October 21, 2016

The General Assembly of the State of Ohio
Criminal Justice Recodification Committee
One Capitol Square
Columbus, OH 43215

Re: Proposed Revisions to Ohio's HIV Transmission/Exposure Statute
Felonious Assault, Ohio Rev. Code Ann. §2903.11

Dear Members of the Criminal Justice Recodification Committee:

We are writing as, and on behalf of, Ohio-based organizations and health care professionals who work with people living with HIV/AIDS ("PLWH"), provide social, medical, and advocacy services for those facing discrimination due to sexual orientation, gender identity, and HIV status, as well as individuals affected by HIV, to comment on the proposed revision to Ohio's HIV transmission/exposure statute, as set forth by the Ohio Assembly's legislative services office in the draft of §2907.10.

We commend the Committee's efforts to incorporate some important modifications to the law. The Committee has eliminated HIV-specific provisions from the crimes of solicitation, loitering to engage in solicitation, and prostitution. Other proposed changes that establish different levels of culpability and reduce the severity of punishment demonstrate that the Committee recognizes some of the very real problems with the current law.

However, as we explain below, the remaining provisions of the proposed bill retain an unsupportable, stigmatizing focus on the consensual sex and intimate relationships of people diagnosed with HIV as "dangerous sexual conduct" meriting severe felony penalties without evidence of intent to do harm, let alone to transmit HIV. This is not only at odds with modern-day understanding of the risks and consequences of HIV transmission, but with nearly every professional HIV medical, social service, legal and public health organization in the United States.[1]

[1] CHLP, *Collection of Statements from Leading Organizations Urging an End to the Criminalization of HIV and Other Diseases* (2014), *available at* http://hivlawandpolicy.org/resources/collection-statements-leading-organizations-urging-end-criminalization-hiv-and-other (including the National Association of Criminal Defense Lawyers, Association of Nurses in AIDS Care, the HIV Medical Association, the American Psychological Association, the US Conference of Mayors, the National Association of County and City Health Officials, and others). Positive Justice

As an initial matter, Ohio's existing public health code squarely deals with the harm that proposed §2907.10 is intended to address. §3701.81 of the public health code penalizes a defendant's failure to take reasonable measures to prevent exposing others to HIV and other infectious diseases with a second-degree misdemeanor.[2] In contrast to what the Committee has proposed, these existing public health provisions treat like risks alike and do not arbitrarily single out HIV for punishment – any serious communicable disease requires a person to take reasonable precautions to prevent exposure to others.

We believe that this approach is more consistent with modern science on the routes and risks of HIV transmission, the rights of people living with HIV and other disabilities, and the fundamental aim of advancing the public's health. We therefore strongly urge the Recodification Committee to call for the repeal of the HIV-specific felony provisions under current law and rely on existing public health provisions (§3701.81), with some modifications to bring them into line with modern concepts of due process and intentionality,[3] to address concerns about communicable disease exposure and transmission, including HIV. A draft of how modifications to current public health code provisions might accomplish this is included in Appendix A of this letter.

Addressing HIV separately in the criminal code reflects an indefensible and irrational form of HIV exceptionalism. Today, HIV is a highly treatable disease – a 20-year old HIV-positive adult on treatment in the United States is expected to live into their 70s.[4] The Centers for Disease Control, reasoning that HIV should be treated the same as other chronic diseases, recommends opt-out HIV screening as a component of the routine services that all of us receive as part of our healthcare.[5] The fear, stigma, and misinformation that remain the foundation of HIV-specific criminal laws operate at confusing cross-purposes with the progress and related policies we have made on treatment, prevention and quality of life for people living with HIV.

