



POSITIVE WOMEN'S NETWORK
USA

Positive Women's Network - USA
436 14th Street, Suite 500
Oakland, CA 94612
510.698.3811 **phone**
www.pwn-usa.org
@uspwn
www.facebook.com/pwnusa

Criminalization of Potential HIV Exposure & Transmission

We envision and work toward a future in which our communities are no longer subject to over-policing, surveillance, and brutality at the hands of law enforcement, and where individuals with a history of interaction with the criminal justice system have full rights and dignity.

HIV Criminalization

HIV criminalization refers to the use of laws and policies to target and punish people based on their HIV positive status. Even though the medical and scientific understanding of HIV has vastly improved since the 1980's when most of these misinformed laws were enacted, they are still used regularly against people living with HIV (PLHIV) and perpetuate legally-sanctioned stigma and discrimination.

As of 2018, there are 34 states and 2 territories that have specific laws that criminalize the alleged potential exposure, non-disclosure, or potential transmission of HIV. These laws create criminal penalties for oral, anal, or vaginal sex, exposure to saliva or blood, sharing needles, donating organs, semen, blood, or breastmilk (including breastfeeding), and engaging in sex work while living with HIV. These also include harsher sentences for PLHIV charged for offenses like solicitation. PLHIV have also been punished under laws that criminalize exposure or transmission of sexually transmitted infections (STIs)¹. In states without HIV specific criminal laws², people have even been prosecuted for HIV exposure and transmission under general criminal laws such as reckless endangerment, assault, bioterrorism, homicide, and attempted homicide.

HIV Criminalization and Other Forms of Policing

All forms of criminalization are used to control marginalized communities and drive the mass incarceration people of color, particularly Black and Latinx³ communities. 17% of the nearly 2.3 million⁴ (disproportionately Black and Latinx) Americans⁵ currently incarcerated are living with HIV, a rate much higher than the general population⁶. Enforcement of HIV criminalization laws is rooted deeply in racial biases. As part of a series of studies on HIV criminalization in California, the Williams Institute reported that Black

¹ "State-by-State Chart of HIV-Specific Laws and prosecutorial Tools." The Center for HIV Law & Policy, August 2017, <http://www.hivlawandpolicy.org/sites/default/files/State-by-State%20Chart%20of%20HIV-Specific%20Statutes%20and%20Prosecutorial%20Tools.%20%28final%208%2023%2017%29.pdf>

² "HIV Criminalization in the United States: A Sourcebook on state and Federal HIV Criminal Law and Practice." The Center for HIV Law & Policy, 2017, www.hivlawandpolicy.org/sites/default/files/HIV%20Criminalization%20in%20the%20U.S.%20A%20Sourcebook%20on%20State%20Fed%20HIV%20Criminal%20Law%20and%20Practice_0.pdf

³ Latinx is used here instead of Latino/a to be more gender inclusive of people of Latin American descent, that may identify outside of the gender binary of man or woman.

⁴ "Mass Incarceration: The Whole Pie 2018." Prison Policy Initiative, 2018, <https://www.prisonpolicy.org/reports/pie2018.html>

⁵ "The Racial Geography of Mass Incarceration." Prison Policy Initiative, 2015, <https://www.prisonpolicy.org/racialgeography/report.html>

⁶ "HIV/AIDS Inequality: Structural Barriers to Prevention, Treatment, and Care in Communities of Color." Center for American Progress, 2012, <https://www.americanprogress.org/issues/lgbt/reports/2012/07/27/11834/hivaids-inequality-structural-barriers-to-prevention-treatment-and-care-in-communities-of-color>. See section titled Criminal Justice.

and Latinx people made up two-thirds (67%) of people who encountered the criminal justice system related to HIV laws but made up only half (51%) of the people living with HIV in the state⁷. Immigrants living with HIV charged under HIV criminalization laws may experience police harassment⁸, as well as long-term detention and deportation⁹.

HIV criminalization laws can also increase the likelihood of violence and police harassment against LGBT individuals¹⁰ (people of transgender experience are seven times more likely to experience violence during an encounter with law enforcement than cisgender individuals¹¹), sex workers (11 states apply felony enhancements against sex workers living with HIV¹²), and people who inject drugs¹³--- all communities that are already vulnerable to over-policing, particularly where these identities intersect¹⁴. Undermining public health and prevention efforts, the threat of criminalization could prevent individuals from these key populations from accessing testing or treatment services out of fear of being prosecuted for their status.

