

ENDING HIV: STIGMA, FEAR-BASED POLICING, AND CRIMINALIZATION IN LOUISIANA THROUGH
TRAINING OF LAW ENFORCEMENT AND PROSECUTORS.

STEFANIE N. STEPHENS¹

INTRODUCTION

Human immunodeficiency virus, commonly known, as HIV is a lentivirus that if left untreated, can lead to acquired immunodeficiency virus, commonly known as AIDS.² AIDS, simply put, suppresses the immune system, which causes a person's body to be vulnerable to other infections.³ Currently, HIV/ AIDS affects more than 1.2 million people living in the U.S, and 1 out of 8 people are not even aware that they have contracted HIV.⁴ HIV emerged during the 1980's, and was originally seen as a type of cancer because of the severity of the disease, and the almost immediate manner in which it claimed an infected person's life.⁵ Since then, many strides have been made medically in improving the quality and length of life of those who have contracted HIV. Despite these medical advancements, those who have contracted HIV now have obstacles to face criminally.

¹ Stefanie N. Stephens, J.D. Candidate May 2018, Southern University Law Center. B.A. 2014, University of Alabama at Birmingham. I am eternally grateful to Attorney S. Mandisa Moore-O'Neal for all of her wisdom, assistance, and support in writing this comment.

² HIV/AIDS 101: U.S. Statistics, U.S. Statistics, <https://www.aids.gov/hiv-aids-basics/hiv-aids-101/statistics/index.html> (last visited Oct 16, 2016)

³ John Pope, AIDS Report Shows Baton Rouge, New Orleans in Top Five, The Times-Picayune (Mar. 15, 2012), http://www.nola.com/health/index.ssf/2012/03/aids_report_shows_baton_rouge.html.

⁴ HIV/AIDS 101: U.S. Statistics, U.S. Statistics, <https://www.aids.gov/hiv-aids-basics/hiv-aids-101/statistics/index.html> (last visited Oct 16, 2016)

⁵ *Id.*

In response to the growing population of persons living with HIV/AIDS, state legislatures created and enacted laws governing the activities of intentional exposure to HIV, intentional transmission of HIV, and disclosure of HIV status to partners. Laws vary from each state regarding what behavior is criminalized, and the penalties imposed if a person is found guilty. In Louisiana, La. R.S. 14:43.5 was enacted in 1987, and criminalizes the intentional exposure to the AIDS virus. The issues with the Louisiana statute are 1) that exposure to the AIDS virus does not necessarily equate to transmission; and 2) some of the behaviors defined, as exposure in the statute will not actually transmit HIV/AIDS. Thus, there has been an emergence of many cases where persons are arrested, tried, and convicted of intentional exposure, where there was little to no rate of transmission of the virus.

As of recently, there has been a movement to change the language of the statute to align with the scientific definitions of transmission, and end the criminalization of ordinary behaviors, which will not lead to contracting HIV. This comment serves to argue that amending La. R.S. 14:43.5 is not enough to affect change in the criminalization of persons living with HIV/AIDS in Louisiana; and urges to also include mandatory HIV/AIDS training of law enforcement officers and prosecutors. By including law enforcement officers and prosecutors in the reform of HIV-specific laws, there is a chance to affect change in the way arrests are made and cases are tried.

Part I: PART I. HISTORICAL BACKGROUND OF HIV AND HIV STIGMAS

a. THE SCIENTIFIC BACKGROUND OF HIV

As stated in the introduction, HIV is belongs to the family of “lenti” or “retro” viruses, which means these viruses are slow acting, and often take many years to produce a disease after

infection.⁶ Lentiviruses are exogenous, meaning they are transmitted horizontally between individuals.⁷ It is important to note that HIV is not just one virus, but is comprised of four distinct subgroups.⁸ Scientific research has categorized these subgroups, by designating them with the letters: M, N, O, and P.⁹ Group M has been primarily found worldwide, and has been in virtually every country on the globe.¹⁰ HIV infects many different types of cells in the body, but primarily infects T4 lymphocytes, and cells of the monocyte-macrophage lineage, including certain cells in the immune system and cells in the nervous system.¹¹ The infection of T4 cells is the fatal complication of HIV because 1) the T4 cells function to identify infectious agents that invade the body, and 2) mobilize the immune system to attack them.¹² As HIV progresses, it eventually infects and inhibits the function of most if an individual's T4 cells; but also disables their ability to grow and control growth of common infectious organisms.¹³

HIV is a blood-borne infection, meaning that the virus is spread amongst humans through contact that is either: 1) blood-to-blood; 2) blood-to-semen/vaginal fluids; or 3) or perinatal.¹⁴

This also tends to suggest that the opportunities for contagion are concentrated among high-risk

⁶ PHILIP F. PIERCE, et al., *An Overview and Introduction to HIV Infection*, 2 Ct. Health Sci. & L. 5 (1991)

⁷ PAUL M. SHARP and BEATRICE H. HANH, *Origins of HIV Pandemic*, Cold Spring Harbor Perspectives in Medicine, 3, 4 2011;1(1):a006841

⁸ *Id.* at 15

⁹ *Id.*

¹⁰ *Id.*

¹¹ PHILIP F. PIERCE, et al., *An Overview and Introduction to HIV Infection*, 2 Ct. Health Sci. & L. 4 (1991)

¹² *Id.*

¹³ *Id.*

¹⁴ STEVEN R. SALBU, *Needle Exchange, HIV Transmission, and Illegal Drug Use: Informing Law and Public Policy with Science and Rational Discourse*, 33 Harv. J. on Legis. 105, 182 (1996)

activities most likely resulting in the intermingling of blood, semen/vaginal fluids, or both.¹⁵ The Center for Disease Control named: male to male sexual contact; sexual relations with numerous partners, including prostitution; receipt of blood clotting products prior to 1985; and the injection of intravenous drugs, among the high-risk activities associated with HIV transmission.¹⁶

