



27 of 27 DOCUMENTS

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37 Champion 7

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INSIDE NACDL: A LAMENTABLE EXAMPLE OF OVERCRIMINALIZATION: HIV CRIMINALIZATION

By Norman L. Reimer

Norman L. Reimer is NACDL's Executive Director and Publisher of *The Champion*.

**TEXT:**

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NACDL has long opposed over-criminalization. These efforts have contributed to an ongoing bipartisan effort in Congress to combat the problem. The Task Force on Overcriminalization established by the House Judiciary Committee has already held several hearings at which numerous witnesses have testified about the need to ensure that federal statutes have adequate *mens rea* requirements. n1 The task force, which was originally authorized only through November 2013, may receive an extension so that it can continue its important work. It should. There is a growing anticipation that the work of the task force may lead to meaningful reform proposals that will bridge the partisan divide.

While the task force has been provided with many examples of how overcriminalization has unjustly ensnared many people from diverse backgrounds and all walks of life, there is one glaring example of overcriminalization that has been over-looked: HIV n2 criminalization. In fairness to the task force, this is also an aspect of the misuse and abuse of the criminal law that has largely been absent from NACDL's reform agenda. This is an omission that must end. It is especially timely that NACDL address this issue now.

Dec. 1, 2013, was the 25th observance of World AIDS Day. The event, which began in 1988, is an opportunity to unite the world in the fight against HIV, show support for those living with the virus, and remember those who have succumbed to it. It is estimated that roughly 34 million people have HIV and that between 1981 and 2007 more than 25 million people died from the virus. n3 Thankfully, HIV is no longer a death sentence -- far from it. Antiretroviral (ART) therapy not only dramatically increases the probability that a person with HIV will never develop AIDS, and hence will avoid a life-threatening disease as a result of the HIV virus, but it also dramatically reduces the risk of transmission. That risk is virtually nonexistent when ART therapy is combined with condom use and other precautions. But I must acknowledge that I did not fully appreciate these important facts until just recently. That brings me to the second reason why it is so timely for NACDL, as the voice of the nation's criminal defense bar, to focus on the tragedy of HIV criminalization.

On Nov. 14-15, 2013, I was privileged to have been invited to serve as an observer on behalf of the criminal defense bar at a National Prosecutors Roundtable on HIV Criminalization Law and Policy. The program was a joint endeavor of the Association of Prosecuting Attorneys (APA) and the Center for HIV Law and Policy. This historic meeting was the first national roundtable of prosecutors convened to review current approaches to HIV-related criminal laws and consider best practices going forward. The express purpose of the meeting was to consider the relevance, viability, and fairness of HIV criminalization laws and policies in light of the current science about HIV transmission and treat-

ment. Much of the convening was devoted to review of that science in an effort to separate facts from myths -- myths that have resulted in the enactment of laws that bear no relationship to reality and that have stigmatized HIV-positive individuals for more than a quarter of a century. n4 The mere fact that the APA has undertaken to rethink HIV criminalization is a testament to that organization's enlightened approach to the prosecutorial function and the over-arching responsibility of prosecutors to seek justice.

Not surprisingly, given that the United States leads the world in mass incarceration, imprisoning more persons in actual numbers and in per capital rates of incarceration, the United States also leads the world in HIV prosecutions. n5 Dozens of states have criminal statutes specific to HIV, others use existing statutes to prosecute persons who commit certain crimes when they are HIV positive, and still others have statutes that enhance punishment for those who have HIV. n6 The comprehensive review of the science presented at the prosecutor's roundtable persuasively demonstrated that many of these laws are the product of hysterical overreaction, lacking any nexus to the actual risk of transmission. For example, it is beyond dispute that the virus cannot be transmitted by saliva, and yet statutes provide augmented penalties for spitting or biting by an HIV-positive individual.

