



The State of Civil and Human Rights in the United States

*The Senate Judiciary Subcommittee on the
Constitution, Civil Rights, and Human Rights*

Testimony of The Center for HIV Law and Policy

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We thank the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights for the opportunity to submit testimony regarding ongoing civil and human rights challenges. **The Center for HIV Law and Policy** (CHLP) is a national legal and policy resource and strategy center working to reduce the impact of HIV on vulnerable and marginalized communities and to secure the civil and human rights of people affected by HIV. CHLP supports and increases the advocacy power and HIV expertise of attorneys, community members, and service providers, and advances policy initiatives that are grounded in and uphold social justice, science, and the public health.

CHLP also founded and coordinates the **Positive Justice Project** (PJP), a national coalition of organizations and individuals working to end HIV criminalization in the United States. PJP's members engage in federal and state policy advocacy, resource creation, and support of local advocates and attorneys working on HIV criminal cases. PJP organizes and mobilizes communities and policymakers in the United States. PJP's advocacy has resulted in the decision of multiple medical, public health, and policymaking organizations to issue statements calling for an end to the use of the criminal law to target the conduct of people living with HIV and other communicable diseases.¹

Our testimony focuses on the continuing use of the criminal law to target people on the

¹ See Presidential Advisory Council on HIV/AIDS (PACHA), *Resolution on Ending Federal and State HIV-Specific Criminal Laws, Prosecutions, and Civil Commitments* (2013) (noting that the criminalization of HIV-affected people fuels HIV stigma), available at http://hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/PACHA_Criminalization_Resolution%20Final%20012513.pdf; American Medical Association (AMA), *Modernization of HIV Specific Criminal Laws* (2014), available at <http://hivlawandpolicy.org/news/ama-adopts-a-resolution-opposing-hiv-criminalization>; HIV Medicine Association (HIVMA), *Repeal of HIV-Specific Criminal Statutes* (2012), available at www.hivma.org/uploadedFiles/IDSA/Careers_and_Training/Opportunities_for_Students_Residents/ID_Career_Paths/HIVMA%20Policy%20Statement%20on%20HIV%20Criminalization.pdf; Association of Nurses in AIDS Care (ANAC), *HIV Criminalization Laws and Policies Promote Discrimination and Must Be Reformed* (2014), available at http://www.nursesinaidscare.org/files/public/ANAC_PS_Criminalization_December12014.pdf; National Alliance of State and Territorial AIDS Directors (NASTAD), *Nat'l HIV/AIDS Strategy Imperative: Fighting Stigma and Discrimination by Repealing HIV-Specific Criminal Statutes* (2011), available at www.nastad.org/Docs/114641_2011311_NASTAD%20Statement%20on%20Criminalization%20-%20Final.pdf; U.S. Conference of Mayors, *Resolution on HIV Discrimination and Criminalization* (2013), available at www.usmayors.org/resolutions/81st_Conference/cs11.asp; Positive Justice Project (PJP), *National Consensus Statement on the Criminalization of HIV* (2012), available at www.hivlawandpolicy.org/resources/positive-justice-project-consensus-statement-criminalization-hiv-united-states-positive (exhibiting more than 1000 organizational and individual endorsements from across the United States); U.S. Dep't of Justice, *Best Practices Guide to Reform HIV-Specific Criminal Laws to Align with Scientifically-Supported Factors* (July 15, 2014), available at <http://aids.gov/federal-resources/national-hiv-aids-strategy/doj-hiv-criminal-law-best-practices-guide.pdf>.

basis of health and disability status that is associated with stigmatized identities in the United States, including people from communities of color, and members of lesbian, gay, bisexual, transgender, economically marginalized and immigrant communities. In particular, we call for the need to provide leadership and funding support for state policy makers to expedite the modernization of criminal laws that target the consensual sexual and otherwise-legal conduct of people living with HIV.

