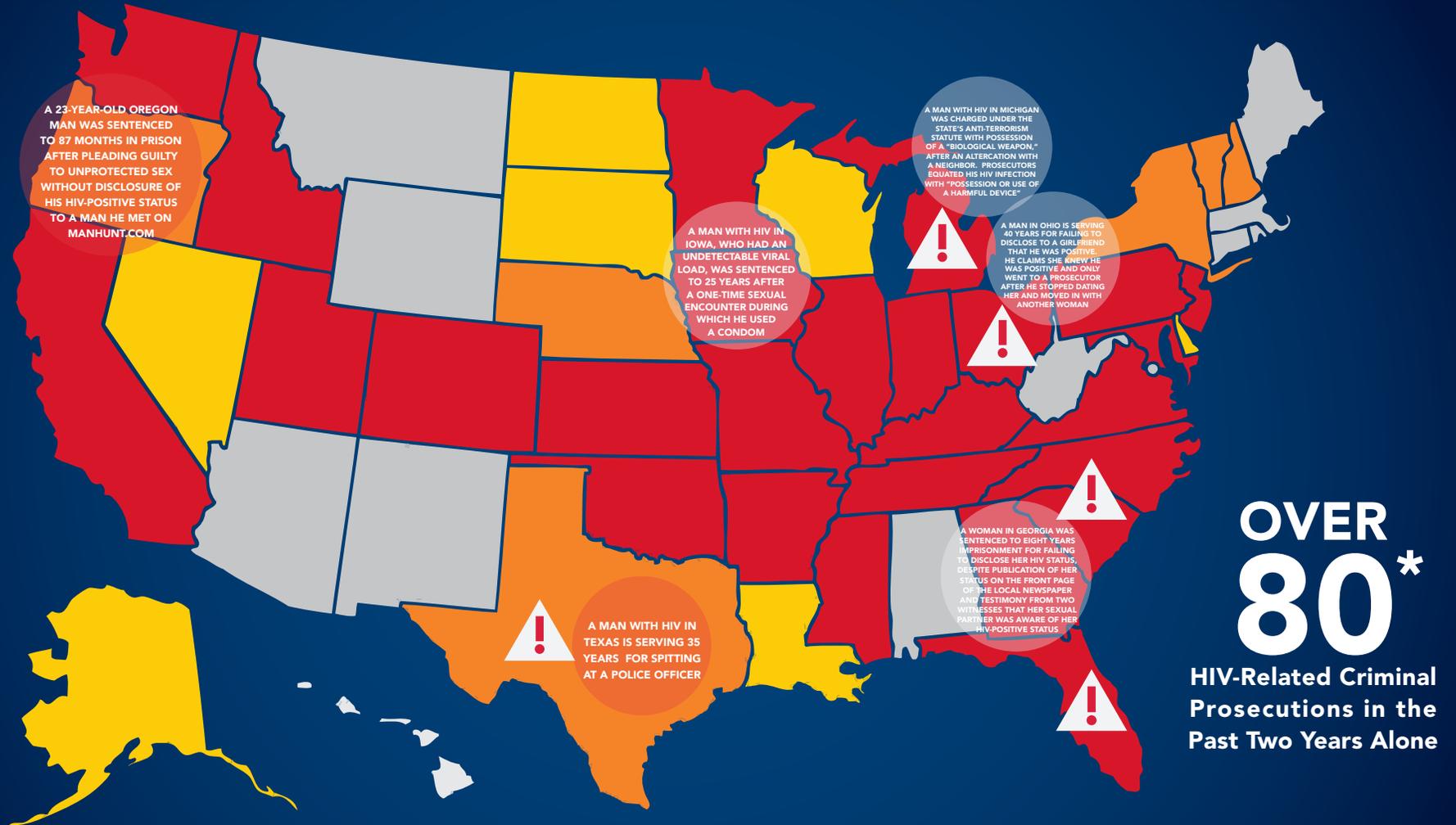


UNJUST, UNJUSTIFIED AND JUST UNACCEPTABLE: HIV CRIMINALIZATION'S IMPACT ON HUMAN RIGHTS AND PUBLIC HEALTH



THE NATIONAL HIV/AIDS STRATEGY ON HIV CRIMINALIZATION (JULY 2010)

"Since it is now clear that spitting and biting do not pose significant risks for HIV transmission, many believe that it is unfair to single out people with HIV for engaging in these behaviors and [people engaging in these behaviors] should be dealt with in a consistent manner without consideration of HIV status. Some laws criminalize consensual sexual activity between adults on the basis that one of the individuals is a person with HIV who failed to disclose their status to their partner. CDC data and other studies, however, tell us that intentional HIV transmission is atypical and uncommon.... [These laws] may not have the desired effect and they may make people less willing to disclose their status by making people feel at even greater risk of discrimination.... 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."⁸

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DISCUSSION

Since the earliest days of the HIV/AIDS epidemic, stigma has been a major obstacle to accessing care and implementing effective HIV prevention policies.¹ People with HIV face pre-judgment, marginalization, discrimination and severe misunderstanding about the means and actual risks of transmission.^{2,3}

Many people with HIV internalize and accept this judgment and the perception of those with HIV as toxic, highly infectious, or dangerous to be around. This has serious adverse ramifications for those individuals, as well as on the broader effort to combat HIV. Widespread ignorance about the actual routes and risks of transmission—and, in particular, the mistaken belief that transmission is likely to occur as the result of a single sexual exposure—is driving the arrest and severe sentencing of people with HIV in this country. In short, HIV-related stigma is both a serious public health problem and a pressing civil liberties issue.

