



HB1497 Crimes – Transfer of Human Immunodeficiency Virus While Committing Sexual Crime

Presented to the Honorable Luke Clippinger and Members of House Judiciary Committee

March 10, 2020 1:00 p.m.

POSITION: OPPOSE

NARAL Pro-Choice Maryland urges the House Judiciary Committee **an unfavorable report on HB1497 Crimes – Transfer of Human Immunodeficiency Virus While Committing Sexual Crime**, sponsored by Delegate Paul Corderman.

Our organization is an advocate for reproductive health, rights, and justice. While we unequivocally condemn any and all acts of sexual violence, additionally criminalizing those living with HIV does not further reproductive justice nor public health. Reproductive justice is a human rights-based approach which emphasizes the dignity and sexual freedom of all people, ultimately to “provide the conditions in which [people] can make healthy, responsible, and safe choices about their health and their lives.”ⁱ(pg 170) The criminalization of sexual activity for those living with HIV does the opposite, contradicting the public health message of mutual sexual responsibility and creating a false sense of security that the criminal legal system will protect people from HIV (instead of the practice of safer sex).ⁱⁱ Countless studies and commentaries have shown that criminalizing HIV does *not* prevent transmission, especially since up to 60% of transmission takes place in the early stages of HIV in which someone does not know they are infected.^{i,iii,iv}

Criminalizing HIV endangers and further targets communities already experiencing marginalization and stigmatization—gay men, low-income individuals, sex workers, women, Black men and women, and people who use drugs.ⁱⁱⁱ These communities often have higher HIV prevalence due to structural and systemic barriers within healthcare access, and criminalization statutes operate under the assumption that every individual has equal access to anti-retroviral treatment (ART), viral load testing, reproductive health supplies, effective and non-stigmatizing providers, and contraceptive negotiation power within sexual activity.^{iv} Criminal penalties are often imposed unevenly across race and gender.^v For example, Black women in California make up only 4% of the HIV-positive population, yet account for 21% of HIV-transmission criminal cases.^v Generally, women are more likely than men to know their status, to be blamed for HIV infection within a sexual interaction, and more likely to be prosecuted for mother-to-child transmission.^{i,iii} A 2019 study found that HIV criminalization is a structural predictor of stress, already adding to the physical, psychological, and mental stresses of marginalization.^{vi}

The empowerment of people living with HIV is central to the public health goal of reducing HIV transmission, particularly since such support increases the likelihood of HIV-positive individuals “act[ing] consistently for their own safety and that of others.”ⁱⁱⁱ(pg 68) HIV criminalization has the opposite effect, increasing HIV-related discrimination and internalized HIV stigma, which both lead to adverse health outcomes, decreased quality of life, and increased psychological distress.^{vi} There is minimal deterrence value of criminal prosecution, particularly for sexual practices.^{vii} A 2007 study by Burriss and colleagues found that criminal law is not a

useful intervention for promoting HIV disclosure, instead leading to stigma and reluctance to cooperate with health authorities.^{vii} Criminalization of HIV siphons resources and support away from effective, evidence-based solutions for reducing the transmission of HIV, such as preventive efforts, protection against discrimination, de-stigmatization efforts, empowerment initiatives, and providing equitable access to testing and treatment.ⁱⁱⁱ It is well-established that anti-retroviral treatments reduce the likelihood of sexual transmission of HIV by up to 96%.^{viii} Instead of focusing on criminalizing the lives of those living with HIV, improvements of sexual and reproductive healthcare could greatly reduce the transmission of HIV.

HIV/AIDS is a virus, not grounds for criminal prosecution. HIV criminalization laws contribute to “an environment of structural stigma against, and perhaps reduced solidarity among, people living with HIV”^{ix}(pg 1009) and ultimately create the perception that “people living with HIV pose a threat to the community at large and act in a deviant, criminal manner.”^{vii}(pg 6) Such stigma leads to decreased openness about one’s serostatus, decreased likelihood of testing and access to treatment.ⁱⁱⁱ In fact, criminalizing HIV leads to increases in HIV-related stigma and poor engagement in healthcare services.^v Disclosing HIV is undoubtedly difficult in a society which continually discriminates against HIV-positive individuals and which does not protect against the dangerous consequences of disclosure, such as rejection, physical or emotional abuse, acts of violence, loss of employment, and the dissolution of personal or familial relationships.^{iv,vii,x} Women who are living with HIV struggle to disclose to their partners often due to the fear of violence or assault, particularly in situations of intimate partner violence.ⁱⁱⁱ Stigma affects one’s ability to have a healthy, positive sexual life: a 2008 study found that 84% of HIV-negative men avoid having sex with HIV-positive men, despite protective measures in place and appropriate supplies being used.^x As Grant writes, “It is as if the idea of HIV is enough to endanger life.”^{iv}(pg 479) Because of such stigmatizing attitudes and fear surrounding disclosure, criminalizing statutes ultimately push individuals to not want to know their status due to fear of future prosecution.^{xi}

In 1989, Maryland enacted its own statute, which prohibits someone from “knowingly transfer[ring] or attempt[ing] to transfer” HIV to another person. 34 states have HIV-specific criminal statutes, many of which were enacted in the 1980s and 1990s as a response to the AIDS epidemic (Fig. 1). As seen in Figure 1, many states either criminalize behavior with low transmission risk or do not specifically address such behaviors. Within legal analyses, scholars and judges reflect substantial concern towards the “creep of criminalization,” as described by Justice Edwin Cameron; the vague criminalization of one behavior can lead to the future criminalization of adjacent, related behaviors.ⁱⁱⁱ(pg 65) This led to a Texas case in which a HIV-positive man was prosecuted for harassing a police officer with a “deadly weapon” after spitting on him, despite saliva not being a known method of HIV transmission.ⁱⁱⁱ Concerningly, criminalizing HIV does not reflect modern advancements of anti-retroviral treatment, pre-exposure prophylaxis (PrEP), and the negligible risks associated with sexual activity with HIV-positive person(s) who are receiving appropriate



