FAQ

# Frequently Asked Questions

## 1. WHAT IS THE PURPOSE OF THIS CONSENSUS STATEMENT?

This statement explains the limitations of "treatment as prevention ("TasP") or "U = U"—HIV treatment's amazing ability to reduce a person's viral load to effectively zero—within criminal law reform. It also suggests some effective ways for advocates to talk about current HIV science with criminal law policy makers.

## 2. WHAT'S THE PROBLEM WITH TALKING ABOUT U=U?

Nothing. The U=U message is personally empowering and is an effective way to talk about the benefits of HIV treatment. Many advocates are talking about how effective HIV treatment reduces transmission risk to effectively zero. This is a good thing.

But changing the criminal law is different from changing individual minds about the importance of HIV care. It is important to think about the legal and social problems that a law focusing on viral load or treatment compliance can have for many PLHIV who face arrest and prosecution.

If we stress U=U as the most important reason to change the law, lawmakers could respond by making treatment compliance or health status a factor in deciding guilt or innocence.

Here is an example of what this could look like in a modernized law that targets intentional disease exposure or transmission:

> *A defendant who was in care, compliant with a treatment regimen, and had an undetectable viral load is not guilty of intentional transmission of HIV.*

Modernized laws should broadly recognize a person's efforts at risk reduction rather than pinpointing compliance with a doctor's instructions or viral load as indicators of lack of intent to harm or absence of transmission risk. Think about it this way: a doctor would never recommend "pulling out" as a risk reduction strategy for a PLHIV. Yet "pulling out" shows a lack of intent to harm, and also reduces the already-low risk of transmission. Such a person should not be prosecuted, but the draft language above would not offer any protection to them.

Policy makers need to also know that, in a single sex act, HIV transmission risk is usually very low even without ART; and that when transmission happens, the person who is infected has a serious but manageable disease, not a "death sentence."

## 3. WHAT ARE "LEGAL PRINCIPLES," ANYWAY, AND WHY ARE THEY SO IMPORTANT?

The criminal law should be based on traditional principles of fairness about what kinds of acts are punished, when punishment is called for, and what type of punishment is fair. It should treat similar types of harm in a similar way. Criminal laws should focus on the actual harm a person intended to cause, not on a person's health status or related identity.

Almost all HIV criminal laws ignore the need to prove either intent to harm or a high risk of death or severe harm, as well as whether any harm occurred at all. They also tend to be out of line with the way a state treats other types of crimes and injuries, including harms from other diseases. For these reasons, HIV criminal laws go against very basic ideas of justice.

Here are some examples of how states treat HIV exposure with no proof of intent to harm or transmission the same as, or more harshly than, killing someone while driving:

| STATE | HIV LAW | VEHICULAR HOMICIDE LAW |
|---|---|---|
| Georgia | 5-20 years prison | 3-15 year (1st degree); 1 year max (2nd degree) |
| Tennessee | 3-15 years, Sex offender registration | 3-15 years |

## 4. WHAT'S THE PROBLEM WITH TREATING PLHIV DIFFERENTLY BASED ON THEIR USE OF ART? IF SOMEONE IS NOT ON ART AND THEY HAVE SEX, ISN'T THAT PLAIN WRONG?

One of the most important things to remember in discussions about modernization is the difference between behavior that is morally objectionable versus behavior that should be treated as a serious crime. Many people will agree that

cheating on a partner or dumping someone because they get sick are unethical and wrong, but almost no one would argue that a person should go to jail for it.

Another key thing to remember is that ART is not available to everyone. Access to health care in this country often varies based on race, class, sexual orientation, and gender identity. People also have the right to decide whether or not to be on ART—a deeply personal choice—without the threat of prosecution and jail time.

That doesn't mean we can't include defenses to prosecution that focus on measures a person took to reduce the risk of transmission. We should just make sure it includes something more readily available than health care, such as condoms and other ways of reducing risk. And we shouldn't punish PLHIV who *don't* use these risk reduction measures.

Most importantly, we should stick to advocacy through principles of fairness. These principles shouldn't be any different just because the defendant is a PLHIV.

