

# HIV criminalization: know your rights



This guide was created as a resource to provide people living with HIV with knowledge and information to protect themselves from being prosecuted and/or criminalized under discriminatory HIV-specific laws. It includes sections with specific information for communities most likely to be impacted by HIV criminalization, as well as general information about understanding your rights as a person living with HIV if arrest, prosecution and/or incarceration should occur. The contents herein are not intended as legal advice.

## I. about HIV

- HIV is not a death sentence. There are treatments available that enable people living with HIV to live long, healthy lives.<sup>1</sup>
- HIV can only be transmitted to others through sex; blood or blood products coming into contact with a mucous membrane, broken skin, directly entering the bloodstream of another person; or through breast milk. It cannot be passed to others through spitting, biting, urine or feces.<sup>2</sup>
- Being on treatment significantly lowers the chance of transmitting HIV to others. **People living with HIV who have a sustained undetectable viral load cannot pass HIV onto others.**<sup>3</sup>
- Condoms and pre-exposure medication (PrEP) greatly reduce the risk of transmitting HIV to others.<sup>4</sup>

## II. what is HIV criminalization?

In the United States, more than 30 states and several territories have at least one law that applies only to people living with HIV, including HIV-specific criminal laws that punish alleged exposure, non-disclosure, and transmission of HIV, and laws that increase penalties for people living with HIV who are convicted of prostitution or solicitation offenses. Many states have also used other criminal laws to prosecute people living with HIV (PLHIV), such as reckless endangerment.

### Activities that can lead to you being charged under HIV criminalization laws include:

- **Having sex with someone without telling them you are living with HIV, including oral sex and sex with a condom. This also applies even if you are on medication that makes your viral load undetectable.**
- **Sharing syringes**
- **Donating blood, organs, tissues**
- **Engaging in sex work**
- **Spitting, biting, or otherwise exposing others to your bodily fluids**

To find out about the specific laws in your state, visit: <http://www.hivlawandpolicy.org/state-hiv-laws> or call the HIV Law & Policy Center. The phone number is listed at the end of the guide.

Under most of these laws, PLHIV can face criminal charges for activities that would normally be legal, such as spitting on someone or having consensual sex. Unfortunately, most of these laws don't reflect the reality of what it means to live with HIV today and can punish PLHIV whether or not HIV transmission happened or was even possible. **That is why it is important to be aware of the laws in your state and know your rights.**<sup>5</sup>

## III. protecting yourself from prosecution for non-disclosure, HIV exposure or transmission

### Documenting disclosure

Documenting disclosure of HIV status is not a guaranteed way of protecting yourself from being criminalized, but if it is an option, it can help your case. Since it may not be safe for everyone to disclose their status in every situation, please take personal risk into account before taking any of these steps and consult disclosure support resources if needed. **Note: Many states require that you disclose before engaging in sex.**<sup>6</sup>

This list is organized in order of strategies most likely to help in court to those that are least likely. Being able to implement one or more of these strategies may help your case. When documenting disclosure, acknowledgment from your partner in writing and/or witnessed by a third party is more likely to work in your favor in court.

#### Some ways you can document that you disclosed include the following:<sup>7</sup>

- Having a partner sign a [disclosure agreement](#)<sup>8</sup>
- Going with your partner to a doctor or caseworker and have them record in your file that your partner knows of your status and/or is taking PrEP if that is applicable.
- Verbally disclosing to your partner in front of friends and family that can serve as witnesses
- Saving social media, email, text communications (save on multiple platforms in case personal computer/phone is seized by police)
- Note: When posting or sending communications that can be shared, widely disseminated, saved without your knowledge----be careful not to include any intention to keep your status secret, concern about disclosing to a partner, or anything similar.<sup>9</sup>
- Keeping personal notes on the date, time, and circumstances of disclosure

### Documenting engagement in medical care

Most states have not yet updated their HIV criminalization laws to reflect the current science on viral suppression as a prevention strategy or other prevention methods that reduce transmission risk, like using condoms and PrEP.<sup>10</sup>

However, in some states and some cases, being on HIV treatment, in care, and/or virally suppressed may be an affirmative defense to non-disclosure charges.<sup>11</sup>

## IV. interacting with law enforcement

When people living with HIV interact with police, they may be at risk for use of HIV-specific criminal laws, especially if there is an altercation.<sup>12</sup> For example, some states have specific laws that criminalize exposing a law enforcement or corrections officer to bodily fluids if you are living with HIV.<sup>13</sup>

In any situation involving law enforcement, use your best judgment in deciding how to proceed. It may not always be possible or safe for you to exercise or assert your rights as outlined in this guide.

