

The Weight of Science: Decriminalizing HIV in Pennsylvania

**Written by the AIDS Law Project of Pennsylvania
in collaboration with the Pennsylvania HIV Justice Alliance
(August 2023)**

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DEDICATION

The *Weight of Science* is dedicated to people living with HIV who experience the stigma of HIV criminalization.

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ABOUT US

Founded in 1988, the **AIDS Law Project of Pennsylvania** is a nonprofit public-interest law firm providing free legal assistance to people living with HIV and those affected by the epidemic. We serve all of Pennsylvania and Southern New Jersey from our offices in Philadelphia and Camden County, NJ.

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Pennsylvania HIV Justice Alliance (PA-HJA) is a coalition of Pennsylvanians living with HIV and strategic allies that speaks with a collective voice to enhance the quality of life and secure a just future for people living with HIV. Our work is inspired by the Denver Principles and is grounded in racial justice and gender justice.

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Please email questions or comments about *The Weight of Science: Decriminalizing HIV in Pennsylvania, (2023)* to weightofscience@aidslawpa.org.

THE WEIGHT OF SCIENCE: DECRIMINALIZING HIV IN PENNSYLVANIA

EXECUTIVE SUMMARY

In Pennsylvania, people living with HIV have been prosecuted under generally applicable criminal laws for conduct that would not be a crime or would not be as serious a crime but for their HIV status. This is HIV criminalization.

HIV criminalization laws do not reflect current scientific knowledge regarding HIV exposure, transmission, prevention, and treatment. Not all contact with the blood or bodily fluid of a person with HIV creates the same risk of transmission. Biting, spitting, or throwing bodily fluids is inaccurately perceived to be a risk, even though transmission of HIV is virtually impossible. The possibility of HIV transmission from any encounter varies widely depending on the type of exposure or behavior. Further, people living with HIV who achieve and maintain an undetectable viral load cannot sexually transmit the virus to others, a concept popularly framed as Undetectable=Untransmittable or U=U.

Criminalizing people because they are living with HIV does not stop transmission. Instead, it undermines efforts to encourage HIV testing and retain people in care, and creates distrust of public health officials and programs. Criminalizing behavior based on HIV status also exacerbates stigma and discrimination.

In addition to generally applicable criminal laws, the Pennsylvania Criminal Code includes enhanced penalties for incarcerated people and sex workers living with HIV. Alternatives to HIV criminalization include restorative justice, diversion, and civil lawsuits.

The science developed over the more than 40 years since HIV was identified creates a clear path to prevent HIV transmission and ensure that people living with HIV do not face stigma and discrimination. Relying on the weight of that science, instead of fear, will enable legislators, law enforcement officers, policymakers, educators, and advocates to stop HIV criminalization and end the HIV epidemic.

INTRODUCTION

More than thirty 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. Pennsylvania prosecutors have used generally applicable laws to punish people living with HIV for conduct that would not be criminal without an HIV diagnosis. Incarcerated people and sex workers in Pennsylvania face more serious charges if they are living with HIV.

What is HIV Criminalization?
HIV Criminalization is criminal prosecution, under either HIV-specific criminal statutes or general criminal statutes in which charges or punishments are initiated or heightened solely because the accused is living with HIV.

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.”²

If convicted, a person living with HIV faces direct consequences such as prison time, fines, and probation, as well as collateral consequences. Beyond the social isolation and psychological distress,³ people who have been convicted of any level of crime endure restrictions and limitations in many areas of life. Seeking employment and housing post-conviction can be particularly difficult.

HIV criminalization conflicts with the current scientific understanding of HIV transmission risks, treating activities that carry negligible or no 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

² Int'l Advisory Panel on HIV Care Continuum Optimization. *IAPAC Guidelines for Optimizing the HIV Care Continuum for Adults and Adolescents*. J. of the Int'l Ass'n of Providers of AIDS Care (2015), doi:10.1177/2325957415613442.

³ Haney, Craig, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*. US Dep't. of Health & Human Services (Nov. 2001), available at: <https://aspe.hhs.gov/reports/psychological-impact-incarceration-implications-post-prison-adjustment-0..>

suits. These alternatives may provide relief to a person who feels harmed because they have been exposed to HIV or acquired HIV.

SECTION 1: SCIENCE

Criminal laws must be grounded in science, rather than outdated assumptions, stigma and fear. In the more than four decades since HIV was first identified, scientific knowledge about the modes, risks, and consequences of HIV transmission has advanced considerably. Contemporary HIV antiretroviral treatment (ART) 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.⁴ ART has also improved the life expectancy of people living with HIV to near that of someone without HIV.⁵

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 during pregnancy, delivery or nursing.⁶

Actual Risk of HIV Transmission

Biting, spitting, throwing bodily fluids or sharing sex toys are inaccurately perceived as an exposure to HIV, even though transmission is virtually impossible.⁷ According to the CDC, risk, if any, of HIV transmission from these activities is negligible. Not all exposure to HIV presents the same – if any – risk of transmission. The possibility of getting HIV from an encounter varies widely depending on the type of exposure or behavior.

