



WHITMAN-WALKER HEALTH

# Uses of the Criminal Law to Control HIV Transmission: The U.S. Experience

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# Whitman-Walker Health

- **Nonprofit community health center serving the greater Washington, DC metropolitan area.**
- **Specialties in HIV care and the health and wellness of the LGBT community.**
- **Primary and HIV specialty medical care; mental health and substance abuse treatment; dental care; legal services; HIV and STI testing, counseling and prevention; other community health services.**
- **In 2014, more than 15,000 patients for all services. Approximately 50% of medical patients are HIV+. Approximately 50% of all patients identify as gay, lesbian or bisexual. Approximately 6% of all patients identify as transgender.**
- **Began in 1970s as a gay and lesbian clinic and mental health center. First agency to respond to the HIV epidemic in the early 1980s in Washington, DC.**



# Topics to Be Addressed

- **Overview of U.S. Criminal Laws That Penalize Exposing Others to HIV**
- **Criticisms of Those Laws and Calls for Reform**
- **Evidence of the Impact of Criminal Laws**
- **Questions of Policy and Philosophy**



# What I Will Not Address

- **Criminal Sanctions for Violations of Public Health Orders**



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# The U.S. Criminal Law Response to HIV

- **33 States and 2 U.S. Territories have one or more criminal laws that specifically sanction allegedly “risky” behavior by persons who know they have HIV.**
  - Sexual acts and/or non-disclosure of HIV status
  - Sharing of drug injection equipment
  - Donations of blood and tissue
  - Sentencing enhancements for persons convicted of other sexual offenses (e.g., prostitution, rape, assault, sex with minors)
- **At least 40 States have prosecuted persons living with HIV for criminal exposure – under HIV-specific laws or general criminal laws (attempted murder, assault, reckless endangerment).**

*Lehman JS et al., Prevalence and public health implications of state laws that criminalize potential HIV exposure in the United States. AIDS Behav 2014; 18: 997-1006. <http://link.springer.com/article/10.1007/s10461-014-0724-0/fulltext.html> (published online March 15, 2014)*

*Center for HIV & Policy, ENDING & DEFENDING AGAINST HIV CRIMINALIZATION, VOL. 1, STATE AND FEDERAL LAWS AND PROSECUTIONS. Winter 2015. <http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/HIV%20Crim%20Manual%20%28updated%205.4.15%29.pdf> (accessed June 17, 2015)*



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# The U.S. Criminal Law Response to HIV

- **Of the States with HIV-specific criminal laws:**
  - **More than half provide sentences of up to 10 years**
  - **7 States provide for sentences of 10-20 years**
  - **5 States provide for sentences of more than 20 years**
  
  - **9 States require registration of persons convicted under the HIV-specific criminal laws as sexual offenders. In other States, convictions under general criminal laws may result in sex offender registration.**
  
  - **In many States, convicted felons have limited voting rights even after they have completed their sentence.**

*Lehman JS et al., Prevalence and public health implications of state laws that criminalize potential HIV exposure in the United States. AIDS Behav 2014; 18: 997-1006.*  
<http://link.springer.com/article/10.1007/s10461-014-0724-0/fulltext.html> (published online March 15, 2014)

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<http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/HIV%20Crim%20Manual%20%28updated%205.4.15%29.pdf> (accessed June 17, 2015)

*Center for HIV Law & Policy, State-by-State Chart of HIV-Specific Statutes and Prosecutorial Tools (last updated 10/21/2013).*  
<http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/State%20By%20State%20HIV%20Laws%20Chart%20updated%2010-21-13.pdf> (accessed June 19, 2015)



# The U.S. Criminal Law Response to HIV

- **From the outset of the HIV/AIDS epidemic, virtually no reliance on old public health laws regulating exposure of others to “communicable disease” or “contagious disease.”**
- **These laws had been virtually unenforced since failed attempts during World War I to control the spread of venereal disease among troops.**
- **In the 1980s, consensus that coercive use of public health laws providing civil confinement powers was an ineffective and undesirable response to the epidemic.**
- **But criminal prosecutions for exposures to HIV as early as the mid-1980s, under general criminal laws and newly-enacted HIV-specific laws.**

*Webber D et al., AIDS AND THE LAW 4<sup>th</sup> ed. 2012 Supp. (New York: Wolters Kluwer Law & Business) 7-4 to 7-6, 7-43 to 7-45*

