013).

⁹⁰ *Id.* at 1412–13.

⁹¹ Newman, *supra* note 89, at 1436.

⁹² Margo Kaplan, *Rethinking HIV-Exposure Crimes*, 87 IND. L.J. 1517, 1564 (2012).

such as race, gender, political belief, and religious affiliation.”⁹³ Furthermore, legislation against discrimination based on sexual orientation has arguably been a driver of human rights legislation,⁹⁴ which is necessary not only to ensure that all citizens are treated equally under the law but also to prevent social persecution.⁹⁵ With the disproportionate prevalence of HIV/AIDS among gay men and ethnic minorities, the “debate on discrimination legislation has become more urgent.”⁹⁶ One finding in South Australia showed that gay men are more likely to seek HIV testing where discrimination on the grounds of sexual orientation is illegal.⁹⁷ Thus, the absence of adequate protection against discrimination may work against the prevention of HIV transmission.⁹⁸ This finding has also proven true in the United States.⁹⁹ When implemented, confidentiality and other legal protections for people with HIV can encourage testing, while requiring name reporting of HIV test results can deter individuals from seeking testing.¹⁰⁰

The Fourteenth Amendment is designed to guarantee due process and equal protection for all.¹⁰¹ The United Nations (U.N.) issued a policy options paper in 2002 that proves that criminalizing certain behavior actually increases the stigma, thus making it more difficult to regulate.¹⁰² The Fourth Circuit has held that even though a state law is facially neutral, its administration can still be unequal by favoring one class of people over another.¹⁰³ If this is the case, the plaintiff must show that there is a more disparate impact on a particular group and that the state’s action was motivated at least in part by an intent to discriminate.¹⁰⁴ Laws that criminalize the transmission of HIV/AIDS arguably fall within this characterization.

⁹³ ROSSER, *supra* note 34, at 59.

⁹⁴ See William B. Turner, *The Gay Rights State: Wisconsin’s Pioneering Legislation to Prohibit Discrimination Based on Sexual Orientation*, 22 WIS. WOMEN’S L.J. 91, 101 (2007).

⁹⁵ ROSSER, *supra* note 34, at 59.

⁹⁶ *Id.* at 60.

⁹⁷ *Id.* at 65.

⁹⁸ *Id.*

⁹⁹ Scott Burris, *Law and the Social Risk of Health Care: Lessons from HIV Testing*, 61 ALB. L. REV. 831, 833 (1998).

¹⁰⁰ See *HIV Surveillance and Name Reporting: A Public Health Case for Protecting Civil Liberties*, AM. CIVIL LIBERTIES UNION (Oct. 1997), <https://www.aclu.org/hiv-surveillance-and-name-reporting-public-health-case-protecting-civil-liberties>.

¹⁰¹ U.S. CONST. amend. XIV, § 1.

¹⁰² Megan Heneke, *An Analysis of HIV-Related Law in South Africa: Progressive in Text, Unproductive in Practice*, 18 TRANSNAT’L L. & CONTEMP. PROBS. 751, 762 (2009).

¹⁰³ *United States v. Johnson*, 28 F. Supp. 3d 499, 507 (2014).

¹⁰⁴ *Id.*

The U.N. paper further argues that HIV transmission lawsuits attract negative media attention and “spread inaccurate information” about people living with HIV/AIDS.¹⁰⁵ Seeing that a disproportionate number of gay men live with HIV/AIDS as compared to the general population, it follows that gay men may receive disproportionate negative attention and prosecution stemming from such laws.

In the United States, some people who have been prosecuted under laws criminalizing the transmission of HIV have brought claims alleging a violation of due process, but most have been unsuccessful.¹⁰⁶ More importantly, equal protection claims surrounding these HIV-specific laws have also been brought and would likely be unsuccessful as well.¹⁰⁷ As will be discussed in greater detail in Part IV, any classification made by the government that does not involve a “suspect class” is subject merely to rational basis review, the lowest standard of review.¹⁰⁸ Rational basis review simply requires the government to give a legitimate purpose for the classification and prove that the law is “a rational way of furthering” a “legitimate government purpose.”¹⁰⁹ Because rational basis review is the lowest standard of review, it is the easiest to satisfy. Thus, the U.S. Supreme Court rarely strikes down cases requiring a rational basis review.¹¹⁰ Because gay men are not considered a suspect class¹¹¹ it is unlikely that any standard higher than rational basis review will be applied to HIV-specific statutes. This leaves little protection for HIV-positive gay men under the U.S. Constitution, despite the Fourteenth Amendment “guarantee.”

II. AMERICAN APPROACH TO HIV TRANSMISSION LAWS

This Part examines the American approach to HIV transmission laws and the effects on HIV-positive individuals. Sixteen states have enacted legislation

¹⁰⁵ Heneke, *supra* note 102, at 763.

¹⁰⁶ See *People v. Russell*, 630 N.E.2d 794, 796 (Ill. 1994) (holding that the statute is not vague and thus did not deny defendant’s due process rights); see also *People v. Jensen*, 586 N.W.2d 748, 750 (Mich. App. 1998) (holding that the statute’s language was not overbroad and did not violate the defendant’s constitutional right to privacy or First Amendment rights).

¹⁰⁷ Heneke, *supra* note 102, at 759.

¹⁰⁸ Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 *FORDHAM L. REV.* 2769, 2770 (2005).

¹⁰⁹ Aaron Belzer, *Putting the “Review” Back in Rational Basis Review*, 41 *W. ST. U.L. REV.* 339, 344 (2014).

¹¹⁰ Heneke, *supra* note 102, at 759.

¹¹¹ Courtney A. Powers, *Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court’s Application of Heightened Scrutiny*, 17 *DUKE J. GENDER L. & POL’Y* 385, 387 (2010).

criminalizing the transmission of HIV.¹¹² The remaining states have provisions under “traditional criminal statutes” that permit the prosecution of infected people who engage in behavior that is likely to transmit HIV.¹¹³ In 1988 the Presidential Commission on the HIV Epidemic recommended that states adopt these criminal statutes specific to HIV/AIDS.¹¹⁴ By the early 1990s, twelve states had implemented such laws;¹¹⁵ all but two of them made the offense “punishable as a felony.”¹¹⁶

If the purpose of these laws was to decrease the transmission of HIV/AIDS, it seems clear that the laws have had little effect. The number of AIDS cases reported in the United States in 1985 was 20,000; the number of annual cases continued to rise, reaching 37,000 in 1986, 61,000 in 1987, and almost 86,000 in 1988.¹¹⁷ In December 1991, 206,392 confirmed cases of AIDS were reported in the United States,¹¹⁸ and more than 133,232 people had died as a result of AIDS.¹¹⁹ By 2007, California had the “second highest number of HIV cases in the nation.”¹²⁰ More than one million people in the United States were infected in 2006, and approximately 40,000 new cases were diagnosed in 2007, with 13.7% of the cases reported in California.¹²¹ In 2009, the majority of new HIV cases occurred based on sexual interactions between gay men; yet prevention among gay men seemed to be the least effective because “young gay men” was the only group in which the number of HIV cases actually rose between 2006 and 2009.¹²² This rise in AIDS cases could be attributed in part to the HIV-specific criminal statutes, which may not be fulfilling or furthering the intended social objective of preventing the spread of HIV/AIDS, as discussed below.

There have been several high profile prosecutions for HIV transmission over the last two decades. *Christian v. Sheft* was the first case involving the

¹¹² Tierney, *supra* note 85, at 491.

¹¹³ *Id.*

¹¹⁴ Deborah A. Wiczorkowski Wanamaker, *From Mother to Child . . . A Criminal Pregnancy: Should Criminalization of the Prenatal Transfer of AIDS/HIV be the Next Step in the Battle Against This Deadly Epidemic?*, 97 DICK. L. REV. 383, 391 (1993).

¹¹⁵ Tierney, *supra* note 85, at 499.

¹¹⁶ *Id.* at 500.

¹¹⁷ GRMEK, *supra* note 9, at 193.

¹¹⁸ Tierney, *supra* note 85, at 477.

¹¹⁹ Leech, *supra* note 8, at 689.

¹²⁰ McCormick, *supra* note 48, at 411.

¹²¹ Adeline Delavande, Dana Goldman & Neeraj Sood, *Criminal Prosecution and Human Immunodeficiency Virus-Related Risky Behavior*, 53 J.L. & ECON. 741, 743 (2010).

