Twenty-First Century Regression: The Disparate Impact of HIV Transmission Laws on Gays

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

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I. 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 AIDS epidemic materialized in the United States and internationally, these emotions invoked much more than denial, laws criminalizing the intentional transmission of HIV/AIDS were quickly invoked. And while the trend toward criminalization seems to be increasing, so is the discrimination and stigma displaced on gays stemming from these laws. The history of animus towards gays provided a framework for a
negative attitude toward sexual minorities and it has continued to grown into the twenty-first century. Current laws criminalizing HIV/AIDS transmission, both domestically and internationally, have the potential to increase both fear of and discrimination towards AIDS victims\(^1\) and thus disparately impact gays. Further, there is a growing concern that transmission laws will be selectively enforced against gays because HIV/AIDS affects them at higher levels.\(^2\) New criminal statutes are needed to combat these disparities.

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

Homosexuality has been “tolerated” in many societies, but it has never been respected or looked to as a model for sexual relations.\(^3\) Sadly this remains true in 2015. The AIDS epidemic began in the United States in 1978.\(^4\) AIDS was undetected until the 1970s.\(^5\) It seemed to be invisible and virtually impossible to detect. AIDS was first seen as a disease infecting solely homosexuals.\(^6\) However, the AIDS virus was around long before the disease arose and spread amongst gay communities.\(^7\)

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\(^5\) Id. at x.


In the 1980s physicians came across a developing illness. They surmised that a new or mutated contagion caused the illness. 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. One commonality amongst his patients were that they were both young and from the growing gay California community. Tests started to show that gay Americans had been infected by cytomegalovirus (CMV), a virus belonging to the herpes virus family. After having linked CMV to herpes, the commonality of homosexuality in a majority of patients was publicized in a negative context. It was later discovered that ninety four percent of the gay community in California had been infected. The virus could cause fatal lesions to newborn babies, but was less of a danger to adults. The first patient suffering from CMV died in March of 1981. American experts concluded that their observations suggested the possibility of an immune disorder, which predisposed individuals to HIV/AIDS who were commonly

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8 GRMEK, supra note 4, at 3.
9 Id.
10 Id.
11 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). (Reports of HIV were found in homosexual men in Los Angeles as well as New York City and San Francisco.).
12 GRMEK, supra note 4, at 3–4; Cf. Tramont, supra note 11, at 254. (By 1983, scientists isolated the cause to the human retrovirus, HIV-1.).
13 GRMEK, supra note 4, at 5. (emphasis added).
14 Id. at 4.
15 Id.; see also William Jordan, Esq., Physicians Who Negligently Failed To Provide Obstetrical Treatment That Was Designed to Prevent Harm to Future Fetuses May Be Liable Later-Born Child Who was Injured in Utero, 39 NO. 4 PROFESSIONAL RESPONSIBILITY REPORTER ART. 27, (2014). (Citing Troxel, in which a plaintiff contracted CMV and gave birth to a child who died from the disease).
16 GRMEK, supra note 4, at 5.
exposed to that disorder. When the disease hit the East Coast, rumors started to spread that a “rare malignant disease” appeared in the gay community of New York. The disease became known as the “gay cancer,” the “gay pneumonia,” and even a “gay plague.” Some people even started using the acronym GRID: Gay-Related Immune Deficiency. The gay population quickly became known as the “sexual third world.” The disease was finally named in the summer of 1982 and AIDS became the accepted reference. After 1982, especially in the United States, the AIDS epidemic spread quickly. There were around one hundred new cases every week in 1984.

Gays were quickly linked to and stereotyped by the disease, leading to both oppression and hardship. The link between AIDS and criminality similarly did not help the homosexual stereotype associated with the disease. AIDS in prison was on the rise as was the imprisonment of drug addicts and gay sex in prisons. This fueled prejudices against persons affected by the disease. For instance, one woman

18 GRMEK, supra note 4, at 6.
19 Id. at 9-10.
21 GRMEK, supra note 4, at 9.
23 GRMEK, supra note 4, at 41.
24 Id.
in an interview stated “this disease . . . affects homosexual men, drug users, Haitians, and hemophiliacs – thank goodness it hasn’t spread to human beings yet.”27 A male subject said, “if it spreads to the general public, it would be a medical crisis, demanding immediate government response.”28 When the journalist asked him his view on the disease he replied and said “It’s God punishing homos.”29 As the link between AIDS and homosexuality became evident, so did vulgar prejudices towards gays.

A cultural stigmatism surrounding HIV/AIDS is still very prevalent in today’s society. In many regions societies, people living with HIV are subject to both stigma and discrimination.30 For gay and bisexual individuals, if they are diagnosed with HIV/AIDS, their life experiences are even more difficult.31 The public’s response to the disease resulted in a rise in attacks on homosexuals,32 and gay men became frequent victims of violence.33 One in five gay men report being physically attacked; fifty-six percent report verbal threats, harassment and abuse; sixty-four percent have experienced homophobic tendencies in their course of employment; and ninety-three percent have experienced homophobic jokes at their

27 Grmek, supra note 4, at 40.
28 Id.
29 Id.
32 Leech, supra note 6, at 690.
33 Rosser, supra note 31, at 200.
workplace.\textsuperscript{34} This violence and prejudice against gays can lead to not only a damaged self-image but also higher stress and depression. Furthermore, society’s prejudice towards gays could actually contribute to the spread of HIV and other STDs\textsuperscript{35} because gay men will live in a reclusive fear instead of seeking necessary and often aggressive medical attention. People affected by HIV/AIDS feel vulnerable and sometimes embarrassed, especially so when they are gay. If they feel that they are going to be discriminated against when seeking help, they will be less likely to do so. And this hesitance could lead to worsening health for these individuals.\textsuperscript{36} Discrimination towards gays still exists today, thus it is likely that those who are gay and affected by HIV/AIDS will be less likely to seek the help and medical attention they need because they constantly live in fear. With this fear comes the inevitable spread of HIV/AIDS because HIV infected individuals will go on about their lives without seeking diagnoses and/or treatment. Further, they may be less likely to disclose their status to their partner for fear of being ostracized or rejected by their partner. This could further spread the virus to others who are otherwise uninformed because of the lack of disclosure by their infected partner.

While there is evidence that public disapproval of homosexuality is declining in broad terms\(^{37}\), the hatred, violence, and stigma towards homosexuality remains prevalent today, particularly among religious Christian groups.\(^{38}\) When seventy percent of a sample of Americans responds to a poll that homosexuality is a sin,\(^{39}\) one is forced to see the despair gays are forced to live with in today’s society, particularly those infected with HIV/AIDS. This disapproval towards gays creates an environment where they feel the need to hide their homosexuality.\(^{40}\) Some gay men feel such isolation, loss, and anxiety that they would be infected with the HIV virus regardless and talk about it in terms that they should just “get it over with” because they feel it is essentially their fate.\(^{41}\) This further proves that heterosexuals feel no fear of their own identity; homosexuals everyday are forced to prove that they are “normal.”\(^{42}\) Having to prove “normalcy” in 2015 suggests how truly regressive our “modern” society is.

**B. Criminalization of Intentional Transmission**

Legislation criminalizing HIV started after panic hit the nation in the 1980s and early 1990s.\(^{43}\) Because of mass misinformation relating to HIV, misinformed

\(^{37}\) Meier & Geis, supra note 3, at 116.

\(^{38}\) 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).

\(^{39}\) Meier & Geis, supra note 3, at 117.

\(^{40}\) Id. at 124.


\(^{42}\) Meier & Geis, supra note 3, at 125.

people started to believe that HIV was “invariably fatal” and the panic prompted
states to enact criminalization laws. Many state legislatures adopted criminal
“exposure” laws after a significant number of gays started contracting HIV in the
late 1980s and people started associating the disease with societal sin. Those who
had HIV/AIDS, but gays in particular, were seen as sexual predators and as
hysteria splashed the media, a legislative response was demanded. Other major
concerns and reasons to implement such laws included protecting the public from
people with HIV who knowingly exposed others to the virus and did not disclose
their status to their partner before having sex.

