

# Viral Apartheid: The Rise of HIV Exceptionalism

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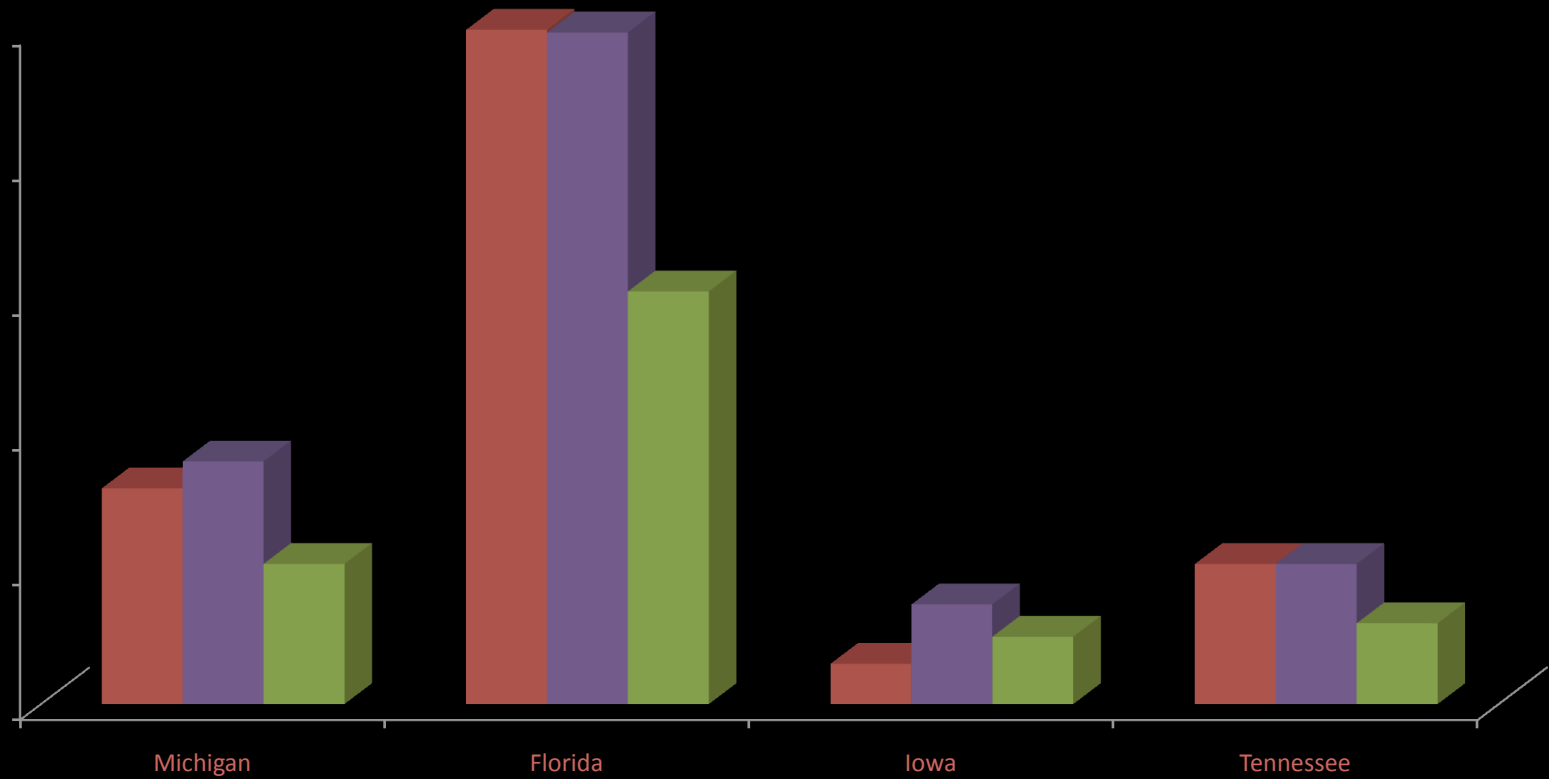
# Viral Apartheid

Disclosure: The following presentation, while the product of research and reporting for the American Independent News Network, does not necessarily represent the views and opinions of AINN. The views expressed are solely those of the presenter. Heywood has been compensated by the Center for HIV Law and Policy for writing a guide on media ethics on reporting on HIV criminalization for that organization.

