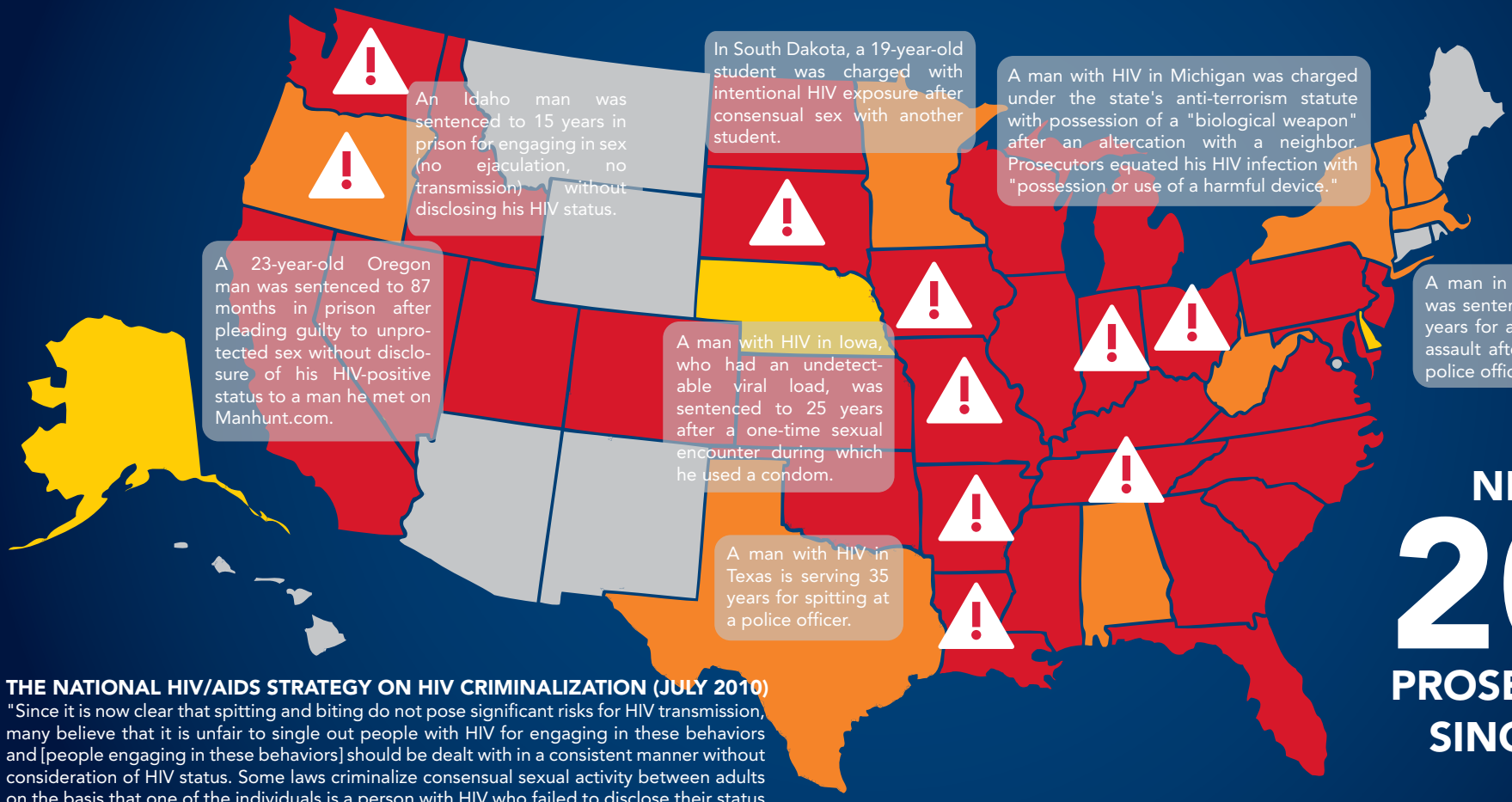
WHEN SEX IS A CRIME AND SPIT IS A DANGEROUS WEAPON

A SNAPSHOT OF HIV CRIMINALIZATION IN THE UNITED STATES



NEARLY

200

PROSECUTIONS SINCE 2008*

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."

- HIV-SPECIFIC STATUTE, AT LEAST ONE PROSECUTION IN PAST TWO YEARS
- HIV-SPECIFIC STATUTE, NO RECENT REPORTED PROSECUTIONS
- HIV-RELATED PROSECUTIONS, THOUGH NO HIV-SPECIFIC STATUTE
- PUNISHMENT INCLUDES SEX OFFENDER REGISTRATION

THE CENTER FOR HIV LAW & POLICY

The Center for HIV Law and Policy
65 Broadway, Suite 832
New York, NY 10006
212.430.6733
www.hivlawandpolicy.org

*The total number of arrests and prosecutions from 2008-2013 reported here are illustrative, not a precise count. It is impossible to track all such arrests and prosecutions as there is no uniform system of monitoring and reporting them. The numbers represent those cases that are searchable in news and legal databases or that otherwise have come to the attention of the authors.

WHEN SEX IS A CRIME AND SPIT IS A DANGERGOUS WEAPON

HIV CRIMINALIZATION HURTS PUBLIC HEALTH

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 risk 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 care[4] —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.[8]

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 from law enforcement personnel,[9] 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.[10]

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.[11] 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.

