

A DOUBLE-EDGED SWORD: OKLAHOMA'S TRANSMISSION STATUTE AND THE LACK OF PROSECUTIONS FOR INTENTIONAL HIV TRANSMISSIONS AGAINST HOMOSEXUAL MALES

Sara Potts*

I. INTRODUCTION

Laws that criminalize the intentional transmission of the human immunodeficiency virus (HIV) should be drafted, implemented, and executed in accordance with accepted criminal-law theory. Title 21, § 1192.1, Oklahoma's HIV-transmission criminalization statute,¹ and the HIV-transmission laws of other states, should not be scrutinized differently than other criminal laws that proscribe an intentional act. Application of any criminal law should occur even-handedly; those who commit the same illegal acts should be punished in the same manner regardless of gender, race, or sexual preference. According to criminal law principles, the Transmission Statute should target those who are most likely to be transgressors and protect those most likely to be victims. In both categories (transgressors and victims), studies show that homosexual males make up the largest category of HIV transmissions; thus, they are the sector of the population most influenced by the Transmission Statute. However, the lack of homosexual prosecutions in Oklahoma, while not immediately insidious, seems to indicate that the law has been used as a subtle moral statement. Rather than protect potential victims and deter those who intend to do harm, the Transmission Statute arguably demonstrates apathy toward homosexuals.

* J.D. expected May 2014. The Author would like to thank Professor LeFrancois, her family, and most of all, her husband, Mike Potts, who has been and continues to be so supportive.

1. Hereinafter, the Author will refer to Title 21, § 1192.1 as "Transmission Statute" or "Statute" in the text. OKLA. STAT. tit. 21, § 1192.1 (OSCN through 2013 Leg. Sess.).

who are living with HIV or AIDS.

Even-handed application of the law would ensure that everyone is within the scope of the law's protections and prohibitions. For example, prior to the late 20th century, most states still had viable criminal laws outlawing consensual acts of sodomy.² Although purportedly applicable to all members of society, consensual sodomy laws were almost exclusively enforced against homosexuals.³ In *Sawatzky v. City of Oklahoma City*, the Oklahoma Court of Criminal Appeals rejected an equal protection claim brought by a homosexual man whom a jury had convicted for soliciting non-compensatory, consensual sodomy from a police officer.⁴ In doing so, the court would not accept Sawatzky's invitation to address the issue of whether same-sex couples could legally engage in private, consensual sodomy.⁵ Instead, the court held that the law's married-couple exception was rationally related to a legitimate government interest.⁶ However, Justice Strubhar pointed out in her dissent that

non-married persons can be convicted of offering to engage in certain acts which are legal for married persons to solicit. It is the reasoning of the majority that it is lawful to distinguish between married persons and non-married persons for purposes of solicitation of lewd acts [T]his language seems to imply that dissimilar treatment of married and non-married persons is justified because public solicitation of lewd acts by non-married persons is likely to offend whereas solicitation to participate in lewd acts by married persons to one another is not.⁷

As with Oklahoma's sodomy laws, the Transmission Statute has not been equitably applied. However, this inequitable application has occurred in an unexpected way. Despite Oklahoma's sluggish acceptance of homosexuality, anti-homosexual statements made by elected state

2. *Bowers v. Hardwick*, 478 U.S. 186, 193 (1986) ("[U]ntil 1961, all 50 states outlawed sodomy, and today, 24 states and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults."), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

3. See *Supreme Court Strikes Down Texas Law Banning Sodomy*, N.Y. TIMES, June 26, 2003, available at <http://www.nytimes.com/2003/06/26/politics/26WIRE-SODO.html>.

4. *Sawatzky v. City of Okla. City*, 1995 OK CR 69, ¶¶ 1-4, 906 P.2d 785, 786.

5. *Id.* ¶ 5, 906 P.2d at 786.

6. *Id.* ¶¶ 5-6, 906 P.2d at 786-87.

7. *Id.* ¶ 2, 906 P.2d at 788 (Strubhar, J., dissenting).

2013]

*Oklahoma's Transmission Statute***435**

officials,⁸ and the Transmission Statute's early enactment in 1988,⁹ there has been a surprising lack of intentional-HIV-transmission prosecutions by homosexual men in Oklahoma.

This Note examines Oklahoma's current Transmission Statute under the legal philosophies and principles of retribution, deterrence, and incarceration, and it explores possible explanations for the lack of homosexual prosecutions in Oklahoma under the Transmission Statute. It also considers the reasons why gay men in Oklahoma may not be bringing transmission allegations to the attention of Oklahoma district attorneys. At the same time, this Note reflects on the inherent limitations built into the structure of the Transmission Statute that would discourage homosexual transmission prosecutions. Finally, this Note applies punishment purposes to the Statute and offers propositions for its repeal or amendment based on its current failure to protect and deter the most-affected population in the state.

II. CRIMINAL LAW PUNISHMENT THEORY AND OKLAHOMA'S TRANSMISSION STATUTE

A. *The History and Structure of Oklahoma's Transmission Statute*

Oklahoma is one of 37 states with an HIV criminalization statute,¹⁰ its Transmission Statute proscribes an HIV-positive individual's conduct either when he or she deliberately infects another with the virus or is "reasonably likely" to transfer the HIV virus.¹¹ The Transmission Statute makes it a felony for anyone aware of his or her AIDS diagnosis or positive HIV status to engage in any kind of activity that is reasonably likely to transmit the virus, including consensual sexual contact, when the consenting partner is not informed of the other person's positive serostatus.¹² The Statute does not only proscribe sexual transmission of HIV, but additionally prohibits all conduct that involves HIV transfer through blood, bodily fluids, and seminal or vaginal secretions; in-utero transmission of HIV or AIDS from a mother to her fetus is the only

8. See Talley, *infra* note 76.

9. Act of May 5, 1988, ch. 153, 1988 Okla. Sess. Laws 547.

10. See HIV CRIMINALIZATION: STATE LAWS CRIMINALIZING CONDUCT BASED ON HIV STATUS, LAMBDA LEGAL (July 12, 2010) available at <http://www.hivlawandpolicy.org/resources/view/198>.

11. OKLA. STAT. tit. 21, § 1192.1 (OSCN through 2013 Leg. Sess.).

12. *Id.*

exception to this statute.¹³ The Statute requires the specific mens rea of knowing one's positive status and intending to transmit the virus through contact.¹⁴ However, both the title and the text of the Statute are confusing, difficult to understand, and difficult to apply to the particular facts of any case, even though the statutory construction of Oklahoma's Statute fares better than similar statutes in other states.¹⁵

Looking to the Transmission Statute's history to determine the legislative intent is not particularly illuminating. The Statute was passed as an "[a]ct relating to [p]ublic [h]ealth and [s]afety" regarding communicable diseases in 1988.¹⁶ The original wording of the Statute, as proposed by House Bill 1789, read:

A new section of law to be codified in the Oklahoma Statutes as Section 1192.1 of Title 21, unless there is created a duplication in numbering, reads as follows:

A. 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.

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.¹⁷

Except for minor adjustments in the sentencing provision, the Transmission Statute has remained unchanged for over 20 years. Under the original Statute, an individual could be charged in one of two ways: either by intending to transmit HIV or by actually infecting another person.¹⁸ In 1991, the legislature revised the Statute in such a way so as to only prohibit the virus's intentional transmission.¹⁹ The revisions amended the Statute in such a way as to clearly identify the statutory requirements: (1) knowledge of one's HIV-positive or AIDS status, (2)

13. *Id.*

14. *Id.*

15. See, e.g., *People v. Jensen*, 586 N.W.2d 748, 753–55 (Mich. Ct. App. 1998) (determining, in part, that simply because mens rea language was lacking in the statute did not mean the legislature intended it to be one of strict liability).

16. Act of May 5, 1988, ch. 153, 1988 Okla. Sess. Laws 547.

17. *Id.* at 549–50.

18. *Id.* at 549.

19. Act of May 17, 1991, ch. 200, 1991 Okla. Sess. Laws 1475, 1476.

2013]

*Oklahoma's Transmission Statute***437**

the intent to infect another, (3) a detailed list of the proscribed ways the virus may be transmitted (excluding in-utero transmissions from mother to unborn child), and (4) adding two independent conditions—that either the receiving party did not consent to the activity that caused the transfer (e.g., rape or forcible sodomy) or that the receiving party consented to the activity but was not informed of the transmitting party’s positive status.²⁰ The legislature then amended the Statute two additional times. In 1997, Oklahoma’s Truth in Sentencing Act removed the sentencing requirement;²¹ however, in 1999 that Act was repealed and the legislature added the five-year felony sentence requisite back to the existing law, taking the Statute back to its 1991 form.²² Despite the Nation’s drastic re-evaluation of the HIV and AIDS epidemic in the last two decades based partly on the fact that HIV is no longer considered to be a guaranteed “death sentence,”²³ the law has not changed since 1999.

*B. The Goals of Criminal Law:
Retribution, Deterrence, and Incarceration*

Laws that criminalize intentional HIV transmission should be structured to achieve one of three philosophical objectives of criminal law theory: retribution through punishment, affirmation of specific social norms regarding acceptable behavior and deterrence of unwanted behavior, or societal protection by incarceration.²⁴ The Supreme Court of the United States has implied that criminal laws should either satisfy retribution or deterrence purposes (or both) to be upheld as

20. *Id.* The new wording of the 1991 amended statute changed the intent requirement to include knowledge of positive serostatus and specified the modes of transmission as “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 of another person, except during in utero transmission of blood or bodily fluids.” *Id.* The amended statute also differentiated between types of non-consent: 1) non-consent of the conduct, as in rape or assault cases; 2) consent to the conduct, but without knowledge of the other individual’s positive HIV status.