¹²² McCormick, *supra* note 48, at 413.

intentional sexual transmission of HIV.¹²³ Marc Christian sued Rock Hudson after realizing that Hudson did not disclose his HIV-positive status before having sex.¹²⁴ After determining that Hudson's conduct was "outrageous," the court awarded Christian \$14.5 million.¹²⁵ The verdict sent the message that someone who knows he is HIV-positive has a duty to warn his sexual partners or refrain from having sex.¹²⁶ Christian's attorney urged the court to "cause a headline" by doubling the jury award of \$14.5 million to show society that there is a duty to warn and punish such "despicable" behavior.¹²⁷ While the award was kept at the original verdict of \$14.5 million,¹²⁸ the establishment of duty to disclose ones' HIV status to their partner caught the world's attention.¹²⁹

In 1988, legislators in Oklahoma criminalized the intentional transmission of HIV through a statute codified in Title 21, Section 1192.1.¹³⁰ Oklahoma's law inspired several state laws that criminalized the "intentional spread of AIDS."¹³¹ Oklahoma's statute makes it "unlawful for any person knowing that he or she has Acquired Immune Deficiency Syndrome (AIDS) or is a carrier of the human immunodeficiency virus (HIV) and with intent to infect another, to engage in conduct reasonably likely to result in the transfer of the person's own blood, bodily fluids."¹³² This statute suffers from several constitutional deficiencies. First, the intent requirement is not clear from a reading of the text. It appears to require specific intent because it specifies "knowing" behavior. However, it could be read as a lesser intent standard.¹³³ This would lead to higher prosecution rates among gay men, drug addicts, and prostitutes.¹³⁴ Second, the statute does not protect due process rights because it fails to give "sufficient warning of the proscribed conduct."¹³⁵ In order to be enforceable,

¹²³ Mosiello, *supra* note 62, at 613; *see also* Aetna Casualty & Surety Co. v. Sheft, 989 F.2d 1105, 1106 (9th Cir. 1993) (summarizing the facts of *Christian v. Sheft*, No. C 574153 (Cal. Super. Ct. Feb. 17, 1989)).

¹²⁴ *Aetna Casualty & Surety Co.*, 989 F.2d at 1105-06.

¹²⁵ *Id.* at 1106.

¹²⁶ Eric L. Schulman, *Sleeping with the Enemy: Combatting the Sexual Spread of HIV-AIDS Through a Heightened Legal Duty*, 29 J. MARSHALL L. REV. 957, 979 (1996).

¹²⁷ Paul Feldman & Hector Tobar, *Jury Asked to Double Award in Hudson Case*, L.A. TIMES (Feb. 17, 1989), http://articles.latimes.com/1989-02-17/local/me-2897_1_rock-hudson-jury.

¹²⁸ Mosiello, *supra* note 62, at 613.

¹²⁹ *See* J.B. v. Bohonovsky, 835 F. Supp. 796, 797 (D.N.J. 1993).

¹³⁰ Leech, *supra* note 8, at 687.

¹³¹ *Id.* at 692.

¹³² OKLA. STAT. tit. 21, § 1192.1 (2006).

¹³³ Leech, *supra* note 8, at 698.

¹³⁴ *Id.*

¹³⁵ *Id.* at 697.

laws must provide a sufficient standard for enforcement and be defined such that a person of ordinary intelligence knows what behavior is prohibited.¹³⁶

The arbitrary wording of the statute increases the risk that it will be enforced disproportionately against homosexual men. The vague wording of these laws create the potential to “criminalize the status of being homosexual” simply because homosexual men suffer disproportionately from HIV/AIDS.¹³⁷ The intent requirement must be made clear and sufficient warning must be given. Otherwise, innocent people could be convicted.

Prosecution under these state statutes is not a thing of the past. In fact, two states that previously provided fairly generous protections for gay men and women, Iowa and Minnesota, have recently prosecuted persons for criminal transmission of HIV.

A. Iowa

In 2006, Adam Musser was prosecuted for criminal transmission of HIV in Iowa under Section 709C.1 of the Iowa criminal code. In *State v. Musser*, the Supreme Court of Iowa held that Iowa’s statute governing criminal transmission of HIV was constitutional and upheld Musser’s twenty-five year prison sentence.¹³⁸ In 2002, Musser had unprotected sex with the victim R.D. three times.¹³⁹ During these encounters, Musser was HIV-positive but was receiving medical treatment.¹⁴⁰ Musser, however, did not tell R.D. that he was HIV-positive.¹⁴¹ R.D. later learned that Musser was HIV-positive and contacted the authorities.¹⁴²

Musser challenged the constitutionality of the Iowa statute, arguing that it violated his First Amendment rights.¹⁴³ Musser’s First Amendment argument was based on the premise that the statute “compels speech,” specifically, that “an HIV-positive person engaging in intimate contact with another person can avoid criminal liability only by telling the potential victim that the person is HIV positive and educating the potential victim about the possible

¹³⁶ Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 550 (2002).

¹³⁷ Leech, *supra* note 8, at 699.

¹³⁸ *State v. Musser*, 721 N.W.2d 734, 741 (Iowa 2006).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 740.

transmission of the virus.”¹⁴⁴ Thus, Musser argued, “[a]n infected person who has sexual relations with another without conveying this information is punished.”¹⁴⁵ The Supreme Court of Iowa admitted that even though the statute “does not explicitly require disclosure by the defendant . . . the practical effect of the Iowa statute is the same as those statutes mandating disclosure.”¹⁴⁶ The court concluded that the statute compelled speech because “[r]ealistically, the only way a defendant can be assured the victim knowingly consents to exposure is for the defendant to tell the victim of the defendant’s HIV status.”¹⁴⁷ However, the court held that the statute was constitutional because it “does not absolutely prohibit an infected person from having sexual relations with another,” and thus was narrowly tailored to the state’s compelling interest in “protect[ing] [the] public health by discouraging the transmission of the AIDS virus.”¹⁴⁸

It was not until the groundbreaking case of *Rhoades v. Iowa*, discussed below, that Iowans came forward and argued that a change in Iowa’s fifteen-year-old HIV transmission law was long overdue and necessary.¹⁴⁹ Fortunately, the legislature agreed. The legislature repealed the statute in 2014¹⁵⁰ and replaced it with the Contagious or Infectious Disease Transmission Act (§709D.1).¹⁵¹ Iowa State Senator Rob Hogg called the current law “draconian, outdated, and discriminatory.”¹⁵² The new Act established four separate charges with varying penalties¹⁵³ when no intent or knowledge is present.¹⁵⁴ The four crimes are: intentional infection of a contagious disease, attempted intentional infection of a contagious disease, reckless exposure to a contagious disease causing infection, and reckless exposure to a contagious disease.¹⁵⁵

¹⁴⁴ *Id.* at 741–42.

¹⁴⁵ *Id.* at 742.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 744.

¹⁴⁹ Gillian Mohny, *Controversial HIV Law in Iowa Could be Changed*, ABC NEWS (Mar. 27, 2014), <http://abcnews.go.com/Health/controversial-hiv-law-iowa-changed/story?id=23071540>.

¹⁵⁰ IOWA CODE § 709C.1 (2014).

¹⁵¹ IOWA CODE § 709C (2014).

¹⁵² Rod Boshart, *Iowa Senate Eases Some Penalties for Transmitting Infectious Diseases*, QUAD-CITY TIMES (Feb. 27, 2014, 1:58 PM), http://qctimes.com/news/state-and-regional/iowa/iowa-senate-eases-some-penalties-for-transmitting-infectious-diseases/article_26a0cf7b-7806-5ee1-93b0-ee1a55c26ed9.html.

¹⁵³ IOWA CODE § 709D (2016).

¹⁵⁴ Boshart, *supra* note 151.

¹⁵⁵ ROBERT R. RIGG, *Transmission of a Contagious Infectious Disease*, in 4 IOWA PRACTICE SERIES § 5.96 (2015).