# Viral Apartheid

- Todd A. Heywood is a person living with HIV. He was diagnosed in 2007. The following presentation is the result of hundreds of hours of interviews with experts, researchers, policy makers and those living with HIV. He is currently writing a book on this topic, by the same name, Viral Apartheid. He lives in Lansing, MI, with his three beloved dogs, Virgil, Gypsy and Gobbo.

# Viral Apartheid



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- The exact nature of the problem is not clearly understood
- Most states do not track specific criminal cases by the criminal code references
- In some states, such as Washington State, the HIV specific law is part of the felonious assault law, and makes teasing the cases out nearly impossible
- The vast majority of cases that we know about are known because of media reports

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- HIV-specific laws:
  - These laws specifically identify those living with HIV and subscribe specific expectations and rules on this class of persons
  - Often rely on disclosure of status as prevention method
  - Reflect the following sentiment: “I can’t imagine a person who would know that a person had AIDS and would sleep with them,” CT Wilson, MD Delegate

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- General Criminal laws
  - This is the use of general laws, such as attempted murder, reckless endangerment or bioterrorism, to charge persons living with HIV.
  - Such prosecutions often over state the risk involved or the potential harm
  - Such prosecutions create dangerous misunderstandings about HIV in the general public

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- In 2009, the Kaiser Family Foundation reported the following:
- 6 in 10 Americans get their information about HIV from the news media
- 23 percent would be uncomfortable with an HIV-positive co-worker
- 35 percent with a positive teacher working with their children
- 42 percent with an HIV-positive room mate
- 51 percent with an HIV-positive person preparing their food



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- KFF found that the general understanding of HIV transmission for the average American remains at a 1987 level
- 27 percent think HIV can be transmitted through a drinking glass
- 17 percent think HIV can be transmitted by touching a toilet seat
- 14 percent think HIV can be transmitted by sharing a pool with an HIV-positive person

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- This lack of understanding related to HIV is play out in the media, the courts and law enforcement when HIV-related criminal charges are brought.
- In spite of the fact that persons with HIV live “normal life spans” today, according to the CDC; HIV is still presented as a “death sentence” in the majority of criminal proceedings and media reports
- The accused are often presented in the media as “serial killers”

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Miasmas and American Public  
Health:  
An Introduction

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- Bacteria as disease causing agent was not a theory until 1890
- Up until then, disease was thought to be caused by “miasmas”
- Miasmas:
  - 1. noxious exhalations from putrescent organic matter; poisonous effluvia or germs polluting the atmosphere.
  - 2. a dangerous, foreboding, or deathlike influence or atmosphere.

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- The presumption of miasma as cause of disease influenced the “Sanitarians” in their war on disease
- The Sanitarian movement was a direct outgrowth of the Second Great Awakening religious movement after the Civil War
- Other movements include women’s and minority rights, voting rights, poverty, workplace rights

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- Sanitarians saw disease linked to poverty, assumed the link was poverty, not the exposure of the poor to dangerous conditions because of poverty
- Open sewers, over crowded tenements, garbage unclean water supplies all centered in the poverty locations of the urban centers
- Focus on poverty led to feeble minded construct of the poor, the forerunner of the “welfare queen” meme

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- As a result of poverty as personal failure concept, Sanitarians and public health developed eugenics programs to help thin out the “feeble-minded” Americans.
- Mostly poor, many immigrants, many women and many minorities impacted.

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- “Clean U B 2”

This is a direct result of the Sanitarians “Cleanliness is next to Godliness” constructs. As a result, a person using this today, without knowing it, is saying:

“I am a straight white, upper middle class heterosexual American born male thus impervious to disease of the poor, people of color and immigrants”



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Koch postulate, or germ theory, first published in 1890.

Argues that a disease causing agent must be present in all cases, that infecting other animals with the agent causes similar disease progress, and that the disease from the animal can be transmitted causing disease again

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- Germ theory led to development of antibiotics and vaccines
- Dozens of classes of antibiotics were in use by the mid-20<sup>th</sup> Century
- Vaccination brought many infectious diseases in America under control: polio, measles, mumps, whooping cough, small pox
- In 1980, the World Health Organization announced that Small Pox had been eliminated from the earth – except in freezers

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With the success of antibiotics and vaccination campaigns, by 1980, many medical schools were encouraging doctors to avoid a specialization in infectious disease and focus instead on heart disease and cancer. Americans generally felt they had conquered infectious disease.

