



# ALL PAIN, NO GAIN

HIV Criminalization in Pennsylvania

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*All Pain, No Gain: HIV Criminalization in Pennsylvania* is the collective effort of many organizations and individuals:

**AIDS Law Project of Pennsylvania**

Malissa L. Durham  
Ronda B. Goldfein  
Teagan Kuruna  
Messapotamia Lefae  
Yolanda French Lollis  
Adrian M. Lowe

**SERO Project**

Tami Haught  
Sean Strub

**Positive Women’s Network – USA Philadelphia Regional Chapter**

LaDonna Boyens  
Julie Graham  
Andrea Johnson  
Suzanne Miller  
Susan Mull  
Waheedah Shabazz-El  
Teresa Sullivan

Tre Alexander  
Greg Gabrellas  
Lawrence S. Krasner  
Andres Montaner  
Christopher Roebuck  
Michael Seidman

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# All Pain, No Gain: HIV Criminalization in Pennsylvania

This report has the broad support of many organizations and individuals.

ActionAIDS

AIDS Law Project of Pennsylvania

SERO Project

Positive Women's Network – USA Philadelphia Regional Chapter

Michael Witmer, LCSW

Mike Ippoliti

American Civil Liberties Union of Pennsylvania

Professor Luis J. Montaner, PhD., The Wistar Institute, Philadelphia, PA

Philadelphia FIGHT

(list in formation)

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*All Pain, No Gain – HIV Criminalization in Pennsylvania.*

# All Pain, No Gain: HIV Criminalization in Pennsylvania

## INTRODUCTION

More than 34 states have an HIV-specific criminal law mandating disclosure of one's HIV positive status prior to engaging in intimate sexual contact. Pennsylvania does not have this type of law. Instead, Pennsylvania uses generally applicable laws to charge people living with HIV for conduct that would not be criminal, except for their HIV status. Prisoners and sex workers living with HIV face more serious charges than an HIV-negative person would for the same offense.

Criminalizing sexual behavior based on HIV status “exacerbates the stigma and discrimination experienced by these individuals, which may result in increased HIV transmission and acquisition risks and contribute to decreased access to and utilization of HIV services.”<sup>1</sup> Furthermore, if convicted, a person living with HIV may face prison time and its associated consequences of reduced employability, social isolation, and psychological distress.<sup>2</sup>

HIV Criminalization conflicts with the current scientific understanding of HIV transmission risks, treating activities that carry negligible risk of HIV transmission as though they were high-risk.

HIV Criminalization undermines efforts to encourage HIV testing and retain people living with HIV in care, and creates distrust of public health officials and programs. Fear of HIV Criminalization may discourage people with HIV from cooperating with traditional sexually transmitted infections (STI) prevention measures, like partner notification and treatment-adherence programs.

Preferred alternatives to initiating criminal proceedings and possible incarceration are restorative justice processes, diversionary programs or civil law suits. These alternatives can be used to provide relief to a person who feels harmed because they think they may have been exposed to or infected by HIV.

## SECTION 1: THE SCIENCE

Criminal laws must be grounded in science, rather than outdated assumptions, stigma and fear. In the more than three decades since HIV was first identified, scientific knowledge about the modes, risks, and consequences of HIV transmission has advanced considerably. Contemporary HIV antiretroviral treatment can successfully reduce the amount of virus in a person's blood (viral load) to levels undetectable by available technology. This is a significant development, as not one incident of sexual transmission of HIV from a person whose viral load was undetectable at the time of the sexual contact has been documented.<sup>3</sup>

HIV can only be transmitted three ways: 1) blood and blood products, 2) intimate sexual contact (mucosal contact including penile-vaginal contact, penile-anal contact and rarely, if ever, oral sex), or 3) vertical transmission (mother-to-child) during pregnancy, delivery or breast-feeding.<sup>4</sup> According to the CDC, risk, if any, of HIV transmission through biting, spitting, throwing fluids or sharing sex toys is negligible.

