

AIDS Panic in the Twenty-First Century: The Tenuous Legal Status of HIV-Positive Persons in America

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Abstract Thirty-four states criminalize HIV in some way, whether by mandating disclosure of one's HIV status to all sexual partners or by deeming the saliva of HIV-positive persons a “deadly weapon.” In this paper, we argue that HIV-specific criminal laws are rooted in historical prejudice against HIV-positive persons as a class. While purporting to promote public health goals, these laws instead legally sanction discrimination against a class of persons.

Keywords AIDS · HIV · Criminal law · Criminalization · Bioethics

Introduction: *Rhoades v. Iowa*

On June 25, 2008, two men, Nick Rhoades and Adam Plendl, met late at night at Mr. Plendl's home after chatting online. The men had consensual intercourse with the use of a condom and parted ways early the next morning. A few days later, Plendl discovered that Rhoades may have been HIV-positive. With the understanding that non-disclosure was a criminal offence

under Iowa law, Plendl filed a police report, and a police investigation in the case was initiated. Adam Plendl *did not* contract HIV during this encounter. Nonetheless, Rhoades was charged and convicted for “criminal transmission of HIV” in 2009. He was sentenced to twenty-five years in prison and labelled a “sex offender” by the state of Iowa.

No doubt, casual encounters like this one occur with great frequency across the United States. Condoms were used during Rhoades and Plendl's encounter, and HIV transmission did not occur. The risk of seroconversion in this case was, by any estimation, exceedingly low. The U.S. Centers for Disease Control and Prevention (CDC) estimates that the risk of HIV transmission for a single act of receptive, *unprotected* anal intercourse between serodiscordant partners is around 0.5 per cent (CDC 2012). The use of condoms and Rhoades' documented undetectable viral load pushed the risk of transmission to Plendl far lower. So, if risk of transmission did not play a significant role in Rhoades' conviction, what was left?

We argue that, in cases like *Rhoades v. Plendl*, the function of HIV-specific laws is not to curb the spread of a deadly virus. Rather, these laws serve to discriminate directly against one class of persons (those with HIV) and more subtly against another (men who have sex with men) who have been judged unfavourably by society. Despite the enormous progress made on gay civil rights in recent decades, HIV-specific laws promote a discourse about AIDS that implicitly condemns queer sex. In other words, these laws are remnants of the conception of the gay male body as “unclean” and

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“contaminated” that was articulated by Treichler in 1987. In light of the U.S. Supreme Court’s 2013 ruling in the Defense of Marriage Act and the Institute of Medicine’s call for greater emphasis on LGBT health, we hold that the contemporary enforcement of HIV-specific laws is unjustifiable medically, legally, or ethically.

The Emergence of an Epidemic

One of the earliest reports of the disease that would later be known as AIDS was a 1981 article in *The New York Times*, which described a mysterious “gay cancer” spreading through the homosexual communities of New York and San Francisco. As understanding of the disease evolved, so did its name. Nonetheless, the perception of HIV/AIDS as a “gay disease” has coloured our understanding of the epidemic from its earliest days (Altman 1981).

By the mid-1980s, the human immunodeficiency virus (HIV) had been identified, and as the pathogen that causes AIDS, and efforts turned to preventing its spread. Naturally, public health authorities focused on the population most affected by the virus: homosexual men. The bathhouses of New York City and San Francisco, once busy community centres, were labelled a “public health nuisance” and closed, despite the fact that there was no evidence that their closure would slow the spread of AIDS. Later, many in the public health community would regard the closing of these facilities as a missed opportunity, as research began to demonstrate that bathhouses were sites where effective preventive measures and education could be provided to a concentrated, relatively high-risk population (Woods et al. 2008).

HIV and the Law

The Reagan Commission

In 1988, six years after the first AIDS cases appeared in the United States, a report was published by Ronald Reagan’s Presidential Commission on the Human Immunodeficiency Virus Epidemic, recommending that states enact criminal statutes to protect their citizens from HIV. The justification given for this recommendation relied on the assumption that stiff penalties would act as

a deterrent for those likely to spread HIV, thereby improving the public’s health.