Viral Apartheid  
**A NEW DISEASE RISES**

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- First described in a June 5, 1981 edition of the CDC publication Morbidity and Mortality Weekly Report (MMWR)
- Five cases of previously healthy homosexual men with pneumocystis pneumonia
- Two of the five were dead upon reporting

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- Second report, July 4, 1981 in MMWR
- Identified cases involving homosexual men, Pneumocystis and aggressive form of Kaposi's Sarcoma skin cancer
- 30 cases in all
- Two cities
- 8 dead
- Those who died did so within 24 months of diagnosis

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- Causation theories early on included:
  - New form of cytomeglavirus
  - Toxic response to poppers, amyl nitrate
  - Toxic response to sperm

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- By 1983, science believed the disease then known as Gay Related Immune Deficiency Syndrome (GRID) was caused by a novel infectious agent
- Robert Gallo at National Cancer Institute hypothesized the disease was caused by a retrovirus
- Three separate labs discovered a virus, ultimately called HIV in 1983.



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- In 1984, HHS Secretary Margret Heckler announced the discovery of the cause of AIDS by U.S. scientist Robert Gallo
- It was later determined that the Gallo virus was so genetically similar to the French virus that it was likely Gallo's virus WAS the French virus

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- As the mainstream media began to pick up and report on the deadly new epidemic, the American public responded with fear
- In 1985, top U.S. scientists held a press conference to challenge the “epidemic of fear” that was washing across the U.S.
- Top policy makers public worked to address the HIV crisis by preventing its further expansion

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- “We must conquer AIDS before it affects the heterosexual population and the general population...We have a very strong public interest in stopping AIDS before it spreads outside the risk groups, before it becomes an overwhelming problem.” Margret Heckler, HHS Secretary, April 15, 1985, International AIDS Conference

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“ Dr. Stephen Joseph, New York City Commissioner of Health, reports that HIV is spreading among drug users virtually unabated and predicts that the rate of HIV infection among intravenous drug users may eventually overtake the rate among homosexual men. This is a particularly ominous trend, since intravenous drug users may provide a point of entry for the virus into the general population.” *Politics of Health*, American Legislative Exchange Council, page 9

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The Rise of Criminal Laws

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- HIV-specific laws first became a national policy concept in 1988.
- It was made as a policy recommendation of the Presidential Commission on the Human Immunodeficiency Virus Epidemic.
- The policy recommendation was found in Chapter 9, and was recommendation

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- 9-46 Adoption by the states of a criminal statute — directed to those HIV-infected individuals who know of their status and engage in behaviors which they know are, according to scientific research, likely to result in transmission of HIV — clearly setting forth those specific behaviors subject to criminal sanctions. With regard to sexual transmission, the statute should impose on HIV-infected individuals who know of their status specific affirmative duties to disclose their condition to sexual partners, to obtain their partners' knowing consent, and to use precautions, punishing only for failure to comply with these affirmative duties

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- 9-47 HIV criminal statutes should include strong, uniform confidentiality protection.



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- 9-48 Prior to instituting a case against an accused individual, prosecuting officials should consult with local public health officials to determine whether to prosecute the individual for an HIV transmission criminal offense or whether public health intervention would be more appropriate. Systems should be set up to facilitate this dialogue. During the presentation of the state's case, the prosecuting attorney should introduce, consistent with federal and state rules of evidence, any information held by the public health department regarding intervention measures taken with respect to the infected individual

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- 9-49 HIV criminal statutes should include a provision stating that prior to termination of any period of incarceration or probation under the statute, the offender will be interviewed by state public health officials for the purpose of determining whether further action will be required by the public health authorities upon release of the individual. Such interview proceeding must be subject to procedural due process safeguards, and any action taken by the public health authorities must be pursuant to powers provided by the state's public health laws.

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- 9-50 States should refrain from criminally prosecuting HIV-infected individuals for HIV transmission when the alleged criminal conduct did not involve a scientifically established mode of transmission.

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- “Establishing criminal penalties for failure to comply with clearly set standards of conduct can also deter HIV-infected individuals from engaging in high-risk behaviors, thus protecting society against the spread of the disease,” the Commission wrote. “An HIV-specific statute, on the other hand, would provide clear notice of socially unacceptable standards of behavior specific to the HIV epidemic and tailor punishment to the specific crime of HIV transmission.”

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- While the Commission recommendation appears to support the current laws in the U.S., the reality is the Commission was exceedingly careful to delineate between those who were transmitting the virus, and those who were simply not fulfilling public health expectations.

