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GUARDING INTERNATIONAL BORDERS AGAINST HIV: A COMPARATIVE STUDY IN FUTILITY

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ABSTRACT

Back in 1985, when knowledge of HIV began to spread, governments reacted by passing immigration laws to restrict the entry of HIV positive individuals. These laws required such individuals to either declare their HIV status or undergo mandatory HIV testing to secure entry. As justification for these initiatives, many countries claimed to be preserving the public health and their domestic economy. The United States, China, and Russia are three countries that have had, or still have, some form of HIV immigration restrictions. Initially, it may seem logical that preventing HIV positive individuals from entering a country will cut down on the spread of HIV and save the economy from health care costs. Nevertheless, an analysis of the HIV travel restrictions of these three countries will show that the public health and economic reasoning behind such laws is flawed because HIV is not spread by casual contact and because economic goals can be accomplished with less restrictive means. Moreover, this article will further reveal that HIV travel restrictions contribute to several health concerns and create issues with confidentially and stigmatization.

In the end, a comparative analysis of these three countries, with specific attention paid to their successes and failures, reveals that the best system is one that works on both an international and domestic level. On the international level, border

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testing must be voluntary, confidential, and informed. It should also utilize pre and post test counseling, and not be used to restrict entry. On the domestic level, individual countries need to educate the public and create programs to address high-risk groups responsible for the rapid spread of HIV. In doing so, society will find not only that it is more effectively protecting itself from the spread of HIV, but also that it is protecting the HIV community from the stigma and discrimination that contributed to the rapid spread of HIV in the first place.

I. INTRODUCTION

Back in 1985, when knowledge of HIV began to spread,[1] the typical government reaction, as with many diseases, included panic and exaggerated response.[2] Globally, governments began passing immigration laws to restrict HIV positive individuals from entering their country's borders by requiring them to declare their HIV status or undergo mandatory HIV testing to secure entry.[3] Overall, four different types of laws were implemented: those that completely restricted entry, those that prevented short-term entry, those that prevented long-term stays, and those that required foreigners who contracted HIV within a country to be deported.[4] At the time, countries justified these restrictions by stressing public health concerns.[5]

However, in as early as 1987, World Health Organization studies confirmed HIV travel restrictions were overly intrusive and ineffective at preserving public health.[6] Moreover, since

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[1] UNAIDS & IOM INT'L ORG. FOR MIGRATION, UNAIDS/IOM STATEMENT ON HIV/AIDS-RELATED TRAVEL RESTRICTIONS 3 (2004).

[2] *See* Jeffrey V. Lazarus et al., *HIV-Related Restrictions on Entry, Residence, and Stay in the WHO European Region: A Survey*, 13 J. INT'L AIDS SOC'Y, Jan. 10, 2010, at 1-2.

[3] *Id.* at 2-3.

[4] UNAIDS & IOM INT'L ORG. FOR MIGRATION, *supra* note 1, at 1-2.

[5] *Id.*

[6] Joseph J. Amon & Katherine W. Todrys, *Fear of Foreigners: HIV-Related Restrictions on Entry, Stay, and Residence*, 11 INT'L AIDS SOC'Y, Dec. 16, 2008, at 2.

1987, further studies by groups such as the United Nations High Commissioner for Human Rights concluded that HIV travel restrictions were ineffective.[7] Nevertheless, as of 2011 over sixty countries still had some sort of travel ban.[8]

Under international law, such as the International Covenant on Civil and Political Rights (ICCPR), countries have broad powers in determining who can enter and stay within their borders; however, these powers can be limited if unequally applied.[9] International law stresses that when human rights restrictions are placed on specific groups, governments need legitimate reasons for violating equal protection, and they need to use the least restrictive means in limiting those rights.[10] Since international laws only apply once a person is within the country's borders,[11] this line of reasoning is only useful after foreigners have legally or illegally entered and are then at risk of deportation. Nevertheless, international health regulations require medically based travel restrictions to adhere to the requirements listed above.[12] As a result, the analysis is the same since this category covers those who have not yet entered the country in the same way as those in the prior category that already entered legally or illegally.

Specifically, in terms of HIV travel restrictions, international governments restrict basic rights, such as freedom of movement, of HIV positive individuals for several reasons, such as preserving the public health and the economy.[13] In evaluating this policy, the Joint United Nations Programme on HIV/AIDS, the World Health Organization, and other groups conclude that these programs are ineffective in carrying out their stated goals; that they actually contribute to greater prob-

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[7] *Id.*

[8] THE GLOBAL DATABASE ON HIV-SPECIFIC TRAVEL AND RESIDENCE RESTRICTIONS, http://hivtravel.org/ (last visited Dec. 15, 2011).

[9] UNAIDS & IOM INT'L ORG. FOR MIGRATION, *supra* note 1, at 6-7.

[10] *Id.* at 7.

[11] *Id.* at 6-7.

[12] Lazarus et al., *supra* note 2, at 5.

[13] *See* UNAIDS & IOM INT'L ORG. FOR MIGRATION, *supra* note 1, at 7.

lems; and that they are not the least restrictive means.[14] Despite this, one must note that not all countries look to international covenants in making such decisions. Nevertheless, that does not prohibit such countries, like the United States and China, from applying this line of reasoning to their own notions of equal protection.[15]

The remainder of this article will explain why HIV travel restrictions are ineffective at achieving their stated goals, and how such laws are not the least restrictive means for achieving those goals. In doing so, this paper will be divided into six parts. Part two will provide an overview of HIV travel restrictions focusing on the scope of the problem, typical justifications for the laws, and their global impact. Parts three, four, and five will discuss the creation and modification of HIV travel laws in three major counties; namely, the United States, China, and Russia. These sections will analyze the origin of the HIV travel restrictions, the impacts and reactions to the laws, and how the laws were ultimately eliminated or changed. The sixth section will compare the laws in the three countries to determine which country's law, or which combination of laws, provides the most effective way of addressing HIV immigration concerns.

II. Overview of HIV Related Travel Restrictions

It is difficult to pinpoint the exact number of countries with HIV travel restrictions;[16] however, as of 2011 it is esti-

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[14] *See id.* at 7-10; Lazarus et al., *supra* note 2, at 5.

[15] *See, e.g.*, Medical Examination of Aliens—Removal of Human Immunodeficiency Virus (HIV) Infection From Definition of Communicable Disease of Public Health Significance, 74 Fed. Reg. 56,547, 56,550-54 (Nov. 2, 2009) (to be codified at 42 C.F.R. pt. 34) [hereinafter Medical Examination Removal] (analysis of United States HIV travel law looked at whether or not law had a logical basis and used least restrictive method); Dejian Lai et al., *HIV/AIDS Testing at Ports of Entry in China*, 32 J. PUB. HEALTH POL'Y 251, 252-54 (2011) (analysis of Chinese HIV travel law looked at whether or not law had a logical basis).

[16] UNAIDS & IOM INT'L ORG. FOR MIGRATION, *supra* note 1, at 3.

mated that over sixty countries had some sort of limitation.[17] As addressed earlier, there are four major types of restrictions: entry restrictions, short-term restrictions, long-term restrictions, and deportation.[18] Currently, nearly fifteen countries have full entry restrictions.[19] Likewise, about twenty countries restrict short-term stays of ninety days or less, while around sixty countries restrict long-term stays.[20] Lastly, about twenty-five countries deport HIV positive foreigners.[21] In all of these countries, HIV status must be declared or proven through testing upon entry; the method depending on each country.[22] Of particular concern is whether testing results are confidential, whether testing is voluntary, whether there is informed consent, and whether pre and post testing counseling are provided.[23] These four factors are important in evaluating HIV immigration laws, and, as will be demonstrated later, their manipulation can turn an overly restrictive law into one that avoids discrimination, protects society, and benefits the HIV community.

To better understand the language and implementations of HIV laws, it is useful to comprehend why such laws are implemented. Traditionally, countries gave two major reasons for implementation: public health and economics.[24] A 2009 study by the Denmark World Health Organization confirms that the vast majority of countries with such laws listed public health as a major reason for implementation.[25] The public health jus-

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[17] THE GLOBAL DATABASE ON HIV-SPECIFIC TRAVEL AND RESIDENCE RESTRICTIONS, *supra* note 8.

[18] UNAIDS & IOM INT'L ORG. FOR MIGRATION, *supra* note 1, at 1-2.

[19] THE GLOBAL DATABASE ON HIV-SPECIFIC TRAVEL AND RESIDENCE RESTRICTIONS, *supra* note 8.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] UNAIDS & IOM INT'L ORG. FOR MIGRATION, *supra* note 1, at 2; WORLD HEALTH ORG. & UNAIDS, GUIDANCE ON PROVIDER-INITIATED HIV TESTING AND COUNSELLING IN HEALTH FACILITIES 30 (2007).

