Criminalizing Consensual Transmission of HIV

Amanda Weiss
Amanda.Weiss@chicagounbound.edu

Follow this and additional works at: http://chicagounbound.uchicago.edu/uclf

Recommended Citation
Criminalizing Consensual Transmission of HIV

Amanda Weiss†

INTRODUCTION

In February of 2003, a shocking and controversial article appeared in Rolling Stone Magazine. The author, Gregory A. Freeman, identified a troubling practice among a minority of gay men: “bug-chasing.”¹ Freeman’s “bug-chasers” are HIV-negative gay men who actively seek out infection, arranging to have unprotected sexual intercourse with infected partners.² This subculture is fueled by the internet, with “bug-chasers” and “gift-givers” (HIV-positive men willing to infect HIV-negative men) posting messages on specialized gay websites.³ The article quotes an authority attributing 25 percent of new infections among gay men to “bug-chasing.”⁴ While that authority has since claimed that Freeman fabricated his quotes⁵ and others have questioned Freeman’s statistics,⁶ there is a general consensus that the phe-

† B.A. 1997, Amherst College; M.A. 1998, Fordham University; J.D. Candidate 2007, University of Chicago.

¹ Gregory A. Freeman, In Search of Death, Rolling Stone 45 (Feb 6, 2003).
² Id.
³ Id.
⁴ Id (“With about 40,000 new infections in the United States per year, according to government reports, that would mean around 10,000 each year are attributable to that more liberal definition of “bug-chasing”.”).
nomenon of “bug-chasing” does exist and is a problem in the gay community.\(^7\)

Although “bug-chasing” behavior remains unregulated, many states have enacted statutes regulating HIV transmission.\(^8\) States responded to the AIDS crisis by passing statutes criminalizing the transmission of the HIV virus.\(^9\) In 1990, the federal government demonstrated its approval of such measures by passing the Ryan White Comprehensive AIDS Resources Emergency (CARE) Act of 1990, codified in scattered sections of Title 42 of the United States Code.\(^10\) The Act “provides emergency AIDS relief grants if a State has statutes which allow a person to be prosecuted for intentionally transmitting HIV to another person.”\(^11\) Sensational cases such as that of Nushawn Williams, a young man who intentionally infected nearly a dozen women and girls in upstate New York with HIV in 1997, accelerated state efforts to criminalize HIV transmission.\(^12\)

HIV transmission statutes vary from state to state. Most statutes do not require specific intent to infect.\(^13\) Some include failure to disclose one’s HIV status as an element of the crime, some allow consent as an affirmative defense, and some make no mention of consent, leaving open the possibility that individuals

---


\(^9\) See id at 241 (“Twenty-four states have adopted statutes that criminalize exposure or transmission of HIV by at least some forms of behavior.”).


\(^12\) Frautschi, 27 NYU Rev L & Soc Change at 610 (cited in note 10).

infected with HIV could be prosecuted for consensual exposure.14

This Comment addresses the legal implications concerning intentional consensual HIV transmission through “bug-chasing” and “gift-giving.” It examines the difficulty of tailoring HIV transmission statutes narrowly enough so that they criminalize the activity of “bug-chasing” without trampling constitutional rights or falling outside the police power of the state. Part I describes the current legal landscape concerning the regulation of HIV transmission by focusing on the scope of the police power of the state in regulating private sexual conduct and public health. Part II synthesizes the court decisions discussed in Part I, concluding that it is legally possible to tailor a statute narrowly enough so that it criminalizes “bug-chasing” behavior without trampling legitimate privacy concerns.

I. HIV Transmission Statutes and Their Enforcement

This Part traces the evolution of criminal HIV statutes and lays out the elements of the crime as described in those statutes, identifying statutes that are drawn in such a way that they could be read to sweep in “gift-giving.” While there have been constitutional challenges to state HIV transmission statutes, none of the challenged statutes have criminalized “gift-giving.” Nonetheless, it is illuminating to look at the grounds for the challenges and the ways in which courts have analyzed them and this Part does that. Next, it discusses cases of HIV transmission tried under military law in which individuals were found guilty of transmitting HIV to an informed partner—”gift-giving” without the intent. Finally, it addresses the police power of the state and the conflict between police power and privacy interests in consensual sexual relations raised in the context of substantive due process.

A. HIV Transmission Statutes

Commentators have identified three separate stages in the emergence of HIV transmission statutes.15 The first stage came when the HIV/AIDS epidemic was first identified and publicized, and legislatures responded to the growing epidemic.16 Next, following the passage of the Ryan White CARE Act,17 states modi-

14 Id at 854-55.
15 Id at 844.
16 Id.
fied their laws in order to secure funding under the Act. Those states that did not already have HIV statutes on their books scrambled to add them, and those that already had them brought them into compliance with the Act’s requirements. A third wave of HIV/AIDS transmission legislation followed the sensational Nushawn Williams case in 1997. In response to massive media coverage, state legislatures adopted bills covering intentional HIV exposure and those with statutes already on the books increased the penalties for intentional exposure.

