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Criminalizing Sexual Transmission of HIV: Oklahoma's Intentional Transmission Statute: Unconstitutional or Merely Unenforceable?

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COMMENT

Criminalizing Sexual Transmission of HIV: Oklahoma's Intentional Transmission Statute: Unconstitutional or Merely Unenforceable?

> *Those who make the laws are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plow. This is a maxim of constitutional law . . . .*[1]

I. Introduction

Acquired Immune Deficiency Syndrome (AIDS) has been an ominous presence in society for over a decade.[2] Health authorities have argued that education and counseling about the disease should be the primary method used to control its spread.[3] Recently, legislators have realized that some individuals may be intentionally transmitting the virus.[4] As a response to these deliberate transmissions, states have attempted to use traditional criminal law to punish, deter, and prevent the intentional spread of AIDS.[5] Such prosecutions have resulted in convictions for activity not medically proven to spread HIV.[6] Realizing the shortcomings of traditional criminal law,[7] states have passed HIV-specific statutes in an attempt to

1. THOMAS MCINTYRE COOLEY, CONSTITUTIONAL LIMITATIONS 483 (6th ed. 1890).

2. GARY P. WORMSER ET AL., AIDS AND OTHER MANIFESTATIONS OF HIV INFECTION 18 (1987).

3. *See generally* NATIONAL RESEARCH COUNCIL, INSTITUTE OF MEDICINE, NATIONAL ACADEMY OF SCIENCES, CONFRONTING AIDS: DIRECTIONS FOR PUBLIC HEALTH, HEALTH CARE, AND RESEARCH 9-13 (1986).

4. *See* NATIONAL RESEARCH COUNCIL, INST. OF MEDICINE, NAT'L ACADEMY OF SCIENCES, CONFRONTING AIDS UPDATE 1988, at 83 (1988).

5. *See, e.g.*, United States v. Moore, 846 F.2d 1163 (8th Cir. 1988) (holding the biting of a prison guard by an HIV-infected inmate to be sufficient grounds to convict inmate for assault with a deadly weapon); State v. Haines, 545 N.E.2d 834 (Ind. Ct. App. 1989) (holding that defendant with ARC who spit, scratched, bit, and hurled blood at police officers, convicted of attempted murder); State v. Cummings, 451 N.W.2d 463 (Wis. Ct. App. 1989) (finding a bite from an inmate to be battery of correction officer); State v. Weeks, No. 15-183 (Tex. Dist. Ct. 1989) (stating that an HIV-infected defendant who spat at prison guard was guilty of attempted murder).

6. *See e.g.* United States v. Moore, 846 F.2d 1163 (8th Cir. 1988) (holding the biting of a prison guard by an HIV-infected inmate to be sufficient grounds to convict for assault with a deadly weapon); Weeks v. Texas, No. 92-1154 (Texas Ct. Crim. App. 1992) (holding that an HIV-infected defendant who spat at prison guard was guilty of attempted murder and given life sentence).

7. *See* Thomas W. Tierney, *Criminalizing the Sexual Transmission of HIV: An International Analysis*, 15 HASTINGS INT'L & COMP. L. REV. 475, 491-99 (1992).

eliminate these weaknesses.[8] Oklahoma has passed such a statute, codified at title 21, section 1192.1.

This comment discusses the discriminatory impacts of Oklahoma's statute. Part II of this comment provides a general understanding of AIDS. Part III addresses the Oklahoma HIV transmission statute and examines problems accompanying its enforcement. Part IV discusses and illustrates the statute's equal protection ramifications and argues that the group of people most prone to discriminatory enforcement of the statute, homosexuals, are a suspect class under both federal and state constitutional law. The section concludes that Oklahoma's HIV-transmission statute violates equal protection. Finally, part V of this comment suggests possible alternatives to the present statute that would concurrently meet the goals of the statute while evading the problems engendered by the current scheme.

II. Facts About AIDS

A. Background

The Human Immunodeficiency Virus (HIV) is a virus that attacks and destroys the human immune system.[9] Specifically, HIV prevents the production of, and in some cases, destroys, those cells in the immune system that are vital to defending against illness.[10] When the body is infected with HIV, diseases that are normally easily treated become extremely difficult to control.[11] Likewise, exceptionally rare cancers once found only in older men appear with alarming frequency in much younger men as a result of the onset of AIDS.[12] Although AIDS is inherently fatal, people have lived as long as eight years after being diagnosed with the disease.[13] However, most AIDS patients live an average of 12.5 months after being diagnosed with AIDS.[14]

Most people infected with HIV live for an extended period without showing any clinical symptoms. Because this period of latency can last from as little as two years to as much as seven years, people can only determine their HIV status through testing.[15]

8. *See* ARK. CODE ANN. § 5-14-123 (Michie Supp. 1991); IDAHO CODE § 39-608 (Supp. 1991); ILL. ANN. STAT. ch. 720, § 12-16.2 (Smith-Hurd Supp. 1993); LA. REV. STAT. ANN. § 14:43.5 (West Supp. 1992); MD. HEALTH-GEN. CODE ANN. § 18-601.1 (Supp. 1990); MICH. COMP. LAWS ANN. § 333.5210 (West Supp. 1991); MO. ANN. STAT. § 191.677 (Vernon Supp. 1992); MONT. CODE ANN. § 50-18-112 (1989); N.D. CENT. CODE § 12.1-20-17 (Supp. 1991); 21 OKLA. STAT. § 1192.1 (Supp. 1992); WASH. REV. CODE ANN. § 9A.36.021 (West Supp. 1991).

9. *See* NATIONAL RESEARCH COUNCIL, INST. OF MEDICINE, NAT'L ACADEMY OF SCIENCES, MOBILIZING AGAINST AIDS 116 (1989) [hereinafter MOBILIZING AGAINST AIDS].

10. *Id.* at 123.

11. S. Sheppard, *Medical and Public Health Overview of HIV Infection, in* AIDS PRACTICE MANUAL: A LEGAL AND EDUCATIONAL GUIDE 2-1, 2-8 (Paul Albert et al. eds., 1991).

12. WORMSER ET AL., *supra* note 2, at 3.

13. *See, e.g.*, George F. Lemp et al., *Survival Trends for Patients with AIDS*, 263 JAMA 402, 403 (1990).

14. *Id.*

15. MOBILIZING AGAINST AIDS, *supra* note 9, at 131-32.

In Africa, where the disease likely began, AIDS is "galloping across" the continent, devastating as much as one third of the adult population.[16] It has been projected that by the year 2015 more than seventy million cases of AIDS will exist in the countries south of the Sahara Desert.[17] Studies in Africa strongly suggest that the deaths due to AIDS will exceed the country's births within a few decades.[18]

As of December 31, 1991, over 133,232 people have died from AIDS in the United States.[19] Estimates predict that between 390,000 and 480,000 cases of AIDS will have been reported by the end of 1993.[20] Two-thirds of these people will have died by then.[21] AIDS is the leading cause of death for men between the ages of 25 and 44 in New York City, Los Angeles, and San Francisco, and for black women between the ages of 15 and 44 in New Jersey.[22] Women are becoming increasingly at risk for AIDS and are the fastest growing group in the country infected with HIV.[23] Women's death rates quadrupled from 1985 to 1988.[24] AIDS is the leading cause of death for women between the ages of 25 and 34 in New York City.[25] The Center for Disease Control determined that 31% of these women contracted the virus through heterosexual intercourse.[26] Tragically, a study has shown that 40% of the women currently infected with HIV felt they did not engage in unsafe or high-risk behavior.[27]

B. Treatment

While there is no known cure for AIDS[28], progress has been made in slowing down the "opportunistic infections" associated with this disease.[29] The anti-viral drug, zidovudine (AZT), helps prevent further decline.[30] However, AZT has toxic side effects[31] and the HIV can develop an immunity to AZT over time.[32]

A newer drug recently approved by the Food and Drug Administration, dideoxyinosine (ddI), has actually increased the quantity of T4[33] cells in patients.[34]