Soon after the initial infection with HIV, an individual will naturally develop antibodies in response to coming in contact with the disease.¹⁷ The presence of these antibodies is what is test for in an HIV/AIDS test.¹⁸ When a person has a positive test for the HIV antibodies, it means that he or she produced the antibodies in response to the presence of the HIV virus.¹⁹ An individual with a positive HIV/AIDS test can be at any stage in the HIV disease from symptom-free to an active disease to developing AIDS.²⁰ A person who is infected with HIV may appear perfectly healthy, as it takes time for the virus to disable enough of the infected person's T4 cells to hamper the functioning of the person's immune system.²¹ Until a person's immune system is suppressed to the point that he or she develops one of many opportunistic infections or certain other certain other manifestations of later or disseminated infection with the virus.²² The course of HIV disease is highly variable, but typically will consist of an acute mononucleosis-like

¹⁵ *Id.*

¹⁶ *Id.* at 106

¹⁷ PHILIP F. PIERCE, et al., *An Overview and Introduction to HIV Infection*, 2 Ct. Health Sci. & L. 5 (1991)

¹⁸ *Id.* at 5, 7

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 5

²² *Id.*

syndrome within weeks of the initial infection of HIV, followed by a variable period when the patient has no symptoms.²³

b. THE EMERGENCE OF HIV IN THE UNITED STATES AND STIGMAS ASSOCIATED WITH
HIV

HIV has a relatively recent history in the United States. The first case of HIV was not reported in the United States until the early 1980's, however, medical cases which indicated AIDS symptoms were as early as, reported 10 years prior.²⁴ In the United States, the Center for Disease Control published, "Morbidity and Mortality Weekly Report" (MMRW) on June 5, 1981, which described cases of a rare lung infection affecting five previously healthy gay men in Los Angeles, California.²⁵ This edition of the MMRW is noted as reporting the first official report of AIDS.²⁶ Further research and reporting of similar cases in the year of 1981 revealed a total of 270 reported cases, resulting in 121 deaths of those cases.²⁷

During this time, the source of transmission was unknown, however, researchers and the public largely attributed HIV to homosexual activity, intravenous drug use, and other "perceived" sexually deviant behavior.²⁸ Attitudes towards HIV shifted in early 1983, when the Center for Disease Control began reporting cases of transmission from female to male sexual

²³ PHILIP F. PIERCE, et al., *An Overview and Introduction to HIV Infection*, 2 Ct. Health Sci. & L. 5 (1991)

²⁴ CARRIE GRIFFIN BASAS, Comment, *The Sentence of HIV*, 101 Ky. L. J., 558 (2012)

²⁵ U.S. STATISTICS, <https://www.aids.gov/hiv-aids-basics/hiv-aids-101/statistics/index.html> (last visited Oct. 16, 2016).

²⁶ CARRIE GRIFFIN BASAS, Comment, *The Sentence of HIV*, 101 Ky. L. J., 558 (2012).

²⁷ *Id.*

²⁸ *Id.* at 559

contact.²⁹In turn, anxiety began to grow over the risk that the disease now posed outside of what was perceived as deviant communities of the population.³⁰ As a result, people without HIV or AIDS began to feel increasingly more vulnerable, and could no longer view the disease as another person's problem.³¹

The stigma attached to HIV cannot be attributed to one single source, but rather is a combination of factors that led to negative public perception. When HIV/AIDS was initially discovered, it was an unknown, deadly disease with mysterious origins that appeared almost out of thin air. Since there was nothing that the public could attribute this disease to, it was almost inevitable that that it would be regarded as an "abomination of one's body."³² Additionally, because the epidemic in the United States disproportionately affected disliked sectors of the population, especially gay and bisexual men, AIDS was also regarded from the start as a "blemish of individual character."³³ HIV/AIDS related stigma has been manifested in discrimination and physical violence against people with this disease, negative feelings towards them, expressions of discomfort about them, and a wish to avoid them and support policies to isolate them from the rest of the population.³⁴

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² GREGORY M. HEREK, et al., *When Sex Equals AIDS: Symbolic Stigma and Heterosexual Adults' Inaccurate Beliefs about Sexual Transmission of AIDS*, 52 Soc. Probs. 16 (2005).

³³ *Id.*

³⁴ *Id.*

The social psychological processes associated with symbolic AIDS stigma foster sexual prejudice in at least two ways.³⁵ First, stigma leads to stereotyping, whereby marked individuals are assumed to possess various undesirable characteristics.³⁶ Which results in a facilitation of equating of AIDS with homosexuality and foster heterosexuals' perception that gay people pose a menace to society through their sexual abuse.³⁷ Secondly, once activated, stereotypes provided a rationale for believing that those in the stigmatized outgroup are fundamentally different from the rest of the population.³⁸ Ingroup members tend to exaggerate differences between their own group and stigmatized outgroup while minimizing the latter's heterogeneity.³⁹ In applying this theory to the HIV/AIDS stigma, this focus of intergroup differences may influence heterosexuals' beliefs about the risk of AIDS transmission through heterosexual sex.⁴⁰ Indeed, as a consequence of overestimating ingroup-outgroup differences, they may perceive themselves as so unlike gay or bisexual people that they fail to recognize that HIV can be transmitted through heterosexual conduct.⁴¹

Several surveys conducted in the United States, as early as 1985, illustrate the public's knowledge of the contraction and transmission of HIV/AIDS. Despite this information, the stigma still remains for inaccuracies regarding the transmission of HIV through casual social contact, such as sharing a drinking glass with an infected person.⁴² This suggests that are the