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- “While we encourage continued state efforts to explore the use of the criminal law in the face of this epidemic, we caution that criminal sanctions for HIV transmission must be carefully drawn, must be directed only towards behavior which is scientifically established as a mode of transmission, and should be employed only when all other public health and civil actions fail to produce responsible behavior. The use of criminal sanctions should not substitute for use of public health measures to prevent transmission.”

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- “I want to insert the word ‘knowingly,’ ‘who knowingly conduct themselves in ways that pose significant risk.’”
- Presidential Commissioner Dr. Frank Kelly, June 17, 1988 Executive Session Transcript. The motion to amend was adopted unanimously.

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- While much of the Commission's report was widely ignored, most historians say, the criminalization recommendation was not.
- On August 5, 1988 President Ronald Reagan sent a memo to department and cabinet heads in relation to implement a "10-point action plan."



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- Memo directed Secretary of Health and Human Services to create a series of consensus conferences, including:
- “One conference should address restrictive measures and criminal statutes directed to HIV-infected persons who knowingly persist in maintaining behaviors that transmit their infection.”

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- It remains unclear if such a conference – or even series of conferences – were ever held by HHS.

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- The next time criminalization becomes a key federal policy initiative it comes from the Congress.
- The Ryan White Comprehensive AIDS Resources Emergency Act (Ryan White CARE Act, 1990) enshrined the recommendation in law.

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- Ryan White CARE Act language:
- **"SEC. 2647. REQUIREMENT OF STATE LAW PROTECTION AGAINST INTENTIONAL TRANSMISSION.**
- **6I(a) IN GENERAL.**-The Secretary may not make a grant under section 2641 to a State unless the chief executive officer determines that the criminal laws of the State are adequate to prosecute any **HIV** infected individual, subject to the condition described in subsection (b),who-

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- Ryan White CARE Act language continued:
- "(1) makes a donation of blood, semen, or breast **milk**, if the individual knows that he or she is infected with HIV and intends, through such donation, to expose another HIV in the event that the donation is utilized;"

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- Ryan White CARE Act language continued:
- "(2) engages in sexual activity if the individual knows that he or she is infected with HIV and intends, through such sexual activity, to expose another to **HIV**; and"

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- Ryan White CARE Act language continued
- "(3) injects himself or herself with a hypodermic needle and subsequently provides the needle to another person for purposes of hypodermic injection, if the individual knows that he or she is infected and intends, through the provision of the needle, to expose another to such etiologic agent in the event that the needle is utilized."

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- Ryan White CARE Act language continued:
- "(b) CONSENT TO RISK OF TRANSMISSION.-The State laws described in subsection (a) need not apply to circumstances under which the conduct described in paragraphs (1)through **(3)** of subsection (a) if the individual who is subjected to the behavior involved knows that the other individual is infected and provides prior informed consent to the activity."



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- Congress, in adopting Ryan White CARE Act clearly wanted “intentional transmission” criminalized.

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The Ryan White CARE Act provisions were inserted in the legislation to prevent Sen. Jesse Helms' amendment which would have created a new federal crime for any person who had ever engaged in commercial sex work or used drugs to donate blood.

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- American Legislative Exchange Council
- Free market, conservative think tank (most recently in the news for anti-union work in Wisconsin, Ohio and Michigan)
- 1988-89 Task Force On State AIDS Policy
- Former staffer Michael Tanner reports the task force was driven by a drug company

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- Published a book in 1989, *The Politics of Health: A State Response to the AIDS Crisis*
- Contained model HIV Assault Law
- In 1991, ALEC reports six states had introduced some version of HIV Assault Law
- Tanner now admits the recommendations were made in fear, should be revisited based on new science.

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- The National HIV/AIDS Strategy released by the Obama Administration in July 2010, contained a clear statement to states to revisit the laws.

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- “In many instances, the continued existence and enforcement of these types of laws run counter to scientific evidence about routes of HIV transmission and may undermine the public health goals of promoting HIV screening and treatment,” the report says, after acknowledging the rationale behind passage of such laws. “CDC data and other studies, however, tell us that intentional HIV transmission is atypical and uncommon. A recent research study also found that HIV-specific laws do not influence the behavior of people living with HIV in those states where these laws exist.” – From Michigan Messenger, July 20, 2010

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- In spite of this call, the Department of Justice reports:
- “DOJ has not been asked by any state to provide technical assistance on this issue. If the department had been asked, we would have worked with that state to provide whatever information they required or that would have been helpful to them in reviewing their state law.” Andy Adora, Spokesperson U.S. DOJ, email June 26, 2012

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- Congresswoman Barbara Lee (D-CA) has introduced the REPEAL HIV Discrimination Act.
- The legislation, if passed, would provide incentive money to states to repeal the HIV-specific laws
- The legislation says HIV criminalization “violates the civil and human rights of individuals who are HIV positive.”