Impact on Women Living with HIV

Much of the reasoning behind HIV criminalization laws was influenced by patriarchal beliefs about the need to protect innocent women and children from becoming “victims” of predatory men recklessly spreading HIV. Yet, which women were considered “innocent” and therefore deserving of that protection was and continues to be rooted in racism and the rigid enforcement of certain gender and sexuality “norms”. The result is that women living with HIV (WLHIV) are routinely denied the full dignity and autonomy over their own lives, sexuality and reproductive choices.

The reality is HIV criminalization laws have never protected women. In fact, they disproportionately target and harm women, particularly women of color, women who do sex work¹⁵, and women of transgender experience (who are also often profiled as sex workers). The Williams Institute studies showed that women made up 43% of those who criminalized based on their HIV-positive status despite only representing 13% of the people living with HIV in the state at the time. Additionally, most HIV-specific criminal incidents in

⁷ Hasenbush, Amira, et al. “HIV Criminalization in California: Penal Implications for People Living with HIV/AIDS.” Williams Institute, 2016, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Criminalization-California-Updated-June-2016.pdf>, see page 17

⁸ “HIV Criminalization Against Immigrants in California.” Williams Institute, 2016, <https://williamsinstitute.law.ucla.edu/wp-content/uploads/HIVCriminalizationAgainstImmigrants.2016.pdf>

⁹ “For Immigrants, HIV Criminalization Can Mean Incarceration and Deportation.” Williams Institute, 2016, <https://williamsinstitute.law.ucla.edu/press/for-immigrants-hiv-criminalization-can-mean-incarceration-and-deportation-2/>

¹⁰ “LGBT Policy Spotlight: HIV Criminalization Laws.” Movement Advancement Project, 2017, <http://www.lgbtmap.org/file/policy-spotlight-HIV-criminalization.PDF>

¹¹ “Hate Violence Against Transgender Communities.” National Coalition of Anti-Violence Programs, 2013, https://avp.org/wp-content/uploads/2017/04/ncavp_transhvfactsheet.pdf

¹² “The Intersection of Sex Work and HIV Criminalization an Advocate’s Toolkit.” The Center for HIV Law & Policy and The National LGBTQ Taskforce, 2017, http://www.hivlawandpolicy.org/sites/default/files/Sex%20Work%20HIV%20Toolkit%20FINAL%20R2_0.pdf

¹³ “The Intersection of Syringe Use and HIV Criminalization an Advocate’s Toolkit.” The Center for HIV Law & Policy and The National LGBTQ Taskforce, 2017, http://www.thetaskforce.org/wp-content/uploads/2014/09/Syringe-Use-Toolkit-Final-R2_0.pdf

¹⁴ “How Police Entanglement with Immigration Enforcement Puts LGBTQ Lives at Risk.” Center for American Progress, 2017, <https://www.americanprogress.org/issues/lgbt/reports/2017/04/12/430325/police-entanglement-immigration-enforcement-puts-lgbtq-lives-risk/>

¹⁵ “HIV Criminalization in California: Penal Implications for People Living with HIV/AIDS.”



California (95 %) involved sex work¹⁶. The risk of criminalization makes women especially vulnerable to coercion, exploitation, and violence from both law enforcement¹⁷ and intimate partners. Partners may use a WLHIV's status and the threat of criminalization to harass, control and coerce them into staying in an unhealthy or unsafe relationship¹⁸. In these instances, survivors may face violence if they disclose their HIV status to an abusive partner, while still risking arrest and prosecution if they choose not to disclose¹⁹.

"People are afraid enough as it is to get tested and know their status. The criminalization further deters people from getting tested, and actually contributes to the spread of the virus, rather than control it."
—woman living with HIV, PWN
Human Rights Survey

The threat of criminalization or violence also deters WLHIV from seeking needed medical care. One national study revealed that, women of transgender experience and third sex²⁰ individuals living with HIV (more than any other group) cited fear of criminalization as a primary reason for avoiding testing or treatment²¹. In at least one instance in the U.S., a WLHIV was charged with felony child neglect for supposedly failing to take measures to prevent transmitting HIV to her baby²². Fear of consequences like this may keep women from seeking pregnancy related care.