The likelihood of transmission from sexual contact may be drastically reduced or eliminated through the use of antiretroviral treatment of the partner living with

⁴ Alison J. Rodger, Valentina Cambiano, Tina Bruun, et al. *Sexual Activity Without Condoms and Risk of HIV Transmission in Serodifferent Couples When the HIV-Positive Partner Is Using Suppressive Antiretroviral Therapy*. 316 J. of Am. Med. Ass'n 171 (2016), doi:10.1001/jama.2016.5148.

⁵ Julia Marcus, et al. *Comparison of Overall and Comorbidity-Free Life Expectancy Between Insured Adults With and Without HIV Infection, 2000-2016*. 3(6) J. of Am. Med. Ass'n Netw Open e207954 (Jun. 2020), doi: 10.1001/jamanetworkopen.2020.7954.

⁶ Ctrs. for Disease Control & Prevention. *HIV Transmission*. <http://www.cdc.gov/hiv/basics/transmission.html> (accessed Apr. 12, 2023).

⁷ Ctrs. for Disease Control & Prevention. *HIV Risk Behaviors*, <https://www.cdc.gov/hiv/risk/estimates/riskbehaviors.html> (accessed Apr. 12, 2023).

HIV; consistent, correct condom use; pre-exposure prophylaxis (PrEP)⁸ for the HIV-negative partner; post-exposure prophylaxis (PEP)⁹ when exposure may have occurred; or other behavior changes to lower-risk activities; or a combination of these strategies.¹⁰

Treatment as Prevention, Undetectable=Untransmittable (U=U)

The ultimate goal of antiretroviral therapy (ART) is to reduce the viral load of a person living with HIV to undetectable levels.¹¹ In recent years, an overwhelming body of clinical evidence has firmly established that people living with HIV who achieve and maintain an undetectable viral load cannot sexually transmit the virus to others, a concept popularly framed as Undetectable=Untransmittable or U=U.¹²

⁸ **Pre-exposure prophylaxis (PrEP)** is a single daily pill or monthly injection that, when taken as prescribed, reduces risk of infection in an HIV-negative individual who is at substantial risk of HIV infection. PrEP reduces the risk of getting HIV from sex by about 99%, and from injection drug use by at least 74%. Ctrs. for Disease Control & Prevention. *Pre-Exposure Prophylaxis (PrEP)* (Jul. 2022) <http://www.cdc.gov/hiv/risk/prep?> (accessed May 4, 2023).

⁹ **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 to stop HIV seroconversion. Ctrs. for Disease Control & Prevention. *Post-Exposure Prophylaxis (PEP)* (Aug. 2022) <http://www.cdc.gov/hiv/risk/pep/index/html> (accessed May 4, 2023).

¹⁰ Ctrs. for Disease Control & Prevention. *HIV Prevention*.

<http://www.cdc.gov/hiv/basics/prevention.html> (accessed Apr. 12, 2023).

¹¹ A person living with HIV may be unable to access ART or comply with treatment and achieve viral suppression due to inadequate health insurance, housing instability, discrimination by the medical profession, etc.

¹² M. Cohen, Y. Chen, M. McCauley, T. Gamble, M.C. Hosseinipour, N. Kumarasamy, et al., *Prevention of HIV-1 infection with early antiretroviral therapy*. 365 *N. Engl. J. Med.* 493 (2011); S.J. Reynolds, F. Makumbi, G. Nakigozi, J. Kagaayi, R.H. Gray, M. Wawer, et al., *HIV-1 transmission among HIV-1 discordant couples before and after the introduction of antiretroviral therapy*. 25 *AIDS* 473 (2011); D. Donnell, J.M. Baeten, J. Kiarie, K.K. Thomas, W. Stevens, C.R. Cohen, et al., *Heterosexual HIV-1 transmission after initiation of antiretroviral therapy: a prospective cohort analysis*. 375 *Lancet* 2092 (2010); A. Anglemeyer, T. Horvath T, G. Rutherford, *Antiretroviral therapy for prevention of HIV transmission in HIV-discordant couples*. 310 *J. of Am. Med. Ass'n* 1619 (2013); R.W. Eisinger, C.W. Dieffenbach, A.S. Fauci, *HIV Viral Load and transmissibility of HIV Infection: undetectable equals untransmittable*, 321 *J. of Am. Med. Ass'n* 451 (2019); Alison J. Rodger, et al, Valentina Cambiano, Tina Bruun, et al. *Sexual Activity Without Condoms and Risk of HIV Transmission in Serodifferent Couples When the HIV-Positive Partner Is Using Suppressive Antiretroviral Therapy*. *supra* n. 3; B.R. Bavinton, A.N. Pinto AN, N. Phanuphak N, et al., *Viral suppression and HIV transmission in serodiscordant male*

HIV Prevention Using Other Methods

In addition to Treatment as Prevention, HIV transmission can be prevented in other ways. Pre-exposure prophylaxis (PrEP) and post-exposure prophylaxis (PEP) are also options to reduce the risk of HIV transmission. As well, consistent, correct condom use is effective in preventing HIV transmission.¹³

SECTION 2: 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, required states to demonstrate that they could prosecute people living with HIV who “intentionally exposed” another person to HIV.¹⁴ Subsequent amendments to the Ryan White CARE Act in 2000 have struck this requirement.¹⁵ Despite the fact that the federal requirement for these counterproductive laws is gone, HIV criminalization laws remain.