One of the more recent HIV transmission cases is *Rhoades v. Iowa*.¹⁵⁶ Rhoades was diagnosed with HIV in 1998.¹⁵⁷ In 2008, Rhoades's doctor told him that "his HIV viral load was nondetectable,"¹⁵⁸ which may have caused Rhoades to believe that he was less infectious.¹⁵⁹ In June 2008, Rhoades met A.P. on a social networking site.¹⁶⁰ On that site, Rhoades' profile stated that he was HIV-negative.¹⁶¹ A.P. invited Rhoades to his home, where they engaged in both protected and unprotected consensual sex.¹⁶² When A.P. found out about Rhoades' HIV status, he went to the hospital for treatment.¹⁶³ Later, A.P. contacted the police and the State charged Rhoades with criminal transmission of HIV, a violation of Iowa Code Section 709C.1.¹⁶⁴ Rhoades was arrested and charged with criminal transmission of HIV, a class B felony in Iowa.¹⁶⁵ Similar class B felonies in Iowa include manslaughter, kidnapping, and robbery.¹⁶⁶ In Rhoades's amicus brief to the Iowa Supreme Court, he stressed the likelihood of HIV transmission.¹⁶⁷ He pointed to studies showing that "unprotected insertive anal sex carries a .06% chance of HIV infection" and using a condom brings that risk down to "nearly zero."¹⁶⁸ Criminalizing such low-risk activities "fail[s] to link culpability and punishment to risk."¹⁶⁹

Because he did not understand the law, Rhoades followed his attorney's advice and entered a guilty plea.¹⁷⁰ Rhoades was unable to post his \$250,000 bail, and was incarcerated for nine months, which included six weeks spent in solitary confinement.¹⁷¹ On September 11, 2009, Rhoades was sentenced to

¹⁵⁶ See *Rhoades v. Iowa*, 848 N.W.2d 22 (Iowa 2014).

¹⁵⁷ *Id.* at 25.

¹⁵⁸ *Id.*

¹⁵⁹ See Joseph Allen Garmon, Comment, *The Laws of the Past Versus the Medicine of Today: Eradicating the Criminalization of HIV/AIDS*, 57 *How. L.J.* 665, 678 (2014).

¹⁶⁰ *Rhoades*, 848 N.W.2d at 25.

¹⁶¹ *Id.*

¹⁶² *Id.* at 25–26 (stating that A.P. performed unprotected oral sex on Rhoades and the two also engaged in protected anal sex where the condom may have failed).

¹⁶³ Young, *supra* note 55.

¹⁶⁴ *Rhoades*, 848 N.W.2d at 26.

¹⁶⁵ Young, *supra* note 55.

¹⁶⁶ *Id.*

¹⁶⁷ Garmon, *supra* note 159, at 678.

¹⁶⁸ *Id.*

¹⁶⁹ McArthur, *supra* note 57, at 724 (internal quotations omitted).

¹⁷⁰ Young, *supra* note 55. Rhoades argued that his attorney was ineffective by allowing Rhoades to plead guilty when there was no evidence that Rhoades intentionally exposed A.P. to HIV. Grant Rodgers, *Rhoades' Conviction Under HIV Transmission Law Will Stand, Iowa Court of Appeals Rules*, *DES MOINES REG.* (Oct. 2, 2013, 9:43 AM), <http://blogs.desmoinesregister.com/dmr/index.php/2013/10/02/rhoades-conviction-under-hiv-transmission-law-will-stand-iowa-court-of-appeals-rules>.

¹⁷¹ Young, *supra* note 55.

twenty-five years in prison.¹⁷² The Supreme Court of Iowa later determined that because Rhoades' viral count was non-detectable there was a question as to whether it was "medically true [that] a person with a non-detectable viral load could transmit HIV."¹⁷³ The court then resentenced Rhoades and ordered that his criminal case be set aside.¹⁷⁴ His twenty-five year sentence was reduced to time spent, plus five years of supervised probation.¹⁷⁵ Additionally, he had to register as a sex offender for the rest of his life, adding to the already heavy stigma surrounding an HIV-positive gay man.¹⁷⁶ If the Iowa Supreme Court had not vacated Rhoades's sentence, he would have been incarcerated for up to twenty-five years in an Iowa state prison for simply having *consensual* sex with his partner despite undertaking extensive HIV treatment to maintain an undetectable viral load and practicing safe sex.¹⁷⁷

B. Minnesota

In 2012, Minnesota prosecuted Daniel Rick for having sex with his partner in violation of Minnesota's anti-transmission statute, even after disclosing that he was HIV-positive.¹⁷⁸ Rick's partner later contracted HIV.¹⁷⁹ The statute prohibits the knowing transfer of a communicable disease,¹⁸⁰ even if the partner is informed of a person's HIV status.¹⁸¹ The Minnesota District Court found in favor of the State and Rick was convicted.¹⁸² Rick appealed and challenged the verdict on the grounds that the statute was ambiguous.¹⁸³ The Minnesota Court of Appeals later reversed his conviction, reasoning that sex between two consenting adults does not warrant punishment.¹⁸⁴ The court found Rick's argument persuasive:

if the legislature was truly concerned with the spread of disease as a public health issue and enacted [section 609.2241] to protect the public health, it would not have required the state to prove that the

¹⁷² *Id.*

¹⁷³ *Rhoades v. Iowa*, 848 N.W.2d 22, 33 (Iowa 2014) (alteration in original).

¹⁷⁴ *Id.*

¹⁷⁵ Young, *supra* note 55.

¹⁷⁶ *See id.*

¹⁷⁷ Garmon, *supra* note 159, at 678.

¹⁷⁸ *State v. Rick*, 821 N.W.2d 610, 611 (Minn. Ct. App. 2012).

¹⁷⁹ *Id.*

¹⁸⁰ MINN. STAT. § 609.2241 (2015).

¹⁸¹ *See id.*

¹⁸² *Rick*, 832 N.W. 2d at 612.

¹⁸³ *Id.* at 613.

¹⁸⁴ *Id.* at 616.

accused lied to his victim about his disease before engaging in sexual penetration in order to convict.¹⁸⁵

This argument supports the theory that these laws were simply passed to oppress gay men rather than to prevent the spread of AIDS.¹⁸⁶ The Minnesota Court of Appeals also held that the statute was ambiguous and that when a statute is ambiguous, or if “doubt exists as to the legislative intent,” the doubt “must be resolved in favor of the defendant,” which is a prime example of the rule of lenity.¹⁸⁷ This strict construction of the Minnesota statute is commendable; however, most courts do not go to such lengths, as seen above in *State v. Musser*.¹⁸⁸

While thirty-two states and two territories have enacted HIV-specific criminal statutes, there have been efforts at the federal level to repeal them.¹⁸⁹ In 2010, the White House proposed a Federal Implementation Plan for the National HIV/AIDS Strategy, which would review existing criminal offenses to determine whether such offenses discriminate against those living with HIV/AIDS.¹⁹⁰ While the plan is not formal legislation, it is a promising approach and positive step towards equality for those who are inevitably discriminated against by criminalization statutes.¹⁹¹

Furthermore, in 2012, Iowa State Senator Matt McCoy called the laws both “draconian” and “outdated” and “introduced a bill to repeal and modernize” Iowa’s law “to include HIV in the contagious disease section of the Iowa Code,” lessening the penalties for transmission.¹⁹² His bill did not make it out of subcommittee,¹⁹³ but it was another step towards equality and non-discrimination for those living with HIV/AIDS. Also in 2012, at the Nineteenth International AIDS Conference in Washington, D.C., the Center for HIV Law

¹⁸⁵ *Id.*

¹⁸⁶ Graham Gremore, *Are Criminal HIV Transmission Laws Outdated?*, QUEERTY (Oct. 28, 2014), <http://www.queerty.com/are-criminal-hiv-transmission-laws-outdated-20141028>.

¹⁸⁷ *Rick*, 832 N.W.2d at 615.

¹⁸⁸ *See State v. Musser*, 721 N.W.2d 734, 757 (Iowa 2006).

¹⁸⁹ Sharon Cowan, *Offenses of Sex or Violence? Consent, Fraud, and HIV Transmission*, 17 NEW CRIM. L. REV. 135, 137 (2014).

¹⁹⁰ *See* WHITE HOUSE, NATIONAL HIV/AIDS STRATEGY: FEDERAL IMPLEMENTATION PLAN 26 (2010), <http://www.whitehouse.gov/files/documents/nhas-implementation.pdf>.

¹⁹¹ *Id.* at 1–5.

¹⁹² Young, *supra* note 55.

¹⁹³ *Id.*

and Policy released a statement “calling on federal and state officials to modernize [HIV] laws and eliminate the HIV-specific statutes.”¹⁹⁴

Unfortunately, there are some who are opposed to repealing criminalization laws. For instance, Scott Burns, the former executive director of the National District Attorneys Association, feels that criminal statutes are necessary when people knowingly and intentionally infect someone with HIV.¹⁹⁵ However, the problem with Burns’s argument is that it is nearly impossible to prove that someone intentionally or knowingly transmitted HIV, making it a crime for people like Rhoades who do not intentionally transmit the virus.