HIV, sexually transmitted infections, tuberculosis (TB), hepatitis, and meningococcal disease are all are poorly understood, stigmatized conditions that disproportionately affect and often intersect in vulnerable and marginalized communities with limited social or political capital. The stigma associated with these health conditions is a manifestation of a much broader set of “social disease”: homophobia, transphobia, racism, sexism and the related “othering” that is done to marginalize, criminalize, and imprison individuals who make mainstream people feel afraid or uncomfortable. This unconscious overreaction by the criminal justice system is part of a larger problem of identity-based policing and criminalization practices.²

Increasing media reports have raised awareness about the pervasive profiling and discriminatory treatment by local, state, and federal law enforcement officials based solely on actual or perceived suspect classifications, such as race, ethnicity, gender, gender identity, gender expression, sexual orientation, religion, economic status, housing status, immigration status, age, or other determinants. The gross ignorance that drives these practices is not isolated to law enforcement; it is entrenched throughout the entire criminal justice system. This is particularly evident through unnecessary prosecutions, judicial decisions exhibiting bias or reliance on inaccurate information, and failures to address blatant misconduct and misuse of the criminal justice system. Overreliance on criminal laws to single out and stigmatize marginalized communities has been a particularly troubling issue for people living with HIV and at-risk communities, including communities of color, LGBT people, sex workers, youth, women, drug-users, and immigrants. One of the more alarming issues for people living with HIV has been the prospect of law enforcement harassment, and criminal prosecution for acts of consensual sex and

² See, e.g., The Center for HIV Law and Policy, *et al.*, *A Roadmap for Change: Federal Policy Recommendations for Addressing the Criminalization of LGBT People and People with HIV* (2014), available at <http://hivlawandpolicy.org/resources/a-roadmap-change-federal-policy-recommendations-addressing-criminalization-lgbt-people-and>.

for conduct, such as spitting and biting,³ which poses no measurable risk of HIV transmission.

Thirty-four U.S. states and territories have laws that criminalize the conduct of people living with HIV based on perceived exposure to HIV and without any evidence of intent to do harm.⁴ Additionally, prosecutions for allegations of non-disclosure, exposure, or transmission of HIV have occurred in at least thirty-nine states under HIV-specific laws or general criminal laws, including aggravated assault, attempted murder, and even bioterrorism⁵ statutes. Most of these laws were adopted before the availability of effective antiretroviral treatment for HIV and when data about the limited routes and risks of HIV transmission were not widely available. As a result, these laws have effectively institutionalized widespread ignorance about HIV and how it is transmitted.

HIV stigma and its relation to misconceptions about HIV transmission have been repeatedly documented.⁶ Extensive misperceptions about the most basic facts of the routes and relative risks of HIV transmission are entrenched and persistent. A recent survey found that “levels of knowledge about HIV transmission have not improved since 1987.”⁷ Studies also

³ CDC, *HIV Transmission* (Sept. 2014), available at <http://www.cdc.gov/hiv/basics/transmission.html> (“HIV cannot be spread through saliva.”); see also *Henderson v. Thomas*, No. 11-CV-224, slip op. at 2 (M.D. Ala. Dec. 21, 2012) (“A person would have to drink a 55-gallon drum of saliva in order for it to potentially result in a transmission.”).

⁴ The Center for HIV Law and Policy, *Ending and Defending Against HIV Criminalization: A Manual for Advocates, State and Federal Laws and Prosecutions, Vol. 1* (updated 2014), available at http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/Criminalization%20Manual%20%28Revised%2012.5.13%29_0.pdf; see also J. Stan Lehman, Meredith H. Carr, Allison J. Nichol, Alberto Ruisanchez, David W. Knight, Anne E. Langford, Simone C. Gray, Jonathan H. Mermin, *Prevalence and Public Health Implications of State Laws that Criminalize Potential HIV Exposure in the United States*, AIDS AND BEHAVIOR (2014), available at <http://hivlawandpolicy.org/resources/prevalence-and-public-health-implications-statelaws-criminalize-potential-hiv-exposure>.