[24] UNAIDS & IOM INT'L ORG. FOR MIGRATION, *supra* note 1, at 1.

[25] Lazarus et al., *supra* note 2, at 2-5.

tification for HIV travel restrictions focuses on the simple premise that allowing HIV positive foreigners and returning nationals to enter a country will increase the spread of HIV within that country.[26] While there is no doubt that the mobile nature of the modern world shares responsibility for this increase, the nature of HIV does not justify such entry restrictions on public health logic.[27] The public health justification can only be used to deny entry when a disease is spread via casual contact, meaning via simple day-to-day encounters such as light contact or breathing the same air; however, HIV is spread through non-casual contact such as sexual intercourse or sharing drug needles.[28]

As mentioned earlier, international health regulations require any laws placing travel restrictions on people with a disease to be based on a solid logical foundation.[29] Since HIV is not spread via casual contact, the restriction's logic is flawed. Granted, there is the argument that if even one additional person contracts HIV there is a public health concern; however, this argument is ineffective since the only legally acceptable justification for a restriction is when the disease spreads via casual contact because such restrictions cause several problems.[30]

HIV travel restrictions are responsible for causing several public health and humanitarian problems.[31] Requiring mandatory HIV testing to enter or remain in a country encourages people to enter illegally and avoid testing, so people do not know they are infected and do not take proper precautions.[32] Moreover, by letting people think HIV is solely a foreign problem, locals neglect to take proper precautions.[33] Resultantly,

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[26] UNAIDS & IOM INT'L ORG. FOR MIGRATION, *supra* note 1, at 8.
[27] *Id.*
[28] *Id.*
[29] Lazarus et al., *supra* note 2, at 5.
[30] UNAIDS & IOM INT'L ORG. FOR MIGRATION, *supra* note 1, at 8.
[31] *Id.*
[32] *Id.*
[33] *Id.*

not only do these laws have no basis in public health, but they actually contribute to public health and humanitarian concerns.

The second major justification for HIV travel restrictions focuses on protecting the economy.[34] Governments claim admitting HIV positive individuals strains public aid and health care.[35] While logical, this blanket ban on HIV positive foreigners is not the least restrictive means of protecting an economy.[36] Not all people with HIV require government aid as many have private insurance, well paying jobs, and/or personal wealth.[37] The goal of preserving economic growth could be met by less restrictive means since case by case analysis would ensure the economy can be protected, while allowing HIV individuals with private resources to enter.[38] This reasoning, combined with the lack of public health justification, shows the logic behind HIV travel restrictions is ineffective. Before beginning the analysis of the laws of specific countries, it is important to understand how many people are affected by these laws and why such laws must be changed.

In 2007, over 190 million people lived outside their country of birth and nearly 900 million traveled internationally.[39] As a result, an extremely large number of people are affected by travel restriction laws since all people entering countries with HIV restrictions must submit to mandatory testing or declare HIV status. Moreover, among those affected, a significant portion includes refugees, asylum seekers, and those seeking reunion with families.[40] Although some countries offer ways to bypass the HIV laws, these means often fail to reopen the door.[41] This is especially tragic when asylum seekers cannot escape

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[34] *Id.* at 9.

[35] *Id.*

[36] *See id.* at 9-10.

[37] *Id.* at 9.

[38] *See id.*

[39] Amon & Todrys, *supra* note 6, at 2.

[40] UNAIDS & IOM INT'L ORG. FOR MIGRATION, *supra* note 1, at 5.

[41] Sherryl S. Zounes, *Positive Movement: Revisiting the HIV Exclusion to Legal Immigration*, 22 GEO. IMMIGR. L.J. 529, 532-33 (2008).

the foul practices that drove them away. Furthermore, there is the additional concern of splitting up families. Following a parallel line of reasoning, since many HIV victims come from developing countries with little to no medical care, many would find it unethical to deny entry when it robs them of treatment.[42]

In addition, there are also implications for local and global economies. When a country bans HIV entry, it bans students, workers, and specialists who contribute to the economy.[43] In addition to the obvious human rights issues of denying employment and education, these countries are being robbed of valuable resources and tourist dollars. Indeed, many countries depend on money from tourism, and for some, the annual number of visitors exceeds the local population.[44]

A third effect is the impact of HIV restrictions on global health. Mandatory HIV testing on entry and deportation of HIV positive foreigners leads many to enter illegally, avoid testing, and avoid getting needed medications to evade detection.[45] Lack of knowledge is especially problematic as people continue to spread HIV if they are unaware of having it.[46] By not getting tested, not only do these individuals put others at risk, but they put themselves at risk by not getting the treatment they so desperately need.

The final global effect focuses on broken confidentiality and the resulting stigma. The confidentially requirements of HIV testing are not always observed, and when information gets out, the resulting stigma can range from employment dismissal to denial of medical care.[47] A Chinese study reveals only around half of people tested for HIV believed confidentiality was maintained, and nearly 11% were certain it was

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[42] UNAIDS & IOM INT'L ORG. FOR MIGRATION, *supra* note 1, at 5.
[43] *See id.*
[44] *Id.*
[45] *Id.*
[46] *See id.*
[47] *See id.*

breached.[48] Moreover, almost 25% reported being victims of discrimination, such as being refused work or being forced to leave it.[49] In short, these practices have led to an epidemic of discrimination.

Taken together, these four factors demonstrate that placing travel restrictions on HIV positive foreigners has a significant impact on a wide range of areas from the global economy to basic human rights. Now that the logic and history of HIV travel restrictions have been established, it will be applied in analyzing the laws of the United States, China, and Russia.

III. CREATION AND EXPULSION OF HIV TRAVEL RESTRICTIONS IN THE UNITED STATES

The United States first implemented immigration restrictions to protect citizens from diseases in 1952 with the passage of the "Immigration and Nationality Act," which prevented entry of foreigners with "communicable diseases of public health significance."[50] Since then, the Center for Disease Control (CDC) and the Department of Human Health and Services (DHHS) have been responsible for adding and removing diseases, and, in 1987, they added HIV to this list.[51]

The regulation was designed to apply to every HIV positive foreigner entering the country regardless of entry point, visit length, or purpose.[52] Moreover, the law mandated the deportation of foreigners who contracted HIV while in the country.[53] On its face, the law itself is quite simple in that it requires immigration personnel to test anyone over the age of fifteen for diseases listed as public health threats, regardless of the type

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[48] UNAIDS, THE CHINA STIGMA INDEX REPORT 8 (2009).

[49] *Id.* at 11.

[50] Medical Examination Removal, *supra* note 15, 74 Fed. Reg. at 56,548.

[51] *Id.*

[52] HIV Nondiscrimination in Travel and Immigration Act of 2007, H.R.3337, 110th Cong. § 2(1) (2007).

[53] *See generally* Medical Examination of Aliens, 42 C.F.R. §§ 34.1, 34.3-34.4 (1991).

of visa they applied for,[54] and no matter an individual's age, immigration personnel is required to test someone if they show symptoms.[55] If the person is HIV positive, or in the case of short term visitors, if the person declared they are HIV positive, immigration reports the finding and bars entry.[56]

Despite these blanket restrictions, there were three ways to bypass the law for separated families, refugees seeking asylum, and short term visitors.[57] Immigrants with certain family ties to legal U.S. residents, such as being a parent or spouse, could enter regardless of their HIV status if they met three requirements: first, that there would be minimal public health danger by admission; second, that there would be minimal risk of spreading HIV by admission; and third, that they would not seek government aid without first seeking permission.[58] Likewise, asylum seekers could enter if they met the first two of the above requirements and could prove their home country discriminated against them for reasons such as race or religion.[59] Lastly, HIV positive foreigners seeking short term entry could stay for thirty days or less if they met the first and third of the above requirements.[60] Nevertheless, while these three exceptions appeared to be a fair means of bypass; practically, they were nearly impossible to invoke.[61] In the case of asylum seekers, this difficulty was compounded by having to prove persecution in one's native country, especially since HIV discrimination was not a valid basis for asylum.[62] Hence, not only were the regulation's restrictions all inclusive, but the so-called exceptions were mirages at best.

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[54] *Id.* § 34.3.

[55] *Id.*

[56] *Id.* §§ 34.2, 34.4.

[57] HIV Nondiscrimination in Travel and Immigration Act of 2007, H.R. 3337, 110th Cong. § 2(1)(A).

[58] *Id.* § 2(1)(A)(i)-(iii).

[59] *Id.* § 2(1)(B); Zounes, *supra* note 41, at 533-35.