Project, *Consensus Statement on the Criminalization of HIV in the United States* (2012)(more than one thousand signatories), *available at* http://www.hivlawandpolicy.org/resources/positive-justice-project-consensus-statement-criminalization-hiv-united-states-positive; In 2010, the Obama Administration also released a National HIV/AIDS Strategy , calling upon state legislatures to "consider reviewing HIV-specific criminal statutes to ensure that they are consistent with current knowledge on HIV transmission and support public health approaches to preventing and treating HIV." *See* White House Office of National AIDS Policy *National HIV/AIDS Strategy for the United States* 37 (2010), *available at* https://www.whitehouse.gov/sites/default/files/uploads/NHAS.pdf

[2] RC § 3701.81 requires that "[n]o person, knowing or having reasonable cause to believe he is suffering from a dangerous, contagious disease, shall knowingly fail to take reasonable measures to prevent exposing himself to other persons, except when seeking medical aid." The penalty for violation is specified in ORC Ann. 3701.99

[3] Specific recommendations for code amendments that would achieve this are included in Appendix A to this letter.

[4] Hasina Samji et al., *Closing the Gap: Increases in Life Expectancy among Treated HIV-Positive Individuals in the United States and Canada*, 8 PLoS One e81355 (2013).

[5] Centers for Disease Control and Prevention, *Revised Recommendations for HIV Testing of Adults, Adolescents, and Pregnant Women in Health-Care Settings* 49 Annals of Emergency Med. 575 (2007).

The Ohio Department of Health strives to promote increased HIV testing and access to care,[6] yet the continued criminalization of HIV non-disclosure is directly at odds with the legitimate government interest of reducing stigma that discourages those at risk of HIV infection from getting tested and, as appropriate, from obtaining essential treatment. The law in fact creates a direct disincentive to being tested, since only persons who have taken an HIV test and been diagnosed with HIV must prove that they have disclosed their health status to avoid criminal liability.

One who avoids testing and thus remains ignorant of his or her status cannot be prosecuted but also cannot be treated. Diagnosis and early treatment of an individual benefit that person and their community – treatment as prevention helps limit onward transmission of HIV, but it can only be fully realized when individuals feel empowered and able to access testing and treatment. For this reason, the President's Advisory Council on HIV/AIDS (PACHA), similar to the positions taken by numerous medical, mental and public health associations on the issue, has called for the repeal of HIV-specific laws "which may discourage HIV testing."[7] Moreover, there is no evidence that criminal laws like that proposed by §2907.10 help to reduce the rate of HIV infection[8] or even promote disclosure of HIV status prior to sex.[9] These laws also do not foster behavior that further reduces an already low risk of transmission, such as condom use.[10]

We also believe that the proposed statute, like the previous felonious assault statute, violates the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act, which prohibit discrimination on the basis of disability. The law singles out people

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[6] Ohio Department of Health, *HIV/STD Prevention Program* (2015), *available at* https://www.odh.ohio.gov/en/odhprograms/bid/hivstd/hivstd1

[7] Presidential Advisory Council on HIV/AIDS (PACHA), *Resolution on Ending Federal and State HIV-Specific Criminal Laws* (2014)(calling for repeal of HIV-specific criminal laws because they "may discourage HIV testing"), *available at* http://hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/PACHA_Criminalization_Resolution%20Final%20012513.pdf

[8] *See, e.g.,* UNAIDS, *Criminalization of HIV Transmission* (2008), *available at* http://www.unaids.org/sites/default/files/media_asset/jc1601_policy_brief_criminalization_long_en.pdf. ("There is no data demonstrating that the threat of criminal sanctions significantly changes or deters the complex sexual and drug-using behaviours which may result in HIV transmission); *See also* Kim Buchanan, *When Is HIV a Crime? Sexuality, Gender and Consent*, 99 Minn. L.Rev. 1231, 1247 (2015) (discussing empirical studies showing failure of HIV-specific criminal laws to reduce the rate of HIV transmission).

[9] *See* Carol L. Galletly, et al., *New Jersey's HIV Exposure Law and the HIV-Related Attitudes, Beliefs, and Sexual Seropositive Status Disclosure Behaviors of Persons Living with HIV*, 102 Am. J. Pub. Health 2135, 2139 (2012)("awareness that New Jersey has an HIV exposure law had little if any effect on the disclosure of [people living with HIV and AIDS]"); Carol Galletly, *et al.*, *A Quantitative Study of Michigan's Criminal HIV Exposure Law*, 24 AIDS Care 174, 178 (2012)(describing the same lack of an effect in Michigan).