### **What is HIV Criminalization?**

*HIV Criminalization is the use of one's HIV positive status in a criminal prosecution, either under HIV-specific criminal statutes that apply only to people living with HIV, or under general criminal statutes where charges or punishments are initiated or heightened solely because of the person's HIV positive status.*

## Actual Risk of HIV Transmission

Not all perceived or potential exposure to HIV presents the same risk of viral transmission. To fully assess the risks of sexual contact, the CDC has created a risk factor tool that allows the user to customize the specific risk of transmission based on gender, HIV status, partner demographics and sexual activity.<sup>5</sup> The risk of transmission from any form of sexual intercourse may be drastically reduced or eliminated by employing risk reduction strategies, such as antiretroviral treatment of the HIV-positive partner; consistent, correct condom use; pre-exposure prophylaxis for the HIV-negative partner; post-exposure prophylaxis in circumstances in which exposure may have occurred; behavior change to lower risk activities; or a combination of these strategies.<sup>6</sup>

## HIV Treatment and Prevention Using Antiretroviral Therapy

The ultimate goal of antiretroviral therapy (ART) is to reduce an individual's viral load to undetectable levels—when an individual's viral load is effectively suppressed, transmission becomes as close to impossible as can be measured, as evidenced by the most recent research.<sup>7,8</sup> The World Health Organization strongly recommends that individuals with HIV begin ART as soon as possible, as its consistent use improves an individual's overall health by reducing their viral load, thereby decreasing the likelihood of transmitting HIV.<sup>9</sup> Two major randomized controlled trials are among the studies supporting these clinical guidelines.<sup>a</sup>

## HIV Prevention Using Other Methods

In addition to ART, HIV transmission can be prevented in other ways. Consistent, correct condom use<sup>b</sup> has an up to 80% effectiveness rate in preventing HIV transmission among MSM.<sup>10,11,12</sup> Pre-exposure prophylaxis<sup>c</sup> (PrEP)<sup>13</sup> and post-exposure prophylaxis<sup>d</sup> (PEP)<sup>14</sup> are also options to reduce the risk of HIV transmission.

## SECTION 2: THE LAW

HIV-specific criminal laws and the use of general criminal laws to initiate or enhance charges against people living with HIV originated in the 1990 Ryan White Comprehensive AIDS Resources Emergency Act. In a misguided attempt to prevent HIV transmission, this federal Act, which provides funding for HIV treatment and prevention, initially required states to demonstrate that they could prosecute people

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<sup>a</sup> Published in 2011, the **HIV Prevention Trial Network (HPTN) 052 study** showed early initiation of ART led to a 93% reduction in sexually transmitted HIV infection among mixed HIV-status heterosexual couples. These results suggest that sexual transmission may be greatly reduced if the partner with HIV maintains a suppressed viral load through continued use of ART. While the HPTN 052 trial observed the effects of ART on HIV transmission rates only among heterosexual couples, the **PARTNER study**, published in 2014, examined both serodiscordant men who have sex with men (MSM) and heterosexual couples in which the infected partner's viral load had been suppressed through ART. In over 44,400 occasions of condom-less penetrative sex, no HIV transmissions were recorded, leading the researchers to conclude that when the infected partner is on ART and has a suppressed viral load, the risk of transmission is nearly zero.

<sup>b</sup> A meta-review of efficacy studies among heterosexual couples (endnote 10) determined that the best estimate of the risk reduction of sexually transmitted HIV through consistent and correct condom use is up to 80%. However, there is some debate about condom efficacy for this purpose. The reduction in risk may range from 35% to 94% (endnote 11). The wide variation in risk reduction is due to small sample sizes. From the cited source (endnote 12): "The wide range of values is explained by the small numbers of people (863) and HIV infections (51) in the studies. Concurrent use of other measures could also contribute to this variation."

<sup>c</sup> Pre-exposure prophylaxis (PrEP) is a single pill containing two drugs that, when taken diligently, reduce risk of infection in an HIV-negative individual who is at substantial risk of HIV infection. PrEP may reduce the risk of acquiring HIV through sexual transmission by up to 73% when medication adherence is greater than or equal to 90%.