[60] HIV Nondiscrimination in Travel and Immigration Act of 2007, H.R. 3337, 110th Cong. § 2(1)(C)(i).

[61] *See* Zounes, *supra* note 41, at 533-35.

[62] *Id.* at 534-35.

Despite the fact that the government enacted the law to protect the public health and preserve the economy, the regulation was controversial.[63] Critics were concerned with false positives and felt that, given the existing number of HIV residents, excluding a few more individuals would be ineffective.[64] Nevertheless, the government asserted that false positives were rare and that despite the large numbers of HIV residents, those infected could transfer the disease.[65] It is important to note that, at the time, this logic was somewhat justified as little was known about HIV.[66] Furthermore, in response to concerns over testing procedures, the government assured that testing would be paid for by those tested, that results would be confidential, and that counseling would be provided to HIV positive individuals on how to treat HIV and prevent its spread.[67] Even though the regulation was eventually overturned, [68] these three provisions are important to highlight because they show the government was trying to narrowly tailor the impact by preventing discrimination and ensuring people got the information they needed.

The first real attempts to change the law came from the Public Health Service in 1991; however, political muscle prevented results.[69] Soon after, the CDC and DHHS, the government organizations that placed HIV on the list of excludable public health diseases in the first place, tried to remove it, but political opposition prevented them from doing so and Congress soon withdrew this power from these departments.[70] The CCD and the DHHS tried to remove the ban because new information on HIV made it evident that the original reason for ex-

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[63] *See* Medical Examination of Aliens, 52 Fed. Reg. 32,540, 32,541 (Aug. 28, 1987) (to be codified at 42 C.F.R. pt. 34).

[64] *Id.*

[65] *Id.*

[66] *See* Medical Examination Removal, *supra* note 15, 74 Fed. Reg. at 56,548.

[67] Medical Examination of Aliens, 52 Fed. Reg. at 32,541-42.

[68] Medical Examination Removal, *supra* note 15, 74 Fed. Reg. at 56,548.

[69] Zounes, *supra* note 41, at 536-37.

[70] *Id.* at 537.

cluding foreigners with HIV, the fear that HIV spread via casual contact, was no longer justified.[71] However, Congress stated that even if there were no legitimate public health reasons, there were still economic justifications such as concerns over the staggering effects on health care.[72]

Aside from few intermittent attempts to change the law, there were no other major efforts towards change until after 2005.[73] In 2006 on World AIDS Day, President George W. Bush announced steps were in place to remove the HIV travel ban.[74] A year later, congress proposed the "HIV Nondiscrimination in Travel and Immigration Act of 2007" to end the restrictions.[75] While it was never passed, its reasoning is noteworthy since it was mimicked in the regulation that later removed HIV regulations.[76] The proposed legislation noted that as of 2007, only thirteen countries including Iraq, Libya, and Sudan had full entry bans.[77] However, it is important to note that the U.S. allowed short term visitors to declare their HIV status as opposed to requiring testing.[78] Moreover, the legislation noted that since the law was passed, thousands of foreigners had been denied entry on the basis of HIV status alone, which likely encouraged illegal immigration and a lack of HIV testing, both of which contribute to public health prob-

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[71] *Id.*

[72] *Id.* at 541.

[73] HIV Nondiscrimination in Travel and Immigration Act of 2007, H.R. 3337, 110th Cong. § 2(12).

[74] Zounes, *supra* note 42, at 547.

[75] HIV Nondiscrimination in Travel and Immigration Act of 2007, H.R. 3337, 110th Cong. § 1.

[76] Medical Examination Removal, *supra* note 15, 74 Fed. Reg. at 56,550-53; HIV Nondiscrimination in Travel and Immigration Act of 2007, H.R. 3337, 110th Cong. § 2.

[77] HIV Nondiscrimination in Travel and Immigration Act of 2007, H.R. 3337, 110th Cong. § 2(7).

[78] *Id.* § 2(1) (applicants for temporary admission may not have to submit to automatic testing, as do applicants applying for permanent residence, but may be required to undergo testing, depending on the particular circumstances).

lems.[79] Lastly, the legislation recognized the work of global organizations, such as the World Health Organization and the Joint United Nations Programme on HIV/AIDS, whose research clearly demonstrated HIV travel restrictions were not justified by public health or economic reasoning.[80]

By the beginning of 2009, change in the United State's HIV immigration restrictions was inevitable. With the newly restored power of the CDC and the DHHS to regulate the list of excludable public health diseases,[81] a joint proposal was created to remove HIV from the list so that HIV testing and declaration would no longer be required of foreigners, and that HIV status could no longer exclude otherwise qualified candidates.[82] On November 2, 2009, a regulation, which went into effect on January 4, 2010, was passed that ended the HIV ban.[83] This regulation mirrored the CDC and DHHS proposal by removing HIV from the list of excludable public health diseases and ending mandatory HIV testing and status declaration.[84]

The main justification cited for changing the policy was reevaluation of the public health and economic reasoning.[85] The previous public health justification stated HIV was spread via casual contact, meaning it was spread by daily activities like simple touching or breathing the same air.[86] However, CDC and DHHS studies showed HIV is not spread by casual contact, but rather by non-casual contact like sexual intercourse or sharing needles.[87]

Furthermore, the regulation addressed supplemental concerns that HIV travel restrictions caused substantial public health and humanitarian concerns.[88] HIV immigration re-

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[79] *Id.* § 2(8)-(9).
[80] *Id.* § 2(10), (13).
[81] Medical Examination Removal, *supra* note 15, 74 Fed. Reg. at 56,548.
[82] *Id.* at 56,549.
[83] *Id.* at 56,547.
[84] *Id.* at 56,547-49.
[85] *Id.* at 56,550-52.
[86] *See id.* at 56,550.
[87] *Id.*
[88] *Id.* at 56,550-51.

strictions are problematic because mandatory testing and status declaration leads to the avoidance of testing and prevents people from securing medicine.[89] This is problematic as studies show proper education and counseling slows down the spread of HIV.[90] Moreover, such restrictions contribute to humanitarian concerns by causing discrimination against HIV positive individuals and by preventing entry of such individuals into countries with better medical care.[91] Lastly, by targeting foreigners, the law misled many to believe HIV is solely a foreign problem.[92] In fact, the government spent so much time watching borders it failed to notice the rapid domestic spread of HIV by high-risk groups, which could have been lessened if proper precautions were taken.[93] Consequently, these travel restrictions were inconsistent with public health logic and created public health and humanitarian problems.

In addition to discarding the public health logic, the new regulation explains why the original economic justification for the law was also invalid. Originally, the government stated that admitting HIV foreigners would strain health care; however, more recent studies show the economic impact was greatly overestimated.[94] At the time the previous regulation was passed, there were no concrete or reliable studies showing that a significant portion of immigrants utilized public assistance in treating HIV.[95] Moreover, the government neglected to consider that immigrants have other means of managing HIV, such as insurance and private assets, meaning only a small percent use public assistance.[96] Furthermore, any public assistance that is depleted is likely nullified by the economic contributions

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[89] *Id.* at 56,550; Zounes, *supra* note 41, at 539-40.

[90] Zounes, *supra* note 41, at 539-40.

[91] Medical Examination Removal, *supra* note 15, 74 Fed. Reg. at 56,550.

[92] *See* UNAIDS & IOM INT'L ORG. FOR MIGRATION, *supra* note 1, at 8-9.

[93] *See generally* Jeffrey H. Samet, *Russia and Human Immunodeficiency Virus – Beyond Crime and Punishment*, 106 ADDICTION 1883, 1883 (2011).

[94] Medical Examination Removal, *supra* note 15, 74 Fed. Reg. at 56,550, 56,552.

[95] *Id.* at 56,552.

[96] *Id.*

of immigrants such as improving the work force, spending money, and paying taxes.[97] Lastly, the original economic reasoning of the regulation was hypocritical in that the U.S. admitted other immigrants with serious diseases even though medical expenses related to such diseases mirror those associated with HIV medical care.[98]

Before getting to the regulation's estimated impact, it is important to note the government considered alternative solutions, but ultimately decided to utilize the method described above.[99] The first solution considered was to keep the existing law in place, but this was quickly dismissed as the law was not supported by its logic and contributed to other problems.[100] The second alternative was to continue mandating HIV testing upon entry, but to stop using it as a basis for preventing entry.[101] At first glance, this seems effective since it allows people to enter the country while at the same time making infected individuals aware of having HIV.[102] This alternative would indeed be beneficial since awareness leads to people getting the help and information they need to prevent HIV's spread; however, it was majorly flawed in that it neither resolved the issues of stigmatization nor the issues regarding deprivation of autonomy.[103] Even if the confidentiality system were improved, there is no guarantee that those with access will not break confidentiality. People deserve to choose when, where, and if they should be tested. Keeping this in mind, along with the fact that the stigma associated with HIV has led people to lose their jobs, be denied work, and be denied medical care; having voluntary and informed testing, accompanied by mandatory counseling, is a much more effective option.[104]

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[97] *Id.*
[98] *Id.* at 56,553.
[99] *Id.* at 56,554-55.
[100] *Id.* at 56,554.
[101] *Id.* at 56,554-55.
[102] *Id.* at 56,555.
[103] *Id.*
[104] *Id.*; UNAIDS & IOM INT'L ORG. FOR MIGRATION, *supra* note 1, at 5.

