



## SELECTED POLICY STATEMENTS AND SUPPORT FOR ENDING HIV CRIMINALIZATION IN THE UNITED STATES

Understanding how the science of HIV conflicts with the rationales of HIV specific criminal prosecutions is only one piece of the work of a thoughtful advocate. In HIV criminalization cases it can also be useful to have citations to other resources that are less scientific, such as national and international documents that support decriminalization or call in to question the foundations of criminalization. This supplement to *Transmission Routes, Viral Loads and Relative Risks: The Science and Research of HIV for Lawyers and Advocates* (available at: <http://www.hivlawandpolicy.org/resources/transmission-routes-viral-loads-and-relative-risks-science-hiv-lawyers-and-advocates>) provides selected recommended resources specific to HIV criminalization, including policy statements, legal summaries, and representative journal articles on the ineffectiveness of criminal law to promote HIV disclosure or reduce transmission risk behavior.

### I. POLICY STATEMENTS

*Resolution of the Board of Directors of the National Association of Criminal Defense Lawyers Concerning HIV Criminalization*, National Association of Criminal Defense Lawyers (2016). Available at: <http://www.nacdl.org/resolutions/2016sm01/>

The Board of Directors of the National Association of Criminal Defense Lawyers (NACDL) unanimously adopted this resolution opposing laws that base criminal liability and/or penalty enhancements on one's HIV status rather than on the intent to harm another individual. In doing so, the NACDL explicitly agrees with the [President's Advisory Council on AIDS](#) that HIV criminalization amounts to bad public health policy and fuels the HIV epidemic.

Useful quotations:

“WHEREAS, the focus on knowledge of status as a key element of an HIV-related crime, rather than on intent and capacity to transmit the virus, is a classic example of an inadequate *mens rea*, or criminal intent, requirement and overly expansive criminalization; and

WHEREAS punishments imposed for non-disclosure of HIV status, exposure, or HIV transmission are grossly out of proportion to the actual harm inflicted and reinforce the fear and stigma associated with HIV . . .”

“WHEREAS HIV criminalization was bad criminal justice policy prior to the advent of modern and effective antiretroviral therapy, and remains so today . . .”

“BE IT RESOLVED that NACDL opposes all laws that base criminal liability and/or penalty enhancements on one’s HIV status rather than on the intent to harm another individual. Accordingly, NACDL supports the repeal of such criminal laws as fundamentally unfair and unjust. . .”

*Resolution Opposing HIV Criminalization*, American Psychological Association (2016). Available at: <http://www.apa.org/about/policy/hiv-criminalization.aspx>

The American Psychological Association’s (APA) mission is “to advance the creation, communication and application of psychological knowledge to benefit society and improve people’s lives.” This resolution encourages repeal of all laws that criminalize and stigmatize PLWH and that undermine national HIV prevention efforts.

Useful quotation:

“WHEREAS considerable taxpayer resources are expended in arresting, prosecuting, sentencing, and housing people accused of violating HIV criminalization laws with no clearly identified public health benefit;

WHEREAS these resources could be diverted to HIV treatment and prevention efforts;

WHEREAS HIV-specific laws and prosecutions may undermine significant publicly funded programs that encourage early testing and treatment of PLHIV;

WHEREAS all people must take responsibility for their actions with respect to protecting sexual partners and for protecting themselves from HIV and other sexually transmitted infections (STIs);

WHEREAS criminalization of HIV can increase the risk of interpersonal violence (IPV) for both women and men when HIV disclosure is not safe or advisable, during custody disputes or pregnancy, and can provide a mechanism for control by abusers who may threaten prosecution based on HIV status;

WHEREAS HIV criminalization laws increase stigma and discrimination related to HIV/AIDS;

WHEREAS people living with HIV are often marginalized and stigmatized on the basis of Lesbian, Gay, Bisexual, Transgender, Queer or Questioning, and Intersex (LGBTQI) status, gender identity/expression, disability, race, ethnicity, socioeconomic status (SES), pregnancy/parental status, sex work, and intravenous drug use, even apart from legal discrimination in those states with HIV criminalization statutes;

WHEREAS criminalization of HIV may cause particular harm to women, youth, and men who have sex with men (MSM) . . .

WHEREAS laws that criminalize perceived or potential HIV exposure may actually undermine public health efforts by providing a disincentive for persons at-risk to be tested;

WHEREAS HIV stigma and discrimination continue to be significant barriers to HIV testing, diagnosis, treatment and engagement in care, thereby fueling the epidemic . . .”

*Best Practices Guide to Reform HIV-Specific Criminal Laws to Align with Scientifically-Supported Factors*, U.S. Department of Justice, Civil Rights Division (2014). Available at: <http://www.hivlawandpolicy.org/resources/us-department-justice-calls-states-eliminate-or-reform-archaic-hiv-criminalization-laws>.

