



What HIV Criminalization Means to Women in the U.S.

Thirty-six states and territories have laws that criminalize HIV exposure and failure by an HIV positive person to disclose (tell someone about) her/his HIV status. If you have consensual (both people agreed to it) sex with someone, and you used condoms, you can still be arrested under these laws if your partner says later that he/she didn't know at the time that you were HIV positive.

In some states, people have even been arrested and sentenced for doing things that do not involve any real risk of transmitting HIV, such as biting or spitting on someone. In states that do not have specific laws on HIV exposure or disclosure, some people living with HIV have been prosecuted for sex or fighting under general criminal laws, such as assault or attempted murder. Stigma and fear are at the root of all these criminal prosecutions of people with HIV.

Women and their experiences have been a central part of the debate over whether HIV criminalization laws are an effective way to protect people. Since women may be vulnerable or may have less power in their relationships than men, some people argue that HIV criminalization laws are needed to keep men from exposing women to HIV.

We all know that women sometimes do face terrible betrayals in their relationships. Many women who wind up infected with HIV are also survivors of different types of abuse, although of course this is not always the case. The question is:

- Do HIV criminalization laws really help to protect women from HIV exposure that can lead to them becoming HIV infected? Do these criminal laws actually help women who contract HIV from a sexual partner?

or

- Is there a better way to address that than by relying on the criminal justice system? Do we need laws that treat HIV as a deadly weapon? Is it possible instead to create a safer environment for HIV status disclosure to partners, make it easier for both partners to have and use tools for safer sex, and increase mental health, counseling and other supportive services for people who get tested for HIV?

To think about this sensitive topic, let's look at some key questions closely:

- 1. Who is getting arrested?** Most HIV criminalization charges appear to happen because of bad break-ups. After a consensual sexual relationship between two adults ended, one partner contacted the police and accused the other partner of exposing him/her to HIV. If the accusing partner is HIV negative, there is no evidence that he/she was put at risk of HIV, especially if the couple used condoms. If the accusing partner is also HIV positive, it may still not be clear as to what both partners knew or didn't know about each other's health status – and when they knew it.

It is also important to remember that an HIV negative partner can still transmit hepatitis, herpes, HPV or other sexually transmitted infections (STIs) and that many of these are more dangerous to people with HIV than to HIV negative people. But arrests are only occurring when someone accuses an HIV positive person of having put a negative person at risk of HIV.

2. How is it possible that the accusing partner wasn't automatically infected with HIV by having sex with someone who is HIV positive? When a person with HIV is taking effective anti-retroviral treatment regularly, the amount of HIV in semen and vaginal secretions is generally very low¹. Thus, the likelihood that he or she will transmit the virus is also usually extremely low. And the risk of transmission from oral sex, which is very low to begin with, is even lower or nonexistent when the person with HIV is on effective treatment and has no measurable virus in his/her system. These factors, or using condoms, are almost never taken into consideration when a person is arrested and sentenced for an HIV-related criminal offense.

Also, many prosecutions have occurred because police or corrections staff accused people in their custody of biting, spitting or throwing body fluids, such as urine, at them. Even though HIV transmission is impossible in these cases, people have still received long prison sentences for supposedly exposing someone to HIV in these ways.

3. What kinds of sentences are people receiving when convicted under HIV criminalization laws? The sentences that people with HIV face under these laws are often out of proportion to any harm that is done, especially if HIV was not transmitted or if the charge is based on a situation (like spitting) in which HIV could not have been transmitted. In many states, people are sentenced to more time for having consensual sex while HIV positive, even when HIV is not transmitted or a condom is used, than for killing someone with an automobile (referred to in most states as “vehicular manslaughter”). Sentences of 3 –10 years are common in HIV criminalization cases, and some people get sentences of 20 - 30 years.

Most of these cases have occurred among former sex partners. They turn into “he said/she said” situations because people seldom have proof that they disclosed their HIV status to their partners before sex. Yet the burden of proof is on the accused person. You can be convicted on the basis of a lie by a former lover if you have no evidence showing that the charge is a lie.

4. But don't people with HIV have a responsibility to tell their partners? Almost everyone agrees that people with HIV have an ethical obligation to reveal their HIV status to a partner. However, the same ethical obligations also apply to people who have other STIs, such as HPV. Most people agree that everyone has an ethical responsibility to use protection when having sex to keep themselves and their partners safe from diseases. This has to include protection from all viruses and diseases - those we know about and those we may not know we have.

It is important to remember that, most of the time, people who transmit HIV to another person do so because they don't know that they are HIV positive or that they are placing their partner at any risk of HIV infection. This happens frequently because people are generally MOST infectious (have the highest amount of HIV in their blood) in the first two months after they, themselves, have become infected² and before they have an HIV test that detects HIV antibodies in their system.