In addition to analyzing why the U.S. restrictions should be removed, both the new regulation and the CDC analyzed what effects and benefits it would have on the global population.[105] From a broad perspective, there would be several humanitarian benefits of removal, since previously unqualified family members could rejoin loved ones, and those seeking asylum and medical care could attain refuge.[106] Moreover, by providing voluntary testing, counseling, and informed consent, the system ensures not only that people with HIV get the aid they need, but that the spread of HIV is monitored. These processes of informed and voluntary consent are important because they make people aware of potential confidentiality issues, prepare them for testing results, help them see the importance of testing, and preserve autonomy.[107] Likewise, counseling for HIV testing is extremely important because with testing includes a duty to inform patients about the meaning of their results, and to educate them on how to get help and how to avoid spreading HIV.[108] As such, by removing entry restrictions, making testing informed and voluntary, and by providing mandatory counseling, this regulation not only ended a system based on false logic, but it also alleviated the additional problems caused by the old system by correcting and accounting for the issues of discrimination, the avoidance of testing, and the lack of autonomy.

As mentioned earlier, the modification and implementation of the four factors of voluntary testing, informed consent, confidentiality, and counseling is an essential tool in turning a restrictive and unethical law into one that avoids discrimination, protects society, and benefits the HIV community.[109] Keeping this in mind along with the analysis articulated above, it is ap-

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[105] Medical Examination Removal, *supra* note 15, 74 Fed. Reg. at 56,556; *Guidance for HIV for Panel Physicians and Civil Surgeons*, CENTER FOR DISEASE CONTROL & PREVENTION (Jan. 4, 2010), http://www.cdc.gov/immigrantrefugeehealth/exams/ti/hiv-guidance-panel-civil.html.

[106] Medical Examination Removal, *supra* note 15, 74 Fed. Reg. at 56,557.

[107] *See generally* WORLD HEALTH ORG. & UNAIDS, supra note 23.

[108] *See generally id.*

[109] *See id.* at 30.

parent the United State's new law demonstrates that an informed design can fix the described problems by manipulating these four factors.

IV. CREATION AND MODIFICATION OF HIV TRAVEL RESTRICTIONS IN CHINA

Ironically, while China's HIV travel restrictions effectively demonstrate how stigma and misplaced blame can lead to public health problems, the early history of HIV in China provides the perfect example of why countries enacted such restrictions in the first place.[110] China's HIV epidemic is divided into four phases: the first, from 1985-1988; the second, from 1989-1993; the third, from 1994-2000; and the fourth, from 2001 to the present.[111]

The first confirmed HIV case in China occurred in 1985 through an American tourist.[112] In fact, it is well-established that the first phase of the disease resulted almost exclusively from the entry of HIV positive foreigners, the return of HIV positive Chinese citizens, and the importation of infected medical products.[113] Consequently, during the first two phases of HIV in China, the disease was concentrated almost exclusively in border areas.[114] It was not until the third phase that HIV spread inward, at which point it did so like a wild fire until it engulfed the entire country.[115] While the reasons for this rapid spread will be explained in detail later, for now, it is sufficient to note that it resulted partly from enacting discriminatory laws and specifically from misplaced blame and discrimination

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[110] See *generally* Sheng Lei & Cao Wu-kui, HIV/AIDS Epidemiology and Prevention in China, 121 CHIN. MED. J. 1230, 1230-33 (2008).

[111] *Id.* at 1230.

[112] Bin Xue, *HIV/AIDS Policy and Policy Evolution in China*, 16 INT'L J. STD & AIDS 459, 459 (2005).

[113] *Id.*; Lei & Wu-kui, *supra* note 110, at 1230.

[114] Lei & Wu-kui, *supra* note 110, at 1230; Zunyou Wu et al., *The HIV/AIDS Epidemic in China: History, Current Strategies and Future Challenges*, 16 AIDS EDUC. & PREVENTION 7, 8 (June Supp. 2004).

[115] Lei & Wu-kui, *supra* note 110, at 1230, 1232.

towards the high-risk groups spreading HIV.[116] A study of China's HIV restrictions will be valuable in analyzing both why such laws are passed and what ill effects such laws bring forth.

China's HIV travel restrictions consist of three separate laws passed over four years.[117] It is noteworthy that all three laws resulted from the idea that China's first two HIV stages resulted almost exclusively from the entry of HIV positive foreigners, the return of HIV positive Chinese citizens, and the importation of infected medical supplies.[118]

The first law, the "Frontier Health and Quarantine Law of the People's Republic of China," sought to protect the public health by preventing HIV and other infectious diseases from entering and spreading throughout the country.[119] The law sought to achieve this objective in two ways. First, it required mandatory testing, or proof of negative status, for all foreigners entering the country, and if an infectious disease was detected, the person needed to be isolated so proper steps could be taken.[120] Second, it required sanitization of all property that came into contact with an infectious disease like HIV.[121] If these provisions were not obeyed, violators could be subject to fines and criminal penalties.[122] As such, the law focused on HIV pos-

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[116] *See id.* at 1231–32.

[117] Rules for the Implementation of Frontier Health and Quarantine Law, (promulgated by Decree No. 2 of the Ministry of Pub. Health, Feb. 10, 1989, effective Mar. 6, 1989) art. 1 (Lawinfochina) (China), *available at* http://www.china.org.cn/travel/2008-01/03/content_1225541.htm; Certain Regulations on the Monitoring and Control of AIDS (promulgated by Ministry of Pub. Health et al., Dec. 26, 1987, effective Jan. 14, 1988) art. 1 (Lawinfochina) (China); Frontier Health and Quarantine Law of the People's Republic of China (promulgated by Order No. 46 of the President of the People's Republic of China, Dec. 2, 1986, effective May 1, 1987) art. 1 (Lawinfochina) (China), *available at* http://www.gov.cn/english/2005-08/29/content_27332. htm.

[118] Lei & Wu-kui, *supra* note 110, at 1230, 1232; Wu et al., *supra* note 114, at 8.

[119] *See* Frontier Health and Quarantine Law of the People's Republic of China, art. 1.

[120] *Id.* art. 5, 12, 16.

[121] *Id.* art. 13.

[122] *Id.* art. 20, 22.

itive foreigners and regulation of materials exposed to infection, although on a seemingly introductory level.

The second law, the "Certain Regulations on the Monitoring and Control of AIDS" act, addressed these issues with a more specific focus.[123] As with the first law, it sought to protect public health; however, it did so through four methods focused exclusively on people and items contaminated with HIV.[124]

First, it required all foreigners entering China to undergo mandatory HIV testing or to prove negative HIV status to secure entry.[125] Second, it required Chinese citizens who had been abroad for over a year to undergo the same testing, and if deemed HIV positive, to be denied entry.[126] Third, it required foreigners who contracted HIV while in China to be deported, and fourth, it required the inspection of imported medical products.[127] Despite these regulations, the law did provide for strict confidentiality and nondiscrimination requirements.[128]

The third law, the "Rules for the Implementation of Frontier Health and Quarantine Law", modified the first law by focusing more specifically on HIV.[129] While the first law only stated that people with infectious diseases needed to be isolated so appropriate steps could be taken,[130] this modification directly stated that those with HIV, whether they be entering foreigners or returning citizens, needed to be excluded from entry.[131]

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[123] *See* Certain Regulations on the Monitoring and Control of AIDS, art. 1.

[124] *Id.* art. 1-2, 4-5, 7-8, 11.

[125] Certain Regulations on the Monitoring and Control of AIDS, art. 1-2, 4, 5.

[126] *Id.* art. 8.

[127] *Id.* art. 7, 11.

[128] *Id.* art. 21.

[129] *See generally* Rules for the Implementation of Frontier Health and Quarantine Law, art. 1.

[130] Frontier Health and Quarantine Law of the People's Republic of China, art. 5, 12.

[131] Rules for the Implementation of Frontier Health and Quarantine Law, art. 99.