Currently, twenty-four states have statutes that criminalize the act of knowingly exposing another human being to HIV. The elements of the crime identified in these statutes may include, in various combinations depending on the statute, intent to engage in activity that might result in transmission, intent to transmit, and non-disclosure of one’s HIV status. “[T]he vast majority of statutes do not require intent to harm, only intent to engage in the activity that creates the exposure.” Specifically, only four of the laws dealing with the sexual transmission of HIV “require intent to infect as an element of the crime.”

Ten state HIV transmission statutes make failure to disclose one’s HIV status an element of the crime (Arkansas, California, Georgia, Louisiana, Michigan, Missouri, New Jersey, Ohio, Oklahoma, and South Carolina), while another eight make consent an affirmative defense (Florida, Idaho, Illinois, Iowa, Nevada, North Dakota, South Dakota, and Tennessee). However, the state of North Dakota allows consent as an affirmative defense only if the sexual activity took place “with the use of an appropriate prophylactic device,” essentially making unprotected sex a crime for anyone with HIV.

Maryland, Virginia, and Washington “fail to mention consent, which may leave HIV-infected individuals vulnerable to prosecution for consensual acts.” Of those, Washington and

---

19 Id.
20 See Lazzarini, Bray, and Burris, Evaluating the Impact of Criminal Laws at 241 (cited in note 9) (“Twenty-four states have adopted statutes that criminalize exposure or transmission of HIV by at least some forms of behavior.”).
22 Lazzarini, 30 J L Med & Ethics at 241 (cited in note 8).
26 Wash Rev Code Ann § 9A.36.011 (West 2000) (“A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: . . . [a]dministers, ex-
Virginia\textsuperscript{27} require specific intent to transmit the infection. Maryland requires intent only if the victim does not contract the virus.\textsuperscript{28} In this sense, Virginia and Washington’s statutes criminalize only “gift-giving” behavior and behavior using sexual intercourse as a weapon; Maryland criminalizes any sexual behavior that results in the transmission of HIV regardless of whether the transmission of the virus was intentional. Virginia’s and Washington’s statutes, then, are the only statutes that are designed so that they criminalize the “gift-giving”/”bug-chasing” phenomenon while not criminalizing accidental transmission of HIV between an HIV-positive partner and an informed partner.

B. Case Law Concerning the Police Power of the State

This section addresses the evolution of case law regarding the police power of the state to make laws concerning public health. It traces the Supreme Court’s attitude toward police power from the early twentieth century through more recent decisions, where police power has been eroded as it has come into conflict with the Court’s conception of substantive due process. Courts’ interpretations of the extent of the police power to regulate public health when that power comes into conflict with a person’s privacy interest will determine whether they find statutes criminalizing “gift-giving” constitutional.

1. Police power and public health: \textit{Jacobson v Massachusetts}.

Regulation of public health and welfare is reserved to the states in the Constitution.\textsuperscript{29} Accordingly, states have the power to pass laws criminalizing behavior likely to endanger public health. The making and enforcing of such laws constitutes the police power of the state.

In 1905 the Supreme Court affirmed that the police power extended to issues of public health in \textit{Jacobson v Massachusetts}.\textsuperscript{30} That case involved a challenge to a Massachusetts stat-

\textsuperscript{27} Va Code Ann § 18.2-67.4:1 (2004) (“Any person who, knowing he is infected with HIV, . . . has sexual intercourse, cunnilingus, fellatio, anallingus or anal intercourse with the intent to transmit the infection to another person is guilty of a Class 6 felony.”).

\textsuperscript{28} Md Health-Gen Code Ann § 18-601.1(a) (LexisNexis 2005) (“An individual who has the human immunodeficiency virus may not knowingly transfer or attempt to transfer the human immunodeficiency virus to another individual.”).

\textsuperscript{29} See US Const Amend X.

\textsuperscript{30} 197 US 11 (1905).
ute requiring smallpox vaccination. In upholding the constitutionality of the statute the Court stated that, "[a]ccording to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." The Court went on to say that,

If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that if a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

In so saying, the court left open the possibility of due process challenges to laws enacted under the auspices of state police powers.