Some states may allow mandatory HIV testing against your will under particular circumstances (detailed below); however, **you are not required to, and should not, tell police your HIV status.**<sup>14</sup>

### If you think you might be arrested:

Arrests are always stressful events but formulating an arrest plan as early as possible can be helpful. [Examples are available online](#) to help you make your own.<sup>15</sup>

- **Always password protect your phones.** Although police should have a warrant before they can search your phone, there is no guarantee that they will follow the rules. Your phone may have communications that prove you disclosed, but that should only be shared with your lawyer. Password protecting your phone does not guarantee that the information is safe but preventing easy access is important.
- **Keep a list of medications and specialized care you require on your person.** Designate

someone who has access to those medications that can bring them to you. If you are currently taking prescription medications, you have a right to keep taking them. If you do not bring prescriptions or a supply of medications with you, tell police medical personnel what medications you need and when. You may be taken to a hospital to get them.<sup>16</sup>

## If you are arrested/detained...

The arresting officer(s) should read you your rights.

**You have the right to remain silent, the right to an attorney, and the right to have an attorney provided for you if you cannot afford one.** You have these rights even if the police do not read them to you.

Immediately ask for an attorney, say you will remain silent until your attorney arrives, and then do so. Document any mistreatment by the police including names, badge numbers, or other identifying information of the officers. It may not always be safe to ask, but you do have a right to this information.<sup>17</sup>

Be polite, but **unless your lawyer is present, do not volunteer any information**, as it could be used against you. This includes:

- Answering questions
- Signing documents
- Disclosing your HIV status
- Submitting to or giving permission for medical testing (be aware some states do require mandatory testing for people engaged in sex work).<sup>18</sup> If forced, say, "I do not consent."<sup>19</sup>

Even if you know you did nothing wrong, volunteering statements to the police without your attorney present is not advised. **The safest option is always to remain silent.**<sup>20</sup>

## If you have been charged:

Regardless of the charges, if you have been assigned a public defender for your case, it is likely that they might have inaccurate, outdated information about HIV. **You can advocate for yourself by sharing relevant information about HIV that will help them with your defense**, including details of disclosure (if that happened), information about how HIV is and is not transmitted, and whether you are on treatment.

If you are being charged for not disclosing your HIV status:

- Do NOT contact the person who is accusing you. Even though it's natural to want to reach out and try to resolve the situation, your communication with the person could be used against you in court.
- If you have any records that show you are on treatment or disclosed to the person accusing you, provide them to your attorney.
- Do NOT talk about the person accusing you to your friends, family, or on social media platforms.
- Do NOT discuss details about your case or your HIV status to cellmates, friends or family while on the phone, or on social media platforms.
- If you were held in custody, once released and if you can do so safely, continue to go to doctor's appointments and do things to help you stay healthy and maintain a sense of normalcy.
- Reach out and get support from people and organizations you trust. See our list below for some recommendations.

## V. important considerations if you are detained or incarcerated

### If you are pregnant:

If you are pregnant, the Eighth Amendment protects your access to health services while you are in custody, but accessibility and quality of services will vary depending on which state you are incarcerated in.

Regardless of your HIV status:

- You cannot be denied an abortion you want.
- You cannot be compelled to get an abortion you do not want.
- You cannot be denied prenatal or pregnancy care
- You cannot be forced to pay before receiving medical care.<sup>21</sup>

If you are not getting or are being denied adequate care, tell your attorney immediately.

A state by state directory detailing pregnancy-related health care and abortion access in prison is available through the [ACLU](#).

### **If you are a parent or caregiver:**

1. If you are a primary caregiver or have dependents, set up a system to notify alternate caregivers of their care plan. The rules about maintaining parental rights during arrest or incarceration will vary from state to state, but your parental rights cannot be terminated based on incarceration alone.
2. The law does not require that the police give you a phone call to make childcare arrangements. If you cannot make a call, inform your attorney immediately so they can help you get authorization to contact caretakers. If a relative or friend is not available, your child will likely be taken in by a county child and family services department. It may still be possible at that point to have a relative pick up the children if they can prove their relationship to the child.
3. If the child stays in the custody of the county, work with your attorney (another attorney may be provided for you for asserting your parental rights in child custody proceedings) to keep the county informed of your situation and to see what next steps are including whether you will have to make a court appearance, arranging visits or calls, and whether to give a relative power of attorney to care for the child in the meantime. It is also important to maintain contact with the child's social worker or case worker if they have one.<sup>22</sup>
4. Generally, your HIV status cannot be used against you in custody proceedings. Discrimination against people living with HIV is prohibited under the Americans with Disabilities Act. The court's chief concern should be the welfare of the child(ren) and HIV status should not be used as a determining factor. However, a judge may find that your status is relevant for other reasons; for example, if you are very sick and would be unable to care for a dependent. There is also the potential that a judge may have inaccurate information and/or biases about people living with HIV.<sup>23</sup>