Despite the protections laid out in these laws, it soon became apparent that such laws were inconsistent with public health promotion and economic logic, and contributed to additional problems.[132] Specifically, these laws contributed to the rapid inward expansion of HIV in China's third HIV phase, confidentiality issues, and discrimination.[133]

HIV travel restrictions like China's are ineffective at meeting their stated goals of promoting public health and the economy.[134] In the case of public health, the only legitimate argument for the Chinese initiatives exists if HIV were spread by casual contact, but since it is not spread in this way, the initiatives are illogical.[135] However, considering that the birth of HIV in China resulted almost exclusively from immigration, [136] this logic likely took quite some time to sink in. Likewise, the economic argument that there will be a strain on health care holds little weight because many people have private assets and because HIV testing on such a massive scale is expensive.[137]

Nevertheless, the real problem with China's HIV laws is not their logical inconsistencies, but rather the resulting public health problems. The first problem, mentioned earlier, is that these laws contributed to the rapid HIV spread in China's third HIV stage.[138] By passing HIV travel laws, the government misled people into thinking HIV was a foreign problem. As a result, neither the government nor the people took proper precautions.[139] Unfortunately, the government was so focused on protecting borders that it failed to notice domestic groups

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[132] *See* Lai et al., *supra* note 15, at 253.

[133] *See id.* at 252-54; Lei & Wu-kui, *supra* note 110, at 1230-32.

[134] *See* UNAIDS & IOM INT'L ORG. FOR MIGRATION, *supra* note 1, at 5, 8.

[135] *Id.* at 8.

[136] *See* Lei & Wu-kui, *supra* note 110, at 1230-32.

[137] UNAIDS & IOM INT'L ORG. FOR MIGRATION, *supra* note 1, at 9-10; Lai et al., *supra* note 15, at 253.

[138] *See* Lei & Wu-kui, *supra* note 110, at 1230-32.

[139] *See id.;* UNAIDS & IOM INT'L ORG. FOR MIGRATION, *supra* note 1, at 8-9.

spreading HIV at alarming rates.[140] Specifically, the government was delayed in detecting high-risk groups, including injection drug users, illegal blood donors, and prostitutes, who were transforming the HIV situation from mere border prevalence to total saturation.[141] It is estimated that these risk groups are responsible for over eighty percent of HIV cases in China, while the percentage spread via foreigners is comparably minimal.[142] These statistics are supported by the fact that the rapid spread of HIV did not cease until the government took steps to target high-risk groups.[143]

In addition, China's HIV laws contributed to problems with discrimination and confidentiality.[144] In a 2009 study, the majority of HIV positive individuals reported social stigma ranging from ostracism by friends and family to not being allowed near children.[145] Likewise, nearly half of the reported discriminations ranged from simple gossip to employment denial.[146] In fact, nearly 12% were even denied medical care.[147] Although 12% is admittedly a small number, one must consider the deadly threat HIV presents. Even a denial to 1% of this group is an outrageous human rights violation. As for confidentiality, despite privacy laws only 40% of participants were certain confidentiality was maintained and nearly a tenth were positive it had been breached.[148] Considering the discriminations listed above, along with other reports of abuse, it is evident that the confidentially and antidiscrimination policies in China's HIV laws are ineffective.[149]

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[140] *See* Lei & Wu-kui, *supra* note 110, at 1230-32.

[141] *See id.*

[142] *See id.* at 1231.

[143] *See* MINISTRY OF PUB. HEALTH OF THE PEOPLE'S REPUBLIC OF CHINA, CHINA 2010 UNGASS COUNTRY PROGRESS REPORT: 2008-2009, at 32-34 (2010).

[144] UNAIDS, *supra* note 48, at 5-13.

[145] *Id.* at 5.

[146] *Id.* at 11.

[147] *Id.*

[148] *Id.* at 8.

[149] Certain Regulations on the Monitoring and Control of AIDS, art. 21; Lai et al., *supra* note 15, at 253.

In order to combat the public health effects of China's HIV travel restriction laws, the government responded with both internal reform and modification of the restrictions.[150] It is useful to analyze the domestic approach, despite the international focus of this article, because the analysis will shed light on two additional factors that can be manipulated to lessen the after effects of HIV travel restrictions as well as the overall spread of HIV.

The domestic approach placed special emphasis on education and high-risk groups.[151] The government undertook large efforts to publicize HIV and its spread via public ad campaigns, sex education classes, radio broadcasts, websites, and TV stations.[152] Considering that at the turn of the century the concept of sex was taboo in China and that sexual education in schools was banned,[153] such a dramatic policy change is extremely impressive. As a result of these open minded approaches, the rate of increase in HIV, which had been steadily rising since the early 1990s, finally began to decrease.[154]

While the advancements mentioned above are impressive, the most effective results are seen by the targeted efforts towards high-risk groups; namely, injection drug users, the sex trade, and blood donorship.[155] In the case of injection drug users, the government opened drug clinics to help them with addiction and as of 2009 nearly a quarter of a million people had utilized such programs.[156] In addition, the government used needle awareness programs to inform the public on the dangers of HIV transfer via drug needles, and, as a result, sterile needle use jumped from nearly 40% to just over 70% from 2007 to

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[150] MINISTRY OF PUB. HEALTH OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 143, at 6-11, 31-41.

[151] *Id*. at 7, 33.

[152] Lei & Wu-kui, *supra* note 110, at 1234.

[153] *See id.*

[154] *See* MINISTRY OF PUB. HEALTH OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 143, at 5.

[155] *Id.* at 33; Lei & Wu-kui, *supra* note 110, at 1233.

[156] MINISTRY OF PUB. HEALTH OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 143, at 33-34.

2009.[157] Likewise, in the case of sex workers, the government heavily publicized condom use, and resultantly, condom use rose from 50% to nearly 80% over the same period.[158] As for poor blood donor practices, the government passed laws closing all blood centers until they satisfied new standards.[159] While some say such action was drastic, the methods appear to be justified considering that nearly a quarter of people with HIV contracted it from contaminated blood.[160] The final policy, which benefited all of China, involved funding more HIV testing centers, as well as spreading awareness that HIV testing was important.[161] As a result of such polices, HIV testing increased dramatically and in 2009 over one and a half million people were tested.[162]

In addition to attacking the public health and human rights effects of HIV travel restrictions through domestic policies, China directly attacked the regulations themselves. On April 24, 2010, the government passed a law that continued the mandatory HIV testing of foreigners, but enabled foreigners with HIV to enter China for a period of less than a year.[163] Likewise, foreigners already in China needed to undergo HIV testing to obtain residency.[164] While this new law did away with the entry ban of HIV positive foreigners, it maintained mandatory HIV testing and prevented HV positive foreigners

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[157] *Id.* at 34.

[158] *Id.* at 33.

[159] Lei & Wu-kui, *supra* note 110, at 1233.

[160] *Id.* at 1231.

[161] MINISTRY OF PUB. HEALTH OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 143, at 37-38.

[162] *Id.* 36-37.

[163] *See generally* Decision of the State Council on Amending the Detailed Rules for the Implementation of the Law of the People's Republic of China Governing the Administration of Entry and Exit of Foreigners (promulgated by Order No. 575 of the People's Republic of China State Council, Apr. 24, 2010) (China), *available at* http://www.gov.cn/flfg/2010-04/27/content _15945 07.htm; Lai et al., *supra* note 15, at 255, 257.

[164] Decision of the State Council on Amending the Detailed Rules for the Implementation of the Law of the People's Republic of China Governing the Administration of Entry and Exit of Foreigners, art. 17(C).

from staying for over a year.[165]

Before moving on to the final Chinese initiative, it will help to evaluate the April 24, 2010 law. First, it is important to note that this new law did not address HIV entry restrictions for returning Chinese citizens who spent over a year abroad. Second, it is noteworthy that while the full ban on HIV positive foreigner entry was lifted, mandatory testing remained along with a ban on stays for over one year.[166] While these modifications were a step in the right direction, they did nothing to solve the problems of autonomy and little to counter the overall public health effects.[167] Granted, the domestic polices mentioned earlier counter some of these public health issues, but there is still the problem of autonomy and remaining issues with stigmatization.[168]

The second HIV regulation, passed in November of 2010, modified the earlier 2010 law.[169] Specifically, articles eight through eleven of the original law were modified to remove the entry ban for returning Chinese citizens abroad for over one year.[170] Moreover, the modification replaced mandatory testing for this group with a need to declare HIV status.[171] However, the law still maintained mandatory testing and an entry ban for all foreigners seeking to enter for over a year or seeking an adjustment to resident status.[172]

In evaluating this final law, it is important to note that as long as there is mandatory testing and entry restrictions, the economic and public health reasoning behind the law will be invalid since HIV is not spread through casual contact and

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[165] Lai et al., *supra* note 15, at 255, 257.

