LEGISLATING A PATHWAY TO IMPROVED OUTCOMES FOR PEOPLE LIVING WITH HIV AND LGBTQ+ NEVADANS

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During the Nevada 81st Legislative Session in 2021, two groundbreaking bills were passed and signed into law that will significantly impact the lives of lesbian, gay, bisexual, transgender, and queer (LGBTQ+) individuals and those living with the human immunodeficiency virus (HIV). The first bill, Senate Bill 275, modernizes outdated and ineffective laws that criminalize HIV.1 Senate Bill 109 requires government entities in Nevada to collect sexual orientation and gender identity and expression (SOGIE) demographic information to have a better understanding of the number of LGBTQ+ individuals living in Nevada and their overall health and well-being.2 These bills will help LGBTQ+ Nevadans, and those living with HIV, to have better health and well-being outcomes.

I. MODERNIZING HIV CRIMINAL LAWS

The term “HIV criminalization” refers to laws that either criminalize normally lawful behavior or enhance the consequences for illegal behavior depending on a person’s HIV status.3 In the late 1980s and early 1990s, legislators across the United States began to pass laws criminalizing various aspects of HIV.4 Statutes reflect the climate of the time, including an exaggerated perception of the risk of transmission, public fears of “contamination,” and a proclivity to punish people living with HIV (PLHIV). Since then, scientific under-

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2 S.B. 109, 81st Sess. § 3 (Nov. 2021).
3 BRAD SEARS & LUIS VASQUEZ, HIV CRIMINALIZATION IN NEVADA: EVALUATION OF TRANSMISSION RISK 3 (2020).
4 See NEV. REV. STAT. § 201.358(1)(a) (1987).
standing of the virus has grown dramatically, but most legislation has remained unchanged, resulting in a gap between current HIV science and how HIV is treated in the legal context. For that reason, there has been a push to modernize these outdated and ineffective laws to better align with the science on HIV transmission.5

Prior to the 81st Legislative Session, Nevada had several statutes criminalizing HIV transmission. The first law criminalizing HIV in Nevada was passed during the 64th Session of the Nevada Legislature in 1987.6 Assembly Bill 550 (1987) established a felony, punishable by one to twenty years in prison and/or a fine of up to $10,000, for a person living with HIV to engage in licensed or unlicensed sex work after receiving notice of their HIV status.7 In 1993, the Legislature passed a law that affected all PLHIV by making it a felony to engage “in conduct in a manner that is intended or likely to transmit” HIV to another person.8

The criminalization of a medical condition has ramifications not only for those accused of the crime, but also for public discourse and cultural attitudes towards the illness. HIV criminal laws are overly broad and have disproportionate effects on sex workers and minorities. For example, in Glogola v. State, the Nevada Supreme Court affirmed a sex worker’s conviction and fifteen-year sentence for solicitation for prostitution after notice of testing positive for HIV.9 The sex worker was convicted although no sexual act was committed and the appellant testified that she did not intend to perform any sexual acts.10 The court upheld the conviction because there was no specific intent requirement.11 Therefore, the state only had to establish the appellant (1) was living with HIV, (2) knew of her status, and (3) offered to provide sexual conduct for a fee.12 Furthermore, despite accounting for ten percent of Nevada’s population and twenty-eight percent of PLHIV in the state, African Americans account for forty percent of those arrested for HIV-related crimes.13 What’s more, African Americans were charged with forty-five percent of all HIV crimes that resulted in a conviction.14 When only the state’s HIV crimes related to sex work were considered, sixty-six percent of the charges were brought against African

7 Id. § 4.
10 Id. at 952.
11 Id. at 952–53.
12 Id.
14 Id. at 4.
Americans, including sixty-seven percent of the charges that resulted in a conviction.\textsuperscript{15}

In 2019, Senator David Parks addressed these issues head on by sponsoring Senate Bill 284, which created the Advisory Task Force on HIV Exposure Modernization (the Task Force).\textsuperscript{16} The bill required the Task Force to conduct a comprehensive examination during the 2019–2020 legislative interim of the statutes and regulations in Nevada related to the criminalization of HIV.\textsuperscript{17} Moreover, the Task Force was to identify any disparities in arrests, prosecutions, or convictions under such statutes or regulations related to race, color, sex, sexual orientation, gender identity or expression, age, or national origin.\textsuperscript{18} The Task Force was to then submit a report of its findings and recommendations to the Governor and the Legislative Counsel Bureau for consideration by the 81st Legislature, which completed in September 2020.\textsuperscript{19}