Soon after the commission’s report was published, states began to enact laws criminalizing, to various degrees, HIV transmission. Three main approaches have been taken in applying criminal intent to these laws (McArthur 2009). In nearly all cases, actual transmission of HIV is not required for prosecution.

1. **The California Approach (Intent to Transmit):** The prosecutor must prove that the defendant intended to transmit the virus. This approach places the heaviest burden on the prosecution. Not only must a defendant be HIV-positive and not disclose his or her status to his or her partner, but s/he must also attempt to *intentionally transmit* the HIV virus with the understanding that it will harm the partner.
2. **The Florida Approach (Understanding of the Risk of Harm):** The prosecutor must prove that the defendant knew his or her action could result in transmission of HIV and also that s/he understood that transmission of the virus could, potentially, harm the partner.
3. **The Iowa Approach (Non-Disclosure Only):** Intent and an understanding of the risk of harm are not necessary to convict a defendant for criminal transmission of HIV. When intent and understanding are not components of the law, all that remains is that a prohibited action was performed by a specific kind of person. This approach is the most ethically problematic of the three. With this approach, a person can be convicted of a crime simply because of his or her HIV status.

Since 1988, thirty-four states in the United States have enacted laws criminalizing HIV, most adopting one of these three approaches. From 2008–2012, there were 350 prosecutions or arrests for HIV-related behaviours, including behaviours known to harbour little to no risk of transmission such as biting, spitting, and urinating, and the cases frequently involve assault on police officers (The Center for HIV Law and Policy 2012).

HIV-Specific Laws in Practice

In 1995, the Fifth Circuit Court of Appeals of the United States held that the spit of an HIV-positive person could be considered a “deadly weapon” (*Weeks v. Scott* 1995, no. 94-20838). Since then, dozens of HIV-positive

persons have been convicted for assault under this precedent. Frequently, those convicted are members of specific, disfavoured minority classes. Convicted felons, sex offenders, substance abusers, and sex workers are often targets of HIV-specific laws (The Center for HIV Law and Policy 2012). One case that illustrates this point is that of Willie Campbell, a forty-two-year-old black man from Dallas, Texas. In May of 2006, Campbell was arrested for public intoxication. During an altercation with police officers, Campbell became agitated and allegedly spit on the officers, telling them he was infected with HIV. Citing his HIV status, a jury eventually convicted Campbell for “assault with a deadly weapon.” He later received a twenty-five-year prison sentence. After Campbell had an outburst during his trial, yelling at attorneys and police officers, becoming belligerent, and eventually being removed from the courtroom, the lead prosecutor, Jenni Morse, reportedly told the media: “You can see why we thought that we needed to get this guy off the streets” (Kovach 2008, ¶7).

Another way HIV-specific laws are used is as “sentence enhancements.” This means that certain crimes (like rape) carry heavier sentences if the defendant is HIV-positive.

From 2008–2012, there were twenty-seven cases of these laws being used to worsen sentences for HIV-positive persons charged with crimes (The Center for HIV Law and Policy 2012). Rape and sexual assault are horrific acts of violence, and it is certainly even more horrific when these acts result in disease transmission. However, proponents of HIV-specific criminal laws must explain why an HIV-positive defendant is “more guilty” than a seronegative counterpart, especially in light of the fact that such laws do not require evidence of HIV transmission. In other words, what is the societal benefit of punishing this class of persons more for the same crime? We believe that HIV-specific laws discriminate against HIV-positive persons, allowing the justice system to treat them more harshly solely because of their serostatus. This is a case of legally sanctioned discrimination.

Contemporary Ethics and HIV Criminal Law

HIV Is Treated Differently Than Other Similar Diseases

To determine whether HIV-specific laws are fair, it is necessary to turn to other, similar diseases. Sexually

transmitted infections (STIs) are a logical place to start. Many states have laws that mandate disclosure of STIs, such as syphilis or gonorrhoea. However, these laws have rarely been enforced. Further, the maximum penalty imposed by STI disclosure laws in any state is a misdemeanor, typically only punishable with a fine (The Center for HIV Law and Policy 2012). HIV, on the other hand, stands in its own legal category. It is true that other STIs are generally less serious than HIV. For one, the most common STIs are curable in many cases and rarely result in death (though they certainly may cause permanent disability as well as stigma). However, there seems to be more behind the criminalization of HIV than the nature of the disease itself.