21. OKLA. STAT. tit. 21 § 1192.1(B) (OSCN through 1999 Leg. Sess.) (stating that “[a]ny person convicted of violating the provisions of this section shall be guilty of a felony”).

22. *See id.*

23. *See infra* Part III.D.

24. Zita Lazzarini, Sarah Bray & Scott Burris, *Evaluating the Impact of Criminal Laws on HIV Risk Behavior*, 30 J.L. MED. & ETHICS 239, 239 (2002).

constitutional.²⁵ Punishment in the form of retribution allows for punishment as “merited harm” for one’s actions, even when no social benefit can be derived from the punishment.²⁶ Supporters of HIV-transmission criminalization laws may assert that the injustice caused by intentional HIV transmission is no different than many retribution laws currently in force, and offenders deserve the same social condemnation and denouncement. In 1988, the Report on the Presidential Commission on the Human Immunodeficiency Virus Epidemic stated,

Extending criminal liability to those who knowingly engage in behavior which is likely to transmit HIV is consistent with the criminal law’s concern with punishing those whose behavior results in harmful acts. Just as other individuals in society are held responsible for their actions outside the criminal law’s established parameters of acceptable behavior, HIV-infected individuals who knowingly conduct themselves in a way that pose [sic] a significant risk of transmission to others must be held accountable for their actions. Establishing criminal penalties for failure to comply [with HIV-transmission laws] . . . can also deter HIV-infected individuals from engaging in high-risk behaviors, thus protecting society against the spread of the disease.²⁷

As one scholar commented, “Those persons who deliberately violate rules aimed at preventing HIV transmitting conduct, deserve to be punished.”²⁸

The Transmission Statute could be integrated as an attempt to act as a law of deterrence rather than retribution. If the Statute’s purpose is to deter unwanted social behavior, that purpose may be achieved either by

25. Meghan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS L. REV. 81, 136 (2010) (citing Kennedy v. Louisiana, 554 U.S. 407, 439–40 (2008); Atkins v. Virginia, 536 U.S. 304, 318–20 (2002); Enmund v. Florida, 458 U.S. 782, 798 (1982)).

26. Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1315–16 (2000).

27. PRESIDENTIAL COMM’N ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC, REPORT 130 (1988) [hereinafter PRESIDENTIAL REPORT], available at <http://ia700402.us.archive.org/14/items/reportofpresiden00pres/reportofpresiden00pres.pdf>.

28. Donald H.J. Hermann, *Criminalizing Conduct Related to HIV Transmission*, 9 ST. LOUIS U. PUB. L. REV. 351, 352 (1990) (“Where a person deliberately violates a statute, the actor deserves to be punished.”).

2013]

*Oklahoma's Transmission Statute***439**

general deterrence or specific deterrence.²⁹ General deterrence is discouragement of all potential offenders.³⁰ In contrast, specific deterrence targets an individual wrongdoer to prevent him from re-offending again.³¹ An example of specific deterrence would be state DUI laws, which stack weightier, more significant penalties onto an individual who has violated a DUI law more than once.³² The Presidential Commission on the Human Immunodeficiency Virus Epidemic defined the benefits of a well-structured statute in deterring social deviation in its 1988 Report as “provid[ing] clear notice of socially unacceptable standards of behavior specific to the HIV epidemic [and] . . . tailor[ing] punishment to the specific crime of HIV transmission.”³³

The Transmission Statute could also be structured by incorporating both the retributive and deterrence philosophical objectives. It could be structured under the philosophical reasoning of incarceration, which incorporates both retribution—removing an offender from society through sentencing—and deterrence—dissuading potential offenders with the possible “agony of solitude.”³⁴ The purpose of incarceration is primarily deterrence—the proverbial “carrot” of freedom that accompanies good social behavior is contrasted by the “stick” of sentencing and penalties. However, critics have criticized incarceration as “offending notions of justice” while ineffectively reducing recidivism and increasing costs to taxpayers.³⁵ This is especially true for Transmission Statute offenders who require expensive medical treatments and are placed in environments where future transmissions are likely to occur.³⁶

29. Cotton, *supra* note 26, at 1316.

30. *Id.*

31. *Id.*

32. See, e.g., OKLA STAT. tit. 47, § 11-906.4(B)(2)–(3); § 11-906.4(D)(2)–(3) (OSCN through 2013 Leg. Sess.).

33. PRESIDENTIAL REPORT, *supra* note 27, at 130.

34. Hannah T.S. Long, *The “Inequability” of Incarceration*, 31 COLUM. J.L. & SOC. PROBS. 321, 322 (1998).

35. *Id.* at 333–34.

36. See Sarah E. Wakeman & Josiah D. Rich, *HIV Treatment in U.S. Prisons*, 4 HIV THERAPY 505, 505–06 (2010), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2953806/> (discussing the extent of “infectious diseases, particularly HIV and HCV” within the prison population and the need for medical care and testing for these individuals).

C. Data and Method of Research

To be effective, a law criminalizing intentional HIV transmission should logically apply to the population segment most likely to be victimized or most likely to offend.³⁷ However, research suggests that homosexual men, the largest at-risk population, are neither pursuing charges of intentional HIV transmission nor being charged with violating this law in Oklahoma.³⁸ This lack of prosecutions is unusual because “[t]he prevalence of AIDS among homosexual men creates the . . . selective enforcement of criminal laws against homosexual men.”³⁹ Yet, research conducted for this Note indicated that a large number of intentional HIV-transmission prosecutions in Oklahoma are heterosexual in nature.⁴⁰ This seems to contradict statistical data gathered both by the Oklahoma Department of Health and the Center for Disease Control that indicates that the highest number of HIV transmissions occurring in Oklahoma are between men who have sex with men (statistically classified as MSM).⁴¹

Although Oklahoma prosecutors have utilized the Transmission Statute, the majority (if not all) of transmission charges that occurred in Oklahoma from 1992–2012 seemed likely to stem from HIV-exposure allegations through consensual heterosexual contact.⁴² While other states have prosecuted homosexual transmission of HIV,⁴³ research for this

37. See Hermann, *supra* note 28, at 353 (“As has been suggested, with the lack of an effective vaccine or curative therapy, all reasonable means of encouraging restraint with respect to behavior known to spread infection should be explored. Conduct likely to infect others with HIV, including serious illness and likely death, warrants criminal sanctions. Moreover, the use of criminal law is fair to those who may be subject to criminal liability when behavior forbidden is within their control and the law gives such persons clear notice of the behavior prohibited.” (footnotes omitted)).

38. See *infra* pp. 444–45.

39. Anne R. Spiegelman, *Selective Prosecution: A Viable Defense Against a Charge of Transmitting AIDS?*, 37 WASH. U. J. URB. & CONTEMP. L. 337, 338 (1990).

40. See *infra* pp. 444–45.

41. See HIV/STD SERV., OKLA. STATE DEP’T OF HEALTH, 2009 OKLAHOMA HIV/STD COMPREHENSIVE EPIDEMIOLOGIC PROFILE 15 (2009) [hereinafter OKLA. HIV PROFILE]. MSM refers to individuals categorized as either men who solely have sex with other men or those who engage in both homosexual and heterosexual sex. *Id.* at 4.

42. See *infra* pp. 444–45.

43. See, e.g., Saundra Young, *Imprisoned over HIV: One Man’s Story*, CNN (Nov. 9, 2012, 8:42 PM), <http://www.cnn.com/2012/08/02/health/criminalizing-hiv/index.html>; Sean Strub, *Think Having HIV is Not a Crime? Think Again*, HUFFINGTON POST (Oct. 20, 2012, 2:26 PM), http://www.huffingtonpost.com/sean-strub/lgbt-hiv-criminalization_b_2039539.html; Kevin Dolak, *Missouri Man May Have Infected Over 300 with HIV*,

2013]

*Oklahoma's Transmission Statute***441**

Note indicated that Oklahoma has yet to prosecute any individual based on accusations of homosexual sexual contact.⁴⁴ Furthermore, Oklahoma's Transmission Statute is problematic because people may find it too prejudicial or may not even be aware that it exists at all; these are common problems for comparable statutes in other states.⁴⁵

Data compiled by the Oklahoma Department of Health indicates that almost 53% of HIV/AIDS cases reported in Oklahoma involved those who had a risk of MSM contact.⁴⁶ Most Oklahoma HIV/AIDS cases occurred in only 3 out of the 77 counties in the state: Oklahoma, Cleveland, and Tulsa.⁴⁷ In those three counties in 2009, 44% of the recorded cases occurred via MSM transmission, and 74% of men in Oklahoma diagnosed with HIV involved risk factors of MSM or MSM with intravenous drug use.⁴⁸ Moreover, 50% of the Oklahoma HIV- or AIDS-related deaths in 2009 were those categorized as MSM.⁴⁹ This data suggests a strong likelihood that homosexual males in Oklahoma are the most at risk for HIV transmission, whether or not transmissions are intentional. Accordingly, since the group most likely to be victimized by HIV transmissions is homosexual men, one may reasonably expect that the majority of prosecutions under the Statute would involve homosexual transmission. However, research shows that HIV transmission via homosexual sex is likely a very small percentage of the total number of Transmission Statute filings or prosecutions in Oklahoma.

Like many states, Oklahoma does not compile statistics on the number of arrests and prosecutions for HIV transmission. To determine

ABC News (Sept. 5, 2013), <http://abcnews.go.com/US/missouri-man-infected-300-hiv/story?id=20168336>.

44. As of March 2013, research for this Note resulted in only one conclusive instance of homosexual consensual transmission produced criminal investigation. See *Oklahoma City Man Arrested on Suspicion of 'Transmitting AIDS,'* NEWSOK (Aug. 28, 2009, 8:06 AM), <http://newsok.com/man-arrested-on-suspicion-of-transmitting-aids/article/3396100>. Further investigation revealed that the State probably never filed charges since there was neither a pending case nor a dropped case on record.

