

6-15-2020

HIV is Not a Crime, There Should Be No Jail Time

Bacilio Mendez II

Follow this and additional works at: https://digitalcommons.law.ggu.edu/ggu_law_review_blog



Part of the [Criminal Law Commons](#), and the [Health Law and Policy Commons](#)

GGU Law Review Blog



© JUNE 15, 2020 [NO COMMENTS](#)

HIV is Not a Crime, There Should Be No Jail Time

Introduction

By way of personal, activist narrative, this blog post will provide broad context to the post-[Stonewall](#) legal landscape and the gay rights (now, the LGBTQ+) movement. The stage set, the writer will inform the audience of specific injustices brought upon persons living with HIV, during modern times, in the United States, simply based on their [serostatus](#) and offer solutions and actions that readers can take themselves.

Pain as Prologue



The Pagoda is a novelty building, built atop the south end of Mount Penn overlooking Reading, Pennsylvania. It has been a symbol of the city for more than a century. (Image via [WFMZ](#).)

I grew up in [Reading, Pennsylvania](#) during the 1980s. Despite being the [fifth largest city in the state](#), Reading seemed as though it was always on the verge of blight and, in 2011, was given the unenviable title of “[Poorest City in America](#).” One of the many [rust belt](#) cities that industrialization forgot and crack cocaine did not spare, this was the place I once called home and where I came out to my Mother as gay—as a middle schooler. I was relieved when she said she would always love me, but she begged me to promise her I would never “get sick.” Sadly, even that young, I knew what she meant. I had a cousin who had died of complications from [HIV](#), compounded by his [intravenous drug use](#); memory betrays me, but he could not have been far into his twenties.

By then it was the 1990s, [Ryan White](#) (and [the legislation that bore his name](#)), the [AIDS Quilt](#), [Larry Kramer](#), and [ACT UP](#) (the [AIDS Coalition to Unleash Power](#)) were household names. The [fear and hysteria of HIV had subsided](#), but the stigma remained and festered. It turned out that [antiretrovirals \(ARVs\)](#), while life-saving for many with HIV/AIDS, were no match for hate and ignorance. As a nation, we had come a long way from [Larry Speakes](#), [press secretary for Reagan in 1982](#), [openly joking about the epidemic when asked about whether the president was tracking the spread of AIDS](#), but not far enough.





Clockwise, From Top Left: Ryan White, a hemophiliac who contracted AIDS, surrounded by mikes held out by reporters on April 21, 1988. (Image: Taro Yamasaki—The LIFE Images Collection/Getty via [TIME.com](https://www.time.com).); The AIDS Memorial Quilt on display at the National Mall in Washington, D.C. in 1992. Image: Renaud Giroux/AFP/Getty via [People.com](https://www.people.com).); Larry Kramer, in his Greenwich Village apartment. Credit.. (Image: Joshua Bright for The New York Times via [NYTimes.com](https://www.nytimes.com).); & Members of ACT UP hold up signs and placards during the Gay and Lesbian Pride march in New York City, June 26, 1988. (Image: The New York Historical Society/Getty Images via [NPR.org](https://www.npr.org).).

Don't Ask Don't Tell was signed into law just a couple years after I mustered up the courage to come out. **Bob Hattoy**, a member of Bill Clinton's Presidential Commission on HIV/AIDS, once summed up the Clintons' approach to gays in their time in the White House in one phrase: "**It's the economy, faggot.**" I did not take **Bill Clinton's acquiescence to the right** as a good sign, but what could I, a high school student in Pennsylvania, do?

Matthew Shepard's brutal murder was around the time I was learning to parallel park. I buried those gruesome images and focused on homecoming. The same month I turned eighteen, **Proposition 22**—only allowing marriage between one man and one woman—was enacted into California law. Another blow to be suppressed and tucked away to be dealt with another time. But, it went forgotten.

We Die to Remember and Are Born to Forget





Left to Right: James Dale's landmark case, the first to challenge a ban on gay members, led the Boy Scouts to accept gay youths as members and leaders. (Image via [Patch.com](#).); & Romer v. Evans plaintiffs and legal team. (Image via [Lambda Legal](#).).