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ GREGORY M. HEREK, et al., *When Sex Equals AIDS: Symbolic Stigma and Heterosexual Adults' Inaccurate Beliefs about Sexual Transmission of AIDS*, 52 Soc. Probs. 17 (2005).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

public's seeming knowledge about the sexual transmission of HIV is not based on a clear understanding of the mechanism by which AIDS is transmitted from one person to another.⁴³ Lack of knowledge about causal contact is correlated with both negative attitudes toward persons with HIV and antigay attitudes.⁴⁴ Public perception and the stigma attached to HIV is a driving force behind the HIV criminal exposure laws. It is important to identify the roots of these misconceptions in order to effectively respond to them AIDS education and stigma reduction efforts.⁴⁵ In affecting change for the reform of HIV criminalization, public perception can play a key role in lobbying efforts for revision of statutes criminalizing intentional exposure to HIV, as well as, urging law enforcement, prosecutors, and judges to undergo mandatory HIV education and training.

c. RYAN WHITE CARE ACT – SHIFT IN TRADITIONAL STIGMAS ASSOCIATED WITH HIV

As discussed in the previous section, the initial stigmas attached to HIV were wildly inaccurate and blatantly discriminatory. Slightly over a decade after HIV was first reported by the Center for Disease Control, the Ryan White controversy appeared. Ryan White became a household name in 1985, when as a 14-year-old he began his successful fight to attend the public school in Kokomo, Indiana, that had banned him amid a clamor of fearful student and their

⁴³ *Id.*

⁴⁴ GREGORY M. HEREK, et al., *When Sex Equals AIDS: Symbolic Stigma and Heterosexual Adults' Inaccurate Beliefs about Sexual Transmission of AIDS*, 52 Soc. Probs. 17 (2005).

⁴⁵ *Id.*

parents.⁴⁶ Unlike the typical stigmas attached to the disease, Ryan contracted HIV through an untested blood donation to treat hemophilia A, which was an inherited disorder.⁴⁷

He was initially diagnosed in December of 1984 and only given 3-6 month to live.⁴⁸ Once he overcame his first bout with the illness, Ryan wanted to return to his school Western Middle School in Russiaville, but was met with staunch opposition. For months, he had been forced to get his seventh-grade class lessons through a telephone hook-up at home.⁴⁹ Several school officials, teachers, parents, and students erroneously insisted that Ryan might transmit his HIV by casual contact such as a handshake, from using public restrooms, or even from handling newspapers from Ryan's paper route.⁵⁰ Even after winning a lengthy court case to allow Ryan back in to school, Ryan was taunted and shunned by his fellow classmates; vandals broke the windows of his home; and cashiers even refused to touch his mother's hand when making change at the supermarket.⁵¹ Ryan White died of a respiratory condition on April 8, 1990, and on August 18, 1990 President George H.W. Bush signed "The Ryan White Comprehensive AIDS Resources Emergency (CARE) Act" into law.

⁴⁶ Dirk Johnson, *Ryan White Dies of AIDS at 18; His Struggle Helped Pierce Myths*, N.Y. TIMES (April. 9, 1990), <http://www.nytimes.com/1990/04/09/obituaries/ryan-white-dies-of-aids-at-18-his-struggle-helped-pierce-myths.html>.

⁴⁷ Howard Markel, *Remembering Ryan White*, Public Broadcasting Station (April. 8, 2016), <http://www.pbs.org/newshour/updates/remembering-ryan-white-the-teen-who-fought-against-the-stigma-of-aids/>.

⁴⁸ *Id.*

⁴⁹ Dirk Johnson, *Ryan White Dies of AIDS at 18; His Struggle Helped Pierce Myths*, N.Y. TIMES (April. 9, 1990), <http://www.nytimes.com/1990/04/09/obituaries/ryan-white-dies-of-aids-at-18-his-struggle-helped-pierce-myths.html>

⁵⁰ *Id.*

⁵¹ *Id.*

This Act provided more than \$2 billion to help cities, states, and community-based health organizations to develop and maintain coordinated and comprehensive systems of diagnosis, care, and treatment especially for the poorest Americans living with HIV/AIDS.⁵² Ryan White's case illustrated the apparent discriminatory attitudes towards persons with HIV in America. When the nation was still grappling with homophobia, unsubstantiated fears of how the virus was transmitted, and a great deal of prejudice towards a growing number of sick individuals, Ryan White's case became the antidote.⁵³ Similar to one looking at their reflection in the mirror, this case allowed America to examine its reflection regarding the treatment of individuals with HIV. Ryan White's case is an important fixture in the fight to overcoming HIV/AIDS stigma because it demonstrates the apparent bias, lack of knowledge, and criticism that surrounds persons living with HIV in America.

d. UNITED STATES AND LOUISIANA- SPECIFIC STATISTICS FOR HIV/AIDS

i. UNITED STATES STATISTICS

A person living in the United States has a 1 in 99 chance of being diagnosed with HIV at some point in her or her life.⁵⁴ More than 1.2 million people in the United States living with HIV, and among those, 1 in 8 persons don't even know it.⁵⁵ Over the last decade the annual overall number of new HIV diagnoses declines, however, this progress has been uneven with

⁵² *Id.*

⁵³ *Id.*

⁵⁴ HIV and AIDS in the United States by Geographical Distribution, Center for Disease Control, <http://www.cdc.gov/hiv/statistics/overview/geographicdistribution.html>. (last updated Sept. 26, 2016).