Here is an example of a way to incorporate treatment into a law that doesn't create a separate defense only for PLHIV on ART or with a low viral load:

> *No person shall intentionally transmit an infectious or communicable disease by engaging in conduct posing a substantial risk of transmission. A person who takes measures to reduce the risk of transmission does not act with the intent to transmit disease.*
>
> *(1) "Infectious or communicable disease" shall mean a non-airborne disease spread from person to person and determined to have significant long-term consequences on the physical health and life activities of the person infected;*
>
> *(2) "Substantial risk of transmission" means a reasonable probability of disease transmission as established by competent medical or scientific evidence. Conduct posing a low or negligible risk of transmission does not meet the definition of conduct posing a substantial risk of transmission; and*
>
> ***(3) "Measures to reduce the risk of transmission" shall mean any method, device, behavior, or activity that limits, or reduces the risk of, transmission of an infectious or communicable disease, including but not limited to the use of a condom, barrier protection, or prophylactic device, or the use of medical treatments known to reduce the infectiousness or transmission risk of the infectious or communicable disease.***
>
> *(4) Lack of measures to reduce the risk of transmission shall not be sufficient to establish proof of specific intent.*

## 5. BUT IF SOMEONE DOESN'T USE A CONDOM OR TAKE ART, ISN'T THERE A SERIOUS RISK OF TRANSMISSION IF SOMEONE ISN'T UNDETECTABLE?

HIV is not easy to transmit, even if you're not undetectable. The average per-act transmission risk for sexual acts ranges from "negligible" to 1.38%, and that's without ART, PrEP, or condom use.

Of course, there are times (such as shortly after a person becomes infected) when the per-act transmission risk is much higher, but that also tends to be when the person does not yet know they are living with HIV. Approximately 33% of HIV transmissions occur from people who do not know they are living with HIV, even though this group is estimated to make up less than 15% of all PLHIV.

Even with low *per-act*-risk, a large number of PLHIV and a large number of sex acts means some transmissions are bound to occur.

## 6. ARE YOU SAYING HIV TRANSMISSION IS NOT A SERIOUS ISSUE?

HIV, like other viral STIs, is incurable, but it is no "death sentence." With adequate treatment, it is a chronic, manageable disease. Someone diagnosed with HIV in the U.S. in their early twenties can have a life expectancy into their seventies or older if they are on treatment and lead a healthy lifestyle.

Every available study to date concludes that HIV criminal laws do not decrease HIV transmission rates. This is yet another reason we need an evidence-based public health approach to the HIV epidemic, instead of wasting resources on locking people up. Making sure people have access to health care is incredibly important!

## 7. BUT ISN'T SOME PROGRESS BETTER THAN NO PROGRESS AT ALL?

This is a hotly debated issue, and people frequently disagree about it. For example, many people supported a federal law ending discrimination against lesbian and gay people that didn't include transgender people because they felt it was easier to pass that way, and because some progress was better than none. Unfortunately, it usually takes a long

time to change a law to cover the people left behind the first time. And some people think that progress that leaves some people out can be taken as putting a "seal of approval" on treating some people less fairly.

With public health messaging, it is always possible to try new and better campaigns. But when it comes to criminal law reform, change can be slow, and once a law is revised, lawmakers are very unlikely to consider further reforms in the near future. Criminal law reform advocacy focused on U=U might lead to a law that only helps some people—those with access to health care and ART—but provides no real help to those without it. Worst of all, legislators may be happy to claim a victory and not revisit the issue for years, decades, or ever again.

## 8. WHAT DOES RACIAL JUSTICE HAVE TO DO WITH HIV CRIMINALIZATION?

Racial disparities exist in both health care and the criminal legal system. If laws based on a person's health status are passed, due to the disparities in the health care system, there may be an increase in the number of people of color arrested, convicted, and sentenced more harshly under these laws.

First, check out these disparities in HIV diagnoses:

| Race | Percent of Population | Percent of HIV diagnoses |
|---|---|---|
| Black (2015) | 12 | 45 |
| Latinx (2014) | 17 | 25 |
| White (2015) | 62.6 | 27 |

For Black and Latino men who have sex with men, the numbers are much worse. And only 49% of all Black PLHIV are virally suppressed. By comparison, 62% of white PLHIV reach viral suppression.

Racial disparities also exist in the criminal legal system. People of color make up only 37% of the U.S. population but 67% of the prison population. Blacks and Latinxs are also more likely than whites to be arrested. Once arrested, they are more likely to be convicted. And once convicted, they are more likely to face harsher sentences.

And there is a clear connection between racial disparities in criminal law and health care outcomes. Incarceration and not having continuous health insurance are both independently associated with stopping ART. States in the Deep South with some of the harshest HIV laws, such as Mississippi and Georgia, also have a higher percentage of Black Americans affected by HIV, as well as a much higher percentage of PLHIV who are unable to access essential medical and prevention services.