In September 1987, President Ronald Reagan created the Presidential
Commission on the Human Immunodeficiency Virus Epidemic, which advised
White House personnel on the dangers and risks associated with HIV/AIDS. The
report encouraged states to explore the use of the criminal law in the face of the
HIV/AIDS epidemic. It argued that merely using traditional criminal laws was
not sufficient and that there was a need for criminal statutes that were HIV-

44 Id.
45 Christina M. Shriver, State Approaches to Criminalizing the Exposure of HIV: Problems in Statutory
47 Saundra Young, Imprisoned Over HIV: One Man’s Story, CNN (Nov. 9, 2012, 8:42 PM),
48 Alexandra McCallum, Criminalizing the Transmission of HIV: Consent, Disclosure, and Online Dating, UTAH L.
REV. 677, 679 (2014).
49 James B. McArthur, As the Tide Turns: The Changing HIV/AIDS Epidemic And The Criminalization of HIV
specific. The report further noted that using the general assault model to penalize HIV transmission would prove to be too lenient because the penalties would not be sufficient for transmission that was proved to be intentional. It concluded that the only way to show that HIV transmission was unacceptable was to create and implement HIV-specific statutes. Other than the penalties being too lenient under a general assault model, further the diseases were too difficult to address under homicide laws. The main goal of the report was to create a “strong national policy” against HIV discrimination. Yet, it seems that today, almost thirty years after the Commission’s report, the criminal laws aimed at HIV/AIDS transmission seem to be as discriminatory as ever.

Then in 1990, the Ryan White Comprehensive AIDS Resources Emergency (CARE) Act provided incentives to states to criminalize the intentional transmission of HIV. The Federal Act provided emergency AIDS grants if a State had statutes prosecuting individuals who intentionally transmitting HIV to another person. States could choose how to fulfill the Federal requirement by either “amending . . . public health statutes to include HIV on their list of sexually

50 Id. at 714.
51 Id. at 713.
transmitted diseases; using traditional criminal law statutes to punish HIV transmission; or enacting specific criminal statutes targeted at HIV transmission.”

Some states defined intentional transmission as “failing to disclose” positive HIV/AIDS status to their sexual partner. However, when the act was reauthorized in 2000, the requirement that states must criminalize the intentional transmission of HIV/AIDS was removed.

As of Summer 2014, twenty-four states have criminal statutes in place that are HIV-specific and target individuals who have HIV, are aware of their HIV statutes, and “knowingly engage” in consensual sex. Fourteen states require a lack of consent, which the prosecutor must prove. 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. Most statutes require the HIV-positive individual to prove that the person they exposed to HIV knew that the individual was infected with HIV prior to having sex and nevertheless consented to sex. However, both Maryland and Washington mention nothing in their statutes about consent or disclosure. In these states a person can

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56 Id.
57 Young, supra note 47.
58 Id.
59 McCallum, supra note 48, at 679.
60 Id.
61 Id. at 680.
be prosecuted for having sex even if their partner is fully informed of his HIV status and consents to sex.

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 and for all persons with HIV to be included in this anti-discrimination legislation because HIV was considered a disability and should thus be covered under such legislation.\textsuperscript{64} President Bush instructed Congress to pass a law, within the Americans with Disabilities Act, which prohibited discrimination against those with HIV and AIDS.\textsuperscript{65} Today, people living with HIV or AIDS are protected under the Americans with Disabilities Act.\textsuperscript{66} Discrimination based on HIV or AIDS status is not tolerated under the ADA.\textsuperscript{67}

Nevertheless, laws criminalizing intentional AIDS transmission were considered to be consistent with the ADA’s protections for HIV persons. After CARE was implemented, the federal funding for HIV/AIDS prevention programs for states became dependent on how effective the state criminal laws were at prosecuting the “knowing” transfer of HIV.\textsuperscript{68} It pressured states to criminalize the

\textsuperscript{65} 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, 560-561, 579 (1998).
\textsuperscript{67} Id.
\textsuperscript{68} McCallum, \textit{supra} note 48, at 679.
transmission of HIV because otherwise they would not receive federal funding for HIV/AIDS prevention programs.\textsuperscript{69} By 1993, almost half of the states had criminal statutes for intentional HIV transmission.\textsuperscript{70}

\textbf{C. How the Laws Discriminate}

Various countries and most states within the United States have imposed laws criminalizing the transmission of HIV. These laws allow for the prosecution of individuals who are HIV-positive and engage in any behavior that could potentially transmit the disease. However, these laws have dangerous consequences because these AIDS-specific criminal laws have the potential to be used as tools of oppression and discrimination against gays. These laws are simply reinforcing the animus and moral disapproval directed at gays that our history so reflects. Further, it can be argued that these transmission laws have the potential to be selectively enforced against gays because HIV/AIDS affects them at higher levels than other groups.\textsuperscript{71}

Gay men are at the highest risk of any group for contracting AIDS. Thus, these AIDS-specific laws are targeted \textit{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 or to educate the public about issues

\begin{footnotesize}
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\item \textsuperscript{69} Id.
\item \textsuperscript{70} Id.
\item \textsuperscript{71} Lahey, supra note 2 at 87.
\end{itemize}
\end{footnotesize}
surrounding HIV, which are objectives that these laws are implemented to fulfill and further.

However, rather than furthering such social objectives, these HIV-specific laws could instead lead to gays being harassed and punished solely because of their sexual orientation rather than for having actually committed any crime. This has the potential effect of criminalizing gay male or females “even in those jurisdictions that no longer have sodomy laws.”72 Furthermore, these laws could deter gays at risk from coming forward for testing and treatment.73 Knowing you have HIV puts you at risk for prosecution if you have sex with others.

A major issue with laws criminalizing the intentional transmission of HIV/AIDS is that they send a message that having sex with an HIV-positive person is always harmful and in turn further fuels the stigma that is already attached to having HIV or AIDS.74 It is almost impossible to prove that intentional transmission of the disease was in fact the ultimate goal of a partner. Not being able to prove such intent is another problem that arises from these laws. Discrimination is fueled by charge and accusation, irrespective of guilty or innocence.

Leaving the HIV-specific criminal statutes and laws as is allows for the loss of rights for HIV-positive individuals to engage in any sexual contact. Thus, what is actually being criminalized is “having sex while HIV positive.” 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.” If laws are well crafted they can mitigate these problems, however they cannot completely eliminate them. Both the United States and other countries would benefit from realizing that statutes criminalizing the transmission of HIV/AIDS are counterproductive.

Anti-discrimination protection has proven to be the most effective tool to combat the transmission of HIV and AIDS. Human rights legislation exists in countries to protect citizens from unfair discrimination on “arbitrary aspect[s] of a person’s life, such as race, gender, political belief, and religious affiliation.” Furthermore, legislation against discrimination based on sexual orientation has arguably been a driver of human rights legislation. This legislation is necessary to not only ensure that all citizens are treated equally under the law but also to help prevent social persecution. With the disproportionate prevalence of AIDS among gay men and ethnic minorities, the “debate on discrimination legislation has

75 Id. at 1436.
77 ROSSER, supra note 31, at 59.
79 ROSSER, supra note 31, at 59.
become more urgent.\textsuperscript{80} One finding in South Australia showed that gay men are more likely to seek HIV testing in areas where discrimination on the grounds of sexual orientation is illegal.\textsuperscript{81} Thus, the absence of adequate protection against discrimination may work against HIV transmission prevention.\textsuperscript{82} Similar findings have been made in the United States because the same concerns regarding privacy and discrimination in regards to getting tested for HIV/AIDS play a role in the United States.\textsuperscript{83} Laws that assure confidentiality and protection against discrimination lead to a reduction in resistance to be tested while laws that require reporting of HIV test results, deter individuals from getting tested.\textsuperscript{84}

The Fourteenth Amendment is designed to guarantee due process and equal protection for all and discrimination against none. The United Nations issued a Policy Options Paper in 2002 that proves that criminalizing certain behavior actually increases the stigma towards those exerting those behaviors making it even harder to regulate.\textsuperscript{85} Because these laws increase the stigma towards gays, they are arguably administered in a discriminatory fashion, which is unconstitutional. 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

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{80} Id. at 60.
\item \textsuperscript{81} Id. at 65.
\item \textsuperscript{82} Id.
\item \textsuperscript{84} Bennett Klein, Esq., \textit{Legal Issues Related to HIV/AIDS}, LRIDII MA-CLE 610 (2002).
\end{itemize}
\end{footnotesize}
people over another.86 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 a discriminatory intent. This is arguably the case with these laws criminalizing the transmission of HIV/AIDS.