III. INTERNATIONAL APPROACH TO HIV TRANSMISSION LAWS

This Part will look at the international approach to HIV transmission laws, specifically in Uganda, Australia, and Niger, and the effects they have on HIV-positive individuals.

A. *Uganda*

The AIDS epidemic in Uganda began in the late 1980s.¹⁹⁶ After Uganda’s civil war and subsequent decolonization, health services collapsed and Uganda could not afford to rebuild them.¹⁹⁷ In 1988, more than five thousand Ugandans were *officially* diagnosed with the disease, but the real figure was closer to forty percent of all individuals examined in Ugandan hospitals for a variety of health reasons.¹⁹⁸

In the early 1990s, studies showed that deaths due to AIDS would exceed the country’s birth rate within a few decades.¹⁹⁹ As of 2007, the Joint United Nations Programme on HIV/AIDS (UNAIDS) estimated that 810,000 of Ugandan adults aged fifteen to forty-nine had acquired HIV.²⁰⁰ In 2010, the East African Community began drafting a regional HIV law that would criminalize HIV transmission in Kenya, Uganda, Tanzania, Burundi, and Rwanda.²⁰¹ Following suit, Uganda has also proposed legislation that would

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ GRMEK, *supra* note 9, at 177–78.

¹⁹⁷ *Id.* at 177.

¹⁹⁸ *Id.* at 178 (emphasis added).

¹⁹⁹ Leech, *supra* note 8, at 689.

²⁰⁰ Kim Thuy Seelinger, *Violence Against Women and HIV Control in Uganda: A Paradox of Protection?*, 33 HASTINGS INT’L & COMP. L. REV. 345, 345–46 (2010).

²⁰¹ *Id.* at 366–67.

require disclosure of HIV status to “any third party with whom an HIV infected person is in close and continuous contact, including but not limited to a spouse.”²⁰² The proposal goes one step further than simply requiring an individual to disclose his or her status.²⁰³

In 2008, the Ugandan Committee on HIV/AIDS and Related Matters considered the country’s HIV and AIDS Prevention and Control Bill.²⁰⁴ As of early 2010, the proposal still remained under consideration.²⁰⁵ The 2009 version of the proposal included a clause prohibiting discrimination against HIV-positive individuals in “employment, insurance, housing, etc.”²⁰⁶ Part IV of the bill criminalizes HIV transmission and proscribes punishment for attempting to transmit HIV to another individual, including felony punishment.²⁰⁷ The National Forum of People Living with HIV/AIDS Networks in Uganda has stated that criminalizing HIV transmission will affect a woman’s willingness to disclose her HIV-positive status and lead to more frequent cases of “silent” transmission in Uganda.²⁰⁸ While the representatives specifically noted the effects on women,²⁰⁹ this Comment notes that the laws criminalizing HIV will likely have similar effects on HIV-positive homosexual men.

Uganda’s HIV and AIDS Prevention and Control Bill is aimed at prohibiting discrimination based on HIV status, but in 2009, the stigma surrounding HIV-positive gay men was at an all-time high in Uganda. For example, on October 13, 2009, David Bahati of the Ugandan Parliament introduced the Anti-Homosexuality Bill of 2009.²¹⁰ The bill seeks to toughen punishment for homosexual acts.²¹¹ Uganda already has strict punishments in place for gay sex, but the bill would further intensify those punishments.²¹² For

²⁰² Obiajulu Nnamuchi & Remigius N. Nwabueze, *Duty to Warn of the Risk of HIV/AIDS Infection in Africa: An Appropriate Legal Response?*, 22 ANNALS HEALTH L. 386, 389 (2013) (internal quotations omitted).

²⁰³ In turn, Niger has adopted this proposal, as discussed later in Part III.C.

²⁰⁴ Seelinger, *supra* note 200, at 367.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 377.

²⁰⁸ *Id.* at 379.

²⁰⁹ *See id.*

²¹⁰ Xavier B. Lutchmie Persad, *Homosexuality and Death: A Legal Analysis of Uganda’s Proposed Anti-Homosexuality Bill*, 6 FLA. A & M U.L. REV. 135, 138 (2010).

²¹¹ *See generally* Dylan Harris, *Death by Injustice: Uganda’s Anti-Homosexuality Laws, Christian Fundamentalism, and the Politics of Global Power*, 3 CATALYST (2013).

²¹² Persad, *supra* note 210, at 138–39.

instance, the bill would increase the current seven-year prison sentence for “consensual same-sex relations” to life imprisonment.²¹³ The bill would also impose the death penalty for “aggravated homosexuality,” which includes “serial offenders,” or people who have previously been convicted of any crimes connected with homosexuality.²¹⁴ HIV-positive status is included in the definition of “aggravated homosexuality.”²¹⁵ The bill was popular among Ugandan citizens and was almost unanimously favored in the Ugandan Parliament.²¹⁶ However, the bill expired after it failed to come to a vote before the Eighth Parliament in 2011.²¹⁷ After the bill was introduced, homophobia worsened in Uganda and violence against homosexuals escalated.²¹⁸ The provisions of Uganda’s HIV and AIDS Prevention and Control Bill criminalizing HIV transmission would arguably expand the already-high stigma against homosexual men in the country.

In May 2014, Uganda’s HIV and AIDS Prevention and Control Bill passed with some opposition.²¹⁹ Ambassador Deborah Birx, the United States Global AIDS Coordinator, was opposed. She felt that the provisions criminalizing the “attempted” transmission of HIV and the “intentional” transmission of HIV, which mandate imprisonment for ten years, were particularly troubling.²²⁰ She stressed that over the past thirty years, stigma, discrimination, and fear have deterred individuals from accessing necessary HIV/AIDS treatment.²²¹ She believes that these provisions concerning the criminalization of HIV/AIDS will expunge the progress made by HIV prevention programs,²²² and that the bill is

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Lucy Heenan Ewins, “Gross Violation”: *Why Uganda’s Anti-Homosexuality Act Threatens its Trade Benefits with the United States*, 34 B.C. INT’L & COMP. L. REV. 147, 148 (2011) (stating that “[a]ggravated homosexuality” is punishable by death).

²¹⁶ Daniel Englander, *Protecting the Human Rights of LGBT People in Uganda in the Wake of Uganda’s “Anti Homosexuality Bill, 2009,”* 25 EMORY INT’L L. REV. 1263, 1263 (2011).

²¹⁷ *Id.*

²¹⁸ *Id.* at 1264; *see also* Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 314 (D. Mass. 2013). The amended complaint states that governmental and media persecution towards the LGBT community increased despite the failure of the Anti-Homosexuality Bill to pass. *Sexual Minorities Uganda*, 960 F. Supp. 2d at 314.

²¹⁹ Press Release, The U.S. President’s Emergency Plan for AIDS Relief (PEPFAR), Statement from Ambassador Deborah Birx, U.S. Global AIDS Coordinator, on the Passage of the HIV Prevention and Control Act by the Ugandan Parliament (May 14, 2014), <http://www.pepfar.gov/press/releases/2014/226095.htm>.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

“regressive” because it undermines the protection of fundamental human rights.²²³

It is clear from Uganda’s high rate of HIV/AIDS that Uganda needs some form of HIV-specific legislation. The question is whether the legislation should criminalize the intentional transmission of HIV/AIDS via the HIV and AIDS Prevention and Control Bill (2009) or establish public health programs, as suggested by Ambassador Deborah Birx. From the early 1990s through 2001, public health programs were successful in Uganda.²²⁴ After enacting aggressive programs to fight the disease, the HIV rate decreased by ten percent.²²⁵ The UNAIDS Reference Group on HIV and Human Rights suggests that the existing criminal laws should be used to address cases of intentional transmission of HIV instead of creating HIV-specific laws that criminalized “HIV-related behaviors.”²²⁶ The case of Uganda demonstrates that even without HIV control legislation, courts will have to deal with cases of the intentional transmission of HIV.²²⁷ For example, a man was given a fourteen-year prison sentence after having sex with a mentally ill nineteen-year-old woman, infecting her with HIV/AIDS.²²⁸ Under the Ugandan Penal Code, anyone who knowingly has sex with a mentally ill woman will be imprisoned for fourteen years.²²⁹ The man was drunk and the woman’s parents offered him a place to stay.²³⁰ In the middle of the night, well aware of his status, he raped the woman and infected her with HIV/AIDS.²³¹ While the intentional spread of HIV/AIDS is not covered by the Penal Code, the HIV/AIDS Prevention and Control Bill seeks to make it a criminal offense.²³² However, the distinction between such an intentional act with a mentally ill woman and a consensual sexual encounter with a trusted partner must be made to guarantee that criminal laws are not discriminatory.