⁵ K. Sinclair, *Michigan Judge Rules That HIV-Positive Man Not a Bioterrorist*, 15(1) HIV/AIDS POLICY LAW REV. 27-8 (2010), available at <http://www.ncbi.nlm.nih.gov/pubmed/21413616> (noting that Michigan judge dismissed charges against an HIV positive man brought under the state’s “bioterrorism” statute).

⁶ The Henry J. Kaiser Family Foundation, *Survey of Americans on HIV/AIDS: Summary of Findings on the Domestic Epidemic* (2009) at 4, 21, available at <http://www.kff.org/kaiserpolls/upload/7889.pdf> (finding that “[o]ne third of Americans (34 percent) harbor at least one misconception about HIV transmission, not knowing that HIV cannot be transmitted through sharing a drinking glass (27%), touching a toilet seat (17%), or swimming in a pool with someone who is HIV-positive (14%); and that “[n]otable [segments of the public] say they would be uncomfortable with an HIV-positive co-worker (23%), child’s teacher (35% of parents), or roommate (42%), and fully half (51%) of adults say they would be uncomfortable having their food prepared by someone who is HIV-positive”).

⁷ *Id.* at 4-5, 22-23.

show that many people do not get tested because of stigma and their fear of discrimination.⁸

People living with HIV also face more severe penalties because law enforcement, prosecutors, courts, and legislators continue to view and characterize them as inherently dangerous, and their bodily fluids as “deadly weapons.”⁹ In fact, nine states add mandatory sex offender classification and registration to those convicted under these laws. Felony convictions and sex offender registration requirements cause irreparable damage to most aspects of defendant’s lives, including, their ability to work, to choose where they live, educational opportunities, even to continue relationships with their own children or other minor relatives.¹⁰

Despite the growing consensus that HIV specific criminal laws and prosecutions need to be reformed,¹¹ criminalization based on an individual’s health status remains pervasive. Many states have “communicable” or “contagious disease” control statutes that criminalize STI exposure, which may or may not include HIV.¹² Most of these statutes are antiquated and were enacted prior to the discovery of HIV. While these statutes have typically not been enforced, there is an increasing trend to use these statutes to target the behaviors of people living with HIV and individuals with other stigmatized health conditions.¹³ Another disturbing occurrence is that

⁸ Peter A. Vanable, Michael P. Carey, Donald C. Blair, and Rae A. Littlewood, *Impact of HIV-Related Stigma on Health Behaviors and Psychological Adjustment Among HIV-Positive Men and Women*, 10(5) AIDS BEHAV. 473 (2006) (summarizing research), available at <http://www.ncbi.nlm.nih.gov/pubmed/16604295>; see also Ronald A. Brooks, et al., *Preventing HIV Among Latino and African American Gay and Bisexual Men*, 19(11) AIDS PATIENT CARE STDS 737, 738 (2005), available at <http://www.ncbi.nlm.nih.gov/pubmed/16283834>.

⁹ See, e.g., *People v. Plunkett*, 19 N.Y.3d 400, 408-9 (2012) (rejecting prosecutor’s argument that an HIV positive person’s saliva is a “dangerous instrument”).

¹⁰ American Bar Association (ABA) Commission on Effective Criminal Sanctions and the Public Defender Service for the District of Columbia, *Internal Exile: Collateral Consequences of Conviction in Federal Laws and Regulations* (2009), available at <http://www.americanbar.org/content/dam/aba/migrated/cecs/internalexile.authcheckdam.pdf>; see National Institute of Justice & ABA Criminal Justice Section, *National Inventory of the Collateral Consequences of Conviction* (2013), available at <http://www.abacollateralconsequences.org/>; see also Legal Action Center, *After Prison: Roadblocks to Reentry, A Report on State Legal Barriers Facing People with Criminal Convictions* (2004), available at http://www.lac.org/roadblocks-to-reentry/upload/lacreport/LAC_PrintReport.pdf.

¹¹ See *supra* note 1 (collecting statements against the criminalization of HIV and other infectious diseases from medical, public health, and policymaking organizations).