[166] Decision of the State Council on Amending the Detailed Rules for the Implementation of the Law of the People's Republic of China Governing the Administration of Entry and Exit of Foreigners, art. 17(C); Lai et al., *supra* note 15, at 255, 257.

[167] *See* Lai et al., *supra* note 15, at 258.

[168] *See id.*

[169] *Id.* at 255.

[170] *Id.*

[171] *Id.*

[172] *Id.*

since economic concerns are nullified by private insurance and economic contributions.[173] Moreover, even with the domestic measures taken by China to lessen these issues and public health effects created by the law, there are still issues with the lack of autonomy and the public health hazards generated by the law, while mandatory testing and entry restrictions remain in place.[174] In addition, the law does not manipulate the other factors previously mentioned, including informed consent and counseling, which, as shown earlier, can be useful at lessening these effects.[175] Hence, while the modification of the original law is a step in the right direction, it neglects to solve all of the described problems.

V. CREATION AND MODIFICATION OF HIV TRAVEL RESTRICTIONS IN RUSSIA

While the HIV situation in the United States and China began in the mid 1980s,[176] Russia had the advantage of being able to learn from the mistakes of others, as its HIV problems did not emerge until the late 1990s.[177] Russia could have learned from how both of these countries kept too much focus on the border and neglected to focus on high-risk domestic groups responsible for the rapid spread of HIV.[178] However, Russia failed to do so, and of the one million HIV victims in Russia as of 2010, nearly 85% contracted it via drug use.[179] Resultantly, not only will an analysis of Russia provide further proof of the faults of HIV travel restrictions, but it will further demonstrate the havoc willful blindness and discrimination reaps on society.

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[173] *See* UNAIDS & IOM INT'L ORG. FOR MIGRATION, *supra* note 1, at 2.

[174] *See* Lai et al., *supra* note 15, at 258.

[175] *See id.*

[176] Medical Examination Removal, *supra* note 15, 74 Fed. Reg. at 56,548; Lei & Wu-kui, *supra* note 110, at 1230.

[177] Samet, *supra* note 93, at 1883.

[178] Lei & Wu-kui, *supra* note 110, at 1230-33; *see* Samet, *supra* note 93, at 1883.

[179] *See* Samet, *supra* note 93, at 1883.

While Russia's HIV problems did not begin to emerge until the 1990s,[180] it quickly responded with numerous laws to combat HIV's spread by foreigners and those infected.[181] Of these, three laws must be addressed to understand how the European Court of Human Rights utilized international law to challenge Russia's HIV travel restrictions.[182]

The first law specifically addressed HIV's spread by foreigners.[183] It was enacted due to the massive global spread of HIV, which Russia saw as a threat to the public health, economy, and society.[184] In doing so, the law required foreigners seeking to enter for over three months to prove HIV negative status to secure entry.[185] Moreover, foreigners already in the country could be deported if they contracted HIV, even if they had become citizens.[186] In addition, the statute promised to keep the public informed of the HIV epidemic, provide testing with anonymous pre-test and post-test counseling, and find ways to prevent HIV's spread.[187] Yet, while Russia took these steps to prevent stigma and misdirection, it failed to prevent misguidance and discrimination from contributing to the rapid spread of HIV via injection drug users.[188]

Russia's second major HIV law focused on criminalizing HIV's spread.[189] Specifically, it criminalized spreading HIV, whether by foreigners or domestic citizens, regardless of

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[180] *Id.*

[181] *See* Kiyutin v. Russia, App. No. 2700/10, ¶¶ 16-25 Eur. Ct. H.R. (2011).

[182] *Id.*

[183] [Federal Law on the Prevention of the Incidence of the Human Immunodeficiency Virus (HIV) Disease in the Russian Federation], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] Mar. 30, 1995, No. 38-FZ, pmbl. [hereinafter Federal Law No. 38-FZ].

[184] *Id.*

[185] *Id.* art. 10(1).

[186] *Id.* art 11(2).

[187] *Id.* art 4(1).

[188] Samet, *supra* note 93, at 1883.

[189] UGOLOVNYI KODEKS ROSSIISKOI FEDERATSII [UK RK] [Criminal Code] art. 122 (Rus.), *available at* http://www.russian-criminal-code.com/ [hereinafter Russia Criminal Code].

awareness of having HIV.[190] Those who spread it without knowing they had it faced three years in prison, and those who were aware of having it could face five years in prison.[191]

Russia's third law focused on foreigners trying to enter the country or gain residence.[192] While its scope is broad, there are a few relevant sections. The first is that all temporary visitors, absent proof of HIV negative status, must leave within ninety days.[193] The second is that foreigners seeking permanent residence can be denied it if they cannot prove HIV negative status.[194] The third states that foreigners can obtain a three-year temporary residence permit if married to a Russian citizen living in Russia; however, such permits are denied if one is HIV positive.[195]

Now that the background has been established, it is time to discuss Russia's major case on HIV travel restrictions and the decision that paved the foundation for this major case. The preliminary case occurred in Russia's Constitutional Court in 2006, and involved a HIV positive foreigner that wanted temporary residence to live with his Russian wife.[196] The foreigner argued that article 7(13) of the "Foreign Nationals Act" and article 11(2) of the "HIV Prevention Act" gave him the right to bypass the HIV requirement since his wife was a Russian citizen/resident and since not doing so would deny equal protection.[197] Unfortunately, the court decided the public health logic outweighed these equal protection violations and denied the permit.[198]

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[190] *Id.*

[191] *Id.*

[192] [Federal Law on the Legal Status of Foreign Citizens in the Russian Federation], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] July 25, 2002, No. 115-FZ, art. 5-6 [hereinafter Federal Law No. 115-F].

[193] *Id.* art 5(1), 10.

[194] *Id.* art. 9(13).

[195] *Id.* art. 6(1-3), 7(13).

[196] *See* Kiyutin v. Russia, App. No. 2700/10, ¶¶ 24-26 Eur. Ct. H.R. (2011).

[197] *Id.*

[198] *Id.*

As discussed earlier, under international law countries have the authority to regulate who can stay within their borders, and that the applicable regulations can overcome equal protection issues if there is a solid basis in logic and utilization of the least restrictive method.[199] Russia, being subject to such an international agreement, must meet these standards to exclude temporary residence permits on the basis of HIV.[200] In the 2006 case previously mentioned, the Russian Constitutional Court declared these requirements were met in such a situation; however, the *Kiyutin* decision says otherwise.[201] The facts of *Kiyutin* are nearly identical to the facts in the Constitutional Court case. Specifically, Victor Kiyutin legally entered Russia, married a Russian citizen, and had a child.[202] However, when he applied for temporary residence via articles 6 and 7 of the Foreign National Act, the government denied his three year permit on the basis on his having HIV.[203]

In deciding *Kiyutin*, the court began by discussing the applicability of international law to this problem via its analysis of articles 8 and 14 of the European Convention of Human Rights (ECHR).[204] Article 8 states "everyone has the right to respect for his private and family life" and that the government cannot interfere with this right without a public health, economic, and/or societal interests.[205] Article 14 states that rights guaranteed by this covenant "shall be secured without discrimination on any grounds such as sex, race . . . or other status."[206] In looking at the language of these articles, a few things must be clarified.

First, the court notes article 8 standing alone does not re-

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[199] UNAIDS & IOM INT'L ORG. FOR MIGRATION, *supra* note 1, at 6-7.

[200] *See* Kiyutin, App. No. 2700/10, ¶ 39.

[201] *Id.* ¶¶ 66-74.

[202] *Id.* ¶¶ 1-8.

[203] *Id.* ¶¶ 9-11.

[204] *Id.* ¶¶ 53-59.

[205] Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

[206] *Id.* art. 14.

quire a country to respect the desires of married couples to live in a country of origin; however, such limitations must be consistent with human rights.[207] Likewise, article 14 by itself provides no real equal protection unless coupled with another law, but these two articles can work together if the problem falls within their scope.[208]

While the separation of families clearly falls under article 8, article 14 is only effective when the discrimination falls into acceptable categories.[209] Fortunately, past precedent, along with groups like the United Nations Commission on Human Rights, considers the term "other status" in article 14 to include health status.[210] As such, together these two articles can address the denial of a temporary residence visas on the basis of HIV.