16. ALAN H. TERL, AIDS AND THE LAW: A BASIC GUIDE FOR THE NONLAWYER at xv (1992).
17. *Id.*
18. *Id.* at xvi.
19. *The Second 100,000 Cases of Acquired Immune Deficiency Syndrome — United States, June 1981-Dec. 1991*, 41 CENTERS FOR DISEASE CONTROL: MMWR (MORBIDITY & MORTALITY WKLY. REP.) 28 (1992).
20. *Estimates of HIV Prevalence and Projected AIDS Cases: Summary of a Workshop, Oct. 31-Nov. 1, 1989*, 39 CENTERS FOR DISEASE CONTROL: MMWR (MORBIDITY & MORTALITY WKLY. REP.) 110, 117 (1990).
21. *Id.*
22. TERL, *supra* note 16, at xvi.
23. *Id.* at xvii.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. Tierney, *supra* note 7, at 482.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 481.
33. *See generally* MOBILIZING AGAINST AIDS, *supra* note 9, at 123 (stating that T4 cells are those

Although the medical community is frantically searching for a cure, none is expected for several years.[35]

C. Transmission

HIV has been medically proven to be transmitted in limited ways: sexual contact, the sharing of contaminated needles, blood transfusion, and perinatally.[36] Although the virus has been detected in bodily fluids such as blood, tears, saliva, and semen,[37] HIV cannot be contracted through casual contact.[38] Likewise, HIV cannot be transmitted through air, food, water, or fomites.[39] Since universal testing of all donated blood began in 1985, incidents of transmission through blood transfusions have been extremely low.[40]

Engaging in high-risk sexual activity, such as unprotected oral, anal or vaginal intercourse, may allow the virus to enter through breaks, tears, or mucous membranes in the mouth, rectum, or vagina.[41] Although condom use decreases the danger of transmitting the virus, condoms are not fail-safe.[42] Sharing needles during intravenous drug use is also highly dangerous.[43] Children usually contract the virus through their mothers, either before (perinatally), during, or after birth (through breast feeding).[44]

D. Societal Response

AIDS was first seen as a disease infecting only homosexuals.[45] One author discussing the fear associated with AIDS states:

> Stigma goes beyond AIDS patients to anyone considered at risk of carrying the infection. Indeed, not only have AIDS patients been subject to discrimination but the public response to the disease has been accompanied by a rise in attacks on homosexuals. Fire officials have

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cells which protect against illness and are most vulnerable to HIV).

34. Tierney, *supra* note 7, at 482.

35. *Id.*

36. WORMSER ET AL., *supra* note 2, at 26.

37. *Id.*

38. *Id.* at 28.

39. *Id.*

40. Tierney, *supra* note 7, at 484.

41. *See* Lawrence A. Kingsley et al., *Risk Factors for Seroconversion to Human Immunodeficiency Virus Among Male Homosexuals*, 1 LANCET 345, 348 (1987).

42. *Condoms for Prevention of Sexually Transmitted Diseases*, 37 CENTERS FOR DISEASE CONTROL: MMWR (MORBIDITY & MORTALITY WKLY. REP.) 133, 134 (1988).

43. Ellie E. Shoenbaurn et al., *Risk Factors for Human Immunodeficiency Virus Infection in Intravenous Drug Users*, 321 NEW ENG. J. MED. 874 (1989).

44. Tierney, *supra* note 7, at 483.

45. WORMSER ET AL., *supra* note 2, at 3; *see also* Allan M. Brandt, *AIDS: From Social History to Social Policy*, 14 LAW MED. & HEALTH CARE 231, 235 (stating that underlying fears of homosexuality give rise to fear of transmission). An illustration of this mindset in the federal government is given by President Reagan's former speechwriter, Pat Buchanan: "The poor homosexuals — they have declared war upon Nature and now Nature is exacting an awful retribution." *Id.*

> refused to resuscitate men they suspected might be homosexuals. Police have worn gloves when approaching suspects in some municipalities.[46]

Many of the fears connected with AIDS reveal underlying concerns about contagion and contamination as well as sexuality.[47] Portions of the public remain in a state of confusion, fear, and misinformation.[48] Disputes and controversy over allowing HIV-positive children to attend school, over infected inmates, and over liability in the work place continue.[49] Poor funding resulting in haphazard attempts at allaying the "dis-ease" of the public has done little to diminish the fear surrounding AIDS.[50]

One scholar has encouraged the creation of a comprehensive health policy based on (1) explicit and exhaustive sexual education programs; (2) increased support for drug treatment; and (3) increased availability of sterile syringes and needles for addicts outside the reaches of treatment.[51] It has also been suggested that pervasive discrimination against homosexuals be stopped.[52] Only by addressing the discrimination and educating the public will the spread of AIDS be effectively abbreviated. To do this successfully, a delicate balance must be struck between governmental power and individual liberties. Political bodies and the legal community as a whole are obligated to legislate to curtail the spread of AIDS. Simultaneously, these bodies must accomplish this formidable task without infringing on the rights of those who are or might be victims of the disease and thus most directly impacted by the legislation.

III. Oklahoma's Criminal Statute

A. Legislative Background

The Presidential Commission on the Human Immunodeficiency Virus Epidemic recommended that HIV-specific statutes be adopted to address the intentional transmissions of HIV.[53] These statutes should give "clear notice of socially unacceptable standards of behavior specific to the HIV epidemic, and tailor punishment to the specific crime of HIV transmission."[54]

46. Allan M. Brandt, *AIDS: From Social History to Social Policy*, 14 LAW MED. & HEALTH CARE 231, 234 (1986). An illustration of the stigma surrounding the "Who knows who has the disease?" dilemma is offered by the ultraconservative William F. Buckley, who suggested mandatory universal screening with all seropositive individuals being tattooed on their forearms and buttocks. *Id.* at 236. Such a recommendation conjures up images of another time when like-minded individuals were advocating the identification of segments of the population with yellow stars and pink triangles and "housing" them in concentration camps.

47. *Id.*

48. WORMSER ET AL., *supra* note 2, at 13.

49. *Id.*

50. *Id.*

51. Leon Eisenberg, *The Genesis of Fear: AIDS and the Public's Response to Science*, 14 LAW MED. & HEALTH CARE 243, 247-48 (1986).

52. *Id.* at 248.

53. Tierney, *supra* note 7, at 499.

54. *Id.*

Responding to these societal and political pressures, Oklahoma passed a statute in 1988 criminalizing the intentional transmission of HIV.[55] The statute read: "It shall be unlawful for any person to engage in any activity with the intent to infect or cause to be infected any other person with the human immunodeficiency virus."[56] To eliminate the vagueness and overbreadth of this language,[57] the state legislature amended the statute in 1991.[58] The current statute reads:

> § 1192.1. Knowingly engaging in conduct reasonably likely to transfer HIV virus — Penalties
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> A. It shall be 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 containing visible blood, semen, or vaginal secretions into the bloodstream of another, or through the skin or membranes of another person, except during in utero transmission of blood or bodily fluids, and:
>
> 1. the other person did not consent to the transfer of blood, bodily fluids containing blood, semen, or vaginal secretions; or
>
> 2. the other person consented to the transfer but at the time of giving consent had not been informed by the person that the person transferring such blood or fluids had AIDS or was a carrier of HIV.
>
> B. Any person convicted of violating the provisions of this section shall be guilty of a felony, punishable by imprisonment in the custody of the Department of Corrections for not more than five (5) years.[59]

A floor amendment prior to the passage of the final version was proposed and adopted by the House of Representatives, which would have made it illegal for a food handler infected with HIV to work in any restaurant in the state.[60] It is impossible for the disease to be transmitted in this manner.[61] Although this amendment was not adopted by the Senate, the fact that such an amendment could be adopted by even one branch of the state legislature illustrates the ignorance and fear that surrounds the disease.

B. Discussion

Oklahoma's amended version of its intentional transmission of HIV statute compensates for many of the afflictions suffered by both its predecessor and similar statutes from other states.[62] For example, an Illinois statute has been attacked as

55. 21 OKLA. STAT. § 1192.1 (Supp. 1988).

56. *Id.*

57. Discussing the blatant constitutional shortcomings of Oklahoma's original statute is beyond the scope of this comment.

58. 21 OKLA. STAT. § 1192.1 (Supp. 1992).

59. *Id.*

60. *Id.*

61. *See* WORMSER ET AL., *supra* note 2, at 28.