<sup>d</sup> Post-exposure prophylaxis (PEP) is a 28-day regime of antiretroviral drugs administered to an HIV-negative individual within 72 hours of a potential exposure to HIV<sup>d</sup>. Studies show that PEP may help protect against HIV infection, though no placebo-controlled trials have been conducted to determine PEP's efficacy.

living with HIV who “intentionally exposed” another person to HIV.<sup>15</sup> Pennsylvania does not have HIV-specific criminal laws mandating disclosure of one’s HIV positive status prior to engaging in intimate sexual contact. Nor does it specifically outlaw the perceived, potential or actual HIV exposure or transmission. Instead, Pennsylvania uses generally applicable criminal laws to prosecute people with HIV even when the act in question has little or no risk of transmitting HIV. Other crimes may be charged depending on the specific allegations. Pennsylvania does, however, have HIV-specific sentencing enhancements for prisoners and sex workers.

### **General Criminal Laws Used to Prosecute People with HIV**

#### *Reckless Endangerment*

Reckless Endangerment is conduct that places or may place another person in danger of death or serious bodily injury.<sup>16</sup> In *Commonwealth v. Cordoba*, the leading Pennsylvania case on HIV Criminalization, a man was charged with Reckless Endangerment for failing to disclose his HIV status to his sexual partner.<sup>17</sup> They engaged in oral sex with ejaculation on the face and chest. The complaining party stated that they did not exchange semen, nor did he see cuts or open sores on the defendant’s body. Although oral sex and the ejaculation on the chest or face present a negligible risk, if any, of transmitting HIV and the complaining party did not become infected, the Superior Court sustained the charge of Reckless Endangerment. The court ruled that the charge is supported because there “may have been the possibility or risk of harm, regardless of the likelihood of that harm.” The case was eventually dismissed when the complaining witness failed to testify.<sup>18</sup>

In *Cordoba*, the Court ruled that a particular sexual activity was deemed by the Court is possibly harmful, despite the fact that it carried, at most, only a negligible risk for HIV transmission. A person living with HIV may assert as a defense to a charge of Reckless Endangerment, that they disclosed their HIV status prior to a consensual sexual activity. Proving that the person disclosed their status, however, may be difficult.

#### *Aggravated Assault*

Aggravated Assault is causing or attempting “to cause serious bodily injury to another”<sup>19</sup> and is a first-degree felony carrying up to a 20-year incarceration sentence.<sup>20</sup> In contrast, Simple Assault is generally a second-degree misdemeanor carrying a two-year maximum.<sup>21</sup>

A few Pennsylvania cases in the 1990s led to conviction for Aggravated Assault because of the defendant’s HIV-positive status. The assaults in question involved biting<sup>22</sup> and throwing feces,<sup>23</sup> acts which according to the CDC pose negligible risk, and therefore cannot be considered to “cause serious bodily injury” consistent with the statute. It was only the HIV status of the defendants that made the assaults “serious,” despite the fact that no one was infected and there was only a negligible, if any, risk of transmission.

If the criminal charges had been based on the actual risk of harm, the acts would constitute simple assaults, and the defendants would have been charged only with a second-degree misdemeanor. Again,

#### ***Julie Graham’s Story***

*In December 2013, Julie Graham was charged in Lebanon County, PA with charged with Sexual Assault, Aggravated Assault, Reckless Endangerment and Simple Assault, two of which are felonies. The charges were based on allegations, brought by a man she had dated, that she had not disclosed her HIV status. The man who made the complaint against her did not contract HIV, and in fact transmission was impossible or virtually impossible because of the type of sexual activity in which they engaged and because she had an undetectable viral load. As a result of vigorous representation by her criminal defense lawyer Lawrence S. Krasner and the AIDS Law Project of Pennsylvania’s meeting with the prosecutor to discuss general concerns about HIV Criminalization, all the charges but one misdemeanor were dropped. For the remaining charge, she was offered a diversion program that will enable her to eventually have the charge expunged.*

these cases are instances in which the fear of HIV trumps the actual scientific understanding of how HIV is passed from person to person. As a result, defendants faced much harsher criminal penalties than the facts warranted.

Pennsylvanians with HIV have also been charged with Aggravated Assault under the deadly weapons section of this statute, which makes it a second-degree felony to cause or attempt to cause “injury to another with a deadly weapon.”<sup>24</sup> In these cases, prosecutors have argued that the bodily fluids of the person with HIV are a deadly weapon.

