



Beyond criminalization: reconsidering HIV criminalization in an era of reform

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Purpose of review

This paper reviews recent studies examining the application of human immunodeficiency virus (HIV)-specific criminal laws in North America (particularly the United States and Canada). In the wake of the development of new biomedical prevention strategies, many states in the United States (US) have recently begun to reform or repeal their HIV-specific laws. These findings can help inform efforts to 'modernize' HIV laws (or, to revise in ways that reflect recent scientific advances in HIV treatment and prevention).

Recent findings

Recent studies suggest that HIV-specific laws disproportionately impact Black men, white women, and Black women. The media sensationally covers criminal trials under these laws, especially when they involve Black defendants who they often describe in racialized terms as predators. Activists contest these laws and raise concerns about new phylogenetic HIV surveillance techniques that have the potential to be harnessed for law enforcement purposes.

Summary

These findings collectively raise urgent concerns for the continued use of HIV-specific criminal laws. These policies disproportionately impact marginalized groups – particularly Black men. Media coverage of these cases often helps to spread misinformation and stigmatizing rhetoric about people living with HIV and promulgate racist stereotypes. Although well-intentioned, new phylogenetic HIV surveillance technologies have the potential to exacerbate these issues if law enforcement is able to gain access to these public health tools.

Keywords

criminal justice, HIV criminalization, molecular surveillance, racial disparities

INTRODUCTION

acquired immunodeficiency syndrome (AIDS) was met with a punitive response when it first emerged in the early 1980s. In the US, conservative evangelical Americans viewed the disease as divine retribution for moral decay. Moral backlash to the epidemic in North America was often fueled by stigmatizing attitudes toward the communities most impacted by the disease – gay men, sex workers, people of color, and drug users – who were already specifically criminalized in many jurisdictions [1].

In this hostile climate, many lawmakers viewed criminal sanction as an appropriate tool to combat the disease. In the US context, a United States Centers for Disease Control and Prevention (CDC) review shows that 33 states enacted criminal penalties that specifically applied to people living with HIV between 1986 and 2011 [2]. These laws varied in their specifics, but generally made it a crime for people living with human immunodeficiency virus (HIV) to have sex without first disclosing their HIV-

positive status. Proof of malicious intent or of transmission is not required – even low or no-risk behaviors could warrant prosecution and imprisonment for many years. Other countries, such as Canada, have used general criminal statutes not specific to HIV (in Canada, 'aggravated sexual assault') to prosecute people living with HIV for failing to disclose [1].

Biomedical prevention strategies have radically transformed the epidemic. Since 2008, evidence has mounted that antiretroviral medication can effectively eliminate the risk of sexual transmission for people living with HIV – a strategy referred to as

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Curr Opin HIV AIDS 2022, 17:000–000

DOI:10.1097/COH.0000000000000715

KEY POINTS

- Many jurisdictions are considering modernizing their HIV laws in the wake of new biomedical technologies that prevent transmission.
- Many state HIV criminal laws disproportionately impact marginalized groups, particularly Black men and women.
- Media outlets sensationally cover HIV criminal cases in ways that promulgate stigmatizing views of people living with HIV and racist stereotypes.
- Advocates raise concerns about new HIV surveillance technologies that employ phylogenetic techniques that could be harnessed by law enforcement if steps are not taken to prevent them from accessing these tools.

‘treatment as prevention’ or TasP [3,4]. In the 2010s, health agencies in Canada and the United States approved a new treatment strategy for seronegative people, ‘preexposure prophylaxis’ or PrEP. PrEP refers to the practice of prescribing anti-HIV medicines to people not yet living with the disease to prevent HIV acquisition [5].

Although AIDS activists have resisted criminalization efforts since the beginning of the epidemic, these calls have begun to resonate with a broader public in the wake of TasP and PrEP. Social scientists and legal scholars have also begun to study these laws and their applications.