*Baldwin P, DISEASE AND DEMOCRACY: THE INDUSTRIALIZED WORLD FACES AIDS 2005 (Berkeley: U. of California Press) 86-93*

*Lazzarini Z, Bray S, Burris S: Evaluating the impact of criminal laws on HIV risk behavior. J Law, Medicine & Ethics 2002;30:239-53*



# 1988 Report of the Presidential Commission on the HIV Epidemic

- **Criminal sanctions for intentional behavior that presents a real risk of transmission are appropriate.**
- **General criminal laws may not be well-suited, so states should explore carefully drawn HIV-specific statutes.**
- **HIV-specific criminal laws should only sanction behavior that is a scientifically established mode of transmission and only apply after all other public health measures and civil actions fail.**

*REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC 1988: 130-31. Available at <http://files.eric.ed.gov/fulltext/ED299531.pdf> (accessed June 17, 2015)*



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# Federal Ryan White Care Act

- **The federal Ryan White Care Act of 1990 conditioned receipt of federal funds on State certification that the State’s criminal laws were adequate to prosecute persons who know they have HIV and engage in sexual activity, exchange needles, or donate blood, semen or breast milk, “and intend to expose another” to HIV. 42 U.S.C. Section 300ff-47.**
- **The provision was repealed in 2000.**



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# What Do the HIV-Specific Laws Penalize?

**Many proscribe not only acts that pose a scientifically-recognized risk of transmission, but also:**

- **Sexual acts generally**
- **Any exposure to bodily fluids**
- **Prostitution**
- **Sentencing enhancement for sexual offenses regardless of risk of HIV transmission (e.g., sex with minors)**
- **Sexual acts without disclosure that one is HIV-positive**

**Some laws require proof of “intent to transmit” but others do not.**

**Many laws do not recognize use of condoms as a defense.**

*Lehman JS et al., Prevalence and public health implications of state laws that criminalize potential HIV exposure in the United States. AIDS Behav 2014; 18: 997-1006. <http://link.springer.com/article/10.1007/s10461-014-0724-0/fulltext.html> (published online March 15, 2014)*

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# Idaho

## **Idaho Code Ann. § 39-608:**

- (1) Any person who exposes another in any manner with the intent to infect or, knowing that he or she is or has been afflicted with acquired immunodeficiency syndrome (AIDS), AIDS related complexes (ARC), or other manifestations of human immunodeficiency virus (HIV) infection, transfers or attempts to transfer any of his or her body fluid, body tissue or organs to another person is guilty of a felony and shall be punished by imprisonment in the state prison for a period not to exceed fifteen (15) years, by fine not in excess of five thousand dollars (\$ 5,000), or by both such imprisonment and fine.**
- (2) Definitions. As used in this section: (a) “Body fluid” means semen (irrespective of the presence of spermatozoa), blood, saliva, vaginal secretion, breast milk, and urine. (b) “Transfer” means engaging in sexual activity by genital-genital contact, oral-genital contact, anal-genital contact ....**
- (3) Defenses. [Consent after full disclosure of the risk, and advice from a physician that one is noninfectious.]**

**In *State v. Mubita*, 145 Idaho 925; 188 P.3d 867 (2008), a man was convicted of 11 counts of violating the statute, and sentenced to 44 years (4 years for each count). Among the sexual acts for which he was convicted were performing oral sex on one of his partners and ejaculating on her leg. The Idaho Supreme Court ruled that this was criminal activity under the statute regardless of the degree of risk involved.**



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# Nebraska

**Neb. Rev. Stat. § 28-934, enacted in 2011:**

- (1) Any person who knowingly and intentionally strikes any public safety officer with any bodily fluid is guilty of assault with a bodily fluid against a public safety officer.**
- (2) Except as provided in subsection (3) of this section, assault with a bodily fluid against a public safety officer is a Class I misdemeanor.**
- (3) Assault with a bodily fluid against a public safety officer is a Class IIIA felony if the person committing the offense strikes with a bodily fluid the eyes, mouth, or skin of a public safety officer and knew the source of the bodily fluid was infected with the human immunodeficiency virus, hepatitis B, or hepatitis C. at the time the offense was committed. [A Class IIIA felony is punishable by 1 to 5 years in prison or \$10,000 or both.]**

**\*\*\***

- (5) As used in this section:**
  - (a) Bodily fluid means any naturally produced secretion or waste product generated by the human body and shall include, but not be limited to, any quantity of human blood, urine, saliva, mucus, vomitus, seminal fluid, or feces ....**