¹² See, e.g., Cal. Health & Safety Code § 120600; La. Rev. Stat. Ann. § 40:1062; Mont. Code Ann. § 50-18-112; N.Y. Pub. Health Law § 2307; S.C. Code Ann. § 44-29-60 (2009); Tenn. Code Ann. § 68-10-107; Vt. Stat. Ann. Tit. 18 § 1106; W. Va. Code § 16-4-20.

¹³ See, e.g., Katie Lucia, *Man Gets 6 Months for Spreading HIV*, DESERT DISPATCH (July 26, 2012), available at <http://www.desertdispatch.com/news/spreading-13329-barstow-gets.html>; *State v. Richardson*, 209 P.3d 696, 701 (Kan. 2009) (noting that the communicable disease criminal law required the prosecution to

state legislatures are attempting to expand the criminalization of health conditions by adding more communicable or infectious diseases to existing HIV specific criminal statutes. For instance, in June 2014, Iowa's legislature expanded its existing HIV-specific criminal statute to include hepatitis, tuberculosis (TB), meningococcal disease, and "any other disease determined to be life threatening."¹⁴ Similarly driven by gross ignorance and misconceptions, legislatures in other states are attempting to implement similar measures.¹⁵ This expansive use of criminal laws to address public health issues is particularly troubling because it is in direct conflict with federal advancements on this issue.

The National HIV/AIDS Strategy (NHAS), released in 2010, includes a statement on the problem and public health consequences of HIV criminalization and maintains that many state HIV-specific criminal laws reflect long-outdated misperceptions of HIV's modes and relative risks of transmission.¹⁶ The NHAS recommends that legislators reconsider whether these laws further the public interest and support public health approaches to preventing and treating HIV.¹⁷ These recommendations were reaffirmed in the Presidential Advisory Council on AIDS (PACHA) Resolution on Ending Federal and State HIV-Specific Criminal Laws, Prosecutions, and Civil Commitments, which noted that the criminalization of HIV positive people fuels HIV stigma.¹⁸ In response to growing national support, bipartisan proposed legislation has been introduced in Congress to encourage modernization of current criminal law approaches to HIV.¹⁹ More recently, in July 2014, the U.S. Department of Justice issued guidance providing technical assistance to states to ensure that HIV-related criminal laws reflect the contemporary medical

prove that the defendant knew he was infected with HIV and intentionally engaged in sexual intercourse with the specific intent to expose another person to HIV).

¹⁴ Iowa Code § 709D.3.

¹⁵ See, e.g., S.B. 1130, 97th Leg., Reg. Sess. (Mich. 2014) (attempting to add Hepatitis C to Michigan's HIV-specific criminal statute).

¹⁶ NHAS available at <http://www.whitehouse.gov/sites/default/files/uploads/NHAS.pdf>.

¹⁷ *Id.*

¹⁸ PACHA, *Resolution on Ending Federal and State HIV-Specific Criminal Laws, Prosecutions, and Civil Commitments* (2013) (noting that the criminalization of HIV-affected people fuels HIV stigma), available at http://hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/PACHA_Criminalization_Resolution%20Final%20012513.pdf.

¹⁹ Repeal Existing Policies that Encourage and Allow Legal (REPEAL) HIV Discrimination Act, H.R. 1843 (May 2013), available at <https://www.govtrack.us/congress/bills/113/hr1843>; see also LOS ANGELES TIMES, Editorial, *Get Rid of those Outdated HIV Laws* (June 6, 2013), available at <http://articles.latimes.com/2013/jun/06/opinion/la-ed-hiv-state-laws-review-2013060>.

and scientific understanding of HIV.²⁰ The stark disconnect between state legislative actions, law enforcement and prosecutorial practices, and federal government guidance demonstrates that all of these entities must be engaged in comprehensive education to ensure effective solutions.

Identity-based policing, prosecutorial policies, and criminal statutes are the consequence of fear and stigma fueling policymaking instead of actual understanding of relevant data. This is most evident through the highly controversial “broken windows” policing practice that fails to consider the social and economic factors that contribute to crime and disorder in communities of color,²¹ and HIV-specific prosecutions that continuously ignore or intentionally misstate current scientific and medical data regarding HIV transmission risks and treatment.²² This approach to policymaking is an inefficient use of the criminal justice system, and it only serves to perpetuate the harm these flawed policies seek to address. Thus, it is necessary for community members, law enforcement, prosecutors, criminal defense attorneys, judges, and legislators to be engaged in comprehensive education, and federal funding must be available to support the necessary education of all these groups.