¹ Male-to-female transmission estimates in high-income countries indicated a low risk of infection in the absence of anti-retrovirals (0.08% chance of transmission per act). With anti-retrovirals, the risk of transmission drops by 80%. Vernazza et al. *Les personnes séropositives ne souffrant d'aucune autre MST et suivant un traitement antirétroviral efficace ne transmettent pas le VIH par voie sexuelle*, Bulletin des médecins suisses, 89 (5) (2008).

² See Brenner et al, *High rates of forward transmission events after acute/early HIV-1 infection*, 195 J. INFECT. DIS. 951 (2007).

What does this mean for HIV positive women?

In the United States, many women living with HIV (although not all) are lower-income women of color. Many are already dealing with discrimination and stigma in their lives for just being who they are. Applying criminal law to HIV nondisclosure or exposure in consensual relationships doesn't do anything to end the social inequalities that make women and girls more vulnerable to HIV, like gender-based violence or difficulties in attaining financial independence for themselves and their family.

In fact, these laws can increase women's risk of violence and abuse, and further promote the fear and stigma experienced by women living with HIV. Here's why:

Women frequently are the first to know their status, and therefore, can be at greater risk of prosecution.

A person is only subject to HIV criminalization laws and prosecution if she or he knows her/his HIV positive status. Women are often the first in a family to get tested for HIV because they are regularly offered testing in family planning and pre-natal care clinics. The first person in a family or relationship to test positive is almost always treated as the person who brought HIV infection into the home, even if it turns out that the other partner was also positive when that first test occurred. This belief opens the door for men bringing charges against their female partners for allegedly exposing them to HIV.

Women may face domestic violence for disclosing their HIV status to their partners or family. But they also risk arrest if they do not.

If you are living with HIV, you can be prosecuted for exposing a sex partner to HIV unless you can prove that you told your sex partner about your HIV status before having sex³. So, when a woman finds out she is positive, the law requires that she tell her partner (if she has one) right away before they have sex again. It doesn't matter if they are using condoms. If she doesn't tell him (or he claims later that she didn't tell him), he can still bring charges against her later under these laws.

Some women, however, may not be able to disclose their HIV status for fear of abuse by her partner or another family member. At the very least, a woman may need to choose very carefully when and how she makes this disclosure. If she can persuade her partner to use a male condom, or if she uses a female condom, she can take this time without putting him at any further risk of HIV exposure.

She may want to prepare for disclosure by educating the household about HIV gradually and/or by developing a plan for protecting herself if someone becomes violent. Under the HIV criminalization laws, women going through this process have the added difficulty of fearing arrest, prosecution and possibly being deprived of access to their children if a partner or family member decides to punish them by calling the police.

Women may be told that they are not ever allowed to have unprotected sex or that getting pregnant is against the law.

In some states that have HIV criminalization laws, state health departments require people who test positive to sign forms that say the person will be guilty of a felony if they ever have unprotected sex, or that they cannot get pregnant. Using the law in this way violates the right of all women, including those who are HIV positive, to conceive and give birth to children. For more information on the rights of women living with HIV to get pregnant and give birth, please see *HIV and Pregnancy: Medical and Legal Considerations for Women and Their Advocates*, available at: <http://www.hivlawandpolicy.org/resources/view/474>.

³ For possible ways to protect yourself from this, see *Guidance for People Living with HIV Who Are At Risk of, or Are Facing, Criminal Prosecution for HIV Nondisclosure or Exposure*, Center for HIV Law and Policy (2011), which is available online at: <http://hivlawandpolicy.org/resources/view/580>

What do these laws mean to all women?

Some people argue that we need HIV criminal laws to protect women. But are they helping?

HIV criminalization does not protect women from sexual coercion or violence.

If a woman is raped or sexually assaulted, those crimes should always be prosecuted and are covered by general criminal laws. HIV-specific criminal laws are not necessary to prosecute people accused of these crimes. In fact, they are overwhelmingly applied in accusations made after romantic, consensual relationships, where one party later claims that she/he did not know the other's HIV status.

Here are some **services that do help women who have been raped or sexually assaulted** to deal with their HIV risk. These should be offered in addition to all the other services women may need to deal with the crime they have suffered:

1) In-depth counseling, available both immediately and as follow-up (when the person is less traumatized) to help them understand their options. If a rape survivor receives an HIV antibody test immediately, it will only reveal her pre-existing HIV status. Its results cannot indicate right away whether HIV has been transmitted as a result of the crime. But the survivor will need access to HIV testing in the weeks and months after the assault, when tests can reliably show her post-assault HIV status.