# Maryland

**“An individual who has the human immunodeficiency virus may not knowingly transfer or attempt to transfer the human immunodeficiency virus to another individual.” MD Code Health-General § 18-601.1(a)**

**“A person who violates the provisions of this section is guilty of a misdemeanor and on conviction is subject to a fine not exceeding \$ 2,500 or imprisonment not exceeding 3 years or both.” MD Code Health-General § 18-601.1(b)**

**In 2012 a bill was introduced in the Maryland General Assembly to make this offense a felony with a 25-year sentence. The bill did not pass.**



## Maryland

- **In *Bragdon v. Abbott*, the U.S. Supreme Court cited the Maryland statute, with those of other states, noting: “The laws of some States ... forbid persons infected with HIV from having sex with others, regardless of consent.” 524 U.S. 624, 641 (1998).**



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# Maryland

- **Persons have been prosecuted and convicted under this statute, and under general criminal laws (assault), for biting or spitting on police officers.**

*Center for HIV & Policy, ENDING & DEFENDING AGAINST HIV CRIMINALIZATION, VOL. 1, STATE AND FEDERAL LAWS AND PROSECUTIONS, Winter 2015.*

<http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/HIV%20Crim%20Manual%20%28updated%205.4.15%29.pdf> (accessed June 17, 2015)

- **In March 2015, a man who had been charged under the Maryland exposure statute for having unprotected sex with 2 women he met in bars, without disclosing his HIV status, pled guilty to “reckless endangerment” and was sentenced to 18 months. He was on ART and his viral load was undetectable, and neither woman was infected.**

*Morse D, Victim in Montgomery County HIV case: ‘I just froze.’ Washington Post (March 30, 2015).*

[http://www.washingtonpost.com/local/crime/man-sentenced-to-18-months-in-montgomery-county-hiv-case/2015/03/30/87b3a238-d6d7-11e4-8103-fa84725dbf9d\\_story.html](http://www.washingtonpost.com/local/crime/man-sentenced-to-18-months-in-montgomery-county-hiv-case/2015/03/30/87b3a238-d6d7-11e4-8103-fa84725dbf9d_story.html) (accessed June 19, 2015)



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## Virginia: “Infected Sexual Battery”

**“Any person who, knowing he is infected with HIV, syphilis, or hepatitis B, has sexual intercourse, cunnilingus, fellatio, anallingus or anal intercourse with the intent to transmit the infection to another person is guilty of a Class 6 felony.” VA Code § 18.2-67.4:1(A)**

**Penalty: 1-5 years and up to \$2,500 fine.**

**“Any person who, knowing he is infected with HIV, syphilis, or hepatitis B, has sexual intercourse, cunnilingus, fellatio, anallingus or anal intercourse with another person without having previously disclosed the existence of his infection to the other person is guilty of a Class 1 misdemeanor.” VA Code § 18.2-67.4:1(B)**

**Penalty: up to 1 year and up to \$2,500 fine.**



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## Virginia: “Infected Sexual Battery”

- **Individuals have been prosecuted under this statute for having sex without disclosure of their HIV status. Defendants have included prostitutes, adults who had sex with minors, and individuals who had sex with their girlfriends or fiancés. Convictions have generally been under the misdemeanor non-disclosure provision or under general criminal laws (assault, sex with minors).**

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# Prosecutions for Criminal HIV Exposure

- **From official records and news reports:**
  - **316 prosecutions between 1986 and 2001**
  - **213 prosecutions between 2008 and 2014**
- **A substantial number of prosecutions, and convictions, were for biting and spitting, usually involving police officers or corrections personnel.**
- **Convictions have often resulted in disproportionately harsh sentences.**
- **Frequently prosecutions have been when defendants have been charged with other sex offenses (prostitution, rape or other assault, sex with minors).**
- **But a number of cases have involved otherwise consensual sex between adults- some based on only a single event, others based on a pattern of multiple sex partners over a lengthy period.**

*Lazzarini Z, Bray S, Burris S: Evaluating the impact of criminal laws on HIV risk behavior. J Law, Medicine & Ethics 2002;30:239-53*

*Center for HIV & Policy, ENDING & DEFENDING AGAINST HIV CRIMINALIZATION, VOL. 1, STATE AND FEDERAL LAWS AND PROSECUTIONS. Winter 2015.*  
<http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/HIV%20Crim%20Manual%20%28updated%205.4.15%29.pdf> (accessed June 17, 2015)