The United Nations paper further argues that HIV transmission lawsuits attract negative media attention and “spread inaccurate information” about people living with HIV or AIDS.87 Seeing that a disproportionate number of gays live with HIV or AIDS, gays would receive negative attention stemming from such laws and subsequent prosecutions.

In the United States, some people who have been prosecuted under laws criminalizing the transmission of HIV have brought claims alleging a due process violation but most have been unsuccessful.88 More importantly, equal protection claims surrounding these HIV-specific laws have also been brought and have similarly been unsuccessful.89 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.90 Rational basis review simply requires the government

87 Heneke, supra note 85, at 763.
88 People v. Russell, 158 Ill.2d 23, 25 (1994) (holding that the statute is not vague and thus did not deny defendant’s due process of law); see also People v. Jensen, 231 Mich.App 439, 447 (1998) (holding that the statute’s language was not overbroad and further did not violate the defendant’s constitutional right to privacy or First Amendment right of speech).
89 Heneke, supra note 85, at 759.
to give a legitimate reason for the classification and prove that the law is “a rational way of furthering” that legitimate government purpose.”91 Because rational basis review is the lowest standard of proof, it is the easiest to prove. Thus, the United States Supreme Court rarely strikes down rational basis review classifications.92 Because gays are not considered a suspect class and are thus subject to the application of rational basis review, it is unlikely that any higher of a standard would be applied to these HIV-specific statutes. This leaves little protection for HIV-positive gay individuals under the United States Constitution, despite the Fourteenth Amendment being a supposed “guarantee.”

II. American Approach to HIV Transmission Laws

Sixteen states have enacted legislation making it a crime to transmit HIV/AIDS.93 The other states have provisions under “traditional criminal statutes” that have the ability to prosecute infected people who engage in behavior that is likely to transmit HIV.94 In 1988 the Presidential Commission on the Human Immunodeficiency Virus Epidemic recommended that states adopt these criminal statutes specific to HIV/AIDS. 95 As of the early 90s, twelve states had

92 Heneke, supra note 85, at 759.
93 Tierney, supra note 72, at 491.
94 Id.
implemented such laws. All of the states that had implemented these laws had made the offense “punishable as a felony,” except two.

If the point of these laws was to decrease the transmission rate of AIDS, it seems clear that they 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 cases in 1986, 61,000 in 1987, and almost 86,000 in 1988. As of December 1991, 206,392 confirmed cases of AIDS were reported in the United States. And as of December 1991, more than 133,232 people had died as a result of AIDS in the United States. As of 2007, California had the “second highest number of HIV cases in the nation.” More than one million people were infected in 2006 and approximately 40,000 new cases in 2007 with 13.7% of cases concentrated in California. In 2009, the majority of new HIV cases occurred between gay men yet prevention among gay men seems to be the least effective because “young gay men” is the only group in which the number of HIV cases actually rose between 2006 and 2009. This rise in HIV cases between 2006 and 2009 could be attributed to the HIV-specific criminal statutes which arguably may

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96 Tierney, supra note 72, at 499.
97 Id. at 500.
98 GRMEK, supra note 4, at 193.
99 Tierney, supra note 72, at 477.
100 Leech, supra note 6, at 689.
101 McCormick, supra note 41, at 411.
103 McCormick, supra note 41, at 413.
not be fulfilling or furthering the intended social objective of preventing the spread of HIV/AIDS.

There have been several high profile prosecutions for AIDS transmission over the last two decades. *Christian v. Sheft* was the first case involving the intentional sexual transmission of HIV.\(^{104}\) Marc Christian, Rock Hudson’s lover, sued Rock Hudson after realizing that Hudson did not disclose his HIV-positive status to him before having sex. After determining that Hudson’s conduct was “outrageous,” the court awarded Christian $14.5 million dollars.\(^{105}\) The verdict sent the message that if you know you have HIV/AIDS you have a duty to warn your sexual partners, or refrain from having sex.\(^{106}\) 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 of such “despicable” behavior.\(^{107}\) While the award was kept at the original verdict of $14.5 million,\(^{108}\) the notion of the duty to disclose ones’ AIDS status to their partner and take steps to prevent transmission was heard round the world.\(^{109}\)

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\(^{105}\) Mosiello, *supra* note 54, at 614.


\(^{107}\) *Jury Asked to Double Award in Hudson Case*, L.A. TIMES, Feb. 17, 1989, WLN 2594602.

\(^{108}\) Mosiello, *supra* note 54, at 614.

In 1988, Legislators in Oklahoma criminalized the intentional transmission of HIV/AIDS through a statute codified at title 21, section 1192.1. Oklahoma’s law began a wave of state laws that criminalized the “intentional spread of AIDS.”

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 the intent to infect another, to engage in conduct reasonably likely to result in the transfer of the person’s own blood, bodily fluids.” This statute suffers from several constitutional infirmities. First, the intent requirement is not clear from the reading of this statute. It seems that it would require specific intent because it specifies “knowing” behavior. However, there is still potential for it to be read as a lesser intent standard. This would lead to higher prosecutions of gays, drug addicts, and prostitutes. Second, the statute does not allow for due process for defendants because it fails to give “sufficient warning of the proscribed conduct.” In order to be enforceable, laws must be sufficiently defined so that a person of “ordinary intelligence” knows what is prohibited and provide a “sufficient standard for enforcement.” With such an arbitrary statute there is the potential risk of discriminatory enforcement against homosexuals. First, the intent requirement must be made clear within this statute

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110 Leech, supra note 6, at 687-692.
111 Id. at 687.
113 Leech, supra note 6, at 698.
114 Id. at 697.
otherwise innocent people could be convicted. Second, sufficient warning must be given otherwise again innocent people could be convicted. Having such vague qualities, these laws have the potential to “criminalize the status of being homosexual” simply because homosexuals suffer disproportionately from HIV/AIDS.116

Prosecutions under such state statutes are not a thing of the past or confined to Southern states. Two states that have provided fairly generous protections of gay and lesbian rights have recently prosecuted persons for criminal transmission. In 2006, Adam Musser was prosecuted for criminal transmission in Iowa under Section 709C.1 of the Iowa criminal code. The Supreme Court of Iowa in State v. Musser held that Iowa’s statute governing criminal transmission of HIV was constitutional and upheld Musser’s twenty-five year prison sentence.117 In 2002, Musser had unprotected sex with the victim, R.D. three times.118 During these encounters Musser was HIV positive but was receiving medical treatment.119 Musser however, did not tell R.D. that he was HIV positive.120 R.D. later learned that Musser was HIV positive and got the police involved.121 Musser raised various constitutional challenges to the Iowa statute. First, he argued that the statute did not actually require a person to disclose his HIV-positive status, so that Musser’s

116 Leech, supra note 6, at 700.
118 Id.
119 Id.
120 Id.
121 Id.
failure to tell his partner that he was HIV positive did not violate the statute. The Supreme Court of Iowa disagreed. The court agreed that the statute did not “explicitly require disclosure by the defendant,” nevertheless, stated that the “practical effect of the Iowa statute is the same as those statutes mandating disclosure.” The court justified their implicit requirement of disclosure by claiming that “realistically” the only way a defendant can be assured that the victim knowingly consents to exposure is for the defendant to tell the victim of the defendant’s HIV status first. Despite any such language, the court read an implicit requirement into the statute. They in turn violated a very basic rule governing the interpretation of criminal statutes – the rule of lenity, which requires that statutory ambiguities be resolved in favor of a defendant. This rule of interpretation reflects basic principles of due process – that a person must know of their legal obligations before they can be criminally punished. Section 709C.1 of the Iowa criminal code was later repealed in 2014 by Acts 2014 (85 G.A.) ch. 1119, S.F. 2297, § 9. In 2014, the legislature repealed the Criminal Transmission of Human Immunodeficiency Virus (HIV) Act (§ 709C.1) and replaced it with the Contagious or Infectious Disease Transmission Act (§709D.1). Senator Rob

122 Id. at 740.
123 Id. at 742.
124 Id.
125 Iowa Code Ann. § 709C.1 (West).
Hogg called the current law “draconian, outdated, and discriminatory.” Under the new Act four separate crimes with varying penalties are implemented for situations where no intent or knowledge is present. The four crimes include: intentional infection of a contagious disease, attempted intention infection of a contagious disease, reckless exposure to a contagious disease causing infection, and reckless exposure to a contagious disease. It was not until after the groundbreaking case of Rhoades v. Iowa (discussed below) that Iowans came forward and argued that a change in Iowa’s 15-year-old HIV transmission law was long overdue and necessary. Luckily, the Legislature listened.