* In some states, very general language about sexual contact or sexual conduct would include oral, vaginal, or anal sex even though not explicitly defined
 Figure 1: Map depicting US states with HIV-specific criminal laws.^{viii}(pg 1002)

treatment.^v Additionally, the lack of knowledge surrounding state laws is concerning: only 15% of participants in a 2000 study could correctly identify their state's HIV criminalization statute.^{viii} Lastly, statutes operate under the expectation that a newly-infected partner will feel unfairly deceived by their partners. Newly-infected women do not typically share these assumed sentiments of blame; amongst women who were infected by their male partners during, most women believed their partner was genuinely ignorant of his status and did *not* hold him responsible.ⁱⁱ

HB1497 prohibits individuals from knowingly transferring or attempting to transfer HIV to another person. Additionally, HB1497 establishes separate and consecutive sentences for crimes of sexual violence—including rape in the first degree, rape in the second degree, sexual offense in the third degree, and sexual abuse of a minor—in which the perpetrator transferred or attempted to transfer HIV. Though we undoubtedly condemn acts of sexual violence in all forms, the addition of a separate, consecutive sentence due to HIV status is inappropriate and ineffective. As writers from the Canadian HIV/AIDS Legal Network established, “Sexual assault is already a criminal act. The offender’s knowledge that he had HIV at the time of the attack may be an aggravating factor, but it is not the essence of the crime.”^{vii(pg 9)}

HIV criminalization expands upon the marginalization and stigmatization experienced by various communities, does not deter risky sexual behavior, works directly against the empowerment and non-judgmental aims of public health, leads to increased psychological distress and potential danger. HB1497 would further stigmatize HIV and damage efforts to engage HIV-positive individuals in broader services as well as damaging individual wellbeing of those living with HIV. For these reasons, NARAL Pro-Choice Maryland **urges an unfavorable committee report on HB1497**. Thank you for your time and consideration.

ⁱ Jürgens, Ralf, Jonathan Cohen, Edwin Cameron, Scott Burris, Michaela Clayton, Richard Elliott, Richard Pearshouse, Anne Gathumbi, and Delme Cupido. 2009. “Ten Reasons to Oppose the Criminalization of HIV Exposure or Transmission.” *Reproductive Health Matters* 17 (34): 163–72. [https://doi.org/10.1016/S0968-8080\(09\)34462-6](https://doi.org/10.1016/S0968-8080(09)34462-6).

ⁱⁱ Persson, Asha. 2014. “‘I Don’t Blame That Guy That Gave It to Me’: Contested Discourses of Victimisation and Culpability in the Narratives of Heterosexual Women Infected with HIV.” *AIDS Care* 26 (2): 233–39. <https://doi.org/10.1080/09540121.2013.811207>.

ⁱⁱⁱ Cameron, Edwin. 2009. “Criminalization of HIV Transmission: Poor Public Health Policy.” *HIV/AIDS Policy & Law Review* 14 (2): 62–75.

^{iv} Grant, Isabel. 2013. “The Over-Criminalization of Persons with HIV.” *University of Toronto Law Journal* 63: 475–84. <https://doi.org/10.3138/utlj.63.3.0301-2>.

^v Yang, Y Tony, and Kristen Underhill. 2018. “Rethinking Criminalization of HIV Exposure - Lessons from California’s New Legislation.” *New England Journal of Medicine* 378 (13): 1174–75. <https://doi.org/10.1056/NEJMp1716809>.

^{vi} Breslow, Aaron Samuel, and Melanie Elyse Brewster. 2020. “HIV Is Not a Crime: Exploring Dual Roles of Criminalization and Discrimination in HIV/AIDS Minority Stress.” *Stigma and Health* 5 (1): 83–93. <https://doi.org/10.1037/sah0000177>.

^{vii} Canadian HIV/AIDS Legal Network. 2009. “Criminalization Confusion and Concerns: The Decade since the Cuerrier Decision.” *HIV/AIDS Policy & Law Review* 14 (1): 4–10.

^{viii} Lehman, J. Stan, Meredith H. Carr, Allison J. Nichol, Alberto Ruisanchez, David W. Knight, Anne E. Langford, Simone C. Gray, and Jonathan H. Mermin. 2014. “Prevalence and Public Health Implications of State Laws That Criminalize Potential HIV Exposure in the United States.” *AIDS and Behavior* 18: 997–1006. <https://doi.org/10.1007/s10461-014-0724-0>.

^{ix} Finitsis, David J., Ronald D. Stall, and Samuel R. Friedman. 2014. “Theory, Analysis, Social Justice, and Criminalizing HIV Transmission: A Commentary on Lehman and Colleagues (2014).” *AIDS and Behavior* 18: 1007–10. <https://doi.org/10.1007/s10461-014-0725-z>.

^x Adam, Barry D., Richard Elliott, Winston Husbands, James Murray, and John Maxwell. 2008. “Effects of the Criminalization of HIV Transmission in Cuerrier on Men Reporting Unprotected Sex with Men.” *Canadian Journal of Law and Society* 23 (1–2): 143–59. <https://doi.org/10.1017/S0829320100009613>.

^{xi} Wainberg, Mark A. 2009. “Criminalizing HIV Transmission May Be a Mistake.” *Canadian Medical Association Journal* 180 (6): 688. <https://doi.org/10.1503/cmaj.090249>.