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## Best Practices Guide to Reform HIV-Specific Criminal Laws to Align with Scientifically-Supported Factors

### Introduction

On March 15, 2014, the Civil Rights Division of the United States Department of Justice and the Centers for Disease Control and Prevention (“CDC”) published *Prevalence and Public Health Implications of State Laws that Criminalize Potential HIV Exposure in the United States, AIDS and Behavior* (“Article”).<sup>1</sup> The Article examines HIV-specific state laws that criminalize engaging in certain behaviors before disclosing known HIV-positive status. Most of these laws do not account for actual scientifically-supported level of risk by type of activities engaged in or risk reduction measures undertaken. As a result, many of these state laws criminalize behaviors that the CDC regards as posing either no or negligible risk for HIV transmission even in the absence of risk reduction measures.<sup>2</sup> The majority were passed before the development of antiretroviral therapy (“ART”), which the CDC acknowledges can reduce the risk of HIV transmission by up to 96%.<sup>3</sup> Most of these laws do not, therefore, account for the use of ART, condoms, or pre-exposure prophylaxis. The Article encourages states to use scientific findings to, “re-examine [these] laws, assess the laws’ alignment with current evidence regarding HIV transmission risk, and consider whether the laws are the best vehicle to achieve their intended purposes.”<sup>4</sup> As required by the Committee Report accompanying the Commerce, Justice, Science, and Related Agencies Appropriations Bill, 2014, the Department of Justice is following that Article with this Best Practices Guide to Reform of HIV-Specific Criminal Laws to Align with Scientifically-Supported Factors (“Guide”) to provide technical assistance to states that wish to re-examine their HIV-specific criminal laws to ensure that existing policies “do not place unique or additional burdens on individuals living with HIV/AIDS” and that these policies “reflect contemporary understanding of HIV transmission routes and associated benefits of treatment.”<sup>5</sup>

“The stigma associated with HIV remains extremely high and fear of discrimination causes some Americans to avoid learning their HIV status, disclosing their status, or accessing

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<sup>1</sup> Available at <http://link.springer.com/article/10.1007/s10461-014-0724-0>.

<sup>2</sup> HIV Transmission Risk: Estimated Per-Act Probability of Acquiring HIV from an Infected Source, by Exposure Act, Centers for Disease Control and Prevention, available at <http://www.cdc.gov/hiv/policies/law/risk.html>.

<sup>3</sup> *Id.*

<sup>4</sup> Article at 1004.

<sup>5</sup> U.S. House. Committee on Appropriations. *Commerce, Justice, Science, and Related Agencies Appropriations Bill, 2014*, (113 H. Rpt. 171).

medical care.”<sup>6</sup> There is no question that “HIV stigma has been shown to be a barrier to HIV testing”<sup>7</sup> and the CDC has unequivocally asserted that HIV “stigma hampers prevention.”<sup>8</sup> Almost 1 in 6, or 15.8% of individuals, in the United States who carry the virus are unaware of it<sup>9</sup> and the virus is disproportionately spread by those who are unaware of their status. In addition, “CDC data and other studies...tell us that intentional HIV transmission is atypical and uncommon.”<sup>10</sup> An important component of curtailing the epidemic is to “ensure that laws and policies support our current understanding of best public health practices for preventing and treating HIV,”<sup>11</sup> including re-considering whether the vast majority of HIV-specific criminal laws “run counter to scientific evidence about routes of HIV transmission and may undermine the public health goals of promoting HIV screening and treatment.”<sup>12</sup>

## Reform

As discussed at length in our Article, there are 33 states that have one or more HIV-specific criminal laws. In addition, in some states, individuals who have been convicted under those laws may face involuntary civil commitment after incarceration<sup>13</sup> or be registered as sex offenders.<sup>14</sup> These laws criminalize non-disclosure of known HIV-positive status in connection

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<sup>6</sup> *National HIV/AIDS Strategy for the United States*, July 2010 at page ix (“NAS”), citing Mahajan AP, Sayles JN, Patel VA et al. *Stigma in the HIV/AIDS epidemic: A review of the literature and recommendations for the way forward. AIDS 2008;22(Suppl 2):S67-S69.*

<sup>7</sup> NAS at 36.

<sup>8</sup> *HIV/AIDS Stigma: An Impediment to Public Health*, Valdiserri, Ronald O, MD, MPH, Am J Pubic Health, 2002, March 92: 341-342 citing Centers for Disease Control and Prevention. HIV Prevention Strategic Plan through 2005. January 2001.

<sup>9</sup> *HIV in the United States: At a Glance*, available at <http://www.cdc.gov/hiv/statistics/basics/ata glance.html>.

<sup>10</sup> NAS at 36; citing CDC HIV Prevention in the United States at a Critical Crossroads, 2009, available at [http://www.cdc.gov/hiv/resources/reports/pdf/hiv\\_prev\\_us.pdf](http://www.cdc.gov/hiv/resources/reports/pdf/hiv_prev_us.pdf).

<sup>11</sup> NAS at 36.

<sup>12</sup> NAS at 37.

