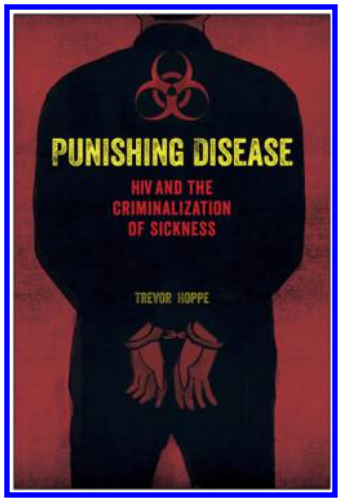
Justice, Science, and HIV: Challenging HIV Criminalization



Punishing Disease: HIV and the Criminalization of Sickness
By Trevor Hoppe
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The criminalization of HIV exposure is a highly flawed strategy to protect the public's health. The theory behind it is simple enough: by requiring people who know they are living with HIV to disclose their status, under penalty of law, the state might prevent transmission to sexual and needle-sharing partners. Criminalization also is a societal statement of disapproval of risking transmission of HIV without informing partners.

Yet the major risk of transmission is not among people who know their status, but with those living with HIV who do not know their status and are not on treatment. Recently infected individuals whose status may not show up on standard HIV tests for six months are a particular problem. Meanwhile, criminalization discourages people from being tested while subjecting people with HIV to the detriments of the criminal justice system, including long-term negative economic and health consequences.[1–3] In any case, how could that system know what was, or was not, said before sex? Yet, more than 30 years into the epidemic and despite copious evidence that the policy is unjust and ineffective, 26 states criminalize HIV exposure.[4] Why?

MASS INCARCERATION

In his new book, Trevor Hoppe adeptly explores the shape, drivers, and process of criminalization of HIV in the contemporary United States. Hoppe shows how patterns that harken back to earlier practices of quarantine persist into today's HIV legal context. *Punishing Disease* describes the "perfect storm" (p. 7) in which the birth of mass incarceration coincided with an outbreak of a new, deadly disease disproportionately affecting disfavored social groups. The rise of conservative political figures such as Jesse Helms and Jerry Falwell set the stage for a punitive response, including calls for quarantine, branding of people living with HIV, and compulsory screening.

The war on drugs during this era had an analogous war on sex, with homophobia at its center. But, as Hoppe documents, the punitive strategy of criminalization was not a simple story of culture wars targeting gay sexuality. HIV criminalization also came amid a broader criminal justice trend away from rehabilitation and a racist backlash to civil rights often portraying Black men as predators.

Moves in state after state to make HIV exposure a crime are thus part of the complex American politics of the past three decades. Hoppe's book helps us better understand why "no disease in modern American history has been met with a similarly systematic campaign to criminalize people living with an infectious disease" (p. 5).

Punishing Disease is built around two interlinked ideas: the inclination toward "punitive disease control" and a political context that fostered "criminalization of sickness." It is not obvious that criminal law is the logical venue to address disease transmission. Yet the incurable and in early years untreatable disease of HIV emerged into a climate of fear. A long line of US law allowed wide use of police powers, including those allowing forced isolation of people with tuberculosis. But for HIV, with no cure, this would have meant imprisoning people for life, which was untenable.

The move to criminalize HIV exposure was amplified by high-profile cases in which prosecutors struggled to convict individuals who had recklessly or intentionally transmitted the virus under general criminal laws of assault or attempted murder. Hoppe deftly traces how these cases led to new felony crimes and how public health was used as a pretense for punishing gay sex, illustrated by legislative debates from Virginia and Nevada

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that leave little doubt about legislators' homophobic intent. When President Reagan's commission on HIV called for HIV-specific criminal laws to "provide clear notice of socially unacceptable standards of behavior" (p. 122), the conservative American Legislative Exchange Council quickly developed a model law diffused to legislatures across the country.