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# Convictions for Criminal HIV Exposure

## Individuals who have been convicted include:

- **Nick Rhoades, who was sentenced in 2009 to 25 years for having protected anal sex and unprotected oral sex, while having an undetectable viral load, with a man he met online. (6 years later, the Iowa Supreme Court reversed his sentence and remanded to the trial court for further proceedings. *Rhoades v. Iowa*, 848 N.W.2d 22 (Iowa 2014).)**
- **Nushawn Williams, who admitted in 1998 to having unprotected sex with numerous young women and girls (probably in excess of 70), at least 14 of whom became HIV-infected (and gave birth to 2 babies with HIV) – released in 2010 after serving 12 years, but then ordered civilly confined, which continues.**
- **Willie Campbell, a homeless man, spit on a police officer during an arrest for public intoxication, hitting the officer’s eyes and mouth, and announced that he “had AIDS.” He was convicted in 2006 of harassing a public servant with a “deadly weapon” – his saliva – and sentenced to 35 years. The Texas Court of Appeals upheld his conviction in 2012.**



## Critiques of HIV Criminal Laws (and Prosecutions Under General Criminal Laws for HIV Exposure)

- **Many prosecutions for behavior that poses no significant risk**
- **Harm to HIV prevention and treatment**
  - **Incentive to avoid HIV testing**
  - **Incentive to avoid engagement in treatment (confidences shared with counselors and providers may be shared with police and prosecutors)**
  - **Discouragement of (after-the-fact) disclosure to sex partners**
- **Furtherance of HIV stigma**
- **Selective/biased prosecution and disproportionately harsh penalties**
- **Ineffective as public health measure and may deflect attention and resources from need to support effective measures**



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# Calls for Reform: U.S. Authorities and Advocates

- **NATIONAL HIV/AIDS STRATEGY FOR THE UNITED STATES (July 2010) 36-37, available at <https://www.whitehouse.gov/sites/default/files/uploads/NHAS.pdf>** (accessed July 15, 2015)
- **U.S. Department of Justice, Best Practices Guide to Reform HIV-Specific Criminal Laws to Align with Scientifically-Supported Factors (July 15, 2014), <https://www.aids.gov/federal-resources/national-hiv-aids-strategy/doj-hiv-criminal-law-best-practices-guide.pdf>** (accessed July 19, 2015)
- *Lehman JS et al., Prevalence and public health implications of state laws that criminalize potential HIV exposure in the United States. AIDS Behav 2014; 18: 997-1006.*  
<http://link.springer.com/article/10.1007/s10461-014-0724-0/fulltext.html> (published online March 15, 2014) (authored by CDC officials and U.S. Department of Justice lawyers)
- **National Association of State and Territorial AIDS Directors, NATIONAL HIV/AIDS STRATEGY IMPERATIVE: FIGHTING STIGMA AND DISCRIMINATION BY REPEALING HIV-SPECIFIC CRIMINAL STATUTES (February 2011), [http://www.nastad.org/sites/default/files/092549\\_NASTAD-Decriminalization-Documents.pdf](http://www.nastad.org/sites/default/files/092549_NASTAD-Decriminalization-Documents.pdf)** (accessed June 19, 2015)
- **Positive Justice Project, Guiding Principles for Eliminating Disease-Specific Criminal Laws (February 2015), <http://hivlawandpolicy.org/resources/guiding-principles-eliminating-disease-specific-criminal-laws-positive-justice-project>** (accessed June 19, 2015)



# Calls for Reform: International Authorities and Advocates

- **UNAIDS, *Policy Brief on the Criminalization of HIV Transmission* (August 2008), available at [http://www.unaids.org/en/resources/documents/2008/20081110\\_jc1601\\_policy\\_brief\\_criminalization\\_long\\_en.pdf](http://www.unaids.org/en/resources/documents/2008/20081110_jc1601_policy_brief_criminalization_long_en.pdf) (accessed June 19, 2015)**
- **International Civil Society in Oslo, *Oslo Declaration on HIV Criminalisation* (February 2012), available at <http://www.hivjustice.net/oslo/oslo-declaration> (accessed June 20, 2015)**



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# What is the Evidence?