62. *See generally* Kristen L. Kwiatt, *The Illinois HIV Transmission Statute: Unconstitutionally*

unconstitutionally vague and overbroad and for failing to give adequate warning as required by the Due Process Clause.[63] Many HIV-specific criminal statutes proscribe conduct that has not been medically proven to transmit HIV or are so vague that the statute could be used to criminalize "safe" conduct.[64] Several courts have convicted people for conduct that has not been shown to transfer the HIV virus. Recently, the Texas Court of Criminal Appeals upheld a conviction imposing a life sentence for attempted murder on an HIV-infected inmate who spat on a prison guard.[65]

Oklahoma's statute limits culpable conduct to that which has been proven capable of transmitting HIV. However, Oklahoma's statute is still far from perfect. Although Oklahoma's statute poses fewer problems than similar statutes in other states, it is still plagued with defects that may render the statute unconstitutional or unenforceable. First, although the statute seems to require specific intent, a court could interpret the statute to require a lower intent standard. The intent requirement as written — and correctly interpreted — presents an almost insurmountable burden of proof for the prosecution. Second, the proscribed conduct could be overly vague. Third, in addition to the vague intent requirement, the statute has other vague provisions which may make it unenforceable or render it unconstitutional. These problems lend to the statute's inability to be enforced.

C. Problems

Oklahoma's statute as written poses several problems that substantially impair its effectiveness. These defects implicate the statute's constitutionality as well as its ability to be enforced.

1. The Necessary Intent

At first reading, it appears that the statute requires the specific intent of "knowingly" transmitting HIV to the victim. Specifically, the statute requires the defendant to (1) know of his or her status as an HIV carrier, and (2) intend to infect another with HIV.[66]

A threshold problem is determining whether the defendant knew of his or her HIV-positive status; this could be established by subpoenaing test results indicating

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Vague or Politically Vogue?, 27 CRIM. L. BULL. 483 (1991).

63. *Id.* Illinois' statute was attacked because: (1) it encouraged "social scapegoating of politically powerless groups"; (2) the statute failed to deter the intentional behavior likely to spread AIDS; (3) the statute may actually increase the spread of the virus by discouraging testing; and (4) the statute as written posed severe problems of proof. *Id.* at 484.

64. *See* IDAHO CODE § 39-608 (Supp. 1991) (prohibiting transfer or attempt to transfer any bodily fluid, including saliva); ILL. ANN. STAT. ch. 720 § 5/12-16.2 (Smith-Hurd Supp. 1993) (prohibiting exposure of bodily fluid of one to another in manner that *could* result in infection); MONT. CODE ANN. § 50-18-112 (1989) (proscribing knowingly exposing another to infection, but failing to define terms); WASH. REV. CODE ANN. § 9A.36.021 (West Supp. 1990) (stating it is illegal to administer or cause HIV to be taken by another person).

65. *Texas Court Lets Stand Life Sentence of Inmate Convicted of Spitting on Guard*, AIDS POL'Y & LAW, Oct. 1992, at 1.

66. 21 OKLA. STAT. § 1192.1 (Supp. 1992).

HIV positive status. However, these test results may be confidential or protected by a privilege. If the state may compel disclosure of test results of a highly private nature, the consequences could be drastic. People who become aware of the government's ability to expose one's test results may forego testing to establish a basis for limiting future liability.[67] People may also be afraid to be tested because confidentiality will no longer be absolute.

In addition, many HIV tests are anonymous. It is therefore highly likely that a defendant who intends to transmit HIV will have first taken the precaution of being tested anonymously. If a defendant is culpable enough to deliberately transmit HIV, he or she is reprehensible enough to deliberately avoid potential liability by being tested anonymously.

Should the state choose to abrogate one's right of confidentiality in HIV testing matters, then the criminal statute will seriously undermine the overall public policy behind the law,[68] and in fact, could conceivably promote the spread of HIV. Lack of confidentiality may discourage people from seeking treatment and testing.[69] This in turn could result in people unaware of their HIV-positive status engaging in activity with a high likelihood of transferring the disease. It is important to remember the statute is not designed to prevent people from engaging in high-risk behavior. Rather, the statute merely proscribes engaging in high-risk behavior knowing that one is HIV-positive and intending to transmit the virus via the unsafe conduct.

The state could also prove the defendant's knowledge through admissions to family, friends, sexual partners, or others. Again, this method poses functional problems. The state would have to intrude into the personal lives of many people associated with HIV-positive individuals. Although the United States Supreme Court has stated that government should not intrude upon an individual's right to privacy in sexual relationships,[70] courts have indicated that this right may be overridden by a compelling state interest, such as prevention of the spread of AIDS.[71] It has been argued that a law that would justify such a "massive governmental intrusion" into innocent people's personal lives would be excessively overbroad.[72] Such a law would "encompass a great deal of sexual activity that presents no threat of harm to others in pursuit of the few instances of sexual activity that do."[73]

67. Tierney, *supra* note 7, at 487.

68. *See* NATIONAL RESEARCH COUNCIL, INST. OF MEDICINE, NAT'L ACADEMY OF SCIENCES, CONFRONTING AIDS: DIRECTIONS FOR PUBLIC HEALTH, HEALTH CARE, AND RESEARCH 9-13 (1986) (stating that educating and counseling the public about the modes of transmission of AIDS is the paramount method for deterring spread of disease).

69. Tierney, *supra* note 7, at 489.

70. *See* Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972); Stanley v. Georgia, 394 U.S. 557, 564-68 (1969); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

71. Lisa Black, *Criminalizing HIV Transmission: New Jersey Assembly Bill 966*, 15 SETON HALL LEGIS. J. 193, 207 (1991) (stating that proper governmental interest can justify revealing otherwise protected test results) (citing United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3d Cir. 1980).

72. Tierney, *supra* note 7, at 488.

73. *Id.*

Assuming the state could successfully prove the defendant's knowledge, the state must then determine whether the defendant had the "intent to infect another."[74] Courts have held that the determination of criminal intent is a factual question rarely demonstrated by direct evidence, but may be inferred from the facts and circumstances surrounding a case.[75] The unique nature of sexual relationships counsels that inferring "intent to infect" based on HIV-positive status, knowledge of the HIV-positive status, and the occurrence of high-risk behavior could either be incredibly easy or impossibly difficult to prove.

In the first instance, the prosecutor may effectively argue for a lowered intent to facilitate conviction. The prosecutor could argue that the defendant's HIV-positive status, knowledge of that status and the fact that he engaged in high-risk behavior must implicitly mean that the defendant intended to transmit the virus. However, the defendant may be ignorant as to what constitutes dangerous activity. Knowledge of HIV-positive status equals neither awareness of unsafe conduct nor desire to harm one's partner. In effect, the prosecutor would be showing that the defendant placed the victim in danger of death or serious bodily injury by consciously disregarding risk to the victim. This *mens rea* as defined by the Model Penal Code merely satisfies the intent requirement for "reckless endangerment,"[76] not "knowledge."

Since many defendants will likely argue that they had no intent to transmit the virus, conviction will frequently turn on the credibility of witnesses. In a situation where the defendant is a homosexual or other highly discriminated-against minority, the jury could conceivably convict based on the defendant's status as a homosexual and not on the defendant's guilt or innocence.

Should the court determine that the intent requirement is comparable to that of a murder or manslaughter statute, then the prosecutor must meet an almost insurmountable burden. Murder requires that the defendant know of his HIV-positive status, believe his actions could transmit the virus, and desire the death of the victim.[77] Knowing or purposeful states of mind require the prosecution to at least show that the defendant was almost practically certain his actions would cause infection.[78] In this situation, the defendant could claim he neither knew his activity was dangerous nor intended or desired the infection of the victim. Absent an overt manifestation of the defendant's desire to transmit HIV, guilt beyond a reasonable doubt would be difficult to legitimately determine.

Enforcing the statute as written requires governmental intrusion into one of the most personal aspects of human nature: the sexual relationship. This statute clearly implicates one's right to maintain the confidentiality of his or her medical condition.[79] This right to privacy, however, is not absolute.[80] One competing

74. 21 OKLA. STAT. § 1192.1 (Supp. 1992).

75. United States v. Fleming, 479 F.2d 56, 57 (10th Cir. 1973).

76. *See* MODEL PENAL CODE § 211.2 (1985).

77. Tierney, *supra* note 7, at 491.

78. *See* MODEL PENAL CODE § 2.02(2)(b) (1985).

79. U.S. CONST. amend. IV; *see also* Whalen v. Roe, 429 U.S. 589 (1977); Woods v. National Life & Accident Ins. Co., 347 F.2d 760 (3d Cir. 1965).