The U.S. Department of Justice (DOJ), Civil Rights Division, released this guide as a supplement to, *Prevalence and Public Health Implications of State Laws that Criminalize Potential HIV Exposure in the United States*, a publication released jointly with the Centers for Disease Control and Prevention (CDC) (available at: <http://www.hivlawandpolicy.org/resources/prevalence-and-public-health-implications-state-laws-criminalize-potential-hiv-exposure>). This guide expands upon the scientific data presented in the previous publication by problematizing current HIV-specific criminal laws that discriminate and stigmatize people living with HIV. The DOJ asserts that most of these laws fail to account for continued medical and scientific developments, and it calls for the states with HIV-specific criminal laws to reform these laws to reflect current medical and scientific evidence of transmission, prevention, and care of HIV.

Useful quotations:

“Generally, the best practice would be for states to reform these laws to eliminate HIV-specific criminal penalties except . . . when a person who knows he/she is HIV positive commits a (non-HIV specific) sex crime where there is risk of transmission . . . [and] where the individual knows he/she is HIV positive and the evidence *clearly* demonstrates that individual’s intent was to transmit the virus *and* that the behavior engaged in had a significant risk of transmission . . .” (emphasis added)

“The estimated per-act probability of acquiring HIV during the following activity per 10,000 exposures is as follows: insertive penile-vaginal intercourse, 4; receptive penile-vaginal intercourse, 8; insertive anal intercourse, 11; and receptive anal intercourse, 138. These risk assessments are in the absence of risk reduction factors. Taking ART can reduce the risk of HIV transmissions as much as 96%, consistent use of condoms reduces the risk of HIV transmission by about 80%, and the use of ART and condoms in combination reduces these risks of transmission by 99.2%.”

*Modernization of HIV Specific Criminal Laws*, American Medical Association (2014). Available at: <http://hivlawandpolicy.org/resources/ama-resolution-opposes-hiv-criminalization>

The American Medical Association (AMA) is the largest association of physicians and medical students in the United States. This AMA resolution encourages vigorous enforcement of existing anti-discrimination laws and the incorporation of HIV in future federal anti-discrimination legislation. It also supports making federal and state laws consistent with current medical knowledge, avoiding criminal punishment based on health and disability status, and educating the public on the stigma and negative health consequences of HIV criminalization.

Useful Quotation:

“Supports consistency of federal and/or state laws with current medical and scientific knowledge including avoidance of any imposition of punishment based on health and disability status.”

*Ending Overly Broad Criminalization of HIV Non-disclosure, Exposure and Transmission: Critical Scientific, Medical and Legal Considerations*, UNAIDS (2014).

Available at:

[http://www.unaids.org/en/media/unaids/contentassets/documents/document/2013/05/20130530\\_Guidance\\_Ending\\_Criminalisation.pdf](http://www.unaids.org/en/media/unaids/contentassets/documents/document/2013/05/20130530_Guidance_Ending_Criminalisation.pdf)

UNAIDS, the joint United Nations Programme on HIV/AIDS, is the main advocate for accelerated, comprehensive, and coordinated global action on the HIV epidemic. UNAIDS strengthens national responses to HIV, aiming to reduce transmission rates and advance the treatment and support of people living with HIV. This UNAIDS publication sets out scientific, medical, and legal guidelines that should inform countries' actions related to criminal law as they affect people living with HIV. It builds on well-accepted principles of public health and international human rights norms in calling for the end of broad criminalization of HIV non-disclosure without actual transmission and intent to harm, as well as the end of the use of negligence as a sufficient culpable mental state and disproportionately harsh punishments.

Useful Quotation:

“Where these drugs [ART] are accessible, HIV infection no longer necessarily results in premature death. . . Arguably, based on current evidence, the harm of HIV should not be treated differently than that of other serious sexually transmitted infections. Non-disclosure, exposure and transmission of these STIs, however, is seldom subject to criminal prosecution.”

***Resolution on Ending Federal and State HIV-Specific Criminal Laws, Prosecutions, and Civil Commitments***, Presidential Advisory Council on HIV/AIDS (PACHA) (2013).

Available at:

<http://www.hivma.org/uploadedFiles/HIVMA/HomePageContent/PACHA%20Resolution.pdf>

The Presidential Advisory Council on HIV/AIDS (PACHA) approved a resolution calling for federal action against HIV criminalization. The approved PACHA resolution broadly condemns laws and policies that discriminate against people living with HIV by criminalizing low-or-no risk behavior and reinforcing fear and stigma associated with HIV. This includes statutes at all levels of government targeting various populations for a number of alleged offenses.