In 2012, Minnesota prosecuted Daniel Rick for having consensual sex with his partner in violation of Minnesota’s anti-transmission statute. The partner later contracted HIV. The statute prohibits the knowing transfer of a communicable disease but does not exempt consensual sex. The District Court found in favor of the State and the defendant was convicted. Rick appealed and challenged the verdict on the grounds that the statute was ambiguous.

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127 Rob Boshart, Iowa Senate Votes to Change Law on Disease Contact, QUAD-CITY TIMES, Feb. 28, 2014, WLNR 5906216.
129 Boshart, supra note 127.
130 4 la. Prac., supra note 124.
133 Id.
134 Minn. State. Ann. § 609.2241 (West).
135 Id.
136 Rick, supra note 132, at 610.
137 Id. at 611.
Minnesota Court of Appeals later reversed his conviction and reasoned that sex between two consenting adults does not warrant punishment.\textsuperscript{138} They found Rick’s argument that “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 accused lied to his victim about his disease before engaging in sexual penetration in order to convict,” to be particularly persuasive.\textsuperscript{139} This argument furthered the theory that these laws were simply passed to oppress gays rather than to prevent the spread of AIDS. They further held that the statute was ambiguous and that when a statute is ambiguous, or if doubt “exists as to the legislative intent,” that the doubt “must be resolved in favor of the defendant”\textsuperscript{140} – a prime example of the rule of lenity (described earlier). This strict construction of the Minneapolis statute is commendable, however, most courts do not go to such lengths to do so, as seen above in State v. Musser.

The most recent HIV transmission case is, Rhoades v. Iowa.\textsuperscript{141} Rhoades was diagnosed with HIV in 1998.\textsuperscript{142} In 2008, Rhoades’s doctor told him that his HIV “viral load was nondetectable.”\textsuperscript{143} Rhoades believed that he was no longer infected

\textsuperscript{138} Id. at 616.
\textsuperscript{139} Id.
\textsuperscript{140} Id. at 615.
\textsuperscript{142} Id. at *3.
\textsuperscript{143} Id. at *4.
In June of 2008 Rhoades met Adam Plendl (A.P.) at a social event. A.P. had previously seen Rhoades’s online profile, which stated Rhoades was HIV negative. A.P. invited Rhoades to go home with him and Rhoades accepted and they engaged in both protected and unprotected consensual sex. When Plendl found out about Rhoades’ HIV status he went to the hospital to get treated. A few days later the police were contacted and the State charged Rhoades with criminal transmission of HIV and violating Iowa Code section 709C.1. He was arrested and charged with criminal transmission of HIV, a class B felony in Iowa. Similar crimes in Iowa include manslaughter, kidnapping, and robbery. In Rhoades’s amicus brief to the Iowa Supreme Court he stressed the likelihood of transmission. He noted that studies showed that unprotected insertive anal sex carries a 0.06% chance of HIV infection and using a condom brings that risk down to “nearly zero.” Criminalizing such low-risk activities “fail[s] to link culpability and punishment to risk.”

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144 Id.  
145 Id.  
146 Id.  
147 Id. (the record states that A.P. performed unprotected oral sex on Rhoades and the two also engaged in protected anal sex where the condom may have failed).  
148 Young, supra note 47.  
149 Rhoades, supra note 141, at *4.  
150 Young, supra note 47.  
151 Id.  
153 McArthur, supra note 49 at 724.
Rhoades ended up pleading guilty because he did not understand the law well enough to do otherwise and instead followed his attorney’s advice to enter a guilty plea.\textsuperscript{154} Rhoades was unable to post bail, set at $250,000, and was incarcerated for nine months, six weeks of which were spent in solitary confinement.\textsuperscript{155} On September 11, 2009, Rhoades was sentenced to twenty-five years in prison.\textsuperscript{156} However, the Supreme Court of Iowa re-sentenced Rhoades and ordered Rhoades’s criminal case to be set aside after determining that, because Rhoades’s viral count was nondetectable, there was a question as to whether it was “medically true [that] a person with a nondetect viral load” could transmit HIV.\textsuperscript{157} His twenty-five years was reduced to time spent, plus five years of supervised probation.\textsuperscript{158} 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.\textsuperscript{159} If the Supreme Court had not vacated Rhoades sentence, he would have been incarcerated for up to twenty-five years in an Iowa state prison for simply having consensual sex with a gay partner despite undertaking extensive HIV treatment to maintain an undetectable viral load and practicing safe sex.\textsuperscript{160}

\textsuperscript{154} Young, supra note 47; see also 7 la. Prac., Evidence § 5.201:2 n.11. (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).
\textsuperscript{155} Young, supra note 47.
\textsuperscript{156} Id.
\textsuperscript{157} Rhoades, supra note 141, at *18 (alteration in original).
\textsuperscript{158} Young, supra note 47.
\textsuperscript{159} Id.
\textsuperscript{160} Garmon, supra note 152, at 678.
While twenty-four states have enacted HIV-specific criminal statutes, there have been efforts at the federal level to repeal such statutes.\(^{161}\) In 2010 the White House proposed a Federal Implementation Plan on the National HIV/AIDS strategy, which would review existing criminal offenses to determine whether such offenses discriminate against those living with HIV/AIDS.\(^{162}\) While this Bill was not enacted, it was a promising approach and good step towards equality for those who are inevitably discriminated against by criminalization statutes. Furthermore, in 2012, Iowa 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.\(^{163}\) His bill did not make it out of subcommittee\(^{164}\) but it was another valid attempt towards equality and non-discrimination for those living with HIV/AIDS. Also in 2012, at the 19th International AIDS Conference in Washington, the Center for HIV Law and Policy, released a statement calling the federal and state officials to modernize such laws and eliminate the HIV-specific statutes.\(^{165}\) However, there are some who are opposed to repealing such laws. For instance, Scott Burns, executive director of the National District Attorneys


\(^{164}\) Young, *supra* note 47.

\(^{165}\) *Id.*
Association, feels that criminal statutes are necessary where people knowingly and intentionally infect someone with HIV.\textsuperscript{166} However, the problem with Burns’ argument is the near impossibility of \textit{proving} that someone intended to do serious harm whether knowingly or intentionally, thus making it a crime for even those who, like Rhoades, did not intentionally transmit the virus.

\section*{III. International Approach to HIV Transmission Laws}

\subsection*{A. Uganda}

The AIDS epidemic in Uganda began in the late 1980s.\textsuperscript{167} After the civil war and decolonization, health services began to collapse and Uganda, being a poorer country, could not afford to rebuild such services.\textsuperscript{168} In 1988, almost five thousand Ugandans were \textit{officially} diagnosed with the disease but the real figure was closer to forty percent of individuals examined in Uganda hospitals.\textsuperscript{169}

As of the early 90s, studies in Africa showed that deaths due to AIDS would exceed the country’s birth rate within a few decades.\textsuperscript{170} As of 2007, UNAIDS estimated that 810,000 of Ugandan adults aged fifteen to forty-nine had acquired HIV.\textsuperscript{171} In 2010, the East African Community began drafting a regional HIV law,

\begin{footnotesize}
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\item \textsuperscript{166} \textit{Id.}
\item \textsuperscript{167} GRMEK, \textit{supra} note 4, at 177.
\item \textsuperscript{168} \textit{Id.}
\item \textsuperscript{169} \textit{Id.} at 178 (emphasis added).
\item \textsuperscript{170} Leech, \textit{supra} note 6, at 689.
\end{itemize}
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which would cover Kenya, Uganda, Tanzania, Burundi, and Rwanda.\textsuperscript{172} The proposed law would criminalize HIV transmission. Uganda has also proposed legislation that requires 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.”\textsuperscript{173} This proposal goes one step farther than simply the duty to disclose, which Niger has adopted and is discussed below.