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- On July 7, 2012, the Global Commission on HIV and the Law issued its final report: “Risks, Rights and Health”
- The report declared HIV-specific laws a violation of the “fundamental human rights” of persons with HIV

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- Global Commission Recommendations:
- “2.1 Countries must not enact laws that explicitly criminalise HIV transmission, HIV exposure or failure to disclose HIV status. Where such laws exist, they are counterproductive and must be repealed. The provisions of model codes that have been advanced to support the enactment of such laws should be withdrawn and amended to conform to these recommendations.”

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- Global Commission Recommendations:
- “2.2. Law enforcement authorities must not prosecute people in cases of HIV non-disclosure or exposure where no intentional or malicious HIV transmission has been proven to take place. Invoking criminal laws in cases of adult private consensual sexual activity is disproportionate and counterproductive to enhancing public health.”

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- Global Commission Recommendations:
- “2.4. Countries may legitimately prosecute HIV transmission that was both actual and intentional, using general criminal law, but such prosecutions should be pursued with care and require a high standard of evidence and proof.”

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- Global Commission Recommendations:
- “2.5. The convictions of those who have been successfully prosecuted for HIV exposure, non-disclosure and transmission must be reviewed. Such convictions must be set aside or the accused immediately released from prison with pardons or similar actions to ensure that these charges do not remain on criminal or sex offender records.”

# **VIRAL APARTHEID: THE EVIDENCE OF FAILURE**

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- The Transmission question – new science and new evidence
- The perception of many Americans is that HIV is a death sentence, when, in fact, current medical interventions have made HIV infection a chronic manageable disease for those who have access to care and treatment.

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- Lingering misconceptions about how HIV is transmitted may be a contributing factor to discomfort around HIV-positive individuals. People who harbor misconceptions about HIV transmission are more likely to say they would be uncomfortable working with someone with HIV (43 percent, compared with 13 percent of those who know that HIV cannot be transmitted in these ways), and more likely to be uncomfortable having their food prepared by someone who is HIV-positive (71 percent compared with 40 percent).



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**New information from the CDC on transmission risks,  
released July 20, 2012 on a new website related to HIV  
criminalization.**

**<http://www.cdc.gov/hiv/law/transmission.htm>**

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- Receptive Anal Intercourse: 50 infections per 10,000 exposures (.5 %)
- Receptive Penile-Vaginal Intercourse: 10 infections per 10,000 exposures (.1%)
- Insertive Anal Intercourse: 6.5 infections per 10,000 exposures (.065%)
- Insertive Penile-Vaginal Intercourse: 5 infections per 10,000 exposures (.05%)
- Receptive or Insertive Oral Sex: Low
- Biting, Spitting or Sex Toys: Negligible

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- The previous estimates are figured without taking into account viral load or condoms.
- Undetectable viral load from ART reduces transmission probability by 96 percent
- Condom use reduces transmission by 80 percent.

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- Other STI transmission probabilities:
- Gonorrhea: from infected male to female – 60-90 percent per exposure
- Gonorrhea: infected female to male – 20-30 percent per exposure
- CDC just issued new guidance announcing a super Gonorrhea bacteria that is resistant to most antibiotic classes.

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- “These norms are weakened by HIV disclosure laws that appear to limit HIV-positive persons’ responsibilities to disclosure only, and to suggest that at-risk persons rely on partners disclosing their serostatus to determine whether condom use is necessary. In short, existing HIV serostatus disclosure laws not only fail to complement public health prevention efforts to promote condom use, they appear to undermine them.”  
Carol Galletly and Scott Pinkerton, AIDS and Behavior, 2006

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- Reliance on sero-status disclosure is called “sero-sorting” in risk reduction language
- It means like with like. HIV-positive with HIV-positive only and HIV-negative with HIV-negative only.
- Sero-sorting is vastly inferior to other risk reduction methods of condoms, sero-positioning and monogamy.

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- HIV annual incidence in people with no safer-sex strategy was 2.95%. In serosorters, it was 1.44% (a 51% reduction in HIV incidence).
- “After this, the next riskiest thing was 100% condom use/no anal sex: the seroconversion rate in this group was 0.76% a year (74% reduction).
- Seropositioning was about as safe: the incidence rate was 0.73% (75% reduction).
- “Men who were ‘top only’ only had an HIV incidence rate of 0.4% (86% reduction).
- And the safest option of all was old-fashioned monogamy; in monogamous men the annual HIV incidence rate was only 0.25%, a 91.5% reduction in HIV risk.