Useful Quotations:

“Most of these laws were adopted before the availability of effective antiretroviral therapy for HIV, which substantially reduces already low transmission risks and provides a pathway to successful HIV treatment.”

“Legal standards applied in HIV criminalization cases regarding intent, harm, and proportionality deviate from generally accepted criminal law principles and reflect stigma toward HIV and HIV-positive individuals.”

“Public health leaders and global policy makers agree that HIV criminalization is unjust, bad public health policy and is fueling the epidemic rather than reducing it.”

“. . . the CDC should issue a clear statement addressing the growing evidence that HIV criminalization and punishments are counterproductive and undermine current HIV testing and prevention priorities.”

***HIV Discrimination and Criminalization***, The U.S. Conference of Mayors (2013). Available at:

<http://hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/US%20Conference%20for%20Mayors%20Resolution.pdf>

The U.S. Conference of Mayors is a non-partisan organization representing cities with populations of 30,000 or more. This resolution calls for the elimination of federal and state HIV-specific criminal laws, prosecutions, and civil commitments in the United States. The resolution also declares support for legislation, such as the proposed federal REPEAL HIV Discrimination Act, which advances these objectives.

Useful Quotation:

“WHEREAS, sound criminal Justice and public health policy toward people living with HIV is consistent with an evidence-based approach to disease control and research demonstrates that HIV-specific laws do not reduce transmission or increase disclosure and may discourage HIV testing.”

*Opposing Stigma and Discrimination Against Persons with Communicable Disease*, National Association of County & City Health Officials (2013). Available at: <http://www.naccho.org/advocacy/positions/upload/13-11-Opposing-Stigma-and-Discrimination-against-Persons-with-Communicable-Diseases-2.pdf>

The National Association of County & City Health Officials (NACCHO) represents 2,700 local public health departments in the United States. Through this policy statement, NACCHO encourages local, state, and federal governments to oppose punitive measures against persons with communicable diseases, including HIV, sexually transmitted infections, all forms of viral hepatitis, and tuberculosis. The statement urges local health departments to adopt certain recommended action from the National HIV/AIDS Strategy.

Useful Quotations:

“Disease-specific laws and policies that result in criminal prosecution fuel stigma and discrimination against person living with communicable diseases.”

“Furthermore, disease-specific laws have not been found to influence the behavior of infected persons, therefore such laws cannot be tied to reducing transmission.”

*Effective Laws to End HIV and AIDS: Next Steps for Parliaments*, Inter-Parliamentary Union & United Nations Development Programme (2013). Available at: <http://www.scribd.com/doc/204497082/Effective-Laws-to-End-HIV-and-AIDS-Next-Steps-for-Parliaments-Inter-Parliamentary-Union-2013>.

The Inter-Parliamentary Union (IPU), the international organization of parliaments, works for peace and cooperation among peoples by considering questions of international interest and contributing to the defense and promotion of human rights. IPU works closely with the United Nations Development Programme (UNDP), which aims to improve the quality of life for people, focusing on poverty reduction, democratic governance, crisis prevention and recovery, and sustainable development. This publication presents basic information and best practices about laws and policies regarding a national HIV response. Additionally, the report includes a set of case studies from five countries that have enacted legislation that proved helpful in improving the prevention, treatment, and care of HIV. Although the United States is not a member of the IPU, the information presented is universally applicable and provides vital points of guidance for HIV legislation.

Useful quotations:

“Laws that criminalize the behavior or conduct of key populations [men who have sex with men, transgender persons, people who inject drugs, sex workers and their

clients, and seronegative partners in serodiscordant couples], or discriminate against them, undermine the AIDS response.”

“These laws deter health seeking behavior, promote discrimination in service delivery, are a barrier to effective HIV programme design and implementation, expose individuals to increased violence, force individuals into risky behavior, and lower self-esteem (this is associated with alcohol and substance abuse, which in turn increases HIV risk).”

“Key questions for parliamentarians when considering HIV-related legislation:

1. Does evidence suggest this law is/will be effective in tackling HIV?
2. Is the law compatible with the legal rights of the people it affects?
3. Have people living with HIV and other people affected by the proposed legislation been involved and consulted in its development or review?”

*HIVMA Urges Repeal of HIV-Specific Criminal Statutes*, HIV Medicine Association (2012). Available at: <http://www.hivma.org/uploadedFiles/HIVMA/FINAL%20HIVMA%20Policy%20Statement%20on%20HIV%20Criminalization.pdf>

As part of the Infectious Diseases Society of America (IDSA), the HIV Medicine Association (HIVMA) represents health care professionals who practice HIV medicine and their patients. Through this publication, HIVMA encourages adoption of policies related to HIV grounded in scientific evidence. This includes an end to punitive laws that criminalize HIV status through nondisclosure, exposure, and transmission; as well as the promotion of public education to counteract the stigma and negative public health impact of those laws and their related prosecutions.

