

2018 Southeast AETC Regional Conference

HIV CRIMINALIZATION
An Overview of Current Laws,
Science and Implications for Reform

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OBJECTIVES OF PRESENTATION

- Define HIV criminalization and identify U.S. jurisdictions that engage in HIV criminalization
- Explain the impact of HIV criminalization on PLHIV, and why HIV criminal laws are both unjust and at odds with accepted public health strategies to end the HIV epidemic
- Describe ways that health and social service professionals can contribute to ending HIV criminalization in their home states

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POTENTIAL HIV EXPOSURE/TRANSMISSION IS A SERIOUS FELONY IN MOST OF THE U.S.

- 32 US states and 2 territories have laws criminalizing the failure to disclose HIV status prior to conduct ranging from sexual intercourse to spitting; most states also have “sentence enhancements” that turn a misdemeanor into a felony (e.g., solicitation/sex work)
- A number of other states (e.g., NY, TX, PA) use general criminal laws to prosecute PLHIV who engage in “exposure without prior disclosure”
- 6 states have punishment that includes sex offender registration
- PLHIV serving years to decades for conduct legal for everyone else

Center for HIV Law and Policy, *When Sex is a Crime and Spit is a Dangerous Weapon*, <http://www.hivlawandpolicy.org/resources/when-sex-is-crime-and-spit-is-dangerous-weapon>
 The Center for HIV Law and Policy, *Prosecutions and Arrests for HIV Exposure in the United States, 2008-2015*, http://www.hivlawandpolicy.org/files/Prosecutions%20and%20Arrests%20for%20HIV%20Exposure%20in%20the%20United%20States%202008-2014_revised%201-2015.pdf
 The Center for HIV Law and Policy, *Comparative Sentencing for HIV in the U.S.*, <http://www.hivlawandpolicy.org/files/www.hivlawandpolicy.org/files/Comparative%20Sentencing%20Chart%20for%20the%20Center%20for%20HIV%20Law%20and%20Policy%20-%20May%202011%20.pdf>

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ELEMENTS OF HIV CRIMINAL LAWS

What gets you in trouble?

- Tested HIV-positive
- Had any kind of contact viewed as “sex”
- Scuffle with law enforcement + HIV status
- Being a sex worker while living with HIV
- HIV+ survivor of sexual assault

What doesn't help?

- Verbal consent
- In most states: Lack of intent to harm/transmit, or level of risk. Use of condoms, sticking to oral sex, low viral load, engaging in near-zero risk conduct usually not relevant

The Center for HIV Law and Policy, Ending and Defending Against HIV Criminalization: State and Federal Laws and Prosecutions, <http://www.hivlawandpolicy.org/resources/ending-and-defending-against-hiv-criminalization-state-and-federal-laws-and-prosecutions>

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WHAT ARE PRIMARY PROBLEMS WITH CRIMINAL HIV LAWS AND PROSECUTIONS?

- No *mens rea* requirement: unlike other crimes against the person, prosecutor does not have to prove intent to harm/intent to transmit
- Revolve around perception that having HIV is physically and socially life-ending
- Treatment as prevention is important—but this is less legally relevant than the significant reduction in risk of suffering and premature death thanks to ART
 - HIV's low per-act transmission risk (e.g., less than 1%) has been known for years (in the “96% reduction in risk” reference, the risk being reduced is only about 1% without treatment)
 - Courts have said that even very small risk is “significant” when the risked outcome is death; lowering risk has reduced, not ended, charges
 - Those most vulnerable to prosecution less likely to have treatment access

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HIV CRIMINALIZATION IN THE UNITED STATES

AN OVERVIEW OF THE VARIETY AND PREVALENCE OF LAWS USED TO PROSECUTE AND PUNISH PEOPLE LIVING WITH HIV (PLHIV) IN THE US.