45. See Lazzarini, Bray & Burris, *supra* note 24, at 249 ("HIV criminal law presents at least two difficulties under this theory. The first . . . is simply whether people are aware of the laws and of exactly what norms of behavior they set forth. People generally are not terribly well-informed of the laws that regulate them, and the laws governing HIV exposure are often sufficiently opaque that even lawyers would argue about exactly what they require or prohibit.").

46. See OKLA. HIV PROFILE, *supra* note 41, at 15.

47. *Id.* at 2.

48. *Id.* at 15.

49. *Id.* at 18.

the number of HIV prosecutions in Oklahoma, the Author executed a refined search of Oklahoma state dockets on Bloomberg Law and Westlaw and then cross-referenced those results against the Oklahoma Supreme Court Network and On Demand Court Records. Based off of those results, the Author conducted a specific word search on Oklahoma state court dockets. Then, the Author individually analyzed each docket found to make sure the initial charges against each defendant included intentional transmission of HIV under the Transmission Statute and not HIV exposure through prostitution, biting, or other HIV-related crimes that are not within the scope of this Note. The total number of intentional HIV-transmission dockets that met these parameters was eleven.⁵⁰ The Author found two additional cases from news reports.⁵¹

50. State v. Hedge, No. CF-2010-2065 (D. Okla. Aug. 18, 2010), available at <http://www.oscn.net/applications/oscn/GetCaseInformation.asp?number=cf-2010-2065&db=Tulsa&submitted=true>; State v. Fisher, No. CF-2006-4192 (D. Okla. Oct. 18, 2006), available at <http://www.oscn.net/applications/oscn/GetCaseInformation.asp?number=CF-2006-4192+&db=Oklahoma&submitted=true>; State v. Perez, No. CF-2003-3920 (D. Okla. Jan. 7, 2004), available at <http://www.oscn.net/applications/oscn/GetCaseInformation.asp?number=CF-2003-3920&db=Oklahoma&submitted=true>; State v. Gotschall, No. CF-2009-133 (D. Okla. Nov. 10, 2009), available at <http://www.oscn.net/applications/oscn/GetCaseInformation.asp?number=CF-2009-133+&db=Logan&submitted=true>; State v. Barker, No. CF-2008-2365 (D. Okla. July 22, 2008), available at <http://www.oscn.net/applications/oscn/GetCaseInformation.asp?submitted=true&viewtype=caseGeneral&casemasterID=2099201&db=Tulsa>; State v. Muhammad, No. CF-2003-1650 (D. Okla. June 17, 2003), available at <http://www.oscn.net/applications/oscn/GetCaseInformation.asp?number=CF-2003-1650+&db=Oklahoma&submitted=true>; State v. Baumann, No. CF-2000-4785 (D. Okla. Dec. 10, 2001), available at <http://www.oscn.net/applications/oscn/GetCaseInformation.asp?number=CF-2000-4785+&db=Oklahoma&submitted=true>; State v. Hall, No. CF-2000-2521 (D. Okla. Mar. 8, 2002), available at <http://www.oscn.net/applications/oscn/GetCaseInformation.asp?number=CF-2000-2521+&db=Oklahoma&submitted=true>; State v. Woods, No. CF-2000-3134 (D. Okla. July 5, 2001), available at <http://www.oscn.net/applications/oscn/GetCaseInformation.asp?number=CF-2000-3134+&db=Oklahoma&submitted=true>; State v. Jackson, No. CF-2012-1013 (D. Okla. filed June 5, 2012), available at <http://www.oscn.net/applications/oscn/GetCaseInformation.asp?number=CF-2012-1013+&db=Cleveland&submitted=true>; State v. Fowler, No. CF-2001-4230 (D. Okla. Nov. 19, 2001), available at <http://www.oscn.net/applications/oscn/GetCaseInformation.asp?submitted=true&viewtype=caseGeneral&casemasterID=1420537&db=Oklahoma>; State v. Williams, No. CF-2000-4785 (D. Okla. Dec. 10, 2001), available at <http://www.oscn.net/applications/oscn/GetCaseInformation.asp?submitted=true&viewtype=caseGeneral&casemasterID=1275038&db=Oklahoma>; State v. Wilson, No. CF-2008-5827 (D. Okla. Nov. 4, 2008), available at <http://www.oscn.net/applications/oscn/GetCaseInformation.asp?submitted=true&viewtype=caseGeneral&casemasterID=2353760&db=Oklahoma>.

51. *Oklahoma City Man Arrested on Suspicion of 'Transmitting AIDS'*, NEWSOK (Aug. 28, 2009, 8:06 AM), <http://newsok.com/man-arrested-on-suspicion-of-transmitting-aids/article/3396100>; *Oklahoma City Man Arrested on HIV Complaint*, NEWSOK

2013]

*Oklahoma's Transmission Statute***443**

The second challenge in evaluating HIV-transmission cases was how to determine which of the 13 instances had been based on homosexual transmission. The Author cross-referenced the male case names on Bloomberg Law and Westlaw to determine whether each case involved homosexual HIV transmission. Because HIV-transmission prosecutions are both novel and rare, the Author assumed that the majority of arrests and prosecutions for HIV transmissions would be publicized in local or national media. Accordingly, the Author cross-referenced each defendant's name on the Internet and also in Oklahoma newspaper archives to investigate the facts of each arrest or prosecution; this allowed the Author to separate those alleged transmissions that occurred via homosexual sex from other forms of transmission. Only one case seemed to have involved homosexual consensual sex,⁵² but the facts could not be definitely determined in two additional cases.⁵³ Even if both inconclusive cases involved homosexual consensual sex, only 20% of the identified HIV-transmission cases occurred through this mode of transmission. If both inconclusive cases involved no homosexual consensual sex, then the percentage of HIV-transmission cases based on consensual homosexual sex would be reduced to less than 5%.

III. INTENTIONAL HIV TRANSMISSION BY HOMOSEXUAL MALES WITHIN THE FRAMEWORK OF THE TRANSMISSION STATUTE

There are several potential explanations for the lack of transmission prosecutions in Oklahoma that are based on consensual homosexual sex. This Note discusses five possible reasons why homosexual HIV exposure through sexual contact has not resulted in criminal charges against the transmitting party, even though data seems to suggest that heterosexual HIV transmission or exposure under similar circumstances would be charged under the Transmission Statute.

(Dec. 15, 2009, 4:37 AM), <http://newsok.com/oklahoma-city-man-arrested-on-hiv-complaint/article/3425108>.

52. *Oklahoma City Man Arrested on Suspicion of 'Transmitting AIDS.'*, NEWSOK (Aug. 28, 2009, 8:06 AM), <http://newsok.com/man-arrested-on-suspicion-of-transmitting-aids/article/3396100>.

53. State v. Perez, No. CF-2003-3920 (D. Okla. Jan. 7, 2004), available at <http://www.oscn.net/applications/oscn/GetCaseInformation.asp?number=CF-2003-3920&db=Oklahoma&submitted=true>; State v. Gotschall, No. CF-2009-133 (D. Okla. Nov. 10, 2009), available at <http://www.oscn.net/applications/oscn/GetCaseInformation.asp?number=CF-2009-133+&db=Logan&submitted=true>.

A. Public Perception and Acceptance in Oklahoma

One possible reason to explain the lack of MSM HIV-transmission prosecutions is the homosexual community's justifiably protectionist attitude, based largely on Oklahoma's often disapproving and occasionally hostile viewpoint on homosexuality. As early as 1977, Oklahomans' attitudes about gays and lesbians and Oklahoma's laws criminalizing homosexual behavior came under national scrutiny for failing to acknowledge the progressive movement of acceptance throughout the rest of the country.⁵⁴ Acceptance of homosexuals in Oklahoma occurred gradually in cities like Tulsa and Stillwater, which tended to be more accommodating than the state's capitol, Oklahoma City.⁵⁵ In the 1980s, Oklahomans' views of homosexuality could be categorized in one of six ways: "(1) unnatural, perverse and sinful[;] (2) a sexual preference[;] (3) a result of childhood trauma[;] (4) learned behavior, morally neutral[;] (5) a problem of genes or hormones[;] [or] (6) a private matter that is nobody's business."⁵⁶ When *The Oklahoman*, one of the largest newspapers in the state, published a series of stories written about being gay in Oklahoma, readers who wrote in accused both the Editor and the newspaper of supporting the "queers" and failing to adhere to the "wholesome family" concept of the newspaper.⁵⁷ Years later, *The Oklahoman* republished an editorial by the *Los Angeles Times* in 1993 that railed against the burgeoning theory that sexual preference is biological and accused the national media of "promot[ing] the gay agenda."⁵⁸

During the 1980s, Oklahomans, including those charged with protecting the community, gave little sympathy (if any) to the Oklahoma homosexual community. Oklahoma City Police Officers allegedly targeted prominent gay nightclubs as well as falsely arrested, verbally terrorized, and sometimes beat patrons for no reason.⁵⁹ Police officers

54. Wayne Singleterry, *Gay Rights Leader Raps State for Not Being 'Progressive,'* OKLAHOMAN, Apr. 6, 1977, at 29.

55. *Tolerance Toward Gays Varies from City to City*, OKLAHOMAN, May 1, 1983, at 18.