[10] See Scott Burris, et al., *Do Criminal Laws Influence HIV Risk Behavior" An Empirical Trial*, 39 Ariz. St. L. J. 467 (2007)(comparing self-reported behavior of people living with HIV and AIDS and those at risk of infection in Illinois and New York, states with and without HIV-specific criminal laws, respectively, and finding no difference in condom use).

living with HIV for discriminatory and onerous punishment in response to conduct that is otherwise completely legal – and it does so without the support of scientific evidence on basic routes and risks of HIV transmission, and despite evidence that it does nothing to advance any conceivable public health purpose.[11]

We have closely reviewed the proposed statute and believe that, barring adoption of our recommendation above, there are additional significant revisions that must be made. These revisions would align the statute more closely with Ohio HIV care and prevention policy, and with the Committee's purpose of reforming portions of the criminal code to eliminate strict liability for certain proscribed conduct and require evidence of intent to do harm as a predicate for criminal liability.

We stress that in our view it is duplicative and senseless to address the transmission of communicable disease in the criminal code when there are already provisions in the public health code governing precisely this issue. Doing so creates a two-tiered system in which different branches of government may function in conflict over the conduct of a single individual. Finally, it bears noting that a person alleging that someone else has intentionally or negligently infected him or her with a serious communicable disease is not barred from pursuing an action in tort.[12]

Our proposed changes to 2907.10 target sections of the draft statute that fail to reflect current, well-established scientific and medical evidence, fail to reflect degrees of culpability and proportional punishment, and that infer criminal intent from purposeful engagement in otherwise legal conduct – all relevant to essential criminal law principles.

Our concerns are explained in more detail below; specific proposed modifications are included in Appendix B to this letter.

1. There is an overall problem with the proposed statute because it contains and uses the terms "sexual activity," "sexual conduct," and "sexual contact" throughout the statute in a confusing and unscientific manner. The indiscriminate use of these terms penalizes sexual activity that poses no chance of transmission. As the Committee is

[11] *Id.*, *see also* Dini Harsono, et al., *Criminalization of HIV Exposure: A Review of Empirical Studies in the United States*, 10 AIDS Behav. __ (2016)(A review of HIV criminalization studies from 1990-2014 suggests laws do not affect risk-taking or HIV disclosure, while arrest and prosecution records reveal many cases target behavior unrelated to the spread of HIV, i.e., the cases either don't involve sex or involve sex with little or no HIV transmission risk)

[12] The Supreme Court of Ohio has interpreted §3701.81(A) to impose a standard of due care that would be exercised by a reasonably prudent person under the circumstances, depending in part on the type of disease and how it is transmitted. It has specifically interpreted §3701.81(A) as applying to venereal disease. Mussivand v. David, 45 Ohio St. 3d 314, 320 (Ohio 1989). As defined in Ohio's Administrative Code, "Sexually Transmitted Disease" and Venereal Disease" are under a single heading and are defined as "an infectious disease commonly contracted through sexual contact such as chancroid, chlamydia, gonococcal infection, granuloma inguinale, human immunodeficiency virus, lymphogranuloma venereum, or syphilis.

aware, "sexual activity" includes both "sexual contact," and "sexual conduct." §2907.01(C). "Sexual contact" is defined as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying another person." §2907.01(B). Inclusion of "sexual contact" by itself, or as part of "sexual activity," is both nonsensical and unscientific. Mere touching of another person does not transmit HIV.[13] The legislature recognized this scientific fact in drafting the previous felonious assault statute, which prohibited "sexual conduct," but not "sexual activity" or "sexual contact."