<sup>13</sup> Twenty states (Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin) and the District of Columbia have enacted laws regarding the post-incarceration involuntary civil commitment of individuals convicted of certain sex offenses under certain circumstances. In addition, the Adam Walsh Child Protection Safety Act of 2006, 42 USC § 1691, *et seq.*, authorizes the federal government to institute involuntary civil commitment proceedings for federal sex offenders under certain circumstances.

<sup>14</sup> All states have sex offender registries. Sex offender registration is also covered by the following federal laws (some of which inform contents of state registries). :

- 1994 - [Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act](#) - Enacted as a part of the Omnibus Crime Bill of 1994, the act:
  - Established guidelines for states to track sex offenders.
  - Required states to track sex offenders by confirming their place of residence annually for ten years after their release into the community or quarterly for the rest of their lives if the sex offender was convicted of a violent sex crime.
- 1996 - [Megan’s Law](#) - During the mid-1990’s every state, along with the District of Columbia, passed a Megan’s Law. In January of 1996, Congress enacted the federal Megan’s Law that:
  - Provided for the public dissemination of information from states’ sex offender registries.
  - Provided that information collected under state registration programs could be disclosed for any purpose permitted under a state law.
  - Required state and local law enforcement agencies to release relevant information necessary to protect the public about persons registered under a State registration program established under the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act.
- 1996 - [The Pam Lychner Sex Offender Tracking and Identification Act of 1996](#):
  - Required the Attorney General to establish a national database (the National Sex Offender Registry or ‘NSOR’) by which the FBI could track certain sex offenders.
  - Mandated certain sex offenders living in a state without a minimally sufficient sex offender registry program to register with the FBI.
  - Required the FBI to periodically verify the addresses of the sex offenders to whom the Act pertains.

with engaging in certain behaviors such as while sharing needles, while engaging in sex work (regardless of risk of the act), or during the commission of a sex crime. Others criminalize behavior such as biting, spitting, and the throwing of bodily fluids by individuals who know they are HIV-positive, often in the context of interaction with law enforcement or corrections

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- Allowed for the dissemination of information collected by the FBI necessary to protect the public to federal, state and local officials responsible for law enforcement activities or for running background checks pursuant to the National Child Protection Act (42 U.S.C. § 5119, *et. seq.*).
    - Set forth provisions relating to notification of the FBI and state agencies when a certain sex offender moved to another state.
  - 1997 - [The Jacob Wetterling Improvements Act](#) - Passed as part of the Appropriations Act of 1998, the Act took several steps to amend provisions of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, the Pam Lychner Sex Offender Tracking and Identification Act, and other federal statutes. This law:
    - Changed the way in which state courts make a determination about whether a convicted sex offender should be considered a sexually violent offender to include the opinions not just of sex offender behavior and treatment experts but also of victims' rights' advocates and law enforcement representatives.
    - Allowed a state to impart the responsibilities of notification, registration, and FBI notification to a state agency beyond each state's law enforcement agency, if the state so chose.
    - Required registered offenders who change their state of residence to register under the new state's laws.
    - Required registered offenders to register in the states where they worked or went to school if those states were different from their state of residence.
    - Directed states to participate in the National Sex Offender Registry.
    - Required each state to set up procedures for registering out-of-state offenders, federal offenders, offenders sentenced by court martial, and non-resident offenders crossing the border to work or attend school.
    - Allowed states the discretion to register individuals who committed offenses that did not include Wetterling's definition of registerable offenses.
    - Required the Bureau of Prisons to notify state agencies of released or paroled federal offenders, and required the Secretary of Defense to track and ensure registration compliance of offenders with certain UCMJ convictions.
  - 1998 - [Protection of Children from Sexual Predators Act](#):
    - Directed the Bureau of Justice Assistance (BJA) to carry out the Sex Offender Management Assistance (SOMA) program to help eligible states comply with registration requirements.
    - Prohibited federal funding to programs that gave federal prisoners access to the internet without supervision.
  - 2000 - [The Campus Sex Crimes Prevention Act](#) - Passed as part of the Victims of Trafficking and Violence Protection Act, the Act:
    - Required any person who was obligated to register in a state's sex offender registry to notify the institution of higher education at which the sex offender worked or was a student of his or her status as a sex offender; and to notify the same institution if there was any change in his or her enrollment or employment status.
    - Required that the information collected as a result of this Act be reported promptly to local law enforcement and entered promptly into the appropriate state record systems.
    - Amended the Higher Education Act of 1965 to require institutions obligated to disclose campus security policy and campus crime statistics to also provide notice of how information concerning registered sex offenders could be obtained.
  - 2003 - [Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today \(PROTECT\) Act](#):
    - Required states to maintain a web site containing registry information, and required the Department of Justice to maintain a web site with links to each state web site.
    - Authorized appropriations to help defray state costs for compliance with new sex offender registration provisions.
  - 2006 - [Adam Walsh Child Protection and Safety Act](#):
    - Created a new baseline standard for jurisdictions to implement regarding sex offender registration and notification.
    - Expanded the definition of "jurisdiction" to include 212 Federally-recognized Indian Tribes, of whom 197 have elected to stand up their own sex offender registration and notification systems.
    - Expanded the number of sex offenses that must be captured by registration jurisdictions to include all State, Territory, Tribal, Federal, and UCMJ sex offense convictions, as well as certain foreign convictions.
    - Created the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART Office) within the Department of Justice, Office of Justice Programs, to administer the standards for sex offender notification and registration, administer the grant programs authorized by the Adam Walsh Act, and coordinate related training and technical assistance.
    - Established the SOMA program within the Justice Department.
  - [Department of Justice, Office of the Attorney General, Applicability of the Sex Offender Registration and Notification Act \(28 CFR Part 72\)](#) - this is a federal regulation that the Department of Justice passed to specify that SORNA's registration requirements are retroactive. All available at: <http://ojp.gov/smart/legislation.htm>.