Pennsylvania does not have HIV-specific criminal laws mandating disclosure of HIV status prior to engaging in intimate sexual contact. Nor does it specifically outlaw actual HIV exposure or transmission. Instead, Pennsylvania prosecutors use generally applicable criminal laws to punish people living with HIV, even when HIV transmission is not possible. Other crimes may be charged depending on the specific allegations. Pennsylvania does, however, have harsher penalties for incarcerated people and sex workers who are living with HIV and are convicted of certain crimes.

couples: an international, prospective, observational, cohort study. 5:e Lancet HIV 438 (2018).

¹³ Smith, D.K., et al. *Condom Effectiveness for HIV Prevention by Consistency of Use Among Men Who Have Sex with Men in the United States*, 68(30) J. AIDS 337 (Mar. 2015) abstract available at: <http://www.ncbi.nlm.nih.gov/pubmed/25469526>; Weller S, Davis K. *Condom effectiveness in reducing heterosexual HIV transmission.* Cochrane Database Syst. Rev. (2002) abstract available at <https://pubmed.ncbi.nlm.nih.gov/11869658/>.

¹⁴ Centers for Disease Control and Prevention. *HIV and STD Criminalization Laws* (2023), available at: <http://www.cdc.gov/hiv/policies/law/states/exposure.html>.

¹⁵ Ryan White CARE Act Amendments of 2000, Pub. L. No. 106-345, § 301(a), 114 Stat. 1345.

General Criminal Laws Used to Prosecute People Living with HIV

Reckless Endangerment

Reckless Endangerment is conduct that places or may place another person in danger of death or serious bodily injury.¹⁶ In *Commonwealth v. Cordoba*, the leading Pennsylvania case on HIV criminalization, a man was charged with Reckless Endangerment for allegedly failing to disclose his HIV status to his sexual partner.¹⁷ 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 HIV was not transmitted, the Superior Court sustained the charge of Reckless Endangerment. The case was eventually dismissed when the complaining witness failed to testify.¹⁸

In *Cordoba*, 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.”¹⁹ 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...under circumstances manifesting extreme indifference to the value of human life”²⁰ and can be charged as a first-degree felony carrying up to a 20-year incarceration sentence.²¹ In contrast, Simple Assault is causing or attempting to cause bodily injury to another and is a misdemeanor carrying a two-year maximum if the alleged victim is over the age of twelve.²²

A few Pennsylvania cases in the 1990s led to convictions for Aggravated Assault because the defendant was living with HIV. The assaults in question involved biting²³ and throwing feces,²⁴ acts which according to the CDC pose negligible risk, and therefore cannot be considered to “cause serious bodily injury”

¹⁶ 18 Pa.C.S. § 2705.

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

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

¹⁹ *Cordoba*, 902 A.2d at 1289.

²⁰ 18 Pa.C.S. § 2702(a)(1).

²¹ 18 Pa.C.S. § 1103(1).

²² 18 Pa.C.S. §§ 2701(b), 1104(2).

²³ *Commonwealth v. Perez*, CP-39-CR-0001227-1998 (Pa.C.P. Lehigh 1998).

²⁴ *Commonwealth v. Brown*, 605 A.2d. 429 (Pa. Super. Ct. 1992).

consistent with the statute. It was only the HIV status of the defendants that made the assaults “serious,” despite the fact that the risk, if any, was negligible, and transmission did not occur.

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. These cases are instances in which the complaining witness’ fear of HIV outweighs the actual science of how HIV is passed from person to person. As a result, defendants faced much harsher criminal penalties than the facts warranted.

Pennsylvanians living 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.”²⁵ In these cases, prosecutors have argued that the bodily fluids of the person living with HIV are a deadly weapon.

Simple Assault

Pennsylvanians living with HIV have also been charged with Simple Assault²⁶ for not disclosing HIV status to sexual partners, for spitting, and for accidentally causing or threatening needle-sticks. 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.

²⁵ 18 Pa.C.S. § 2702(a)(4).

²⁶ 31 Pa.C.S. § 2701(a).

Julie Graham’s Story

In December 2013, Julie Graham was charged with Sexual Assault, Aggravated Assault, Reckless Endangerment and Simple Assault, two of which are felonies. The charges brought in Lebanon County were based on allegations of a man she had dated, who claimed she had not disclosed her HIV status prior to sexual contact. The complaining witness did not acquire HIV, and in fact transmission was virtually impossible based on the type of sexual activity and her undetectable viral load. Julie was vigorously represented by criminal defense lawyer Larry Krasner. The AIDS Law Project also played a role in her defense by meeting with the Lebanon County prosecutor to explain the public health consequences of HIV Criminalization. As a result of this representation, all the charges but a single misdemeanor were dropped. For the remaining charge, she was offered a diversion program that enabled her to eventually have her record expunged. As a result of this incident, Julie has become a national advocate for the end of HIV criminalization. Her name is used with her permission. Larry Krasner was elected Philadelphia’s District Attorney in 2017 and re-elected in 2021. He is currently serving his second term.

