



July 26, 2012

Dear Representative:

**RE: ACLU Urges Support and Co-Sponsorship of the REPEAL HIV Discrimination Act (H.R. 3053)**

On behalf of the American Civil Liberties Union (ACLU), a non-partisan organization with more than half a million members, countless additional activists and supporters, and fifty-three affiliates nationwide, we urge you to support and co-sponsor the Repeal Existing Policies that Encourage and Allow Legal (REPEAL) HIV Discrimination Act (H.R. 3053) (“the REPEAL Act”). This legislation is sponsored by Rep. Barbara Lee (D-CA), and would begin to reform antiquated federal and state laws and policies rooted in misconceptions and prejudices against people living with HIV/AIDS.

The REPEAL Act would require the Attorney General, Secretary of Health and Human Services (HHS), and the Secretary of Defense to review federal and state laws, regulations and policies, including the Uniform Code of Military Justice, as well as court precedents that involve criminal liability for people living with HIV.<sup>1</sup> Federal officials would work in concert with state attorneys general, state and local health officials, members of the Armed Forces, legal advocacy groups, and people living with HIV/AIDS to highlight areas of the law that discriminate against people living with HIV. The Attorney General would then submit the relevant findings to Congress, including recommendations for best practices for laws dealing with HIV in the criminal context.

**HIV Criminalization Laws – Relics of Fear and Misunderstanding**

This legislation is long overdue. During the earliest days of the HIV/AIDS epidemic, science and medicine could barely keep up with the fear and prejudice that engulfed the nation. Researchers and medical professionals knew little about how HIV was transmitted, and even less about how to treat HIV once acquired. In response, Congress passed the Ryan White Comprehensive AIDS Resources Emergency (CARE) Act to provide states, nonprofit organizations, and medical professionals with grants and funds to develop more efficient and effective medical treatments for individuals and

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<sup>1</sup> H.R. 3053, 112th Cong. § 5 (2011)

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families dealing with HIV/AIDS. Unfortunately, Congress conditioned the receipt of funds on states first creating criminal penalties for the intentional transmission of HIV.<sup>2</sup> As a result, state legislatures across the country passed laws criminalizing not only the intentional transmission of HIV, but often “exposure” of another individual to HIV. “Exposure,” as defined in these laws, may include consensual intimate conduct, regardless of the actual risk of transmission, and acts such as biting or spitting, which carry virtually no risk of HIV transmission.<sup>3</sup>

Thirty-four states criminalize one’s HIV status through such laws.<sup>4</sup> The majority of these laws were enacted in accordance with the requirements of the Ryan White CARE Act, before HIV/AIDS was well understood. They reflect the fear, misunderstanding, and prejudice that surrounded HIV decades ago, but have no place in state and federal criminal codes today. While modern science and medicine have advanced dramatically, some state legislatures are still passing laws that resemble the legal relics the REPEAL HIV Discrimination Act seeks to reexamine. For example, in 2011, the state of Nebraska joined the fray when its legislature enacted a law that created a new criminal offense – assault with a bodily fluid. The law made it a felony offense for any individual with HIV to strike a public officer with blood, semen, saliva, feces, or mucus.<sup>5</sup> Three decades of sound science have proven HIV cannot be transmitted by any fluid besides the first two, and, even then, transmission is virtually impossible through a “strike” with blood or semen. Regrettably, the persistent stigma surrounding HIV too often overshadows medical facts and common sense. The REPEAL Act is an essential step towards reviewing and ultimately reforming criminal laws that undermine public health initiatives aimed at preventing the spread of HIV.

### **State and Federal Laws – Prosecutions of People Living with HIV**

States across the country vary in their handling of HIV criminalization.<sup>6</sup> In the vast majority of these states, a person living with HIV is subject to criminal prosecution for conduct which, if not for that individual’s HIV status, would not lead to any criminal sanctions. Certain states require proof that a person living with HIV intentionally exposed his or her sexual partner to HIV in order to support a conviction.<sup>7</sup> In other states, one’s HIV status is classified as an “aggravating factor,” giving judges the discretion to increase a criminal sentence for assault or sexual assaults

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<sup>2</sup> See Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. No. 101-381, § 2647, 104 Stat. 576 (prior to 2000 repeal).

<sup>3</sup> *HIV Transmission: Can HIV be spread through a bite?*, CENTER FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/hiv/resources/qa/transmission.htm> (last updated Mar. 25, 2010).

<sup>4</sup> *Criminal Statutes on HIV Transmission, 2010*, KAISER HEALTH NEWS, <http://www.statehealthfacts.org/comparemaptable.jsp?ind=569&cat=11&sub=130&yr=138&typ=5> (last updated June 12, 2010).

<sup>5</sup> NEB. REV. STAT. ANN. § 28-934 (West 2012).

<sup>6</sup> CENTER FOR HIV LAW & POLICY, *Positive Justice Project: State and Federal Prosecutions, Vol.1*, (Fall 2010) available at <http://hivlawandpolicy.org/resources/view/564>.