⁵⁵ HIV/AIDS 101: U.S. Statistics, <https://www.aids.gov/hiv-aids-basics/hiv-aids-101/statistics/index.html> (last visited Oct 16, 2016).

diagnoses increasing in certain groups.⁵⁶ Gay and bisexual men are still the largest population of individuals with HIV, accounting for 83% of diagnoses amongst men and 67% of all diagnoses.⁵⁷ Within this population, African-American gay and bisexual men accounted for the largest estimated HIV diagnoses.⁵⁸ Heterosexual contact accounted for 24% of the estimated HIV diagnoses, but this is also steadily declining with a 35% decrease in HIV diagnoses.⁵⁹ Only 6% of HIV diagnoses are attributed to injection of drug use.⁶⁰ HIV diagnoses among women are also on the decline, with a decrease in 40%.⁶¹

Unfortunately, the HIV diagnoses for the African American population have not achieved similar results of decline. African-Americans only represent about 12% of the United States population but actually account for an estimated 44% of HIV diagnoses.⁶² Young African-American males, between the ages of 13 and 24, are the most impacted. The Center for Disease Control reports that this group has actually experienced an increase in HIV diagnoses, with an estimated increase of 87%. Although, it is important to note, this percentage is said to have decreased by a mere 2% since 2010.⁶³ HIV also disproportionately affects Hispanics/Latinos. The Center for Disease Control reports that this population represents about 17% of the United States population, but accounts for an estimated 23% of HIV diagnoses.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ HIV/AIDS 101: U.S. Statistics, U.S. Statistics, <https://www.aids.gov/hiv-aids-basics/hiv-aids-101/statistics/index.html> (last visited Oct 16, 2016).

⁶² *Id.*

⁶³ *Id.*

HIV also has a disproportionate impact on the Southern region in the United States with the amount of HIV diagnoses made. The Northwestern, Western, and Midwestern regions follow the Southern region in the amount of HIV diagnoses made.⁶⁴ Southern states experience a catch-22 with HIV infection because there are fewer people living with HIV in the South that are actually aware of their infection compared to any other region.⁶⁵ As a result, fewer people in the South with HIV are actually receiving medical care, which could preserve their own life and the transmission to another.⁶⁶

Mortality in the South remains alarmingly high for people with HIV, with a death rate that is three times higher than people living with HIV in other states.⁶⁷ One of the most commonly cited reasons to be considered for the disparate effect of HIV on Southern states is driven in part by socioeconomics. Issues such as income inequality and poverty, which are prevalent in the South, appear to have a correlative effect on poorer health outcomes. Research suggests, that improvement of these socioeconomic issues in the South could possibly result in better access to medical care and treatment. Presently, the Center for Disease Control is pursuing a high-impact prevention approach targeted at the Southern region.⁶⁸ The key strategy within this plan is to make medical care and prevention tools more accessible to treat both persons with untreated HIV infection, and prevent the spread of HIV to others.⁶⁹

⁶⁴ *Id.*

⁶⁵ HIV in the Southern States, CDC Issue Brief 1, (last updated May 2016), <https://www.cdc.gov/hiv/pdf/policies/cdc-hiv-in-the-south-issue-brief.pdf>.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

ii. LOUISIANA STATISTICS

The first AIDS diagnosis in Louisiana took place in 1979, and since that time, has initiated one of the state's most challenging health crises.⁷⁰ In 2013, Louisiana was ranked 11th among the 50 states in the number of HIV diagnoses. So far there have been 37, 095 cumulative cases of HIV detected, with 13, 494 cumulative deaths among persons with HIV/AIDS having occurred in Louisiana.⁷¹ According to the Center for Disease Control's STD Surveillance Report, Louisiana ranked 2nd in the nation for estimated HIV transmission rates, and 9th in the number of estimated HIV cases.⁷² Following this further, in previously mentioned report Louisiana was ranked 2nd in AIDS case rates and 11th in the number in the number of estimated AIDS cases.⁷³ As of June 30, 2016, there is a total of 21,106 persons living with HIV infection in Louisiana, and of these individuals, 11, 025 have an AIDS diagnosis.⁷⁴ In 2015, an estimated 1, 139 new cases of HIV and 523 new cases of AIDS were diagnosed in Louisiana that year.⁷⁵

The cities of Baton Rouge and New Orleans appear to contribute the largest number of cases in Louisiana because of the new cases diagnosed; Baton Rouge and New Orleans reported

⁷⁰ Hayley H. Fritchie, Comment, Burning the Family Silver: A Plea to Reform Louisiana's Antiquated HIV-Exposure Law, 90 Tul. L. Rev. 209, 4 (2015).

⁷¹ Louisiana HIV, AIDS, and Early Syphilis Surveillance Quarterly Report, La. Dep't of Health & Hosp. 1, (June 30, 2016), <http://new.dhh.louisiana.gov/assets/oph/HIVSTD/SecondQuarter2016HIVSyphilisReport.pdf>.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 1, 4

22% and 33% of cases, respectively.⁷⁶ The CDC ranked the Baton Rouge metropolitan statistical area 1st in estimated HIV and AIDS case rates. The city of New Orleans trails closely behind Baton Rouge with a ranking of 3rd in estimated HIV case rates and 4th in estimated AIDS case rates.⁷⁷ Currently 5, 323 persons are living with HIV in Baton Rouge, and 8, 142 persons are living with HIV in New Orleans.

The estimated transmission risks of HIV in Louisiana are categorized as: 55% attributed to men who have sex with men; 26% attributed to heterosexuals; 12% attributed to injection drug users; 6% attributed to men who have sex with men who also inject drugs; 1% attributed to perinatal; and less than 1% attributed to transfusion/hemophilia and confirmed “other.”⁷⁸ These percentages are analogous to national statistics with men engage in sex with other men leading other risk factors by twice as much. As of June 30, 2016, 55% of all persons living with HIV in Louisiana were classified as men who sex with men.