## **VI. other important considerations for communities that may be targeted by police**

### **If you inject drugs:**

Criminalization of people who use injection drugs can result from laws targeting:

- People living with HIV who share injection equipment
- People who have, buy or distribute drug paraphernalia
- People who possess, buy, use or distribute drugs

Several states have syringe service programs (SSPs)<sup>24</sup> which provide access to free sterile needles/ other injection equipment and dispose of used syringes. These programs usually issue an ID upon registration that has a verification hotline number for police.

Having the ID on your person and/or leaving copies of the ID or registration documents with a trusted person who can access them can be useful, since several states have an exception to their laws prohibiting possession of paraphernalia for people registered in these programs.

### **If you are a person of transgender experience:**

Criminalization can occur under laws that prohibit possession of drug paraphernalia including syringes that are used to inject non-prescribed hormones, steroids, or silicone.

- Always carry an ID if possible; even if your ID does not show the correct gender marker, it is better to show it to the police when they ask.<sup>25</sup>
- With pat downs and strip searches, you may ask for an officer of your gender to conduct the search, however you have no right to have such a request fulfilled and officers might not comply.<sup>26</sup>
- You have the right not to be strip searched in front of other detainees absent an emergency.



- You have a right to access prescription hormones and HIV medication you are currently taking.<sup>27</sup>

### **If you are an immigrant:**

- If you have it, always carry U.S. identification and copies of your immigration documents. Leave copies of all important documents with a trusted friend who is a U.S. citizen. **Never carry false documents or provide false information.**
- In police custody or immigration detention, **do not volunteer information about your immigration status, where you were born, or where you are from.** Immediately ask for a lawyer and only discuss your immigration status with them.<sup>28</sup>
- Always consult with your attorney before directly contacting your immigration officials. Immigration officials are not required to explain all your legal options or other information relevant to maintaining your immigration status.<sup>29</sup>
- Non-citizens in police or ICE custody<sup>30</sup> or who are in immigration detention still have the same right to access essential health services and medication. Unfortunately, immigration enforcement officials are notorious for not upholding those rights. If you cannot get access to HIV related care, immediately contact your attorney. Additionally, your attorney can connect you with immigrant rights advocacy organizations that may be able to help advocate for you.

### **If you are a survivor of or are experiencing intimate partner violence:**

Anti-violence organizations and service providers for survivors may not always understand HIV-related stigma and the ways HIV criminalization laws can be used as tools of coercion and control in abusive relationships.<sup>31</sup>

Organizing or having someone you trust organize a community support effort or campaign that centers your needs and wishes<sup>32</sup> can be helpful when it comes to navigating the criminal justice system.

This support can take many forms including having people:

- Help facilitate communication between you and your loved ones
- Create fundraisers and awareness campaigns to cover your legal expenses, living expenses while incarcerated, and cost of care for dependents, etc.
- Write you letters of support
- Create a reentry safety net for you after release including resources for safe housing, employment, medical care, and emotional support
- Work with your legal team to uphold your rights and dignity<sup>33</sup>

Specialized legal support is available for both you and your defense attorneys through organizations like the National Clearinghouse for Battered Women.<sup>34</sup>

### **If you do sex work:**

Several states impose enhanced penalties for prostitution and solicitation offenses when a sex worker is living with HIV.<sup>35</sup>

Some states require mandatory HIV testing where someone is suspected of being involved in sex work.<sup>36</sup>

- In states that require an HIV test be given upon arrest for solicitation, testing and subsequent disclosure of the results can still happen even if you are ultimately found not guilty.
- If you are not sure about your state's laws on mandatory testing and are being pressured, you can **say that you do not give consent while the test is being administered.** This way, if the test was not required, you can say that you objected.

To find more information on mandatory testing laws in your state, consult the [Center for HIV Law & Policy Sourcebook](#) listed at the end of this guide.