<sup>7</sup> See KAN. STAT. ANN. §21-3435 (West 2012).

if the victim might have contracted HIV, or even had a fear of contracting HIV.<sup>8</sup> The vast majority of states, however, go further, creating a criminal offense for people living with HIV to engage in consensual sexual conduct. In such states, when an individual, knowing he or she is living HIV, engages in *any* sexual act with a willing partner, regardless of whether or not protection was used, that individual becomes a criminal. No actual transmission is necessary. The use of protection does not constitute a defense. An individual can be convicted of a felony, sentenced to prison, and forced to register as a sex offender, simply for being a person living with HIV who engaged in consensual intimate conduct. While disclosure of one's HIV status does constitute a defense in most states, a person living with HIV is often hard pressed to prove disclosure in court, as evidence of whether or not HIV was discussed before intimate conduct often devolves into one partner's word against the other's.<sup>9</sup> The REPEAL Act is crucial to ensuring no one faces the serious threat of a criminal conviction simply because he or she is living with HIV.

Court dockets across the country are replete with examples of the application of discriminatory HIV criminalization laws. Consensual sexual partners are sentenced to jail time, even when HIV status had been discussed before intimate conduct, or condoms were used during sex. Individuals with HIV convicted of simple crimes, like robbery or assault, have seen zealous prosecutors elevate the charges for no reason other than their HIV status. Particularly egregious examples of discriminatory prosecutions include:

- A homeless man in Texas was sentenced to 35 years in prison for spitting at a police officer. Despite the fact that HIV cannot be transmitted through saliva (and, of course, the officer did not contract HIV), an ordinary assault charge turned into a prison term lasting more than three decades.<sup>10</sup>
- Nick Rhoades, a man living with HIV in Iowa, had consensual sex. Rhoades used a condom and he did not transmit HIV to his partner. Regardless, an Iowa court sentenced Rhoades to 25 years in prison for criminal transmission of HIV.<sup>11</sup> As a result of advocacy on his behalf, Mr. Rhoades served a year of the sentence, but has been forced to register as a sex offender. The appeal of his conviction is currently pending with the assistance of advocacy groups, without which Mr. Rhoades might still be in prison.<sup>12</sup>

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<sup>8</sup> See ALASKA STAT. ANN. § 11.41.420 (West 2012); see ALASKA STAT. ANN. § 12.55.155(c)(33) (West 2012); see TENN. CODE ANN. § 40-35-114(21) (West 2012).

<sup>9</sup> See, e.g., *Ginn v. State*, 667 S.E.2d 712, 713 (Ga. Ct. App. 2008) (woman living with HIV sentenced to eight years imprisonment, despite producing multiple witnesses at trial who testified her partner was aware of her HIV status).

<sup>10</sup> *HIV-positive man sentenced 35 years for spitting at office*, USA TODAY, May 15, 2008, [http://www.usatoday.com/news/nation/2008-05-15-2185646531\\_x.htm](http://www.usatoday.com/news/nation/2008-05-15-2185646531_x.htm).

<sup>11</sup> Mary Stegmeir, *Plainfield man gets 25 years for transmitting HIV*, WCF COURIER, May 1, 2009, [http://wfcourier.com/news/breaking\\_news/plainfield-man-gets-years-for-transmitting-hiv/article\\_603d678c-26d8-5d9b-8f3e-e140e208e643.html?mode=story](http://wfcourier.com/news/breaking_news/plainfield-man-gets-years-for-transmitting-hiv/article_603d678c-26d8-5d9b-8f3e-e140e208e643.html?mode=story).

<sup>12</sup> Miranda Leitsinger, *Man makes safe-sex argument to overturn conviction on HIV exposure*, MSNBC.COM, June 14, 2012, <http://usnews.msnbc.msn.com/news/2012/06/14/12226274-man-makes-safe-sex-argument-to-overturn-conviction-on-hiv-exposure?lite>.

- During an altercation, a man living with HIV in Michigan bit his neighbor on the arm. Local prosecutors charged him not only with assault, but also bio-terrorism, alleging he used HIV as a biological weapon. The ACLU of Michigan harshly criticized the charge and filed an *amicus curiae* brief with the court.<sup>13</sup> Thankfully, a judge eventually threw out the bio-terrorism charge.<sup>14</sup>

These kinds of prosecutions are rooted in the prejudice and stigma surrounding HIV.

State legislatures are not alone in their discriminatory criminal laws. Similar federal laws stigmatize and penalize individuals based on their HIV status. Courts have used the flexibility of the federal sentencing guidelines to treat HIV as an “aggravating factor.” For example, a man convicted of public lewdness while soliciting sex from an undercover federal agent had his sentence increased because he had HIV.<sup>15</sup> The court made no attempt to determine the actual risk of HIV transmission involved in the sexual activity solicited, nor did any sexual activity actually occur.