80. U.S. CONST. amend. IV. The Fourth Amendment only protects against unreasonable searches

policy is involved when another's health is put at stake.[81] AIDS is surely a disease that warrants intrusion into one's medical background. Therefore, an HIV test could be used as evidence in a prosecution under this statute.

In *Jacobsen v. Massachusetts*,[82] the United States Supreme Court asserted that a state legislature may protect the public health and safety even if such protection would require restraint of individual constitutional rights.[83] In *United States v. Westinghouse Electric Corporation*,[84] the Third Circuit Court of Appeals stated that medical records may be disclosed after considering many factors such as the type of record requested, the likelihood of harm if there is nonconsensual disclosure, the necessity of the records, public policy, and public interest.[85] Clearly, a balancing test must be used to determine whether the accused's interests outweigh those of the state in preventing the further spread of HIV. Since the latter goal seems to be a highly compelling state interest, it is likely that individual privacy will be subordinated to the concerns of the government. However, Oklahoma's statute may inappropriately allow the government to invade upon innocent people's private lives. A law that "sweeps so broadly" may not legitimately fall under the rubric of compelling state interest. Clearly, the right to privacy places significant barriers in the path of enforcement of the statute.

Due to the uncertain definition of intent in the statute, prosecutors may be unsure of the evidence required to convict. Assuming the statute requires the higher specific intent, prosecutors would be faced with a virtually insurmountable burden. This element causes common-sense problems of proof. Short of a blatant admission by the defendant that he or she wanted to kill the victim, few situations exist where specific intent can be proven beyond a reasonable doubt. Therefore, unless the court determines that the intent may be inferred from the circumstances, this element will be virtually impossible to prove. Should the court conclude that specific intent to infect another may be inferred by conduct, constitutional concerns become entangled in the argument.

The intent requirement in this statute poses a real threat of basing conviction on the caprice of moral disapprobation or censure of a judge or jury. Such an intent requirement should be made more specific to prevent unprotected minorities from being convicted for their minority status rather than for a criminal act.

2. The Necessary Act

A second problem with the statutory language concerns the conduct required for conviction. The statute proscribes "conduct reasonably likely to result in the transfer of the person's own blood, bodily fluids containing visible blood, semen or vaginal secretions into the bloodstream of another, or through the skin or other membranes

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and seizures.

81. *See* New Jersey v. T.L.O., 469 U.S. 325 (1985).

82. 197 U.S. 11 (1905).

83. *Id.* at 28.

84. 638 F.2d 570 (3d Cir. 1980).

85. *Id.* at 578.

of another person."[86] This requirement, although limited to the known methods of transmitting HIV, may not be sufficiently certain to warn people precisely of which conduct is criminal and which is legal.

The statute does not require that bodily fluids actually be transferred from the HIV-positive person to the partner. The conduct engaged in need be no more certain or definite than that which is *reasonably likely* to result in the transfer of bodily fluids. Imagine a situation where the HIV-positive defendant performs unprotected oral sex on her male partner. Defendant has a cold sore on the inside of her mouth. It is possible that blood from the cold sore could transfer from the defendant through her boyfriend's urethra. However, it is highly unlikely that such a transmission would result. It is also highly unlikely that a jury would convict under these circumstances. Now imagine a homosexual couple engaging in the same behavior. One must wonder whether the gay defendant would be convicted where the heterosexual defendant would likely not be.

In this age of AIDS it would be difficult to assert that such a victim did not assume the risk of contracting HIV when he or she initially consented to the conduct. Situations where consent is an issue will become swearing matches between the defendant and the victim. When the truth turns on a statement allegedly made in the confines of one's own home prior to sexual intercourse, the judge or jury will have to determine who is telling the truth. If this determination is wrong, an innocent person may be convicted or a guilty one set free.

3. Vagueness

Some of the statute's defects that lead to problems of enforcement may also undermine the statute's constitutionality. One such defect is that the statute deprives the defendant of due process by failing to give sufficient warning of the proscribed conduct.[87] In *Grayned v. City of Rockford*,[88] the Supreme Court articulated the test for striking down a statute as void for vagueness grounds. Laws must be sufficiently defined so as to (1) give the person of ordinary intelligence a reasonable opportunity to know what is prohibited; and (2) provide explicit standards for those who apply them.[89] In addition, Justice Marshall stated that vague laws offend the

86. 21 OKLA. STAT. § 1192.1 (Supp. 1992). Interestingly, the statute only criminalizes the *attempt* to transmit HIV without proscribing the *actual* transmission of the virus.

87. Jordan v. DeGeorge, 341 U.S 223, 230 (1951).

88. 408 U.S. 104 (1972).

89. *Id.* at 108-09 (citations omitted). Justice Marshall stated:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates the basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statue "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings

First Amendment by forcing citizens to "steer far wider" of prohibited conduct than necessary.[90]

As discussed, Oklahoma's statute fails to provide a sufficient definition of intent. Although the language appears to require "knowing" intent, it is conceivable that a lesser intent would suffice under the appropriate circumstances. Homosexuals, intravenous drug users, and prostitutes would be especially vulnerable to prosecutions. Thus, to avoid arbitrary and discriminatory enforcement, the statute must be made more explicit.[91]

The phrase "conduct reasonably likely to transfer" HIV is especially vulnerable to attack. Situations exist where an overzealous prosecutor could charge someone whose conduct was not "reasonably likely to transfer" HIV. Of special concern would be a situation where members of hated minorities engaged in conduct "reasonably likely," but took precautions. Since condoms are not fail safe and homosexuals are easy targets for discrimination, a prosecutor may be allowed to argue for a broad interpretation in order to convict.

Another concern arises when dealing with intravenous drug users. Is bleaching a needle sufficient to remove sharing needles from the confines of "conduct reasonably likely to transfer" bodily fluids? Since bleaching the needle may kill the virus, one would think it is safe conduct. However, the statute refers to the transfer of bodily fluids. Therefore, one could argue that sharing needles still transfers bodily fluids of HIV-infected persons, notwithstanding the effective sterilization of the needles. The judge or jury could substitute fear and ignorance for the intent necessary to convict under the unclear language of the statute.

The possibility for exploitation of the Oklahoma statute because of its vague terms is very real. Although abuse requires a combination of a discriminated-against minority and a discriminatory government, this combination could result readily. One must remember that homosexuality in itself is not illegal, although sodomy is illegal in some states. Oklahoma's statute could arguably be used to proscribe homosexuality by interpreting the statute in accordance with such a goal. As Justice Thurgood Marshall mentioned in *Grayned*, "where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.'"[92] The freedom of intimate association should not be curtailed merely because the "governing majority in a state has traditionally viewed a particular practice as immoral."[93]

One must not overlook the public policy objectives behind enforcing an HIV-specific criminal statute. One author mentions that public health officials are convinced that public education and counselling about the modes of transmission

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inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden zone were clearly marked.

Id.

90. *Id.*

91. *Id.* at 108.

92. *Id.* at 109 (quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964) and Cramp v. Board of Pub. Instruction, 368 U.S. 278, 287 (1961)).

93. Bowers v. Hardwick, 478 U.S. 186, 189 (1986) (Stevens, J., dissenting).

and methods of reducing risk, not the criminal law, should be the chief strategy for preventing the spread of HIV.[94] The author argues that to be effective, such laws must be clearly written and criminalize only conduct medically proven to transmit HIV.[95] Although the statute effectively achieves one public policy objective, punishment, one must question whether such a goal with a minute impact can justify the ancillary dangers inherent in the vague language. Since education seems to be the primary goal of government, a criminal statute should be used to (1) inform the public of the proscribed acts medically capable of transmitting HIV; (2) alleviate public fears of casual contagion; and (3) encourage testing and participation in counseling and treatment programs.[96]

Oklahoma's statute either fails to address or specifically undermines these purposes. Oklahoma's vague language regarding both the necessary intent and conduct certainly fails to inform the public about the unlawful conduct. Such ambiguous language could actually foment public fears because people could be criminally liable for conduct they never realized was illegal. Additionally, the statute fails to address public fears as to casual contagion. Although the statute ostensibly limits criminal conduct to those activities medically proven to transmit HIV, the language remains too vague to effectively inform people about otherwise safe activity.