Terroristic Threats

A Terroristic Threat involves directly or indirectly communicating intent to commit violence “with intent to terrorize another” person²⁷ and is a first-degree misdemeanor²⁸ carrying a maximum five-year imprisonment sentence.²⁹

In a 2004 case, *Commonwealth v. Walker*, a man living 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.”³⁰ The defendant was convicted of Terroristic Threats, rather than Simple Assault because of his HIV status.

Sexual Assault

Sexual Assault is “sexual intercourse ...with a complainant without the complainant’s consent”³¹ and is a second-degree felony carrying a maximum ten-year imprisonment sentence.³²

In 2014, a woman living 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 acquire HIV. The Sexual Assault charge eventually was withdrawn.

Enhanced Penalties for People Living with HIV

Sex Work and HIV

Prostitution can be charged if a defendant is alleged to engage “...in sexual activity as a business”³³ or “loiters ... for the purpose of being hired to engage in sexual activity.”³⁴ These laws also apply to sex work customers and “promoters.”

In Pennsylvania, prostitution-related offenses are misdemeanors, unless one of the parties knows or “should have known” that they are HIV-positive.³⁵ The penalty for a first or second prostitution conviction is a maximum sentence of one year in jail. HIV-related prostitution offenses are felonies carrying a maximum

²⁷ 18 Pa.C.S. § 2706(a)(1).

²⁸ 18 Pa.C.S. § 2706(d).

²⁹ 18 Pa.C.S. § 107(b)(6).

³⁰ *Commonwealth v. Walker*, 836 A.2d 562 (Pa. Super Ct. 2004).

³¹ 18 Pa.C.S. § 3124.1.

³² 18 Pa.C.S. §1103(2).

³³ 18 Pa.C.S. § 5902(a)(1).

³⁴ 18 Pa.C.S. § 5902(a)(2).

³⁵ Felony Prostitution, 18 Pa.C.S. § 5902 (a.1)(4); Felony Promoting Prostitution, § 5902(c)(1)(v); Felony Patronizing a Prostitute, § 5902(e)(4).

sentence of seven years,³⁶ even without evidence that HIV could have been transmitted. Harsher penalties even apply to cases where *no* sexual activity has occurred or will occur, including sting operations where a defendant could be charged with prostitution for offering to exchange sex for money with an undercover police officer.³⁷

A charge of felony prostitution does not differentiate between sexual acts that carry a risk of HIV transmission and those that do not. Defendants engaging in sex acts that carry no risk of HIV transmission, such as sexual massage³⁸ can also be subject to the harsher penalty. Undetectable viral load, the use of condoms, or other HIV prevention strategies is not a defense. Because the harsher penalty applies to any person who has been diagnosed with HIV, regardless of actual transmission or risk of transmission of HIV, it disincentivizes testing and is counter to public health goals.

Assault by Prisoner

If an incarcerated person “infected by communicable disease, including ... HIV” intentionally or knowingly causes another person to come into contact with bodily fluids “by throwing, tossing, spitting or expelling,”³⁹ that person can face an additional sentence of up to ten years.⁴⁰ If this “assault” was committed against a correctional facility employee, the sentence *must* run consecutive to the current sentence.⁴¹ These harsher penalties have been imposed when HIV transmission is virtually impossible; in 2009, an incarcerated woman living with HIV was convicted of Assault by Prisoner for spitting at another inmate.⁴² She received an additional ten years on her sentence.

Assault on a Law Enforcement Officer

At the end of 2022, HB103 was signed into law. This bill expanded the penalties of the existing law for assaulting a law enforcement officer,⁴³ by making it a third degree felony to “intentionally or knowingly cause[] a law enforcement officer to come into contact with bodily fluids” and a second degree felony if the bodily fluid

³⁶ 18 Pa.C.S. § 1103(3).

³⁷ *Commonwealth v. Danko*, 421 A.2d 1165, 1171 (Pa. Super. Ct. 1980)(“The evidence that appellant offered to engage in specific sexual acts for a price, used words commonly used by prostitutes to describe those acts, accepted the money offered for one of those acts, and undressed in preparation for it, was sufficient to prove that she was then engaging ‘in sexual activity as a business.’”).

³⁸ *Commonwealth v. Johnson*, 670 A.2d 666 (Pa. Super. Ct. 1996).

³⁹ 18 Pa.C.S. § 2703 (a).

⁴⁰ 18 Pa.C.S. §§ 106(3), 1103(2).

⁴¹ 18 Pa.C.S. § 2703 (b).

⁴² *Commonwealth v. Visnesky*, CP-66-CR-0000104-2009 (Pa.C.P Wyoming 2009).

⁴³ 18 Pa.C.S. § 2702.1.

came from a person “infected by a communicable disease.” Language was ultimately added to the bill that “the communicable disease referenced in subparagraph (i) is communicable to the law enforcement officer by the method used or attempted to be used to cause the law enforcement officer to come into contact with the blood, seminal fluid, saliva, urine or feces.”⁴⁴ An incarcerated person can only be charged with the higher grade felony, if they caused – or tried to cause – a law enforcement officer to come into contact with bodily fluids, in a method that a communicable disease could be transmitted.