²²³ *Id.*

²²⁴ Heneke, *supra* note 102, at 776.

²²⁵ *Id.*

²²⁶ Seelinger, *supra* note 200, at 380.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ Dradenya Amazia, *Man Jailed for Infecting Girl with HIV*, HIV JUST. NETWORK (Dec. 3, 2008), <http://www.hivjustice.net/news/uganda-man-jailed-for-infecting-mentally-ill-woman-with-hiv-fuels-proposed-wilful-transmission-law-debate/>.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Annotated Legal Bibliography on Gender*, 17 CARDOZO J.L. & GENDER 197, 253 (2010).

B. Australia

Since Australian colonization in the late 1700s, healthcare has been a concern among government authorities.²³³ The case of HIV/AIDS was no different, and the Australian government paid significant attention to HIV/AIDS when it first appeared there.²³⁴ Among the first steps taken by the government to prevent the spread of HIV was quarantine.²³⁵ Due to panic in parts of Australian society, individuals with HIV/AIDS were systematically detained.²³⁶

South Australia was the first Australian state to decriminalize homosexual activity.²³⁷ In 1984, they passed an equal opportunity bill barring discrimination on the grounds of sexual orientation.²³⁸ By 1992, however, four provinces in Australia had passed legislation that specifically criminalized the transmission of HIV.²³⁹ The governments of Queensland and New South Wales enacted these laws in response to the public demand for government action to stop the spread of AIDS.²⁴⁰ However, scholars have criticized these laws as “ill-conceived actions.”²⁴¹ For example, some critics have argued that one provision, which makes it an offense for individuals to have sex if they know they are HIV-positive, will likely lead individuals with HIV to hide their status and not seek advice or treatment.²⁴²

In 1984, Queensland passed the Health Act Amendment Act (No. 2).²⁴³ The law imposed a \$10,000 fine and sentenced individuals who “knowingly

²³³ Carlos Scott Lopez, *Prolonged Administrative Detention of Illegal Arrivals in Australia: The Untenable HIV/AIDS Justification*, 4 WASH. U. GLOBAL STUD. L. REV. 263, 293 (2005).

²³⁴ *Id.* at 294.

²³⁵ *Id.*; see also Peter Margulies, *Asylum, Intersectionality, and AIDS: Women with HIV as a Persecuted Social Group*, 8 GEO. IMMIGR. L.J. 521, 549 (1994); MICHAEL COSTA, JULIE HAMBLIN, MARK DUFF & DAVID PATTERSON, AUSTRALIAN HIV/AIDS LEGAL GUIDE 1, 13, 28 (1991).

²³⁶ See Lopez, *supra* note 233, at 295–96.

²³⁷ ROSSER, *supra* note 34, at 9.

²³⁸ *Id.*

²³⁹ Tierney, *supra* note 85, at 506; see also John M. Dwyer, *Legislating AIDS Away: The Limited Role of Legal Persuasion in Minimizing the Spread of the Human Immunodeficiency Virus*, 9 J. CONTEMP. HEALTH L. & POL'Y 167, 167 (1993).

²⁴⁰ Tierney, *supra* note 85, at 506; see also Dwyer, *supra* note 239, at 168 (stating that the government imposed such laws because, as the Premier of an Australian State noted, “they [the public] expect me to be tough about this thing”).

²⁴¹ Tierney, *supra* note 85, at 506.

²⁴² Gaye T. Lansdell, *What Have We Achieved? Reviewing AIDS-Related Law and Policy in Australia*, 18 ANGLO-AM. L. REV. 201, 212–213 (1989).

²⁴³ Tierney, *supra* note 85, at 506; see *Health Act Amendment Act (No. 2) 1984, No. 103 s 3(f), (g)* (Austl.).

infected” another person with HIV to prison for two years.²⁴⁴ The Act was repealed and replaced with an almost identical Health Act Amendment Act in 1988.²⁴⁵

The New South Wales criminal provision is even more detailed than the Queensland Act. The New South Wales statute makes it a crime for a person with AIDS to have sex with another person.²⁴⁶ The statute provides one defense, which is available only if the other person was informed of the individual’s status prior to intercourse and voluntarily agreed to accept the risk of having sex.²⁴⁷ While the penalty is \$5,000, imprisonment is not a punishment as in the Queensland Act.²⁴⁸ South Australia and Victoria have similarly passed legislation criminalizing the transmission of HIV, which require that anyone suffering from AIDS take all “reasonable measures to prevent transmission.”²⁴⁹ Violations of both laws carry a \$10,000 fine.²⁵⁰ Victoria goes a step further and makes it an offense to “knowingly or recklessly” infect another person with an infectious disease, including HIV, and imposes a \$20,000 fine;²⁵¹ there is one defense in the statute, which applies only if the victim knew about the individual’s status before engaging in sex, and nonetheless accepted the risks.

The Australian statutes in all four provinces are arguably vague and dangerous,²⁵² leaving room for prejudice that could affect the decision to prosecute and, ultimately, convict HIV-infected persons.²⁵³ For example, in *R v. Reid*, the appellant’s appeal of his ten-year and six-month prison conviction was dismissed despite scant evidence that the appellant had the motive and desire to transmit HIV to the complainant.²⁵⁴ The appellant was HIV-positive and had intercourse with the complainant, transmitting HIV to him.²⁵⁵ The complainant said that the appellant assured him that he was not HIV-positive before having sex with him, and that without this assurance, he would not have

²⁴⁴ Tierney, *supra* note 85, at 506; *see also Health Act Amendment Act (No. 2)*, *supra* note 243, s 3(i), (ii).

²⁴⁵ Tierney, *supra* note 85, at 507; *see also Health Act Amendment Act (No. 3) 1988* s 48 (Austl.).

²⁴⁶ Tierney, *supra* note 85, at 507.

²⁴⁷ *Id.*

²⁴⁸ Marlene C. McGuirl & Robert N. Gee, *AIDS: An Overview of the British, Australian, and American Responses*, 14 *HOFSTRA L. REV.* 107, 120 (1985).

²⁴⁹ Tierney, *supra* note 85, at 507; *see Public and Environmental Health Act 1987* s 37(1) (Austl.).

²⁵⁰ Tierney, *supra* note 85, at 507.

²⁵¹ *Id.* at 508; *see Health (General Amendment) Act 1988* s 120(1) (Austl.).

²⁵² Tierney, *supra* note 85, at 508.

²⁵³ *Id.*

²⁵⁴ *See generally R v Reid* [2006] 202 QCA 1, ¶ 87 (Austl.).

²⁵⁵ *Id.* ¶ 3.

had sex with him.²⁵⁶ The appellant was convicted of unlawfully transmitting HIV with the intent to do so, in violation of the Criminal Code (Qid), § 317(b).²⁵⁷ On appeal, the appellant argued that there was no evidence that he was “motivated by a subjective desire” to transmit HIV to the complainant.²⁵⁸ He further argued that the sentence of more than ten years was excessive.²⁵⁹ However, the Court of Appeal of the Supreme Court of Queensland held that the appellant had such a motive to transmit HIV and upheld the conviction.²⁶⁰ Section 317(b) of the Criminal Code defines “intent” as follows: “the accused must be proved to have meant to transmit the disease: his actions must have been designed to bring about that result.”²⁶¹

The dissent found that the appellant lost his chance for acquittal because the appellant had to have known that the transmission of HIV was “probable or likely” during unprotected sex, which the jury was not told.²⁶² Proving intent is nearly impossible; no jury knows exactly what an appellant’s intent was or what they were thinking at the time of the act.²⁶³ However, the concurrence felt that there was no reason to further explore or elaborate on the meaning behind intent.²⁶⁴ The dissent’s argument in *R v. Reid* is most aligned with non-discrimination towards gay men. The majority opinion could lead to the incarceration of innocent gay men who had consensual sex with someone because it is extremely difficult to determine whether someone had the *intent* to intentionally transmit HIV to a partner who consented to sex. The likelihood that an innocent man is going to jail when he engages in consensual safe sex and accidentally transfers HIV to his partner is high.

C. Niger

HIV/AIDS is not prevalent in Niger.²⁶⁵ The U.N. Human Development Report noted that only 0.5% of Niger’s population between the ages of fifteen

²⁵⁶ *Id.*

²⁵⁷ *Id.* ¶ 24.