Additionally, the racial breakdown of HIV diagnoses in Louisiana is: 69% blacks; 26% whites; 4% Hispanic/Latinos; 1% multiracial; and less than one percent of Asian/Pacific Islanders, American Indian, or unknown race.⁷⁹ Blacks in Louisiana are more affected by HIV than any other race, and experience a severe health disparity.⁸⁰ In 2015, 72% of newly diagnosed

⁷⁶ *Id.*

⁷⁷ Louisiana HIV, AIDS, and Early Syphilis Surveillance Quarterly Report, La. Dep’t of Health & Hosp. 1, (June 30, 2016), <http://new.dhh.louisiana.gov/assets/oph/HIVSTD/SecondQuarter2016HIVSyphilisReport.pdf>.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

HIV cases and 74% of newly diagnosed AIDS cases were among blacks.⁸¹ Yet, blacks only make up 32% of Louisiana's population.⁸² Moreover, men constitute the vast majority of persons newly diagnosed with HIV and living with HIV, with 70% and 75% respectively.⁸³ Women, on the other hand, are three times less likely than men to be newly diagnosed and living with HIV, with 29% and 25% respectively.⁸⁴

The greatest number of all new HIV diagnoses in Louisiana occurred in persons between the ages of 25-34.⁸⁵ The age group of 13-24 followed, with 26% of all new HIV diagnoses.⁸⁶ However, there is a discrepancy in the age groups of persons actually living with HIV and the age groups of persons newly diagnosed with HIV. Currently, persons over the age of 60 represent the greatest percentage of persons living with HIV in Louisiana. Whereas persons in the age group of 25-34 represent the largest percentage of all new HIV diagnoses in Louisiana. These statistics give rise to the conclusion that specifically the adolescent and young adult population of Louisiana are failing to receive treatment, and appear to have a higher mortality rate among the other age groups of persons living with HIV.

d. EXAMINATION OF LOUISIANA'S ENACTMENT OF HIV-SPECIFIC LAW: LA. R.S. 14:34.5

Louisiana does not stand alone in the adoption of laws specific to HIV/AIDS. In response to the mounting hysteria surrounding the HIV/AIDS epidemic, many states began adopting HIV-

⁸¹ *Id.*

⁸² *Id.*

⁸³ Louisiana HIV, AIDS, and Early Syphilis Surveillance Quarterly Report, La. Dep't of Health & Hosp. 1, (June 30, 2016),

<http://new.dhh.louisiana.gov/assets/oph/HIVSTD/SecondQuarter2016HIVSyphilisReport.pdf>.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

specific laws. Consequently, the Ryan White CARE Act even places a condition that states receiving HIV-related health care funding must adopt laws that criminalize HIV transmission.⁸⁷ Currently, there are a total of 67 laws enacted in 33 states, including Louisiana, which explicitly focus on persons living with HIV.⁸⁸ Louisiana's HIV-specific law is contained in La. R.S. 14:34.5, Intentional Exposure to the AIDS Virus. This statute provides that:

A. No person shall intentionally expose another to any acquired immunodeficiency syndrome (AIDS) virus through sexual contact without the knowing and lawful consent of the victim.

B. No person shall intentionally expose another to any acquired immunodeficiency syndrome (AIDS) virus through any means or contact without the knowing and lawful consent of the victim.

C. No person shall intentionally expose a police officer to any AIDS virus through any means or contact without the knowing and lawful consent of the police officer when the offender has reasonable grounds to believe the victim is a police officer acting in the performance of his duty.

D. For purposes of this Section, the following words have the following meanings:

(1) "Means or contact" is defined as spitting, biting, stabbing with an AIDS contaminated object, or throwing of blood or other bodily substances.

(2) "Police officer" includes a commissioned police officer, sheriff, deputy sheriff, marshal, deputy marshal, correctional officer, constable, wildlife enforcement agent, and probation and parole officer.

E. (1) Whoever commits the crime of intentional exposure to AIDS virus shall be fined not more than five thousand dollars, imprisoned with or without hard labor for not more than ten years, or both.

(2) Whoever commits the crime of intentional exposure to AIDS virus against a police officer shall be fined not more than six thousand dollars, imprisoned with or without hard labor for not more than eleven years, or both.⁸⁹

This statute was originally introduced as House Bill 1634 in 1987, which failed to define exposure and provided for a fine of five thousand dollars and five years, with or without hard labor.⁹⁰ Later, the statute was amended as House Bill 1728 in 1993 to include additional

⁸⁷ HIV-Specific Criminal Laws, Center for Disease Control, <https://www.cdc.gov/hiv/policies/law/states/exposure.html> (last updated March 18, 2016).

⁸⁸ *Id.*

⁸⁹ LA. R.S. 14:43.5

⁹⁰ *Id.*

definitions of “means or contact” and “police officer”, and penalties for exposure to police officers.⁹¹ Moreover, this statute was enacted during the initial wave of HIV hysteria as a means to curb the spread of the infection.⁹² In the wake of the hysteria, Representative Kern Hand first proposed a law that would punish intentional exposure to the AIDS virus to the Louisiana House of Representatives.⁹³ While explaining the purpose of the bill to the Senate Committee, Representative Hand stated: “The purpose of this bill is to deter those who are infected with the AIDS virus from remaining sexually active in the community.⁹⁴” It is important to note that a representative from the ACLU staunchly opposed this proposed law due to its possible effects for deterring people from being tested for HIV to prevent meeting the “intentional” requirement of the law.⁹⁵ Nevertheless, despite the important consideration offered by the ACLU representative, the bill was subsequently adopted and became law.

The state must prove the critical elements of: (1) intent, (2) actual knowledge of AIDS infection, (3) exposure, and (4) lack of knowing and lawful consent of the victim, in order to charge an accused with the crime of intentional exposure to the AIDS virus. The most crucial element that must be shown by the state is the intent of the accused. In order for the State to satisfy this requirement, the state must prove that (1) the defendant was aware of his HIV status⁹⁶; (2) was aware that HIV could be transmitted through means identified in the statute⁹⁷; and (3) intended to commit an act proscribed by the statute as a means of exposure.⁹⁸ Within the

⁹¹ *Id.*

⁹² Cheney C. Joseph, Jr., *Criminal Procedure*, 48 LA. L. REV. 2, November 1987 at 281.