2. The road to *Lawrence v Texas*: the evolution of substantive due process and the right to privacy.

While *Jacobson* establishes a seemingly strong police power in the states with regard to public health issues, in more recent cases the Court has recognized the right of individuals to be free of government regulation in their private sexual relations. The conflict between these competing concerns is implicated in any analysis of HIV transmission statutes. Since *Jacobson*, the Court has recognized an increasingly broad right to privacy in intimate relations. First, in *Griswold v Connecticut*, the Court invalidated a Connecticut statute prohibiting the use of contraceptives, stating,

The present case, then, concerns a relationship [the marital relationship] lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contracep-

---

31 Id.
32 Id at 25.
33 Id at 31.
34 381 US 479 (1965).
tives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship.\textsuperscript{35}

Then, in \textit{Planned Parenthood v Casey},\textsuperscript{36} the Court extended the privacy right first articulated in \textit{Griswold} to unmarried persons, stating that, "Our cases recognize 'the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'\textsuperscript{37}

The textual interpretation of the Due Process Clause of the Fourteenth Amendment that forms the basis of the Court's decisions in \textit{Griswold}, \textit{Roe v Wade},\textsuperscript{38} \textit{Casey}, and, ultimately, \textit{Lawrence v Texas}\textsuperscript{39} finds its source in Justice Harlan's famous dissent in \textit{Poe v Ullman}.\textsuperscript{40} In that dissent, Justice Harlan argued that the court had consistently refused to limit due process to procedural fairness because if it did, the Due Process Clause would not protect individuals in "situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three."\textsuperscript{41}

It is important to note that there is no one true precedent recognizing substantive due process.\textsuperscript{42} Nonetheless, "it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the federal Constitution from invasion by the States."\textsuperscript{43}

In applying substantive due process to statutes, the Court employs one of two levels of scrutiny. If the Court finds that the statute does not impinge on a "fundamental right," the Court applies a rational basis analysis: if the statute in question has a

\textsuperscript{35} Id at 485 (emphasis in original).
\textsuperscript{36} 505 US 833 (1992).
\textsuperscript{37} Id at 851, quoting \textit{Eisenstadt v Baird}, 405 US 438, 453 (1972).
\textsuperscript{38} 410 US 113 (1973).
\textsuperscript{39} 539 US 558 (2003).
\textsuperscript{41} \textit{Poe}, 367 US at 541.
\textsuperscript{42} \textit{Whitney v California}, 274 US 357, 373 (1927) (Brandeis concurring).
\textsuperscript{43} Id.
In contrast, when the Court finds that a statute tramples on a "fundamental right," it subjects the statute to strict scrutiny, which requires the government to prove the statute is necessary to further a substantial government interest. 45

3. Lawrence v Texas.

In Lawrence v Texas, 46 the Court explicitly held that the right to privacy encompasses consensual sexual acts and implicitly held that such acts are fundamental rights demanding strict scrutiny analysis. The Court in Lawrence struck down a Texas sodomy statute, explaining,

[the case . . . involve[s] two adults who, with full and mutual consent from each other, engaged in sexual practices . . . .] The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. 47

At the same time, the court acknowledged that "[t]he Texas statute further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual." 48 So it appeared that after Lawrence, the police power of the state would not extend to consensual sexual conduct without a showing of a legitimate state interest—although the court never discussed what a sufficient legitimate state interest would be.

However, in subsequent decisions courts have not interpreted Lawrence so expansively. In his dissent in Lawrence, Justice Scalia pointed out that "nowhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause." 49 However, at the same time the Court appeared to apply strict scrutiny to the statute in question. 50

---

44 Harrison, 83 Va L Rev at 500-01 (cited in note 40).
45 Id.
46 Lawrence, 539 US at 558.
47 Id at 578.
48 Id.
49 Id at 586 (Scalia dissenting).
50 Lawrence, 539 US at 578 ("The Texas statute further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual."). Under the scrutiny applied when fundamental rights are not implicated, the appropriate
cently, the Seventh Circuit entertained a petition for a writ of habeas corpus on the ground that the statute the petitioner had been convicted under, a Wisconsin statute prohibiting incest, was unconstitutional after the Lawrence opinion. The petitioner in this case argued that Lawrence identified a constitutional right to privacy for all sexual acts between consenting adults. But the Seventh Circuit interpreted Lawrence narrowly, confining its application to acts of homosexual sodomy and denying that the right identified in Lawrence applied to incest. The court stated, “Lawrence . . . did not announce . . . a fundamental right, protected by the Constitution, for adults to engage in all manner of consensual sexual conduct, specifically in this case, incest. . . . Lawrence, whatever its ramifications, does not, in and of itself, go so far.”

While the broad police power with regard to public health and welfare identified in Jacobson was gradually eroded as it came into conflict with substantive due process concerns in Griswold, Roe, Casey, and ultimately Lawrence, courts most recently have been loathe to interpret Lawrence in its strongest form. This indicates that courts might construe the privacy interest identified in Lawrence narrowly when presented with an HIV transmission statute. “Bug-chasing” and “gift-giving” were certainly not within the privacy interests contemplated by the Court in the Lawrence decision.