## 9. SHOULD I BRING UP MY UNDETECTABLE VIRAL LOAD TO DEFEND MYSELF IF I AM PROSECUTED FOR NOT DISCLOSING MY HIV STATUS TO A PARTNER?

Yes. Defense attorneys can and should use any tool to defend their clients. But there is a difference between arguments used in any particular PLHIV's legal defense and those used to shape legal reform efforts that will affect all PLHIV. The second approach establishes health status as a factor in determining guilt or innocence.

## 10. SO WHAT ARE SOME EFFECTIVE TALKING POINTS FOR MODERNIZING HIV CRIMINAL LAWS?

Here are some talking points you may find helpful in advocating for HIV criminal law reform:

- The criminal law should treat HIV like every other disease under the criminal law. To create a special law for HIV that doesn't require that the person intend any harm or even pose a serious risk of harm is discrimination based on that person's health status.
- PLHIV on effective treatment live near-normal lifespans, have active, healthy lives and don't transmit HIV. Since HIV criminal laws don't reduce infection rates or change behavior, money used to put PLHIV in jail would be better spent getting more people into health care!
- Laws that treat HIV like a death sentence are years behind the science and encourage people to be terrified of HIV and avoid getting tested and in care.
- The laws should encourage healthful behavior for all citizens, including routinely doing any of the many things that people can do to reduce disease transmission (such as using a condom) and discouraging assumptions that increase STI and HIV transmission (such as assuming a partner will always know and always tell you if they have an infectious disease).

RESOURCES

# Useful Research Links

## HIV CRIMINAL LAW REFORM ADVOCACY RESOURCES

The Center for HIV Law and Policy, Why Are We Putting People in Jail for Having HIV? A Grassroots Guide to HIV Criminalization: Facts, Foolishness, and Solutions (2015)

Collection of Statements from Leading Organizations Urging an End to the Criminalization of HIV and Other Diseases

Dini Harsono et al., Criminalization of HIV Exposure: A Review of Empirical Studies in the United States, 21 AIDS& BEHAV. 27 (2017)

Positive Justice Project, Consensus Statement on the Criminalization of HIV in the United States (2012)

Positive Justice Project, Guiding Principles for Eliminating Disease-Specific Criminal Laws (2015)

## RESOURCES ON CRIMINAL LAW

Center for American Progress & Movement Advancement Project, Unjust: How the Broken Criminal Justice System Fails LGBT People (2016)

## HIV BIOMED & EPIDEMIOLOGY/HEALTH CARE

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)

Center for HIV Law & Policy, Routes, Risks Realities of HIV Transmission and Care: Current scientific knowledge and medical management, July 2015

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

Ctrs. for Disease Control and Prevention, Factors Increasing the Risk of Acquiring or Transmitting HIV, Dec. 4, 2015

## SYSTEMIC INEQUALITY

Allison J. Hughes et al., *Discontinuation of Antiretroviral Therapy Among Adults Receiving HIV Care in the United States*, 66(1) JAIDS 80-89 (2014).

Catherine Hanssens et al., A Roadmap for Change: Federal Policy Recommendations for Addressing the Criminalization of LGBT People and People Living with HIV (2014)

Ctrs. for Disease Control and Prevention, *Lifetime Risk of HIV Diagnosis* (2016)

Ctrs. for Disease Control and Prevention, Monitoring Selected National HIV Prevention and Care Objectives by Using HIV Surveillance Data, Vol. 21 (2016)

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

The Henry J. Kaiser Family Foundation, *AIDS Drug Assistance Programs (ADAPs)* 2014

The Sentencing Project, Criminal Justice Facts

The Sentencing Project, Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System, Feb. 3, 2015

### PARTNERS

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)

### SIGN ON

## Join the Movement. Sign the Consensus Statement

**THE *CONSENSUS STATEMENT ON HIV "TREATMENT AS PREVENTION" IN CRIMINAL LAW REFORM* IS INTENDED TO PROMOTE HIV CRIMINAL LAW REFORM THAT IS JUST AND EQUITABLE.**

Add your organization's name to our growing list of endorsers here.

### CONTACT

## Reach out!

If you have questions about HIV criminalization, criminal justice reform, or this consensus statement, please reach out to the Center for HIV Law and Policy.

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