The book also shows the dangerous disconnect between the rapidly changing science of HIV and the actions of prosecutors and courts. This is richly illustrated with examples of cases of people with HIV imprisoned simply for having sex, even when transmission did not occur and in some cases was not even scientifically plausible (e.g., "nasal–vaginal penetration"). Most importantly, courts have not acknowledged that HIV is now treatable, a fact of which judge after judge took no notice.

EXPOSURE CONVICTIONS

Among Hoppe's most remarkable contributions is an analysis of how race, gender, and sexuality drive cases based on an original data set of 431 convictions in Arkansas, Florida, Louisiana, Michigan, Missouri, and Tennessee. Despite gay men making up a majority of men living with HIV, Hoppe finds that heterosexual men account for the majority of exposure convictions (p. 170). As a percentage of HIV diagnoses, HIV-positive heterosexual men are convicted at rates seven times greater than gay men.

With respect to race, Hoppe finds similarly surprising data. There are multiple anecdotes of highly racialized prosecutions such as that of Michael Johnson, a Black gay college student recently released after being convicted in an overwhelmingly White, conservative Missouri county. Yet Hoppe finds that both Black straight men and Black gay men are convicted at rates similar to those among their White counterparts.

Delving further, Hoppe shows that the most important factor predicting conviction is the characteristics of the "victim." HIV exposure of women, particularly White women, is linked to the highest rates of conviction. According to Hoppe, one reason could be likelihood of reporting. Black partners may be less likely to file charges against Black partners for a variety of socially rooted reasons. There may also be a "shock" factor in which partners from groups with lower HIV prevalence rates may be more alarmed, explaining the inverse relationship between HIV prevalence in the "victim" group and conviction. Note that the sample size, particularly for gay men, is small, and Hoppe does not test whether the relationships he observes are statistically significant. Nonetheless, these important findings complicate prevailing narratives used to challenge criminalization. Race, sexuality, and gender appear to be playing different roles than many suggest, an insight helpful for effective reform.

"HIV STOPS WITH ME"

We quibble some with Hoppe's thoughtful work on the connection between public health and criminalization. In chapter 2, "HIV Stops With Me," Hoppe takes on public health messaging from the Centers for Disease Control and Prevention (CDC) and local officials for what he calls the "repolarization of post-AIDS HIV prevention." By this he means a move from safer sex messaging for general populations to "targeting people living with HIV for HIV prevention." A 2003 CDC report ushered in this shift, and a 2011 study showing that antiretroviral treatment effectively stops HIV transmission began the era of "treatment as prevention." Hoppe suggests that this messaging unintentionally contributed to the criminalization of HIV. This claim requires more evidence. Indeed, Hoppe's thorough annex of HIV criminalization laws shows that 143 laws were passed before 2003, but just 19 after the new CDC policy was produced. Although this does not conclusively refute his theory, it calls for richer data on the timing and trends of prosecutions.

In some ways a focus on criminalization of HIV—a comparatively rare event—can divert attention from the more common health effects of untreated HIV. The powerful lens of "undetectable = untransmittable" has been empowering for many people living with HIV and is gaining ground globally as a result of the efforts of groups led by people with HIV.[5] Hoppe is right to encourage balanced messaging, but there is also significant good to come from sensitizing those living with HIV about the benefits of antiretroviral treatment.

PUNITIVE RESPONSES

The complex story of HIV criminalization reveals a great deal about the power of the state in securing, and undermining, public health and human rights. *Punishing Disease* analyzes this complexity with compelling theoretical depth and robust empirical evidence. Although AIDS is in many ways unique, recent epidemics from Zika to Ebola show that the American instinct toward punitive responses to disease remains well entrenched, and this is made all the more complex as that instinct interacts with the contexts of race, class, gender, and sexuality. Shifting this trajectory for HIV and for the pandemics to come is a difficult but urgent task for public health. AJPH

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CONFLICTS OF INTEREST
We declare no conflicts of interest.

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