For too long, federal and state public health authorities have accepted the persistent, widespread public ignorance about the actual routes, real risks, and current-day consequences of HIV transmission by neglecting the need for frank, accurate information that is essential to sound sexual health. As the criminal justice treatment of HIV demonstrates, ignorance is the furthest thing from bliss for those individuals whose decision to get tested for HIV opens the door for felony prosecution.

²⁰ U.S. Dep’t of Justice, *Best Practices Guide to Reform HIV-Specific Criminal Laws to Align with Scientifically-Supported Factors* (July 15, 2014), available at <http://aids.gov/federal-resources/national-hiv-aids-strategy/doj-hiv-criminal-law-best-practices-guide.pdf>.

²¹ See Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Space: A New Look at Disorder in Urban Neighborhood*, 105(3) AM. J. SOC. 603 (Nov. 1999) (finding that disorder does not cause crime; rather, disorder and crime co-exist, and both are caused by similar social and economic factors); Randall G. Sheldon, Center on Juvenile and Criminal Justice, *Assessing “Broken Windows”: A Brief Critique* (2013), available at <http://www.cjcj.org/uploads/cjcj/documents/broken.pdf> (noting that “with so many arrests on minor charges, more and more people (especially young minority males) will have a record, thus hindering their job prospects in the future and perhaps even propelling them into more crime, especially drug crimes”).

²² See Carol Galletly & Steven Pinkerton, *Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV*, 10(5) AIDS BEHAV. 451 (Sept. 2006) (finding that HIV specific laws undermine HIV prevention efforts on consistent condom use and reduce health-seeking behavior among people living with HIV); see also CDC, PACHA & HRSA/DHHS Joint Advisory Committee on HIV, Viral Hepatitis and STD Prevention and Care, *HIV Disclosure Summit* (June 2012), available at <http://aids.gov/federal-resources/pacha/meetings/2013/feb-2013-joint-letter-to-sec-of-health.pdf> (recognizing that mandatory disclosure laws may deter populations at risk for HIV from seeking testing).

In conclusion, to address this educational need, we recommend the following:

- The Department of Justice and other appropriate federal agencies should fund qualified organizations experienced in working with the criminal defense and prosecution bar to provide basic HIV education and training for law enforcement officials, prosecutors, criminal defense attorneys, judges and state legislators. This educational training should cover HIV transmission routes and risk, the realities of an HIV diagnosis under current treatment, and an overview of the socio-economic factors that fuel the epidemic.
- The Department of Health and Human Services (HHS) and the Centers for Disease Control and Prevention (CDC) should mandate development and support of accurate, age-appropriate and LGBT-inclusive HIV and STI literacy programs for students and staff of all federally supported school systems as a condition of federal funding.
- CDC must develop and distribute more direct and explicit public service announcements on the routes, risks and consequences of all sexually transmitted infections, including HIV, dispelling myths that fuel HIV criminalization via mainstream and new media.
- CDC's and other related websites, including AIDS.gov, should prominently include information on the actual routes, relative risks, and consequences of HIV and other STI transmission that reflects real-life risk reduction choices (e.g., oral sex as a very low-to-no-risk alternative; the impact of drug therapies on the already low transmission risk of HIV).
- HHS, the Health Resources and Services Administration (HRSA), and other responsible federal agencies should require proof of written policies and standards for the provision of sexual health care and HIV-inclusive sexual health literacy programs for police lock-ups, juvenile facilities, and correctional and detention settings receiving federal funds. Staff education should include training on avoiding discriminatory enforcement of regulations against people living with HIV and on maintaining HIV status confidentiality.

We thank you for your consideration of these comments, and welcome the opportunity to discuss them further with you and your staff.