With all of that history on my back, I graduated from [Reading Senior High School](#), I packed up for [Oberlin College](#), and tried to focus on the small victories. Thanks to my queer elders protesting in the streets, speaking truth to power, and not taking no for an answer, I could march in parades and [Will & Grace \(the first incarnation\)](#) was a smash hit. "Sure," I thought, "[Boy Scouts of America v. Dale](#) said that [the Scouts could expel me](#), but the leadership of the troop housed at [my Roman Catholic Church, in Reading, Pennsylvania](#), made me [Senior Patrol Leader](#). Plus, I earned the rank of [Eagle Scout](#), so, how bad could things really be?" In my naiveté, I was convinced that, because we had "won" [Romer](#), it was just a matter of time before the future I was promised would come to be a reality. I had plenty of that—time—and I was prepared to bide it.



Left to Right: A veteran of the 1969 Stonewall uprising, Sylvia was a tireless advocate for all those who have been marginalized as the "gay rights" movement has mainstreamed. Sylvia fought hard against the exclusion of transgender people from the Sexual Orientation Non-Discrimination Act in New York, and was a loud and persistent voice for the rights of people of color and low-income queers and trans people. (Image via [SLRP - Silvia Rivera Law Project](#).); & Mike Shriver leans against the [National AIDS Memorial Grove](#)'s large memorial boulder in Golden Gate Park. (Image: Kevin N. Hume via [S.F. Examiner](#).).

I thought that from the comfort of [Oberlin](#)'s bubble I could hunker down for four years and come out the other side to a new, even more accepting world. One that had no need for powerhouses like [Silvia Rivera](#) and [Mike Shriver](#). I was wrong.

September 11, 2001, was the beginning of my sophomore year. Feminist theorist [Jasbir K. Puar](#), posited that "patriotism during the post 9/11 crisis was inextricably tied to a reinvigoration of heterosexual norms for Americans." [Karma R. Chávez](#) dove further, analyzing how "after the September 11, 2001, attacks on the United States, people from across the political spectrum offered explanations for the terrorists' motivations and searched for where to place the blame. Figures that featured centrally in the Cold War, such as the 'homosexual-communist-subversive,' would reemerge in new forms in the discourse of this burgeoning War on Terror, including the racialized figure of the 'queer-immigrant-terrorist.'"



9/11 was a galvanizing event, but, again, as a student in rural Ohio, I felt anemic at best and incompetent at worst, with respect to how to address the rage I felt around the practices of **affective citizenship** I saw being both quietly accepted and strictly enforced around me. As pointed out by **Tara A. Casey, et al.**, at the time, the “tactical inclusion of previously marginalized [people worked] to distract attention from the nation’s perpetuation of settler colonialism, racism, acts of war, and so on, under the guise of sexual modernity.” The inclusion of white, gay assimilationist values, vis-à-vis marriage equality, was the peak of **pandering for pink dollars** from the untapped **dinks** and **well-heeled gays** of the early aughts.

Again, I stifled and honed in on getting out. Again, in the form of another graduation. And, again, I forgot about the struggle and stopped trying to find my way through it.

An Activist’s Awakening

Oberlin taught me a great many things. What it did not teach me, however, was how to find a life sustaining job with a BA in modern dance. I moved to New York City after college, as one does, and, after some time, found my way into magazine publishing. It paid the bills and had great benefits. After years of economic insecurity, I was easily lulled into corporate complacency.

I lived in the **Greenwich Village**, ate a majority of my meals out, and had been taken under the wing of a kind group of older men (which, at the time, meant anyone over twenty-five) thanks to a new romantic relationship. They all grew up in New York City. All of them had even gone to the same high school. I idolized them. I finally had friends like me and they accepted me for me. I moved up the corporate ladder and began traveling regularly to Europe for work. I was basking in the privilege and comfort I was denied as child. I felt that I had arrived. I was completely oblivious to the political world and felt justified in my ignorance. I told myself that “smarter people would handle those things and that after years of struggling, I finally earned a well-deserved break. Me not having to fight was the point of all that protesting and rioting, wasn’t it?” Again, I was wrong and I found out in the most unexpected way.

This group of friends that I had lucked into, rotated who planned vacations and after a few years as the “baby of the group,” it was finally my turn. I wanted so desperately to impress these men that had welcomed me into their circle and I had my sights set on Aruba. I had researched flights, resorts, and tour companies; linked Excel sheets were involved. I put all of my hard work into a heavily hyperlinked email and hit send. Within two minutes I had gotten a flat “Sorry, kid. Not gonna to happen” from one of the them. I was crushed. Then, I was angry.