## **Burris S *et al.*: Do criminal laws influence HIV risk behavior? An empirical trial. Ariz St L J 2007: 39: 467-519**

- **Survey of MSM and IVDUs in Chicago (Illinois has an HIV criminal law) and NYC (New York does not).**
- **No significant difference in reported UAI or UVI between those who knew of the law and those who did not.**
- **No significant difference in reported UAI between those living in the two states. Slight difference in reported UVI between Chicago and New York (less in Chicago).**
- **NO difference in reported UAI between HIV+ diagnosis and those without such a diagnosis. Those who knew they were HIV+ less likely to report UVI if black, but not if white.**
- **Most participants strongly agreed that it is wrong to not disclose HIV status and engage in UAI/UVI without a condom.**
- **Less likely to engage in UAI if believed UAI was wrong and government regulation of sexual behavior was legitimate, and if fearful of punishment, but no apparent linkage of those beliefs to knowledge of the law.**



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# What is the Evidence?

**Horvath KJ, Weinmeyer RM, Rosser BRS: 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; 10: 1221-1228**

- **Survey of attitudes of broad sample of MSM across the USA – states with and without HIV criminal laws.**
- **65% overall believed it should be illegal for someone who knows he is HIV+ to have unprotected sex without disclosure. Persons who knew they were HIV+ were less supportive of this being illegal.**
- **No association between residence in a state with or without an HIV criminal law, and belief that the law should criminalize UAI without HIV disclosure.**
- **No association between residence in a state with or without an HIV criminal law, and reported UAI, for the overall sample or for those with an HIV diagnosis.**



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# What is the Evidence?

**Galletly CL, Pinkerton SD, DiFranceisco W: A quantitative study of Michigan's criminal HIV exposure law. AIDS Care 2011; 24: 174-179**

- **Survey of people living with HIV in Michigan, which criminalizes “sexual penetration” by persons with HIV without disclosure of HIV status.**
- **“A majority of participants were aware of Michigan's HIV exposure law. Awareness of the law was not associated with increased seropositive status disclosure to all prospective sex partners, decreased HIV transmission risk behavior, or increased perceived responsibility for HIV transmission prevention. However, awareness of the law was significantly associated with disclosure to a greater proportion of sex partners prior to respondents' first sexual interaction with that partner. Awareness of the law was not associated with increased HIV-related stigma, perceived societal hostility toward PLWH, or decreased comfort with seropositive status disclosure.” (p. 174)**
- **Substantial majority supported criminalization of non-disclosing unsafe sex.**
- **People unaware of the law perceived greater social hostility than those who were aware of the law.**



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## What is the Evidence?

**Galletly CL, Glasman LR, Pinkerton SD, DiFranceisco W: New Jersey's HIV exposure law and the HIV-related attitudes, beliefs, and sexual and seropositive status disclosure behaviors of persons living with HIV. Am J Pub Health 2012; 102: 2135-2140**

- **Survey of people living with HIV in New Jersey, which criminalizes “acts of sexual penetration” by persons with HIV without informed consent.**
- **“Results. Fifty-one percent of participants knew about the HIV exposure law. This awareness was not associated with increased sexual abstinence, condom use with most recent partner, or seropositive status disclosure. Contrary to hypotheses, persons who were unaware of the law experienced greater stigma and were less comfortable with positive serostatus disclosure.” (p. 2135)**



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# What is the Evidence?

## Conclusions of these studies:

- **No evidence that HIV-specific criminal laws are a deterrent to UAI without disclosure, at least at current levels of enforcement. Weak evidence (in one study only) of possible deterrent effect on UVI.**
- **General agreement with moral norms of disclosure and protection, but no evidence that the laws have any effect.**
- **Laws not widely known except in Michigan, where the law mandates notice to persons testing HIV+.**
- **No evidence that knowledge of the HIV criminal laws is a disincentive to knowing one's HIV status. (For additional evidence that law does not have much effect on most individuals' decision whether to get an HIV test, see *Burris S, Law and the Social Risk of Health Care: Lessons from HIV Testing. 61 Alb L Rev 1998: 61: 831-895, at 842-56.*)**
- **No evidence that HIV criminal laws are experienced as stigmatizing; in the New Jersey and Michigan studies, persons *unaware* of the laws reported *greater* feelings of HIV stigma.**



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# Experience of Whitman-Walker Health

- **In 2014, 5,461 Washington, DC-area individuals received HIV testing and counseling.**
- **Reasons given for delaying HIV testing in the past and reluctance to test: perceived stigma of being HIV+, fear of having an illness misunderstood to be fatal, fear of “never having a partner” if HIV+.**
- **Most people were unaware of the laws in DC, Maryland and Virginia; they learned only during counseling if testing HIV+.**
- **When learning of the laws in Maryland and Virginia, many clients were confused and distressed by the ambiguity in the laws.**



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# What Do We Know?

