Alternatives to Criminalization of HIV Transmission and Exposure

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ALTERNATIVES TO CRIMINALIZATION OF HIV TRANSMISSION AND EXPOSURE

Testimony for the American Bar Association AIDS Coordinating Committee on Criminal HIV Exposure and Transmission Laws
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With the adoption of the United States National HIV/AIDS Strategy, the U.S. Department of Justice has been tasked with providing technical assistance to states seeking to amend or eliminate their HIV exposure and transmission laws. This begs the question – what are viable alternatives to HIV criminal exposure and transmission laws? It is important to consider the objectives and proposed outcomes of possible alternatives to criminalization, and whether those objectives further criminal justice, public health, and/or human rights goals. This is particularly important given that these goals often conflict when thinking about the best interest of the HIV positive individual. The goals of criminal law include: incapacitation, retribution, rehabilitation, and deterrence. The goals of the HIV and human rights framework are different and include (but are not limited to) improving the quality of life of people living with HIV/AIDS through access to treatment, services, and support; stopping the spread of HIV/AIDS through access to prevention education; providing access to knowledge of one’s HIV status through voluntary counseling and testing; providing access to treatment; and providing access to a full range of sexual and reproductive health services. It is important to consider both which set of goals are driving alternative approaches to criminalization of HIV transmission, and also to consider how a human rights based approach can underpin the proposed alternative(s).

Human Rights Framework

The human rights framework offers a way to keep the rights of the HIV positive individual central. The human rights approach is grounded in international agreements and provides a framework for thinking about the legal response to HIV.

In 2006, governments agreed upon a Political Declaration on HIV/AIDS that outlined some of the principles that should drive a human rights based response with specific regard to HIV. Laws that criminalize HIV transmission and exposure undermine progress towards these commitments. These include (as summarized by the UNAIDS Reference Group on HIV and Human Rights):

• Ending the criminalization of HIV transmission and exposure;

1 Many thanks to Fazeela Siddiqui for fantastic research assistance. Thanks also to Brook Kelly and Alison Yager for helpful feedback on this presentation. A version of this presentation is also contained within a larger summary of testimonies entitled Women & Criminal HIV Exposure and Transmission Laws: Origins, Effects & Alternatives. This version of the presentation differs slightly from the version contained in the longer document. This presentation was made to the American Bar Association on October 18, 2010.
• Promoting a social and legal environment that is supportive of and safe for voluntary disclosure of HIV status;
• Removing any legal barriers to provision of HIV prevention measures, including comprehensive age-appropriate sex education and harm reduction services, such as needle-exchange programs and opioid substitution treatment;
• Enacting and enforcing comprehensive anti-discrimination laws that protect people living with HIV or at risk of infection;
• Reviewing and repealing laws that criminalize or further marginalize vulnerable groups such as sex workers, people who use drugs, and men who have sex with men, driving them away from the prevention, treatment, care and support services they need; iii

The United Nations Joint Programme on HIV/AIDS (UNAIDS), many non-governmental organizations, and advocates for HIV positive people often utilize core human rights principles to define a set of alternative areas to focus on instead of criminalization of HIV transmission including but not limited to:

• Utilizing human rights principles in the response: participation, transparency, accessibility, availability, affordability, quality;
• Involving people living with HIV/AIDS in the law making process;
• Investing in prevention education programs;
• Ensuring access to voluntary HIV testing and pre- and post- test counseling;
• Making treatment and care accessible, affordable, available, and of high quality;
• Working to end sexual violence;
• Investing in programs that help individuals get out of abusive relationships;
• Ensuring access to post-exposure prophylaxis;
• Investing in programs that are demonstrated to reduce sexual violence in communities (inclusive of MSM, LGBT);
• Strengthening anti-discrimination laws to ensure protection of people living with HIV;
• Building privacy and confidentiality laws around testing;
• Building systems of support around disclosure; and,
• Promoting informed public debate and dialogue

A Note on Public Health Law

Often there is a call to use “public health law” as an alternative framework from criminal law. It is important to note that laws driven by public health objectives can also be coercive. This is exemplified in the case of Mississippi where individuals who test HIV positive are asked to acknowledge that there is a “necessity of not causing pregnancy or becoming pregnant.” When public health is the driving force behind the creation and maintenance of laws that are meant to have an impact on the health of communities a health and human rights approach becomes crucial to ensuring that human rights are
not violated and the trust and well-being of individuals and communities are maintained.

**The Criminal Justice Framework**

Alternatives to criminalization within the criminal justice system include: alternative dispute resolution, restorative justice and mediation. These approaches may move away from the most punitive elements of the criminal justice system, but they do little to address the negative consequences of criminalization that include stigmatizing PLWHA, perpetuating myths and misunderstandings about HIV transmission, and putting all responsibility for HIV prevention on HIV-positive individuals. For individuals who have been infected by their partners, an alternative criminal justice framing could help to address the sense of injury suffered by infection, and may help to mediate the sense of needing for retribution through incarceration. These guiding principles of restorative justice offered by the U.S. Office of Justice Programs reinforce this:

- Crime is an offense against human relationships.
- Victims and the community are central to justice processes.
- The first priority of justice processes is to assist victims.
- The second priority is to restore the community, to the degree possible.
- The offender has personal responsibility to victims and to the community for crimes committed.
- Stakeholders share responsibilities for restorative justice through partnerships for action.
- The offender will develop improved competency and understanding as a result of the restorative justice experience.\(^v\)

The programs for alternative dispute resolution, restorative justice, or mediation are varied and can be introduced at different times during an individuals experience with their HIV diagnosis and potential desire to utilize the criminal justice system. For example during prevention education, when one is receiving knowledge of their HIV status, during testing and disclosure, before prosecution, or during a prosecution. These programs can be varied and include mediation, facilitating apologies, working with prosecutors and judges to ensure sensitivity in dealing with issues of HIV, and engaging with the criminal justice system to find alternative sentencing arrangements.

**Next Steps**

Alternatives to criminalization of HIV transmission and exposure must be grounded in human rights principles, and must further broader efforts to end stigmatization of HIV-positive people. In the short term there are several steps that can be taken to construct clear alternatives to criminalization of HIV transmission. These include:
• Supporting the new White House National AIDS Strategy that acknowledges that criminalization of HIV transmission undermines HIV programs.
• Promoting research on the effect of criminal transmission laws particularly on women and people of color.
• Advocating for a shift in focus (financially and otherwise) from criminalization to prevention and treatment.
• Educating actors in the criminal justice system including judges, defense attorneys, and prosecutors.
• Advocating for the use of alternative models of criminal justice for those individuals currently being prosecuted.
• Educating the media on the stigmatizing and often false information being spread through reporting on HIV criminalization cases.
• Continuing to support prevention, treatment, and care initiatives based on human rights principles.
• Working toward repealing HIV specific criminal exposure and transmission laws.

This presentation on alternatives to criminalization is a starting point in a much larger discussion around advocacy to end the criminalization of HIV transmission and exposure. The presentation highlights that it is necessary to clarify what is meant by “alternatives to criminalization.” In particular it is necessary to identify the goals and principles of the proposed alternatives and to clearly define how one ends the practice of criminalization while simultaneously finding alternatives for individuals being prosecuted under existing HIV criminalization provisions.

ENDNOTES

1 United States National HIV/AIDS Strategy Federal Implementation Plan, p 26 (July 2010) (DOJ and HHS OS will identify a departmental point of contact and provide technical assistance resources to States considering changes to HIV criminal statutes in order to align laws and policies with public health principles).