This review considers recent scientific and legal scholarship examining the impact of HIV criminal statutes, focusing on North America due to space constraints (particularly the US and Canada). We review three distinct areas of inquiry. First, we examine scholarship analyzing the uneven application of HIV criminal statutes based on race, gender, and sexuality. Second, we summarize recent scholarship considering attempts to reform or ‘modernize’ these laws. Third, we assess scholarship that considers the ethical and legal implications of new HIV surveillance technologies that rely on phylogenetic technologies.

THE FALSE PROMISE OF EQUAL JUSTICE: HOW HIV CRIMINALIZATION IS SHAPED BY RACE, GENDER, AND SEXUALITY

Recent scholarship analyzes the criminal justice-related impacts of HIV criminalization. We review two veins of scholarship: one considering whether HIV-related prosecutions disproportionately involve members of marginalized communities; and a second analyzing how sensational media coverage of criminal trials constructs stigmatizing narratives of culpability and victimhood. Both literatures reveal how

Black men, Black women, and white women living with HIV face a steep social cost under these laws.

Disparate impacts of HIV criminal statutes: Race, gender, and sexuality

Both HIV acquisition and incarceration have become normalized events for Black men in the US. If current trends persist, the CDC estimates that 1 in 2 Black men who have sex with men in the US will acquire HIV in their lifetime [6]. This stark figure echoes recent estimates that nearly 70% of Black men who do not graduate high school will experience incarceration in their lifetime [7].

These inequities have informed scholarship evaluating potential disparities under HIV criminal statutes. An analysis of prosecutions in South Carolina reveals that 45% of defendants convicted between 2009 and 2019 were Black men; prison sentences overall ranged from 3 to 10 years [8]. In Missouri, over 60% of convicted defendants were Black men despite making up 46% of people living with HIV in the state [9]. In Georgia, 61% of people arrested for HIV-related crimes were Black in 2021 and a 2018 analysis found that Black men were twice as likely as white men to have been convicted [10,11].

In states where the law specifically targets sex work, women were more frequently targeted for prosecution. In Georgia, concurrent sex work offenses were more likely to involve Black women [11]. Most Nevada prosecutions were sex-work-related and over 1/3 of defendants were women [12]. Although Black people make up 28% of people living with HIV in Nevada, they comprised 40% of all prosecutions. In Florida, more than half of the defendants were women. White women were vastly overrepresented, making up 39% of defendants but only 4% of people living with HIV in the state [13].

Demographic data related to the defendant’s sexuality was not typically available. A 2018 review of 206 prosecutions in Michigan, Missouri, and Tennessee found that – compared to the population of people living with HIV at large – heterosexual male defendants were convicted at rates 7 times higher than defendants who were men who have sex with men [1].

The socio-legal construction of HIV threat

The second strain of inquiry reveals how HIV-related prosecutions reinforce stigmatizing labels of people living with HIV as deviant and blameworthy [14]. By situating people living with HIV as deviant and their partners as ‘good victims,’ prosecutors and the media shape the public’s understanding of who is to

blame – and who gets to be a victim deserving of the public’s sympathy – in cases of HIV exposure [15].

A mostly white-male news media helped spark an AIDS panic in the 1980s by stoking the public’s racialized and sexual fears [16]. Early media reports of noncompliance dwelled on cases of Black women living with HIV who were engaging in sex work. This group turned out to be an ideal villain for media audiences in need of a blameworthy scapegoat [16].

More recently, the 2015 criminal trial in Missouri against Michael Johnson received national attention when he was convicted and sentenced to 30.5 years in prison. An analysis of news reporting on the case shows how the media framed Johnson, a Black gay man in his early 20s, as dishonest, sexually predatory, and the culpable aggressor in a consensual encounter [17[¶]]. A separate analysis shows how prosecutors cast Johnson as a cartoonish Black predator, even showing pictures of his large genitals to the jury [18].