After establishing the applicability of international law, the court inquired into whether Kiyutin was comparable to others seeking such a temporary visa as there couldn't be alternative reasons for denying entry.[211] Specifically, the law says one is eligible for temporary residence when said person is married to a Russian citizen living in Russia.[212] In this regard, Kiyutin measured up perfectly with others seeking such a visa as he was married to such a person.[213]

After establishing that Kiyutin was analogous to other applicants, the court began its analysis of whether the different treatment in this case on the basis of HIV status was founded in both "a legitimate aim and . . . a reasonable relationship of proportionality between the means employed and the aim sought to be realized."[214] In civil rights cases, this level of proportionality has little leeway as, due to the relative importance,

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[207] *Kiyutin*, App. No. 2700/10, ¶ 53.
[208] *Id.* ¶¶ 54.
[209] *Id.* ¶¶ 54, 56.
[210] *Id.* ¶¶ 56-58.
[211] *Id.* ¶ 59-62.
[212] Federal Law No. 115-F, *supra* note 192, art. 6(3).
[213] *Kiyutin*, App. No. 2700/10, ¶ 60.
[214] *Id.* ¶¶ 61-62.

the law must utilize the least restrictive means.[215] This is especially true when the group has been a target of discrimination in the past.[216] Since the disease began in the 1980s, HIV victims have been subject to a wide range of discriminations from physical violence to health care denial.[217] Even after new developments came to light on how HIV was spread, this persecution continued, and has been verified by United Nations reports.[218] The court held HIV victims had a history of discrimination, so the law would need to utilize legitimate logic and the least restrictive means in achieving its goals to exclude Victor Kiyutin.[219]

In beginning its analysis, the court looked at the preamble of the "HIV Prevention Act," which provided that HIV restrictions were based on the need to preserve the public health and the economy.[220] In analyzing the preamble, the court determined its logic was cursory, so it decided to take a closer look.[221] In terms of public health, the court determined the logic was flawed, and it did not utilize the least restrictive means.[222] Specifically, the court held the public health logic was flawed as travel restrictions based on diseases can only be justified if the disease is spread by casual contact.[223] Since HIV is spread by non-casual contact, the logic is unsound.[224] In regards to utilizing the least restrictive means, the court decided it would be more effective and less restrictive to focus on individual high-risk activities such as promoting condom use or clean needles.[225] Likewise, since HIV transfer was subject to criminal penalties, Russia already had means of preventing

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[215] *See id.* ¶¶ 62-63.
[216] *Id.* ¶ 63.
[217] *Id.* ¶ 64.
[218] *Id.* ¶¶ 64-65.
[219] *See id.*
[220] *Id.* ¶ 66.
[221] *Id.*
[222] *Id.* ¶ 68.
[223] *Id.*
[224] *Id.*
[225] *See id.*

HIV's spread and the government could not sufficiently justify why criminal penalties were not enough of a deterrent.[226] Hence, the court decided the "HIV Prevention Act" relied on insufficient logic and failed to utilize the least restrictive means.

In addition, the court held that such laws were hypocritical and led to public health problems.[227] The court noted there was no logic behind allowing entry for short term visitors and returning nationals, but not allowing long term entry to foreigners.[228] Statistically, not only do these two groups greatly outweigh the third, but the risk of transfer is exactly the same, so it is illogical to allow entry to the first two groups, but not the third one.[229] Likewise, the law does not limit the return rate of short-term visitors, and the government had said Kiyutin could leave every ninety days and return on a continual cycle.[230] Moreover, the economic reasoning behind the law is inconsistent since foreigners cannot use free medical care in Russia.[231] Lastly, in regards to the causation of public health issues, the court noted such laws not only lead foreigners to enter illegally and avoid testing, but also lead residents to believe HIV is solely a foreign problem, both of which cause people to fail to take proper precautions.[232]

In its final level of analysis, the court determined the utilization of blanket restrictions in the "HIV Prevention Act" and the "Foreign Nationals Act" resulted in a failure to utilize the least restrictive methods.[233] Specifically, the court held that by utilizing blanket restrictions rather than individual assessments, such as looking at family concerns, the laws were overly restrictive.[234]

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[226] *Id.*
[227] *Id.* ¶¶ 69-72.
[228] *Id.* ¶ 69.
[229] *Id.*
[230] *Id.*
[231] *Id.* ¶ 70.
[232] *Id.* ¶ 71.
[233] *Id.* ¶¶ 72-74.
[234] *Id.*

As a result of the above analysis, the court concluded the denial of a temporary residence permit, due solely to HIV status, violates articles 8 and 14 of the ECHR since the laws in question had no logical basis, were hypocritical, caused public health problems, and failed to utilize the least restrictive means.[235] As a result, the court granted Kiyutin's entry permit, awarded him 20,000 euros in non-pecuniary damages, 15,000 euros for emotional distress resulting from discrimination, and reasonable legal costs.[236]

Before comparing all three countries, it is helpful to determine exactly what *Kiyutin* stands for. While *Kiyutin* goes into some detail on how the relevant sections of the "Foreign Nationals Act" and "HIV Prevention Act" do not satisfy articles 8 and 14 of the ECHR, the court never specifically discards these laws.[237] Likewise, while the court states equal protection is violated by excluding a temporary residence permit to an otherwise qualified candidate due to HIV, this logic is restricted to the concept of marriage via article 8 of the ECHR.[238] As such, in the case of regular residence permits in the "Foreign Nationals Act" and ninety day entry limits in the "HIV Prevention Act," while the same type of equal protection argument would seem on point, neither matter deals with family rights so the *Kiyutin* decision does not apply.[239] Nevertheless, *Kiyutin* creates an extremely important baseline for dealing with future cases involving Russia's HIV travel restrictions. In reaching its decision, the court decided people with HIV are a group that has been historically discriminated against, which means that any regulations that discriminate against those with HIV will be held to the strictest level of scrutiny.[240] This, combined with the fact that the court's opinion favors individual assessment

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[235] *Id.* ¶¶ 65-74.

[236] Id. ¶¶ 78-83.

[237] *Id.* ¶¶ 53-83.

[238] *Id.*

[239] Federal Law No. 38-FZ, *supra* note 183, art. 10(1), 11(2); Federal Law No. 115-F, *supra* note 192, art. 9(13).

[240] *Kiyutin*, App. No. 2700/10, ¶¶ 61-65.

over blanket HIV restrictions and does not favor the public health and economic reasons for HIV travel restrictions, indicates Russia's other HIV travel restrictions will not last much longer.[241]

VI. MAKING COMPARISONS: SEEKING A METHOD THAT BENEFITS SOCIETY AND HIV VICTIMS

In looking at the laws of the United States, China, and Russia, as well as international perspectives on the matter, not only is it apparent that there is no legitimate public health or economic justifications for HIV immigration restrictions requiring mandatory testing to secure entry, but also that these laws contribute to public health problems. However, at the same time, not doing anything about the problem is just as, if not more, dangerous since lack of awareness prevents the government and its citizens from taking the necessary steps to protect others from the spread of HIV. This point has been demonstrated only too well by the rapid spread of HIV in all three countries while their governments were ignoring the problem and/or focusing on the wrong outlets.[242] In order to solve this problem in a way that avoids discrimination, protects society, and benefits the HIV community, one must look closely at and compare all three approaches to take advantage of the collective knowledge learned from past mistakes.

Fortunately, in making this comparison, guidelines are provided by groups such as UNAIDs and the World Health Organization. These entities recommend the manipulation of four factors to ensure that both the interests of society and the HIV community are protected.[243] Specifically, they recommend all HIV testing should be done voluntarily, utilize informed consent, maintain confidentiality, and include pre and post test

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[241] *Id*. ¶¶ 68-72.

[242] Lei & Wu-kui, *supra* note 110, at 1230-32; Samet, *supra* note 93, at 1883-84.

[243] *See* WORLD HEALTH ORG. & UNAIDS, *supra* note 23, at 30; UNAIDS & IOM INT'L ORG. FOR MIGRATION, *supra* note 1, at 2.

counseling.[244] Nevertheless, as demonstrated by the HIV problem in China, two additional factors must be considered as well; the utilization of education and targeted aid towards high-risk groups.[245] Hence, it will take an analysis of all six factors to determine what system is best.

Utilizing these factors, it would seem Russia's current HIV policies would come in third place. However, an important disclaimer must be attached to this placement because while the United States and China have had over twenty-five years to deal with HIV, Russia has only been dealing with it for around fifteen years and already has made truly remarkable progress.[246]

The source of Russia's new approach to HIV, the *Kiyutin* case, ensures the government cannot deny foreigners a temporary residence permit in order to live with a Russian spouse merely on the basis on having HIV.[247] This new approach represents a substantial change from its original policy of not granting any form of residence permit to foreigners with HIV. However, while the logic of the court's holding could be extended to other forms of HIV restrictions such as full residence permits, the court neglected to comment on the scope of its ruling and further application would require the use of different articles of the ECHR.[248] Resultantly, for all foreigners seeking residency permits in Russia, other than those falling under the *Kiyutin* exception, mandatory verification of HIV status is still required.[249] That being said, *Kiyutin* creates an extremely important baseline for dealing with future cases involving HIV travel restrictions, as the court decided people with HIV have

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[244] *Id.*

[245] *See* MINISTRY OF PUB. HEALTH OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 143, at 5; Samet, *supra* note 93, at 1883-84.

