



August 1, 2011

Dear colleagues and members of PACHA:

We are writing in response to your proposed letter to President Obama and Secretary Sebellius, in which you outline what you believe should be the administration's primary focus in advancing the goals of the National HIV/AIDS Strategy over the next year.

On the whole we believe the letter outlines appropriate, high-impact areas of focus and we endorse most of your recommendations. However, we believe the letter's exclusion of the public health and human rights crisis of HIV criminalization – the use of the law to target and severely punish individuals living with HIV for consensual sex and conduct that poses no measurable risk of HIV transmission – is a serious oversight that must be corrected.

The January 2011 meeting of PACHA included a detailed presentation and discussion on the realities and harms of HIV criminalization. You also will shortly be receiving a draft of a bill from Congresswoman Barbara Lee – the REPEAL HIV Discrimination Act – that sets out in detail the history and consequences of criminalization, which are serious and extensive, and which include long prison terms, destruction of individuals' and families' lives, restrictions on reproductive choice, and registration as sex offenders. Consequently, we will not repeat here the many reasons why concrete steps to address HIV criminalization must be a priority for President Obama, HHS/CDC, DOJ, and PACHA.

We are appending several documents that we hope you will find useful: 1) relevant excerpts from the NHAS strategy on ending disparities; 2) a chart illustrating the disparate treatment of HIV and criminal offenses for other types of harms; and 3) a chart illustrating the disparate treatment of HIV compared with the transmission risks and consequences of other infectious diseases which are rarely if ever the subject of the criminal law. We also are attaching your draft letter with our proposed additions highlighted in yellow.

Time and again, and for many years, we have seen government and non-governmental agency references to the shocking fact of ongoing HIV stigma and discrimination and the documented role it plays as a barrier to HIV testing, individual engagement in care, and broadly-embraced public health goals. Rarely, if ever, is this reference accompanied by concrete plans and commitments to address it.

It is time to turn the expression of legitimate concern about HIV stigma and discrimination from a throw-away line to a three-dimensional plan for action. And this plan must start with addressing one of the ugliest manifestations of the problem – government-sanctioned discrimination in the use of the criminal law against individuals who test positive for HIV.

Respectfully,

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**EXCERPT FROM THE NHAS ON DISCRIMINATION, STIGMA
AND THE PROBLEM OF HIV-SPECIFIC CRIMINAL LAWS AND PROSECUTIONS**

“[Discrimination] undermines efforts to encourage all people to learn their HIV status, and it makes it harder for people to disclose their HIV status to their medical providers, their sex partners, and even clergy and others from whom they may seek understanding and support...We know that many people feel shame and embarrassment when they learn their HIV status. And, there is too much social stigma that seeks to assign blame to people who acquire HIV. Encouraging more individuals to disclose their HIV status directly lessens the stigma associated with HIV. As we promote disclosure, however, we must also ensure that we are protecting people who are openly living with HIV. This calls for a continued commitment to civil rights enforcement.

Working to end the stigma and discrimination experienced by people living with HIV is a critical component of curtailing the epidemic. The success of public health policy depends upon the cooperation of the affected populations. People at high risk for HIV cannot be expected to, nor will they seek testing or treatment services if they fear that it would result in adverse consequences of discrimination. HIV stigma has been shown to be a barrier to HIV testing and people living with HIV who experience more stigma have poorer physical and mental health and are more likely to miss doses of their medication.

An important step we can take is to ensure that laws and policies support our current understanding of best public health practices for preventing and treating HIV. At least 32 states have HIV-specific laws that criminalize behavior by people living with HIV. Some criminalize behavior like spitting and biting by people with HIV, and were initially enacted at a time when there was less knowledge about HIV’s transmissibility. Since it is now clear that spitting and biting do not pose significant risks for HIV transmission, many believe that it is unfair to single out people with HIV for engaging in these behaviors and should be dealt with in a consistent manner without consideration of HIV status. Some laws criminalize consensual sexual activity between adults on the basis that one of the individuals is a person with HIV who failed to disclose their status to their partner. **CDC data and other studies, however, tell us that intentional HIV transmission is atypical and uncommon. A recent research study also found that HIV-specific laws do not influence the behavior of people living with HIV in those states where these laws exist. ... In many instances, the continued existence and enforcement of these types of laws run counter to scientific evidence about routes of HIV transmission and may undermine the public health goals of promoting HIV screening and treatment.”**

(emphasis added)

The following chart compares the sentencing schemes for HIV exposure, non-disclosure and/or transmission laws in the United States with example of laws punishing drinking and driving, recklessly or negligently endangering others and vehicular homicide. In comparison with HIV exposure, which often carries minimal risk,¹ the danger posed by these crimes is similar if not greater.² However, as the chart below shows, the punishment for HIV exposure can be much severe in comparison to violation of the laws listed below.