I fired back and forth with this person for a few volleys, ‘replying all’ each time, thinking someone would come to my defense—this was before texting was commonplace. Nothing. Eventually, I started receiving off-chain messages from other members of the group begging me to drop it and to wait to discuss it over dinner, in person. I didn’t understand, but I relented when my then-partner sent me an email asking me to back down.

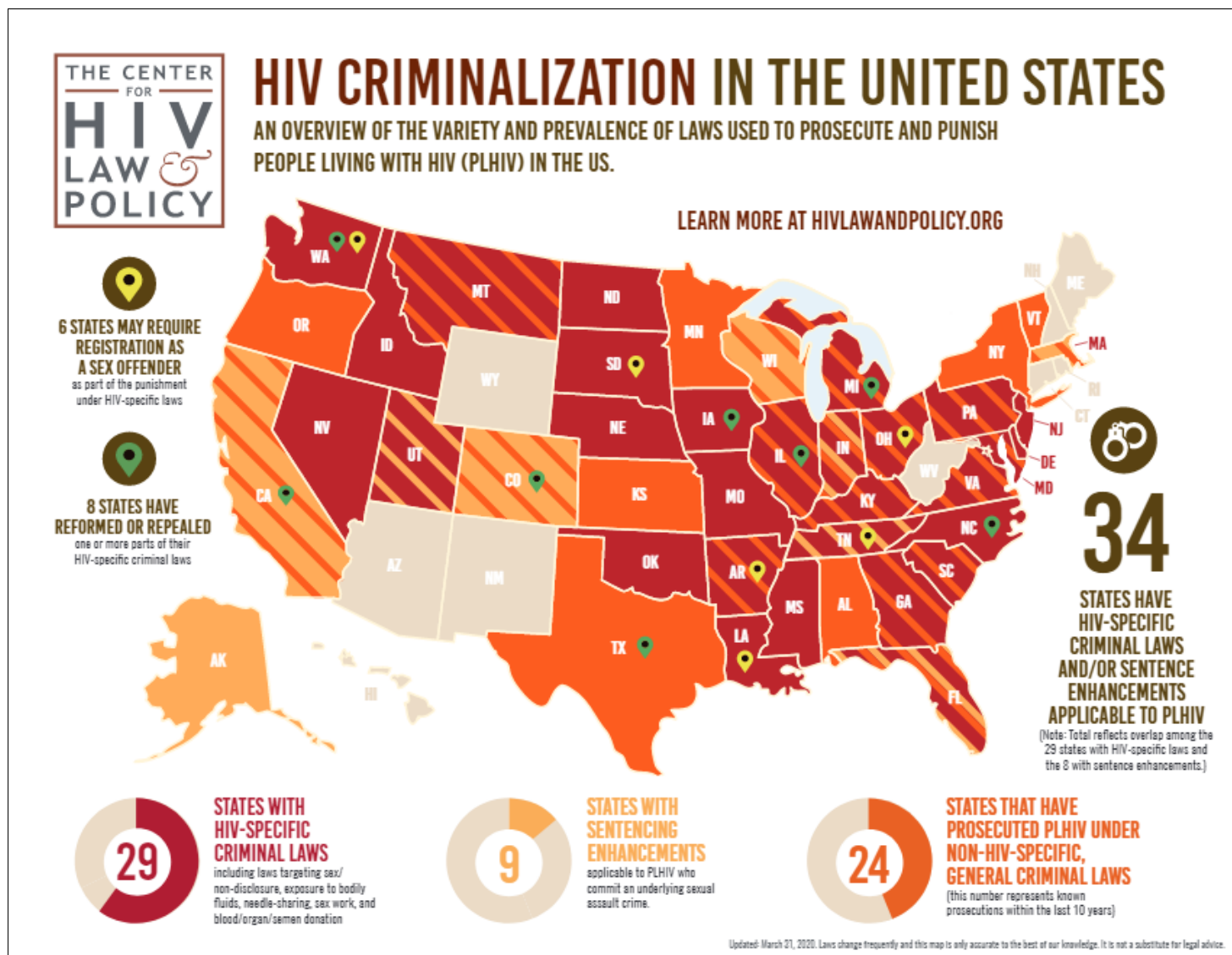
I moved on and tried to get on with my work for the day, until, that is, my desk phone rang. I recognized the number as that of the man who first shot down my idea and my anger all came rushing back. I picked up, prepared to go to battle when, we'll call him "Jeff," immediately disarmed me. He asked me to lunch to talk. In the few years we had known each other, we had never done anything alone. It was a big group of friends and, while I had splintered off with some of the guys, I had only ever been with Jeff when a few others were around. I said yes and we met in Madison Square Park.