56. Jim Killackey, *Even at Its Best, the Gay Life Is a Hard One*, OKLAHOMAN, May 4, 1983, at 37.

57. Letters to the Editor, *Readers Respond to Series on Oklahoma's Gay Community*, OKLAHOMAN, May 8, 1983, at 29.

58. Cal Thomas, Op-Ed., *Gay Games Give Media Chance to Assist Agenda*, OKLAHOMAN, June 28, 1994, at 6.

59. Terrie Clifford, Jim Killackey & Kevin Stoner, *Cloud of Fear Hangs over City's*

2013]

*Oklahoma's Transmission Statute***445**

were also accused of harassing gatherings of gay men in local parks or picnic areas; at the time, the police officers asserted that a police presence at these outdoor areas was necessary in order to deter prostitution or other sexual misbehavior.⁶⁰ There was even an effect on the police themselves. Gay police officers were warned not to request assistance from other officers if any problems arose during the course of duty.⁶¹ Moreover, many ministers and church workers were fired or harassed into leaving their jobs once it was discovered that they were gay.⁶² In the 1990s homosexuals still felt unwanted and unaccepted in most Oklahoma church congregations as many Oklahomans still regarded homosexuality as “a sin” and encouraged homosexuals to remain anonymous; they kept their focus on administering their message to homosexuals outside their congregations who had been suffering from AIDS complications.⁶³

While Oklahoma’s acceptance of gay, lesbian, and transgendered lifestyles has steadily improved over the last three decades, many Oklahomans—including citizens, elected officials, and community leaders—still reject homosexuality for either religious or moral reasons. State representative Sally Kern has made several controversial statements against homosexuality, including her belief that “gays are an even bigger threat than terrorism or Islam,” all of which she considers to be a “big threat.”⁶⁴ Congressman James Lankford, a United States Representative for Oklahoma, stated that the “power of humiliation” would prevent state mental health agencies from treating mentally-ill gay, lesbian, bisexual, and transgendered (LGBT) patients.⁶⁵ Recently, Oklahomans have opposed lifting the Boy Scouts of America’s ban on gay members and described the end of the ban as “a slap in the face to American freedoms.”⁶⁶ Some have even stated that allowing openly gay members

Homosexual Community, OKLAHOMAN, May 2, 1983, at 1.

60. See *Trolls Replace Straights as Primary Threat to Park Gays*, OKLAHOMAN, May 27, 1984, at 12.

61. Clifford, Killackey & Stoner, *supra* note 59.

62. *Id.*

63. Pat Gilliland, *Churches, Homosexuality at Odds*, OKLAHOMAN, June 2, 1991, at 24.

64. Editorial, *Kern, Lankford Aim to ‘Humiliate’ GLBTQ Substance Abuse Patients*, OKLAHOMA DAILY (Jan. 27, 2013), <http://www.oudaily.com/news/2013/jan/27/editorial/>.

65. *Id.*

66. Lacie Lowry, *Oklahomans Weigh In on Boy Scouts’ Reconsideration of Gay Ban*, NEWS9.COM (Feb. 5, 2013), <http://www.news9.com/story/20973964/tulsans-weigh-in-on->

into the association would possibly contravene the Boy Scouts' underlying principles of "character building, leadership development and personal fitness."⁶⁷ Consequently, homosexual men may not be reporting intentional HIV-transmission offenses that could be prosecuted under the Transmission Statute because of a perception that Oklahoma's community is intolerant of the homosexual lifestyle; regardless of whether or not this perception is reality, it is possible that homosexual men fear a report would incur an angry backlash, or worse, apathy.

Moreover, fear of discrimination still encourages anonymity. Tens of thousands attend Oklahoma City's yearly Gay Pride parade, yet those who coordinate the event insist on keeping their identities secret just like those who are prominent in establishing gay rights in the state.⁶⁸ Former State Representative Thad Balkman claimed that anti-gay legislation was reflective of both the "historical and political climate of Oklahoma."⁶⁹ In 2007, controversy surrounding banners hung to celebrate gay and lesbian rights spurred the Oklahoma City mayor to remove them from the city's light posts.⁷⁰ Based on the last 40 years, it is not surprising that those within Oklahoma's gay community have taken measures to protect themselves by handling issues and concerns on their own. In a sense, the misconceptions that many Oklahomans have about homosexual lifestyles have resulted in a reverse-stigmatization of the straight population. Some in the gay community see the Oklahoma heterosexual community as judgmental, unwilling to help, and even potentially dangerous.⁷¹

boy-scouts-reconsidering-gay-ban.

67. Gayle Reams, Letter to the Editor, *Scouts' Survival Questioned*, OKLAHOMAN, Feb. 4, 2013, available at <http://newsok.com/your-views/article/3751733>.

68. See Judy Gibbs Robinson, *Gay People Still Fear Discrimination*, OKLAHOMAN, June 24, 2004, at 8A; see also W.J. "Bill" Williams, *Diametrically Opposed*, OKLAHOMAN, July 16, 2004, at 14A (claiming that homosexuals should be grateful to their parents for not being gay because if the parents had been, the children would not have been born); Editorial, *Another False Notion: Doctors [Cave-In] to Homosexual Rights*, OKLAHOMAN, Feb. 10, 2002, at 10A (maintaining that Oklahomans are against the idea of allowing same-sex couples to adopt children). Two years later, Governor Brad Henry signed H.B. 1821, which banned the recognition of out-of-state adoptions by same-sex couples. See OKLA. STAT. tit. 10, § 7502-1.4(A) (OSCN through 2013 Leg. Sess.).

69. *Gay Adoption Under Fire*, OKLA. DAILY (July 14, 2004), <http://oudaily.com/news/2004/jul/14/gay-adoption-under-fire/>.

70. *After 20 Years, Gay Community Still Fights for 'Fair and Just' State*, OKLAHOMAN, June 17, 2007, at 6A.

71. For example, in 2010, Zach Harrington, an openly gay teenager, committed suicide after attending a public city council meeting in Norman, Oklahoma, during which members of the community were encouraged to comment about the proposed recognition

2013]

*Oklahoma's Transmission Statute***447**

But progress has occurred—sort of. In 2012, Oklahoma elected its first openly gay senator.⁷² That same year, however, United States Congressman James Lankford made a public statement rejecting workplace discrimination protection for homosexuals because homosexuality is a “choice,”⁷³ and an Oklahoma County District Judge ruled against a transgendered woman’s petition for a legal name change because the judge reasoned that the petitioner could not change her male DNA irrespective of her lifestyle.⁷⁴ When it comes to equality, Oklahoma has also been criticized for moving backwards while the rest of the nation moves toward acceptance of all lifestyles.⁷⁵ Indeed, Oklahoma State Representative Sally Kern recently said, “[N]o society that has totally embraced homosexuality has lasted more than a few decades.”⁷⁶ Based on these comments and others like them, it is not unreasonable to hypothesize that the gay community may have made either the conscious or unconscious decision to confine and handle homosexual problems, including HIV/AIDS transmissions, within its own community.

of Gay, Lesbian, Bisexual and Transgendered Month. Several individuals made anti-gay statements. See Andrew Knittle, *North Grad Took Life After Week of ‘Toxic’ Comments*, NORMAN TRANSCRIPT, Oct. 10, 2010, available at <http://normantranscript.com/headlines/x1477594493/-I-m-sure-he-took-it-personally>.

72. *Al McCaffrey, Oklahoma State Representative, Becomes State’s First Openly Gay Senator*, HUFFINGTON POST (Feb. 15, 2012, 2:08 PM), http://www.huffingtonpost.com/2012/02/15/al-mccaffrey-oklahoma-senator-gay_n_1279556.html.

73. Annie-Rose Strasser & Scott Keyes, *GOP Rep. Lankford Explains Why It Should Be Legal To Fire Someone for Being Gay: ‘It’s a Choice Issue.’* THINKPROGRESS (May 14, 2012, 9:00 AM), <http://thinkprogress.org/lgbt/2012/05/14/482200/lankford-fired-gay/?mobile=nc>.

74. Brief for Appellant at 9, *In re Harvey*, 2012 WL 3072254 (Okla. Mar. 29, 2012) (No. 110048) (quoting the trial judge in an Order Overruling Motion for New Trial in which the judge said “Petitioner has made the material misrepresentation that his sex can be changed to that of a female, even though his DNA cannot be changed . . . [o]bviously, since he dressed as a woman when he came to court he wants to have the public view him as a woman and not a man” (alterations in original) (internal quotation marks omitted)). The trial judge’s ruling on this issue was overturned by the Oklahoma Court of Civil Appeals. See *In re Harvey*, 2012 OK CIV APP 112, ¶ 5, 293 P.3d 224, 225 (holding that no evidence supported the trial court’s determination that the name change petition was made for fraudulent or illegal purposes).

75. *Oklahoma Bill Aims to Reinstitute Homophobia and Discrimination in State National Guard*, HUMAN RIGHTS CAMPAIGN (Feb. 17, 2012), <http://www.hrc.org/press-releases/entry/oklahoma-bill-aims-to-reinstitute-homophobia-and-discrimination-in-state-na>.

76. See Assoc. Press, *Oklahoma Legislator’s Anti-Gay Comments Stir Hostile Reaction*, JOPLIN GLOBE (Mar. 10, 2008), <http://www.joplinglobe.com/statenews/x212121962/Oklahoma-legislator-s-anti-gay-comments-stir-hostile-reaction>.

B. Future Prosecutions of Gay Victims

A second possible reason for the lack of homosexual HIV-transmission cases in Oklahoma is a fear of future prosecution. If a victim of homosexual HIV transmission identifies the person whom he believes transmitted the virus to him, that victim will publicly acknowledge his own positive serostatus. As a result, the victim makes his own future sexual acts subject to potential prosecution. In other words, the present victim cannot take back his own positive-status knowledge and thus may be prosecuted in the future for transmission to another.⁷⁷

Because the Transmission Statute requires knowledge of one's positive HIV status with the intent to transmit,⁷⁸ one possible defense to this charge would be the lack of knowledge.⁷⁹ But a victim would be unable to claim a lack of HIV status knowledge if the victim had acknowledged his status previously in court. Although reporting a nonconsensual transmission may not be a recognized fear, victims likely recognize the publicity and scrutiny placed on both transgressors and victims of transmission cases.⁸⁰

Homosexual victims are not only put on notice as to the level of scrutiny and possible negative consequences of identifying the person who infected them, but they may also be aware of the minimal outrage existing when there is an HIV-transmission case involving homosexuals as opposed to the more acute outrage when the case involves heterosexuals. The disparity of this outrage may be because of the fact that many Oklahomans still consider HIV and AIDS to be the "gay disease," as it was misnamed during the 1980s and 1990s.⁸¹ For example, statements made by Oklahoma State Representative Sally Kern indicated her belief that HIV and AIDS only affect homosexuals.⁸² This

77. Knowledge of one's positive serostatus may be either actual or constructive knowledge. Mona Markus, *A Treatment for the Disease: Criminal HIV Transmission/Exposure Laws*, 23 NOV. L. REV. 847, 864-67 (1999).