- **No evidence HIV-specific criminal laws are effective public health measures.**
- **Many HIV-specific laws criminalize behavior that poses no risk or only a negligible risk.**
- **HIV-specific laws, and general criminal laws in many states, have resulted in many medically irrational outcomes and miscarriages of justice.**
- **There is a pressing need for criminal justice reform as a matter of justice and human rights.**
- **Criminal sanctions for intentional or knowing exposure of others to a significant risk of HIV continue to have widespread public support.**



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# Reform or Repeal HIV-Specific Laws?

- **Are general criminal laws of assault, reckless endangerment – and, in extreme cases, attempted murder – adequate to address egregious situations posing clear dangers to the public?**
  - **Can abuses of general criminal laws be addressed through science-based prosecutorial guidelines and education of police, prosecutors, defense attorneys and courts?**
  - **Are prosecutions under general criminal laws more responsive to scientific/medical advances than HIV-specific statutes that may become out of date?**
- **Do HIV-specific laws stigmatize people living with HIV as uniquely dangerous, or conversely, do they provide more notice to people living with HIV and more guidance for police, prosecutors and courts?**



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# Are HIV-Specific Criminal Laws Stigmatizing?

- **If they are written and enforced to apply only to clear, significant risks?**
- **Studies reported to date do not provide evidence that HIV-specific laws are generally perceived as stigmatizing by people living with HIV or by MSM.**
- **Do the laws convey that actions by people living with HIV are uniquely blameworthy out of proportion to their actual dangerousness?**
  - **Andrew Speaker in 2007: diagnosed with multi-drug resistant TB, advised not to travel, flew to Greece for his wedding, then to Italy. There, he was advised that his diagnosis had changed to extensively drug-resistant TB. To evade public health orders, he flew to Canada from the Czech Republic and then drove back to the US in a rental car. *Fallow HA: Reforming federal quarantine law in the wake of Andrew Speaker: “The tuberculosis traveler.” J Contemporary Health L & Policy 2009: 25: 83- 106, available at <http://scholarship.law.edu/jchlp/vol25/iss1/6>.***
  - **Driving under the influence jeopardizes the safety of potentially many people, but typically offenses are punishable by fines or short jail terms.**
- **Is knowing exposure of another to a serious disease, without their knowledge, in acts of sexual intimacy particularly blameworthy?**



# Relevance of Breakthroughs in Treatment and Biomedical Prevention?

- **ART, if successful in reducing viral load to undetectable levels, may reduce infectiousness by as much as 96%. *Centers for Disease Control & Prevention, Prevention Benefits of HIV Treatment, <http://www.cdc.gov/hiv/prevention/research/tap> (accessed June 16, 2015).* But people living with undetectable viral load are still advised to avoid UAI and UVI. Should a low or undetectable viral load preclude prosecution or conviction?**
- **PrEP, if consistently used by someone who is HIV-negative, may reduce the risk of transmission by as much as 92%. *Centers for Disease Control & Prevention, Pre-Exposure Prophylaxis (PrEP), <http://www.cdc.gov/hiv/prevention/research/prep> (accessed June 16, 2015).* But individuals on PrEP are still counseled to avoid UAI/UVI. If Matt is HIV+ and has UAI with Jeff, should it be a defense if Jeff is on PrEP? If Matt mistakenly thought that Jeff was on PrEP? If Jeff told Matt that he was on PrEP but didn't tell Matt that he wasn't taking the medication regularly?**
- **ART has dramatically reduced HIV-related mortality and morbidity and transformed HIV into a largely manageable, chronic condition. Should we maintain that HIV transmission is insufficiently grave to justify criminal sanctions for exposure/transmission?**