Jeff was famously, the most acerbic of the group, but when I approached him in the park, he seemed softer. I asked where he wanted to eat, but he suggested we just stroll for a bit and see what interested us. He always had an opinion on where to eat, so I felt like he was stalling and decided to press him on the topic of Aruba. Jeff stopped short, very calmly said that he would love to go to Aruba, but that he couldn't because Aruba did not allow people living with HIV into the country.

I had no idea that Jeff was positive and had certainly never heard of such a thing as a travel restriction based on HIV status. I was shocked, sad and livid. Worst of all, I didn't know how to support him. That's when the Jeff I knew, reappeared. He said something to the effect of, "Don't turn this into a whole thing, B. Just pick a new place. I have to get back to the office."

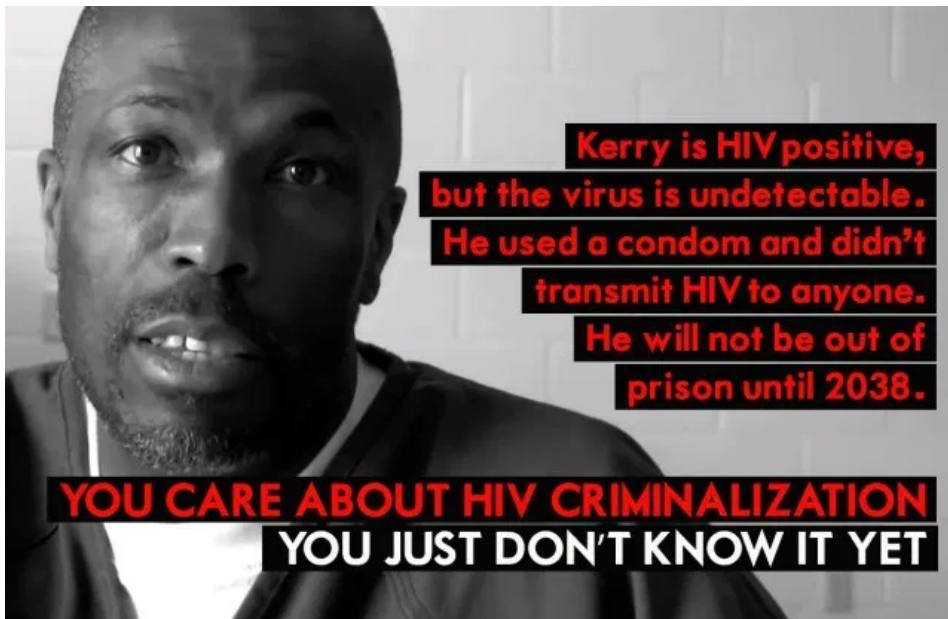
But after a lifetime of taking no action, that was when I decided to stop forgetting, stop suppressing my anger, stop feeling weak, and start fighting back. I joined **ACT UP** shortly thereafter.

I knew that I wasn't going to be able to do anything about Aruba's restrictions, but at the time **ACT UP** was throwing its muscle behind something that was related and interested me—the ways in which states were criminalizing people living with HIV/AIDS. What follows is a brief cross section of some harrowing cases from the late 1990s to 2020.



When Sex is a Crime and Spit is a Dangerous Weapon: a Snapshot of HIV Criminalization in the United States (PDF via [The Center for HIV Law and Policy](#).)

Idaho



(Image via HIVJustice.net.)

Kerry Thomas is serving 30 years in prison for consensual sexual contact under circumstances where both parties agree that he always insisted on using condoms and during a period when his medical records show he had an undetectable viral load. *State v. Thomas*, 983 P.2d 245 (Idaho Ct. App. 1999).