How HIV Criminalization Laws Fail and Harm People Living with HIV

1. They perpetuate HIV-related stigma and discrimination by singling out people living with HIV (PLHIV) for criminal prosecution for acts that would not otherwise be illegal.
2. They frequently misrepresent risk by criminalizing acts that are scientifically proven not to transmit HIV (i.e. spitting, biting, scratching, sex with a condom, sex with an undetectable/untransmittable viral load).
3. They hinder HIV prevention efforts by penalizing PLHIV for knowing their status. You cannot be prosecuted if you do not know you are living with HIV. These laws make getting tested for HIV itself a “risky” activity.

¹⁶ “HIV Criminalization in California: Penal Implications for People Living with HIV/AIDS.”

¹⁷ “HIV Criminalization in California: Penal Implications for People Living with HIV/AIDS.”

¹⁸ “What HIV Criminalization Means to Women in the U.S.” Positive Justice Project, <http://www.hivlawandpolicy.org/sites/default/files/Women%20and%20HIV%20Criminalization.pdf>

¹⁹ “What HIV Criminalization Means to Women in the U.S.” See page 3.

²⁰ Third sex is an umbrella term used in the study to refer to individuals who do not identify as men or women

²¹ “HIV Criminalization Discourages HIV Testing, Disclosure and Treatment for Transgender and Third Sex Individuals.” Transgender Law Center, 2013, <https://transgenderlawcenter.org/archives/8538>

²² “Criminalization of HIV transmission.” AIDS-Free World, 2014, <https://www.hivlawandpolicy.org/sites/default/files/Criminalization%20of%20HIV%20transmission%20-%20AIDS%20Free%20World.pdf>



"I refuse to be judged by this disease for I am much, much more than the disease. So, I keep this a secret. As a teacher I could lose my job. Not disclosing could get me jail time. Therefore, I no longer date. It's difficult being a leper of the 21st century."
—woman living with HIV, PWN Human Rights Survey

4. They ignore the complications of disclosure. People living with HIV may not want to disclose their status for many reasons including fear of intimate partner violence, fear of discrimination and HIV-related stigma, and lack of information about living with HIV. HIV criminalization laws only exacerbate fears about disclosure by creating additional consequences without and assuming that disclosure is always simple or safe. Additionally, disclosure is difficult to prove meaning PLHIV are still at risk of being charged even after they have disclosed.

5. They contradict messages that sexual health is a shared responsibility for both partners. HIV criminalization laws hold PLHIV solely responsible for their partner(s) sexual health, even though that responsibility should be shared among partners equally.

"HIV criminalization laws hurt everyone with HIV because it's hard enough to feel okay about being sexual without feeling like your body is a deadly weapon [. . .] Safe sex should always be both person's responsibility." — woman living with HIV, PWN Human Rights Survey

6. They lead to prosecution based on HIV status alone. Unlike other criminal laws, most HIV criminalization laws do not require proof of an intent to harm. Lack of actual transmission or showing of low/no possibility of transmission is usually not accepted as a defense. That means intent to harm is assumed just based on person knowing their positive status and that is enough to prosecute them²³. The Williams Institute studies

²³ "Arrests and Prosecutions for HIV Exposure in the United States, 2008–2018." Center for HIV Law & Policy, 2018 <https://www.hivlawandpolicy.org/sites/default/files/Chart%20of%20U.S.%20Arrests%20and%20Prosecutions%20for%20HIV%20Exposure%20in%20the%20United%20States%20%28updated%20May%202018%29.pdf>



revealed that out of 385 incidents of one or more HIV-specific charge being brought against a PLHIV, every single incident ended with a conviction for at least one of the charges²⁴.

Consequences of After Being Criminalized for HIV Status

“A minor infraction of the law while positive could lead to a felony conviction, a lengthy prison sentence, public shaming, and registration as a sex offender.”
-Robert Suttle, Sero Project Deputy Director and Criminalization Survivor

The continued stigma against people living with HIV as well as against people who have survived criminalization means that the consequences of being charged under an HIV criminalization law persist long after a PLHIV leaves the criminal justice system and can affect every aspect of their lives including:

1. Loss of Privacy and Dignity:

- Misrepresentation in the media after criminalization can lead to feelings of dehumanization, isolation, and humiliation and may also jeopardize survivor's safety.
- Criminal record with HIV-related charges may often mean the accused's status becomes publicized²⁵.
- 6 states require registration as a sex offender as part of the punishment under HIV-specific laws²⁶ creating additional privacy and safety concerns.

