

HIV, CRIMINAL LAWS, PUBLIC HEALTH LAWS, AND PRIVACY RIGHTS

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Objectives

Answer questions from persons with an HIV diagnosis

- Who do I have to tell?
- Can I be prosecuted or sued for having sex?
- Can I be prosecuted or sued for not telling my sex partner(s) that I am HIV+?
- Can my doctor or another health care provider report me if he or she thinks I am having unsafe sex?

Understand the policy issues involved in HIV-related criminal and privacy laws



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Before We Get to Sex

- A person with an HIV diagnosis has no legal obligation to disclose the diagnosis to an employer, landlord, school, or anyone else to obtain needed services
- *Unless*
 - They need an accommodation (e.g., doctor's appointments, medication side effects)
 - *Maybe* if they work in health care
 - *Seek legal advice (from WWH or another knowledgeable lawyer) first!*



Legal Obligations by HIV+ Person to Disclose to Sex Partners or to Avoid Sex

- HIV-Specific Criminal Laws
- Prosecutions Under General Criminal Laws (e.g., assault, reckless endangerment, attempted murder)
- Potential Lawsuit for Damages by Sex Partner



HIV Criminal Laws Generally

- Most HIV-specific criminal laws were enacted in the early days of the epidemic, and many are not consistent with medical realities.
- Some laws criminalize (certain types of) sex by someone who knows they are HIV+, without disclosure and consent.
- Some laws enhance sentences for other sex offenses (e.g., assault or sex with a minor or prostitution) if the offender is HIV+.
- General criminal laws can also be used (attempted murder, assault, threat to do bodily harm, reckless endangerment).



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HIV Criminal Laws Generally

- Some laws attempt to single out “unsafe” sexual behavior for criminalization, but most make no distinction between use and non-use of condoms, and some criminalize any exchange of fluids or sexual activity, even activities that pose no significant risk of transmission.
- In many states, HIV+ people have even been prosecuted – and sentenced to lengthy prison terms – for non-sexual acts such as biting or spitting – especially when police or prison guards are involved – even though such activities pose essentially no risk of transmission.



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HIV Criminal Laws Generally

- Prosecutions are infrequent but arbitrary; often used only when another sex offense is alleged (such as assault, sex with a minor, or prostitution).
- Evidence indicates that the laws are selectively enforced against sex workers, women of color (transgender or cisgender), and gay men (especially gay men of color).
- Penalties are often disproportionately harsh.



HIV Criminal Laws Generally

- No evidence that criminal laws are effective HIV prevention tools, but moral feelings (and political posturing) have made the laws difficult to eliminate or reform.
- Studies to date have concluded that the existence of laws criminalizing (nonconsensual) sex by people who know they are HIV+ have no measurable effect on sexual behavior.
- Although many advocates argue that the laws discourage HIV testing and increase HIV stigma, studies to date largely reveal no measurable effect on either.



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District of Columbia

- No HIV-specific criminal law
- No reported prosecutions under general criminal laws



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)



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Maryland

“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.



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Maryland

Public Health regulations state:

An attending physician “shall ... [r]equest the assistance of the health officer if an individual with HIV refuses to comply with recommendations that reduce the risk of transmission to unsuspecting contacts.” Code of Maryland Regulations §10.18.04.02(B)(3)

The health officer “[s]hall ... [t]ake the least restrictive action necessary to induce appropriate behavior changes to reduce the risk of transmission of HIV, including ... [c]onsulting with the State's attorney about action, if appropriate, under ... [§18-601.1 or more general public health laws that prohibit knowingly exposing others to infectious disease].” Code of Maryland Regulations §10.18.04.02(C)(3)(d)



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What Does the Maryland Law Mean?

“Knowing attempt to transfer HIV” – requires specific intent?

- Have I violated this law if I *intend* to enjoy myself and am not thinking about the other person? What if I use a condom? If I don't use a condom but my viral load is undetectable? If my partner knows I am HIV+ and consents? If my partner is on PrEP?
- In *Bragdon v. Abbott*, the 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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Prosecutions Under the Maryland Law Are Infrequent But Do Occur

- There have been a handful of reported prosecutions, and several individuals have served jail time. There have been more prosecutions under the general criminal offense of “reckless endangerment,” which is also a misdemeanor with similar penalties.
- The most widely publicized prosecutions have been for biting or spitting on a police officer – acts that pose essentially no risk of HIV transmission!



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.



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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 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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What Does the Virginia Law Mean?

- The statute is more specific than Maryland's law. However, what is "intent to transmit the infection"? If I just intend to have unprotected sex and don't care whether my partner becomes infected, am I guilty?
- It appears that if HIV is not disclosed, using a condom, or having an undetectable viral load, or having a sex partner who is on PrEP, is not a defense to a misdemeanor charge.



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Prosecutions Under the Virginia Law Are Infrequent But Do Occur

- There have been at least several reported prosecutions and convictions – one involving sex with a minor, and one where the defendant's girlfriend continued her relationship with him after learning of his HIV and later turned him in after the relationship went sour.