Iowa

SERO Stories - Nick Rhoades



Nick Rhoades is HIV+ and has been undetectable for years. When he had sex with a man he met online in 2008, he used a condom. Rhoades was prosecuted and convicted for not disclosing his HIV status to his partner before they had sex. He was sentenced to twenty-five years and lifetime of sex offender registration. *Rhoades v. State*, 880 N.W.2d 431 (Iowa 2016).

Louisiana

SERO Stories - Robert Suttle



While working as an assistant clerk for the Louisiana Court of Appeals, **Robert Suttle** went through a contentious breakup that resulted in Suttle being sentenced to six months in jail and registering as a sex offender for intentionally exposing a sexual partner to HIV even though there was no transmission of the virus.

Michigan

Daniel Allen was involved in an altercation in which he allegedly bit his neighbor. Allen faced assault charges as a result of the incident, but he also was charged with violating a Michigan bioterrorism statute based on the allegation he has HIV. Under the state's anti-terrorism statute, Allen was said to be in possession of a "biological weapon"—prosecutors equated his HIV infection with "possession or use of a harmful device." *People v. Allen*, No. 2009-4960 (Macomb County Ct. Mich. Cir. Ct. June 2, 2010).

Missouri

Michael Johnson was arrested in October 2013 on charges that he had violated Missouri's criminal HIV transmission/exposure statute. His original sentence was longer than the state average for second-degree murder. *Missouri v. Michael L. Johnson*, Case No. 1311-CR05915-01 (Criminal Court for the 11th Judicial Circuit, St. Charles County, Missouri).

New York

David Plunkett served over six years in a New York state prison before an appeals court ruled that saliva could not be considered a "deadly weapon" in New York State. Medical and public health experts long-ago dismissed the risk of HIV transmission through spitting or biting as near-zero, too small even to be measured. *People v. Plunkett*, 971 N.E.2d 363 (N.Y. 2012).

Texas

Willie Campbell is serving 35 years in Texas for spitting at a police officer, after the court classified the homeless man's saliva as a "deadly weapon." *Campbell v. State*, No. 05-08-00736-CR, 2009 Tex. App. LEXIS 5369 (Tex. App. July 14, 2009).

U.S. Army

SERO Stories - Monique Moree



Monique Howell Moree was charged by the U.S. Army for failing to disclose her HIV-positive status to a partner in South Carolina before having sex with him. Howell was charged with aggravated assault, a felony charge in military law, for not disclosing her HIV+ status even though the partner said he didn't want her charged and that she told him to use a condom. She was facing 8-12 years in prison. In May 2007, Howell had not been found guilty of any crimes, but, she was told she had 72-hours left in the United States military. Her discharge was considered honorable, but it certainly wasn't her choice. Indeed, she had planned to re-enlist. That was no longer an option for her.

