



**A NEW STRATEGY TO END CIVIL AND CRIMINAL PUNISHMENT AND
DISCRIMINATION ON THE BASIS OF HIV STATUS:
THE POSITIVE JUSTICE PROJECT**

From the beginning of the HIV/AIDS epidemic, stigma and fear have fueled mistreatment of people living with HIV. One of the more troubling and persistent issues for people with HIV has been the prospect of criminal prosecution for acts of consensual sex and for conduct, such as spitting or biting, that poses no significant risk of HIV transmission. The Positive Justice Project is CHLP's response to this issue: a truly community-driven, multidisciplinary collaboration to end government reliance on an individual's positive HIV test result as proof of intent to harm, and the basis for irrationally severe treatment in the criminal justice system.

The use of criminal law as a way to stop or slow HIV transmission invariably is ineffective. The reasons why individuals take risks with their health, and how they assess risk, are many and complex. Arresting and prosecuting people with HIV for consensual sexual relationships or no-risk conduct, such as spitting, does nothing to take these reasons into account, or to assess risks based on the specific circumstances of the case at hand, such as viral load or even basic issues of intent or mutual responsibility.

Since 1986, there have been hundreds of HIV-specific prosecutions brought against people who have tested positive for HIV antibodies or the virus itself. Some defendants were charged under HIV-specific criminal statutes, while others were charged under general criminal laws. The number of cases in which there was any evidence of an actual intent to infect or otherwise harm a partner are negligible, and many people have served or are serving decades-long sentences, or are subject to extremely intrusive, expensive and indefinite monitoring and supervision as "sex offenders," in situations where there was no evidence that the defendant in fact transmitted the virus to anyone. In a study of HIV-related prosecutions between 1986 and 2001, 25% involved biting, spitting, or scratching – actions which typically would be treated as misdemeanors with nominal penalties, if prosecuted at all.

Although the adoption of HIV-specific laws is not a new development—about 26 states had them on the books by 1990—the debate about them has continued over the course of the epidemic. In the United States, thirty-six states and territories now criminalize the conduct of HIV-positive people for the supposed failure to disclose their HIV status or exposure of another to HIV through some form of physical contact. However, even when an HIV-positive person discloses her/his HIV status to a partner, takes precautions to prevent transmission (such as using a condom during sex),

or engages in conduct that poses no real risk of transmission, that person can be prosecuted and imprisoned in many jurisdictions.

Ostensibly, the purpose of these statutes—often referred to as "criminal exposure" or "transmission" laws—is to deter HIV-positive people from putting others at risk. The stated intent of a provision in an earlier version of the Ryan White Care Act – a critical source of funding across the country for the care and prevention of HIV/AIDS – requiring states to address the issue in order to qualify for funding was to ensure that states were equipped to prosecute the “intentional transmission” of HIV. This mandate produced ill-conceived laws largely based on ignorance about the actual routes and statistical risks of HIV transmission, and on the intense stigma associated with HIV and those it disproportionately affects. Decades later, actual cases of HIV-positive individuals acting with the intent to transmit HIV still are exceedingly rare. However, these laws and the prosecutions they countenance largely focus on the existence or lack of proof of disclosure, not on the nature of the exposure, the actual level of risk present or even whether HIV was transmitted.

Typically there is little or no consideration of the relative HIV transmission risks associated with certain behaviors, especially when the case involves biting or spitting, which pose virtually no risk of HIV transmission; or the use of condoms during sex, which will prevent most transmissions; or how anti-retroviral treatment (ART) dramatically reduces HIV viral load and the risk of HIV transmission. It is not the fact of HIV infection, but rather proof (through admission, a record of testing or treatment) that a person knew that she/he had HIV at the time of the contact that exposes an individual to criminal prosecution.

Consequently, and as some studies of the impact of these laws have demonstrated, they do nothing to advance their intended purpose. Instead, these laws further stigmatize already-marginalized populations, likely deter people at risk from getting tested or getting care, and inhibit disclosure for those who already know they have HIV.

Sensationalized media attention that often accompanies these prosecutions has a significant impact on people with HIV, as well as the community at large. It has a negative impact on the public's perception of people with HIV and their understanding of HIV transmission. When someone is "accused" of potentially exposing or infecting another person, or is described in terms such as "AIDS monster," the language is laden with judgment and presumed guilt. It tends to brand all HIV-positive people as toxic and dangerous, and treats HIV infection in itself as evidence of wrongdoing.