Finally, the statute also discourages people from seeking testing and treatment. Because the statute potentially allows for extreme abuse of constitutional rights to privacy, people may actively avoid testing either to limit liability or to preclude possible future public disclosure of test results. Therefore, the goals of education and counselling will be eviscerated should the statute ever be enforced beyond the most limited circumstances evidencing the most culpable conduct.[97]

A statute criminalizing the sexual transmission of HIV can *justifiably* be applied to only a minute portion of society: those HIV-infected individuals who with malice aforethought intentionally infect another with HIV. However, Oklahoma's statute as written presents a high risk of convicting innocent people. Since the statute poses severe threats of discrimination and arbitrary enforcement resulting in the undermining of legitimate state interests, the statute should either be rewritten or repealed to avoid potentially drastic results.

IV. Equal Protection

A. Introduction

Enforcement of Oklahoma's statute may have a discriminatory impact on groups who suffer disproportionately from the AIDS virus. One scholar has argued that HIV-specific criminal statutes could become an instrument of official persecution against gay men and intravenous drug users, simply because they are the largest

94. Tierney, *supra* note 7, at 475.
95. *Id.* at 487.
96. Eisenberg, *supra* note 51, at 248.
97. *See* State v. Haines, 545 N.E.2d 834 (Ind. Ct. App. 1989).

group at risk for AIDS.[98] This persecution could be manifested in harassment and punishment — not for the commission of any crime — but for sexual orientation or drug addiction. These laws would effectively criminalize the status of being homosexual. Such laws would also essentially criminalize gay sex, even in jurisdictions that have repealed sodomy laws.[99]

B. Federal Equal Protection Doctrine

Under federal constitutional law, a court must determine whether the challenged statute has a sufficiently legitimate purpose. Because all classifications are not suspect, varying degrees of judicial scrutiny exist. Groups classified by race, nationality, or alienage are considered a "suspect class," warranting the highest level of scrutiny, "strict scrutiny."[100] When determining whether a group is a suspect class under federal constitutional law, the court considers several factors: whether the group has suffered a history of purposeful discrimination, whether this discrimination has been invidious, and whether the group lacks sufficient political power to redress their grievances from the political branches of government.[101] Invidious discrimination is defined by determining: whether the trait which defines the class bears any relation to ability to perform or contribute to society;[102] whether the class has been burdened with unique difficulties due to prejudice or inaccurate stereotypes; and whether the trait or characteristic defining the class is immutable.[103] The legislation must be narrowly tailored to serve a compelling state interest. In addition, higher scrutiny will be applied when the classification encroaches on personal rights protected by the Constitution, commonly referred to as fundamental rights.[104]

Groups classified by gender or by the status of illegitimacy are considered "quasi-suspect."[105] The law creating the challenged classification will be subject to a heightened scrutiny, although not as high a scrutiny as a suspect classification.[106] Classifications based on these traits must substantially relate to a legitimate state interest to survive constitutional attack.[107]

The final classification reserved for remaining groups merits the lowest level of scrutiny. Under this test, the classification will be presumed valid and will withstand review if it is rationally related to a legitimate governmental interest.[108]

Sexual orientation discrimination cases have been challenged in a number of instances through equal protection arguments.[109] However, before addressing equal

98. Tierney, *supra* note 7, at 489.
99. *Id.*
100. City of Cleburne v. Cleburne Living Ctr. 473 U.S. 432, 440 (1985).
101. *Id.* at 440-42.
102. Frontiero v. Richardson, 411 U.S. 677, 686 (1973).
103. *See Cleburne*, 473 U.S. at 440-44; *Frontiero*, 411 U.S. at 685-87.
104. *Cleburne*, 473 U.S. at 440.
105. *Id.* at 440-41.
106. *Id.*
107. *Id.*
108. *Id.* at 440.
109. *See* High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990);

protection status for gays, it is necessary to first address *Bowers v. Hardwick.*[110]

1. Bowers v. Hardwick

Writing for a 5-4 majority in *Hardwick*, Justice White determined that homosexuals do not have a constitutional right of privacy to engage in sodomy.[111] The court explicitly confined their holding and discussion to the privacy issue, refusing to address whether gays have heightened rights under the equal protection clause.[112]

In the wake of the *Hardwick* decision, many scholars have attacked the Court's holding.[113] Professor Anne B. Goldstein determined in an exhaustive study that the majority of the Court based their conclusion on inaccurate historical conceptions of homosexuality and sodomy.[114] By acting on this misconception, the Court was able to "make a profound change in constitutional interpretation, from the liberal to the conservative paradigm, without acknowledging either that it had done so or the implications of the shift."[115] Professor Nan D. Hunter has argued that the *Hardwick* decision attempts to delineate a difference between homosexuals and heterosexuals in the very acts which they share in common.[116] Hunter cites the incidence of homosexual and heterosexual sodomy as support.[117] Judge Norris of the Ninth Circuit Court of Appeals argues that *Hardwick* had nothing to do with equal protection.[118] He believes it is clearly incorrect to expand the *Hardwick* holding to preempt equal protection arguments. Under Judge Norris' argument, a right to privacy and equal protection under the laws are distinct legal concepts. By

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Ben-Shalom v. March, 881 F. 2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); Steffan v. Cheney, 780 F. Supp. 1 (D.D.C. 1991), *rev'd*, 8 F.3d 57 (D.C. Cir. 1993).

110. 478 U.S. 186 (1986).

111. *Id.* at 191.

112. *Id.* at 188 n.2. *See generally* Nan D. Hunter, *Life After* Hardwick, 27 HARV. C.R.-C.L. L. REV. 531 (1992); Roderick W. Lewis, Note, *Watkins v. U.S. Army and Bowers v. Hardwick: Are Homosexuals a Suspect Class or Second Class Citizens?*, 68 NEB. L. REV. 851 (1989); Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073 (1988); Tracey Rich, *Sexual Orientation Discrimination in the Wake of* Bowers v. Hardwick, 22 GA. L. REV. 773 (1988); Shelley R. Wieck, *Constitutional Challenges to Sodomy Statutes in the Context of Homosexual Activity After* Bowers v. Hardwick, 32 S.D. L. REV. 323 (1987).

113. *See supra* note 112.

114. Goldstein, *supra* note 112, at 1103. It is beyond the scope of this comment to adequately discuss these misconceptions.

115. *Id.*

116. Hunter, *supra* note 112, at 544.

117. *Id.* Data indicates that between 96% and 99% of homosexuals engage in oral sex with a smaller proportion engaging in anal sex. PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES 236, 242 (1983). Between 90 and 93% of heterosexuals have engaged in oral sex and a smaller proportion in anal sex. *Id.*

118. Watkins v. U.S. Army, 875 F.2d 699, 723 (9th Cir. 1989) (Norris, J., concurring); *see also* High Tech Gays v. Defense Indus. Sec. Clearance Office, 668 F. Supp. 1361, 1370-71 (N.D. Cal. 1987), *rev'd in part, vacated in part*, 895 F.2d 563 (9th Cir. 1990); Lewis, *supra* note 112, at 854.

failing to recognize this premise, states may be given the authority to pass laws that impose special restrictions on gays.[119]

Despite these arguments, many courts have latched onto *Hardwick* as a justification to deny equal protection status to homosexuals.[120] In *High Tech Gays v. Defense Industrial Security Clearance Office*,[121] the Ninth Circuit Court of Appeals refused a Fifth Amendment Equal Protection challenge to the Department of Defense's policy of denying high security clearances to gay members of the military.[122] The court in *High Tech Gays* interpreted *Hardwick* to mean that "homosexual activity is not a fundamental right protected by substantive due process and that the proper standard of review under the Fifth Amendment is rational basis review."[123]

The Ninth Circuit determined that it would be "incongruous" to expand the doctrine of Equal Protection to include a fundamental right of homosexual conduct under the equal protection component of the Due Process Clause of the Fifth Amendment.[124] The court continued with the circular reasoning that because homosexual conduct can be criminalized, gays and lesbians cannot constitute a suspect or quasi-suspect class and consequently cannot be given heightened protection under the Equal Protection doctrine.[125] The Seventh, the D.C., and the Federal Circuit Courts of Appeal have reached similar conclusions, citing *Hardwick*.[126]

2. Analysis

Although *Hardwick* and its progeny have made an equal protection argument under federal law a formidable task, the door has not yet been indisputably shut. In *Watkins v. United States Army*,[127] the Ninth Circuit held that gays constitute a suspect class and warrant strict scrutiny.[128] Although the court, sitting *en banc*, later withdrew its earlier holding and upheld on estoppel grounds,[129] Judge Norris provided an excellent argument for classifying gays as a suspect class.