Canadian scholars have similarly used sensational trials as windows into the social dynamics of HIV criminalization. An analysis of four widely reported trials argues that the news media constructs defendants living with HIV as predators by casting them as hypersexual and, thus, dangerous, and by crafting narratives that appeal to emotions of disgust and fear [19]. Media outlets disproportionately focus on cases involving Black male defendants – especially Black immigrant men [20[¶],21[¶]]. In a separate study, scholars show how Canadian white women who transgress also face harsh social scrutiny and sanction – further revealing the gendered and racialized dynamics of HIV criminalization [22].

HIV MODERNIZATION: UNDERSTANDING THE SHIFTING HIV POLICY LANDSCAPE

Social movements working against HIV criminalization have cited powerful new biomedical prevention and treatment technologies as key justifications for revising HIV legislation. These efforts are sometimes referred to as movement to ‘modernize’ HIV laws in ways that reflect recent scientific advances in HIV treatment and prevention [23[¶],24[¶]].

Most HIV criminal statutes in the US were written in the 1980s when HIV was a poorly understood and, in most cases, a terminal disease [1]. Some state laws were used to prosecute low or no risk behavior such as spitting, biting, oral sex, or vaginal or anal sex with a condom or a partner with an undetectable viral load. Even in cases in which it would have been unlikely or even impossible for the person living with HIV to transmit HIV to the other person involved, defendants are routinely sentenced as felons with lengthy prison sentences [1].

The disproportionality between the harm alleged in many cases and the harsh sentences handed down has emboldened advocates to seek change [1]. Since 2012, advocacy efforts have successfully lobbied lawmakers in ten states to reform or repeal their HIV-specific criminal statutes: California, Colorado, Illinois, Iowa, Michigan, Missouri, Nevada, North Carolina, Virginia, and Washington [24[¶],25].

Recent HIV legislation has sometimes made direct reference to biomedical prevention strategies. For example, under North Carolina’s revised statute, people living with HIV are no longer subject to prosecution for not disclosing their HIV-status if they use a condom and/or if they have had an undetectable viral load for at least six months [24[¶]]. Other states have been bolder, repealing their HIV disclosure mandate for all people living with HIV, regardless of their viral load, such as Illinois in 2021 [24[¶]].

Historically, research has shown that HIV advocates justified the need for legislative change by directly invoking advances in HIV treatment and prevention [26]. However, legislators have not always been keen to act on these scientific advances. HIV advocates have had to build grassroots, intersectional movements to demand change in their states to prod lawmakers to action [27].

Although these reforms have been lauded by many, some scholars remain concerned that some ‘modernized’ state laws continue to penalize people living with HIV who have not (or cannot) achieve an undetectable viral load. Scholars argue that this leaves the most marginalized populations subject to further criminalization under the law – particularly Black people in the US who are systematically disadvantaged and thus less likely to be in care and virally suppressed than their white counterparts [18,27]. HIV modernization has the potential to concentrate punitive and carceral measures on Black people living with HIV and leave them at greater risk of criminal penalties for nondisclosure.

HIV anticriminalization movements have responded to this issue by arguing for decriminalization instead of modernization. For example, in 2017, HIV advocates in the US released a statement to communicate their concerns of HIV modernization [28]. They argue that the use of biomedical prevention science in HIV policymaking intensifies inequalities and heightens the criminalization of racialized groups that have been historically disadvantaged and harmed [28].

Other international groups, like the International AIDS Society, UNAIDS, and the International Association of Providers of AIDS Care, along with international HIV scientists, have supported HIV

modernization [23[■]]. However, they also argue that people living with HIV pose less risk to their sexual partners than is widely believed by the criminal legal system [23[■],29]. Therefore, while HIV modernization is a means to lessen stigma and discrimination, decriminalization could eliminate unjust HIV prosecutions altogether.

