

The lower courts' decisions, employing a reasonable limiting construction of the felony reckless endangerment statute that ensures fair notice of the behavior the statute was meant to prohibit and guards against arbitrary and discriminatory enforcement, should stand. The alternative is for the felony reckless endangerment law to become an impermissibly vague tool that allows law enforcement to target conduct, especially the conduct of unpopular communities, that was never intended to be regulated under the criminal laws.

II. THE CRIMINALIZATION OF CONSENSUAL SEX BY PEOPLE LIVING WITH HIV CREATES STIGMA, DISCOURAGES TESTING AND OTHER PROVEN PREVENTION STRATEGIES, AND FRUSTRATES PUBLIC HEALTH POLICY GOALS.

The unjustified imposition of harsh criminal penalties—like the one sought by the State— on people living with HIV/AIDS frustrates important public policy and HIV-prevention goals. First, criminalization leads to the increased stigmatization of an already misunderstood and vilified community. Consequently, increased stigma, ignorance, and fear lead directly to a decrease in testing and a decrease in open communication between sexual partners about their health. Both federal and New York State HIV-prevention priorities, including those re-affirmed by the Department of Justice in its recently-released guidance on the issue, reflect this perspective; they stress the importance of public education and de-stigmatization while discouraging criminalization outside the limited contexts of intentional transmission and sexual assault.

a. Laws That Criminalize People Living With HIV Lead to Increased Stigma, Fear, and Ignorance.

People living with HIV experience stigma based on fear and ignorance every day, and the criminalization of their consensual sexual conduct fuels that stigma. Barriers to employment, health care, housing, and public accommodations are common. *See generally* Lambda Legal, *HIV Stigma and Discrimination in the U.S.: An Evidence-Based Report* (Nov. 2010).⁹ HIV stigma is largely the result of a general lack of knowledge about the basic modes of HIV transmission and the current prognosis for those living with HIV, as “[l]arge segments of the public remain uneducated about HIV and how it is transmitted, which promotes fear and antipathy” that can “often translate into biased and discriminatory actions.” Katherine R. Waite et al., *Literacy, Social Stigma, and HIV Medication Adherence*, 23 J. Gen. Internal Med. 1367, 1367 (2008).

Criminalizing sexual activity by people living with HIV further increases that stigma by perpetuating outdated and sensationalized fears about the virus, its effects, and its modes of transmission. The United States Department of Justice has issued new guidance this year reiterating its position that states must bring prosecutions “into alignment with current evidence regarding HIV transmission

⁹ http://www.lambdalegal.org/sites/default/files/publications/downloads/fs_hiv-stigma-and-discrimination-in-the-us_1.pdf. This document offers a survey of cases and other reports involving individuals being fired from their jobs, denied health care, refused services, kicked out of their homes, denied positions in the government, segregated in prisons, and even accused of being a human vessel for bioterrorism.

and current knowledge of quality and length of life for those living with HIV” and discouraging the criminalization of people living with HIV beyond instances of sexual assault or intentional transmission. *DOJ Best Practices* at 4. The report recognizes that the current legal landscape, in which prosecutions remain *out of* alignment with modern understandings of the disease, has resulted in “[t]he stigma associated with HIV remain[ing] extremely high.” *Id.* at 1;¹⁰ *see also* Sarah J. Newman, *Prevention, Not Prejudice: The Role of Federal Guidelines in HIV-Criminalization Reform*, 107 Nw. U. L. Rev. 1403, 1428 (2013) (“Prosecuting HIV exposure under traditional criminal laws suffers from the same problems associated with prosecution under current HIV-specific statutes.”).

b. Increased Stigma and Fear of Discrimination Lead Directly to Decreased Testing, Decreased Understanding of HIV, and Failures in Public Prevention Efforts.

The effect of increased stigma is clear: it frustrates public health-based prevention efforts and works against every proven public policy effort to curb the spread of HIV/AIDS. In short, “stigma hampers prevention.” Ronald O. Valdiserri, *HIV/AIDS Stigma: An Impediment to Public Health*, 92 Am. J. Pub. Health 341, 342 (Mar. 2002).¹¹ It does so by discouraging individuals from getting tested,

¹⁰ The *DOJ Best Practices* guide quotes A.P. Mahajan et al., *Stigma in the HIV/AIDS Epidemic: A Review of the Literature and Recommendations For the Way Forward*, 22 AIDS S67, S67-69 (2008), available at www.ncbi.nlm.nih.gov/pmc/articles/PMC2835402/.