EMPIRICAL STUDIES DEMONSTRATE THE NEGATIVE IMPACT OF HIV CRIMINALIZATION LAWS

1. There is no evidence that criminalization laws deter risky behavior.[12]
2. 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.[13]
3. 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.).[14]
4. Criminalization sends the inaccurate message that attempting to avoid sexual partners with HIV is an adequate prevention strategy.
5. HIV criminalization laws weaken the message that sexual health is the responsibilty of both partners during sex and increase stigma by strengthening the culture of blame surrounding infection.[15]
6. Treatment reduces transmission risk through all routes to near-zero.[16]
7. HIV criminalization is based on and reinforces grossly inaccurate perceptions of the actual routes and relative risks of HIV transmission.[17]

For information about the Positive Justice Project, a diverse national coalition of organizations and individuals working to end HIV criminalization, go to *www.hivlawandpolicy.org*.

RESOURCES

[1]Brimlow DL, Cook JS, Seaton R, eds. Stigma and HIV/AIDS: A review of the literature. US Department of Health and Human Services, Health Resources and Services Administration, HIV/AIDS Bureau. 2003.

[2]Herek GM. AIDS and stigma. *American Behavioral Scientist*. 1999; 42(7): 1102-1112.

[3]Herek GM, Mitnick L, Burris S, Chesney M, Devine P, Fullilove MT et al. AIDS and stigma: A conceptual framework and research agenda. *AIDS and Public Policy Journal*. 1998; 13(1): 36-47.

[4]Sayles JN, Wong MD, Kinsler JJ, Martins D, Cunningham WE. The association of stigma with self-reported access to medical care and antiretroviral therapy adherence in persons living with HIV/AIDS. *Journal of General Internal Medicine*. 2003; 24(10): 1101-1108.

[5]Bharat S. Racism, racial discrimination and HIV/AIDS. Paper prepared for UNESCO/OHCHR Workshop to Develop Educational Material to Foster Tolerance and to Eliminate Prejudice. Paris, France. February 2002.

[6]World Health Organization (WHO). WHO technical consultation in collaboration with the European AIDS Treatment Group and AIDS Action Europe on the criminalization of HIV and other sexually transmitted infections. Copenhagen, Denmark. October 2006.

[7]Policek N, Doupe A. Criminalization of HIV transmission. International Conference on AIDS. 2000; 13: abstract no. MoPeE2865.

[8]Trevor Hoppe, Controlling Sex in the Name of "Public Health": Social Control and Michigan HIV Law, Social Problems (2013).

[9]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).

[10]*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).

[11]*See, e.g.*, State v. Bird, 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 be-cause of risk of HIV transmission); Campbell v. State, 2009 WL 2025344 (Tex. App. 2009) (affirming conviction of assault based on a state medical witness testimony that in the absence of scientific evidence, there was a theoretical possibility of HIV transmission through saliva).

[12]Patrick O'Byrne, Alyssa Bryan, Cory Woodyatt, Nondisclosure Prosecutions and HIV Prevention: Results From an Ottawa-Based Gay Men's Sex Survey, Journal of the Association of Nurses in AIDS Care (2012); Zita Lazzarini et al., Evaluating the Impact of Criminal Laws on HIV Risk Behavior, 30 J.L. Med. & Ethics 239, 239-253(2002); Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial. Scott Burris et al., 39 Ariz. St. L.J. 467 (2007).

[13]Horvath KJ, Weinmayer R, Rosser S. Should it be illegal for HIV-positive persons to have unprotected sex without disclosure? An examination of attitudes among US men who have sex with men and the impact of state law. *AIDS Care*. 2010; 22(10): 1221-1228; Burris S, Beletsky L, Burleson JA, Case P, Lazzarini Z. Do criminal laws influence HIV risk behavior? An empirical trial. *Arizona State Law Journal*. 2007; 39: 467.

[14]Galletly CL, DiFranceisco W, Pinkerton SD. HIV-positive persons' awareness and understanding of their state's criminal HIV disclosure law. *AIDS and Behavior*. 2009; 13(6): 1262-1269.; Dodds C, Bourne A, Weait M. Responses to criminal prosecutions for HIV transmission among gay men with HIV in England and Wales. *Reproductive Health Matter*. 2009; 17(34): 135-145.

[15]Dodds C, Keogh P. Criminal prosecutions for HIV transmission: People living with HIV respond. *International Journal of STD & AIDS*. 2006; 17: 315-318.

[16]Broder S. The development of antiretroviral therapy and its impact on the HIV-1 AIDS pandemic. *Antiviral Research*. (2010); A. Anglemyer et al., Antiretroviral therapy for prevention of HIV transmission in HIV-discordant couples (Review), Cochrane Database of Systematic Reviews (2011).

[17]Carol L. Galletly and Zita Lazzarini, Charges for Criminal Exposure to HIV and Aggravated Prostitution Filed in the Nashville, Tennessee Prosecutorial Region 2000-2010, *AIDS and Behavior*, 2013.

MAP SOURCES

CHLP, "Prosecutions for HIV Exposure in the United States: Fifty States, U.S.Territories, and Military Courts."

CHLP, "Prosecutions for HIV Exposure in the United States, 2008-2013."

CHLP, Chart: State-by-State Criminal Laws Used to Prosecute People with HIV.