Indeed, a flaw in HIV-related prosecutions is their focus on the individual's HIV-positive status and the individual's engagement in certain sexual activity rather than on the actual risk of transmission. This is largely an irrational approach. The capacity to transmit HIV is dependent upon many factors, but the most important is the viral load, i.e., the amount of virus present in an infected person. Yet paradoxically, the viral load is greatest when a person has initially become infected, a point at which they will not have any symptoms of disease and likely will have no clue that they are HIV positive. On the other hand, when receiving antiretroviral therapy, it is likely that [\*8] the viral load will be so low as to render the likelihood of transmission remote. Accordingly, it has been observed that "[s]exual exposure statutes that define the offense in terms of status and activity are almost inevitably overbroad. The numerous variables that affect risk -- often interdependently -- make it difficult (if not impossible) to prohibit categories of sexual activities without being overinclusive." n7

The focus on knowledge of status as a key element of an HIV-related crime, rather than on intent and capacity to transmit the virus, is the classic example of inadequate *mens rea* and overly expansive criminalization. The net effect of this has been to perpetuate the stigmatization of HIV patients, an enduring legacy of the hysteria that gripped the nation when AIDS was first diagnosed in the 1980s. Fortunately there is a growing clamor for reform, with even the White House criticizing HIV criminalization statutes. n8 But even as some embrace the need for reform, the reality is that not only are HIV criminalization laws not being repealed, new ones are still being proposed. n9

Accordingly, until these misguided prosecutions end there is much work to do. For the practicing defense bar, when representing a client facing a criminal charge or an enhanced penalty as a result of the client's positive HIV status, it is essential to understand the underlying science related to the virus and carefully analyze all aspects of the criminal statute and the prosecution's theory.

Fortunately, the Center for HIV Law and Policy has developed a helpful toolkit to assist the criminal defense bar. n10 For NACDL, as an organization that has led the fight against overcriminalization and to ensure adequate *mens rea* requirements in all criminal statutes, the fight to end HIV criminalization must be among the association's highest priorities.

#### FOOTNOTE-1:

n1 NACDL Immediate Past President Steven D. Benjamin testified at the first hearing of this congressional task force, held on June 14, 2013, on the subject of "Defining the Problem and Scope of Overcriminalization and Overfederalization." NACDL Executive Director Norman L Reimer testified at the second hearing of the task force, held on July 19, 2013, on the subject of "Mens Rea: The Need for a Meaningful Intent Requirement in Federal Criminal Law."

n2 The Human Immunodeficiency Virus is the virus that causes AIDS (Acquired Immune Deficiency Syndrome).

n3 Go to <http://www.worldaidsday.org>.

n4 Following the roundtable, the APA will endeavor to develop consensus positions with respect to reform of HIV-related laws. As that process unfolds, additional defense input and comment will be sought.

n5 Angela Perone, *From Punitive to Proactive: An Alternative Approach for Responding to HIV Criminalization That Departs From Penalizing Marginalized Communities*, 24 HASTINGS WOMEN'S L.J. 363, 366-367(2013).

n6 For a comprehensive discussion of HIV-related criminal statutes, see *From Punitive to Proactive*, *supra* note 5. See also Ari Ezra Waldman, *Exceptions: The Criminal Law's Illogical Approach to HIV-Related Aggravated Assaults*, 18 VA. J. Soc. POL'Y & L. 550, 551-552 (2011); Margo Kaplan, *Rethinking HIV-Exposure Crimes*, 87 IND. L.J. 1517, 1518.(2012).

n7 Kaplan, *supra* note 6, at 1530.

n8 White House, National HIV/AIDS Strategy for the United States 37 (2010), *available at* <http://www.whitehouse.gov/administration/eop/onap/nhas>. See also Positive Justice Project joint statement on the need to modernize HIV criminal laws and prosecution policies, *available at* <http://www.hivlawandpolicy.org/resources/positive-justice-project-consensus-statement-criminalization-hiv-united-states-positive>; Oslo Declaration on HIV Criminalization, *available at* <http://www.hivjustice.net/oslo/oslo-declaration>; proposed laws introduced by Representative Barbara Lee -- Repeal HIV Discrimination Act in 2011 (<http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.3053:#>) and Ending the HIV/AIDS Epidemic Act of 2012 (<http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.6138:>).

n9 Perone, *From Punitive to Proactive*, *supra* note 5, at 364. On the other hand, a proposal was introduced in Congress to urge states to repeal laws that discriminate against HIV status. S. 1790, H.R. 3053.

n10 The toolkit is available at <http://www.hivlawandpolicy.org/resources/legal-toolkit-resources-attorneys-handling-hiv-related-prosecutions-ending-and-defending>.