In 2008 the Committee considered Uganda’s HIV and AIDS Prevention and Control Bill.\textsuperscript{174} As of early 2010, the proposal still remained under consideration.\textsuperscript{175} The 2009 version included a clause prohibiting discrimination against HIV-positive people in “employment, insurance, housing, etc.”\textsuperscript{176} Part IV of the Ugandan bill criminalizes HIV transmission and asserts liability, such as felony punishment for attempting to transmit HIV to another individual.\textsuperscript{177} 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 HIV-positive status and lead to more frequent cases of “silent transmission” in Uganda.\textsuperscript{178} While the representatives specifically noted the effects on women, the same result will come from these laws criminalizing HIV on homosexuals who

\begin{footnotesize}
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\item[\textsuperscript{172}] Id. at 366.
\item[\textsuperscript{174}] Seelinger, supra note 171, at 367.
\item[\textsuperscript{175}] Id.
\item[\textsuperscript{176}] Id.
\item[\textsuperscript{177}] Id. at 377.
\item[\textsuperscript{178}] Id. at 379.
\end{itemize}
\end{footnotesize}
will similarly be less likely to disclose their HIV status and further cases of “silent transmission.”

Uganda’s HIV and AIDS Prevention and Control Bill is aimed at prohibiting discrimination based on HIV-status, however, as of 2009, the stigma surrounding gays and HIV-positive status was at an all time high in Uganda. On October 13, 2009, David Bahati of the Ugandan Parliament introduced the Anti-Homosexuality Bill of 2009. The bill seeks to toughen punishment for homosexual acts. Uganda already has strict punishment in place for gay sex but this would intensify those punishments. For instance, the bill would increase the current seven-year prison sentence for “consensual same-sex relations”, to life imprisonment. The bill would also impose the death penalty for “aggravated homosexuality,” which includes “serial offenders,” or people who have previously been convicted of any homosexual related crimes. HIV-positive status is included in the definition of “aggravated homosexuality.” The Bill was popular among Uganda citizens and was almost unanimous in the Ugandan Parliament. However, the Bill expired

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181 Xavier, supra note 179.
182 Id. at 139.
183 Id. at 139-140.
after it failed to come to a vote before the Eighth Parliament in 2011. But following introduction of the Bill, homophobia worsened in Uganda and violence against LGBT people escalated. Because there is already a high stigma towards gays in Uganda, Uganda’s HIV and AIDS Prevention and Control Bill and its provisions to criminalize HIV transmission would arguably expand and increase such stigma.

In May of 2014, Uganda’s HIV and AIDS Prevention and Control Bill passed with some opposition. Ambassador Deborah Birx, the United States Global AIDS Coordinator, was particularly 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. She stressed that over the past thirty years, stigma, discrimination, and fear have deterred individuals from accessing necessary HIV/AIDS treatment. She believes that these provisions concerning the criminalization of HIV/AIDS will expunge the progress that has been made over the years by HIV prevention

186 Id.
187 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).
189 Id.
190 Id.
programs\textsuperscript{191} and that this bill is “regressive” rather than progressive thus undermining the protection of fundamental human rights.\textsuperscript{192}

It is clear with Uganda’s high rate of HIV/AIDS that Uganda needs some form of HIV control. The question is whether or not the legislation should be in the form of laws criminalizing the intentional transmission of HIV/AIDS via the HIV and AIDS Prevention and Control Bill (2009) or instead through public health programs, as suggested by Ambassador Deborah Birx. From the early 1990s through 2001, public health programs proved to be successful in Uganda.\textsuperscript{193} After enacting aggressive programs to fight the disease, the HIV rate decreased by ten percent.\textsuperscript{194} The UNAIDS Reference Group on HIV and Human Rights purports that the existing criminal laws should be used to address cases of intentional and actual transmission of HIV, instead of creating HIV-specific laws that criminalized “HIV-related behaviors.”\textsuperscript{195} One valid point from Uganda itself is that even without HIV control legislation, Ugandan courts are already dealing with cases of the intentional transmission of HIV.\textsuperscript{196} One example being a man who was given a fourteen year prison sentence after having sex with a mentally ill nineteen year old and infecting her with HIV/AIDS.\textsuperscript{197} Under the Ugandan Penal Code, anyone who

\textsuperscript{191} Id.
\textsuperscript{192} Id.
\textsuperscript{193} Heneke, \textit{supra} note 85, at 775.
\textsuperscript{194} Id.
\textsuperscript{195} Seelinger, \textit{supra} note 171, at 380.
\textsuperscript{196} Id.
\textsuperscript{197} Id.
has sex with a woman, knowing that she is mentally ill, will be imprisoned for fourteen years.\textsuperscript{198} The man was drunk and the girl’s parents offered him a place to stay and in the middle of the night, well aware of his status, he raped the girl and infected her with HIV/AIDS.\textsuperscript{199} While the intentional spread of HIV/AIDS in not covered by the Penal Code, the HIV/AIDS Prevention and Control Bill, seeks to make this a criminal offense.\textsuperscript{200} However, the distinction between such an intentional act on a mentally ill young girl, and a consensual sexual encounter with a trusted partner, must be made to guarantee that these criminal laws are not discriminatory.

\textbf{B. Australia}

When Britain colonized Australia in the late 1700s, healthcare was a concern among Australian authorities.\textsuperscript{201} Thus, the Australian government paid significant attention to AIDS when it first appeared there.\textsuperscript{202} The first remedy for individuals infected with AIDS was quarantine.\textsuperscript{203} Due to panic in parts of Australian society, HIV/AIDS individuals were actually detained.\textsuperscript{204}

\begin{flushright}
\textsuperscript{199} Id.
\textsuperscript{200} Annotated Legal Bibliography on Gender, 17 CARDOZO J.L. & GENDER 197, 252 (2010).
\textsuperscript{202} Id. at 294.
\textsuperscript{203} Id.; see also Peter Margulies, \textit{Asylum, Intersectionality, and AIDS: Women with HIV as a Persecuted Social Group}, 8 GEO. IMMIGR. L.J. 521, 549 (1994); see also MICHAEL COSTA & JULIE HAMBLIN & MARK DUFF & DAVID PATTERSON, \textit{AUSTRALIAN HIV/AIDS LEGAL GUIDE} 1, 13, 28 (1991).
\textsuperscript{204} Lopez, \textit{supra} note 201 at 296.
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South Australia was the first Australian state to decriminalize homosexual activity.\(^{205}\) In 1984, they passed an equal opportunity bill that barred discrimination on the grounds of sexual orientation.\(^{206}\)

But as of 1992, four provinces in Australia had passed legislation that specifically criminalized the transmission of HIV.\(^{207}\) These statutes are HIV-specific and aimed at criminalizing the transmission of HIV.\(^{208}\) There is constant debate over these laws. The Queensland and New South Wales governments enacted these laws in response to the public demand for government action to stop the spread of AIDS.\(^{209}\) However, these laws have been criticized by scholars as premature actions.\(^{210}\) For example, critics argue that one provision in particular which makes it an offense to have sex, if the infected person knows they have AIDS before the sex takes place, will likely lead to individuals with AIDS to hide rather than seek advice or treatment in clinics in clear view of conservative observation.\(^{211}\)

\(^{205}\) ROSSER, supra note 31, at 9.

\(^{206}\) Id.

\(^{207}\) Tierney, supra note 72, at 506.

