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Ending AIDS as a Public Health Threat: The Power of Change

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HIV Criminalization: Progress, Challenges, Perils ... and Opportunities

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**Those who cannot remember
the past are condemned to
repeat it.**

**George Santayana, philosopher, poet, novelist,
essayist**



WHAT HAVE WE LEARNED?

- Sexually transmitted disease with severe pathological consequences
- Been trying to control for decades
- Epidemic caused panic, adoption of punitive restrictive laws, and tendency even of health officials and doctors to mischaracterize the source and transmission routes of the disease (e.g., influx of immigrants from certain countries, might be casually transmitted)



WHAT HAVE WE LEARNED?

- Earliest treatments had numerous, often severe side effects and consequences over the long haul
- Thus primary approach to controlling its spread was enactment of laws relying on the state's police powers to punish and confine those who pose risks
- But the availability of effective treatment did not ultimately slow the epidemic
- Became clear that was not possible to treat our way out of this epidemic; social conditions and environment at least as key



WHAT HAVE WE LEARNED FROM THIS HISTORY OF SYPHILLIS?



Potential HIV exposure/transmission is a serious felony in most of the U.S.

- 32 US states and 2 territories have laws criminalizing the failure to disclose one's HIV status prior to conduct the legislature deems can expose or transmit HIV transmission to another
- 11 states have laws that make it a crime for people with HIV to spit or bite (issues that sometimes arise in the context of arrest by law enforcement)
- A number of other states (e.g., NY, TX, PA) use general criminal laws to prosecute PLWH who engage in “exposure without prior disclosure”
- 9 states have punishment that includes sex offender registration
- PLWA serving years to decades for conduct legal for everyone else

Center for HIV Law and Policy, When Sex is a Crime and Spit is a Dangerous Weapon,
<http://www.hivlawandpolicy.org/resources/when-sex-crime-and-spit-dangerous-weapon-snapshot-hiv-criminalization-united-states-center>.

The Center for HIV Law and Policy, *Prosecutions and Arrests for HIV Exposure in the United States, 2008–2015*,
http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/Chart%20of%20US%20Prosecutions%202008-2014_revised%201.2015.pdf.

The Center for HIV Law and Policy, *Comparative Sentencing for HIV in the U.S.*,
<http://hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/Comparative%20Sentencing%20Chart%20%28The%20Center%20for%20HIV%20Law%20and%20Policy%2C%20May%202012%29.pdf>





ELEMENTS OF HIV CRIMINAL LAWS

- **What gets you in trouble?**
 - Tested HIV-positive
 - Had any kind of contact viewed as “sex”
 - Scuffle with law enforcement + HIV status
- **What doesn't help?**
 - Verbal consent
 - In most states: Use of condoms, sticking to oral sex, low viral load, engaging in near-zero risk conduct



Particularly Problematic: Testing and Prevention Bait & Switch

- State and Federal health officials: broad promotion of testing (e.g., National HIV Testing Day!), know your status, HIV is treatable disease, end “exceptionalism”
- State and federal prosecutors: exposing someone to HIV is like pointing a loaded gun at their head; HIV is a “death sentence”
- Expanded use of surveillance data: new STI, possible criminal charge



Unintended Consequences: Is there too much focus on disclosure?

- Is it fair or realistic to expect, let alone demand, HIV disclosure in all circumstances?
- Is the responsibility for preventing STI transmission shared between all consensual partners?
- Is responsibility for preventing HIV the same as for all STIs? Is it solely on the person with HIV?
- Has everyone in this room who ever had an STI disclosed it every time before sex?



Criminal laws vs. Science and Public Health

- Laws reflect long-outdated misconceptions about the routes, risks and consequences of HIV transmission
 - “High Risk” = < 2% of transmission?
 - Risk associated with oral sex, insertive vaginal sex very low
 - With effective ART: HIV = chronic manageable disease, risk even further reduced to near-zero
- Laws and prosecutions at odds with health department-supported prevention priorities -- consistent condom use, mutual responsibility, anti-stigma campaigns, and getting tested!