⁹³ Hayley H. Fritchie, Comment, Burning the Family Silver: A Plea to Reform Louisiana’s Antiquated HIV-Exposure Law, 90 TUL. L. REV. 209, 8 (2015).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See *State v. Gamberella*, 633 So. 2d 595, 602 (La. App. 1 Cir. 1993).

⁹⁷ *Id.*

⁹⁸ See *State v. Roberts*, 2002-2520, p. 14 (La. App. 4 Cir. 3/26/03); 844 So. 2d 263, 272.

context of this statute, the term “intentionally” can arguably carry the same connotation as the term “knowingly.”⁹⁹ An offender may knowingly act, with respect to his status and the danger of transmission, through sexual contact.¹⁰⁰ However, the state does not carry the burden of proving neither the actual transmission of HIV to the victim, nor the victim’s intent to expose itself to HIV.¹⁰¹

The element of actual knowledge of the AIDS infection appears to be the least complicated. This simply requires proof, rather than mere knowledge of symptoms, which would lead a reasonably well-educated person to believe he has AIDS. However, evidence of awareness of symptoms may be sufficient to assist with making the inference of actual knowledge in the absence of a physician’s diagnosis.¹⁰² As mentioned previously, the element of exposure does not require actual transmission of HIV. Instead, an accused with HIV engaging in sexual activity, among other things, is sufficient. It is important to note that death or contraction of the disease is not the actual criminal consequence.¹⁰³ Rather, it is the creation of the risk of the infection, which is the activity sought to be punished through this statute.¹⁰⁴ The last element within this statute is the lack of knowing and lawful consent of the victim. This is defined as the “victim's awareness that the defendant is infected with the virus which causes AIDS and that the virus can be spread through" the means of exposure identified in the statute.¹⁰⁵”

e.

⁹⁹ Cheney C. Joseph, Jr., *Criminal Procedure*, 48 LA. L. REV. 2, November 1987 at 281.

¹⁰⁰ *Id.*

¹⁰¹ Hayley H. Fritchie, Comment, *Burning the Family Silver: A Plea to Reform Louisiana’s Antiquated HIV-Exposure Law*, 90 TUL. L. REV. 209, 8 (2015).

¹⁰² Cheney C. Joseph, Jr., *Criminal Procedure*, 48 LA. L. REV. 2, November 1987 at 281.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See *State v. Gamberella*, 633 So. 2d 595, 603 (La. App. 1 Cir. 1993).

f. ISSUES ASSOCIATED WITH LA. R.S. 14:43.5

As with other states who have also adopted HIV-specific legislation, Louisiana now has some significant issues created by adopting La. R.S. 14:43.5. One of the most apparent issues is the statute's effect in discouraging HIV testing. Since the statute requires that an individual is aware of his status in order to be charged with the crime of Intentional Exposure to the AIDS Virus, they may opt to forego being tested in order to avoid criminal liability. Another issue closely related to the statute's effect of discouraging HIV testing is the undermining and interference with public health goals. Public health organizations, among other things, promote the testing and treatment of HIV as a means to reduce the transmission of the disease.¹⁰⁶ Further, a particularly alarming issue with regard to this statute is its overbreadth. A statute is overbroad if it is deemed likely to interfere with constitutionally protected behavior.¹⁰⁷ With respect to HIV, a statute that criminalizes conduct incapable of transmitting HIV may be considered overbroad.¹⁰⁸ Although, the Louisiana Supreme Court has specifically held that statutes of this type are not overbroad, stating "uncertainty of the medical community concerning all aspects of this disease" rendered this flaw nonfatal to the statute.¹⁰⁹

Additionally, the Louisiana statute's language implies incorrect conclusions about HIV transmission. Both the title and language of the statute focus solely on exposure to HIV, which does not equate to transmission of HIV. Further, the statute also defines specific types of "means or contact", which are not ways in which HIV may be contracted. The acts of spitting and biting

¹⁰⁶ Margo Kaplan, *Rethinking HIV-Exposure Crimes*, 87 INDIANA LAW JOURNAL 4, 1563 (2012).

¹⁰⁷ Amy L. McGuire, *AIDS As A Weapon: Criminal Prosecution of HIV Exposure*, 36 HOUS. L. REV. 1787, 1810 (1999).

¹⁰⁸ Hayley H. Fritchie, Comment, *Burning the Family Silver: A Plea to Reform Louisiana's Antiquated HIV-Exposure Law*, 90 TUL. L. REV. 209, 10 (2015).

¹⁰⁹ *Id.*

are highly problematic due to the fact that HIV is neither exposed nor transmitted through saliva. Also, the statute fails to define the “knowing and lawful” consent of the victim, as a means for persons living with HIV in Louisiana to adhere to this law. Equally, the statute’s language specifically uses the term “AIDS” although persons living with HIV can be charged with this crime, and fails to make the distinction among HIV and AIDS.¹¹⁰

Another issue is that this statute fails to distinguish among levels of culpability.¹¹¹ Those who are accused are all automatically charged with the same crime, which carries the same consequences. There is no distinction among those who actually have the intention to expose and transmit HIV to another, and those who did not. Following this further, this statute does not account for exposure from low-risk individuals, i.e. those who pose a low transmission rate, and those who are high-risk, i.e. those who have extremely high viral loads where transmission is more likely. Lastly, this statute places the burden of prevention of HIV transmission solely on the accused through its use of the language “knowing and lawful consent of the victim.” In effect, its conveying the message that the victim’s only power is giving consent to sexual activity with a person living with HIV, and the victim is powerless in preventing themselves from being exposed.

g. BRIEF EXAMINATION OF CRIMINAL CASES WITH DEFENDANTS CHARGED WITH LA. R.S.