Useful Quotations:

“In the U.S., HIV criminalization has resulted in unacceptable human rights violations, including harsh sentencing for behaviors that pose little to no risk of HIV transmission.”

“These laws and prosecutions unfairly target individuals with HIV infection and are not based on the latest scientific knowledge regarding HIV transmission, including the finding that transmission risk from biting or spitting is negligible.”

*National Consensus Statement on the Criminalization of HIV in the United States*, Positive Justice Project and The Center for HIV Law and Policy (2012). Available at: <http://www.hivlawandpolicy.org/resources/positive-justice-project-consensus-statement-criminalization-hiv-united-states-positive>

The Positive Justice Project is a national coalition of organization and individuals leading the effort to end HIV criminalization in the United States. This statement points to the growing consensus on the need to end the use of special criminal laws and policies that target persons with HIV for consensual sex or otherwise "exposing" another person to HIV. The statement demands that laws and practices be modernized to reflect current science and knowledge about HIV, and the standards of proof and process normally afforded individuals facing charges of a criminal offense against another.

Useful Quotations:

“Public health leaders and global policy makers agree that HIV criminalization is unjust, bad public health policy and is fueling the epidemic rather than reducing it.”

“Therefore, to ensure a just application of the criminal law to transmission of sexually transmitted infections, we demand that Federal and State officials modernize criminal laws to eliminate HIV-specific statutes and ensure that any prosecution on the basis of HIV or any other STIs requires: 1. proof of an intent to harm; 2. conduct that is likely to result in that harm; 3. proof that the conduct of the accused in fact resulted in the alleged harm; and 4. punishment that is proportionate to the actual harm caused by the defendant’s conduct.”

*Global Commission on HIV and the Law: Risks, Rights & Health*, Global Commission on HIV and the Law (2012). Available at: <http://www.hivlawcommission.org/resources/report/FinalReport-Risks,Rights&Health-EN.pdf>

The Global Commission on HIV and the Law, an independent body convened by the United Nations Development Programme (UNDP) on behalf of the Joint United Nations Programme on HIV/AIDS (UNAIDS), undertook extensive research, consultation, analysis and deliberation over a period of 2 years to examine links between legal environments and HIV responses. Regarding the criminalization of HIV, this report condemns laws explicitly criminalizing transmission, exposure, or non-disclosure of HIV as counterproductive to public health and safety efforts. The report, however, makes an exception for the prosecution of cases where there is actual and intentional HIV transmission. Moreover, the report calls for retroactive pardons of individuals convicted under such laws.

Useful quotations:

“There is no evidence that laws regulating the sexual conduct of people living with HIV change behaviour in a positive way. Nor do such laws take into account the success of antiretroviral treatment (ART) in significantly

reducing transmission risk and improving the quality of life and longevity for people with HIV.”

“Indeed, the fear of prosecution isolates [PLWH] and discourages them from getting tested, participating in prevention or treatment programmes or disclosing their status to partners. . . By dividing populations into the sick and the healthy or the guilty and the innocent, criminalization denies the complex social nature of sexual communities and fractures the shared sense of moral responsibility that is crucial to fighting the epidemic.

*Oslo Declaration on HIV Criminalisation* (2012). Available at: <http://www.hivjustice.net/oslo/oslo-declaration/>

The Oslo Declaration is the product of an international civil society group of individuals and organizations led by, and including, people living with HIV working to end the injustice implicated by HIV criminalization. The interdisciplinary group includes expertise from medical, social, ethical, political, human rights, and judicial fields. The declaration calls for a review of national laws and policies related to people living with HIV globally.

Useful quotations:

“Existing HIV-specific criminal laws should be repealed, in accordance with UNAIDS recommendations. If, following a thorough evidence-informed national review, HIV-related prosecutions are still deemed to be necessary they should be based on principles of proportionality, foreseeability, intent, causality and non-discrimination; informed by the most-up-to-date HIV-related science and medical information; harm-based, rather than risk-of-harm based; and be consistent with both public health goals and international human rights obligations.”

“HIV epidemics are driven by undiagnosed HIV infections, not by people who know their HIV-positive status.”

*National HIV/AIDS Strategy Imperative: Fighting Stigma and Discrimination by Repealing HIV-Specific Criminal Statutes*, National Association of State and Territorial AIDS Directors (2011). Available at: <http://hivlawandpolicy.org/resources/national-hivaids-strategy-imperative-fighting-stigma-and-discrimination-repealing-hiv>

The National Alliance of State and Territorial AIDS Directors (NASTAD), an organization that represents public health officials and administers state and territorial HIV/AIDS programs, has released a statement supporting efforts to end HIV-specific criminal laws and policies that perpetuate stigma and discrimination against HIV positive persons.