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# Law Reform in Iowa

- **Prior to 2014, it was a felony, punishable by up to 25 years in prison, to engage in “intimate contact” without disclosure of one’s HIV infection. “Intimate contact” was defined as “the intentional exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of the human immunodeficiency virus.” Iowa Code Sec. 709C.1.**
- **Nick Rhoades was convicted and sentenced to 25 years for protected anal intercourse and unprotected oral sex with a man he met online, although his viral load was undetectable.**
- **In 2014, the Iowa Supreme Court reversed his conviction and held that “intimate contact” required activity that posed a reasonable possibility of transmission. *Rhoades v. Iowa*, 848 N.W.2d 22 (Iowa 2014).**
- **The old Iowa statute was repealed in 2014, and new laws enacted that (i) apply to hepatitis, TB and meningococcal disease as well as HIV; and to (ii) provide for greater penalties if the defendant intended to infect the other person vs. acted with reckless disregard, and greater penalties if the other person became infected vs. did not become infected. Iowa Code Sec. 709D.3.**



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# An Alternative Approach: “A Separate Crime of Reckless Sex”

**Ayres I, Baker K: A separate crime of reckless sex. U Chicago L Rev 2005: 72: 599-666. Model statute proposed at 632-33:**

- (1) A person is guilty of reckless sexual conduct when the person intentionally engages in unprotected sexual activity with a person other than his or her spouse and these two people had not on an occasion previous to the occasion of the crime engaged in sexual activity.**
- (2) Affirmative Defense: Notwithstanding Section (1), it shall be an affirmative defense to any action brought under this article that the person with whom the defendant had unprotected sex expressly asked to engage in unprotected sexual activity or otherwise gave unequivocal indications of affirmatively consenting to engage in sexual activity that is specifically unprotected.**
- (3) Definitions:**
  - (a) "Sexual activity" means penile penetration of a vagina or anus accomplished with a male or female.**
  - (b) "Unprotected sexual activity" means sexual activity without the use of a condom.**

**\* \* \***
- (4) Sanctions:**
  - (a) Sentence: The crime of reckless sexual conduct is punishable by imprisonment in the state prison for up to three months, or a fine.**
  - (b) Sexual Offender Status: The court shall not register a person as a sexual offender because the person was found guilty of reckless sexual conduct.**



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# “Don’t I Have the Right to Know?”

- **Is disclosure of HIV status still an important public health goal?**
  - **In the age of ART and PrEP?**
  - **Criminal laws mandating disclosure don’t seem to be effective**
- **Should the law recognize my right to know, even if the risk to which I am exposed is slight?**
- **Does an emphasis on the responsibility of the person with an HIV diagnosis undercut the responsibility of the other person in a sexual encounter?**



WHITMAN-WALKER HEALTH

# Is Sexual Behavior Resistant to Change?

- **Among MSM, UAI between HIV-discordant individuals remains at significantly high levels. *Centers for Disease Control & Prevention: HIV testing and risk behaviors among gay, bisexual, and other men who have sex with men – United States. MMWR 2013: 62: 958-962 .***
- **UAI is correlated with many factors, including alcohol, mind-altering substance use, sexual enhancement medication, setting in which sex occurs, and intentional condom nonuse. Perceived social norms, personal intentions about condom use and perceptions of personal responsibility were not significantly correlated, positively or negatively, with UAI. *Lacefield K et al.: Comparing psychosocial correlates of condomless anal sex in HIV-diagnosed and HIV-nondiagnosed men who have sex with men: A series of meta-analyses of studies from 1993-2003. LGBT Health 2015: 2: 1-21.***
- **Condom-less intercourse has strong emotional and spiritual appeal for many gay men. *Martin JI: Transcendence among gay men: Implications for HIV prevention. Sexualities 2006: 9: 214-235.***
- **Much communication in sexual encounters is indirect, and misunderstanding is not uncommon; “in real life disclosure and consent may look more like an avian mating ritual than the negotiation of a business contract.” *Burris S et al.: Do criminal laws influence HIV risk behavior? An empirical trial. Ariz St L J 2007: 39: at 509.***



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# Concluding Questions

- **Is the persistence of “risky” sexual behavior a reason to decriminalize it or to continue to resort to criminal sanctions?**
- **There is a broad consensus that the criminal law should proscribe intentionally or recklessly causing serious harm to another. If this principle applies to HIV exposure, how to define the behavior that is sufficiently egregious to sanction?**
- **Will biomedical advances help us answer this question by substantially reducing the likelihood of HIV transmission in most unprotected sexual encounters? Are there concerns about focusing criminal sanctions on individuals who are not on ART or whose partners are not on PrEP, because they cannot afford it or because they are otherwise not sufficiently engaged with the medical system?**