²⁵⁸ *Id.* ¶ 52.

²⁵⁹ *Id.* ¶ 2.

²⁶⁰ *Id.* ¶ 87.

²⁶¹ *Id.* ¶ 10.

²⁶² *Id.* ¶ 11 (McPherson, JA, dissenting).

²⁶³ *Id.* ¶ 4.

²⁶⁴ *Id.* ¶ 3–4 (Chesterman, J, and Keane, JJA, concurring).

²⁶⁵ Thomas A. Kelley, *Exporting Western Law to the Developing World: The Troubling Case of Niger*, 39 GEO. WASH. INT’L L. REV. 321, 334 (2007).

and forty-nine is infected with HIV;²⁶⁶ as of 2012, only 0.1% of both female and males between the ages of fifteen and twenty-four were infected with HIV.²⁶⁷ Though the percentage of HIV-positive individuals in Niger is not particularly high, these statistics do not accurately reflect the population's actual HIV prevalence. Data from 2014 show that only sixteen percent of males in Niger aged fifteen- to twenty-four years-old had comprehensive knowledge of HIV/AIDS in terms of a true comprehension of the disease and its consequences.²⁶⁸ With such a low percentage of the population having a complete understanding of the virus, it is hard to believe that they could understand that criminalizing the transmission of HIV/AIDS would be the best approach.

Since 1999, Niger has passed a new Constitution, criminal code, and Code of Criminal Procedure.²⁶⁹ The reformed criminal code is an attempt to modernize Niger by criminalizing and penalizing the intentional transmission of HIV, despite the low prevalence of HIV in the country.²⁷⁰ The reforms are intended to bring Niger up to date on “legal doctrines that have been adopted by much of the Western world over the past forty years.”²⁷¹ For example, the new code will create penalties for the intentional transmission of HIV.²⁷² The goal of changing the criminal code is to protect human rights and individual liberties and to abandon any laws that are contrary to that idea.²⁷³ However, it is arguable that imposing penalties for intentional transmission of HIV has the opposite effect because it ignores human rights and liberties, which ultimately harms homosexual men.

West and Central Africa derive their HIV transmission provisions from The Action for West Africa Region or “AWARE-HIV/AIDS” model,²⁷⁴ which

²⁶⁶ U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2014, SUSTAINING HUMAN PROGRESS: REDUCING VULNERABILITIES AND BUILDING RESILIENCE 191 (2014) [hereinafter HUMAN DEVELOPMENT REPORT 2014].

²⁶⁷ *Id.* at 187.

²⁶⁸ Obiajulu Nnamuchi, *Millennium Development Goal 6 and the Trifecta of HIV/AIDS, Malaria, and Tuberculosis in Africa: A Human Rights Analysis*, 42 DENVER J. INT'L L. & POL'Y 247, 257 (2014).

²⁶⁹ Kelley, *Exporting Western Law to the Developing World*, *supra* note 265, at 329–30.

²⁷⁰ *Id.* at 331–34.

²⁷¹ Thomas Kelley, *Squeezing Parakeets into Pigeon Holes: The Effects of Globalization and State Legal Reform in Niger on Indigenous Zarma Law*, 34 N.Y.U. J. INT'L L. & POL. 635, 695 (2002).

²⁷² *Id.*

²⁷³ *Id.* at 696.

²⁷⁴ Nnamuchi & Nwabueze, *supra* note 202, at 389.

itself is fashioned from UNAIDS's proposals.²⁷⁵ The model law, which is commonly known as the N'djamena model law, was created in September 2004 in collaboration with other regions.²⁷⁶ One highlighted goal of the AWARE-HIV/AIDS model was to guarantee individual human rights.²⁷⁷ For example, the model law includes seven chapters, some of which contain provisions for mandatory testing, health and counseling services, and prohibitions on discrimination based on an individual's suspected HIV status.²⁷⁸ However, it has been noted that the human rights provisions in the law are weak at best.²⁷⁹ Furthermore, the law never explicitly refers to human rights and is silent on important public interests such as prisoners' rights to condoms and women's rights.²⁸⁰

Article 26 of the AWARE-HIV/AIDS model requires someone with HIV to disclose his or her status to a spouse or regular partner as soon as possible, or at most within six weeks of the diagnosis.²⁸¹ Thus, the legislation in Niger firmly imposes the duty to warn.²⁸² Many recent statutes in Africa are modeled on the AWARE-HIV/AIDS model.²⁸³ The AWARE-HIV/AIDS model is heavily influenced by the U.S. model, thus countries in Africa that adopt the AWARE-HIV/AIDS model have started creating HIV criminalization statutes.²⁸⁴ However, Sierra Leone, which adopted a criminalization statute, has recently repealed it, and repeal efforts in several other jurisdictions are reported to be ongoing.²⁸⁵

UNAIDS has criticized HIV-specific criminalization statutes on an international scale,²⁸⁶ and has recommended several changes to the AWARE-

²⁷⁵ Leslie Pickering Francis & John G. Francis, *Criminalizing Health-Related Behaviors Dangerous to Others? Disease Transmission, Transmission-Facilitation, and the Importance of Trust*, 6 CRIM. L. & PHIL. 47, 53 (2012).

²⁷⁶ Robert Johnson, *The Model Law on HIV in Southern Africa: Third World Approaches to International Law Insights into a Human Rights-Based Approach*, 9 AFR. HUM. RTS. L.J. 129, 145 (2009).

²⁷⁷ *Id.*; see also ACTION FOR W. AFRICA REGION HIV/AIDS, PROMISING AND BEST PRACTICES IN HIV/AIDS PREVENTION AND CARE FOR WEST AND CENTRAL AFRICA 15 (2006).

²⁷⁸ Johnson, *supra* note 276, at 145.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ Nnamuchi & Nwabueze, *supra* note 202, at 389.

²⁸² *Id.*

²⁸³ Francis & Francis, *supra* note 275, at 53.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.* (explaining that UNAIDS's goal was to cut the number of HIV-specific criminalization statutes in half by the end of 2015).

HIV/AIDS model.²⁸⁷ For example, UNAIDS opposes criminalization when the risk of transmission is low, such as when protection is used.²⁸⁸ UNAIDS's stance on criminalizing HIV/AIDS parallels that of Ambassador Deborah Birx, who feels that such laws undermine the work that has been done by HIV prevention programs,²⁸⁹ and instead replaces them with means that have not proven effective in preventing HIV transmission.²⁹⁰ In this way, the UNAIDS approach parallels the majority decision in the *Rhoades* case.²⁹¹

IV. SOLUTION

Part IV examines a possible solution in the United States to lessen the discriminatory nature of HIV transmission laws. It has been more than twenty years since Ronald Reagan's Presidential Commission on the HIV Epidemic advised states to create HIV-specific criminal laws.²⁹² While some states have continued to advocate for and adopt HIV-specific criminal statutes, others believe that repeal is the more appropriate route.²⁹³ The appropriate solution is to create a new criminal statute, which can accomplish the same goals as existing HIV-specific criminal statutes but can do so without discriminating against gay men.

A. *New Recommended Model Criminal Statute*

The legislation proposed in this Comment would be created entirely from existing global HIV-specific criminal laws, taking parts of each to create a new law that would no longer be predominately discriminatory on its face or in practice.

1. *Intent*

If laws against HIV transmission are put in place, they must include intent requirements. Juries should not be permitted to presume "intent" simply because a person who knows that they are HIV-positive engages in sexual activities. The point is not to criminalize having sex while HIV-positive but to

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ Press Release, *supra* note 219.

²⁹⁰ Johnson, *supra* note 276, at 146.

²⁹¹ See *supra* text accompanying notes 156–77.

²⁹² Sara Klemm, *Keeping Prevention in the Crosshairs: A Better HIV Exposure Law for Maryland*, 13 J. HEALTHCARE L. & POL'Y 495, 504 (2010).

²⁹³ *Id.*

protect people from willful attempts to transmit HIV. Language from the Queensland Criminal Code § 317(b) provides a good model for legislation: “an accused must be proved to have meant to transmit the disease; that is, his or her actions must have been designed to bring about that result.”²⁹⁴ A criminal code should be modeled after this intent requirement to remove ambiguity. This language ensures that a person will not be convicted unless they intended to transmit HIV to their partner during sex. Without such a clear intent requirement, a statute would allow for innocent people to be convicted when their intent is simply to have sex with their partner.