As a member of the Positive Justice Project, an initiative of The Center for HIV Law and Policy, NASTAD members have committed to examining existing public health policies

related to HIV criminalization while emphasizing the importance of providing comprehensive prevention and care services for HIV positive individuals.

The NASTAD statement, one of the first of its kind released by a national HIV policy or service organization, provides an excellent model for other HIV organizations and advocates.

Useful quotation:

“NASTAD supports efforts to examine and support level-headed, proven public health approaches that end punitive laws that single out HIV over other STDs and that impose penalties for alleged nondisclosure, exposure and transmission that are severely disproportionate to any actual resulting harm.”

*National HIV/AIDS Strategy*, White House Office of National AIDS Policy (2010). Available at: <http://hivlawandpolicy.org/resources/national-hivaids-strategy>

On July 13, 2010, the Obama administration released the National HIV/AIDS Strategy (NHAS) for the United States. The NHAS is the culmination of work and advocacy by people living with HIV, their advocates, AIDS service organizations, federal and state agency representatives, and corporate representatives, such as pharmaceutical companies, with a stake in the plan. The NHAS is organized into four areas of focus:

- 1) Reducing New HIV Infections;
- 2) Increasing Access to Care and Improving Health Outcomes for People Living with HIV;
- 3) Reducing HIV-Related Disparities and Health Inequities; and
- 4) Achieving a More Coordinated National Response to the HIV Epidemic, which looks to a more coordinated response to the three priority issues around which the report is organized.

The NHAS addressed multiple issues in which The Center for HIV Law and Policy took a leading interest, including HIV criminalization, stepped-up enforcement of existing civil rights laws, expanded access to legal services, prisoners' health and prevention rights, gender issues, and informed consent. Most of these issues are addressed in greater detail in the NHAS section on reducing disparities.

The NHAS statement featured the problem and public health consequences of HIV criminalization. The NHAS maintains that many state HIV-specific criminal laws reflect long-outdated misconceptions about the routes, risks, and consequences of HIV transmission.

The NHAS also recognizes more generally the importance of addressing widespread public ignorance about HIV transmission risks, a central aspect of HIV-related criminal

prosecutions. The NHAS represents the first meaningful official U.S. government statement on the issue of criminalization and the role of civil rights in addressing the HIV epidemic.

Useful quotation:

“In some cases, it may be appropriate for legislators to reconsider whether existing laws continue to further the public interest and public health. 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.”

*Criminalization of HIV Transmission*, UNAIDS (2008). Available at: <http://hivlawandpolicy.org/resources/criminalization-hiv-transmission-policy-brief-un aids>

In response to a recent increase in HIV criminalization cases both in the United States and abroad, UNAIDS issued this policy brief to arm advocates with information and arguments against these discriminatory laws and practices. The policy brief discusses why HIV-specific criminalization laws do not achieve justice, or prevent HIV transmission and how these laws actually cause more harm, such as by increasing stigma and disproportionately targeting ethnic minorities. A focus on the unique plight of women and girls living with HIV helps contextualize these criminalization laws in a way that makes their harmful effects more evident. The brief concludes with recommendations for governments and other advocates to develop more meaningful and effective responses to prevent HIV transmission, such as voluntary counseling and testing for couples, voluntary disclosure, and ethical partner notification.

Useful quotations:

“States should also avoid introducing HIV-specific laws and instead apply general criminal law to cases of intentional transmission.”

“There are no data indicating that the broad application of criminal law to HIV transmission will achieve either criminal justice or prevent HIV transmission.”

*Positive Justice Project: A New Strategy to End Civil and Criminal Punishment on the Basis of HIV Infection*, The Center for HIV Law and Policy (2010). Available at: <http://hivlawandpolicy.org/resources/positive-justice-project-new-strategy-end-civil-and-criminal-punishment-basis-hiv>

This policy statement provides comprehensive information about the Positive Justice Project, a national coalition of organization and individuals leading the effort to end HIV criminalization in the United States. One of the more troubling and persistent issues for people living 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 the Center for HIV Law and Policy'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.

This document addresses the issue of HIV criminalization; how criminalization leads to negative health outcomes and increased fear and misunderstanding about HIV; and how the Positive Justice Project fights against the ignorance and hysteria surrounding HIV criminalization.

The goal of the Positive Justice Project is to bring an end to laws and policies that subject people with HIV to arrest and increased punishment on the basis of gross ignorance about the nature and transmission of HIV, without consideration of the actual risks of HIV exposure.