#### *Terroristic Threats*

A Terroristic Threat involves directly or indirectly communicating intent to commit violence “with intent to terrorize another” person<sup>25</sup> and is a first-degree misdemeanor<sup>26</sup> carrying a maximum five-year imprisonment sentence.<sup>27</sup>

In a 2004 case, *Commonwealth v. Walker*, a man with HIV was convicted of making Terroristic Threats when he scratched a police officer and told the officer he had open cuts on his hands and allegedly said, “I’m taking you with me.”<sup>28</sup> The defendant was convicted of Terroristic Threats, rather than Simple Assault because of his HIV-positive status.

#### *Sexual Assault*

Sexual Assault is “sexual intercourse ...with a complainant without the complainant’s consent”<sup>29</sup> and is a second-degree felony carrying a maximum ten-year imprisonment sentence.<sup>30</sup>

In 2014, a woman with HIV was charged with Sexual Assault and other crimes after a man she dated accused her of not disclosing her HIV status after consensual sexual activity. The woman’s viral load was undetectable and the man did not contract HIV. The Sexual Assault charge eventually was withdrawn.

#### *Simple Assault*

Pennsylvanians with HIV have also been charged with Simple Assault<sup>31</sup> for not disclosing HIV status to sexual partners, for spitting, and for needle-sticks during arrest. Simple Assault involves “intentionally, knowingly, or recklessly, caus[ing] bodily injury on another,” “negligently caus[ing] bodily injury ... with a deadly weapon,” “attempt[ing] ... to put another in fear of imminent serious bodily injury,” or knowingly concealing a syringe that penetrates a law enforcement officer or correctional employee during an arrest or a search.

#### ***Sentence Enhancements for Prisoners and Sex Workers***

##### *Assault by Prisoner*

*If a prisoner who is living with HIV (or another infectious disease) intentionally or knowingly exposes another person to his or her bodily fluids “by throwing, tossing, spitting or expelling,”<sup>32</sup> the HIV-positive person can face an additional sentence of up to ten years.<sup>33</sup> If this assault was committed against a correctional facility employee, the sentence must be served consecutively with the person’s current sentence.<sup>34</sup> Likelihood of actual transmission is not a defense to a charge of assault by prisoner.*

##### *Prostitution while HIV-positive*

*Prostitution-related offenses are misdemeanors, unless one of the parties knows or “should have known” that they are HIV-positive,<sup>35</sup> in which case the offense is a felony carrying a maximum sentence of seven years.<sup>36</sup> HIV transmission is not required for prosecution under this statute, nor does this statute differentiate between sexual acts that carry a risk of HIV transmission and those that do not. As such, proof of condom use or disclosure may be irrelevant. Note that these laws also apply to sex work customers and “promoters.”*

## SECTION 3: THE PUBLIC'S HEALTH

Using the criminal law to create or increase the severity of charges against people with HIV is woefully misguided and inconsistent with effective public health practice. The goal of public health initiatives is to “to prevent disease, promote health, and prolong life” at the community level by assessing and monitoring of community health status, implementing public health policies, and providing access to prevention and treatment for health conditions.<sup>37</sup> While many of these statutes may have been passed with the intention of reducing HIV transmission, no evidence exists to show that transmission has been reduced.

In fact, criminalization may exacerbate instead of reducing HIV transmission because it places the entire burden on the person living with HIV to disclose their status and adjust their sexual activity accordingly. Exempting the negative partner of any personal responsibility for the encounter is inconsistent with the public health message that HIV prevention is a shared obligation.

The 2010 National HIV/AIDS Strategy for the United States encourages lawmakers to rethink HIV Criminalization because it has no scientific basis and undermines public health.<sup>38</sup> Instead, these laws increase HIV stigma, create a deterrent for testing, treatment, and retention in care; and conflicts with best public health practices.