Judge Norris argued that discrimination against homosexuals is clearly no less "pernicious" or severe than the discrimination faced by other groups already treated as suspect classes, such as aliens or people of a particular national origin.[130] Other courts have acknowledged the hatred and bigotry to which homosexuals are subject.[131]

119. *Watkins*, 875 F.2d at 723.
120. *See supra* note 109.
121. 895 F.2d 563 (9th Cir. 1990).
122. *Id.* at 571.
123. *Id.*
124. *Id.*
125. *Id.*
126. *See supra* note 109.
127. 847 F.2d 1329 (9th Cir. 1988).
128. *Id.* at 1352.
129. *See* Watkins v. U.S. Army, 875 F.2d 699, 711 (9th Cir. 1989).
130. *Id.* at 724 (Norris, J., concurring).
131. *See* Rowland v. Mad River Local Sch. Dist., 730 F.2d 444, 453 (6th Cir. 1984) (Edwards, J.,

In *Commonwealth v. Wasson*,[132] a social historian testifying as an expert witness offered extensive evidence of the purposeful discrimination suffered by homosexuals.[133] Recent examples of the bigotry and hatred suffered by homosexuals are illustrated by the attempts at discriminating against homosexuals through state amendments.[134] In Oregon, voters had the opportunity to pass a state constitutional amendment that would discourage homosexuality and classify it as "abnormal, wrong, unnatural, and perverse."[135] The bombing of a gay man's and lesbian woman's Oregon house by teenagers was attributed to the perception of the race, color, and sexual orientation of the victims; this perception was in turn attributed in part to the bigotry underlying the proposed amendment to the state's constitution.[136] The man had been gay-bashed less than a month before. He and his lesbian roommate died in the blast.[137] Similar amendments have been proposed in Colorado and Maine.[138] California, Idaho, Ohio, and Washington are states which could be facing similar attempts at "putting bigotry to a vote" in the future.[139] Thus, homosexuals have been subjected to a history of purposeful discrimination and continue to be discriminated against.

The second consideration addressed when determining whether a class may be considered suspect is whether the discrimination suffered by the class can be termed invidious. In making this determination, one factor of note is whether the trait which defines the class bears any relation to the ability to perform or contribute to society. If the trait bears no such relation, then the discrimination may be invidious. In *Watkins*, the soldier had an exemplary record.[140] Even the military conceded that Watkins' ability to perform was in no way hampered by his sexual orientation.[141]

One must also consider whether classifications based on sexual orientation reflect prejudice and inaccurate stereotypes. This factor is also satisfied, as evidenced by Oregon's attempt at terming homosexuals as "abnormal, wrong, unnatural or perverse." Prominent sex researchers have determined that homosexuality is not immoral, perverse, or deviate; rather, they have determined homosexuality exists in

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dissenting) (stating that homosexuality "evoke[s] deeply felt prejudices and fears on the part of many people") , *cert. denied*, 470 U.S. 1009 (1985); Gaylord v. Tacoma Sch. Dist. No. 10, 559 P.2d 1340, 1345 (Wash.) ("A majority of people and adults in this country react negatively to homosexuality.") (quoting a sociologist's testimony at trial), *cert. denied*, 434 U.S. 879 (1977).

132. 842 S.W.2d 487 (Ky. 1992).

133. Shirley A. Wiegand et al., *Part of the Moving Stream: State Constitutional Law, Sodomy, and Beyond*, 81 KY. L.J. 449 (1993).

134. *The Oregon Trail of Hate*, N.Y. TIMES, Oct. 29, 1992, at A2; Anna Quindlen, *Putting Hatred to a Vote*, N.Y. TIMES, Oct. 28, 1992, at A26.

135. Quindlen, *supra* note 134. The measure failed on November 3, 1992, by a narrow majority.

136. *Id.*

137. John Gallagher, *The Rise of Fascism in America*, THE ADVOCATE, Nov. 3, 1992, at 38.

138. *The Oregon Trail of Hate*, *supra* note 134.

139. Gallagher, *supra* note 137.

140. Watkins v. U.S. Army, 875 F.2d 699, 725 (9th Cir. 1989) (Norris, J., concurring).

141. *Id.*

all societies and is normal to that extent.[142] However, irrational fears, prejudice and inaccurate stereotypes still exist.

The final factor considered when determining invidious discrimination is whether homosexuality is an immutable characteristic. Scientific data indicates that humans maintain little control over sexual orientation and that sexual orientation is virtually immune to change.[143] Although homosexuals can cease the activity which outwardly identifies their class, they cannot change their inward attractions to the same sex.[144] It would be as difficult for homosexuals to change their sexual orientation as it would be for heterosexuals. Since sexual orientation is an immutable characteristic, irrational fears, prejudice and inaccurate stereotypes concerning homosexuality still exist, and since one's sexual orientation bears no relation to one's ability to perform or contribute to society, discrimination against homosexuals is appropriately termed invidious.

The third consideration when determining suspect class status concerns whether homosexuals faced with official discrimination lack the political power necessary to obtain redress from the political branches of government.[145] Judge Norris acknowledged that homosexuals cannot protect their political rights because of the very nature of the discrimination: "the very fact that homosexuals have historically been under represented in and victimized by political bodies is itself strong evidence that they lack the political power necessary to ensure fair treatment at the hands of government."[146] Judge Norris emphatically determined that these social and political pressures force people to conceal their sexual orientation, thereby, preventing effective representation.[147] In fact, "coming out of the closet" to assert one's rights against discrimination merely exposes people to the very biases and hatred they are attempting to battle.[148] The result is "that the voices of many are not even heard, let alone counted."[149]

Homosexuals meet the requirements necessary to be considered a suspect class. Homosexuals have suffered a history of purposeful discrimination. This discrimination constitutes a gross unfairness sufficiently inconsistent with the ideals of equal protection to consider the discrimination invidious. As a result, homosexuals have been unable to assert political power in a manner that effectively allows them to obtain redress from official discrimination.

C. Oklahoma's More Sensitive Commitment to Equal Protection

The use of state constitutional law has become increasingly popular when the federal law fails.[150] It is well recognized that state constitutions may afford more

142. *See* PAUL ROBINSON, THE MODERNIZATION OF SEX (1989). Not all researchers in this field embrace this author's view.

143. *See* Harris M. Miller II, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 817-21 (1984).

144. *Id.* This issue remains a point of contention among experts in this field.

145. *Watkins*, 875 F.2d at 726.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *See generally* Wiegand, *supra* note 133.

heightened rights than those allowed by the federal constitution.[151] The only limitation placed on state courts by federal constitutional law is that the state may not provide lesser rights than those afforded by the federal constitution.[152] States may follow a more expanded view of constitutional law than that which is followed by the federal courts.[153] Following state constitutional law instead of federal law is favored by Justice Brennan: "[s]tate constitutions . . . are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."[154] These elevated rights are the product of many influences. Many state constitutions were written before the federal Bill of Rights, the Fourteenth Amendment, and the incorporation doctrine.[155] Also, many state constitutions are heavily copied from other state constitutions rather than the federal Constitution.[156]

Although excellent arguments exist for deeming gays a suspect class under the United States Constitution, the *Hardwick* decision and the subsequent erroneous applications by other federal courts have made the obstacle to enhanced rights great indeed. Overcoming this encumbrance, state courts have applied their state constitution and found enhanced rights for homosexuals.[157]

In *Commonwealth v. Wasson*,[158] the Supreme Court of Kentucky recently struck down that state's sodomy statute.[159] Relying solely on state constitutional grounds,[160] the court reasoned in its equal protection analysis that the sodomy statute discriminated against sexual orientation, not the act of sodomy.[161] The interests of the government failed to satisfy the court, terming the purposes of the statute "simply outrageous."[162] The Kentucky court clearly believed that gays merit a higher scrutiny.[163]

Likewise, in *Michigan v. Bullock*,[164] the Michigan Supreme Court struck down a statute as being cruel and unusual punishment.[165] Michigan's constitution provides: "Excessive bail shall not be required; excessive fines shall not be

151. *Id.*

152. *See* John C. Cooper, *Boosting Your Case with Your State Constitution*, 72 A.B.A. J. 49 (1986).