Collateral Consequences of Criminal Convictions

In addition to the direct consequences of criminal convictions, legal sanctions are imposed by statute on people because of their criminal record. Mandatory consequences of even a misdemeanor conviction can include forfeiture of retirement benefits for public employees and officials;⁴⁵ notification to state professional licensing boards; ineligibility for naturalization, visa, or asylum;⁴⁶ ineligibility for employment at any school for 5 years from expiration of sentence;⁴⁷ ineligibility to serve as law enforcement or firefighter;⁴⁸ ineligibility for firearms license (Philadelphia only);⁴⁹ ineligibility for taxicab license;⁵⁰ and ineligibility to serve on a jury.⁵¹

Felony convictions can carry additional mandatory consequences including deportation;⁵² denial of retirement pay for military service;⁵³ permanent or temporary ineligibility for legal name change;⁵⁴ and denial of commission for military service.⁵⁵

In addition to mandatory collateral consequences, discretionary consequences of criminal convictions permitted by law include temporary or permanent suspension of a license by state professional licensing boards; denial of student

⁴⁴ *Id.*

⁴⁵ 43 P.S. § 1313.

⁴⁶ 8 CFR 204.2, 208; 8 CFR 316.10.

⁴⁷ 24 P.S. § 1-111.

⁴⁸ 16 P.S. § 7509; 37 Pa. Code § 203.11; 53 P.S. § 12234; 53 P.S. § 22532; 53 P.S. § 752.3; 53 Pa.C.S. § 2164.

⁴⁹ PA Philadelphia Cty. LR 700.

⁵⁰ 53 P.S. § 25295.

⁵¹ 42 Pa.C.S. § 4502.

⁵² 8 USC § 1101(a)(43).

⁵³ 10 USCS § 12740.

⁵⁴ 54 Pa.C.S. §702(c).

⁵⁵ 20 CFR 1002.135.

loans and scholarships;⁵⁶ impeachment as a witness; denial of a firearms license;⁵⁷ denial of liquor license;⁵⁸ ineligibility to reside in public housing,⁵⁹ and restriction from gaming facilities.⁶⁰ A criminal record can also result in exclusion from private housing.⁶¹

SECTION 3: PUBLIC HEALTH

Using the criminal law to create or increase the severity of charges against people living with HIV is woefully misguided and inconsistent with effective public health practice. The goal of public health initiatives is to improve health, prolong life, and improve the quality of life at the population level “through health promotion, disease prevention and other forms of health intervention.”⁶² Many of these statutes may have been passed with the intention of reducing HIV transmission, yet no evidence exists to show that transmission has been reduced.

In fact, criminalization may exacerbate instead of reduce 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 2022-2025 National HIV/AIDS Strategy for the United States encourages lawmakers to repeal or update laws criminalizing HIV because they do not reflect scientific evidence or effective public health strategies.⁶³ Instead, these laws increase HIV stigma, and undermine public health by deterring testing.⁶⁴ Support for reform of HIV criminalization statutes has also come from a varied range of respected sources, including United States Department of Justice;⁶⁵ Centers for

⁵⁶ 24 P.S. § 5104.1.

⁵⁷ 37 Pa. Code § 21.11.

⁵⁸ 47 P.S. § 4-470.

⁵⁹ 24 CFR 966.4.

⁶⁰ 58 Pa. Code § 511a.3.

⁶¹ *Pennsylvania Fact Sheet (2020) available at*

<https://www.rootandrebond.org/wp-content/uploads/2020/02/PAFactSheet.pdf>.

⁶² World Health Org., *Health Promotion Glossary of Terms 2021 (2021) available at* <https://www.who.int/publications/i/item/9789240038349>.

⁶³ The White House. *National HIV/AIDS Strategy for the United States 2022-2025, available at* <https://files.hiv.gov/s3fs-public/NHAS-2022-2025.pdf>.

⁶⁴ *Id.*

⁶⁵ US Dept. of Just. Civ. Rights Div., *Best Practices to Reform HIV-Specific Criminal Laws with Scientifically-Supported Factors (2014)*, available at <https://www.hivlawandpolicy.org/sites/default/files/DOJ-HIV-Criminal-Law-Best-Practices-Guide.pdf>.

Disease Control and Prevention;⁶⁶ Presidential Advisory Council on HIV/AIDS;⁶⁷ American Medical Association;⁶⁸ American Nursing Association;⁶⁹ American Psychological Association;⁷⁰ U.S. Conference of Mayors;⁷¹ the Infectious Diseases Society of America;⁷² the HIV Medicine Association;⁷³ the National Association of County and City Health Officials;⁷⁴ the United Nations;⁷⁵ and the National Association of Criminal Defense Lawyers.⁷⁶

⁶⁶ *Id.*

⁶⁷ Presidential Advisory Council on HIV/AIDS, *Resolution on Ending Federal and State HIV-Specific Criminal Laws, Prosecutions, and Civil Commitments* (Feb. 2013), available at <https://www.aids.gov/federal-resources/pacha/meetings/2013/feb-2013-criminalization-resolution.pdf>.