78. OKLA. STAT. tit. 21, §1192.1 (OSCN through 2013 Leg. Sess.).

79. See Markus, *supra* note 77, at 864.

80. CTR. FOR HIV LAW AND POLICY, ENDING & DEFENDING AGAINST HIV CRIMINALIZATION: A MANUAL FOR ADVOCATES 164-65 (2010).

81. See Sharon Bernstein, *HIV Ads Embrace, and Stun, Audience*, L.A. TIMES, Sept. 30, 2006, at A2, available at <http://articles.latimes.com/2006/sept/30/local/me-hiv30>.

82. See Andrew Belonsky, *Sally Kern Claims Gay Love 'More Dangerous' than Terrorism*, DEATHANDTAXES, <http://www.deathandtaxesmag.com/140608/sally-kern-claims-gay-love-more-dangerous-than-terrorism/> (last visited Jan. 8, 2014).

2013]

*Oklahoma's Transmission Statute***449**

unfortunate rhetoric from an elected state official could be inferential proof that many Oklahomans may not consider HIV transmissions between homosexuals to be a crime. However, Oklahoma citizens sent over 200,000 emails to Governor Mary Fallin and other state leaders in response to Kern's statements, but these officials failed to provide any answers or criticisms.⁸³ Oklahoma-based photographer Ashley Griffith stated, "I think that a lot of Oklahomans still see HIV/AIDS as a gay man's disease and the truth is for a while now the growing rates of infection are in young women and straight men."⁸⁴

While infection rates have actually increased in women and straight men,⁸⁵ the majority of HIV transmissions in Oklahoma occur between homosexual males.⁸⁶ Yet there have been few arrests or prosecutions in Oklahoma based on homosexual transmission.⁸⁷ The only transmission allegations that reach the local media often have sensational or sordid details and involve heterosexual sex. For example, *Capitol Beat OK* reported a story about an Oklahoma City woman who accused the former Oklahoma Democratic Party's executive director of transmitting HIV to her without her knowledge.⁸⁸ Additionally, in 2012, News9 reported about a man from Grady County, Oklahoma, who had been charged with transmitting HIV to his girlfriend and his wife, both of whom had given birth to his children.⁸⁹

83. *200,000 E-mails Speaking Out Against Sally Kern Met with Silence from Oklahoma Leaders*, HUMAN RIGHTS CAMPAIGN (Sept. 15, 2011), <http://www.hrc.org/press-releases/entry/200000-e-mails-speaking-out-against-sally-kern-met-with-silence>.

84. Robin Dorner, *Red State: A Portrait of HIV/AIDS in Oklahoma*, GAYLY (Nov. 27, 2012, 12:00 AM), http://www.gayly.com/red-state-portrait-hivaids-oklahoma#.UO4SvG_AfJc.

85. See OKLA. HIV PROFILE, *supra* note 41, at 25.

86. *Id.* at 29–30.

87. Only one homosexual transmission criminal report was found during the research of this Note. Michael Austin was arrested for 'transmitting AIDS' after he had engaged in oral sex with another man at an Oklahoma City motel without informing the other man of his positive status. Further research was inconclusive as to whether criminal charges were subsequently filed against Austin. See *Oklahoma City Man Arrested on Suspicion of 'Transmitting AIDS'*, NEWSOK (Aug. 27, 2009, 8:06 AM), <http://newsok.com/man-arrested-on-suspicion-of-transmitting-aids/article/3396100>.

88. Patrick B. McGuigan, *As Controversy Mounts, Oklahoma City Woman Hires Attorney To Field Questions About Relationship with Jay Parmley*, CAPITOLBEATOK (Apr. 24, 2012), <http://capitolbeatok.com/reports/as-controversy-mounts-oklahoma-city-woman-hires-attorney-to-field-questions-about-relationship-with->.

89. Both women claim they were not informed of the man's positive serostatus, and both gave birth to children, one with HIV and the other born with AIDS. Adrianna Iwansinski, *Wife of Grady County Man Arrested for Rape Says He Gave Her HIV*, NEWS9.COM (Mar. 16, 2012, 8:00 AM), <http://www.news9.com/story/17160567/>

There is no definitive way to know if prosecutors are refusing to prosecute or are simply unable to prosecute intentional-transmission allegations made by gay men in Oklahoma. Records are not available to show the number of allegations made under this statute; prosecutorial filings listed by legal databases serve as the only available information and even this information is inconclusive. However, homosexual victims of intentional HIV transmission may be aware that accusations could lead to a Pandora's Box of scrutiny placed on their own private lives and sexual practices in addition to potential future exposure to prosecutions under the same law.

C. The High Risk Nature of Homosexual Sex

The third conceivable explanation for the lack of homosexual HIV-transmission cases may be the possibility that many people continue to believe that homosexuals engage in high-risk sexual activity; this belief stems from the perceived nature of their sexual dispositions.⁹⁰ As a study by Carol Galletly and Steven Pinkerton summarized, "the purpose of U.S. HIV disclosure laws seems to be to establish and promulgate expected norms of behavior. The laws do this by articulating standards for conduct and then prompting, through social influence and the prospect of punishment, behavioral compliance with these standards."⁹¹

This mindset is characteristic of the hetero-normative concept of sex, which holds that heterosexual relationships are the standards by which all other relationships are to be contrasted. Men who are unfaithful and transmit HIV to their wives or girlfriends are ostracized and punished severely, whereas those who transmit HIV in homosexual relationships are already outside what is seen as socially acceptable sexual behavior. Not only is this attitude morally improper, it is also statistically unfair. In

wife-of-grady-county-man-arrested-for-rape-he-gave-her-hiv-virus?clienttype=printable;
see also James Bright, *Sylve Trial Date Could Be Early Next Year*, EXPRESS-STAR (Sept. 7, 2012), <http://chickashanews.com/x1023271956/Sylve-trial-date-could-be-early-next-year>.

90. See, e.g., Randy Dotinga, *Biology Leaves Gay Men Highly Vulnerable to HIV*, TULSA'S CHANNEL 8 (July 20, 2012, 1:26 PM), <http://www.ktul.com/story/19072831/biology-leaves-gay-men-highly-vulnerable-to-hiv-study> (reporting that "[w]hen it comes to the transmission of HIV, a man who has unprotected anal intercourse is at especially high risk").

91. Carol Galletly & Steven Pinkerton, *Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV*, 10 AIDS & BEHAV. 451, 452 (2006).

2013]

*Oklahoma's Transmission Statute***451**

2011, men accounted for nearly 82% of newly diagnosed HIV/AIDS cases in Oklahoma, and women made up slightly over 18%.⁹² Over 60% of Oklahomans living with HIV or AIDS are MSMs or MSMs who engage in intravenous drug use.⁹³ The implied message seems to be the following: These laws were not meant to protect gay men, but were intended to protect women.

However, the belief that gay men engage in high-risk sex may not be completely off base. There are indications that homosexual sex has indeed become riskier in recent years.⁹⁴ There are websites that advocate homosexual “barebacking,” or engaging in sex without a condom.⁹⁵ Additionally, the homosexuals who do engage in unprotected sex may fit into one of three categories: those who intentionally pursue infection or transmission to others,⁹⁶ those who are uninterested in their own serostatus or the serostatus of their partners,⁹⁷ and those who engage in unprotected sex in order to be more intimate with their partners.⁹⁸ One worrisome trend is “stealthing,” where one gay sex partner assures the other that he will wear a condom only to remove the condom prior to the sexual act.⁹⁹ Other trends include “conversion parties,” in which HIV-negative individuals engage in unprotected sex with HIV-positive persons in hopes of contracting the virus.¹⁰⁰

Not only could it be argued that heterosexuals in Oklahoma believe that homosexual transmissions occur due to mostly high-risk activity, but members of the gay community may believe it as well. After all, if there was consent to high-risk homosexual sex, some may infer consent to the

92. HIV/STD SERVICE, OKLA. STATE DEP'T OF HEALTH, HIV/AIDS IN OKLAHOMA, 2011: QUICK FACTS [hereinafter OKLAHOMA QUICK FACTS], available at <http://www.ok.gov/health2/documents/HIV-QuickFactsHIV2011.pdf>.

93. *Id.*

94. For a general overview of how homosexual sex has changed in the recent years, see generally Chris Ashford, *Barebacking and the ‘Cult of Violence’: Queering the Criminal Law*, 74 J. CRIM. L. 339 (2010).

95. *Id.* at 344.

96. *Id.* (noting that individuals who intentionally transmit HIV to willing recipients, “bug chasers,” are known as “gift-givers”).

97. *Id.* (hypothesizing that this group of barebackers engage in unprotected sex due to “condom fatigue,” after years of being told to practice condom-only sex).

98. *Id.*

99. *The Underworld of Non-consensual, Unsafe Sex...and the Actual People Who Support It*, CONFESIONS OF A PERVERTED MIND (Dec. 1, 2012, 12:00 AM), <http://blog.guyngear.com/2012/12/the-underworld-of-non-consensual-unsafe.html?zx=a5cdf5cab272ac14>.

