THE CONSENSUS STATEMENT

Consensus Statement on HIV "Treatment as Prevention" in Criminal Law Reform

JULY 13, 2017

THE UNDERSIGNED AGREE...

that reliance on viral load or compliance with medical treatment as a basis to reform HIV criminal laws poses dangerous consequences for those who lack access to care. It also contradicts everyone's basic right to make health care decisions, including whether and when to get treatment, without running afoul of the criminal law.

There is increasing agreement that risk of HIV transmission from a person living with HIV (PLHIV) who is on Antiretroviral Therapy (ART) and has a continuously undetectable viral load is effectively zero.[i]

This fact has undeniable importance for personal and public health on many levels. Basing criminal law reform on this fact, however, could undermine key legal principles that support fair treatment for all people affected by HIV and other stigmatized diseases. As advocates, we should avoid the risk of using health status—most often determined by access to care—as a stand-in for determining guilt and criminal liability.

Broad awareness of the fact that HIV is not easily transmitted and that ART reduces that small risk to effectively zero can cure the ignorance about HIV transmission risks that fuels HIV stigma and discrimination. Increasing public understanding of this additional benefit of life-saving treatment for PLHIV—treatment as prevention, or TasP—can help leverage investment in HIV treatment programs, while ending needless fear that sex with someone living with HIV is inherently "risky."

For far too long, public health officials avoided dissemination of the facts about HIV's very low per-act transmission rates with or without effective ART. In response, PLHIV-led campaigns have highlighted the prevention benefit of viral-suppressing treatment (such as TasP or "U = U," i.e., "Undetectable = Untransmittable") and have the support

of HIV organizations around the world.[ii] In several cases, lawyers have helped PLHIV facing criminal penalties for non-disclosure by explaining to the court that the defendant's HIV treatment not only keeps him or her healthy but reduces the risk of passing the virus on to someone else to effectively zero.

However, the role of current medical developments in public health strategies and individual prosecutions is different from its limited value in criminal law reform. Legal defense in individual cases certainly could include showing the PLHIV's low viral load and related non-infectiousness; and nothing in this statement is meant to limit the options available to a criminal defense lawyer representing an individual client. However, advocacy that promotes putting HIV treatment and prevention tools into actual criminal laws will have negative, if unintended, consequences for many of those most likely to be targeted by criminal law enforcement.

This is because the *two biggest problems with almost all HIV criminal laws and prosecutions* are that 1) they focus on HIV disclosure rather than on whether the PLHIV had an intent to do harm; and 2) HIV laws' felony punishment and severe sentences treat any risk of HIV infection as the equivalent of murder or manslaughter.

Our most pressing responsibility in HIV criminal law reform is to challenge these two problems by advocating for the related core legal principles that (1) convictions must require proof that the person intended to do harm; and (2) the degree of punishment must be closely related to the level of injury.[iii]

In changing the criminal law's treatment of HIV, it is important to lead with these principles. There is nothing unique about HIV—or exposure to any disease through consensual sex, for that matter—that requires giving up these core principles. Current science makes it clear that HIV is not easy to transmit, and even when transmitted it is easily survivable with appropriate treatment. To summarize, if HIV treatment's value as prevention winds up in the text of a criminal law, it can:

- Lead to using a person's health or failure to stay in health care as evidence of guilt or innocence.
- Lead policy makers and prosecutors to believe, and argue, that PLHIV who are not virally suppressed pose a significant risk of transmission to sexual partners.[iv] This is simply not true. Even without being on treatment and without using a condom, the per-act HIV transmission risk of receptive anal intercourse, which is the sex act that is most likely to result in HIV transmission, is less than 2%, or 2 in a 100.[v]
- Take focus away from the fact that HIV is a chronic, manageable disease—not a "death sentence."[vi] HIV is not significantly different from other serious diseases, such as type 2 diabetes. To treat it otherwise by making its transmission a felony with a long sentence reinforces what likely is the most serious source of HIV stigma, discrimination, and violence against PLHIV.

For these reasons, we must be careful to avoid giving policy makers the impression that, absent treatment or an undetectable viral load, prosecution of PLHIV is warranted.

Missouri's HIV criminal law demonstrates this problem: PLHIV in Missouri who know their HIV status may be prosecuted for having consensual sex with another person without disclosure. If convicted—which does not require transmission or even a measurable risk of transmission, let alone intent to transmit—a PLHIV could face fifteen years' imprisonment.[vii] An advocacy focus on HIV treatment's power of prevention does not address these injustices within the law, and it may detract from principled legal arguments that do.

And importantly, we have to acknowledge ongoing, severe inequalities in the criminal legal system and related, decades-long racial and economic inequalities in access to health care, including ART. People of color, particularly Black Americans, face discrimination at every level of the criminal legal system—from discriminatory policing practices to sentencing disparities.[viii] LGBTQ people, people living in poverty, undocumented immigrants, and those relying on sex work to survive also face regular targeting by the criminal legal system.[ix] The same factors that create this unfairness also make members of these communities less likely to achieve long-term viral suppression.[x]

Criminal law's treatment of risk, harm and related punishment must reflect current science. Even more importantly, modernized laws must reflect the essential principle that only those who act with the intent to do harm by transmitting a disease be held criminally accountable.[xi] Finally, our advocacy has to reflect current realities of deeply rooted racial and economic inequalities that are embedded in the criminal legal and health care systems in the U.S.