153. Thayer v. Phillips Petroleum Co., 613 P.2d 1041, 1045 (Okla. 1980) (Opala, J., concurring). *See generally* Wiegand, *supra* note 133.

154. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

155. Wiegand, *supra* note 133, at 451.

156. *Id.*

157. *See Wasson*, 842 S.W.2d at 487 (holding sodomy statute unconstitutional as violative of equal protection and privacy, and implicitly determining gays are suspect); Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 595 P.2d 592 (Cal. 1979) (using state equal protection doctrine to strike down discriminatory statute).

158. 842 S.W.2d 487 (Ky. 1992).

159. *Id.* at 491-92.

160. *Id.* at 489.

161. *Id.* at 500.

162. *Id.* at 501.

163. Wiegand, *supra* note 133, at 451.

164. 485 N.W.2d 866 (Mich. 1992).

165. *See* Wiegand, *supra* note 133, at 452.

imposed; cruel *or* unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained."[166] The United States Constitution reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel *and* unusual punishments inflicted."[167] In holding that the Michigan statute at issue violated the state constitution, *Bullock* illustrates the reality that slight textual variations between the state and federal constitutions can result in different treatment of similarly situated defendants.[168]

Oklahoma's constitution is no exception to these trends. It was written in 1907, the year Oklahoma gained statehood.[169] Although Oklahoma's constitution bears many similarities to the federal constitution, the federal constitution copied what the Founding Fathers considered to be the "best" features of the original thirteen states' constitutions.[170] Oklahoma's constitution was influenced by other state constitutions as well as the progressive climate of the times.[171] In fact, the constitution strongly resembled that which was written at the pre-statehood Sequoyah Convention, which in turn was heavily copied from other state constitutions.[172]

Generally, Oklahoma's constitution evinces a more expansive outlook towards individual rights. This is illustrated by the constitution's length, its Bill of Rights, and its treatment of suffrage. Most constitutions prior to 1907 were around fifteen thousand words long.[173] By contrast, Oklahoma's constitution was around fifty thousand words long.[174] Within this expansive length is found another indicator of commitment to personal liberties.

Most state constitutions' Bill of Rights list twenty to thirty enumerated rights.[175] Oklahoma, however, surpasses this trend by enumerating thirty-three rights.[176] Finally, Oklahoma's constitutional commitment to individual rights can be found in a 1918 amendment extending suffrage to women.[177] This expansion of women's rights occurred two years before the federal government recognized the right in the federal constitution.[178]

In keeping with this tradition of heightened awareness of individual liberties, Oklahoma case law has embraced a "more sensitive" view of equal protection.[179] Although no overt equal protection clause exists in Oklahoma's Constitution, article

166. MICH. CONST. art. I, § 16 (emphasis added).

167. U.S. CONST. amend. VIII (emphasis added).

168. *See* Wiegand, *supra* note 133.

169. DAVID R. MORGAN ET AL., OKLAHOMA POLITICS AND POLICIES: GOVERNING THE SOONER STATE 68 (1991).

170. *Id.*

171. *Id.* at 68-75.

172. *Id.* at 68.

173. *Id.* at 69.

174. *Id.*

175. *Id.*

176. *Id.* at 70.

177. *Id.* at 71.

178. *Id.*

179. *See* Harry F. Tepker, *The Trouble with Pool Halls: Rationality and Equal Protection in Oklahoma Law*, 3 EMERGING ISSUES ST. CONST. L. 151 (1990).

II, section 7 has been interpreted as a like guarantee.[180] Article II, section 2 has also been cited as a guardian of equality in Oklahoma.[181]

Oklahoma's "more sensitive" view of equal protection is best discussed within the framework of *Callaway v. City of Edmond*,[182] a 1990 decision. In *Callaway*, an Edmond city ordinance prohibited pool halls and similar establishments from allowing children under the age of eighteen on the premises. Since age is neither a suspect class nor a quasi-suspect class, the ordinance could only violate equal protection if it failed to bear any conceivable, rational relation to a legitimate public purpose. The trial court in *Callaway* acknowledged the city's authority to limit or prohibit the operation of pool halls within city limits[183] and considered the curbing of gambling a legitimate public purpose.[184] Yet the Court of Criminal Appeals struck down the ordinance, holding that it violated the provisions of equal protection under Oklahoma case law and the state constitution.[185] The court stated that the ordinance did not bear a rational relationship to the ultimate objective of regulating gambling.[186] When one examines federal constitutional law surrounding equal protection analysis, one could likely (and prematurely) conclude that the Court of Criminal Appeals arrived at an erroneous decision, disparate from any possible support in precedent. However, exploration of Oklahoma state equal protection law reveals that *Callaway* is merely an extension of an already well established tradition of a "more-sensitive" view of equal protection in Oklahoma. This view has resulted in an expansion of individual liberties in Oklahoma and, thus, an expansion of equality.

The *Callaway* court realized that curtailing gambling was a legitimate public purpose.[187] However, the court refused to believe that the ordinance was rationally related to forwarding this legitimate public purpose, inhibiting gambling.[188] In addition, the court determined that the ordinance was too broad and an unjustifiable effort at protecting the city's youth from "certain unhealthy influences."[189] Thus, the ordinance was violative of equal protection in Oklahoma.

To better understand the *Callaway* court's decision, one must consider the spirit of equal protection steeped in tradition and precedent in Oklahoma. In *Thayer v. Phillips Petroleum*,[190] Justice Opala referred to this spirit and tradition:

180. *See, e.g.*, Fair Sch. Fin. Council of Okla. Inc. v. State, 746 P.2d 1135, 1148 (Okla. 1987). The Oklahoma Constitution states: "No person shall be deprived of life, liberty, or property without due process of law." OKLA. CONST. art. II, § 7.

181. *See* Tepker, *supra* note 179, at 154 n.13. The Oklahoma Constitution provides: "All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry." OKLA. CONST. art. II, § 2.

182. 791 P.2d 104 (Okla. Crim. App. 1990).

183. *Id.* at 106.

184. *Id.* at 107.

185. *Id.* at 106-07.

186. *Id.*

187. *Id.* at 107.

188. *Id.*

189. *Id.*

190. 613 P.2d 1041 (Okla. 1980).

> Oklahoma has adhered, since 1908, to a more sensitive view of the XIVth Amendment's Equal Protection Clause . . . . Oklahoma's commitment to its own, more sensitive version of equal protection [has] survived [more limited federal interpretations]. The federal constitution does not prohibit the state from following a more expanded view of restraints than that mandated by the U. S. Supreme Court. We should therefore give continued validity to our [case law adopting this view].[191]

The 1908 case to which Justice Opala was referring is *Chicago, R.I. & P. Ry. Co. v. Mashore*.[192] The Oklahoma Supreme Court in *Mashore* struck down an attorney's fees statute that allowed prevailing plaintiff's but not prevailing defendants to recover fees in certain situations.[193] In its holding, the Oklahoma Supreme Court adopted the words of Cooley's Constitutional Limitations: "Those who make the laws are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plow. This is a maxim of constitutional law."[194] Following this line of reasoning, the court in *Mashore* determined that the defendant was not on equal footing with his adversary, and subsequently struck down the statute.[195]

In *Wilson v. Foster*,[196] the Supreme Court of Oklahoma continued to follow the spirit of more — rather than less — equality by holding that consolidating matrimonial action custody cases with actions brought by a noncustodial parent to declare the child deprived violated equal protection.[197] In this case, a mother who was faced with such a consolidation was deprived of a jury trial because the action brought by her ex-husband was a non-jury proceeding.[198] The court in this case generally affirmed its commitment to individual liberties by asserting that classifications must not be arbitrary or capricious.[199] The equal protection clause, the court reaffirmed, is intended to protect individuals from such arbitrary discrimination by the government.[200]

Viewing the *Callaway* decision through the lens focused by *Mashore*, *Wilson* and other similar cases,[201] *Callaway* becomes clear: Oklahoma is dedicated to a more fundamental, expansive, and "sensitive" view of equal protection. *Callaway* is not an aberration, flaunting its singular inconsistencies in the face of federal equal protection analysis. Rather, *Callaway* merely affirms the existence of a commit

191. *Id.* at 1045 (Opala, J., concurring).
192. 96 P. 630 (Okla. 1908).
193. *Id.* at 635.
194. *Id.* at 633 (quoting Cooley, *supra* note 1, at 483).
195. *Id.*
196. 595 P.2d 1329 (Okla. 1979).
197. *Id.* at 1333.
198. *Id.*
199. *Id.*
200. *Id.* at 1332.
201. *See* Parkhill Truck Co. v. Reynolds, 359 P.2d 1064, 1067-68 (Okla. 1961); Keaton v. Branch, 231 P. 289 (Okla. 1925); Oligschlager v. Stephensen, 104 P. 345 (Okla. 1909).

ment in Oklahoma to a rudimentary principal upon which the United States was founded: equality.