100. Tim Dean, *Breeding Culture: Barebacking, Bugchasing, Giftgiving*, 49 MASS. REV. 80, 85 (2008).

possibility of transmission. However, the idea that only gay men engage in high-risk sexual practices is simply inaccurate. Data suggests that most men, regardless of whether they are heterosexual or homosexual, continue to engage in sexual activity despite confirmation of HIV-positive status.¹⁰¹ In fact, one study indicated that an individual's diagnosis of HIV-positive status had no effect on the amount of safe sex engaged by men (homosexual or otherwise).¹⁰² Reasons for this lack of change in risky behavior could be the fear of "negative consequences" of disclosure or the fact that informed partners still engaged in unsafe sex with HIV-positive men regardless of the notified risk.¹⁰³

D. The Gay Community's Focus on Prevention and Treatment in the Context of the National Public Health Policy

Not all of the potential explanations for the lack of homosexual HIV-transmission prosecutions are based on perceived narrow-mindedness or misconceptions. Although there are some in the state, like Sally Kern, who openly criticize the gay community, there are also Oklahomans who encourage openness and acceptance of all lifestyles. Moreover, there may be a lack of homosexual HIV-transmission cases in the state because the gay community and its supporters focus on support and treatment for those with HIV and AIDS rather than criminalization. Non-profit organizations, like RAIN Oklahoma, emphasize the importance of HIV prevention instead of encouraging transmission prosecutions.¹⁰⁴ The Tulsa Community Foundation, Tulsa Reaches Out (TRO) Project, and Community Service Council of Greater Tulsa partnered together in 2005 to investigate and assess the needs of Tulsa's LGBT citizens.¹⁰⁵ The Health, Outreach, Prevention, & Education (HOPE) Testing Clinic operates the state's HIV/STD hotline and targets its "culturally sensitive" services to "underserved populations."¹⁰⁶ Finally, social networks in the

101. N. Crepaz & G. Marks, *Serostatus Disclosure, Sexual Communication and Safer Sex in HIV-Positive Men*, 15 AIDS CARE 379, 379 (2003).

102. *Id.* at 380.

103. *Id.*

104. *About Us*, RAINOKLAHOMA, <http://www.rainoklahoma.org/history-cont> (last visited Sept. 26, 2013) ("Our message is that HIV is 100% preventable.").

105. See TULSA CMTY. FOUND., TULSA REACHES OUT (TRO) PROJECT & CMTY. SERV. COUNCIL OF GREATER TULSA, TULSA'S GAY COMMUNITY: A NEEDS ASSESSMENT REPORT (2005).

106. *About H.O.P.E.*, H.O.P.E., <http://hopetesting.org/about-us/about-h-o-p-e/> (last visited Jan. 8, 2014). For an extensive list of organizations that provide HIV/AIDS-

2013]

*Oklahoma's Transmission Statute***453**

state allow those with HIV to blog, connect, and chat freely with others in password-protected environments.¹⁰⁷

Focusing on support and treatment for those with HIV also reflects the global movement away from HIV-transmission criminalization to public health awareness as more organizations and countries acknowledge the fact that “[l]aws that penalize HIV transmission and homosexuality contribute to stigma and discrimination for people living with HIV and MSM.”¹⁰⁸ In the United States, legislators have moved away from HIV-transmission criminalization, but the recognition of these changes in American courtrooms has been slow. HIV-transmission laws have also been criticized for shifting the responsibility of transmission onto the HIV-positive transmitter, which undermines public health promotions for shared responsibility as an incentive for safe and responsible sex between consenting partners.¹⁰⁹ Additionally, HIV laws have been condemned for weakening the public health importance in taking personal responsibility for one’s own health while stigmatizing and disaffecting those who are HIV-positive.¹¹⁰

On May 7, 2013, Congresswoman Barbara Lee reintroduced the Repeal Existing Policies that Encourage and Allow Legal HIV Discrimination Act (REPEAL), calling for the nationwide reevaluation and rewriting of all HIV criminalization laws.¹¹¹ REPEAL, which was still in committee as of May 2013,¹¹² proposes that the nation’s mindset about HIV and AIDS, as well as our treatment of those living with the virus, must be altered from the unjustifiably high-pitched fear of transmission of the latter part of the 20th century to a more rational, research-driven approach indicative of today’s values.¹¹³

According to REPEAL, “placing legal responsibility for preventing

related services, see generally HIV/STD SERV., OKLA. STATE DEP’T OF HEALTH, OKLAHOMA HIV/AIDS RESOURCE GUIDE (2010), available at <http://www.ok.gov/health2/documents/HIV-STDResourceGuide.pdf>.

107. For example, Twospiritsplus.com allows members to post journals, videos, and photos, while also offering a support network for those living with HIV or AIDS. *Social Forum*, TWOSPIRITSPLUS.COM, <http://twospiritsplus.com/Social/> (last visited Jan. 8, 2014).

108. Kevin Moody, *Ensuring Human and Sexual Rights for Men Who Have Sex with Men Living with HIV*, 87 BULL. WORLD HEALTH ORG. 875, 875 (2009).

109. Galletly & Pinkerton, *supra* note 91, at 455.

110. *Id.* at 452–53.

111. Repeal Existing Policies that Encourage and Allow Legal HIV Discrimination Act [REPEAL], H.R. 1843, 113th Cong. § 4 (2013) [hereinafter REPEAL Bill].

112. *H.R. 1843: REPEAL HIV Discrimination Act of 2013*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/113/hr1843> (last visited Sept. 26, 2013).

113. See REPEAL Bill, *supra* note 111, at § 3.

the transmission of HIV and other pathogens exclusively on people diagnosed with HIV . . . undermines the public health message that all people should practice behaviors that protect themselves and their partners from HIV and other sexually transmitted diseases.”¹¹⁴ Additionally, the laws, policies, and regulations for those with HIV or AIDS should demonstrate a “public health-oriented, evidence-based, medically accurate, and contemporary understanding of” how and under what conditions HIV is transmitted, the positive effects of treatment and therapy, and the negative consequences on both individuals and the community by punishing those living with or affected by HIV.¹¹⁵

An HIV diagnosis no longer sounds the death knell so familiar and foreboding during the 1980s and 1990s when “many Americans were frantic about the possibility of [HIV transmission].”¹¹⁶ To allay the public’s alarmed response to the “disfavored social standing” of those who were infected by the new disease, public health organizations emphasized four key facts in an attempt to dispel HIV-related stigma: (1) that everyone, not just homosexuals or drug users, are vulnerable to HIV transmission; (2) HIV-positive status can only be confirmed by laboratory testing, thus everyone should incorporate protective practices; (3) the best sexual practices for all people are first, abstinence, and second, monogamy in conjunction with consistent condom use; and (4) discrimination against those with HIV served no public health purpose since the virus could not be transmitted through “casual contact.”¹¹⁷ Although there is still no cure, HIV is now considered to be a “treatable, chronic, medical condition.”¹¹⁸ However, “prosecutors, courts, and legislators continue to view and characterize the blood, semen, and saliva of people living with HIV as a ‘deadly weapon.’”¹¹⁹

Nationally, HIV-criminalization laws have been denounced for perpetuating the idea that contracting HIV is an automatic death sentence; and courts around the country relying on testimony from public health department officials, rather than specialized experts, only compounded this idea.¹²⁰ Several courts have taken judicial notice of the

114. *Id.* § 2(9).

115. *Id.* § 3(2).

116. Galletly & Pinkerton, *supra* note 91, at 451 (citations omitted).

117. *Id.* at 451–52 (citations omitted).

118. REPEAL Bill, *supra* note 111, at § 2(8).

119. *Id.*

120. Roger Peabody, *In the Real World HIV Has Changed; In the Courtroom It Is Still the 1980s*, NAM: AIDS MAP (July 26, 2012), <http://www.aidsmap.com/In-the-real-world-hiv-has-changed-in-the-courtroom-it-is-still-the-1980s>.

2013]

*Oklahoma's Transmission Statute***455**

“deadly” or “dangerous” potential of HIV transmission in order to allow prosecutions of more serious offenses.¹²¹ In Oklahoma, an HIV-transmission criminal charge opens the door for prosecutors to allege more serious offenses, such as assault and battery with a deadly weapon. For example, there was one Oklahoma case brought by the District Attorney of Grady County, Oklahoma, against Christopher Franklin Sylve for both HIV transmission as well as assault and battery with a deadly weapon.¹²² In short, the State accused Sylve of using his penis and HIV-positive bodily fluid as a “deadly weapon.”¹²³ According to the Grady County District Attorney, the assault-and-battery-with-a-deadly-weapon charges were filed against Sylve because Sylve’s actions were “similar to a murder case. The only difference [between the defendant’s HIV transmission to two women and murder is that] being in a murder case we have a victim who is dead right then.”¹²⁴ In other words, Sylve’s alleged violation of the Statute, a felony punishable for up to five years,¹²⁵ enabled the District Attorney to tack on two additional charges that carry potential life sentences.¹²⁶

The Grady County District Attorney’s statements demonstrate a vindictive agenda against the defendant as well as a woeful misunderstanding of the changes in HIV/AIDS treatment and research in the 21st century.¹²⁷ His statement reflects an outdated understanding of

world-HIV-has-changed-in-the-courtroom-it-is-still-the-1980s/page/2454299/.

121. See, e.g., *Mathonican v. State*, 194 S.W.3d 59, 69 (Tex. App. 2006) (holding that seminal fluid may be considered a deadly weapon because “seminal fluid from an HIV-positive man is capable of causing death or serious bodily injury to another person when the HIV-positive man engages in unprotected sexual contact. . . . [T]hat basic truth therefore need not be established at trial by expert testimony”); see also *Najera v. State*, 955 S.W.2d 698, 700–01 (Tex. App. 1997) (holding that the since HIV causes AIDS, which has no cure, the requirements for establishing a deadly weapon charge against the defendant were satisfied).