C. Case Law Concerning HIV Transmission

Courts have unfailingly upheld the constitutionality of state HIV statutes. In addition, military courts have found individuals guilty of offenses such as aggravated assault and wanton disregard for human life for transmitting the HIV virus to informed, consenting partners. This section examines these cases.

1. Constitutionality of HIV statutes.

State HIV transmission statutes have unfailingly survived constitutional challenges. However, all of the cases were decided

\[
\text{inquiry is whether there is a rational basis for the law.}
\]

\footnotetext{51}{Muth v Frank, 412 F3d 808 (7th Cir 2005).}

\footnotetext{52}{Id at 817.}

\footnotetext{53}{Id.}

\footnotetext{54}{Id. See also Williams v Attorney General of Ala, 378 F3d 1232, 1234-35 (11th Cir 2004) (“[N]o Supreme Court precedents, including the recent decision in Lawrence v Texas are decisive on the question of the existence of . . . a right [to sexual privacy].”).}
pre-\textit{Lawrence} and none of the challenges have involved the informed consent issue.

In 1993, the Louisiana First Circuit Court of Appeal held that Louisiana's transmission statute, which provided: "No person shall intentionally expose another to any acquired immunity deficiency syndrome (AIDS) virus through sexual conduct without the knowing and lawful consent of the victim,"\textsuperscript{55} was neither vague nor overbroad.\textsuperscript{56} The court also held that the defendant's claim that "the statute interferes with the right of an HIV-infected person to engage in sexual activities"\textsuperscript{57} was without merit, concluding:

The right of privacy is not absolute; it is qualified by the rights of others. Furthermore, the right of privacy does not shield all private sexual acts from state regulation. No one can seriously doubt that the state has a compelling interest in discouraging the spread of the HIV virus.\textsuperscript{58}

Thus, in this case, the court found the state's need to protect the public health outweighs the individual's privacy interest.

In Illinois, where informed consent is an affirmative defense to the crime of intentionally transmitting the HIV virus, the State Supreme Court overturned Illinois trial courts' decisions invalidating the state's HIV statute.\textsuperscript{59} Defendants had challenged the statute on the grounds that it violated the defendants' right to free speech and association, and that it was unconstitutionally vague.\textsuperscript{60} In analyzing the freedom of association issue, after stating that it recognized no constitutional right to intimate association, the court in dictum opined as to what a supposed right to intimate association would properly encompass. It pointed out that in situations where a defendant had not informed his partner of his HIV status (as was the case for one of the defendants) or a defendant aware of his HIV infection had forcibly raped another person, "[i]t is preposterous to argue that the statute constitutes a violation of . . . the . . . supposed right to intimate association."\textsuperscript{61} Turning to the vagueness contention, while conceding that "[v]agueness, like beauty, may be in the eye

\textsuperscript{55} La Rev Stat § 14:43.5(a) (West 1997).
\textsuperscript{56} \textit{Louisiana v Gamberella}, 633 S2d 595, 603 (La App 1993).
\textsuperscript{57} Id at 603.
\textsuperscript{58} Id at 604 (citations omitted).
\textsuperscript{59} \textit{People v Russell}, 630 NE2d 794 (Ill 1994).
\textsuperscript{60} Id at 795-96.
\textsuperscript{61} Id at 796.
of the beholder,” it held that the statute was “sufficiently clear and explicit” to meet constitutional requirements.62

Finally, the Michigan Court of Appeals, in 1998, held that that state’s HIV transmission statute was neither “unconstitutionally infirm on the basis that it lack[ed] an explicit mens rea requirement,” nor violative of the defendant’s right to privacy or the right to be free from compelled speech.63 With regard to the defendant’s privacy challenge, the court said, “[w]e believe that defendant’s ostensible right to withhold her HIV status from her sexual partners is not an absolute right when balanced against the state’s ‘unqualified interest’ in preserving human life.”64

In all of these cases, courts found the public health interest to be compelling enough that state police power outweighed due process concerns. In effect, the courts said that the right to privacy did not encompass the right to infect another person with a deadly virus without that person’s consent.

2. Military cases concerning HIV transmission.

The only case law concerning the transmission of HIV with the informed consent of the victim is found in military courts. The defendants in these cases were not charged for violating HIV transmission statutes, but rather for violating the Uniform Code of Military Justice, 10 USC Ch 47. The charges ranged from aggravated assault to wanton disregard for human life and in reaching their holdings the military courts relied heavily on potential third party harms and, more significantly, the importance of maintaining discipline and order. Notably, 10 USC § 934 Art 134 provides that “all disorders and neglects to the prejudice of good order and discipline in the armed forces . . . shall be taken cognizance of by a [military court] . . . and shall be punished at the discretion of that court.”