Support for reform of HIV Criminalization statutes has also come from a varied range of respected sources, including United States Department of Justice and the Centers for Disease Control and Prevention’s joint recommendation;<sup>39</sup> the Presidential Advisory Council on HIV/AIDS;<sup>40</sup> the American Medical Association;<sup>41</sup> the American Nursing Association;<sup>42</sup> the American Psychological Association;<sup>43</sup> U.S. Conference of Mayors;<sup>44</sup> and the Infectious Diseases Society of America and the HIV Medicine Association’s joint recommendation<sup>45</sup> (see Appendix).

### **Deterring Testing, Treatment and Retention in Care**

A major public health concern regarding HIV Criminalization is that it may create a disincentive to learn one’s HIV status because of the potential criminal liability that accompanies awareness of one’s HIV status.<sup>46</sup> This is at odds with evidence-based public health interventions that encourage HIV testing and treatment.<sup>47</sup> A person living with HIV who doesn’t know their status and therefore does not seek treatment, not only puts their personal health at risk, but is likely not to use risk-reduction strategies as consistently with sexual partners as they would if they were aware of their status. Not knowing their HIV status means they may suffer avoidable health effects from HIV and may unknowingly transmit the virus to their sexual partners. More than half of HIV transmission occurs when the partner who has HIV does not know it.<sup>48</sup> Any impediment that may deter testing, such as criminalizing HIV, is clearly not in the best interest of public health.

### **Undercutting Harm Reduction Principles**

As criminalization laws are used to prosecute acts which carry negligible risk of transmitting HIV, evidence of basic harm reduction methods is not recognized in the statute as a defense. Sexual contact harm-reduction — choosing to engage in a lower-risk activity (i.e., oral sex, using condoms consistently and correctly) rather than a higher-risk activity<sup>49</sup> — does not protect an individual from future legal problems, and therefore, creates no incentive to choose the less risky option. Research shows that HIV criminal laws have little or counter-productive effects on the risk behavior of men that have sex with men (MSMs).<sup>50</sup> While these studies focused on HIV-specific laws, no evidence exists to show any difference in behavior when states use generally applicable laws to prosecute HIV-positive individuals.<sup>51</sup>

**Partner Notification**

Criminalization may also undermine the public health practice of encouraging people with HIV to voluntarily share contact information of their sexual or needle-sharing partners to public health authorities so that their partners can be offered HIV testing.

Traditional STI reporting protocols dictate that the identity of the person with HIV is not revealed to the partner. Nonetheless, people with HIV may be less willing to disclose the names of their partners for fear that their own status and identity will become known and that they will be subjected to criminalization.<sup>52</sup>

## SECTION 4: THE ALTERNATIVES

No one benefits from prosecuting and incarcerating people with HIV for consensual sexual activity. Prosecution may result in the disclosure of private medical information, creating a potential risk of partner violence and a negative and irreversible impact on all parties. Incarceration increases stigma, impedes access to healthcare, and upon release causes instability in housing and employment, for the individual, their families and their community. Instead, alternatives to criminalization should be considered for any person, who engages in consensual activity and feels harmed because they think they may have been exposed to or infected by HIV.

### *Restorative Justice*

A viable alternative to criminal prosecution is the restorative justice method of reconciliation. Restorative justice focuses on repairing harm, promotes personal responsibility, and seeks redress for those who were harmed and recompense from those who have caused that harm.<sup>55</sup> The Restorative Justice Council states<sup>56</sup> that in the context of the criminal justice system, “restorative justice is about victims and offenders communicating within a controlled environment to talk about the harm that has been caused and finding a way to repair that harm.” Approaches such as these are frequently used to resolve conflict or criminal matters, while sparing the parties from the unnecessary harshness of the criminal justice system.

Restorative justice provides a non-stigmatizing way to create dialogue between the partners, allowing each person to be heard, while offering a path toward resolution that is accessible for all parties.

### *Diversion Programs*

Another alternative is diversion programs, a form of sentencing designed to enable criminal defendants to avoid some charges and/or a criminal record.

A diversion program recognizes that low-level offenses, particularly those committed by first-time offenders, shouldn't necessarily trigger the normal criminal-case process. Counseling, as an element of a diversion program, may be more beneficial than incarceration.