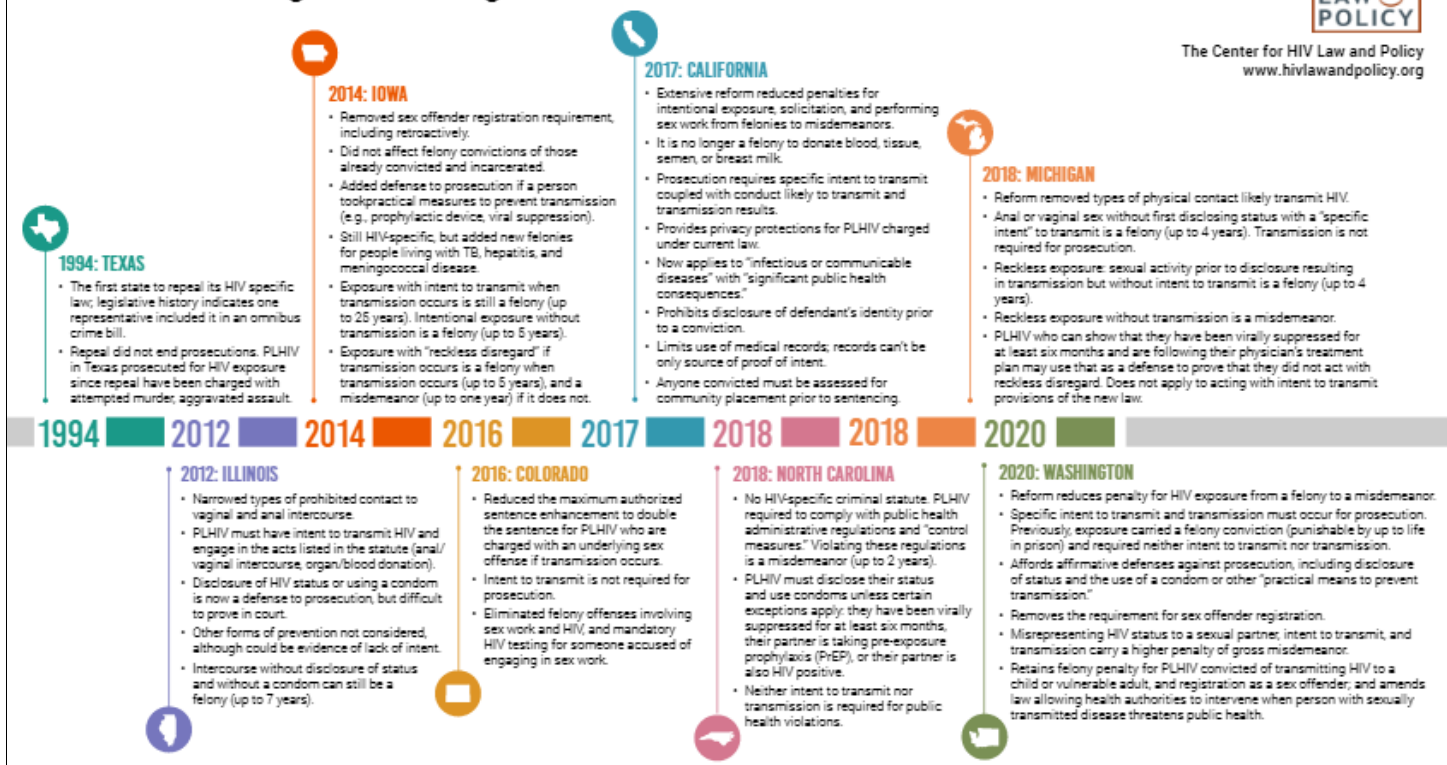
HIV is Not a Crime, There Should Be No Jail Time

Timeline of State Reforms and Repeals of HIV Criminal Laws

States with most significant changes to their HIV laws



The Center for HIV Law and Policy
www.hivlawandpolicy.org



This resource for community advocates provides a timeline describing the repeals and reforms to HIV criminal laws in the seven states that have made the most significant changes to their laws since 1994, including Texas, Illinois, Iowa, Colorado, California, North Carolina, and Michigan. Special thanks to community advocate Bryan C. Jones of Ohio for recognizing the need for and requesting the creation of this resource. (Image current as of March 24, 2020, via [The Center for HIV Law and Policy](http://www.hivlawandpolicy.org).)

State-by-State Statutory Information

Click a state for details on HIV-related laws, guidelines for healthcare workers, and testing and treatment information. (*Note: This information is current as of the publication date of this blog post.*)

[Alabama](#)

[Alaska](#)

[Arizona](#)

[Arkansas](#)

[California](#)

[Colorado](#)

[Connecticut](#)

[Delaware](#)

[District of Columbia](#)

[Florida](#)

[Georgia](#)