The leading case on consensual HIV transmission is United States v Bygrave.65 In Bygrave, the HIV-positive defendant was charged with assault with a means likely to cause death or grievous bodily harm to a woman who knew of his HIV positive status and with whom he had unprotected sexual intercourse.66

62 Id.
63 People v Jensen, 586 NW2d 748, 755-59 (Mich App 1998)
64 Id at 756, quoting Cruzan v Director, Missouri Dep’t of Health, 497 US 261, 282 (1990).
65 46 MJ 491 (Ct App Armed Forces 1997).
66 Id at 492.
In the decision, which preceded Lawrence, the military court found that case law was inconclusive as to whether the right to privacy encompassed acts of sexual intercourse between consenting, unmarried adults and in such a case "the most prudent course of action is to assess the governmental interests counterbalancing the proposed right before determining conclusively whether the right exists."\(^{67}\) In upholding the assault conviction, the court held that the government's interest in the health of the defendant's sexual partner was "not negated by the fact that [she] chose to put her own health in danger by having unprotected sex with an HIV-positive partner."\(^{68}\) The court explained that

[b]y compromising her own health, she also risked compromising the health of others. The Government's interests in the present case are not limited to the health of [this woman], but also encompass the health of any sexual partners she may have in the future, any children she may bear, and anyone else to whom she may potentially transmit HIV through nonsexual contact.\(^{69}\)

Similarly, in United States v Johnson,\(^{70}\) a military court held that the HIV-infected defendant, who did not inform his partner of his HIV status, was guilty of aggravated assault and that even had he informed his partner of his HIV status, "consent by the victim is not a valid defense when the conduct is of a nature to be injurious to the public as well as to the party assaulted."\(^{71}\)

In United States v Morris,\(^{72}\) the court held the defendant guilty of wanton disregard for human life for engaging in unprotected sexual intercourse with a partner who was informed of his HIV status and nonetheless consented, explaining,

the . . . "essence" of the offense . . . hence its criminality, is that the appellant "engaged in sexual intercourse with another, knowing that to do so without protection was an 'inherently dangerous' act likely leading to 'death or great bodily harm,' and that under the circumstances his conduct was 'prejudicial to the good order and discipline in

\(^{67}\) Id at 495.

\(^{68}\) Id at 496.

\(^{69}\) Bygrave, 46 MJ 491.


\(^{71}\) Id at 804.

\(^{72}\) 30 MJ 1221 (Army Ct Mil Rev 1990).
Thus, ultimately, the criminality of the act lay in the fact that it posed a danger to military order. The court in Morris thus made explicit what had been an implicit background consideration in Bygrave and Johnson.

The approach to HIV transmission taken by the military is similar to the approach taken by Maryland's statute in that HIV transmission is a criminal act, regardless of consent. In all these cases, even without the intent to transmit inherent in "gift-giving," interests in public health and military order were found to outweigh the privacy interests of individual soldiers. This makes sense because, in the military, health interests are heightened due to the limited size of the world in which individuals move (one's movements might be confined to a ship, or a small military base for months on end) and because of the military's raison d'être (sick soldiers are not particularly effective in protecting the national interest).

II. CRIMINALIZING "GIFT-GIVING": CONSTITUTIONALLY POSSIBLE AND SOUND PUBLIC POLICY

Three state statutes (those of Maryland, Virginia, and Washington) appear to criminalize "gift-giving" by including neither failure to inform a partner of one's HIV status as an element of the offense nor informed consent of one's partner as an affirmative defense. This Part analyzes these statutes in terms of their constitutionality by applying the reasoning used by the courts in the cases discussed in Part I, and then in terms of their public policy functions and implications.

A. Acceptable Manifestation of Police Power

Although it does present the potential for third party harms, "bug-chasing" is, like suicide, an activity that causes harm primarily to the person engaging in the activity. Thus, for the same reasons it is difficult to criminalize suicide, it is difficult to explicitly criminalize "bug-chasing." But some HIV transmission statutes implicitly criminalize "gift-giving." The statutes of Maryland, Virginia, and Washington, in failing to make non-

---

73 Id at 1228, quoting United States v Woods, 28 MJ 318, 320 (Ct Mil App 1989).
disclosure of HIV status an element of the crime or informed consent an affirmative defense, leave open the possibility of prosecuting “gift-givers.” However, the question remains whether statutes drafted in such a way are constitutional and an acceptable manifestation of the police power of the state.