Sentencing Chart

	HIV Exposure Laws & Prosecutions	Drinking & Driving Laws	Reckless Endangerment	Vehicular Homicide
National Trends	<ul style="list-style-type: none"> • Range: 5-25 years in prison³ • Some states have mandatory sex offender registration⁴ 	<ul style="list-style-type: none"> • First offense: <1 year in prison⁵ • Subsequent offense: <3 years in prison⁶ 	<ul style="list-style-type: none"> • Misdemeanor: ~2 years in prison⁷ • Felony: ~10 years in prison⁸ 	<ul style="list-style-type: none"> • Range: 1-99 years in prison⁹
Georgia	<ul style="list-style-type: none"> • Statute: maximum 20 years in prison¹⁰ • Example prosecution: 8 years in prison¹¹ 	<ul style="list-style-type: none"> • 10 days - 1 year in prison for first offense; • 90 days - 1 year for second offense¹² 	N/A	<ul style="list-style-type: none"> • Maximum 1 year in prison¹³
Oklahoma	<ul style="list-style-type: none"> • Statute: maximum 5 years in prison¹⁴ • Example prosecution: Life sentence¹⁵ 	<ul style="list-style-type: none"> • 48 hours - 1 year in prison for first offense; 1-5 years for second offense¹⁶ 	N/A	<ul style="list-style-type: none"> • Maximum 1 year in prison¹⁷
California	<ul style="list-style-type: none"> • Statute: maximum 8 years in prison¹⁸ 	<ul style="list-style-type: none"> • 96 hours - 6 months in prison for first offense; • 96 hours - 1 years for second offense¹⁹ 	N/A	<ul style="list-style-type: none"> • Maximum 4 years in prison²⁰

¹ The risk of transmission for a single act of unprotected sex between a man and a woman is less than 0.1%. Julie Fox et al. "Quantifying sexual exposure to HIV within an HIV-serodiscordant relationship: development of an algorithm." 25 AIDS 1065. 2011.

² For example, a person with a .08 BAC is almost 3 times more likely to get into an accident compared to a person with no alcohol in his or her system. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, NATIONAL SURVEY OF DRINKING AND DRIVING ATTITUDES AND BEHAVIORS: 2008 5 (2010), available at <http://www.nhtsa.gov/staticfiles/nti/pdf/811342.pdf>.

³ FLA. STAT. ANN. § 384.24(2) (2011) (knowingly transmitting HIV, third degree felony, up to five years in prison); WASH. REV. CODE ANN. § 9A.36.011 (assault via intentionally transmitting HIV, Class A felony, 93-318 months in prison); ARK. CODE ANN. § 5-14-123 (2011) (knowingly transmitting HIV, class A felony, minimum 6 years in prison with maximum 30 years); IOWA CODE § 709C.1

(2011) (knowingly transmitting HIV, class B felony, up to 25 years in prison).

⁴ These states include, but are not limited to: Arkansas, ARK. CODE ANN. § 12-12-903 (12)(A)(i)(P); Iowa, IOWA CODE ANN. § 692A.102(1)(c)(22); Ohio, OHIO REV. CODE ANN. § 2950.01(G)(1)(c)(West 2010); Louisiana, LA. REV. STAT. § 541(24)(2005) (modified with minor changes by 2010 La. Sess. Law Serv. Act. 387 (H.B. 825)); South Dakota, S.D. CODIFIED LAWS § 22-24B-2 (West 2010); Tennessee, TENN. CODE ANN. § 40-39-202(28) (2004).

⁵ See, e.g., CONN. GEN. STAT. § 14-227(g) (subsequent offense carries a fine as well as a prison sentence of at least 2 days and a maximum of 6 months); PA. CONS. STAT. § 3802 (first offense carries a fine as well as prison sentence of at least 3 days and maximum of 6 months). See also NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, A STATE-BY-STATE ANALYSIS OF LAWS DEALING WITH DRIVING UNDER THE INFLUENCE OF DRUGS (2008).

⁶ See, e.g., CONN. GEN. STAT. § 14-227(g) (second offense carries a fine as well as a prison sentence of at least 120 days with a maximum of 2 years); PA. CONS. STAT. § 3802 (second offense carries a fine as well as prison sentence of at least 90 days and maximum of 5 years). See also NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, A STATE-BY-STATE ANALYSIS OF LAWS DEALING WITH DRIVING UNDER THE INFLUENCE OF DRUGS (2008).

⁷ See, e.g., COLO. REV. STAT. § 18-3-208 (class 3 misdemeanor, maximum 6 months in prison); PA. CONS. STAT. § 2705 (class 2 misdemeanor, maximum 2 years in prison).

⁸ See, e.g., N.Y. PENAL LAW § 120.25 (first degree reckless endangerment, class D felony, maximum 7 years in prison); TENN. CODE ANN. § 39-13-101 (class E felony, maximum 6 years in prison).

⁹ See MADD, PENALTIES FOR DRUNK DRIVING VEHICULAR HOMICIDE (2011), available at http://www.madd.org/laws/law-overview/Vehicular_Homicide_Overview.pdf.

¹⁰ GA. CODE ANN. § 16-5-60(d) (2011) (person with HIV who knowingly uses bodily fluids against a correctional officer).

¹¹ Ginn v. State, 667 S.E.2d 712, 713 (Ga. Ct. App. 2008) (unprotected sex without disclosure, even though two witnesses testified the "victim" knew of defendant's HIV status).

¹² GA. CODE ANN. § 40-6-391 (2011).

¹³ GA. CODE ANN. § 40-6-393(c) (2011) (2nd degree vehicular homicide)

¹⁴ OKLA. STAT. ANN. tit. 21, § 1192.1 (2011) (knowingly engaging in conduct likely to transfer HIV)

¹⁵ Bill Braun, *Tulsa Man Imprisoned for Life on Sex Counts*, TULSA WORLD, May 24, 2000 (HIV exposure in conjunction with several counts of child sexual abuse).

¹⁶ OKLA. STAT. ANN. tit. 47, § 11-902 (2011).

¹⁷ OKLA. STAT. ANN. tit. 47, § 11-903 (2011) (negligent homicide).

¹⁸ CAL. HEALTH & SAFETY CODE § 120291 (2011) (Unprotected sexual activity by one who knows self to be infected by HIV).

¹⁹ CAL. VEH. CODE § 23152 (2011).

²⁰ CA. PENAL CODE § 191.5(b) (2011) (vehicular manslaughter while intoxicated).