Hawaii

Idaho

Illinois

Indiana

Iowa

Kansas

Kentucky

Louisiana

Maine

Maryland

Massachusetts

Michigan

Minnesota

Mississippi

Missouri

Montana

Nebraska

Nevada

New Hampshire

New Jersey

New Mexico

New York

North Carolina

North Dakota

Ohio

Oklahoma

Oregon

Pennsylvania

Puerto Rico

Rhode Island

South Carolina

South Dakota

- Brigid Bone, Note, *Whose Responsibility is it to PrEP for Safe Sex? Archaic HIV Criminalization and Modern Medicine*, 53 Wash. U. J.L. & Pol'y 319 (2017).
- The **ACT UP Oral History Project** is a collection of interviews with surviving members of the AIDS Coalition to Unleash Power, New York. The project is coordinated by Jim Hubbard and Sarah Schulman, with principal camera work by James Wentzy and additional camerawork on the West Coast by S. Leo Chiang and Tracy Wares.
- **The Women of ACT UP NY**.
- **The Fierce Urgency Of Whenever** by Andrew Sullivan.
- **Fire in the Blood** tells the story of how Western pharmaceutical companies and governments aggressively blocked access to low-cost AIDS drugs for the countries of Africa and the global south in the years after 1996—causing ten million or more unnecessary deaths – and the improbable group of people who decided to fight back.
- **HIV IS NOT A CRIME**, 2011 Film by Sean Strub, Edited by Leo Herrera/HomoChic.
- **The HIV Story Project** is a San Francisco based non-profit organization focused on bridging HIV/AIDS with film, media and storytelling to fight the pandemic and the global stigma associated with it.
- Halperin, D. M., & Hoppe, T. (2017). *The War on Sex*. Amsterdam, Netherlands: Amsterdam University Press.
- Hoppe, T. (2018). *Punishing Disease: HIV and the Criminalization of Sickness*. Amsterdam, Netherlands: Amsterdam University Press.
- **How to Survive a Plague** is a documentary film about the early years of the AIDS epidemic, and the efforts of activist groups **ACT UP** and **TAG**.
- Joanne Csete, Richard Pearshouse & Alison Symington (2009) Vertical HIV transmission should be excluded from criminal prosecution, *Reproductive Health Matters*, 17:34, 154-162, DOI: [10.1016/S0968-8080\(09\)34468-7](https://doi.org/10.1016/S0968-8080(09)34468-7).
- Kim Shayo Buchanan, *When Is HIV a Crime? Sexuality, Gender and Consent*, 99 Minn. L. Rev. 1231 (2015).
- Klitzman, R., Kirshenbaum, S., Kittel, L. et al. Naming names: Perceptions of name-based HIV reporting, partner notification, and criminalization of non-disclosure among persons living with HIV. *Sex Res Soc Policy* 1, 38–57 (2004).
<https://doi.org/10.1525/srsp.2004.1.3.38>.
- Leslie E. Wolf & Richard Vezina, *Crime and Punishment: Is There a Role for Criminal Law in HIV Prevention Policy?*, 25 Whittier L. Rev. 821 (2004).
- **Life Before the Lifeboat: San Francisco's Courageous Response to the AIDS Outbreak** is a documentary about the AIDS epidemic in its early years in San Francisco and was the brainchild of UC San Francisco AIDS pioneering physician Paul Volberding, MD, who is now director of the AIDS Research Institute and director of research for Global Health Sciences. This documentary features Volberding in intimate conversations with some of San Francisco's courageous leaders from the earliest days of the AIDS epidemic when the UCSF-affiliated San Francisco General Hospital was ground zero for the AIDS epidemic. The 30-minute film highlights how political and gay activists, along with health care professionals at SFGH, UCSF and other medical centers, came together to respond to the health crisis and in the process developed what is now a national model of care for this patient population.
- Shahabudeen K. Khan, *The Threat Lives On: How to Exclude Expectant Mothers from Prosecution for Mere Exposure of HIV to their Fetuses and Infants*, 63 Clev. St. L. Rev. 429 (2015).
- Strub, S. (2014). *Body Counts*. New York, New York: Scribner.
- **UNAIDS interactive map** of global HIV-related travel restrictions. The 48 countries and territories that still have some form of HIV-related travel restriction are: Angola, Aruba, Australia, Azerbaijan, Bahrain, Belize, Bosnia and Herzegovina, Brunei Darussalam, Cayman Islands, Cook Islands, Cuba, Dominican Republic, Egypt, Indonesia, Iraq, Israel, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lebanon, Malaysia, Maldives, Marshall Islands, Mauritius, New Zealand, Oman, Palau, Papua New Guinea, Paraguay, Qatar, Russian Federation, Saint Kitts and Nevis, Samoa, Saudi Arabia, Saint Vincent and the Grenadines, Singapore, Solomon Islands, Sudan, Syrian Arab Republic, Tonga, Tunisia, Turkmenistan, Turks and Caicos, Tuvalu, Ukraine, United Arab Emirates, and Yemen.
- **United in Anger: A History of ACT UP** is an inspiring documentary about the birth and life of the AIDS activist movement from the perspective of the people in the trenches fighting the epidemic. Utilizing oral histories of members of ACT UP, as well as rare archival footage, the film depicts the efforts of ACT UP as it battles corporate greed, social indifference, and government neglect.
- Yang YT, Underhill K. *Rethinking criminalization of HIV exposure—lessons from California's new legislation*. *N Engl J Med*. 2018;378(13):1174-1175.