All the cases holding HIV transmission statutes to be constitutional involved statutes that either make withholding one’s HIV status from one’s partner an element of the crime or allow the informed consent of one’s partner as an affirmative defense. These court decisions, as discussed below, hinge on the notion of informed consent. In Gamberella, the defendant “argue[d] that the statute interfere[d] with the right of an HIV-infected person to engage in sexual activities.” However, the court responded that:

[T]he right of privacy does not shield all private sexual acts from state regulation. No one can seriously doubt that the state has a compelling interest in discouraging the spread of the HIV virus. Forcing an infected person to inform all of his sexual partners so the partner can make an informed decision prior to engaging in sexual activity furthers the state’s interest in preventing the spread of the virus.

Similarly, in Jensen the court said “Michigan has an undeniable compelling interest in discouraging the spread of the HIV virus. Requiring an infected person to so inform sexual partners so they can make an informed decision before engaging in sexual penetration is narrowly tailored to further this compelling state interest.” Finally, in Russell, the court, after noting that it “knew of no such right,” said it was “preposterous” to argue that a defendant’s right to intimate association was violated when she neglected to inform her partner of her HIV status.

The courts in Jensen and Russell, both decided before Lawrence, refused to recognize a right to intimate sexual contact but nonetheless based their decisions largely on the informed con-

---

77 See Jensen, 586 NW2d 748 (upholding constitutionality of statute criminalizing withholding knowledge of HIV-positive status); Russell, 630 NE2d 794 (upholding statute where informed consent is an affirmative defense and withholding knowledge of HIV-positive status is an element of the crime); Gamberella, 633 S2d 595 (same).
78 Gamberella, 633 S2d at 603.
79 Id at 604 (emphasis added) (citation omitted).
80 Jensen, 586 NW2d at 757 (emphasis added) (citation omitted).
81 Russell, 630 NE2d at 796.
sent provisions in the statutes being challenged. It therefore appears that Maryland’s statute might, after Lawrence, be unconstitutional.

In Lawrence, the Court recognized a right of privacy in consensual sexual relations absent a showing of a legitimate state interest. Maryland’s statute, in not allowing informed consent as a defense, does “interfer[e] with the right of an HIV-infected person to engage in sexual activities.” Even in Jacobson, which recognized a broad police power with regard to issues of public health, the Court was careful to point out that “the police power of a State ... may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases as to justify the interference of the courts to prevent wrong and oppression.”

However, in cases interpreting Lawrence, courts have refused to construe Lawrence as identifying a constitutionally protected right to engage in all consensual sexual conduct. Nonetheless, when the Seventh Circuit interpreted Lawrence narrowly and refused to extend Lawrence’s holding to sweep up incest, it said that the Lawrence Court recognized a protected interest in homosexual sodomy. However, it should be noted that one of the Lawrence Court’s main criticisms of the decision it overruled, Bowers v Hardwick, was that the Bowers Court stated the issue presented as whether there is a fundamental right to engage in homosexual sodomy. The Lawrence Court said that framing the issue that way, “disclose[d] the Court’s own failure to appreciate the extent of the liberty at stake” and that the statutes under consideration in those cases “ha[d] more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home.” The Seventh Circuit’s narrow interpretation runs contrary to these statements of the Court in Lawrence. Nonetheless, even under the Seventh Circuit’s narrow interpretation, consen-

---

82 Jensen, 586 NW2d at 757; Russell, 630 NE2d at 796.
83 Lawrence, 539 US at 578.
84 Gamberella, 633 S2d at 603.
85 Jacobson, 197 US at 38.
86 See Muth, 412 F3d 808 at 817 (“Lawrence also did not announce ... a fundamental right, protected by the Constitution for adults to engage in all manner of consensual sexual conduct.”); Williams, 378 F3d 1232 at 1238 (“[W]e decline to extrapolate from Lawrence and its dicta a right to sexual privacy triggering strict scrutiny.”).
87 Muth, 412 F3d at 817.
89 Lawrence, 539 US at 567.
90 Id.
sual sodomy acts of HIV-positive homosexuals would probably be protected. There have been no cases since Lawrence in which a public health statute has been challenged on the ground that it violates the Court’s ruling in Lawrence. It seems plausible that after Lawrence, the Court would deem statutes criminalizing all acts of unprotected sex by HIV-positive persons “oppressive.”

However, lower courts seeking to reign in the Court’s holding in Lawrence might give extra weight to the public health risk presented by the AIDS virus, and a majority of the newly-composed Supreme Court might be similarly disposed. The fact that the Court in Lawrence declined to explicitly recognize a “fundamental right” in intimate sexual relations means that a court analyzing an HIV statute would not have to subject the statute to strict scrutiny; under rational basis scrutiny it would only have to find a “legitimate state interest” in the prevention of HIV transmission.