⁶⁸ Am.Med. Assn., *H-20.914 Discrimination and Criminalization Based on HIV Seropositivity* (Feb. 2013), available at: <http://hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/AMA%20Resolution.pdf>

⁶⁹ Am.Nurses Assn. & the Assn. of Nurses in AIDS Care, *HIV Criminalization Laws and Policies Promote Discrimination and Must be Reformed*. (Nov. 2014), available at http://www.nursesinaidscare.org/files/bb/ANAC_PS_Criminalization_December22014_FinalforJANAC.pdf.

⁷⁰ Am. Psychological Assn., *Resolution Opposing HIV Criminalization* (2016), available at <http://www.apa.org/about/policy/hiv-criminalization.aspx>.

⁷¹ US Conf. of Mayors, *HIV Discrimination and Criminalization* (2016), available at http://www.usmayors.org/resolutions/81st_Conference/cs11.asp.

⁷² Infectious Disease Socy. of America & the HIV Med. Assn., *Position on the Criminalization of HIV, Sexually Transmitted Infections, and Other Communicable Diseases* (Mar. 2015), available at http://www.hivma.org/uploadedFiles/HIVMA/Policy_and_Advocacy/HIVMA-IDSA-Communicable%20Disease%20Criminalization%20Statement%20Final.pdf.

⁷³ *Id.*

⁷⁴ Natl. Assn. of Cty. & City Health Officials, *State of Policy: Opposing Stigma and Discrimination against Persons with Communicable Diseases* (2013), available at <http://www.naccho.org/uploads/downloadable-resources/Policy-and-Advocacy/13-11-Opposing-Stigma-and-Discrimination-against-Persons-with-Communicable-Diseases-2.pdf>.

⁷⁵ Off. of the U.N. High Commr. for Hum. Rights/ Joint U.N. Programme on HIV/AIDS, *The International Guidelines on HIV/AIDS and Human Rights; 2006 Consolidated Version* (2006), available at <https://www.ohchr.org/Documents/Issues/HIV/ConsolidatedGuidelinesHIV.pdf>; UNAIDS Ref. Grp. on HIV & Human Rights, *Decriminalisation and the end of AIDS: keep the promise, follow the science, and fulfill human rights* (2023) *Sexual & Reproductive Health Matters*, 31:1, 2194188, DOI: 10.1080/26410397.2023.2194188.

⁷⁶ Natl. Assn. of Criminal Defense Lawyers. *Resolution of the Board of Directors of the National Association of Criminal Defense Lawyers Concerning HIV Criminalization* (2016), available at <http://www.nacdl.org/resolutions/2016sm01/>.

Deterring Testing, Treatment and Retention in Care

A major public health concern regarding HIV criminalization is the creation of a disincentive to learn one's HIV status because of the potential criminal liability that accompanies awareness of one's HIV status.⁷⁷ This is at odds with evidence-based public health interventions that encourage HIV testing and treatment.⁷⁸ 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. Not knowing their HIV status means they may suffer avoidable health effects from HIV and unknowingly transmit the virus to their sexual partners. Any impediment that deters 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 or no likelihood of transmitting HIV, evidence of risk reduction methods is not recognized as a defense in some states. Maintaining an undetectable viral load or choosing to engage in activity with a lower likelihood of exposure (i.e., oral sex, using condoms) does not protect an individual from prosecution. Research shows that HIV criminalization, based on HIV-specific criminal laws or generally applicable laws, does not increase - and may in fact, decrease - risk reduction strategies among men that have sex with men (MSMs).^{79, 80}

Partner Notification

Criminalization may also undermine the public health practice of encouraging people living with HIV to voluntarily share contact information of their sexual or

⁷⁷ Centers for Disease Control and Prevention. *HIV and STD Criminalization Laws (2023)*, available at: <http://www.cdc.gov/hiv/policies/law/states/exposure.html>.

⁷⁸ UNAIDS, *Ending Overly Broad Criminalization of HIV Non-Disclosure, Exposure, and Transmission: Critical Scientific, Medical and Legal Considerations (2013)*, available at http://www.unaids.org/sites/default/files/media_asset/20130530_Guidance_Ending_Criminalisation_0.pdf.

⁷⁹ Horvath, K.J., et al., *Men Who Have Sex with Men Who Believe that Their State has a HIV Criminal Law Report Higher Condomless Anal Sex than Those Who are Unsure of the Law in Their State*. 21(1) AIDS Behav. 51 (Jan. 2017), available at: <http://www.ncbi.nlm.nih.gov/pubmed/26780329>.

⁸⁰ O'Byrne, P., Bryan, A., Woodyatt, C. *Nondisclosure Prosecutions and HIV Prevention Results from an Ottawa-Based Gay Men's Sex Survey*. 2 J. Assn. Nurses in AIDS Care (2012), available from: <https://www.hivlawandpolicy.org/sites/default/files/Nondisclosure%20Prosecutions%20and%20HIV%20Prevention%20-%20Results%20From%20an%20Ottawa-Based%20Gay%20Men%20C3%A2%E2%82%AC%E2%84%A2s%20Sex%20Survey%20%28O%27Byrne%2C%20et%20al.%29.docx.pdf>.

needle-sharing partners to public health authorities so that their partners can be offered HIV testing.