Useful quotations:

“[C]riminalization of HIV legitimizes the ignorance, homophobia and racism that fuels inflated fears of HIV and those who have HIV.”

“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.”

*10 Reasons to Oppose the Criminalization of HIV Exposure or Transmission*, Open Society Institute (2008). Available at: <http://hivlawandpolicy.org/resources/10-reasons-oppose-criminalization-hiv-exposure-or-transmission-open-society-institute>

This document, published by the Open Society Institute, AIDS & Rights Alliance for Southern Africa, and United Nations Development Programme (UNDP) and endorsed by dozens of organizations, provides ten reasons why HIV criminalization is generally an unjust and ineffective public policy. The document includes basic information, and persuasive quotes from international leaders and governing bodies coming out against criminalization.

Useful quotations:

“[E]xcept in cases where individuals specifically intend to do harm, criminalizing HIV exposure or transmission cannot be justified because it does not empower people to avoid HIV infection and may in fact make it more difficult to do so, thus endangering both public health and human rights.”

“Allocating limited resources to prosecutions, rather than to HIV prevention measures that work and to programs to deal with the underlying causes, is a misuse of resources.”

*10 Reasons Why Criminalization of HIV Exposure or Transmission Harms Women*, Athena Network (2009). Available at: <http://hivlawandpolicy.org/resources/10-reasons-why-criminalization-hiv-exposure-or-transmission-harms-women-athena-network>

The authors conclude that HIV criminalization leads to negative public health outcomes, increased gender-based violence, and greater social and political inequalities for women. Since women are more likely to be the first to know their HIV status due to provider-initiated HIV testing and pre-natal care, women are more likely to be prosecuted for HIV exposure, be blamed for HIV transmission, and face greater risk of HIV-related violence and abuse for "bringing HIV into the family."

Marginalized women are predictably at greater risk for prosecution under these laws. Sex workers and illicit drug users, who typically have proportionately less access to HIV prevention, testing, treatment, and support services, are often prosecuted under HIV criminalization statutes. The criminalization of HIV exposure adds to the stigma of the women who face a threat of double prosecution – prosecution for engaging in behavior that already is criminalized, such as sex work, and for HIV exposure.

The authors note that many proponents of HIV criminalization argue that these laws protect women, when in fact they have no impact on risk behavior or on reducing women's exposure and vulnerability to HIV. As an alternative to HIV criminalization statutes the authors advocate for a human rights-based approach, protecting the dignity and rights of all people and thereby fostering an environment in which persons can feel free to access information on HIV prevention, testing, treatment, and support services without the risk of prosecution.

## II. LEGAL SUMMARIES

*Ending and Defending Against HIV Criminalization: State and Federal Laws and Prosecutions*, The Center for HIV Law and Policy (2010). Available at: <http://www.hivlawandpolicy.org/resources/ending-and-defending-against-hiv-criminalization-state-and-federal-laws-and-prosecutions>

This manual provides a comprehensive analysis of HIV-specific criminal laws and prosecutions in all fifty states, the military, federal prisons and U.S. territories. This is a resource for lawyers and community advocates on the laws, cases, and trends that define HIV criminalization in the United States. Thirty-two states and two U.S. territories have HIV-specific criminal statutes and dozens of states have reported proceedings in which people living with HIV have been arrested and/or prosecuted for consensual sex, biting, and spitting. Nearly 200 such prosecutions have occurred since 2008.

While this is not a scientific article or policy statement, it contributes significantly to the field by documenting and parsing the breadth and depth of the codification of poor science and policy in legislation and case law.

*HIV and the Criminal Law*, Edwin Bernard, NAM AIDS Map (2010). Available at: [www.aidsmap.com/law](http://www.aidsmap.com/law)

This book is a broad resource on the criminalization of HIV exposure and transmission. It touches on the fundamentals of the global HIV pandemic, the role of human rights and the law in the international response to HIV, the kinds of laws used to prosecute, the impact of criminalization on individuals, communities, and countries, the concepts of harm and responsibility, and the course of the global HIV epidemic. The book also includes international resources and individual country data available at the time of publication, including a summary of laws, prosecutions and responses to criminalization of HIV exposure or transmission internationally.

*State Criminal Statutes on HIV Transmission*, Lambda Legal (2010). Available at: <http://www.hivlawandpolicy.org/resources/state-criminal-statutes-hiv-transmission-lambda-legal>

This chart includes state-by-state information on criminal laws related to exposure and transmission of HIV for all 50 states and the District of Columbia. Information includes statutory and regulatory citations, crime classification, summaries of laws, and additional notes.