LEARN MORE AT HIVLAWANDPOLICY.ORG

6 STATES MAY REQUIRE REGISTRATION AS A SEX OFFENDER under HIV-specific laws

6 STATES HAVE REPEALED OR REPEALED AND REPEALED parts of their HIV-specific criminal laws

30 STATES WITH HIV-SPECIFIC CRIMINAL LAWS includes laws targeting PLHIV, PLHIV who are sex workers, PLHIV who are sex workers and PLHIV who are sex workers

8 STATES WITH LAWS THAT APPLY INCREASED PENALTIES AND/OR SENTENCE ENHANCEMENTS and/or sentence enhancements and/or sentence enhancements

18 STATES THAT HAVE PROSECUTED PLHIV UNDER NON-HIV-SPECIFIC, GENERAL CRIMINAL LAWS this number represents known prosecutions within the last 10 years

34 STATES HAVE HIV-SPECIFIC CRIMINAL LAWS AND/OR SENTENCE ENHANCEMENTS (Note: This includes laws targeting PLHIV, PLHIV who are sex workers, PLHIV who are sex workers and PLHIV who are sex workers)

UNINTENDED CONSEQUENCES IS THERE TOO MUCH FOCUS ON DISCLOSURE?

- Is it fair or realistic to expect, let alone demand, HIV disclosure in all circumstances?
- Is responsibility for preventing HIV the same as for all STIs? Is it solely on the person with HIV?
- Has everyone in this room who ever had an STI disclosed it every time before sex?

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POSITIVE JUSTICE PROJECT PRINCIPLES FOR REFORM



- No disease-specific criminal law or sentence enhancement;
- Must prove specific intent to harm + conduct likely to do intended harm;
- Steps to reduce risk = no intent to harm;
- No airborne/casually transmitted diseases;
- Proportionate penalty, no sex offender status;
- No felony laws for transmitting/exposing another to disease; and
- No new or increased penalties for others.

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KEEP THE BIG PICTURE, PAST AND FUTURE, IN FOCUS

- Since 1980, eight new sexually transmitted pathogens have been recognized in the United States...think in terms of "HIV.2"
- Other STIs may cause serious, life-threatening complications including cancers, infertility, ectopic pregnancy, spontaneous abortions, stillbirth, low birth weight, neurologic damage, and death. What is the rationale for singling out HIV, or any specific disease?
- What have we learned from syphilis, its criminalization and the development of effective treatment?

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WHAT CAN HEALTH CARE AND SOCIAL SERVICE PROFESSIONALS DO?

- Ignorance ≠ Bliss: Promote sexual health literacy via school health programs, detention, foster care and prison facilities, etc., and as part of basic health care
- Re-think and re-brand! Stop using terms like “high-risk” and “high-risk populations”
- Advocate for consistency in government agencies’ treatment and messaging of HIV and other STIs
- Advocate for policies that put disclosure of HIV in perspective with disclosure of other diseases and matters of interest to sex partners

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WHAT CAN HEALTH CARE AND SOCIAL SERVICE PROFESSIONALS DO?

- Get legislative bodies to open session with “What Every Policy Maker Should Know About HIV”
- Endorse PJP Consensus Statement & post on website
- Find out what is happening in your state – call/email CHLP to find out: Kate Boulton, Esq. kboulton@hivlawandpolicy.org; Arpita Appannagari, aappannagari@hivlawandpolicy.org; 212.430.6733
- Get on our expert witness list! Review records, offer affidavits/testimony in cases, to legislators and legislative committees
- Join Positive Justice Project! Info: pjp@hivlawandpolicy.org

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Guiding Principles for Eliminating Disease-specific Criminal Laws
www.hivlawandpolicy.org/pjp



Consensus Statement on the Criminalization of HIV in the United States
www.hivlawandpolicy.org/pjp



Consensus Statement on HIV “Treatment as Prevention” in Criminal Law Reform
www.hivtaspcrimlaw.org

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THE CENTER FOR HIV LAW & POLICY
is a national resource and advocacy organization working to advance the rights of people affected by HIV. We combine an online HIV Policy Resource Bank, a creative national advocacy agenda, and case assistance focused on systems and institutions with significant impact on marginalized communities.

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