PROGRESS

- PJP CONSENSUS STATEMENT: > 1000 SIGNATORIES
- INCREASED AWARENESS; ROADMAP FOR CHANGE
- PACHA, ONAP, NHAS, ETC.
- INCREASED FUNDER ENGAGEMENT
- STATE REFORM LED BY LOCAL ADVOCATES
- GOOD BILLS UNDER DISCUSSION IN GA, TN, CA, CO...



State Officials Behind the Consensus Curve

- **Presidential Advisory Council on HIV/AIDS (PACHA)**, Resolution on Ending Federal and State HIV-Specific Criminal Laws, Prosecutions, and Civil Commitments (2013)
- **U.S. Department of Justice**, Best Practices Guide to Reform HIV-Specific Criminal Laws to Align with Scientifically-Supported Factors (2014)
- **American Academy of HIV Medicine (AAHIVM)**, Policy Position on HIV Criminalization (2015)
- **American Psychological Association (APA)**, Resolution Opposing HIV Criminalization (2016)
- **American Medical Association (AMA)**, Modernization of HIV Specific Criminal Laws (2014)
- **The Association of Nurses in AIDS Care (ANAC)**, HIV Criminalization Laws and Policies Promote Discrimination and Must Be Reformed (2014)
- **HIV Medicine Association (HIVMA)**, Repeal of HIV-Specific Criminal Statutes (2012)
- **National Alliance of State and Territorial AIDS Directors (NASTAD)**, National HIV/AIDS Strategy Imperative: Fighting Stigma and Discrimination by Repealing HIV- Specific Criminal Statutes (2011)
- **National Association of County & City Health Officials (NACCHO)**, Statement of Policy: Opposing Stigma and Discrimination Against Persons with Communicable Diseases (2013)
- **U.S. Conference of Mayors**, Resolution on HIV Discrimination and Criminalization (2013)
- **Positive Justice Project**, National Consensus Statement on the Criminalization of HIV (2012) (statement features more than 1000 organizational and individual endorsements from across the United States).



Positive Justice Project Principles for Reform



- a) No disease-specific criminal law or sentence enhancement;
- b) Must prove specific intent to harm + conduct likely to do intended harm;
- c) Steps to reduce risk = no intent to harm;
- d) No airborne/casually transmitted diseases
- e) Proportionate penalty, no sex offender status
- f) No felony laws for treatable disease; and
- g) No new or increased penalties for others



CHALLENGES & PERILS

- Criminal justice reform is new to most now engaged in it on this issue
- Reasonable reform requires major investment in community/stakeholder education before a rush to the legislature
- Levels of agreement diverge when defendant isn't a "poster boy"
- Unappetizing compromises can become "models" for reform elsewhere



OPPORTUNITIES FOR REFORM



WHAT CAN HEALTH CARE AND PREVENTION PROVIDERS DO?

- Ignorance \neq Bliss: Promote sexual health literacy via school health programs, federally funded detention, foster care and prison facilities, etc., and as part of basic health care
- Surgeon Gen'l letter to U.S. households on STIs/HIV
- Advocate for consistency among government agencies in the treatment and messaging of HIV and other STIs
- Advocate for policies that put disclosure of factors that may be of interest to sex partners in perspective
- “What Every Policy Maker Should Know About HIV”



WHAT CAN HEALTH CARE AND PREVENTION PROVIDERS DO?

- Come out of the Anti-Criminalization Closet: ***speak out*** – via LTE, op-eds, calls to prosecutors and legislators and public health officials, against the prosecution of PLWH for consensual sex, spitting
- All health care providers, but ESPECIALLY AIDS/STI Directors and state health department officials: ***Flag and correct*** inflammatory, inaccurate, stigmatizing press and prosecution statements about HIV and PLWH
- ***CONNECT*** WITH THE POSITIVE JUSTICE PROJECT! Engage as time permits with local advocacy efforts, federal policy advocacy (team up with other advocacy organizations)



WHAT CAN HEALTH CARE AND PREVENTION PROVIDERS DO?

- Learn more about the “tough cases” before assuming the defendant “got what he deserved”
- Learn more about the Nushawn Williams and Michael Johnson cases
- Sign onto briefs and other advocacy in support of the “HIV criminalized”



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