### III. SELECT ARTICLES ON USING CRIMINAL LAW RESPONSE TO HIV TRANSMISSION AND EXPOSURE

*Criminalisation and the Moral Responsibility for Sexual Transmission of HIV*, Scott Burris and Matthew Weait, working paper prepared for the Third Meeting of the Technical Advisory Group of the Global Commission on HIV and the Law (2011). Available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2126714](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2126714)

The Global Commission on HIV and the Law, an independent body convened by the United Nations Development Programme (UNDP) on behalf of the Joint United Nations Programme on HIV/AIDS (UNAIDS), undertook extensive research, consultation, analysis and deliberation over a period of 2 years to examine links between legal environments and HIV responses. This working paper examines the complexity of responsibility for actors within a sexual community given various risks, specifically HIV transmission, from a moral standpoint. It finds that criminalization of HIV within this context fails because its foundational moral principles are incomplete and therefore unjust.

Useful quotation:

“Informed consent is not the norm of sexual relationships; this is a descriptive, not a normative statement, conveying merely that people do not normally expect or require of sex partners that they detail all possibly pertinent information and that explicit consent be given before sexual activity. . . A right to engage in risky behaviour seems to be logically required by a commitment to autonomy. It follows that a simple rule about disclosure or safer sex does NOT follow from the principle of autonomy. Take, for example, the duty of non-maleficence as it applies to a person who knows he is HIV-positive but has an undetectable viral load due to effective ARV treatment. Objectively, he poses no risk of transmitting HIV to a partner,

and so non-maleficence does not preclude unprotected sex without disclosure.”

*High Income Countries Issue Brief: Laws and Practices Relating to Criminalisation of People Living with HIV and Populations Vulnerable to HIV*, Global Commission on HIV and the Law (2011). Available at: <http://www.hivlawcommission.org/index.php/regional-dialogues-main/high-income-countries?task=document.viewdoc&id=46>

The Global Commission on HIV and the Law, an independent body convened by the United Nations Development Programme (UNDP) on behalf of the Joint United Nations Programme on HIV/AIDS (UNAIDS), undertook extensive research, consultation, analysis and deliberation over a period of 2 years to examine links between legal environments and HIV responses. This paper outlines the HIV responses in high-income countries, examining significant challenges and best practices, accounting for, not only public health, but also individual human rights. Moreover, it reiterates the call for States to reform and review criminal laws related to PLWH in order to ensure fulfillment of their international human rights obligations. Specifically it supports Congresswoman Lee’s REPEAL HIV Discrimination Act.

Useful quotation:

“Additionally, in the USA, many prosecuted cases involve behaviours that include little or no transmission risk: a large number of cases have resulted in conviction and weighty sentencing for spitting and biting despite scientific evidence that such behavior cannot transmit HIV.”

*Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial*. Scott Burris et al., 39 ARIZ. ST. L.J. 467 (2007). Available at: <http://hivlawandpolicy.org/resources/do-criminal-laws-influence-hiv-risk-behavior-empirical-trial-scott-burris-et-al-39-ariz-st>

This study sought to determine whether the presence of HIV-specific criminal laws influenced sexual behaviors that pose a risk of HIV transmission and found no evidence that they did. The study examined Illinois and New York because they exhibit contrasting legal situations. Illinois has an HIV-specific law explicitly requiring disclosure by HIV-positive persons. New York has no HIV-specific law. This study looked for evidence that differences in law and beliefs about the law influence condom use in anal or vaginal sex.

In this study, 490 people at a perceived elevated risk of HIV were interviewed, 248 in Chicago and 242 in New York City. Approximately half in each state were men who have sex with men ("MSM") and half were injecting drug users ("IDUs"). One hundred sixty two subjects reported known HIV infection (Chicago 58; New York City 104). Three hundred twenty-eight reported being HIV negative or not knowing their HIV status.

Individuals that lived in Illinois, with a criminal law explicitly regulating sexual behavior of the HIV-infected, were little different in their self-reported sexual behavior from people in New York, a state without such a law. Individuals who believed the law required HIV positive persons to practice safer sex or disclose their status reported being just as risky in their sexual behavior as those who did not. The data do not support the proposition that passing a law prohibiting unsafe sex or requiring disclosure of infection influences people's normative beliefs about risky sex. Most people in the study believed that it was wrong to expose others to the virus and right to disclose infection to their sexual partners. These convictions were not influenced by the respondents' beliefs about the law or whether they lived in a state with such a law or not.

Burris' findings here are consistent with other completed studies, all of which, to date, have failed to find any evidence that criminal law has an influence on sexual risk behavior. Given concerns about possible negative effects of criminal law, including increased stigma and reluctance to cooperate with health authorities, the findings suggest caution in using criminal law as a behavior change intervention for people who are HIV positive.