Even though traditional sexually transmitted infection reporting protocols dictate that the identity of the person living with HIV not be revealed to the partner, the fear that their status and identity will become known and that they will be criminalized is pervasive,⁸¹ reducing willingness to disclose the names of partners.

SECTION 4: HUMAN RIGHTS

According to the UNAIDS Reference Group on HIV and Human Rights, HIV criminalization laws constitute human rights violations.

HIV criminalisation exacerbates racial and other injustices, with ethno-racial minorities often disproportionately prosecuted and/or sentenced, ...and the populations most affected by HIV—usually already subjected to infringements of human rights—are inevitably also heavily affected by the threat of criminalisation.

HIV criminalisation compounds gender inequality: women living with HIV may face prosecution for alleged HIV non-disclosure even in circumstances where disclosure or taking prevention precautions were not realistic options, while also contributing to increased violence against women living with HIV.⁸²

Racial Disparities

Pennsylvania does not track the race and ethnicity of people who are arrested, prosecuted, or convicted. Across the country, however, where there are HIV criminalization laws, data shows that people of color are disproportionately targeted. For example, a report from the Williams Institute documents that Black men are 44% of the people living with HIV in Louisiana, yet they make up 91% of the people who are prosecuted under HIV criminalization laws.⁸³ Under a since-repealed HIV criminalization law in California, “Black and Latino people

⁸¹ *Id*; Sero Project, *The National HIV Criminalization Survey, 2021* (2021), available at <https://www.seroproject.com/wp-content/uploads/2023/03/Sero-Project-National-HIV-Criminalization-Survey-Report-2021.pdf>.

⁸² UNAIDS Ref. Grp. on HIV and Human Rights, (2023) *Decriminalisation and the end of AIDS: keep the promise, follow the science, and fulfill human rights*, *Sexual and Reproductive Health Matters*, 31:1, 5, 2194188, DOI: 10.1080/26410397.2023.2194188 .

⁸³ Nathan Cisneros and Brad Sears, *Enforcement of HIV Criminalization in Louisiana*, (Sept. 2022) available at <https://williamsinstitute.law.ucla.edu/publications/hiv-criminalization-louisiana>.

comprised over two-thirds (68%) of the people who came into contact with the criminal justice system under [the law], although just over one-half (56 %) of people living with HIV in California are Black and Latino.”⁸⁴

Gender Disparities

For many years, the Positive Women’s Network has emphasized that HIV criminalization puts women living with HIV at increased risk of violence, sexual assault, and trauma.⁸⁵

Black and Indigenous women, and Latinas are disproportionately affected by interpersonal violence.⁸⁶ Criminalization exacerbates the danger by forcing women to choose between potential partner violence if they disclose their status or risk of arrest, prosecution and incarceration if they do not. The threat of criminalization is used as a tool of abuse, harassment, or coercion and is often a deterrent from accessing treatment.⁸⁷

SECTION 5: ALTERNATIVES

No one benefits from arresting, prosecuting, and incarcerating people living with HIV for consensual adult 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 acquires HIV from consensual activity or feels harmed because they believe they were exposed to HIV.

⁸⁴ California Assembly Bill 1726, (Feb. 2023) available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB1726.

⁸⁵ Positive Women’s Network, *HIV Criminalization: An Overview* (Aug. 2022) available at <https://www.pwn-usa.org/hiv-criminalization-an-overview/#:~:text=Under%20federal%20law%2C%20it%20is,risk%20of%20transmission%20of%20HIV>.

⁸⁶ Ctrs. for Disease Control & Prevention, *The National Intimate Partner and Sexual Violence Survey: 2010-2012 State Report* (April 2017), 120 available at <https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf>.

⁸⁷ PWN, *HIV Criminalization: An Overview* supra n. 84.

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.⁸⁸ Restorative justice is about victims and offenders communicating within a controlled environment about the harm that has been caused and finding a way to meaningfully repair or redress that harm.⁸⁹ This approach is 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 parties, allowing each person to be heard, while offering a path toward resolution that is accessible for all parties.

What is Restorative Justice?

The Bureau of Justice Assistance National Training and Technical Assistance Center (BJANTTAC) defines restorative justice as attempting to repair harm caused by crime or conflict. Restorative justice aims to help people feel safe as opposed to conventional crime responses such as punitive actions.⁹⁰

To achieve this, BJANTTAC recommends reflecting on the harm that a community or person has experienced. This helps lead people toward understanding what they need to do to feel safe again or accept responsibility for their actions.⁹¹

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 people with no other criminal record, shouldn't necessarily trigger the normal criminal-legal process. Counseling, as an element of a diversion program, may be more beneficial than incarceration.

⁸⁸ Restorative Justice Exchange, *The Heart of the Matter* (2022) <https://restorativejustice.org/why-restorative-justice/the-issue/>.

⁸⁹ *Id.*

⁹⁰ Pointer, Lindsey, *What is "Restorative Justice" and How Does it Impact Individuals Involved in Crime?* (Aug. 2021), available at <https://bjatta.bja.ojp.gov/media/blog/what-restorative-justice-and-how-does-it-impact-individuals-involved-crime>.

⁹¹ *Id.*

Civil Lawsuits

A civil lawsuit may also be considered if an individual has sustained economic or an otherwise quantifiable loss.