14:43.5

There have been several questionable cases, which have emerged in recent years involving a defendant charged with Intentional Exposure to the AIDS Virus. One case involved

¹¹⁰ *Id.*

¹¹¹ *Id.*

Defendant Robert Suttle. Suttle and his partner were involved in a relationship, and once it ended, his partner filed criminal charges against him for failing to disclose his HIV status when they first met.¹¹² Instead of risking the possibility of serving a ten-year sentence, Suttle chose to accept a plea bargain and served six months in prison.¹¹³ He is now required to register as a sex offender until the year of 2024, and his license contains the words “SEX OFFENDER” printed in red ink underneath his picture.¹¹⁴ Also, defendant Brice Joseph was also charged with the crime of intentional exposure in Calcasieu Parish after he allegedly spit on a police officer while being arrested.¹¹⁵

Next, Ellis Wilson, Jr., of Baton Rouge, was first arrested for driving while intoxicated after the deputies found him attempting to pull his truck out of a hole.¹¹⁶ Before the deputies drove Wilson to the jail, he voluntarily informed them of his status.¹¹⁷ He allegedly spit on another person in the patrol car, and was subsequently charged with intentional exposure.¹¹⁸ Wilson says his arrest, which was written about in the news, was humiliating and he still gets looks from those who recognized him in the paper.¹¹⁹ In addition, he stated that he was informed by nurse prior to the incident to disclose his status, in the event that he and the law

¹¹² Sean Strub, Think Having HIV Is Not a Crime? Think Again, The Huffington Post (Oct. 29, 2012), http://www.huffingtonpost.com/sean-strub/lgbt-hiv-criminalization_b_2039539.html.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Lake Charles Man Accused of Intentional AIDS Exposure, KPLC (2013), <http://www.kplctv.com/story/22303105/lake-charles-man-accused-of-intentional-aids-exposure-by-spitting>.

¹¹⁶ Daniel Bethencourt, Little-Known Louisiana Law Allows HIV-Exposure Arrests for Spitting, but CDC Says Disease Can't Spread That Way, Advocate (Nov. 8, 2014, 11:14 PM), <http://theadvocate.com/news/police/10555637-123/little-known-louisianalaw-allows-hiv-exposure>.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

enforcement officers get into a scuffle to prevent getting in to further trouble.¹²⁰

Similar to Wilson, defendant Melvin Brumfield appeared drunk and approached deputies who were questioning his relative, and cursed at them and demanded that they leave his relative alone.¹²¹ As the deputies drove him away from the scene, Brumfield allegedly spat twice through the police unit's grave bars and his saliva made contact with the eye socket of the deputy both times.¹²² He then allegedly told the deputy to "die ... nice and slow, I have that gangster."¹²³ The deputy interpreted this to be slang for HIV.¹²⁴ Brumfield stated in an interview that he does not remember saying anything like that, much less spitting and implying that he has a virus which he insists he does not have.¹²⁵ Nevertheless, deputies booked him on one count of intentional exposure, with the rest of his charges being misdemeanors.¹²⁶ Brumfield sat in jail for months unable to afford to post bond due to added amount of the felony HIV-related accusation.¹²⁷ More than two months after his initial arrest, Brumfield filed a court motion stating that he did not have access to a lawyer, and asked for a release without bail.¹²⁸ He also included in his motion

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Daniel Bethencourt, Little-Known Louisiana Law Allows HIV-Exposure Arrests for Spitting, but CDC Says Disease Can't Spread That Way, Advocate (Nov. 8, 2014, 11:14 PM), <http://theadvocate.com/news/police/10555637-123/little-known-louisianalaw-allows-hiv-exposure>.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Daniel Bethencourt, Little-Known Louisiana Law Allows HIV-Exposure Arrests for Spitting, but CDC Says Disease Can't Spread That Way, Advocate (Nov. 8, 2014, 11:14 PM), <http://theadvocate.com/news/police/10555637-123/little-known-louisianalaw-allows-hiv-exposure>.

that he had taken two HIV tests, which both came back negative.¹²⁹ Three months after his initial arrest, Brumfield's court motion was granted and he was released on the exact same day.¹³⁰ Court records indicate that he was never even charged with any of the other misdemeanors he was arrested for.¹³¹

PART II. PROPOSAL FOR TRAINING PROGRAMS FOR LAW ENFORCEMENT OFFICERS AND PROSECUTORS IN LOUISIANA

a. BRIEF PROPOSAL TO AMEND LOUISIANA'S STATUTE

As shown in the preceding section of this comment, Louisiana's current HIV-specific legislation lacks an educated, logical, and practical approach to HIV. The language of the statute is saturated with ignorant stigmas that have ousted scientifically. Still, the statute has not been amended since 1993, and at that time, it was only to include additional definitions and enhanced sentence penalties for intentional exposure to a police officer. It is alarming that in Louisiana HIV exposure, which potentially has no bearing on reducing the life span of a victim, is punished more severely than negligent homicide, where the victim's life is actually ended. Indeed, this statute is in dire need of being amended, and this comment proposes several revisions that should be made.

First, the language of the statute must be revised to only target substantial and justifiable risks, which are scientifically proven.¹³² In doing so, it allows the law to reflect and evolve changing information and knowledge. Second, the statute should account for varying levels of

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Margo Kaplan, *Rethinking HIV-Exposure Crimes*, 87 INDIANA LAW JOURNAL 4, 1544 (2012).

culpability, as well as, the risk posed by the accused. Low-risk individuals who lack serious intent to expose and transmit HIV cannot be categorized and punished as others who pose a more serious threat and intention. Third, the severity of the punishment should be reduced in accordance with the levels of culpability and intention, as well as, overall to end reflecting the prejudiced attitude toward persons living with HIV/AIDS. Fourth, the statute should remove the penalty enhancements for law enforcement officer because the statute does not reflect any risky behaviors that the accused and law enforcement officers are engaged in, rather it creates these behaviors. Lastly, the statute should include the defense of consent, and define the “knowing and lawful consent of the victim.”