As the Committee is aware, there is some sexual conduct, as currently defined in §2907.01(A), that carries a non-existent or extremely low risk of transmission.[14] The Centers for Disease Control and Prevention notes, "[i]n general, there's little to no risk of getting HIV from oral sex" ."[15]

To account for these transmission variables and to reflect current scientific knowledge, "sexual conduct" should be replaced with the term "conduct posing a strong possibility of transmission" for the purposes of Section 2907.10.

The proposed draft language of §2907.10(A) aims to penalize the intentional and nonconsensual transmission of disease. To preserve that aim, but to limit applicability only to those situations where conduct would facilitate such intent, this section should be modified. Additionally, the penalty for a violation of (A) should reflect that HIV is now a chronic, manageable condition, and that there is no rational basis for a discriminatory, HIV-specific criminal statute. Finally, the use of the term "carrier" should be removed, as it is archaic and pejorative.

2. Section 2907.10(B) imposes an unjustifiably severe penalty – a second-degree felony – for HIV transmission in the absence of a person's specific intent to transmit HIV. The U.S. Department of Justice recommends that criminal penalties be eliminated unless "the evidence clearly demonstrates that the individual's intent was to transmit

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[13] Centers for Disease Control and Prevention. *HIV Transmission.* (2016), *available at* http://www.cdc.gov/hiv/basics/transmission.html (HIV isn't transmitted by contact such as hugging or shaking hands. Only certain body fluids, including blood, semen, pre-seminal fluids, rectal fluids, vaginal fluids, and breast milk from an HIV-infected person can transmit HIV).

[14] §2907.01(A) defines "sexual conduct" as vaginal intercourse between a male and a female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

[15] "Transmission of HIV [orally], though extremely rare, is theoretically possible if an HIV-positive man ejaculates in his partner's mouth during oral sex." The CDC defines oral sex as ". . . putting the mouth on the penis (fellatio), vagina (cunnilingus), or anus (rimming)." Centers for Disease Control and Prevention, *HIV Transmission* (2016), *available at* http://www.cdc.gov/actagainstaids/basics/transmission.html.

the virus and that the behavior engaged in had a significant risk of transmission . . ." [16] Similarly, §2907.10(C) imposes a first-degree misdemeanor in the absence of specific intent to harm *or* transmission. Where specific intent to transmit HIV is lacking and the defendant's sole intent was to engage in otherwise legal sexual conduct, there should be no offense. These sections should be removed from §2907.10. An additional reason for removing these sections is to achieve the Committee's mission of "efficient use of resources." Thus, incarceration should be preserved solely for (A). Also refer to the above analysis regarding the stigmatizing impact of discriminatory, HIV-specific criminal laws that violate the ADA and fail to advance any conceivable public health purpose. It is our position that no specific disease or condition should be singled out for criminal punishment.

3. The Recodification Committee appropriately recognized the importance of codifying a defendant's efforts to reduce the risks of disease transmission. Additional clarification is necessary to include all potential means of reducing or eliminating the risk of disease transmission, and to ensure that prophylaxis is not the only risk reduction measure recognized within the statute.

Thank you for allowing us to comment on the current draft of §2907.10. If the Committee has any questions, please contact us. We welcome the opportunity for discussion. Please contact Lauren Fanning, PJP Senior Community Outreach Specialist, at (253) 820-0463 or lfanning@hivlawandpolicy.org for for additional information.

Very truly yours,

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[16] U.S. Department of Justice, Civil Rights Division. *Best Practices Guide to Reform HIV-Specific Criminal Laws to Align with Scientifically-Supported Factors* (2014), *available at* https://www.aids.gov/federal-resources/national-hiv-aids-strategy/doj-hiv-criminal-law-best-practices-guide.pdf.