Beyond a Failure to Disclose: AIDS phobia in the Criminal Justice System

In the U.S. there have been hundreds of "failure to disclose" convictions and they have gotten the bulk of media and community attention. But HIV criminalization is more than just "failure to disclose" prosecutions. It also includes prosecutions for non-sexual behaviors. Spitting poses no risk of HIV transmission, yet just in the past two years, there have been at least 13 criminal prosecutions of people with HIV in the U.S. for alleged spitting, and at least another 10 for biting. None of these incidents resulted in documented cases of HIV transmission; all of them produced serious consequences for those who were prosecuted.

Criminalization is also reflected in exceedingly harsh prosecution decisions or "enhanced" sentencing of persons with HIV charged with other crimes. In 2009, for example, a woman with

HIV in Maine who was eligible for release from a federal prison was sentenced to continued confinement when the judge learned that she was HIV positive and pregnant. The judge in her immigration case sought to "protect" the fetus from infection by extending her incarceration for the length of her pregnancy. Although legal advocates (including the Center for HIV Law and Policy) secured her release shortly thereafter, the inclination of a federal judge to confine a woman with HIV to prison, despite testimony that she had a doctor and was engaged in prenatal care, reveals ignorance and an inclination to criminalize HIV infection that reaches even the most educated and privileged members of our society.

HIV Criminalization is Bad Public Health Policy

HIV criminalization statutes are terrible public health policy because they discourage persons at risk from getting tested. Yet those with HIV who are aware of their HIV positive status appear to be more careful in their sexual behaviors than those who are unaware they have HIV; testing is a basic tool of HIV prevention as well as an essential gateway to care.

Criminalization statutes also make it more difficult for persons with HIV to disclose their HIV status with any sense of safety. Those who know they have HIV already suffer significant discrimination and stigma. Disclosing one's HIV status can be emotionally difficult, risking rejection from family and friends, sometimes with great insult or abuse, and often puts at risk one's employment, housing, relationships or personal safety. Criminalization ignores the complexity of many intimate relationships; the continuing stigma attached to gay and bisexual identities further complicates the issue of disclosure.

Criminalization of HIV also discourages responsible individual behavior in preventing the transmission of STIs, limiting criminal liability only to the knowledge of HIV infection and ignoring the need to reinforce conduct which stems the transmission of all STIs – such as HPV – which have life-threatening consequences (such as cervical cancer), which pose additional health risks to those who are HIV positive, or which may surface in the future as a public health threat.

Finally, criminalization of HIV legitimizes the ignorance, homophobia and racism that fuels inflated fears of HIV and those who have HIV. It undermines efforts to prevent new HIV infections and provide access to care in multiple ways:

- Ignorance of one's HIV status is the best defense against a "failure to disclose" prosecution; a powerful disincentive to getting tested.
- Young African American men who have sex with men are among the most challenging groups to get tested. The prospect of prosecution for failing to disclose--especially since these prosecutions often boil down to a "he said, he said" or "he said, she said" situation--is a powerful disincentive to testing.
- Most new infections are caused by sexual contact with persons who have not been tested and are unaware that they have HIV, yet only those who have taken the test are subject to prosecution.

- Prosecuting the failure to disclose one's HIV status undercuts the most basic HIV prevention message: that in the 21st century, every person must take responsibility for protecting herself/himself from HIV and other sexually-transmitted infections.

POSITIVE JUSTICE PROJECT: A New Strategic Approach

We believe that success in reducing and ending reliance on criminal laws to single out and stigmatize people with HIV, educating courts, prosecutors, media and, ultimately, in lessening stigma and discrimination, begins with a focus on the very real and serious public health ramifications of HIV criminalization. This is no way involves abandonment of civil liberties principles, but rather broadens the focus of advocacy to the public health consequences of ignoring individual rights.

A multi-pronged and collaborative plan is needed to address HIV criminalization, including a focused cross-disciplinary conversation about reconsidering the way we conceptualize and talk about HIV and transmission risk.

Goals of the **Center for HIV Law and Policy's Positive Justice Project** include:

- Broader public understanding of the stigmatizing impact and other negative public health consequences of criminalization and other forms of discrimination against people with HIV that occur under the guise of addressing HIV transmission.
- Community consensus on the appropriate use of criminal and civil law in the context of the HIV epidemic.
- Clear statements from lead government officials on the causes and relative risks of HIV transmission and the dangers of a criminal enforcement response to HIV exposure and the epidemic.
- A broader, more effective community-level response to the ongoing problem of HIV-related arrests and prosecutions.
- Elimination of the inappropriate use of criminal and civil punishments against people with HIV.