SB 275 is the legislation that resulted from the Task Force’s recommendations, which made several important changes to the state’s approach to the HIV epidemic. The law repeals NRS 201.205, the statute that felonized conduct likely to transmit HIV, and replaces it with a misdemeanor offense that applies to all communicable diseases.\textsuperscript{20} Instead of criminalizing living with HIV, the misdemeanor created by SB 275 not only requires intent to transmit, but also conduct likely to transmit and actual transmission.\textsuperscript{21} Further, the bill provides for an affirmative defense to prosecution if the person subject to exposure (1) knew the defendant has a communicable disease, (2) knew the conduct could result in transmission, and (3) consented to the conduct.\textsuperscript{22} The bill adds a second affirmative defense to prosecution if someone uses means to prevent transmission.\textsuperscript{23} The legislation also repeals the felony for engaging in or soliciting prostitution after a positive HIV test and the requirement that a person arrested for prostitution to be tested for HIV.\textsuperscript{24}

In addition to the changes to the criminal code, the bill aimed to take a holistic approach to modernize Nevada’s laws. Thus, the bill also made improvements to the way the state approaches communicable diseases generally. For example, SB 275 makes amendments to provisions regarding testing for communicable diseases following incidents where first responders are exposed to bodily fluids; updates the duties of individuals living with communicable dis-

\textsuperscript{15} Id.
\textsuperscript{16} S.B. 284, 80th Sess. § 1 (Nev. 2019).
\textsuperscript{17} Id. § 1.10(a).
\textsuperscript{18} Id. § 1.10(c).
\textsuperscript{19} Id. § 1.12; OCTAVIO POSADA ET AL., REPORT TO THE GOVERNOR AND DIRECTOR OF THE LEGISLATIVE COUNSEL BUREAU FOR TRANSMITTAL TO THE 81ST SESSION OF THE LEGISLATURE: ADVISORY TASK FORCE ON HIV EXPOSURE MODERNIZATION 4 (2020).
\textsuperscript{20} S.B. 275, 81st Sess. § 24 (Nev. 2021).
\textsuperscript{21} Id. § 6.4.
\textsuperscript{22} Id. § 6.5.
\textsuperscript{23} Id. § 6.6.
\textsuperscript{24} Id. § 24.
cases; and amends public health officials’ authority to order testing, treatment, isolation, or quarantine. This holistic approach ensures that all Nevadans living with communicable diseases are treated with dignity when interacting with the government.

The Nevada Legislature placed a declaration of legislative intent in the public health law to make the state’s public policy plain, stating that “the spread of communicable diseases is best addressed through public health measures rather than criminalization.” In addition to the aforementioned revisions, SB 275 repeals the provision that allows for the detention of people living with HIV/AIDS and eliminates many of the stigmatizing references to AIDS in the public health code. Moreover, SB 275 reestablishes Nevada’s Advisory Task Force on HIV Modernization for the 2021–2022 legislative term, recognizing that there is still work to be done to ensure that the legislation handles PLHIV fairly. The Task Force will make additional recommendations for legislative reform based on research and input from community members and PLHIV.

II. COLLECTION OF SEXUAL ORIENTATION AND GENDER IDENTITY AND EXPRESSION DATA

In the United States, the number of individuals that self-identify as LGBTQ+ has increased substantially over the past couple of decades. We know this through various survey tools that have been developed to capture one’s sexual orientation and gender identity and expression (SOGIE) as demographic information. Some of these federal surveys include the National Health and Nutrition Examination Survey (NHANES) and the National Survey of Family Growth (NSFG), the Behavioral Risk Factor Surveillance Survey (BRFSS), and the Youth Risk Behavior Survey (YRBS). With the help of these survey tools, we can capture information to understand the health and well-being of LGBTQ+ individuals that are increasing in population.