Nonetheless, while Bygrave, Johnson, and Morris all upheld the constitutionality of convictions for HIV transmission to partners who gave their informed consent by citing a legitimate interest in health and welfare,91 there are compelling reasons why these cases might come out differently in a non-military court today. First, they were all decided before the Court in Lawrence recognized a right to privacy in consensual sexual relations. In fact, the court in Bygrave specifically cited Bowers,92 the case that Lawrence overruled, saying that “the Supreme Court has made equally clear that there is no generalized constitutional right to sexual intimacy between consenting adults.”93 Second, these cases were not prosecuted under civilian law but under the Uniform Code of Military Justice.94 It is important to consider the emphasis the military places on good order and discipline when analyzing military case law.95 In fact, in Morris, the court went so far as to say that the “essence” of the defendant’s crime was that “under the circumstances his conduct was ‘prejudicial to the good order and discipline in the Armed Forces.’”96 The

91 Bygrave, 46 MJ 491; Johnson, 27 MJ 798; Morris, 30 MJ 1221.
93 Bygrave, 46 MJ at 495; Lawrence, 539 US at 578 (“Bowers was not correct when it was decided, and it is not correct today.”).
94 UCMJ, Art 134, 10 USCA § 934.
95 For example, 10 USC § 934 Art 134, providing that “all disorders and neglects to the prejudice of good order and discipline in the armed forces . . . shall be taken cognizance of by a [military court] . . . and shall be punished at the discretion of that court.”
96 Morris, 30 MJ at 1228.
criminalization of this behavior under the Uniform Code of Military Justice is not indicative of how such behavior would be regarded in a civilian court of law.\textsuperscript{97}

As noted above, one could make a powerful argument that even after \textit{Lawrence} the state interest in controlling HIV transmission is compelling enough to justify the intrusion of the state’s police power into intimate sexual relations. Criminalizing sex that might result in transmission of a deadly disease is very different from criminalizing homosexual sodomy.\textsuperscript{98} However, a statute criminalizing all unprotected sex that HIV-positive persons engaged in by definition would sweep in unprotected sex between married people when one of those people is HIV-positive. The marriage bond is one that the Supreme Court has traditionally held sacred.\textsuperscript{99} Even the military court in Bygrave declined to rule on whether HIV transmission with informed consent within a marital relationship would be criminal.\textsuperscript{100}

So, is there a way to draw a statute that criminalizes HIV transmission or exposure with informed consent (“gift-giving”) that passes constitutional muster? Perhaps there is. Virginia’s HIV transmission statute provides that “[a]ny person who, knowing he is infected with HIV, syphilis, or hepatitis B, has sexual intercourse, cunnilingus, fellatio, anallingus or anal intercourse with the intent to transmit the infection to another person is guilty of a Class 6 felony.”\textsuperscript{101} By making \textit{intent to transmit} an element of the crime, the statute criminalizes not the sexual act but the intent to cause harm. There is almost certainly a legitimate interest in such a case and the statute is tailored so narrowly that it sweeps in only the legitimate interest.

“Bug-chasing” could certainly be labeled suicidal behavior. If “bug-chasing” is framed as suicide, “gift-giving” would be assisting the suicide of the “bug-chaser.” The Supreme Court has upheld the constitutionality of statutes criminalizing assisted sui-

\begin{footnotesize}
\begin{enumerate}
\item[97] Although civilian laws might have analogous interests, courts are not required to analyze cases with regard to an effect on the maintenance of “good order and discipline.”
\item[98] The risks to both the individual actors and third parties are much greater in the case of sex that could result in the transmission of HIV than they are in the case of homosexual sodomy; in fact, in the case of homosexual sodomy, third party risks are non-existent.
\item[99] See, for example, \textit{Griswold}, 381 US 479, 486 (1965) (acknowledging the traditional “notions of privacy surrounding the marriage relationship”).
\item[100] \textit{Bygrave}, 46 MJ at 497 (“Nor need we consider whether our evaluation of the interests in the present case would differ if appellant had been prosecuted for sexual acts within the context of a marital relationship.”).
\end{enumerate}
\end{footnotesize}
cide, even though in such cases the “victim” was consenting.\textsuperscript{102} The state’s interest in criminalizing the intentional transmission of HIV to a consenting partner is even greater than the state’s interest in criminalizing assisted suicide. In cases of assisted suicide, the only life taken is that of the person assisted. In cases of HIV transmission other lives besides that of the “bug-chaser” are endangered since there is the risk of incidental exposure to other members of the public, as well as the risk that once infected the victim may pass the disease on to other sexual partners.