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- Even in adopting the recommendations for criminalization, Commissioners conceded a concern that people would forego testing in order to avoid punishment



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- “I want to suggest a Catch 22 that people are missing. If ignorance of HIV status eliminates this entire thing...[some one will say] ‘Well, I don’t want to get tested, but I want to go out and have sex and I don’t want to have any repercussions.’ He’s found a loophole that’s better than anything we ever did for tax evasion.” Dr. Theresa Crenshaw, June 17, 1988, Executive Session transcript

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- Take the test, risk arrest
- Until May, anecdotal evidence only
- In May, Journal of the Association of Nurses in AIDS Care (JANAC) published a study of men who have sex with men in Ottawa, CA.

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- JANAC study:
- “In the wake of a series of high-profile HIV nondisclosure prosecutions, researchers surveyed men who have sex with men in Ottawa, Canada. They found that a significant minority of participants — 17 percent — said the prosecutions had ‘affected their willingness to get tested for HIV,’ and nearly 14 percent said the prosecutions ‘made them afraid to speak with nurses and physicians about their sexual practices.’”
- The researchers found that this same group reported receiving less testing for HIV and other sexually transmitted infections, was more likely to engage in higher-risk sexual activities, and had a higher number of recent sexual partners.

**VIRAL APARTHEID: INHIBITING  
ACCESS TO JUSTICE**

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- Sero Project Preliminary Survey results
- 2,078 people living with HIV in the United States
- Online survey June and July 2012
- Findings show “tremendous alienation and vulnerability” for people with HIV and the criminal justice system

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- Do you trust you will get a fair hearing if accused of failing to disclose your status to a sexual partner?
- 49% did not trust
- 30% unsure
- 21% did trust

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- Do you worry about being falsely accused of not disclosing?
- 29% said they worried a few times
- 9% said they worried frequently

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- How clear are you on what is prohibited by your HIV law?
- 48% said not clear
- 30% somewhat clear
- 63% reported they were unsure if their state had a law
- 73% said they were not informed when they tested positive about a state law



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- Trevor Hoppe, University of Michigan Ph.D. candidate in Sociology and Women's Studies
- Analysis of transcripts of 30 convictions under Michigan's disclosure law
- Found justice system still referred to HIV as a death sentence, with the most reference between 2007 and 2010.

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- Black men who have sex with women represented 14 % of the cases of HIV in the surveyed counties, but represented 41% of the defendants
- Conversely, white men who have sex with men represented 39% of HIV cases in the regions, but only 15% of defendants
- Points to a possible racial disparity in prosecutions in Michigan.

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- Galletly et al, Journal For AIDS Behavior
- “Twenty-three U.S. states currently have laws that make it a crime for persons who have HIV to engage in various sexual behaviors without, in most cases, disclosing their HIV-positive status to prospective sex partners. As structural interventions aimed at reducing new HIV infections, the laws ideally should complement the HIV prevention efforts of public health professionals. Unfortunately, they do not. This article demonstrates how HIV disclosure laws disregard or discount the effectiveness of universal precautions and safer sex, criminalize activities that are central to harm reduction efforts, and offer, as an implicit alternative to risk reduction and safer sex, a disclosure-based HIV transmission prevention strategy that undermines public health efforts. The article also describes how criminal HIV disclosure laws may work against the efforts of public health leaders to reduce stigmatizing attitudes toward persons living with HIV.”

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- “Moreover, the disclosure-based norm endorsed by these laws encourages at-risk persons to rely on prospective sex partners to disclose their HIV status, if positive, and to assume that there is minimal risk absent positive serostatus disclosure. Serostatus disclosure laws thus may foster a false sense of security among HIV-negative persons who may choose to forgo condom use unless notified of their partners’ HIV-positive status,” the researchers wrote. “These norms are weakened by HIV disclosure laws that appear to limit HIV-positive persons’ responsibilities to disclosure only, and to suggest that at-risk persons rely on partners disclosing their serostatus to determine whether condom use is necessary. In short, existing HIV serostatus disclosure laws not only fail to complement public health prevention efforts to promote condom use, they appear to undermine them.”

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- “Incidence of HIV infection in states with and without HIV exposure laws does not differ, as one would expect if the laws were preventing new infections.”