Useful quotations:

“Our findings indicate that criminal law does not have a disease control function, at least as these laws are now written and enforced.”

“Our strongest test- belief that the law requires disclosure or condom use- did not predict actual sexual behavior among either the infected or the uninfected.”

“The problem of HIV transmission through sexual behavior appears to be the result of small risks accumulating over a large population, rather than the product of a small number of reckless transmitters.

*Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV*, C. Galletly & S.D. Pinkerton, AIDS BEHAVIOR (2006). Available at: <http://hivlawandpolicy.org/resources/conflicting-messages-how-criminal-hiv-disclosure-laws-undermine-public-health-efforts>

As structural interventions aimed at reducing new HIV infections, HIV-related criminal laws ideally should complement the HIV prevention efforts of public health professionals. The authors here conclude that they do not. This article demonstrates how HIV disclosure laws disregard or discount the effectiveness of universal precautions and safer sex, criminalize activities that are central to harm reduction efforts, and offer, as an implicit alternative to risk reduction and safer sex, a disclosure-based HIV transmission prevention strategy that undermines public health efforts. The article also describes how criminal HIV disclosure laws may work against the efforts of public health leaders to reduce stigmatizing attitudes toward persons living with HIV.

Useful quotation:

“The emphasis on serostatus disclosure and the lack of attention to condom use in existing HIV disclosure statutes implies that disclosure, per se, is sufficient to prevent transmission of HIV.”

“In contrast to public health efforts to reduce HIV-related stigma, HIV disclosure laws—which potentially punish HIV- positive persons for engaging in consensual sexual activities— highlight the distinction between persons with HIV and uninfected persons (whose consensual sexual activities are not subject to criminal scrutiny). In so doing, the criminal law reinforces the “us versus them” dichotomy that is central to prevailing theories of stigma.”

*Evaluating the Impact of Criminal Laws on HIV Risk Behavior*, Zita Lazzarini et al., 30 J.L. MED. & ETHICS 239, 239-253 (2002). Available at: <http://hivlawandpolicy.org/resources/zita-lazzarini-et-al-evaluating-impact-criminal-laws-hiv-risk-behavior-30-jl-med-ethics>

This article analyzes whether laws criminalizing HIV exposure are effective tools for preventing the spread of HIV/AIDS in the United States and concludes that criminal law is not effective in preventing the transmission of HIV or encouraging behaviors known to reduce the risk of exposing others to HIV. In fact, such laws and prosecutions may actually undermine public health messages meant to curb HIV rates.

Prosecutions under HIV-specific statutes, as well as general criminal laws, have in a number of instances lead to imprisonment for behaviors that have, at best, a remote possibility of HIV exposure or transmission (i.e., spitting and biting). According to the authors, criminal theory relies on the idea that criminal laws can protect against the spread of disease through three main mechanisms: 1) deterrence from high-risk behavior due to fear of legal repercussions; 2) support of a social norm against high risk behavior; and 3) incapacitation of those who engage in high-risk behavior through imprisonment or removal from society.

The authors find that each of these mechanisms fails to fulfill its promise when it comes to preventing exposure to and transmission of HIV. The authors argue that criminal law cannot be appropriately applied to the majority of cases of alleged HIV-exposure that occur within the normal bounds of acceptable social interactions – such as consensual sex or needle sharing. The activities outside those bounds – such as non-consensual sex – are already illegal and therefore it is not effective to have an HIV-specific statute to deter people's actions. Meanwhile, in the case of the incapacitation argument, incarceration does not remove the possibility of spreading HIV; sex continues behind bars, where typically there are no condoms available and an increased risk of sexual assault. The data and analysis completed by the authors suggest that criminalization of HIV does not prevent future cases of infection but that such laws and prosecutions may, in fact, drive high-risk behaviors "underground" and contribute to the stigma already widely associated with HIV. The criminalization of HIV fails to incorporate scientific reasoning in understanding how HIV is transmitted and prosecutes individuals based solely on their HIV status, regardless of whether their conduct resulted in HIV exposure, let alone transmission, or if they had an intent to expose others to HIV.

Useful quotation:

“The public health case for criminalization has generally been seen as weak. Criminal law can be an effective tool of HIV prevention only if it incapacitates or deters the people whose behavior is responsible for a significant proportion of new cases, but criminalization stumbles almost immediately on a paradox. The behavior most widely accepted as wrong - deliberately using HIV as a tool to harm or terrorize another - is too rare to influence the epidemic, whereas the behavior most responsible for spreading the virus - voluntary sex and needle sharing - is difficult and controversial to prohibit. Both the impetus for and opposition to criminalization reflect profound social differences over the acceptability of homosexuality and drug use, and the clash of values those differences entail.”