\(^{208}\) Id.; 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 (1993).

\(^{209}\) Tierney, supra note 72, at 506.; see also Dwyer, supra note 208 at 167-168. (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.”).

\(^{210}\) Tierney, supra note 72, at 506.

In 1984, Queensland passed the Health Act Amendment Act (No. 2). The law imposed a $10,000 fine and a sentence of two years in prison on anyone who “knowingly infected” any other person with HIV. However, in 1988 the Act was repealed and then replaced with an almost identical Health Act Amendment Act.

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. The only defense available is if the other person was actually informed of the individual’s AIDS infection prior to intercourse and voluntarily agreed to accept the risk associated with having sex with the infected individual. The penalty is $5,000, however, there is no imprisonment punishment as in the Queensland Act. South Australia and Victoria have similarly passed legislation criminalizing the transmission of HIV and impose the requirement that anyone suffering from AIDS must take all “reasonable measures” to prevent transmission to others. The penalty for violating the law is a $10,000 fine. Victoria goes a step further and makes it an offense to “knowingly or recklessly” infect another person with an infectious

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213 Id.; see also Queensl. Health Act. Amendment Act (No. 2) supra note 212.
214 Tierney, supra note 72, at 507.; see Queensl. Health Act. Amendment Act (No. 3), 1988 § 48 (Austl.).
215 Tierney, supra note 72, at 507.
216 Id.
219 Id.
disease, including HIV and imposes a $20,000 fine.\textsuperscript{220} Again, the only defense is if someone voluntarily accepts the risk and knew about the individual’s infected state before engaging in sex with him or her.

The Australian statutes in all four provinces are arguably vague and indeed prospectively dangerous. A combination of vague language used and lack of definitional clarification, constitutes an arena for prejudice, which could negatively affect the decision to prosecute and ultimately, to convict.\textsuperscript{221} For example in \textit{R v. Reid}, the appellant’s appeal against his ten year and six month imprisonment conviction was dismissed despite scant evidence that the appellant had the motive and desire to transmit HIV to the complainant.\textsuperscript{222} The appellant was HIV positive and had intercourse with the gay complainant, transmitting HIV to him.\textsuperscript{223} The complainant said that the appellant assured him that he was not HIV positive before having sex with him; that otherwise he would not have had sex with him.\textsuperscript{224} The appellant was convicted of unlawfully transmitting HIV with the intent to do so, in violation of the \textit{Criminal Code} (Qld), § 317(b).\textsuperscript{225} On appeal, the appellant argued that there was no evidence that he was “motivated by a subjective desire” to transmit HIV to the complainant.\textsuperscript{226} He further argued that the sentence of more

\begin{enumerate}
\item[220] Tierney, \textit{supra} note 72, at 508.; \textit{see} Vict. Health (General Amend.) Act, 1988, § 120(1) (Austl.).
\item[221] Tierney, \textit{supra} note 72, at 508.
\item[223] \textit{Id.} at 3.
\item[224] \textit{Id.}
\item[225] \textit{Id.} at 24.
\item[226] \textit{Id.} at 52.
\end{enumerate}
than ten years was excessive. 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. The language from the *Criminal Code*, § 317(b) and the meaning of “intent” is that “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.” The dissent argued that because the jury was not told that the appellant had to know that by having unprotected sex that it was “probably or likely” that HIV would be transmitted, that the appellant thereby lost his chance for acquittal. 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, however, the concurrence felt that there was no reason to further explore or elaborate on the meaning behind intent. The dissent’s argument in *R v. Reid* is most aligned with non-discrimination towards gays. The majority opinion risks the incarceration of innocent gay people who merely had consensual sex with someone. It is extremely difficult to determine whether someone had the *intent* to intentionally transmit HIV to a partner who consented to having sex or whether it was just that, a consensual sexual encounter. Unless it is obvious that someone maliciously had sex with someone to intentionally transmit HIV, the likelihood that an innocent person who

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228 *Id.* at (3).
229 *Id.* at (4).
230 *Id.* at (4) (alteration in original).
engaged in consensual safe sex and accidentally transmitted the disease going to jail, is both high and discriminatory in nature.

C. Niger

HIV/AIDS is not prevalent in Niger.\textsuperscript{231} The United Nations Human Development Report noted that HIV infects 0.5\% of Niger’s population between the ages of fifteen and forty-nine.\textsuperscript{232} As of 2012, HIV affected only 0.1\% of both female and males between the ages of fifteen and twenty-four.\textsuperscript{233} The percentage of HIV/AIDS is not prevalent in Niger but neither is accurate comprehension of the virus. As of 2014, datum showed, that the number of males ranging between fifteen and twenty-four with comprehensive \emph{correct} knowledge of HIV/AIDS in Niger was as low as sixteen percent.\textsuperscript{234} With the disparity amongst the population in understanding the virus, it is hard to argue that they could possibly understand that criminalizing the transmission of HIV/AIDS is the best approach. If they do not understand the virus, it will be nearly impossible for them to understand the criminal code associated with it.


\textsuperscript{233} \textit{Id.} at 187.

Since 1999 Niger has passed a new Constitution, a new Criminal Code, and a new Code of Criminal Procedure.\textsuperscript{235} The reformed Criminal Code tries to modernize Niger by criminalizing and penalizing the intentional transmission of HIV, despite the low prevalence of HIV in the country.\textsuperscript{236} The purposes of these reforms are to simply catch Niger up to “legal doctrines that have been adopted by much of the Western world over the past forty years.”\textsuperscript{237} For example, the new Code will create penalties for the intentional transmission of HIV.\textsuperscript{238} The seemingly more important goal of changing the criminal code is to protect human rights and individual liberties and abandon any laws that are contrary to that idea.\textsuperscript{239} However, one could argue that imposing penalties for the intentional transmission of HIV actually does the opposite and in fact ignores human rights and liberties, because these laws and imposed penalties will in fact harm gays.

West and Central Africa derive their HIV provisions from The Action for West Africa Region or “AWARE-HIV/AIDS” model.\textsuperscript{240} It is fashioned from proposals from the United States Agency for International Development.\textsuperscript{241} The model law, which is commonly known as the N’djamena model law, was created

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235 & Kelley, Exporting Western Law to the Developing World, supra note 231, at 329. \\
236 & \textit{Id.} at 330. \\
238 & \textit{Id.} \\
239 & \textit{Id.} at 696. \\
240 & Dr. Nnamuchi & Dr. Nwabueze, \textit{supra} note 173, at 389. \\

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in September 2004 in collaboration with other regions.\textsuperscript{242} One highlighted goal of the AWARE model was to guarantee individual human rights.\textsuperscript{243} For example, the N’djamena model law has seven chapters, some including the provisions for mandatory testing, health and counseling services, and the prohibitions on discrimination based on the individual’s suspected HIV status.\textsuperscript{244} However, it has been noted that the human rights provisions modeled in the law are weak at best.\textsuperscript{245} Furthermore, it never explicitly refers to human rights and is silent on important public interests such as prisoners’ rights to condoms and women’s rights.\textsuperscript{246} 

Article 26 of the AWARE-HIV/AIDS’s model requires someone with HIV to disclose his or her HIV status to a spouse or regular partner as soon as possible or at most within six weeks of the diagnosis.\textsuperscript{247} The legislation in Niger firmly purports the duty to warn a sexual partner of the virus.\textsuperscript{248} Many recent statutes in Africa are modeled on this AWARE model.\textsuperscript{249} The AWARE model is heavily influenced by the United States model, thus countries in Africa that adopt the AWARE model have started creating HIV criminalization statutes. However, 

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\item \textsuperscript{244} Johnson, \textit{ supra} note 242 at 145.
\item \textsuperscript{245} \textit{Id.}
\item \textsuperscript{246} \textit{Id.}
\item \textsuperscript{247} Dr. Nnamuchi & Dr. Nwabueze, \textit{ supra} note 173, at 389.
\item \textsuperscript{248} \textit{Id.}
\item \textsuperscript{249} Francis & Francis, \textit{ supra} note 241, at 53.
\end{itemize}
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Sierra Leone, which adopted a criminalization statute, has recently repealed it and several other repeal efforts are reported to be ongoing.\textsuperscript{250}

In countries abroad, UNAIDS, the United Nations Programme on HIV/AIDS, has criticized HIV-specific criminalization statutes.\textsuperscript{251} Their goal is to reduce these statutes by half by this year.\textsuperscript{252} However, to reach this goal changes to the AWARE model are recommended.\textsuperscript{253} One change relating to situations where risks of transmission are low or when protection, such as condoms, were used. UNAIDS opposes criminalization in such circumstances.\textsuperscript{254} UNAIDS stance on criminalizing HIV/AIDS parallels that of Ambassador Deborah Birx, who feels that such laws undermine the work that has been done through HIV prevention programs. UNAIDS is concerned that these laws are likely to undermine proven HIV prevention efforts and instead replace them with a means that is backed by no evidence of effectively preventing HIV transmission.\textsuperscript{255} The UNAIDS approach to laws criminalizing HIV transmission similarly parallels the majority decision in the \textit{Rhoades} case.