CONCLUSION

HIV criminalization disregards science, ignores legal principles of harm and punishment, undercuts public health initiatives, devalues risk reduction strategies for HIV prevention, and exacerbates stigma. Criminalization makes it more difficult for people living with HIV to disclose to partners and to access and stay in care.

The science developed over the more than 40 years since HIV was identified creates a clear path to prevent HIV transmission and ensure that people living with HIV do not face stigma and discrimination. Relying on the weight of that science, instead of fear, will enable legislators, law enforcement officers, policymakers, educators, and advocates to stop HIV criminalization and end the HIV epidemic.

Appendix: Selected Statements from Supporting Organizations

- American Medical Association**, *H-20.914 Discrimination and Criminalization Based on HIV Seropositivity* (Feb. 2013),
<https://web.archive.org/web/20221020133346/https://www.hivlawandpolicy.org/sites/default/files/AMA%20Resolution.pdf>.
- American Psychological Association**, *Resolution Opposing HIV Criminalization* (2016),
<https://www.apa.org/about/policy/resolution-opposing-hiv-criminalization.pdf>.
- American Nurses Association**, *HIV Criminalization Laws and Policies Promote Discrimination and Must be Reformed* (Nov. 2014), available at
https://web.archive.org/web/20181201165541/http://www.nursesinaidsca.org/files/bb/ANAC_PS_Criminalization_December22014_FinalforJANAC.pdf/.
- Association of Nurses in AIDS Care**, *HIV Criminalization Laws and Policies Promote Discrimination and Must be Reformed* (Nov. 2014), available at
https://web.archive.org/web/20181201165541/http://www.nursesinaidsca.org/files/bb/ANAC_PS_Criminalization_December22014_FinalforJANAC.pdf/.
- Centers for Disease Control and Prevention**. *HIV and STD Criminalization Laws* (2023),
<http://www.cdc.gov/hiv/policies/law/states/exposure.html>.
- HIV Medicine Association**, *Position on the Criminalization of HIV, Sexually Transmitted Infections, and Other Communicable Diseases* (Mar. 2015),
<https://www.hivma.org/globalassets/hivma/policy-and-advocacy/policy-priorities/policy-statements/hivma-idsa-communicable-disease-criminalization-statement-final.pdf>.
- Infectious Diseases Society of America**, *Position on the Criminalization of HIV, Sexually Transmitted Infections, and Other Communicable Diseases* (Mar. 2015),
<https://www.hivma.org/globalassets/hivma/policy-and-advocacy/policy-priorities/policy-statements/hivma-idsa-communicable-disease-criminalization-statement-final.pdf>.
- Joint United Nations Programme on HIV/AIDS**, *Ending Overly Broad Criminalization of HIV Non-Disclosure, Exposure, and Transmission: Critical Scientific, Medical and Legal Considerations* (2013),
http://www.unaids.org/sites/default/files/media_asset/20130530_Guidance_Ending_Criminalisation_0.pdf.
- National Association of County & City Health Officials**, *State of Policy: Opposing Stigma and Discrimination against Persons with Communicable Diseases* (2013),
<http://www.naccho.org/uploads/downloadable-resources/Policy-and-Advocacy/13-11-Opposing-Stigma-and-Discrimination-against-Persons-with-Communicable-Diseases-2.pdf>.
- National Association of Criminal Defense Lawyers**. *Resolution of the Board of Directors of the National Association of Criminal Defense Lawyers Concerning HIV Criminalization* (2016),
<http://www.nacdl.org/resolutions/2016sm01/>.
- Office of the United Nations High Commissioner for Human Rights/Joint United Nations Programme on HIV/AIDS**, *The International Guidelines on HIV/AIDS and Human Rights; 2006 Consolidated Version* (2006),
<https://www.ohchr.org/Documents/Issues/HIV/ConsolidatedGuidelinesHIV.pdf>.

Presidential Advisory Council on HIV/AIDS, *Resolution on Ending Federal and State HIV-Specific Criminal Laws, Prosecutions, and Civil Commitments* (Feb. 2013),
<https://web.archive.org/web/20170131221547/https://www.aids.gov/federal-resources/pacha/meetings/2013/feb-2013-criminalization-resolution.pdf>.

The White House. *National HIV/AIDS Strategy for the United States 2022-2025*,
<https://files.hiv.gov/s3fs-public/NHAS-2022-2025.pdf>.

UNAIDS Reference Group on HIV and Human Rights, *Decriminalisation and the end of AIDS: keep the promise, follow the science, and fulfill human rights*, *Sexual and Reproductive Health Matters* (2023) 31:1, 2194188, DOI: 10.1080/26410397.2023.2194188.

United States Conference of Mayors, *HIV Discrimination and Criminalization* (2016),
https://web.archive.org/web/20170123040632/http://www.usmayors.org/resolutions/81st_Conference/cs11.asp.

United States Department of Justice Civil Rights Division, *Best Practices to Reform HIV-Specific Criminal Laws with Scientifically-Supported Factors* (2014),
<https://www.hivlawandpolicy.org/sites/default/files/DOJ-HIV-Criminal-Law-Best-Practices-Guide.pdf>.