¹¹ <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447072/> (citing CDC, *HIV Prevention Strategic Plan through 2005* (January 2001), <http://stacks.cdc.gov/view/cdc/6442>).

discouraging the open discussion of HIV/AIDS between sexual partners, and diluting the message of public health efforts to connect people living with HIV with appropriate medical care and support.

Because of this stigma—caused, in part, by criminal laws that vilify people living with HIV/AIDS—“fear of discrimination causes some Americans to avoid learning their HIV status, disclosing their status, or accessing medical care.” *DOJ Best Practices* at 1-2. The fear that a trip to one’s health care provider will result in discrimination or negative responses leads directly to an avoidance of health care providers, and, similarly, rules and laws stigmatizing non-disclosure have been shown to drive people away from counseling. *See* Carol Galletly & Steven Pinkerton, *Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV*, 10 *AIDS Behav.* 451, 458 (Sept. 2006).¹²

Ultimately, the rationale—on which the current prosecution presumably rests—that a law criminalizing non-disclosure will effectively *deter* non-disclosure is incorrect. The National HIV/AIDS Strategy (“NHAS”), the United States’ federal strategy to combat the HIV epidemic, emphasizes de-stigmatization as a

¹²*See also* J. D. Fortenberry et al., *Relationship of Stigma and Shame to Gonorrhea and HIV Screening*, 92 *Am. J. of Pub. Health* 378 (Mar. 2002), *available at* <http://ajph.aphapublications.org/doi/full/10.2105/AJPH.92.3.378>; Valdiserri, *HIV/AIDS Stigma*, *supra*.

key component of reducing HIV transmission and, to this end, specifically states that laws criminalizing non-disclosure “may make people *less* willing to disclose their status by making people feel at even greater risk of discrimination.” NHAS at 36-37 (Jul. 2010) (emphasis added).¹³ This is because, for many individuals, the fear of stigma and discrimination that could result from disclosure overwhelms all other considerations. *See id.* at 35 (widespread ongoing stigma “makes it harder for people to disclose their HIV status to their medical providers, their sex partners, and even clergy and others from whom they may seek understanding and support”).¹⁴

In addition, policymakers recognize that an overemphasis on disclosure as a means of avoiding exposure frustrates HIV-prevention efforts. Newly infected individuals still receive negative HIV screening results during the period immediately after they have contracted the virus, which means that disclosure of a “negative” test result does not guarantee that a sexual partner is free of HIV. *See CDC, Act Against AIDS: Testing* (Feb. 2014).¹⁵ Overall, 15% to 20% of people

¹³ <http://www.whitehouse.gov/sites/default/files/uploads/NHAS.pdf>.

¹⁴ *See also* WHO, *Gender Dimensions of HIV Status Disclosure to Sexual Partners: Rates, Barriers, and Outcomes* 12-13 (2004), <http://www.who.int/gender/documents/en/genderdimensions.pdf>.

¹⁵ www.cdc.gov/actagainstaids/basics/testing.html.

living with HIV are unaware of their status,¹⁶ and, consequently, placing too much emphasis on the role played by a partner's disclosure or non-disclosure distracts from the lack of certainty involved in *any* form of disclosure; this can lull consensual sexual partners who do not have HIV into assuming that the responsibility to act to prevent HIV transmission rests solely on their partner.

Overall, public health strategies for HIV/AIDS prevention reflect the fact that a criminal rule making felons out of people living with HIV who do not—for whatever reason—disclose their status to consenting partners is at direct odds with current proven prevention strategies.

c. New York State Policy Reflects the Consensus That Stigmatizing Non-Disclosure Is Harmful to Public Health.

New York is deeply engaged in a statewide effort to prevent the spread of HIV/AIDS, and the priorities of the State's effort emphasize education and confidentiality, not criminalizing or further stigmatizing those living with HIV/AIDS. In addition to the New York State Department of Health's AIDS Institute, which was established by the Legislature in 1983 to, among other things, "develop and promote an outreach campaign directed toward targeted high risk populations to provide coordinated information regarding the treatment and counseling programs and sources of financial assistance available," Pub. Health

¹⁶ CDC, *Monitoring Selected National HIV Prevention and Care Objectives by Using HIV Surveillance Data—United States and 6 Dependent Areas—2011* at 39-40 (Oct. 2013), http://www.cdc.gov/hiv/pdf/2011_Monitoring_HIV_Indicators_HSSR_FINAL.pdf.