### *Civil Lawsuits*

A civil lawsuit may also be considered for the complaining party who has sustained economic or an otherwise quantifiable loss.

### ***What is Restorative Justice?***

*The Centre for Justice and Reconciliation defines restorative justice as having three steps: “(1) repair: crime causes harm and justice requires repairing that harm; (2) encounter: the best way to determine how to do that is to have the parties decide together; and (3) transformation: this can cause fundamental changes in people, relationships and communities.”<sup>53</sup>*

*Restorative justice techniques include:*

- *Victim-offender mediation: A safe, structured, and mediated conversation between the victim and the offender;*
- *Family or community group conferencing: The victim, offender, and their families and community come together to determine how to rectify the crime; and*
- *Peacemaking or sentencing circles: The victim, offender, their families and community, advocates, police, attorneys, judges, and other stakeholders come together to determine sentencing that addresses all parties' concerns.*<sup>54</sup>

## **CONCLUSION**

HIV Criminalization undercuts important public health initiatives by ignoring actual transmission risk, exacerbating stigma, and devaluing the importance of personal responsibility in HIV prevention. Criminalization makes it more difficult for those who have been diagnosed with HIV to disclose their HIV status to partners or to access and stay in care. In short, it's all pain and no gain. Pennsylvania can and must do its part to reduce HIV transmission by ending HIV Criminalization.

*With thanks to the Center for HIV Law and Policy, the Sero Project and PWN-USA for their fine reference materials.*

## Appendix: Selected Statements from Supporting Organizations

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<sup>9</sup> World Health Organization. Guideline on When to Start Antiretroviral Therapy and on Pre-Exposure Prophylaxis for HIV. Available at: [http://apps.who.int/iris/bitstream/10665/186275/1/9789241509565\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/186275/1/9789241509565_eng.pdf).

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<sup>14</sup> AIDSMap. Post-Exposure Prophylaxis: Efficacy. Available at: <http://www.aidsmap.com/Efficacy/page/1746573/>.

<sup>15</sup> Centers for Disease Control and Prevention. HIV-Specific Criminal Laws. Available at: <http://www.cdc.gov/hiv/policies/law/states/exposure.html>.

<sup>16</sup> 18 Pa.C.S. § 2705.

<sup>17</sup> *Commonwealth v. Cordoba*, 902 A.2d 1280 (Pa. Super. 2006).

<sup>18</sup> Order Granting Petition for Writ of Habeas Corpus, *Cordoba*, CP-06-CR-0000586-2005 (Pa.C.P. Berks, Nov. 29 2007).

<sup>19</sup> 18 Pa.C.S. § 2702(a)(1).

<sup>20</sup> 18 Pa.C.S. § 1103(1).

<sup>21</sup> 18 Pa.C.S. §§ 2701(b), 1104(2).

<sup>22</sup> *Commonwealth v. Perez*, CP-39-CR-0001227-1998 (Pa.C.P. Lehigh 1998).

<sup>23</sup> *Commonwealth v. Brown*, 605 A.2d. 429 (Pa. Super. Ct. 1992).

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- <sup>24</sup> 18 Pa.C.S. § 2702(a)(4).
- <sup>25</sup> 18 Pa.C.S. § 2706(a)(1).
- <sup>26</sup> 18 Pa.C.S. § 2706(d).
- <sup>27</sup> 18 Pa.C.S. § 107(b)(6).
- <sup>28</sup> *Commonwealth v. Walker*, 836 A.2d 562 (Pa. Super Ct. 2004).
- <sup>29</sup> 18 Pa.C.S. § 3124.1.
- <sup>30</sup> 18 Pa.C.S. § 1103(2).
- <sup>31</sup> 18 Pa.C.S. § 2701(a).
- <sup>32</sup> 18 Pa.C.S. § 2703 (a).
- <sup>33</sup> 18 Pa.C.S. §§ 106(3), 1103(2).
- <sup>34</sup> 18 Pa.C.S. § 2703 (b).
- <sup>35</sup> Felony Prostitution, 18 Pa.C.S. § 5902 (a)(4); Felony Promoting Prostitution, § 5902(v); Felony Patronizing a Prostitute, § 5902(e)(4).
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