[246] *See* Medical Examination Removal, *supra* note 15, 74 Fed. Reg. at 56,548; Lei & Wu-kui, *supra* note 110, at 1230-33; Samet, *supra* note 93, at 1883.

[247] *See* Kiyutin v. Russia, App. No. 2700/10, ¶ 74 Eur. Ct. H.R. (2011).

[248] *Id.* at ¶¶ 74-81.

[249] Federal Law No. 115-F, *supra* note 192, art. 10(1); Federal Law No. 115-FZ, *supra* note 134, art. 7(13).

been historically discriminated against, which means any regulations discriminating against them will be held to the strictest level of scrutiny.[250] Considering the fact that the court's opinion favors individual assessment over blanket restrictions and disfavors the typical public health and economic reasons for HIV travel restrictions, this seems to indicate that Russia's other HIV travel restrictions will not last much longer.[251] In addition, it is important to point out that HIV testing in Russia has confidentially policies in place along with pre and post test counseling.[252] However, Russia has not adopted any effective policies of education or targeted efforts towards high-risk groups.[253] Resultantly, in looking at the six factors, while Russia has ensured its testing polices utilize informed consent, confidentiality, and pre and post test counseling, it has failed to change its mandatory HIV verification requirements for a large percentage of incoming immigrants and has failed to utilize education and targeted programs to combat the HIV problem. Unfortunately, this lack of progress is evidenced by the increasingly rapid spread of HIV within Russia and its cities.[254]

In comparison, China would seem to come in second place. Although it also has yet to remove all entry restrictions and mandatory testing, it has removed restrictions for a larger portion of entering immigrants and satisfies more of the six recommended factors.[255] Specifically, China's two latest HIV laws removed all short term entry restrictions for foreigners and returning nationals, but kept in place mandatory testing and mandatory proof of HIV status for foreigners seeking to stay for over a year and returning nationals abroad for over a year.[256]

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[250] *Kiyutin*, App. No. 2700/10, ¶¶ 61-65.

[251] *See id.* ¶¶ 68-72.

[252] Federal Law No. 115-F, *supra* note 192, art. 10(1); Federal Law No. 38-FZ, *supra* note 183, art. 4(1).

[253] *See* Samet, *supra* note 93, at 1883.

[254] *Id.*

[255] *See* Certain Regulations on the Monitoring and Control of AIDS, art. 21; Lai et al., *supra* note 15, at 258-59; MINISTRY OF PUB. HEALTH OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 143, at 5-6.

[256] Decision of the State Council on Amending the Detailed Rules for the

While China's testing policies are designed to ensure confidentiality, they do not incorporate policies of informed consent or pre and post test counseling,[257] which is dangerous since people do not learn how to prevent spreading HIV and are not told of the risks and stigmas that they will be facing. China, however, largely makes up for these omissions though utilizing remarkably effective educational programs and programs targeting high-risk groups, which have helped to finally slow the rapid spread of HIV in China.[258] Indeed, such programs transformed condom use among sex workers and safe needle use among injection drug users from nonexistent to something utilized by over seventy percent of each of these high-risk populations.[259] Consequently, China's HIV immigration laws are superior to Russia's because while they do not utilize informed consent and pre/post test counseling, they ensure confidentially, apply education and targeted programs towards high-risk groups, and most importantly, have changed mandatory testing requirements from ones that effected all incoming immigrants to ones that only effect those seeking permanent residence.[260]

Finally, utilizing an analysis of all six factors defined above, the United States would come in first place in its handling of its HIV Immigration policy. Unlike China and Russia, the United States has successfully removed all of its HIV entry restrictions, and HIV testing is now completely voluntary for all entering foreigners in order to preserve their fundamental right to autonomy.[261] In addition, the CDC has ensured that not only are measures in place to protect confidentiality, but

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Implementation of the Law of the People's Republic of China Governing the Administration of Entry and Exit of Foreigners, art. 2; Lai et al., *supra* note 15, at 258-59.

[257] *See generally* Certain Regulations on the Monitoring and Control of AIDS, art. 21.

[258] Lei & Wu-kui, *supra* note 110, at 1232-34; MINISTRY OF PUB. HEALTH OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 143, at 5.

[259] MINISTRY OF PUB. HEALTH OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 143, at 33-34.

[260] Lei & Wu-kui, *supra* note 110, at 1232-34.

[261] Medical Examination Removal, *supra* note 15, 74 Fed. Reg. at 56547, 56554.

also that all testing will be accompanied by informed consent and pre and post test counseling, which ensures that people are aware of how HIV spreads and what stigmas they may be facing.[262]

Lastly, through Ryan White Laws, the United States utilizes education programs and policies to focus on high-risk groups and geographical areas in order to help lessen the spread of HIV within its borders and prevent stigma by educating the population.[263] In short, the United States' current HIV Immigration Laws satisfy all six factors outlined above in that the testing is voluntary, protects confidentiality, utilizes informed consent, makes use of pre and post test counseling, and uses both education and targeted polices to prevent the spread of HIV within its borders.

VII. CONCLUSION

Through the comparison of the HIV travel restrictions in the United States, China, and Russia, it is readily apparent that banning HIV positive individuals from entering a country's borders protects neither the public health nor the global economy. Ironically, while preventing the entry of HIV positive foreigners may seem logical at first, in practice it contributes to public health problems as the resulting stigma creates fear of testing, which amplifies problems exponentially as people cannot prevent spreading a disease they are unaware of having.[264] Even if one admits that the first few strands of HIV initially enter through a country's borders, the true danger begins when domestic groups rapidly spread the disease inward.[265] This re-

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[262] Guidance for HIV for Panel Physicians and Civil Surgeons, *supra* note 105.

[263] *See generally* Ryan White Comprehensive AIDS Resources Emergency Acts of 1990, S. 2240, 101st Cong. (1990) (enacted); Ryan White HIV/AIDS Treatment Modernization act of 2006, H.R. 6143, 109th Cong. (2006) (enacted); Ryan White HIV/AIDS Treatment Extension Act of 2009, S. 1793, 111th Cong. (2009) (enacted).

[264] UNAIDS & IOM INT'L ORG. FOR MIGRATION, *supra* note 1, at 8-9.

[265] *See* Lei & Wu-kui, *supra* note 110, at 1231-32.

ality, coupled with the severe human rights abuses that result from the stigma of HIV, such as denial of medical care, denial of work, and ostracism from the community,[266] clearly demonstrates mandatory HIV testing to secure entry at borders is ineffective, inefficient, and inhumane.

As a solution to this problem, this comparative study on the HIV policies, successes, and failures of these three countries suggests that, on the international level, border testing should be voluntary, confidential, informed, and coupled with both pre and post test counseling.[267] These four procedures will ensure that basic autonomy is respected, that the risk of discrimination is minimized, that individuals are aware of the risks of discrimination before testing, and that they receive the necessary information to deal with the disease and prevent spreading it to others.

Moreover, this comparison clearly demonstrates that while such international policies are effective at decreasing the spread of HIV, the only way to truly put a dent in the disease's spread is to attack it domestically as well by educating the public and creating programs targeting the high-risk groups responsible for the rapid spread of HIV.[268] These two domestic approaches are equally important because they educate people about how HIV is spread, directly target those who are proven to spread the disease the most, and lessen the risk of discrimination as there will be less misguided fear when people realize HIV does not spread by casual contact.

In the end, it seems the only way to truly combat HIV is not to hide from the disease and/or treat it as a foreign problem, but rather to openly acknowledge HIV and the fundamental rights of those plagued with this disease. In doing so, society will find not only that it is more effectively protecting itself

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[266] Medical Examination Removal, *supra* note 15, 74 Fed. Reg. at 56,550, 56,555; UNAIDS & IOM INT'L ORG. for MIGRATION, *supra* note 1, at 5.

[267] *See* World Health Org. & UNAIDS, *supra* note 23, at 30; UNAIDS & IOM INT'L ORG. FOR MIGRATION, *supra* note 1, at 2.

[268] *See generally* MINISTRY OF PUB. HEALTH OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 143, at 5; Samet, *supra* note 93, at 1883-84.

from the spread of HIV, but also that it is protecting the HIV community from the stigma and discrimination that initially contributed to the rapid spread of HIV.