Military service members are prosecuted under the Uniform Code of Military Justice, and an individual in the Armed Forces living with HIV can face disciplinary measures for “conduct prejudicial to good order.” Additionally, service members living with HIV who engage in consensual sex face aggravated assault charges, even when their HIV status has been disclosed in advance, because the military defines assault as any contact with a means likely to produce death or grievous bodily harm, and has viewed sexual activity by someone with HIV as meeting that standard.<sup>16</sup> Even an *attempted* sexual act, not resulting in any sexual penetration or intimate contact, was held to constitute “attempted” aggravated assault, leading to jail time and a dishonorable discharge from the military.<sup>17</sup> Such sentences have no place in society today.

### **Miscarriage of Justice and Counterproductive for Public Health**

Despite claims made by proponents, HIV criminalization laws do nothing to reduce the spread of HIV and can actually be counterproductive. By threatening individuals living with HIV with criminal prosecution based on their status, these laws incentivize ignorance.<sup>18</sup> If a person doesn’t

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<sup>13</sup> Brief for the American Civil Liberties Union (ACLU) of Michigan as Amicus Curiae Supporting Defendant, *People v. Allen*, Case No. 2009-4960-FH (Macomb County Ct. June 2, 2010) available at <http://aclumich.org/sites/default/files/file/AllenAmicus.pdf>

<sup>14</sup> *Judge Throws Out Bio-Terrorism Charge Against HIV-Positive Biter*, WILX.COM, June 3, 2010, <http://www.wilx.com/home/headlines/95585424.html>; see also *People v. Allen*, Case No. 2009-4960-FH (Macomb County Ct. June 2, 2010).

<sup>15</sup> *U.S. v. Burnett*, 545 F. Supp. 2d 1207 (N.D. Ala. 2008).

<sup>16</sup> *United States v. Bygrave*, 46 M.J. 491 (C.A.A.F. 1997) (HIV-positive defendant could not claim partner gave informed consent to sexual intercourse).

<sup>17</sup> *United States v. Johnson*, 30 M.J. 53, 56 (C.M.A.), cert. denied, 498 U.S. 919 (1990).

<sup>18</sup> *National HIV/AIDS Strategy Imperative: Fighting Stigma and Discrimination by Repealing HIV-Specific Criminal Statutes*, NATIONAL ALLIANCE OF STATE AND TERRITORIAL DIRECTORIES (NASTAD), Feb. 2011, [http://www.nastad.org/Docs/114641\\_2011311\\_NASTAD%20Statement%20on%20Criminalization%20-](http://www.nastad.org/Docs/114641_2011311_NASTAD%20Statement%20on%20Criminalization%20-)

know his status, he can't be prosecuted for consensual sexual conduct. Encouraging people to avoid voluntary HIV testing undermines public health. Additionally, HIV criminalization laws put the entire burden of practicing safe sex on the partner living with HIV, when protection should be a shared responsibility.

In fact, the stigma that comes from HIV criminalization adversely impacts the willingness of individuals living with HIV to discuss their status with partners, health care providers and family members. By criminalizing HIV, federal and state laws perpetuate a dangerous stereotype surrounding HIV: contracting the virus is a death sentence. In actuality, HIV is a chronic, manageable condition. Many individuals living with HIV have a viral load – the measure of the HIV virus present in the bloodstream – that is undetectable. For these individuals, transmission to others is exceedingly rare.<sup>19</sup> Many courts ignore these realities as a defense against prosecution.<sup>20</sup>

### **Conclusion**

HIV criminalization laws are fundamentally unjust and do not reflect the advances made in modern science and medicine over the past 30 years. Instead, they reflect a culture of blame based on outdated myths surrounding HIV. These laws create a vicious cycle of fear and discrimination: the laws originated in the earliest days of the AIDS epidemic, when fear and ignorance prevailed. The stigma perpetuated by the laws discourages people from voluntarily getting tested and encourages concealment of one's HIV status and the resulting harsh prosecutions lead to more fear and increased stigma for people living with HIV. The REPEAL Act (H.R. 3053) would be a critical first step in breaking this cycle. It is time to ensure that federal and state laws end discrimination, remove the stigma surrounding HIV, and create policies that actually reduce rates of HIV transmission.

We strongly urge you to support and co-sponsor the REPEAL HIV Discrimination Act (H.R. 3053).

Sincerely,



Laura W. Murphy  
Director, Washington Legislative Office



Ian S. Thompson  
Legislative Representative

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[%20Final.pdf](#) (stating HIV criminalization “undercuts our most basic HIV prevention and sexual health messages, and breeds ignorance, fear and discrimination against people living with HIV.”).

<sup>19</sup> *Effect of Antiretroviral Therapy on Risk of Sexual Transmission of HIV Infection and Superinfection*, CENTER FOR DISEASE CONTROL AND PREVENTION, Sept. 2009,

<http://www.cdc.gov/hiv/topics/treatment/resources/factsheets/pdf/art.pdf>.

<sup>20</sup> *See, e.g., State v. Richardson*, 209 P.3d 696 (Kan. 2009).