A more expensive test (called an HIV DNA PCR test) can produce accurate results more quickly. The counselor should provide her with full information about the kinds of HIV testing that are available, at what cost, and when to take them. **No one should be tested for HIV, especially in a crisis situation, without full counseling about what the test can and cannot determine**, how often the test may need to be repeated, and what information about the HIV test will go into the patient's permanent medical record.

2) It is possible to have the body fluids samples collected after the attack (in the "rape kit") tested for HIV. If the woman knows for sure that she was HIV negative at the time of the attack and HIV is shown to be present in any of these fluids, it may show that the attacker has HIV. This does not automatically mean that the survivor is HIV infected, since relatively few exposures to HIV actually result in HIV transmission. But it may encourage the survivor to **consider starting a course of medication called Post Exposure Prophylaxis, or PEP right away**, to make sure that the HIV she was exposed to does not "take hold" and infect her.⁴

3) All rape or assault survivors should **receive full counseling about PEP and should be offered PEP medications**. These medications can cause some uncomfortable side effects (diarrhea, nausea, headaches and tiredness) and they need to be taken regularly for several weeks to be effective. Some people choose not to take PEP -- but this decision should be made by the survivor, herself, not anyone else. **PEP must be started within 72 hours of the potential exposure to be effective**, so all rape/assault survivors should be offered PEP immediately. Some choose to start taking it right away and then re-evaluate the decision later, when they have more time to think. A woman can always stop taking PEP later if she decides, upon reflection, that she doesn't want it.

The consequences of HIV criminalization are real, and really severe.

People who are prosecuted under the HIV criminalization laws often get felony convictions and potentially decades in prison. Even a short time in jail can cause a woman to lose custody of her children and/or have trouble finding work. An increasing number of people arrested for HIV-related "crimes" are being prosecuted

⁴ For more information on PEP, see <http://www.avert.org/pep-prep-hiv.htm>.

or pressured to plead as sex offenders. Being legally labeled as a sex offender can make it nearly impossible for women to find work since many jobs available to women require being near children.

The most vulnerable and marginalized populations are often the ones who face prosecution.

Like the rest of the criminal justice system, HIV criminalization laws tend to have the harshest impact on those with the fewest resources. When a woman, a person of color, or a LGBTQ person encounters the criminal justice system, they are far less likely to get fair treatment than others may get, regardless of who is at fault or the actual harm done.

Sex workers, for example, have often been the targets of HIV criminalization. In Tennessee alone, there have been at least 39 cases of women being arrested for “aggravated prostitution” – a crime that targets sex workers who know their HIV status and is punishable by three to fifteen years imprisonment.⁵ Sex workers and drug users, who typically have less access to HIV health and support services, are at real risk of arrest and unusually harsh punishment under many states’ HIV criminal laws, even when they don’t transmit HIV to another person.

Every person has the responsibility to protect her/himself from HIV and STIs.

Except in situations of sexual coercion, assault, or rape, adults should be responsible for protecting themselves from HIV. This may be difficult for women, since condoms – the most effective prevention tool – are generally controlled by men. But female condoms are publicly available and designed to give women a way of protecting themselves, even when men refuse to put on male condoms. And new methods such as microbicides⁶ are being developed to give women more ways of protecting themselves from HIV without their male partners’ cooperation.

HIV is preventable and anyone, male or female, who voluntarily engages in unprotected sex is making some decisions about the partner’s HIV status. You are assuming some level of possible HIV risk if you choose to have sex without a condom. Perhaps you assume that your partner is HIV negative, even though you have not talked about it. Perhaps you have talked about it, and you trust your partner to be honest with you. Perhaps you have both been tested recently, you have seen each other’s HIV negative test results, and you believe that your partner has not done anything that could involve HIV risk. You may be right about these assumptions, or you may be wrong. But the bottom line is that none of us can rely on someone else to take care of our sexual health. We all have to take responsibility for protecting ourselves from HIV. We can’t rely on the criminal justice system to do it for us.

The Positive Justice Project is a project of The Center for HIV Law and Policy. The goal of the Positive Justice Project is the repeal of HIV criminalization statutes — laws that create HIV-specific crimes or which enhance penalties for persons who are HIV positive and convicted of criminal offenses — and the end of arrests and prosecutions based on the fact of a positive HIV test. Learn more at: <http://www.hivlawandpolicy.org/public/initiatives/positivejusticeproject>



⁵ TENN. CODE. ANN. § 29-13-516.

⁶ See www.global-campaign.org for more information about microbicides.