officials.<sup>15</sup> Finally, the majority criminalize the failure to disclose known HIV-positive status in connection with engaging in adult consensual sexual behaviors of various types.<sup>16</sup>

The majority of these laws were enacted at a time when far less was known about risk, likelihood, and mode of transmission of the virus and at a time when the quality of life and lifespan of an individual with the virus was vastly different than it is currently. In fact, “HIV medications and treatments have significantly changed the course of HIV infection since the early days of the epidemic. With daily medication, regular laboratory monitoring, and lifestyle changes (e.g., exercise, adequate sleep, smoking cessation), HIV can be manageable as a chronic disease. People living with HIV can enjoy healthy lives.”<sup>17</sup> As a result, certain of these laws do not accurately reflect the current science of transmission, do not account for risk reduction behaviors and medical protocols that greatly reduce transmission risk, and do not reflect that, with testing and treatment, HIV may be a manageable medical condition.

Generally, the best practice would be for states to reform these laws to eliminate HIV-specific criminal penalties except in two distinct circumstances. First, states may wish to retain criminal liability when a person who knows he/she is HIV positive commits a (non-HIV specific) sex crime where there is a risk of transmission (e.g., rape or other sexual assault). The second circumstance is 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, whether or not transmission actually occurred.

For states that choose to retain HIV-specific criminal laws or penalty enhancements beyond these two limited circumstances, the best practice would be to reform and modernize them so that they accurately reflect the current science of risk and modes of transmission, the quality of life and life span of individuals who are living with HIV, account for circumstances where the failure to disclose is directly related to intimate partner violence<sup>18</sup>, and ensure they are the desired vehicle to achieve the states’ intended purpose in enacting them initially or retaining them in modernized form.

In bringing these laws into alignment with current evidence regarding HIV transmission and current knowledge of quality and length of life for those living with HIV the following facts should be taken into account:

- The CDC categorizes the risk of transmission of HIV from biting, spitting, or throwing body fluids, even in the absence of risk reduction measures, as negligible,

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<sup>15</sup> For example, 18 U.S.C. § 4014, Testing for human immunodeficiency virus, sets out the protocol for situations where a federal detainee or inmate intentionally or unintentionally exposes an officer or employee of the United States, or to any person lawfully present in a correctional facility who is not incarcerated there, to the HIV virus.

<sup>16</sup> Article at 1001.

<sup>17</sup> <http://www.aids.gov/hiv-aids-basics/just-diagnosed-with-hiv-aids/overview/chronic-manageable-disease/>

<sup>18</sup> Gielen AC, McDonnell KA, Burke JG, O’Campo P. Women’s Lives After an HIV-Positive Diagnosis: Disclosure and Violence. *Maternal and Child Health Journal*. 2000; 4(2):111-120.

defined as exposure routes that are technically possible but unlikely and not well documented.<sup>19</sup>

- The CDC categorizes the risk of transmission of HIV during receptive and insertive oral intercourse, even in the absence of risk reduction measure, as low.<sup>20</sup>
- 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.<sup>21</sup>
- Taking ART can reduce the risk of HIV transmission 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%.<sup>22</sup>
- With testing and treatment, HIV can be a manageable chronic disease. As of 2013, a 20-year old with the HIV virus who is on ART and is living in the United States or Canada has a life expectancy into their early 70's, a life expectancy that approaches that of an HIV-negative 20-year old in the general population.<sup>23</sup>

## Conclusion

While HIV-specific state criminal laws may be viewed as initially well-intentioned and necessary law enforcement tools, the vast majority do not reflect the current state of the science of HIV and, as a result, place unique and additional burdens on individuals living with HIV. Generally, states that choose to retain HIV-specific criminal laws should consider limiting criminal liability to the circumstances set forth herein. States that wish further technical assistance with respect to their HIV-specific criminal laws should contact: Allison Nichol, Special Counsel for Disability Resources: [allison.nichol@usdoj.gov](mailto:allison.nichol@usdoj.gov)

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<sup>19</sup> HIV Transmission Risk: Estimated Per-Act Probability of Acquiring HIV from an Infected Source, by Exposure Act, Centers for Disease Control and Prevention, available at <http://www.cdc.gov/hiv/policies/law/risk.html>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Closing the Gap: Increases in Life Expectancy among Treated Individuals in the United States and Canada, Hasina Samji *et. al.*, Page 16, PLOS ONE, available at <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0081355>.