As the number of individuals that identify as LGBTQ+ has grown, laws that protect LGBTQ+ Americans from discrimination have increased as well. The 2015 U.S. Supreme Court ruling in Obergefell v. Hodges afforded marriage equality for same sex couples across the nation, and the Supreme Court

25 See id. §§ 5–7.
26 Id. § 3.3.
27 Id. § 24.
28 Id. § 22.
ruled in *Bostock v. Clayton County* that Title VII of the Civil Rights Acts protects individuals from discrimination based on sexual orientation and gender identity in employment.\(^{32}\) Advances at the state level, which are tracked by national LGBTQ+ advocacy organizations such as the Human Rights Campaign and the Movement Advancement Project through various indexes, are used to track states’ progress in passing pro-equality bills or stopping harmful bills.\(^{33}\) These advances show that states, like Nevada, are making great strides regarding the type and number of pro-equality bills that have passed in the state. According to the Human Rights Campaign, Nevada falls into the category of working toward innovative equality and has passed a sweeping set of pro-LGBTQ+ bills, which has increased non-discrimination protections for LGBTQ+ Nevadans.\(^{34}\)

Despite these advancements, no federal law and few state laws have passed that would require governments to uniformly and consistently collect SOGIE data; therefore, researchers rely upon national surveys and methodologies to make population estimates in states.\(^{35}\) However, things are starting to change. U.S. governments, at the federal and state level, are beginning to understand that SOGIE data is important because this data can better include LGBTQ+ people in goals and priorities when planning programs and services, identify the impact of stigma and prejudice on health and well-being outcomes, and evaluate the effectiveness of government in providing services to LGBTQ+ people.

At the federal level, H.R. 3509 was introduced in 2019 and would require federal agencies that collect information through a survey that includes demographic data to review existing data sets and determine where SOGIE data is not included and assess needed changes to survey methods related to asking SOGIE through surveys.\(^{36}\) In California, Assembly Bill 677 was passed and requires certain state employment and education agencies to collect demographic data about LGBTQ+ people whenever they collect data about other demographic groups.\(^{37}\) Nevada is now one of the only states in the United States that is required by law to collect and report SOGIE data, on a broad scale.

Nevada’s Senate Bill 109, sponsored by Senator Pat Spearman, requires all governmental agencies to collect sexual orientation and gender identity infor-


\(^{36}\) LGBTQ Data Inclusion Act, H.R. 3509, 116th Cong. § 2(a) (2019).

mation when other demographic information such as race and age are being collected and outlines a few important provisions.\textsuperscript{38} One provision of the law does not require someone to provide the information to a governmental agency.\textsuperscript{39} Moreover, one cannot be denied assistance for failure to provide the information to a governmental agency.\textsuperscript{40} Another provision is that a governmental agency that does not have the financial resources to comply with the requirements of SOGIE data collection is not required to comply until January 1, 2024.\textsuperscript{41}

With the number of people who identify as LGBTQ+ growing, and the number of pro-equality bills signed into law in Nevada, it is important that government entities increase data collection efforts to have a better understanding of the number of LGBTQ+ Nevadans and their health and well-being. Data collection will help to assess how LGBTQ+ Nevadans are benefitting from all of the pro-equality bills that have passed over the years. Although survey tools such as the Youth Risk Behavior Survey and the Behavioral Risk Factor Surveillance Survey have been used in Nevada for a couple of decades to collect SOGIE data, SB 109 will give the state of Nevada authority to require government entities to collect the data related to health and human services, criminal justice, education, and child welfare. Therefore, when information is needed to know the impacts of public health concerns, such as COVID-19 or HIV criminalization, data will be more readily available to make informed decisions that will benefit LGBTQ+ people in Nevada.

Together, SB 275 and SB 109 represent a significant step forward in policies that affect LGBTQ+ Nevadans. SB 275 takes a proactive approach to addressing the stigma behind HIV and ensures that PLHIV are treated with dignity and respect under the law by removing disparities between HIV and other communicable diseases. With data collected through SB 109, Nevada legislators, and others, will be able to make data-informed policy decisions and better serve LGBTQ+ Nevadans. These bills are expected to lead to better health outcomes for not only those who identify as LGBTQ+, but for all Nevadans.

\textsuperscript{38} S.B. 109, 81st Sess. § 4.1 (Nev. 2021).
\textsuperscript{39} \textit{Id.} § 4.2(a).
\textsuperscript{40} \textit{Id.} § 4.2(b).
\textsuperscript{41} \textit{Id.} § 5.5.