b. CRITIQUE OF AMENDMENT ONLY APPROACH TO END CRIMINALIZATION IN

LOUISIANA

However, although this comment does propose amending the statute, re-writing the statute to include more generalized, scientifically factual language is not enough to affect change. Deep-rooted stigmas and bias will not automatically fade by exchanging the words of a statute. Law enforcement officers and prosecutors may still have their own personal prejudices and biases. That, coupled with the large amount of discretion they hold over people is a dangerous combination, especially for marginalized groups like persons living with HIV/AIDS. Likewise, amending legislation is not a short process, which can take years to accomplish, but the time for ending the criminalization of HIV in Louisiana is now. For these reasons, I also propose and strongly urge for the training of law enforcement officers and prosecutors as explained below.

c. PROPOSAL FOR MANDATORY HIV/AIDS TRAINING OF LAW ENFORCEMENT AND PROSECUTORS

Today, the process for charging a person with a crime first requires the arrest of an individual by law enforcement officers. Law enforcement officers are extremely important actors in the criminal justice system because they are often the first people to encounter the accused before the process begins. They are entrusted with making judgment calls of whether or not to arrest an individual, which although do not amount the seriousness of a conviction and sentence, still have a huge impact on the daily life of that person arrested. Additionally, prosecutors are also equally important. Although an accused does not interact with a prosecutor, they are also entrusted with making judgment calls to bring charges against an accused for the crime upon which they are arrested. For these reasons, this comment urges that in order reduce the criminalization of persons living with HIV in Louisiana, the mandatory training of law enforcement officers and prosecutors is required.

Police practices often reflect community prejudices.¹³³ Police may act to protect what they perceive to be their community, the one from which they come, the one they see as legitimate and in conformance with the dominant social and moral norms.¹³⁴ As a result, police become a key part in destroying stigma and discrimination against the criminalization of persons living with HIV/AIDS.¹³⁵ Law enforcement and prosecutors should no longer be seen as an

¹³³ Nick Crofts, et al., *Police, Law Enforcement, and HIV*, Journal of the International AIDS Society 3, July 2016, at 3.

¹³⁴ *Id.*

¹³⁵ *Id.*

adversary to those living with HIV/AIDS, but instead as an advocate through partnerships with public health organizations.

Although very few formal scientific evaluations have been made addressing HIV/AIDS biases and police, research for implicit biases and police has been conducted. Research regarding implicit biases is applicable here because implicit biases are those which can distort one's perception and subsequent treatment in favor or against a given person or group which occurs against persons with HIV/AIDS.¹³⁶ Research conducted suggests that it is possible to address and reduce implicit bias through training and policy interventions with law enforcement agencies.¹³⁷ Furthermore, this research also suggests that negative implicit biases may also be gradually unlearned and replaced with non-biased ones.¹³⁸ Two methods scientists have shown to reduce implicit biases, which could be highly effective in decriminalizing HIV, are through positive contact with stereotyped groups, and counter-stereotyping whereby individuals are exposed to information that is opposite of the cultural stereotypes of the groups.¹³⁹

To facilitate these interactions, I propose that law enforcement officers and prosecutors are required to take part in a mandatory training seminar for HIV/AIDS education conducted by a public health organization. Rather than only the public health employees presenting information, persons living with HIV/AIDS in that particular parish can also take part in presenting information and interacting law enforcement and prosecutors in an effort to show the

¹³⁶ IMPLICIT BIAS, <https://trustandjustice.org/resources/intervention/implicit-bias>, (last visited Dec. 30, 2016)

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Lorie Fridell, *This is Not Your Grandparent's Prejudice: The Implications of Modern Science of Bias for Police Training*, September 2013, <https://static1.squarespace.com/static/54722818e4b0b3ef26cdc085/t/5478b85ee4b0674c74c9f008/1417197662596/not-your-granparents-prejudice.pdf>.

human side of the law, which they uphold. Additionally, the presentation of HIV facts concerning transmission, exposure, and statistics will both offer counter-stereotypes to the ones in which they already possess and educate them to replace their previously held bias.

CONCLUSION

Our knowledge and treatment of HIV has evolved, and now there is no longer a death sentence attached to every diagnosis. But, sadly our law has remained the same, and looms a prison sentence over the head of every person living with HIV/AIDS in Louisiana. Despite the overwhelming evidence that this law is ineffective and discriminatory, it still remains in effect. On its face, this statute appears to extend beyond the facets of punishing those who use their status as weapon, and broadly covers those who are simply aware of the risks and potential dangers, which accompany their status. Overall, it is evident Louisiana fails to take any real consideration in to the actual exposure and transmission of HIV. A more educated, logical, and practical approach is desperately needed to avoid the arbitrary use of this law. Ironically, the purpose of this law was to prevent a person with HIV from using their status as a weapon against others, however, it appears that that is precisely what the state is doing to the accused.

Moreover, a prosecutor with the Baton Rouge District Attorney's Office was quoted stating that although a law is in place, they would never charge someone for an offense as minor as spitting.¹⁴⁰ This very statement begs the questions: Why criminalize this conduct by this group of persons at all? Why embarrass this particular group by arresting them for this particular

¹⁴⁰ Daniel Bethencourt, Little-Known Louisiana Law Allows HIV-Exposure Arrests for Spitting, but CDC Says Disease Can't Spread That Way, Advocate (Nov. 8, 2014, 11:14 PM), <http://theadvocate.com/news/police/10555637-123/little-known-louisianalaw-allows-hiv-exposure>.

conduct? Why place a poll tax, through paying fees associated with arrests, to engage in behaviors that others may engage in for fee? Analyzing this further, in consideration of the statistics of individuals living with HIV in Louisiana, arguably the state may use this law as a safety net for all the people not swept up in the mass incarcerations and war on drugs.

Considering that Louisiana incarcerates the most people in the world, reforming this statute and training law enforcement officers and prosecutors not only would save valuable time and resources, but most importantly protect individuals living with HIV and afford them the respect and dignity that Louisiana has failed to give them.