Share this:



Like this:

Like

Be the first to like this.

Bacilio Mendez II

Bacilio Mendez II is a fourth year Honors JD/MBA student at the GGU School of Law/Edward S. Ageno School of Business ('20) where he is the Founding Editor-In-Chief of the GGU Tax & Estate Planning Review, Submissions & Web Editor of the GGU Environmental Law Journal, and Executive Website Editor of the GGU Law Review. Bacilio is also the former Director of Information and Compliance for Benjamin Madison Wealth Advisors. In 2013, Bacilio was named the National Lawyers Guild (NLG) Legal Worker of the Year and was an NLG 2012 W. Haywood Burns Memorial Fellow for Social & Economic Justice (focusing on data visualization of public information). Prior to law school, Bacilio earned a Master of Library and Information Science from Pratt Institute where he served the Kings County Supreme Court, of the New York State Unified Court System, as the 2010 Nathan R. Sobel Law Library Fellow and was inducted into Beta Phi Mu (the International Library & Information Studies Honor Society). Bacilio also holds a Bachelor of Arts in Modern Dance from Oberlin College and is a member of both the Screen Actors Guild-American Federation of Television and Radio Artists and the Actors' Equity Association. You can reach out to Bacilio via <http://bacilio.com> and connect with him on [LinkedIn](#).



Leave a Reply

Enter your comment here...

This site uses Akismet to reduce spam. [Learn how your comment data is processed.](#)

Search blog

Search



Archive

Select Month



Tennessee

Texas

Utah

Vermont

Virginia

Washington

West Virginia

Wisconsin

Wyoming

The Pitfalls of Legislating Out of Fear

McCoy Australia final edit



Advancements in HIV/AIDS prevention and treatment programs aside, many who are HIV-positive are still criminalized solely based on their status. These people often face **severe sentences for engaging in any sexual activity without disclosing, and in some cases even if they do disclose**, their status to their partner, regardless of the level of risk associated with the behavior. Moreover, many HIV-specific criminal laws enacted during the height of the epidemic, over forty years ago, are not only ineffective at preventing transmission, but also stigmatize those living with the disease and **reduce the likelihood that individuals will get tested**.

Laws that criminalize otherwise legal behaviors or add penalties to existing crimes for people living with HIV have largely been based on irrational and unfounded or disproven fear. Adding to that fear was limited understanding of the routes and risks of transmission, the limited number of effective preventative options, and the perception of HIV as an incurable and, thereby, inevitably fatal disease. But just as science has advanced, so must our laws.

Final Thoughts: Fair Laws, Not Fear Laws

SERO Stories - Rep Barbara Lee



Thirty-four states have HIV-specific criminal laws and/or sentence enhancements applicable to people living with HIV/AIDS (this total reflects the overlap among the twenty-nine states with HIV-specific laws and the nine with sentence enhancements).

These laws are outdated and contribute to HIV stigma and discrimination. I call on lawyers, activists, and students to push their legislatures to treat HIV just as they do all other serious communicable diseases and to rally around a few simple changes to bring these laws in line with what we know about the disease. To that end, as suggested by **legal policy organizations**, **civil rights activists**, and **medical professionals** alike, a model law must include:

1. Criminal intent to infect;
2. Conduct likely to transmit;
3. No new crimes or increased penalties for any other disease;
4. Punishment proportionate to the actual harm; and
5. Classification as a misdemeanor, not a felony.

This is the path forward. The path away from forgetting and towards justice.

Lastly, if you find yourself in the same quandary that I did when I was in New York and you get sick and tired of being sick and tired, but didn't know what to do to change things, I would offer you the immortal advice of **Mike Shriver**: "In the midst of not knowing what to do, do something. And in the midst of not knowing how well do it, just do it regardless. And keep doing it, no matter how tired you get, because someone has to keep doing it, because someone is relying on you."

Further Reading/Viewing

- Amira Hasenbush, Bianca D.m. Wilson, Ayako Miyashita & Madeleine Sharp, The Williams Inst. Univ. Of Cal. L.a. Sch. Of Law, **HIV Criminalization And Sex Work In California (2017)**.