Risk of Criminal Prosecution in the DMV: the Bottom Line

- No significant risk in DC
- In Virginia and Maryland, some risk – probably small – if the sex partner isn't informed
- The risk is probably even smaller if the HIV+ individual is on medication and used condoms (because prosecutors tend to be reasonably well educated about HIV transmission risks)



Reform of HIV Criminal Laws in Other States: California

California law was amended in 2017 to provide:

“Any person who exposes another to [HIV] by engaging in unprotected sexual activity [penetrative anal or vaginal sex without a condom] when the infected person knows at the time of the unprotected sex that he or she is infected with HIV, has not disclosed his or her HIV positive status, and acts with the specific intent to infect the other person with HIV, is guilty of a felony punishable by imprisonment in the state prison for three, five, or eight years. Evidence that the person had knowledge of his or her HIV positive status, without additional evidence, shall not be sufficient to prove specific intent.”

CAL. HEALTH & SAFETY CODE § 120291 (2017)



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Reform of HIV Criminal Laws in Other States: 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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Reform or Repeal of HIV-Specific Criminal 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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“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?



What About People With HIV Whose Viral Load is Undetectable Because of ART?

- Scientific consensus that a sustained undetectable viral load renders the probability of HIV transmission essentially too small to measure (“U=U”).
- Growing interest in reforming criminal laws to eliminate liability if the HIV+ person is undetectable.
- Viral load suppression requires access and consistent adherence to ART, so viral suppression is lower in lower-income populations and in people of color. Would criminal law reform based on U=U exacerbate racial inequities?



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What About People With HIV Whose Viral Load is Undetectable Because of ART?

North Carolina recently amended its public health regulations to provide that there is no obligation to refrain from sexual intercourse, use condoms, or inform one's sex partner of one's status if "the person living with HIV is in HIV care, is adherent with the treatment plan of the attending physician, and has been virally suppressed for at least 6 months (HIV levels below 200 copies per milliliter) at the time of sexual intercourse."

10A North Carolina Administrative Code 41A .0202



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A New Issue: HIV “Cluster Detection” or “Molecular Surveillance”

- When an individual is newly diagnosed with HIV infection, their virus is analyzed to determine the best course of treatment (drug resistance)
- Viral samples are sent to the state/local health department, and to the CDC, for further analysis (genetic sequencing)
- These techniques can identify viral strains in different individuals that are closely related.
- This information, together with other information on HIV+ persons, can be used to identify “clusters” of infections occurring in the same area or in a sexual or injection drug use network. The information can be used to target public health interventions.



A New Issue: HIV “Cluster Detection” or “Molecular Surveillance”

- Molecular surveillance can determine whether A and B have the same virus and whether they likely contracted HIV in a given network – but cannot determine the direction of transmission (whether A transmitted to B, or vice versa, or neither).
- No reported instances at this time of this information being used in criminal investigations or prosecutions, but advocates are concerned.
 - Law enforcement can access public health and medical records of suspects and defendants in most if not virtually all states.
 - Information that A and B’s viruses are related, or part of the same cluster, could be used to confuse or prejudice a judge or jury.



Lawsuits for Civil Damages by the HIV-Negative Sex Partner?

- No reported cases in DC, Maryland or Virginia
- The outcome of a lawsuit would likely be controlled by scientific knowledge (was there actually a significant risk of transmission in the circumstances?) and whether the individual consented to the sexual act(s)



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Can a Health Care Provider Report an HIV-Positive Patient Who Endangers Their Sex Partners Or Contact the Partners?

The general rule is that medical information is confidential, and non-consensual disclosures are unlawful – but there are exceptions.



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Can a Health Care Provider Report an HIV-Positive Patient Who Endangers Their Sex Partners Or Contact the Partners?

- Under [DC law](#), confidentiality of the patient is paramount. The right of a health care provider even to notify the Department of Health is unclear.



Can a Health Care Provider Report an HIV-Positive Patient Who Endangers Their Sex Partners Or Contact the Partners?

Maryland law authorizes physicians and their designees to make disclosures to the sexual and needle-sharing partners of an HIV-positive patient if the patient refuses to inform them, or to report the patient to the public health department. The health care provider has immunity under the law for any good-faith decision to disclose or *not* to disclose.

Md. Code Ann., Health-Gen. I § 18-337



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Code of Maryland Regulations §10.18.04.02(B)(3)



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Can a Health Care Provider Report an HIV-Positive Patient Who Endangers Their Sex Partners Or Contact the Partners?

Virginia law authorizes (but does not require) a physician to disclose to a patient's "spouse". Other sex partners, and needle-sharing partners, are not mentioned.

Va. Code Ann. § 32.1-36.1



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Can a Health Care Provider Report an HIV-Positive Patient Who Endangers Their Sex Partners Or Contact the Partners?

Like DC and unlike Maryland, [Virginia law is unclear](#) on whether a health care provider can report to the health department a patient who fails to follow safe-sex recommendations and exposes others to HIV without their knowledge.



HIPAA

Disclosures of protected health information without the patient's written consent are prohibited with limited exceptions.



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HIPAA

- Disclosures to public health officials that are required or authorized by law are permitted.
- Disclosures *may* be permitted when an individual poses a serious danger to themselves or to others, but the scope of this exception are unclear.



Questions?



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