Stigma discourages people at risk from accessing care⁴—including testing for HIV—and it discourages people who know they have HIV from disclosing that fact to potential sexual partners and others.⁵ Nothing more powerfully drives stigma than when government sanctions it through discriminatory practices in the law or its application. This is reflected perhaps most dramatically in the criminal prosecutions of people with HIV who are unable to prove they disclosed their HIV-positive status to partners prior to sexual contact.⁶

The ostensible purpose of these statutes is to deter HIV-positive people from putting others at risk, but all available evidence shows that HIV criminalization does not serve its intended purpose. The inherent problem with these laws is that they focus primarily on the existence or lack of proof of disclosure (and on the health status of the person who has been tested for HIV), not on the nature of the exposure, the actual level of risk present, the intent of the person with the positive HIV test or even whether HIV was transmitted. Consequently, and as studies of the impact of these laws have demonstrated, they do nothing to advance their supposed goals.⁷

Our analysis is not able to capture fully whether defendants with HIV are given fair trials. In most cases, information about the baseline HIV status of the defendant's sexual partner or contacts is not available and proof of transmission to a sexual partner is generally not an element. In the reported cases involving situations in which a sexual partner actually tests positive for HIV, little if any information is provided about how the defendant, as opposed to another sexual partner, has been established as the source of infection.

News and case reports also do not typically reveal whether the truthful testimony of defendants is given less weight because of the social stigma that attaches to the defendant's HIV status and the emotionally-charged allegations of betrayal within deeply intimate relationships. Nevertheless, given many of the “facts” as found by judges or juries in these cases, there is certainly support for the view that the testimony of defendants with HIV is often discounted. This is particularly true in cases where conflicting testimony is from law enforcement personnel,⁸ such as those testifying that they were spit upon or bitten by an HIV-positive defendant in their custody, or from the “morally innocent” sexual partners whose trust has allegedly been betrayed by the nondisclosure of HIV status by a sexual partner.⁹

Defendants also may not have adequate access to expert scientific witnesses and defense counsel may be less than well-informed about the underlying medical and scientific issues.¹⁰ Indeed, some convictions of persons with HIV appear to be the result of so-called expert testimony that is nothing more than “junk science.” Even in cases where the defendant has well-informed and zealous counsel that seeks to challenge and discredit these so-called experts, judges and juries are often swayed by such inaccurate testimony because it comports with their own preconceived misconceptions about HIV transmission.

Finally, under many HIV-specific statutes, particularly those imposing enhanced penalties for prostitution offenses, cases can be prosecuted under attempt or solicitation theories, and no evidence of a completed offense is necessary for conviction. Under these often overly broad statutes, no sexual contact or other activity posing a risk of HIV transmission is necessary, and often court opinions offer scant information about the actual risk of HIV transmission that would have resulted from the offense, had it been completed.

EMPIRICAL STUDIES DEMONSTRATE THE NEGATIVE IMPACT OF HIV CRIMINALIZATION LAWS—MORE RESEARCH IS NEEDED

No evidence that criminalization laws deter risky behavior.

Studies have found no differences in risky sexual behavior between residents living in a state with a specific disclosure law compared to residents living in a state without such a law.¹¹

Even when people are aware that an HIV-specific law exists in a particular state, they usually do not understand how the law functions (e.g., types of sexual behavior/activity requiring disclosure, penalty for non-disclosure, etc.).¹²

Criminalization sends the inaccurate message that attempting to avoid sexual partners with HIV is an adequate prevention strategy.

HIV criminalization laws weaken the message that sexual health is the responsibility of both partners during sex and increase stigma by strengthening the culture of blame surrounding infection.¹³

For instance, a majority of sexually active gay men believe it should be illegal for PLWH to have unprotected sex without disclosure because PLWH should have the primary and exclusive responsibility to protect their sexual partners. Men who have never been tested for HIV are more likely to expect disclosure from HIV-positive partners and more likely to support criminal prosecutions.¹⁴

Predictors for support of HIV criminalization laws include: HIV-negative or unknown status, less education, a non-gay sexual orientation and residing in a state perceived to be hostile to LGBT persons.¹⁵

HIV criminalization laws may actually reduce instances of disclosure.

People living with HIV express concerns with the negative impact of required disclosure (e.g., possibility of secondary disclosure by prospective partner; perceived legal vulnerability based on HIV-positive status) and a belief that such laws create an inequitable distribution of the burden, because the law holds HIV-positive persons entirely responsible for protecting the health of an at-risk partner.¹⁶

In a study involving in-depth interviews with 42 gay men asking about awareness and personal impact of criminal prosecutions for reckless transmission of HIV in the UK, some of the respondents who planned to behave and communicate differently with sexual partners in the future actually planned to **maximize their anonymity and be less open about their HIV status.**¹⁷

The actual impact of HIV criminalization on the inclination and decision to get an HIV test has not been studied, although anecdotal evidence suggests that it is having a **negative impact, particularly in communities of color.**

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⁸ See, e.g., *People v. Hall*, 124 Cal. Rptr. 2d 806 (Cal. Ct. App. 2002) (affirming HIV testing order on theory that sweat on defendant's hands might pose a risk of HIV transmission to prosecutor who defendant assaulted during his criminal trial).

⁹ See, e.g., *Ginn v. State*, 667 S.E.2d 712 (Ga. Ct. App. 2008) (affirming conviction in case that resulted from the defendant's former sexual partner applying for an arrest warrant with magistrate court and giving a statement to sheriff's department against the defendant for failing to inform him of her HIV status, although her HIV status was published on the front page of a local newspaper before she commenced the sexual relationship).

¹⁰ See, e.g., *State v. Bied*, 692 N.E.2d 1013 (Ohio 1998) (affirming conviction based on defendant's no contest plea which was deemed an admission of factual issue as to whether saliva can be a deadly weapon because of risk of HIV transmission).

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