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APPENDIX A

In order to conform the treatment of HIV with the treatment of other serious infectious diseases without creating new crimes for other health conditions, we propose the following amendment to the current public health code provisions contained in RC § 3701.81:

"No person, ~~knowing or having reasonable cause to believe~~ with knowledge that he is suffering from a dangerous, contagious disease, shall ~~knowingly~~ intentionally ~~fail to take reasonable measures to prevent exposing~~ transmit that disease to other persons." ~~except when seeking medical aid."~~

The penalty for violation is specified in RC § 3701.99

As currently drafted, §3701.81 is imprecise, overly broad and punishes mere exposure without evidence of any intent to do harm or actual harm occurring. Introducing requirements for actual intent and transmission calls for a more rigorous individualized assessment of the behavior, mental state, and circumstances of individuals impacted by §3701.81. These changes are more consistent with modern principles of due process, proportionality, and fundamental fairness.

APPENDIX B

. The numbered recommendations below correspond to the above analysis of the Committee's proposed Section 2907.10

1. As used in Section 2907.10 "conduct posing a strong possibility of transmission" shall mean a strong possibility of disease transmission as established by competent current medical or epidemiological evidence. Conduct posing a low or negligible risk of transmission as established by competent current medical or epidemiological evidence does not meet the definition of conduct posing a strong possibility of transmission.

2. §2907.10(A) should be simplified and amended as follows:

   - [a]ny person, with knowledge that the person has a serious infectious or communicable disease, who purposely acts to transmit that disease, and purposely engages in conduct that poses a strong possibility of transmission, and transmits that disease to that other person, without that person's consent, is guilty of a first-degree misdemeanor.

   - For the purposes of §2907.10, a "serious infectious or communicable disease" means a non-airborne disease spread from person to person that is fatal or causes disabling long-term consequences in the absence of lifelong treatment and management.

   - Nothing in this section shall be construed to expand the scope of offenses or diseases currently described by §3701.81, or to enhance or increase the penalties for persons with infectious, communicable or sexually transmitted diseases as described under §3701.81.

3. The following subsections should be added to the current proposal:

   "[e]vidence relevant to a determination of whether conduct poses a strong possibility of transmission shall be assessed on a case-by-case basis.

   "[e]vidence that a person with a serious infectious or communicable disease has not taken measures to decrease the risk of transmission is not sufficient to establish conduct that poses a strong possibility of transmission or that the person acted with the purpose of achieving transmission.."

"[e]vidence that a person with a serious infectious or communicable disease has taken or tried to take measures to decrease the risk of transmission shall demonstrate that the person acted without the purpose of transmitting that disease."

The following is a revised §2907.10 that incorporates our proposed recommendations:

Sec. 2907.10. (A) Any person, with knowledge that the person has a serious infectious or communicable disease, who purposely acts to transmit that disease, and purposely engages in conduct that poses a strong possibility of transmission, and transmits that disease to that other person, without that person's consent, is guilty of a first-degree misdemeanor.

(1) As used in this section, "serious infectious or communicable disease" means a non-airborne disease spread from person to person that is fatal or causes disabling long-term consequences in the absence of lifelong treatment and management.

(2) As used in this section "conduct posing a strong possibility of transmission" shall mean a strong possibility of disease transmission as established by competent current medical or epidemiological evidence. Conduct posing a low or negligible risk of transmission as established by competent current medical or epidemiological evidence does not meet the definition of conduct posing a strong possibility of transmission.

(3) Evidence relevant to a determination of whether conduct poses a strong possibility of transmission shall be assessed on a case-by-case basis.

(4) Evidence that a person with a serious infectious or communicable disease has not taken measures to decrease the risk of transmission is not sufficient to establish conduct that poses a strong possibility of transmission or that the person acted with the purpose of achieving transmission.

(5) Evidence that a person with a serious infectious or communicable disease has taken or tried to take measures to decrease the risk of transmission shall demonstrate that the person acted without the purpose of transmitting that disease.

(6) Notwithstanding R.C. 2923.01, 2923.02 and 2923.03, no person shall be found guilty of conspiracy, complicity, or attempt to commit a violation of division (A) without actual transmission of disease occurring.

(7) *Nothing in this section shall be construed to expand the scope of offenses or diseases currently described by §3701.81, or to enhance or increase the penalties for persons with infectious, communicable or sexually transmitted diseases as described under §3701.81*