2. *Level of Scrutiny*

When a law is aimed at a specific class, states must prove that a government interest meets a certain level of scrutiny—rational basis (the lowest level of scrutiny), intermediate scrutiny (the middle level of scrutiny), or strict scrutiny (the highest level of scrutiny).²⁹⁵ If the state fails to meet the designated level of scrutiny, the statute will be deemed unconstitutional.²⁹⁶ Classifications that do not involve a designated suspect class are subject to rational basis review, the easiest test for the government to prove.²⁹⁷ Thus, most statutes survive the rational basis test, which only requires that the law is rationally related to a “legitimate” government interest.²⁹⁸ In contrast, to survive strict scrutiny, the government must prove that it has a compelling interest and that the law is necessary (i.e., “the only way”) to accomplish this interest.²⁹⁹ Although gay men are not considered a suspect class and are therefore subject to rational basis review, HIV-specific criminal statutes inherently create a suspect class because they are discriminatory in practice.³⁰⁰ Rather than rational basis review, these laws deserve either intermediate level

²⁹⁴ *R v. Reid*, [2006] 202 QCA 1, 6 (Austl.).

²⁹⁵ Erin M. O’Toole, *HIV-Specific Crime Legislation: Targeting an Epidemic for Criminal Prosecution*, J.L. & HEALTH 183, 202 (1995).

²⁹⁶ *Id.*; see also Joan A. Lukey & Jeffrey A. Smagula, *Do We Still Need a Federal Equal Rights Amendment?*, 44 BOS. B.J. 10, 26 (2000).

²⁹⁷ O’Toole, *supra* note 295, at 202; see also *Finch v. Commonwealth Health Ins. Con. Auth.*, 459 Mass. 655, 668–69 (2011) (stating that strict scrutiny is used only when a statute “burdens the exercise of a fundamental right” or discriminates on the basis of a suspect class).

²⁹⁸ Matthew V. Daley, *A Flawed Solution to the Sex Offender Situation in the United States: The Legality of Chemical Castration for Sex Offenders*, 5 IND. HEALTH L. REV. 87, 104–05 (2008) (stating that courts rarely overturn a statute based on rational basis review).

²⁹⁹ Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 360 (2006).

³⁰⁰ O’Toole, *supra* note 295, at 203–04.

scrutiny or strict scrutiny. If all else fails, a rigorous rational basis scrutiny should be applied.

Without a higher level of scrutiny, these laws will be left intact, despite the fact that they are discriminatory on their face. There are three ways that intentional discrimination can be established: (1) the law is expressly discriminatory on its face, (2) the law is neutral on its face but it is discriminatory in practice, or (3) the law is neutral on its face and administered appropriately but it was enacted with discrimination as its sole purpose.³⁰¹ Strict scrutiny should be applied because it is the hardest level for the government to overcome and is invoked when a fundamental right is involved.³⁰² Here, the Fourteenth Amendment is compromised when these criminal laws are imposed, thus various fundamental rights are involved. However, intentional discrimination must be established for a suspect class to receive strict scrutiny.³⁰³ The laws criminalizing the transmission of HIV/AIDS are discriminatory in practice because they disparately affect gay men, requiring strict scrutiny review.

Alternatively, intermediate level scrutiny is an option. It requires that the classification be “substantially related to an important government objective.”³⁰⁴ President Barack Obama stated that classifications based on sexual orientation should be subject to a higher level of scrutiny and that intermediate is the level that should be applied.³⁰⁵

If neither strict scrutiny nor intermediate scrutiny can be applied, the next best approach to these laws would be to apply rigorous rational basis review. Courts have applied rigorous rational basis review to various situations, including “same-sex marriage, adoption by gay men and lesbians, and intimate sexual relations.”³⁰⁶ Rigorous rational basis review is triggered when animus exists towards a particular group.³⁰⁷ Homosexual men and women are arguably

³⁰¹ *Id.* at 203.

³⁰² *Id.*; see also Martha I. Morgan, *Fundamental State Rights: A New Basis for Strict Scrutiny in Federal Equal Protection Review*, 17 GA. L. REV. 77, 84 (1982) (citing *Rodriguez*, which held fundamental rights to be a basis for strict scrutiny).

³⁰³ See O’Toole, *supra* note 295, at 203.

³⁰⁴ Tina C. Campbell, *The “Determination of Marriage Act”: A Reasonable Response to the Discriminatory “Defense of Marriage Act,”* 58 LOY. L. REV. 939, 961 (2012).

³⁰⁵ *Id.*

³⁰⁶ Miranda Oshige McGowan, *Lifting the Veil on Rigorous Rational Basis Scrutiny*, 96 MARQ. L. REV. 377, 377 (2012).

³⁰⁷ *Id.* at 409.

part of a “structural group.”³⁰⁸ Structural groups come together because of common “structural inequalities” that oppress them.³⁰⁹ Arguably, the laws criminalizing HIV transmission do just that to gay men—oppress them. It has been argued that structural groups need protection the most when they publicly protest some form of legal treatment.³¹⁰ The recent cases involving Rhoades, Rick, and Musser and their public protests against HIV transmission statutes show that they need protection, which is not available in existing laws.³¹¹ Rigorous rational basis review forbids laws that restrict a particular group’s rights by requiring the state to prove both harm and that the regulation is narrowly tailored to prevent such harm.³¹² Furthermore, rigorous rational basis review requires the state to consider how such laws would affect everyone in a community.³¹³ This means that that the state must “take into account the social consequences of the state action.”³¹⁴ This would force legislators to draft laws in such a way as to guarantee that they would not stem from animus or hate towards gay men.

It is unclear whether strict scrutiny, intermediate, or rigorous rational basis review would be applied to classifications based on sexual orientation.³¹⁵ Regardless of which standard of review is used, these laws would become significantly vulnerable.

3. *Duty to Disclose*

Statutes should avoid penalizing individuals for having consensual sex with the knowledge that they are HIV-positive because it leaves HIV-positive individuals open to revenge suits by former sexual partners who knew their HIV status but had sex with them anyway. Legally a person should be able to consent to the risk of exposure to the virus. Thus, the duty to warn a sexual partner should be incorporated into any HIV-specific criminal statute. Some U.S. states,³¹⁶ Niger, and Uganda incorporate a duty to warn into their laws. In

³⁰⁸ *Id.* at 427.

³⁰⁹ *Id.*

³¹⁰ *Id.* at 430–31.

³¹¹ See discussion *supra* Part II.

³¹² McGowan, *supra* note 306, at 431.

³¹³ *Id.* at 432.

³¹⁴ *Id.*

³¹⁵ *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 985 (N.D. Cal. 2012).

³¹⁶ Jody B. Gabel, *Liability For “Knowing” Transmission of HIV: The Evolution of a Duty to Disclose*, 21 FLA. ST. U.L. REV. 981, 991 (1994) (citing *United States v. Womack*, 27 M.J. 630 (1988), which held that the duty to disclose one’s HIV positive status to both present and future partners was a reasonable requirement to minimize the spread of HIV and AIDS).

the United States, most state statutes require an HIV-positive individual to prove that the person they infected knew of their HIV-positive status. Other states, such as Maryland and Washington, are silent as to consent or disclosure, allowing for an increased risk that innocent people will face criminal liability for consensual acts.³¹⁷ In comparison, both Uganda and Niger have proposed legislation that requires disclosure of an individual's HIV status to their partner. Niger's law is the model for the ideal statute.³¹⁸ Article 26 of the AWARE-HIV/AIDS model requires someone with HIV to disclose their status to a "spouse or regular sexual partner as soon as possible and at most within six weeks of the diagnosis."³¹⁹ This unambiguous standard would ensure that a third party was aware that the individual was infected and that the third party willingly consented to sex with that person after being warned.

4. *Defenses*

Providing affirmative defenses can be an effective way to address criminal HIV transmission issues³²⁰ and guarantee that these criminal laws will be applied in a non-discriminatory manner. Furthermore, because intent is so arbitrary and hard to prove, the defenses of disclosure, informed consent, and condom use can protect the fundamental rights of HIV-positive individuals. New South Wales's criminal provision is one of the few statutes that makes it a crime for a person with AIDS to have sex with an uninfected person, and makes the defense of disclosure and consent available.³²¹ The defense is available if the sexual partner was informed of the HIV-positive individual's status prior to sex and voluntarily agreed to accept the risk associated with having sex.³²² For instance, courts in New South Wales have held that fully informed consent could be a defense for reckless transmission of HIV.³²³ They have also held that this defense should not be extended to those who intentionally transmit the disease.³²⁴ Without this defense, there would be no opportunity for an HIV-positive individual to bring evidence that they

³¹⁷ Md. Code Ann., *supra* note 71; Wash. Rev. Code Ann., *supra* note 71.