The example of hepatitis C highlights the unique legal status that HIV has undeservedly gained. Like HIV, hepatitis C is an often chronic, typically incurable disease. It is transmitted most frequently through blood, though a significant minority of cases may be transmitted sexually. There also have been cases of intentional transmission of hepatitis C, often by healthcare workers. Thus, hepatitis C shares many important characteristics with HIV:

1. It can be intentionally, criminally transmitted.
2. It is a chronic, incurable disease in most people.
3. It can be contracted from sexual activity.

Despite all of these similarities, there are no states in the United States with mandatory disclosure laws for hepatitis C, while thirty-four states criminalize HIV in some way. Perhaps the critical difference between the two pathogens, then, is that HIV has the unique reputation of being a distinctly queer virus that could, at any time, ravage the heterosexual mainstream. Hepatitis C, being thought of as a disease of needle-sharers, has certainly not generated the public paranoia that HIV has historically.

HIV-Specific Statutes Are Harmful

Twenty-five years after the Regan Commission published its recommendations, it has become abundantly clear that they have failed to improve the public’s health. Specifically, HIV-specific statutes are not only ineffective but may *hinder* HIV prevention efforts and harm HIV-positive persons (Burris and Cameron 2008) by:

- A. **Deterring testing**, thereby increasing the number of HIV-positive persons unaware of their status—these individuals are more likely to spread the virus to others.
- B. **Deterring treatment**, thereby decreasing the number of HIV-positive patients whose disease is well controlled on medications; patients with poor disease control are more likely to transmit HIV to others and more likely to suffer preventable complications of their conditions, including premature death.
- C. **Promoting misconceptions about HIV**, by criminalizing behaviour with virtually no risk of transmission. For example, if the spit of an HIV-positive individual is considered a “deadly weapon” by the government, it is likely that many people will come to believe that HIV can be transmitted through saliva. This could have multiple negative effects, including further stigmatizing HIV-positive people as a class and reducing awareness about activities that do transmit HIV and how to protect oneself.

In spite of the fact that current criminal law is starkly misaligned with public health aims, these laws continue to be enforced with frequency and severity across the United States. With the U.S. Food and Drug Administration (FDA) stamp of approval now in place for the use of Truvada for pre-exposure prophylaxis (PreP) against HIV, it is even more important to work to de-stigmatize the disease so that due emphasis can be placed on HIV prevention and treatment.

Conclusion: A Return to *Rhoades v. Iowa*

In this paper, we argue that HIV-specific laws do not exist to promote public health aims. Rather, they are an artefact of historical prejudice against HIV-positive persons as a class. Fear, prejudice, and misunderstanding have fuelled the debate on HIV criminalization more than any public health rationale has. Stories of malicious transmitters of HIV, like Patient Zero, popularized by the media have created a sense of “AIDS panic” that has been a part of American society for decades. Since the Presidential Commission on the Human Immunodeficiency Virus Epidemic recommended that states consider enacting HIV-specific laws in 1988, it has become abundantly clear that these

laws are ineffective. In 2010, the executive branch reversed its position, as President Obama’s National HIV/AIDS Strategy recommended that states revisit and revise policies on HIV criminalization. Nonetheless, these laws remain in force in thirty-four states across the nation and continue to be actively enforced.

Today, Nick Rhoades remains in jail as his case is considered for appeal. Rhoades is not being punished for harming anyone else. Adam Plendl did not contract HIV from their encounter and was, in all likelihood, never in serious danger of contracting the virus. Rhoades’ conviction is not helping to deter the spread of HIV. Rather, he should be regarded as an example of a responsible person living with HIV. His viral load was undetectable because he took his medication as prescribed, and he used a condom during sexual encounters. Many people living with HIV cannot claim the same level of diligence. However, Rhoades remains in jail. This injustice is a result of historical prejudice, fuelled by popular stories about AIDS and those who suffer from it. It is time for HIV-specific statutes to be recognized as tools of irrational legal discrimination and for such statutes to be repealed.

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