Law § 2776, New York State has recently launched an “Ending the Epidemic Task Force,”¹⁷ identifying the three main strategies for decreasing the number of new HIV infections and improving the health of those living with HIV/AIDS: “(1) Identifying people with HIV who remain undiagnosed and linking them to health care; (2) Linking and retaining people diagnosed with HIV to health care and getting them on anti-HIV therapy to maximize HIV virus suppression so they remain healthy and prevent further transmission; and (3) Providing access to Pre-Exposure Prophylaxis (PrEP) for high-risk people to keep them HIV negative.” Press Release, Governor Andrew Cuomo, *Governor Cuomo Announces Task Force to Develop Plan to End AIDS Epidemic* (Oct. 14, 2014).¹⁸ A key goal of this initiative will be to “reduce the stigma associated with HIV/AIDS.” *Id.*

These legislative and executive campaigns and policies mirror the federal strategies discussed in the previous subsection; they focus on education, destigmatization, and connecting people living with HIV/AIDS with health care. Expanding the reach of New York’s felony reckless endangerment statute to sweep up consenting individuals who cannot show that they affirmatively disclosed their HIV status would work *against* these goals, stoking public fear, legitimizing

¹⁷ https://www.health.ny.gov/diseases/aids/ending_the_epidemic/index.htm.

¹⁸ <http://www.governor.ny.gov/news/governor-cuomo-announces-task-force-develop-plan-end-aids-epidemic>.

outdated notions of what HIV means, and ultimately discouraging people from getting tested and accessing appropriate health care.

The New York State Legislature has never passed any legislation evincing a desire to criminalize the consensual sexual acts of those living with HIV. There have been bills proposed dating back to at least 2003 that would have established an HIV-specific reckless endangerment statute, *see* NY Senate Bill 2189/Assembly Bill 8758 (2013-2014),¹⁹ or that would have categorized similar behavior as assault in the first degree, *see* NY Assembly Bill 4006,²⁰ but none have passed.

The laws regarding HIV that *have* passed, by contrast, reaffirm the protections that those living with HIV must be afforded. New York State's public health laws codify the confidential nature of an HIV diagnosis, ensuring, for example, that anyone performing an HIV test must convey to the test subject that "the law protects the confidentiality of HIV related test results," that "the law prohibits discrimination based on an individual's HIV status," and that "there is treatment for HIV that can help an individual stay healthy." Pub. Health Law § 2781(3).

The use of the New York courts to bring harsh felony charges against people living with HIV or AIDS is not in keeping with the laws and policies of the State.

¹⁹ <http://open.nysenate.gov/legislation/bill/S2189A-2013> (noting a legislative history dating back to 2003).

²⁰ http://assembly.state.ny.us/leg/?default_fld=&bn=A04006&Summary=Y&Text=Y.

The District Attorney's arguments in this case are based on an ignorance of both medical science and the proven public health policies that prevent new HIV infections and AIDS. Public health officials have rejected the use of coercive measures as a strategy to stop HIV transmission, and this Court should not stymie their efforts with a drastic, unsupported re-writing of existing law.

III. RECKLESS ENDANGERMENT IN THE SECOND DEGREE IS ALSO INAPPLICABLE TO CONSENSUAL SEX BY PEOPLE LIVING WITH HIV FOR THE REASONS STATED, BUT THAT QUESTION IS NOT CURRENTLY BEFORE THE COURT.

Reckless endangerment in the *second* degree requires "conduct which creates a substantial risk of serious physical injury to another person." Penal Law § 120.20. Because of both the low risk of transmission associated with acts of consensual sex by people living with HIV, *see* Part I, *supra*, and the many policy arguments against laws that criminalize consensual sex by people living with HIV, *see* Part II, *supra*, *amici* would submit that the charge of second degree reckless endangerment is inapplicable to such conduct.

However, the question presented to this Court on appeal by the District Attorney is "Should this Court reinstate the count of the indictment charging reckless endangerment in the first degree . . . ?" Appellant's Br. at 1. Accordingly, the issue of whether the trial court's reduced charge of reckless endangerment in the second degree was supported by sufficient evidence is not before this Court, and that issue has not been developed by either party's briefs. For that reason, this

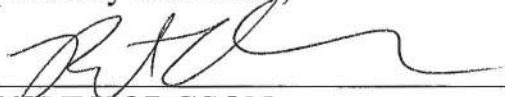
Court should not address the separate question of whether reckless endangerment in the second degree is applicable to the defendant's conduct. This is an issue that should be developed on remand.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court affirm the decision of the Appellate Division and deny the District Attorney's appeal.

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Respectfully submitted,



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