Although it has been argued that there is an implicit defense of informed consent in those statutes where the defense is not explicit,\textsuperscript{103} Virginia’s statute is written in a way that makes it difficult to read in such a defense. While § 18.2-67.4:1(A) makes intent to transmit HIV a Class 6 Felony and makes no mention of informed consent, § 18.2-67.4:1(B) reads as follows: “Any person who, knowing he is infected with HIV, syphilis, or hepatitis B, has sexual intercourse, cunnilingus, fellatio, anallingus or anal intercourse with another person without having previously disclosed the existence of his infection to the other person is guilty of a Class 1 misdemeanor.” By specifically making non-disclosure an element of the crime in § 18.2-64.4:1(B), the legislature may have effectively precluded courts from reading non-disclosure into § 18.2-67.4:1(A).

In summary, Virginia’s statute criminalizes “gift-giving” and yet is tailored narrowly enough that even under an expansive interpretation of \textit{Lawrence} it would be considered an acceptable manifestation of police power.

B. Criminalizing Informed, Consensual HIV Transmission is Wise Public Policy

It can be argued that statutes criminalizing HIV exposure might frustrate public health efforts by deterring people from getting tested: if they do not know their HIV status, these people cannot be guilty of knowingly exposing a sexual partner to HIV. Leslie E. Wolf and Richard Vezina have made this argument:

\textsuperscript{102} See \textit{Vacco v Quill}, 521 US 793 (1997) (holding that a New York statute prohibiting assisted suicide does not offend the Equal Protection Clause of the Fourteenth Amendment); \textit{Washington v Glucksberg}, 521 US 702 (1997) (upholding Washington criminalization of assisted suicide because it is not a fundamental liberty interest protected by the due process clause).

Although there is little data on this issue, the threat of criminal prosecution may deter people from HIV testing, counseling, and treatment. People who do not know their HIV status may be more likely to engage in high-risk behaviors, and, therefore, may increase the spread of HIV transmission. Certainly a statute like that of Maryland which criminalizes all unprotected sex practiced by HIV-positive persons might have this effect. However, a statute like Virginia’s or Washington’s that only criminalizes sex with the intent of transmitting HIV might deter intentional transmission of the virus but not testing. Under Virginia’s and Washington’s statutes, one can engage in unprotected sex even with the knowledge one is HIV-positive without running afoul of the statute so long as one has no intent to transmit the virus to one’s partner.

The problem with statutes criminalizing intentional, consensual transmission of HIV is that they are very difficult to enforce. There is of course the issue of proving intent that occurs with all statutes making intent an element of the offense. There is also an additional issue unique to intentional, consensual HIV transmission statutes: outside the closely-regulated world of the military it is unlikely that transgressions of the statute would come to the attention of law enforcement, which might explain why military courts are the only fora in which defendants have been prosecuted for HIV transmission with informed consent.

One way might to overcome this problem would be to regulate the acts leading up to the actual transmission. The “bug-chasing” phenomenon has been fueled in large part by the internet. Because “gift-givers” post ads on internet sites, one way to enforce intentional HIV transmission with informed consent could be to criminalize transmission attempts, police gay websites, and prosecute “gift-givers” posting on the sites. However, simply posting an ad on a website would probably not be considered an attempt. For example, in State v Duke, the defendant planned a vacation to commit sex acts he had discussed with a twelve year old girl (actually an undercover cop) he met over the internet. The agreement between the defendant and the undercover cop was that he would flash his car lights at her to identify himself. The court held that the overt acts of the defendant when he planned to meet the girl, went to the appointed meeting place,
and flashed his car lights were all planning and did not go far enough toward consummation to constitute an attempt at sexual battery. Prosecuting attempts would require difficult undercover operations in which police forces might be reluctant to invest resources.

CONCLUSION

This comment seeks to find a statute that would criminalize the practice of "gift-giving" while not infringing on the right to privacy in consensual sexual relations articulated by the Supreme Court in Lawrence. After analyzing case law on HIV transmission statutes, the police power of the state, and convictions for HIV transmission with informed consent in United States military courts under the Uniform Code of Military Justice, HIV transmission statutes which criminalize the intentional exposure of a partner to HIV and preclude a defense of informed consent seem most likely to accomplish this.

It appears that statutes that deny a defense of informed consent and lack a mens rea element are probably too broad to survive a constitutional challenge after the Court's decision in Lawrence. Since Lawrence, there have not been any cases challenging public health statutes on the grounds that they violate the constitutionally protected right to engage in private consensual sexual behavior the Court recognized in Lawrence. Subsequent decisions have interpreted Lawrence narrowly, denying that there is a constitutional right to engage in consensual sexual acts. The courts providing these interpretations might be inclined to weigh heavily the public health interest in preventing the spread of HIV and AIDS and might therefore find such statutes constitutional. However any court sincerely interpreting Lawrence would probably find the public health risk too slight to allow such a broad infringement on consensual intimate conduct. Therefore statutes which criminalize the intentional exposure of a partner to HIV and preclude a defense of informed consent are the most appropriate legal means of addressing the "bug-chasing" phenomenon.