ENDNOTES

[i] Alison Rodger et al., *Sexual activity without condoms and risk of HIV transmission in serodifferent couples when the HIV-positive partner is using suppressive antiretroviral therapy*, 316 JAMA 171, 171 (2016). The connection between effective treatment, viral suppression, and significantly reduced transmission risk was first highlighted in 1994, when a study of pregnant women demonstrated AZT therapy dramatically decreased rates of perinatal transmission. Edward M. Connor et al., *Reduction of Maternal-Infant Transmission of Human Immunodeficiency Virus Type 1 with Zidovudine Treatment*, 331 New Eng. J. Med. 1173, 1173 (1994).

[ii] E.g., Prevention Access Campaign, *Risk of Sexual Transmission of HIV from a Person Living With HIV Who Has An Undetectable Viral Load: Messaging Primer & Consensus Statement* (2017), https://www.preventionaccess.org/consensus (https://www.preventionaccess.org/consensus).

[iii] The lack of a mens rea requirement in criminal law is rare, typically used in situations where the criminalized conduct is both statistically likely to cause harm and the harm is statistically likely to be severe, such as in toxic waste dumping.

[iv] Ctrs. for Disease Control and Prevention, *HIV Risk Behaviors: Estimated Per Act Probability of Acquiring HIV from an Infected Source, by Exposure Act*, Dec. 4, 2015, https://www.cdc.gov/hiv/risk/estimates/riskbehaviors.html (https://www.cdc.gov/hiv/risk/estimates/riskbehaviors.html). HIV transmission risk may be about 7.25 times higher during the acute stage of infection, and about 2.58 to 2.65 times higher in the presence of ulcerative sexually transmitted infection. Ctrs. for Disease Control and Prevention, *Factors Increasing the Risk of Acquiring or Transmitting HIV*, Dec. 4, 2015, https://www.cdc.gov/hiv/risk/estimates/riskfactors.html (https://www.cdc.gov/hiv/risk/estimates/riskfactors.html).

[v] *HIV Risk Behaviors*, *supra* note 4.

[vi] Ctr. for HIV Law & Policy, *Routes, Risks Realities of HIV Transmission and Care: Current scientific knowledge and medical management*, July 2015, https://www.hivlawandpolicy.org/resources/routes-risks-and-realities-hiv-transmission-and-care-current-scientific-knowledge-and (https://www.hivlawandpolicy.org/resources/routes-risks-and-realities-hiv-transmission-and-care-current-scientific-knowledge-and)

[vii] Mo. Rev. Stat. §§ 191.677(1)(2), 558.011(1)(2) (2016).

[viii] *See, e.g.*, The Sentencing Project, *Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System*, Feb. 3, 2015, http://www.sentencingproject.org/publications/black-lives-matter-eliminating-racial-inequity-in-the-criminal-justice-system/ (http://www.sentencingproject.org/publications/black-lives-matter-eliminating-racial-inequity-in-the-criminal-justice-system/).

[ix] Center for American Progress & Movement Advancement Project, *Unjust: How the Broken Criminal Justice System Fails LGBT People* (2016), http://www.hivlawandpolicy.org/resources/unjust-how-broken-criminal-justice-system-fails-lgbt-people-center-american-progress-and (http://www.hivlawandpolicy.org/resources/unjust-how-broken-criminal-justice-system-fails-lgbt-people-center-american-progress-and); Catherine Hanssens et al., *A Roadmap for Change: Federal Policy Recommendations for Addressing the Criminalization of LGBT People and People Living with HIV* (2014), http://hivlawandpolicy.org/resources/a-roadmap-change-federal-policy-recommendations-addressing-criminalization-lgbt-people-and (http://hivlawandpolicy.org/resources/a-roadmap-change-federal-policy-recommendations-addressing-criminalization-lgbt-people-and).

[x] *See, e.g.*, Dini Harsono et al., *Criminalization of HIV Exposure: A Review of Empirical Studies in the United States*, 21 AIDS& Behav. 27 (2017). N. Crepaz et al., *Viral Load Dynamics Among Persons Diagnosed with HIV: United States, 2014*. Conference on Retroviruses and Opportunistic Infections. Seattle, Feb. 13-16, 2017. Abstract 31, http://www.croiconference.org/sessions/viral-load-dynamics-among-persons-diagnosed-hiv-united-states-2014

(http://www.croiconference.org/sessions/viral-load-dynamics-among-persons-diagnosed-hiv-united-states-2014) (Finding women, young people, Black people, and people who inject drug are all less likely to achieve or maintain viral suppression.); *see also*

Ctrs. for Disease Control and Prevention, *Monitoring Selected National HIV Prevention and Care Objectives by Using HIV Surveillance Data, Vol. 21* (2016), https://www.cdc.gov/hiv/pdf/library/reports/surveillance/cdc-hiv-surveillance-supplemental-report-vol-21-4.pdf (https://www.cdc.gov/hiv/pdf/library/reports/surveillance/cdc-hiv-surveillance-supplemental-report-vol-21-4.pdf) (While 72% of Black people are linked to care within one month of diagnosis, only 54% are retained in regular care and still fewer are virally suppressed (49%), compared to 62% of white people).

[xi] This includes the criminal law treatment of other stigmatized diseases, such as any form of hepatitis or ebola, that are far easier to transmit, possibly far harder to treat, and primarily affect people from other or identical marginalized communities.