CRIMINALIZATION AND MOLECULAR SURVEILLANCE

Recent studies have considered the ethical implications of expanding forms of genomic research and public health surveillance in the age of big data [30[■]]. Activists have raised several key concerns with these technologies: Can the data produced by new surveillance technologies become evidence in HIV-related criminal cases? Can law enforcement gain access to these surveillance tools to identify potential lawbreakers?

Molecular HIV surveillance – also known in the US as ‘cluster detection and response’ – has been implemented as part of public health surveillance systems around the world, particularly in parts of Canada, the US, the UK, Africa, Asia, and Europe [31[■]]. These techniques repurpose (often without consent and outside of a clinical setting) biomaterial and other demographic data on people living with HIV to examine epidemic patterns in real-time, to identify risk networks for intervention [30[■]]. Phylogenetic techniques allow for the comparison of multiple genetic sequences to find similarities and differences that suggest potential clusters and transmission networks. For example, these tools can be used to indicate the country of origin of HIV infection along with the time of infection. More controversially, these tools have been used to infer the direction of transmission from one person to another [32[■]].

Studies have used these tools to examine the sexual networks of trans women, migrants, gay men, people who use drugs, and straight-identified men who had same sex sexual relations [30[■],31[■]]. These technologies can expose certain biomedical ‘truths’ about a subject’s sexuality in a way that might conflict with a person’s own reporting on the topic [33]. These ‘truths’ could present concerns for the use of such data in criminal trials. One study in the US suggests the practice is being deployed as a way to produce ‘out of care watch lists’ that are used in collaboration with correctional and law enforcement agencies [34[■]].

Public health agencies are employing molecular surveillance techniques in legal contexts around the world in which the sexual and/or drug-using practices of people living with HIV are specifically

criminalized. In such a highly sensitive context, sharing information across a range of government agencies raises important privacy and autonomy concerns and can potentially lead to intensified criminalization [35–37]. This has a potential for increased intertwining of public health, policing and criminal justice responses, which use the tools, technologies, and forms of reasoning from the criminal law to respond to public health issues [20[■]].

In light of these concerns, community advocates in the US have called for a moratorium on the use of molecular surveillance technologies [38[■]]. Globally, HIV Justice Worldwide and the Positive Women’s Network recently called on practitioners to ensure that data from these research and public health surveillance systems is ‘never used in criminal, civil, or immigration investigations or prosecutions’ [31[■]].

Such critiques of molecular surveillance are grounded in longstanding critiques against the racist practices of medicine and public health, which view the bodies of people living with HIV solely as objects of risk and study, not subjects deserving of rights and decision-making [32[■]]. In Canada, qualitative research with Indigenous women living with HIV has proposed the experience of over-surveillance by health professionals, police, and the law, as a form of ‘colonial surveillance and racism’ [39[■]]. Critical public health scholars in the area have called for research into the implications of increased surveillance, and for all approaches to be grounded in human rights and racial justice [20[■]].

CONCLUSION

The social effects of HIV criminalization are now well described. However, more research is needed to clearly identify the mechanisms driving this punitive phenomenon. For example, while disparate racial outcomes would seem to be the result of discriminatory intent on the part of prosecutors or police officers, one recent analysis suggested an ‘HIV threat’ hypothesis: that racial disparities in HIV-related criminal justice outcomes may be due to uneven crime reporting patterns among populations more or less likely to see HIV as a threat [1]. Empirical work is needed to test this theory.

Beyond the criminal justice system, future research could better evaluate how public health bureaucracies deploy surveillance technologies in ways that can have legal implications. Qualitative studies can also evaluate the impacts their surveillance programs have on people living with HIV and on other communities.

As state lawmakers reconsider the necessity of using the criminal law to combat infectious disease,

social science can provide helpful insight to help guide future policy. How do we transform systems of criminalization into systems of care? Interdisciplinary work like the research reviewed in this paper can shed light on these questions.

Acknowledgements

None.

Financial support and sponsorship

None.

Conflicts of interest

There are no conflicts of interest.

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