\textbf{IV. Solution}

It has been more than twenty years since President Reagan’s Presidential Commission on the Human Immunodeficiency Virus Epidemic advised states to

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\item \textsuperscript{250} Id.
\item \textsuperscript{251} Id.
\item \textsuperscript{252} Id.
\item \textsuperscript{253} Id.
\item \textsuperscript{254} Id.
\item \textsuperscript{255} Johnson, supra note 242, at 146.
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create criminal HIV-specific criminal laws. While certain states have continued to advocate and adopt HIV-specific criminal statutes, others, particularly internationally, have expressed the belief that repeal is the appropriate route because these laws actually do more downstream harm than good. Rather than simple repeal, however, the appropriate solution is to create a new criminal statute. The new statute can still accomplish the same effects that these HIV-specific criminal statutes and laws seek to accomplish but can do so while avoiding discrimination against gays.

A. Law

The proposed legislation would be created entirely from various criminal HIV-specific laws throughout the world, taking parts of each, to create a law that would no longer be predominately discriminatory in practice or on its face.

a. Intent

If laws against HIV transmission are put in place, they must have intent requirements. Juries should not be permitted to presume intent from a person’s knowing he has HIV and that person’s having sex. The point is not to criminalize having sex while positive. It is to protect people from willful attempts to harm them. 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

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257 Id.
disease; that is, his or her actions must have been designed to bring about that result.” This intent requirement is something that a criminal code should be modeled after because it is clear and unambiguous as to the infected person’s intent. It makes sure that there is no other possible reason that the individual had sex with their partner, other than meaning to transmit the disease and infect the individual with HIV/AIDS. 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.

b. 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; either rational basis (the lowest level of scrutiny), followed by intermediate, or strict scrutiny (the highest level of scrutiny). And if the state fails to meet the designated level of scrutiny, the statute will be deemed invalid. Classifications that do not involve a designated “suspect” class are subject to lower level scrutiny otherwise known as rational basis. Thus, because gays are not considered a suspect class they are subject to rational basis review, which, being the lowest level of scrutiny is the easiest test for

258 Reid, supra note 222, at (3).
260 Id.; see also Joan A. Lukey & Jeffrey A. Smagula, Do we Still Need a Federal Equal Rights Amendment?, BOSTON B.J., 10, N. 19 (2000).
261 O’Toole, supra note 259 at 202.; see also Finch v. Commonwealth Health Ins. Connector Auth., 459 Mass. 655, 668-669 (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).
the government to prove. Meaning that most statutes survive the rational basis test because it only requires that the government’s interest be rationally related to a “legitimate” governmental interest.\(^{262}\) Whereas to survive strict scrutiny, the highest level of scrutiny, the government must prove that they have a compelling governmental interest and the interest must be necessary “(i.e. the only way)” to accomplish such interest.\(^{263}\) These HIV-specific criminal statutes are inherently creating a suspect class because they are discriminatory in practice. Rather than rational basis review, these laws deserve either intermediate level scrutiny or strict scrutiny. If all else fails, a *rigorous* rational basis scrutiny should be applied.

Without a higher level of scrutiny, these laws are left as facially discriminatory. Strict scrutiny is the ideal level of scrutiny to be imposed because it is the hardest for the government to overcome. Additionally, strict scrutiny is invoked when a fundamental right is involved.\(^{264}\) Here, the fourteenth amendment is compromised when these criminal laws are imposed, thus various fundamental rights are arguably involved. However, *intentional* discrimination must be established for a suspect class to receive strict scrutiny.\(^{265}\) There are three ways that

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\(^{264}\) O’Toole, supra note 259 at 203.; 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).

\(^{265}\) 16B Am. Jur. 2d Constitutional Law § 862.
intentional discrimination can be established: the law is expressly discriminatory on its face, the law is neutral on its face but it is discriminatory in practice, or the law is neutral on its face and administered appropriately but it was enacted with discrimination as the sole purpose.\textsuperscript{266} The laws criminalizing the transmission of HIV/AIDS are arguably discriminatory in practice because they disparately affect gays thus making these laws deserving of strict scrutiny rather than rational basis review.

Intermediate level scrutiny is also an option for a different standard to apply to these laws. It requires that the classification be “substantially related to an important government objective.”\textsuperscript{267} President 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.\textsuperscript{268}

If both strict scrutiny and intermediate application cannot be applied, the next best amendment to these laws would be to apply rigorous rational basis scrutiny. Courts have applied rigorous rational basis scrutiny to various situations, including “same-sex marriage, adoption by gay men and lesbians, and intimate sexual relations.”\textsuperscript{269} Rigorous rational basis scrutiny is triggered when animus

\begin{itemize}
\item \textsuperscript{266} O’Toole, \textit{supra} note 259 at 203.
\item \textsuperscript{268} Id.
\item \textsuperscript{269} Miranda Oshige McGowan, \textit{Lifting the Veil on Rigorous Rational Basis Scrutiny}, 96 MARQ. L. REV. 377 (2012).
\end{itemize}
exists towards a particular group. Gay men and lesbians are arguably part of a structural group. Structural groups come together because of common “structural inequalities” that oppress them. Arguably, these law criminalizing HIV transmission do just that to gays, oppress them. It has been argued that structural groups need protection the most when they publicly protest some form of legal treatment. The recent cases involving Rhoades, Rick, and Musser and their public protests against HIV transmission statutes show that they need some different form of protection that they are simply not getting from current laws. Rigorous rational basis 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. Furthermore, such review requires the state to consider how such laws would affect everyone in a community. Meaning that the state must take into account the “social consequences of the state action.” This would force legislators to draft laws in such a way that guarantee the laws would not stem from animus or hate towards gays. If strict scrutiny were taken off the table as an option, arguably the next best level of scrutiny would be to apply rigorous rational basis scrutiny. While the level of scrutiny as to classifications based on sexual

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270 *Id.* at 409.
271 *Id.* at 427.
272 *Id.*
273 *Id.* at 431.
274 *Id.*
275 *Id.* at 432.
276 *Id.*
orientation is still open\textsuperscript{277}, under strict scrutiny, intermediate, or rigorous rational basis scrutiny these laws would become significantly vulnerable.

c. Duty to Disclose

Statutes should avoid penalizing persons for merely having sex with the knowledge that they are HIV positive. That leaves HIV positive people open to revenge suits by former lovers who knew the HIV status of their partners and had sex with them anyway. A person should be able to consent to taking the risk of exposure. Thus, the duty to warn a sexual partner is an important aspect that should be incorporated into any HIV-specific criminal statute. Some states in the United States\textsuperscript{278}, along with Niger and Uganda incorporate a duty to warn into their laws. However, while in the United States, most statutes require that the HIV-positive person prove that the person they infected knew that they were HIV positive, both Maryland and Washington mention nothing in their statutes about consent or disclosure and thus allow for non-culpable people to face criminal liability for consensual acts.\textsuperscript{279} Instead, both Uganda and Niger have proposed legislation that requires disclosure of HIV status. Ideally, Niger’s law, where HIV/AIDS is hardly

\textsuperscript{278} 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).
prevalent, should be the model for the ideal statute.\textsuperscript{280} Article 26 of the Action for the West Africa Region or “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.”\textsuperscript{281} This unambiguous standard would make clear to a third party that an individual was infected and that the individual willingly consented to sex with that person, after being warned.