The confidentiality and use of the results of these tests vary across jurisdictions but they can be used to increase sentences as well as to support prosecution under non-disclosure laws.<sup>37</sup> Consult with your attorney about how to protect your privacy.

## resources

### Legal support and resources

- Contact your local public defender's office, HIV legal clinic or service provider
- **Lambda Legal Defense:** [lambdalegal.org](http://lambdalegal.org). Lambda has regional help desks and can refer you to local attorneys as well.  
Western Regional office (CA): 213-382-7600  
National Headquarters (NY): 212-809-8585  
Midwest Regional Office (IL): 312-663-4413  
Southern Regional Office (GA): 404-897-1880  
South Central Regional Office (TX): 214-219-8585
- **American Civil Liberties Union:** to find your local ACLU chapter, visit [aclu.org](http://aclu.org) or call 212-549-2500.
- **Center for HIV Law & Policy:** Call 212-430-6733 or visit [www.hivlawandpolicy.org](http://www.hivlawandpolicy.org)

#### CHLP Resources

- CHLP Sourcebook on HIV Criminalization: <https://www.hivlawandpolicy.org/sourcebook>
- CHLP and LGBTQ Task Force - Syringe Use and HIV Toolkit: [http://www.hivlawandpolicy.org/sites/default/files/Syringe%20Use%20Toolkit%20Final%20R2\\_0.pdf](http://www.hivlawandpolicy.org/sites/default/files/Syringe%20Use%20Toolkit%20Final%20R2_0.pdf)
- CHLP and LGBTQ Task Force - Sex Work and HIV Toolkit: [http://www.thetaskforce.org/wp-content/uploads/2014/09/Sex-Work-HIV-Toolkit-FINAL-R2\\_0.pdf](http://www.thetaskforce.org/wp-content/uploads/2014/09/Sex-Work-HIV-Toolkit-FINAL-R2_0.pdf)
- CHLP's Guidance for People Living with HIV Who Are Threatened with, or Are Facing, Criminal Prosecution for HIV Nondisclosure or Exposure: [https://www.hivlawandpolicy.org/sites/default/files/Crim%20Checklist%20for%20PLWHA\\_122012.pdf](https://www.hivlawandpolicy.org/sites/default/files/Crim%20Checklist%20for%20PLWHA_122012.pdf)
- **National Lawyers Guild National Police Accountability Project:** visit [www.nlg-npap.org](http://www.nlg-npap.org), or call 212-679-5100.

### National networks for support & advocacy for people living with HIV

- Positive Women's Network-USA, [pwn-usa.org](http://pwn-usa.org)
- Positively Trans, <https://transgenderlawcenter.org/programs/positively-trans>
- Sero Project, [seroproject.com](http://seroproject.com)
- THRIVESS, <https://www.thrivess.org/>
- US People Living with HIV Caucus, <http://www.hivcaucus.org/>

### For pregnant people

- ACLU national and state guidelines on pregnancy-related health care and abortion services in prisons, <https://www.aclu.org/state-standards-pregnancy-related-health-care-and-abortion-women-prison-0#hd5>

### For parents

- Legal Services for Prisoners with Children, [Prisonerswithchildren.org](http://Prisonerswithchildren.org)

### For sex workers

- Sex Workers Project, Urban Justice Center, [www.sexworkersproject.org](http://www.sexworkersproject.org)
- Desiree Alliance, [desireealliance.org](http://desireealliance.org)

### For IPV survivors

- Legal Momentum (IPV Survivors), <http://www.legalmomentum.org/>
- National Clearinghouse for the Defense of Battered Women, (technical assistance to attorneys defending IPV survivors), <https://www.ncdbw.org/for-those-charged-with-a-crime>
- National Domestic Violence Pro Bono Registry, <https://www.probono.net/dv/>

### For LGBTQ people of color

- Counter Narrative Project: [thecounternarrative.org](http://thecounternarrative.org)
- API Wellness (LGBTQ people of color), [apiwellness.org](http://apiwellness.org)
- THRIVESS, [thrivess.org](http://thrivess.org)

### For people who use drugs

- Harm Reduction Coalition, [Harmreduction.org](http://Harmreduction.org)
- Drug Policy Alliance, [www.drugpolicy.org/](http://www.drugpolicy.org/)

## Additional resources

Information for incarcerated survivors of IPV:

[Survivedandpunished.org](http://Survivedandpunished.org)

Williams Institute Report on HIV Criminalization in California: <https://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Criminalization-California-Updated-June-2016.pdf>



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