122. Adrianna Iwasinski, *Wife of Grady County Man Arrested for Rape Says He Gave Her HIV*, News 9 (Mar. 14, 2012), <http://wnow.worldnow.com/story/17160567/wife-of-grady-county-man-arrested-for-rape-he-gave-her-hiv-virus>.

123. Shannon Rigsby, *Charges Amended Against HIV Positive Man*, CHICKASHANOW (Mar. 15, 2012, 7:32 PM), http://chickashanow.com/story.php?id=2012-03-15_19:32:58.

124. *Id.*

125. OKLA. STAT. tit. 21, §1192.1 (OSCN through 2013 Leg. Sess.).

126. *Id.* § 652(c) (OSCN through 2013 Leg. Sess.). Sylve was also charged with three counts of statutory rape for allegedly engaging in sexual acts with an underage girl. Bright, *supra* note 89.

127. Compare Rigsby, *supra* note 123 (“[T]he women who have had this contact with [the defendant], they have a death sentence, but it’s going to take quite some time for that death to be executed.”), with *Najera v. State*, 955 S.W.2d 698, 701 (Tex. App. 1997) (“According to statistics current at the time of the appellant’s trial in February 1996,

HIV life expectancy because recent studies from Oklahoma indicate that the life expectancy of those living with HIV has greatly improved.¹²⁸ The life expectancy for those living in Oklahoma and infected with HIV or AIDS has risen by 35% over a nine-year span.¹²⁹ Additionally, fewer AIDS diagnoses were reported from 2005 to 2009 while the number of HIV diagnoses have steadily increased,¹³⁰ with some sources reporting a 112% rise in Oklahoma HIV diagnoses by 2012.¹³¹ This decrease in the number of AIDS cases paired with the increase of HIV cases supports the statistical inference that HIV-positive cases may be treated for a significant period of time without developing into AIDS.¹³²

E. Structural Limitations Within the Transmission Statute

Lastly, the structure of Oklahoma's Transmission Statute may also make transmission prosecutions difficult for both homosexual and heterosexual transmission, which would explain why only sensationalized heterosexual transmissions actually ever go to court. The Statute can be dissected into four parts: (1) that a person knows he or she is HIV positive or has AIDS; (2) that the person intends to infect another person; (3) that the transmitting person engaged in conduct reasonably likely to result in the recognized methods of transmitting the virus; and (4) either (a) the receiving person did not consent to the conduct of transmission, or (b) the receiving person consented to the transmission conduct but had not been informed of the transferring individual's positive status.¹³³

The first two elements of this crime would be difficult to prove in almost any situation because of the high level of culpability required—knowledge and intent. Under Oklahoma criminal law, “the word knowing[] ‘imports only a knowledge that the facts exist which bring the act or omission within the provisions of [the criminal code]. It does not

ninety-five percent of persons who contract HIV die within twelve years.”).

128. OKLA. HIV PROFILE, *supra* note 41, at 19 (showing that studies indicate that while the number of people diagnosed with HIV has increased, the number of people who have AIDS has decreased, suggesting that those infected with HIV are living longer and early detection prevents development of AIDS).

129. *Id.*

130. *Id.* at 2.

131. Editorial, *Know Your Status To Make Future HIV-Negative*, OKLAHOMA DAILY (Nov. 27, 2012), <http://oudaily.com/news/2012/nov/27/ourviewAIDS/>.

132. See OKLA. HIV PROFILE, *supra* note 41, at 1, 4.

133. OKLA. STAT. tit. 21, § 1192.1(A) (OSCN through 2013 Leg. Sess.).

2013]

*Oklahoma's Transmission Statute***457**

require any knowledge of the unlawfulness of such act or omission.”¹³⁴ Knowledge of one’s positive serostatus could be confirmed by subpoenaed test results, provided that disclosure of the medical records was not prohibited by privilege.¹³⁵ Alternatively, a defendant’s knowledge of his positive status may be established by testimony from family and friends who were told by the defendant of his positive HIV results.¹³⁶ Despite corroboration problems and fear of stigmatization,¹³⁷ a victim could also assert that the defendant did not mention his positive status prior to the consensual sexual act. However, critics have warned against allowing this type of testimony in instances of homosexual transmission because “the jury could conceivably convict based on the defendant’s status as a homosexual and not on the defendant’s guilt or innocence.”¹³⁸

The second element is the intent to infect another.¹³⁹ Absent physical proof, like a statement by the accused or witness testimony, it would be difficult to determine whether the defendant intentionally transmitted or exposed the other person to HIV. In Oklahoma, the term “intentionally” is synonymous with “willfulness,”¹⁴⁰ defined as “simply a purpose or willingness to commit the act or the omission referred to.”¹⁴¹ This mens rea requirement has been criticized for creating a “nearly impossible” burden for state prosecutors to meet, and some have suggested that the element be removed from the Statute altogether.¹⁴² Those who criticize the intent requirement attack the Transmission Statute for appearing intent-specific when, in actuality, it is intent-ambiguous in practice; it “poses a real threat of basing conviction on the caprice of moral disapprobation or censure of a judge or jury. Such an intent requirement

134. State *ex rel.* Okla. Bar Ass’n v. Krug, 2004 OK 28 n.8, 92 P.3d 67, 71 n.8 (citing OKLA. STAT. tit. 21, § 96).

135. R. Brian Leech, Comment, *Criminalizing Sexual Transmission of HIV: Oklahoma's Intentional Transmission Statute: Unconstitutional or Merely Unenforceable?*, 46 OKLA. L. REV. 687, 693–94 (1993).

136. *Id.* at 694.

137. See *supra* Part III.A.

138. Leech, *supra* note 135, at 695.

139. OKLA. STAT. tit. 21, § 1192.1(A) (OSCN through 2013 Leg. Sess.).

140. Perrine v. State, 1919 OK 22, ¶ 7, 178 P. 97, 98 (“Willfulness is synonymous with intentionally, designedly, without lawful excuse and therefore accidentally.” (citation omitted)).

141. OKLA. STAT. tit. 21, § 92 (OSCN through 2013 Leg. Sess.).

142. Christina M. Shriver, *State Approaches to Criminalizing the Exposure of HIV: Problems in Statutory Construction, Constitutionality and Implications*, 21 N. ILL. U. L. REV. 319, 344–45 (2001).

should be made more specific to prevent unprotected minorities from being convicted for their minority status rather than for a criminal act.”¹⁴³

The third element of the Statute, the method of transmission,¹⁴⁴ is typically not a problematic element to prove. However, satisfying the fourth element, thus proving that the receiving party was not informed by the other person of that person’s positive serostatus, may prove problematic in consensual transmission cases.¹⁴⁵ As Brian R. Leech noted, “Enforcing [§ 1192.1] . . . requires governmental intrusion into one of the most personal aspects of human nature: the sexual relationship.”¹⁴⁶ Consensual sex occurs most often in private surroundings where statements made by either party cannot be corroborated. Assume a man and a woman are about to engage in consensual sex. Moments before consummating, the man tells the woman of his positive status in the privacy of the bedroom, and she consents to the risk of exposure. Later, the woman learns that she was in fact infected and falsely claims that the man did not inform her. If a defendant were to assert that the alleged victim in this hypothetical case had actually been told of his HIV-positive status, how would the prosecutor prove otherwise? Now suppose these contradictory statements were made by two gay men, layering the concerns previously mentioned in this Note about social acceptance, sensationalism, and sexual practices.¹⁴⁷ What is already a confusing and potentially improper case for prosecution becomes even more problematic—a case of “he said, she said” transforms into a case of “he said, he said.” The truth is that difficulties arise in prosecuting transmission based on consensual sex, regardless of sexual disposition, and these difficulties evince a need for prosecutorial symmetry currently lacking in the law’s application.

Oklahoma prosecutors are likely aware of the difficult task in proving the Transmission Statute’s necessary elements. In 1992, prosecutors were forced to drop charges against a Seminole County man after learning that his girlfriend, the alleged victim, had been informed of the defendant’s positive status prior to consensual sex.¹⁴⁸ Fewer than 15 HIV-transmission charges have been filed in Oklahoma since 2000, and

143. Leech, *supra* note 135, at 696.

144. OKLA. STAT. tit. 21, § 1192.1(A) (OSCN through 2013 Leg. Sess.).

145. *See id.*

146. *Id.*

147. *See supra* Parts III.A, III.C.

148. *Authorities Drop Charge Against HIV-Positive Man*, TULSA WORLD, Oct. 1, 1992, at C12.

2013]

*Oklahoma's Transmission Statute***459**

almost all of these transmission charges were either dropped or the defendant pled guilty to a lesser charge.¹⁴⁹ In 2001, Oklahoma county prosecutors dismissed a felony HIV-transmission charge against a female defendant when her HIV results came back as negative.¹⁵⁰ A Tulsa County defendant pled not guilty in 2010; he then amended his plea to guilty when his transmission charges were modified to Disturbing the Peace.¹⁵¹ Only one case charged prior to 2012 has gone to trial with transmission charges pending against the defendant, and the defendant was acquitted of criminal HIV transmission by demurrer.¹⁵²

Accordingly, the Transmission Statute is an ineffective law for many reasons. First, the law is ineffective because it serves no retributive purpose. What would be the just deserts to a person who has infected another with HIV through *consensual* sex? An HIV diagnosis no longer guarantees death, and medical advancements have made living with HIV more manageable; it is no longer appropriate to convict a person who engages in consensual sex when the alleged victim assumed the risk. Second, retribution is ill-served by this law since it fails to consider personal accountability because an individual who consents to having sex should also be responsible for inquiring into the other person's health status. Third, the Statute is a poor legal deterrent. The majority of transmissions in Oklahoma are between MSMs, yet there are very few arrests or prosecutions of this population. Even the salacious publicity that accompanies some heterosexual transmission cases has not decreased the number of MSM transmissions, and reports confirm the number of MSM HIV transmissions have actually increased. Fourth, the law serves no public health deterrent and may even be antagonistic to state and national health policies. Lastly, research suggests that despite the likelihood of a five-year felony sentence, arrests under the Statute do not always amount to filing charges, and those that are brought to court are inconsistently prosecuted. In light of these facts, it is not unreasonable to propose that the Statute serves no legitimate

149. See *supra* notes 50–51.

150. State v. Fowler, CF-2001-4230 (D. Okla. Nov. 19, 2001), available at <http://www.oscn.net/applications/oscn/GetCaseInformation.asp?number=CF-2001-4230&db=Oklahoma&submitted=true>.