³¹⁸ HUMAN DEVELOPMENT REPORT 2014, *supra* note 266, at 187 (stating that as of 2012, approximately 0.1% of people between the ages of fifteen and twenty-four were infected).

³¹⁹ Nnamuchi & Nwabueze, *supra* note 202, at 389.

³²⁰ Klemm, *supra* note 292, at 504.

³²¹ Tierney, *supra* note 85, at 507.

³²² *Id.*

³²³ Dennis J. Baker, *The Moral Limits of Consent as a Defense in the Criminal Law*, 12 NEW CRIM. L. REV. 93, 94 (2009).

³²⁴ *Id.*

disclosed their status to their partner and that their partner accepted the risk and consented to sex.

Condom use is an additional affirmative defense that can be asserted.³²⁵ It has been argued that an HIV-positive individual who failed to disclose his or her status, but did wear a condom, should be exempt from liability.³²⁶ Disclosure, informed consent, and condom use are all non-discriminatory affirmative defenses that could help reduce HIV transmission and should thus be incorporated into statutes that criminalize HIV transmission.

5. Penalties

Penalties accompanying criminal HIV transmission laws create two major concerns. The first concern with such statutes is their lack of consistency in punishment across states.³²⁷ Because prosecutors have discretion regarding what offenses to charge, criminal HIV transmission may be prosecuted as attempted murder³²⁸ in one jurisdiction and assault³²⁹ in another. The discretion in implementing HIV transmission laws can lead to arbitrary punishment.

The second and more pressing concern is the harshness of penalties associated with such statutes. Iowa State Senator Matt McCoy introduced a bill in 2012 that modernized Iowa's criminal transmission laws and lowered penalties.³³⁰ The bill relied on a tiered sentencing system rather than a "one size fits all" approach:³³¹ "If someone *intends* to transmit the virus *and* transmission actually takes place it is still a class B felony, if there is intent but no transmission it is a [class] D felony and if there is no intent but transmission takes place, it is also a class D felony."³³² Furthermore, under the new law, convicted individuals are no longer required to register as sex offenders for the

³²⁵ Klemm, *supra* note 292, at 523.

³²⁶ Isabel Grant, *The Boundaries of the Criminal Law: The Criminalization of the Non-Disclosure of HIV*, 31 DALHOUSIE L.J. 123, 177 n.193 (2008) (arguing that exemption from liability should occur because "the public interest in promoting the use of condoms outweighs the public interest in criminalizing the failure to disclose where a condom is used").

³²⁷ Michael L. Closten et al., *Criminalization of an Epidemic: HIV-AIDS and Criminal Exposure Laws*, 46 ARK. L. REV. 921, 954 (1994).

³²⁸ *State v. Haines*, 545 N.E. 2d 834, 835 (Ind. Ct. App. 1989).

³²⁹ *Commonwealth of Pa. v. Brown*, 413 Pa. Super. 421, 431 (1992).

³³⁰ Young, *supra* note 55.

³³¹ *Bill Introduced to Reform Iowa's HIV Criminalization Law*, KWWL (Feb. 18, 2014, 3:13 PM), <http://www.kwwl.com/story/24755264/2014/02/18/bill-introduced-to-reform-iowas-hiv-criminalization-law>.

³³² *Id.* (emphasis added) (quoting Tami Haught of Community HIV/Hepatitis Advocates of Iowa Network).

entirety of their lives; a “retroactive clause” within the bill would remove anyone from the sex offender registry who was previously required to register under Iowa’s previous criminal code.³³³ Iowa’s softened criminal code forces prosecutors to prove that both intent and transmission occurred before charging someone with a class B felony—the same felony punishment for crimes such as manslaughter, kidnapping, and robbery.

6. Remedies

While it may seem that proving an individual has transmitted HIV is a straightforward issue, this is far from true. An increasing number of people are being prosecuted for criminally transmitting HIV to another person, such as the recent example of Rhoades.³³⁴ Aside from prosecution, damages are often recoverable in an action for the transmission of HIV and prove to be an additional remedy for those affected.³³⁵ Such damages include hospital and medical expenses, lost earnings, and past and future pain and suffering.³³⁶ However, to bring such a cause of action, a plaintiff must prove that the defendant intentionally misrepresented their HIV status to the plaintiff, amongst other factors.³³⁷ This proves to be a common issue with the laws criminalizing the transmission of HIV because intent is difficult to prove. This difficulty presents the complex question as to what remedy—prosecution or damages—is appropriate when HIV is transmitted. Certain state statutes even allow for prosecutors to file criminal charges against a defendant rather than first exhausting all civil remedies.³³⁸ However, *Rhoades* demonstrates that prosecution is not always the best remedy.³³⁹ If an individual is seeking damages, proving intent becomes even more important. If the intent language is not clear in a statute, then damages should not be granted as a remedy because criminalization would “no more effectively deter the spread of HIV than the imposition of tort liability.”³⁴⁰ As evidenced by the failed attempt at

³³³ *Id.*

³³⁴ UNAIDS, *supra* note 80, at 5.

³³⁵ Eric M. Larsson & Jean A. Talbot, *Cause of Action to Recover Damages for Transmission of AIDS Through Negligence, Misrepresentation or Nondisclosure of Infected Status*, in 39 CAUSES OF ACTION 241 (2d ed. 2009).

³³⁶ *Id.* at 258.

³³⁷ *Id.* at 241.

³³⁸ *State v. Stark*, 66 Wash. App. 423, 431 (1992).

³³⁹ See *supra* text accompanying notes 156–77.

³⁴⁰ Ari Ezra Waldman, *Exceptions: The Criminal Law’s Illogical Approach to HIV-Related Aggravated Assaults*, 18 VA. J. SOC. POL’Y & L. 550, 602 (2011).

prosecution in *Rhoades*, damages seem to be the more appropriate remedy in HIV transmission cases.

CONCLUSION

Myriad laws governing the actions of HIV-positive individuals may have been necessary or useful to some degree at their inception, but are no longer useful today. These laws should therefore “be eliminated from the criminal code,”³⁴¹ whether through outright repeal or amendment. Due process and equality demand that these onerous statutes be revisited. As of 2009, all U.S. states had implemented criminal laws punishing sexual behavior that exposed people to HIV, and about half have laws that are HIV-specific.³⁴² These HIV-specific laws in particular should be eliminated or amended because when misapplied, they fail to meet their purpose and address the needs of those who are disproportionately affected by HIV/AIDS.³⁴³

Today, the question of whether HIV transmission should ever be criminalized remains open to debate both in the United States and abroad. A major concern is whether criminal law is the appropriate vehicle when it comes to regulating the intentional transmission of HIV.³⁴⁴ However, the trend towards criminalization seems to be increasing, despite growing criticism of the laws and broader understanding of and tolerance for individuals living with HIV/AIDS.³⁴⁵ There is no question that states can and should pass legislation addressing HIV transmission; the question is how they should pass such laws and what effect they may have. Criminal laws cannot address all problems, and communities must be very selective when deciding which legal matters need criminal attention³⁴⁶ and which remedies are effective. Arguably, the transmission of HIV is not a matter that should be addressed by criminal statutes.

There is a distinctly apparent issue surrounding these laws criminalizing the transmission of HIV. Because gay men are disproportionately affected by HIV/AIDS, laws criminalizing the transmission of HIV have a disparate impact on gay men. Furthermore, because gay men are not considered a

³⁴¹ MEIER & GEIS, *supra* note 6, at 240.

³⁴² Heneke, *supra* note 102, at 765.

³⁴³ MEIER & GEIS, *supra* note 6, at 239.

³⁴⁴ *Id.*

³⁴⁵ Cowan, *supra* note 189, at 136.

³⁴⁶ MEIER & GEIS, *supra* note 6, at 238–39.

suspect class, they have little to no chance of successfully challenging the constitutionality of such laws under the Fourteenth Amendment. History has failed gay men in the past and we do not want history to repeat itself. By eliminating or amending laws criminalizing the transmission of HIV and creating a new criminal statute as outlined above, we can avoid allowing homophobic hysteria, animus, and moral disapproval of gay men³⁴⁷ to continue influencing American criminal and public health policies.

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³⁴⁷ Romer v. Evans, 517 U.S. 620, 644 (1996).

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