\textbf{d. Defenses}

Providing affirmative defenses can be an effective way to address criminal HIV transmission issues.\textsuperscript{282} Defenses are one of the few ways to guarantee that these criminal laws will maintain a non-discriminatory approach. Furthermore, because intent is so arbitrary and hard to prove, having the defenses of disclosure, informed consent, and condom use are necessary for the fundamental rights of HIV/AIDS positive individuals to be honored. Australia’s New South Wales criminal provision is one of the few statutes that first, makes it a crime for a person with AIDS to have sex with another person, but second, makes the defenses of disclosure and consent available to the HIV/AIDS positive individual.\textsuperscript{283} The defense is available if the other person (the non-HIV/AIDS carrier) was informed of the HIV/AIDS positive individual’s status prior to sex and \textit{voluntarily} agreed to

\textsuperscript{280} United Nations Human Development Report, \textit{Sustaining Human Progress: Reducing Vulnerabilities and Building Resilience}, 187 (2014) (as of 2012 approximately 0.1\% of people are infected between the ages of fifteen and twenty four).
\textsuperscript{281} Dr. Nnamuchi & Dr. Nwabueze, \textit{supra} note 173, at 389.
\textsuperscript{282} Klemm, \textit{supra} note 256, at 504.
\textsuperscript{283} Tierney, \textit{supra} note 72, at 506-507.
accept the risk associated with having sex with the HIV/AIDS positive individual. For instance, in R. v. Konzani, the majority held that fully informed consent could be a defense for reckless transmission of HIV. On the contrary, the defense should not be extended to those who intentionally transmit the disease, as evidenced in R. v. Brown. Including such a defense is important because without it, there would be no opportunity for the HIV/AIDS positive individual to bring evidence that first, they disclosed their status to their partner, and second, that their partner accepted and consented to sex. Without having the opportunity to prove such behavior, prosecutors would be able to prove intent without the infected individual having a chance to negate such intent. As noted previously, it is difficult to prove intent, so it is only fair to allow the defenses of disclosure and consent to negate such arbitrary intent standards of proof. Condom use is an additional affirmative defense that can be asserted. Properly using a condom during “risky” consensual sex in addition to disclosure of HIV status can be an affirmative defense. Furthermore, 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. Disclosure, informed consent, and condom use are all affirmative

284 Id. at 507.
286 Id.
287 Klemm, supra note 256, at 523.
defenses that can help reduce HIV transmission while simultaneously providing a non-discriminatory approach to criminal HIV transmission laws and should thus be incorporated into such statutes.

e. Penalties

Penalties surrounding criminal HIV transmission laws create two major concerns. The first concern with such statutes is their lack of consistency in punishment across states.289 Because prosecutors have discretion regarding what offenses to charge, criminal HIV transmission may be prosecuted as attempted murder290 in one place and assault291 in another. The subjective rules concerning discretion create a gaping hole in which arbitrary punishment lies.

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.292 The bill relied on a tiered sentencing system rather than a “one size fits all” approach.293 The tiered system of sentencing is maintained as follows: if someone intends to transmit the virus and transmission actually takes place, it is still a class

\[\text{liability should occur because “the public interest in promoting the use of condoms outweighs the public interest in criminalizing the failure to disclose where a condom is used”.)}\]

292 Young, supra note 47.
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. Furthermore, under the new law, Iowans are no longer required to register as sex offenders for the entirety of their lives and additionally a “retroactive clause” within the bill would remove anyone from the sex offender registry who was previously required to register under 709c, Iowa’s previous criminal code. Iowa’s softened criminal code fairly penalizes the transmission of HIV/AIDS. It forces prosecutors to prove that both intent and transmission occurred before subjecting someone to a class B felony; the same felony punishment for crimes such as manslaughter, kidnapping, and robbery. Considering the seriousness of the latter crimes, prosecutors should have the burden to prove both intent and actual transmission before having the opportunity to subject someone to such a felony.

f. Remedies

While it may seem that proving an individual has transmitted HIV/AIDS is a straightforward issue, as proven, that is far from true. An increasing number of people are being prosecuted for criminally transmitting HIV/AIDS to another person, one recent example being Rhoades. Aside from prosecution, damages are often recoverable in an action for the transmission of HIV/AIDS and prove to be

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294 Id.
295 Id.
an additional remedy for those affected by the transmission of HIV/AIDS. Such damages include: hospital and medical expenses, lost earnings, and past and future pain and suffering. 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. This proves to be a common issue among these laws criminalizing the transmission of HIV/AIDS because intent is difficult to prove unambiguously. With the difficulty that comes with trying to prove intent comes the hard question as to what an appropriate remedy is in the situation of transmission of HIV/AIDS. For instance, whether prosecution is truly the appropriate remedy in these situations or whether simply damages are more appropriate. However, the Rhoades case evidenced that prosecution does not seem to be a fail proof remedy in situations such as these. Some might argue that damages are instead the more appropriate remedy. But again, the issue of proving intent arises if an individual is seeking damages in this context. If the intent language is not clear in a statute then damages should not be granted as a remedy. Certain state even statutes allow for prosecutors to file criminal charges against a defendant rather than first exhausting all civil remedies, such as damages. Again prosecutors have arbitrary discretion to decide whether to criminally charge an

297 Id.
298 Id.
individual, which failed in the Rhoades case, instead of seeking damages. The argument today remains whether prosecution or damages is the appropriate route to take in cases of criminal HIV transmission. However, criminalization would “no more effectively deter the spread of HIV than the imposition of tort liability,” and thus as evidenced by the failed attempt at prosecution in the Rhoades case, damages seem to be the more appropriate remedy in HIV transmission cases.

V. Conclusion

There are myriad laws that may have been necessary or useful to degrees at inception but are no longer useful today and should be eliminated from the criminal code, whether through outright repeal or amendment. Due process and simple justice and equality demand that these onerous statutes be revisited. As of 2009, all of the states in the United States had implemented criminal laws punishing sexual behavior that exposed people to HIV. And about half have laws that are HIV-specific. These HIV-specific laws in particular should be eliminated because when applied inappropriately, the intended reach has the potential to not only fail, but also fail those who are disproportionately affected by HIV/AIDS.

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301 MEIER & GEIS, supra note 3, at 240.
302 Heneke, supra note 85, at 765.
303 Id.
304 MEIER & GEIS, supra note 3, at 239.
The question whether HIV/AIDS transmission should ever be criminalized remains open to debate domestically and internationally today. A major concern is whether criminal law is the appropriate “vehicle” of control when it comes to regulating the intentional transmission of HIV/AIDS.305 However, the trend toward criminalization seems to be increasing306 even in the context of increasing criticism and broader understanding of and tolerance for those afflicted by the virus or the disease. There is no question that States can and should legislate on HIV transmission. The question is how and with what effect. Criminal laws cannot address all problems and communities must be very selective when deciding which legal matters need criminal attention307 and which remedies are effective. Arguably, the transmission of HIV is not a matter that is appropriate for legal attention in a criminal statutory respect.

There is a distinctly apparent issue surrounding these laws criminalizing the transmission of HIV and the Fourteenth Amendment. Because gays are disproportionately affected by HIV/AIDS these laws disparately impact gays. Furthermore, because gays are not yet considered a suspect class, they have little to no chance of successful constitutional protection under the Fourteenth Amendment if they challenge such laws. This failing needs to be combatted by amending the laws criminalizing the transmission of HIV and creating a new criminal statute as

305 Id. at 240.
306 Cowan, supra note 161, at 136.
outlined above. As they say, history repeats itself. If history is in fact repeating itself, we need to avoid repeating the part of it that emanated from hysteria, animus, and moral disapproval\textsuperscript{308} towards gays.

\footnote{Romer v. Evans, 517 U.S. 620, 644 (1996).}