Applying the *Callaway* holding and its predecessors to Oklahoma's statute criminalizing the intentional transmission of HIV, it becomes evident that this statute offends the sensitive aspirations of Oklahoma's equal protection doctrine. The prevention of the spread of HIV and AIDS is certainly a legitimate public purpose. However, like *Callaway*, the issue does not revolve around the legitimacy of the purpose being promoted, but turns on whether Oklahoma's statute is rationally related to the ultimate objective of regulating the spread of HIV. More importantly, the statute must not offend the concept upon which equal protection is premised, equality, and the case law through which the more sensitive equal protection doctrine is embraced.

The Oklahoma statute exercises grave injustices against those carrying the AIDS virus. More specifically, the statute allows for the high likelihood of discrimination against homosexuals. Homosexuals are not only the highest group at risk of AIDS; homosexuals are also a unique minority who experience the fear, ignorance, and disapprobation of many members of society. These characteristics coupled with the lack of political power in the state creates a dismal combination.

The statute as written is likely to discourage testing and treatment by those at risk for the disease and by those already infected with HIV. By allowing for the prosecution of HIV-positive individuals under the highly flawed provisions of the statute, the statute may ironically increase the spread of HIV. Since HIV is a highly stigmatized virus and because homosexuals and others with HIV will fear prosecution based on an ambiguous statute, treatment and testing will be skirted. Prosecutions will become "swearing contests" between the defendant and the alleged victim, the outcome turning on the more credible witness. Because inherent biases may sway the fact finder, people will be convicted based on a condition or a status, not on the merits of the case or the defendant's guilt or innocence. Although such injustice may not become a pervasive phenomenon, the likelihood of just one conviction based on prejudice and facilitated by the inadequacies of the statute warrants revision of Oklahoma's law. Even one conviction of an innocent person because of their status as a homosexual or as an HIV carrier affronts the equal protection doctrine as well as the judicial system as a whole.

By applying Oklahoma's more expansive view of equal protection, the state can acknowledge the shortcomings of the statute and begin to correct its flaws. The legitimate public purpose behind the statute will then begin to be promoted. Educating people about AIDS and HIV and protecting people from the intentional transmission of HIV are the legitimate goals of a properly worded statute. These goals cannot be segregated. A statute must be written with education in mind. Only for the most onerous acts should criminal prosecution be allowed. A statute which discriminates against an unprotected minority and undermines the very purpose underlying the statute is not the solution to an epidemic. It is merely a response to the fear, hatred, and ignorance surrounding the disease and those infected with it. Society must overcome these hurdles in order to address AIDS with intelligence and foresight.

One way to begin this process is to confront the statute's inadequacies. By addressing the concerns and problems outlined in this text, the statute will more appropriately provide for education while deterring the most severe acts warranting criminal sanction.

V. Proposed Revisions

This comment suggests bifurcation of the statute into one allowing criminal penalties and one providing civil treatment and counseling. The criminal statute would apply only in those situations evidencing the presence of malice aforethought or an equally guilty state of mind. The civil statute should address those situations where an HIV-positive person engages in negligent or reckless conduct in violation of the provisions of the civil statute. The civil statute would also provide for criminal sanctions for those who continually violate the civil statute's provisions.

Criminal sanctions for HIV transmission is not an adequate remedy for curtailing an epidemic. Education should be the prevalent means by which the spread of HIV is appropriately addressed. Also, some people engage in more culpable and onerous activity with the specific intent of transmitting HIV. These situations warrant criminal punishment. However, a delicate balance must be struck between individual liberties and the public goal of limiting the spread of HIV. To do so requires more focus on education than on criminal sanction and requires some sacrifices in the process.

A. Criminal Punishment

The criminal portion of the statute should specify the intent element and should punish only the most culpable of individuals. Otherwise, privacy, equal protection, and witness credibility immediately become unassailable obstacles. The winner becomes the most credible and the most convincing witness. The loser becomes the right to privacy, the right to equal protection of the laws, and dignity. HIV-transmission trials will become a counterpart to date-rape trials, with all the accompanying implications. However, in analyzing the situation, one must realize that this area is the source of most of the flaws of the original statute and, unfortunately, any statute which attempts to regulate consensual sexual intercourse should be highly scrutinized.

Revisions to the criminal statute should begin with a specific definition of the necessary intent to avoid any inconsistencies. Language stating that the intent should be evidenced by malice aforethought or the presence of a depraved and malignant heart could be added to clarify the intent standard. Also, the necessary act should be limited to those acts medically *capable* of transmitting HIV. This provision would eliminate the ambiguities of the current statute, which merely require that the transmission of bodily *fluids* be *reasonably likely*. Therefore, biting or spitting cases, where blood is not transferred or the skin is not broken, will not fit within the parameters of the proposed revision.

The focus should be placed on education rather than punishment. By limiting the criminal sanctions available, the purpose of the statute will be better served. Likewise, by focusing on education, society as a whole will become more aware of the characteristics of the disease, resulting in fewer cases of HIV and fewer instances where these statutes will be implicated.

B. Civil Sanctions

For those actions that do not rise to the level of a violent felony evidencing the malicious intent to infect another with HIV, a statute providing counseling and treatment is proposed.

This statute would fall under the authority of the Department of Health and Public Safety. The statute would be part of article 5, which deals with disease prevention and control. The civil statute would provide for situations where the intent is difficult to determine or absent. It should be designed to encourage people to determine their HIV status prior to engaging in sexual intercourse. By providing civil sanction for situations where the defendant engaged in the requisite conduct while being HIV-positive without inquiring into the defendant's mental state, individuals will be encouraged to actively seek treatment and testing.

The statute would also require a complaining witness. This provision safeguards against unnecessary intrusions into people's private lives. It places the decision to make public what is usually private on the shoulders of the victim. Granted, should the victim decide to remain silent, then the acts will remain unfettered until someone does complain. However, since the proceedings would be entirely confidential, there should be little reason for a complaining witness not to come forth with a good faith claim. Likewise, the process would include provisions for testing the defendant and would also be confidential.

By giving the power to act against negligent or reckless conduct in this manner, people will become educated while being deterred from future unsafe conduct. At the same time, by bifurcating civil prosecutions from criminal ones, the problems plaguing Oklahoma's current statute are more effectively addressed. While the proposed statutes do not profess to solve all problems surrounding the HIV epidemic, criminalization of HIV transmission, and educating the public, the proposed revisions do address these shortcomings in a manner that significantly decreases the current statute's flaws.

VI. Conclusion

Oklahoma's statute criminalizing the sexual transmission of HIV, although a noble attempt at preventing a perceived danger, falls far short of the mark. Preventing the spread of HIV is certainly a compelling state interest. Punishing the intentional transmission of HIV is even more compelling.

However, the state must arrive at a fragile balance between individual liberties and the abbreviation of the spread of HIV and AIDS. A statute that implicates, rather than protects, individual liberties fails to effectively achieve the state goal. Likewise, a statute that undermines the very purpose it is meant to serve most certainly frustrates the government's aspirations.

Perhaps more importantly, a statute which discriminates against a minority violates a basic proposition upon which the United States was founded: equality. Such a statute undeniably denigrates Oklahoma's commitment to equality through its more sensitive view of equal protection doctrine. Oklahoma's statute clearly violates equal protection by discriminating against a minority deserving status as a suspect class: homosexuals.

Education is the most formidable weapon to fight the spread of HIV. Although the intentional transmission of the disease is repugnant, the ramifications of criminalizing those acts in a manner tainted by vagueness and fear are perhaps even more loathsome. By educating people about HIV and AIDS and its modes and methods of transmission, people will be protected from their own ignorance as well as that of their partners. Striking out against the people most strongly affected by the disease is not the answer. To overcome or at least limit the spread of the disease, society must act responsibly and realistically. Education is the first step towards achieving this end.

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