151. State v. Hedge, CF-2010-2065 (D. Okla. Aug. 18, 2010), available at <http://www.oscn.net/applications/oscn/GetCaseInformation.asp?number=CF-2010-2065&db=Tulsa&submitted=true>.

152. State v. Ledford, CF-2000-4321 (D. Okla. Mar. 20, 2002), available at <http://www.oscn.net/applications/oscn/GetCaseInformation.asp?number=CF-2000-4321&db=Oklahoma&submitted=true>.

punishment-theory objective.

IV. WHAT WAS THE MOTIVE BEHIND OKLAHOMA'S TRANSMISSION STATUTE?

Many criminal HIV-transmission laws were enacted in order to meet the federal funding requirements of the Ryan White Comprehensive AIDS Resources Emergency Act of 1990.¹⁵³ The Ryan White Act's purpose was to "provide emergency assistance to localities . . . disproportionately affected by the [HIV] epidemic and to make financial assistance available to States . . . to provide for the development, organization, coordination and operation of more effective and cost efficient systems for the delivery of essential services to individuals and families with HIV disease."¹⁵⁴ The Ryan White Act provides billions of dollars each year to aid states in providing health and support services to individuals and families affected by HIV or AIDS.¹⁵⁵ The financial assistance provides payment for medication programs, additional health insurance, and "early intervention services."¹⁵⁶ However, in order to receive federal funding, the Ryan White Act's § 2647 required states to demonstrate that current criminal law statutes were sufficient for the prosecution of intentional HIV transmission.¹⁵⁷ Although the provision specifically indicated that states were not obliged to enact HIV-specific criminal laws, many states did so.¹⁵⁸ By 2006, federal funding to states for HIV/AIDS services had increased by almost two billion dollars.¹⁵⁹

Yet, unlike other states that initiated HIV-transmission statutes in order to receive federal funding, Oklahoma's legislature enacted its Transmission Statute in 1988,¹⁶⁰ which was two years prior to when

153. See Ryan White Comprehensive AIDS Resources Emergency Act Of 1990, 42 U.S.C. §§ 300ff–90, (codified as amended at 42 U.S.C. §§ 300ff-87 to -140 (2009)).

154. *Id.* § 300ff.

155. See, e.g., *id.* §§ 300ff-71(j) (providing \$396,740,000 for the fiscal years of 2007–2013); 300ff-55 (authorizing \$1,485,179,000 for the fiscal years of 2007–2013); 300ff-33(h) (authorizing \$90,000,000 for the fiscal years of 2007–2009); 300ff-31b(a); 300ff-28(a) (authorizing \$8,187,082,000 for the fiscal years of 2007–2013).

156. THE HENRY J. KAISER FAMILY FOUND., HIV/AIDS POLICY FACT SHEET (2006) [hereinafter KAISER FACT SHEET], available at http://s3.amazonaws.com/zanran_storage/www.kff.org/ContentPages/394934.pdf.

157. 42 U.S.C. § 300ff-47(a) (1994).

158. James B. McArthur, Note, *As the Tide Turns: The Changing HIV/AIDS Epidemic and the Criminalization of HIV Exposure*, 94 CORNELL L. REV. 707, 715 (2009).

159. KAISER FACT SHEET, *supra* note 156, at 2.

160. Act of May 5, 1988, ch. 153, 1988 Okla. Sess. Laws 547.

2013]

*Oklahoma's Transmission Statute***461**

Congress had passed the Ryan White Act. It appears that Oklahoma did not enact the Statute to comply with the Ryan White Act even though Oklahoma received almost 11 million dollars of funding in 2010.¹⁶¹ If Oklahoma did not enact the Transmission Statute to receive federal aid, then there is very little evidence to indicate why Oklahoma legislators passed such an ineffective law. Even recent proposals to amend the Statute¹⁶² reflect no change from the language of the 1999 draft. In 2010, State House Representatives Wade Rousselot and Ken Luttrell, together with State Senator Earl Garrison, proposed House Bill 2732 in which they advised a new law be enacted as Title 21, § 1192.2 of the Oklahoma Statutes.¹⁶³ Their amendment would make knowingly exposing or communicating a sexually transmitted disease to any child under 18 a criminal offense punishable up to a life sentence.¹⁶⁴ The bill did not propose a modification to the existing Statute to reflect modern views on HIV transmission, but instead proposed an additional offense, as stated in § 1192.2, for the knowing and intentional infection of HIV to a child under 18.¹⁶⁵

Although the measure died in conference,¹⁶⁶ the introduction of this bill created no discussion about the current Transmission Statute or the validity of its recommended expansion. A video of the House of Representatives during the floor amendment for the proposed statute shows Representative Rousselot leaning against the wall, casually waiting for questions or debate.¹⁶⁷ Not a single question was raised as to the implications of the new amendment, nor did any legislator ask for clarification of the current law's applications despite the fact that no changes have been made to the law in over 20 years. In less than three minutes of video footage, the House passed Bill 2732 to the Oklahoma

161. *Oklahoma: Total Ryan White Funding, FY2010*, STATEHEALTHFACTS.ORG, available at <http://www.statehealthfacts.org/profileind.jsp?rgn=38&ind=534> (last visited Sept. 27, 2013).

162. H.B. 2732, 52d Leg., 2d Sess. (Okla. 2010).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Bill Information for HB 2732 (2009-2010): History for HB 2732*, OKLAHOMA STATE LEGISLATURE, available at <http://www.oklegislature.gov/BillInfo.aspx?Bill=HB2732&Session=1000> (last visited Jan. 7, 2014).

167. Video, *House Session—Legislative Day 19, HB 2732 Rousselot*, OKLAHOMA STATE LEGISLATURE 27:10, 28:02 (Mar. 3, 2010), <http://www.oklegislature.gov/BillInfo.aspx?Bill=HB2732&Session=1000>.

Senate.¹⁶⁸ The Bill did not leave the Senate, but it is interesting to note that the only changes proposed have focused on broadening the scope of the law rather than remedying prosecutorial issues or outdated language.¹⁶⁹

One interpretation of the House's general disinterest in analyzing Oklahoma's current Transmission Statute could be that Oklahoma legislators are satisfied with it as it stands today. In fact, the aforementioned proposed amendment seems to indicate that House Representatives wished for the law to target a larger, unrelated class of criminals: Oklahoma sex offenders who expose children to HIV and AIDS. If the law had passed, prosecutors would have had an additional charge carrying a life sentence that could have been used against an HIV-positive individual accused of sexually abusing a child. For such long-reaching implications, the lack of discourse regarding the amendment to the Statute is unacceptable and reaffirms the national disappointment in Oklahoma's criminal law system. REPEAL would affect the Statute should REPEAL ever be enacted into federal law. However, the Oklahoma Legislature should not wait for federal mandates to make changes to the Statute. With or without a federal impetus, changes to both HIV criminalization and the attitudes of Oklahomans are warranted immediately.

V. CONCLUSION

Analysis of the recent HIV-transmission cases in Oklahoma highlights clear structural concerns in the Transmission Statute. If the Statute's elements are too difficult to prove in most situations, particularly the intent-to-transmit requirement, why are prosecutors filing HIV-transmission charges at all? Since no homosexual transmission cases have been found, any examination into the contours of the offense must be based on the heterosexual transmission cases. As previously mentioned, charges based on the Statute rarely go to trial and are usually dismissed, modified, or tacked onto a laundry list of other charges in the hopes of spurring a plea negotiation. This outcome raises an important question: is the Statute just one of the many available tools to be used against a defendant to persuade the defendant to accept a plea? Is the HIV-transmission law just another topping available at the "salad bar" of

168. *Id.* at 28:10.

169. *See, e.g., id.* at 27:32.

2013]

*Oklahoma's Transmission Statute***463**

prosecutorial discretion? After all, prosecutorial discretion in the HIV-transmission-crimes context has already been criticized for “run[ning] the risk that prosecutors will disproportionately pursue actions against disfavored groups such as racial and sexual minorities.”¹⁷⁰ Yet history shows that Oklahoma prosecutors have avoided charging homosexual transmission cases as zealously as heterosexual transmission cases. Because of this, the only cases that typically are prosecuted under the Statute have been in a category that Oklahomans are more comfortable discussing in public: the unfaithful heterosexual male.

It is true that correlation does not equal causation. The fact that the majority of HIV transmissions that occur in Oklahoma are between MSMs does not automatically mean that the lack of homosexual transmission cases is anything but incidental. However, factors exist, such as the state’s slow acceptance of homosexual lifestyles and the contemporary emphasis on public-health awareness, which bear some effect on the applicability of the Statute in relation to homosexual consensual sex. These factors cannot be ignored and, at the very least, a serious discussion should be taking place in Oklahoma to determine if the apparent moral objectives of the law are sufficient to keep it on the books.

170. McArthur, *supra* note 158, at 736 (footnote omitted).