2. Economic Insecurity

- Felony sentences or enhancements can mean losing access to public benefits (housing, food stamps, financial aid for higher education) and supportive government programs that are vital for preventing HIV and keeping PLHIV in care²⁷.
- Many employers require people convicted of felonies to disclose that history on job applications. This forces PLHIV to disclose their HIV status.
- In states that require registration as a sex offender, there would be additional limitations on available jobs especially in fields such as child-care or teaching²⁸.

3. Disenfranchisement

- PLHIV who are convicted of felonies can lose their right to vote. 21 states prohibit people convicted of felonies from voting until they are discharged from parole or probation. Florida, Iowa, and Kentucky permanently bar people charged with felonies from voting even after they have served

²⁴ “HIV Criminalization in California: Penal Implications for People Living with HIV/AIDS.” See page 3

²⁵ “Media-Driven Stigma Continues with New HIV Criminalization Case.” The Center for HIV Law & Policy, 2014, <https://www.hivlawandpolicy.org/news/media-driven-stigma-continues-new-hiv-criminalization-case>

²⁶ “HIV Criminalization in the United States: An overview of both the variety and prevalence of laws used to prosecute and punish people living with HIV in the U.S.” The Center for HIV Law & Policy, 2017, <http://www.hivlawandpolicy.org/sites/default/files/CHLP%20HIV%20Crim%20Map%20Final.pdf>

²⁷ “HIV Criminalization in California: Penal Implications for People living with HIV/AIDS.”

²⁸ “HIV Criminalization in California: Penal Implications for People living with HIV/AIDS.”



their sentence²⁹. Felony disenfranchisement affects 1 in 13 Black voters compared to 1 in 56 non-Black voters³⁰, disproportionately barring Black individuals from civic participation.

4. Loss of the Right to Parent

- Criminalized parents living with HIV face greater barriers to regaining custody of their children. In states where conviction requires sex offender registration, child custody and visitation rights can also be jeopardized³¹.

What Can Be Done?

At the federal level:

1. **Pass the REPEAL (Repeal Existing Policies that Encourage and Allow Legal) HIV Discrimination Act** which incentivizes and provides guidance to help states and U.S. territories modernize their HIV-specific laws, bringing them in line with contemporary understanding of HIV transmission.
2. **Pass the Pretrial Integrity and Safety Act** which provides grants to states to help them end the use of money bail as a requirement of pre-trial release in criminal cases. Currently, people can be held up to a year without ever being charged of a crime, simply because they cannot afford to pay for bail. This practice unjustly punishes low-income individuals as it prolongs separation from family, community, work, school and other life responsibilities. For PLHIV, pretrial detainment may cause a disruption in critical care and treatment.
3. **End and Prevent Cooperation Between Local Law Enforcement Agencies and Immigration and Customs Enforcement (ICE)**. Cooperation between local law enforcement and ICE increases the risk of arrest and extended periods of detainment for immigrants. Immigrants in detainment are often denied essential healthcare access and legal services and PLHIV may be completely unable to access care and medications.

At the state level:

1. **Repeal State HIV Criminalization Laws** that punish the alleged non-disclosure, exposure and transmission of HIV to bring them in alignment with current scientific understanding of HIV transmission. Reforms should seek to dispel HIV exceptionalism, promote shared sexual decision-making, protect all people living with HIV regardless of viral load, and support the right to disclose when one feels safe. Sentence enhancements and mandatory testing for sex workers living with HIV and enhancements for people who use drugs living with HIV should be eliminated.
2. **Eliminate “Condoms as Evidence” Laws**, which allows the possession of condoms to be used as the basis for a solicitation charge or police harassment. These policies make it impossible for sex workers to protect themselves and deprive people who do sex work agency in their decisions about contraceptive use.
3. **Fund Re-Entry Services** for people who are formerly incarcerated to help them transition back into the community including housing support, employment support, and linkage to healthcare.

²⁹ “Criminal Disenfranchisement Laws Across the United States.” Brennan Center for Justice, 2018

<https://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states>

³⁰ “Felony Disenfranchisement.” The Sentencing Project, <https://www.sentencingproject.org/issues/felony-disenfranchisement/>

³¹ “What HIV Criminalization Means to Women in the U.S.”



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Positive Women's Network - United States of America (PWN-USA) is a national membership body of women living with HIV working to prepare and involve all women living with HIV, in all our diversity, including gender identity and sexual expression, in all levels of policy and decision-making to improve the quality of women's lives. PWN-USA applies a gender equity and human rights lens to the HIV epidemic to achieve federal policies grounded in the reality of women's lived experiences.

