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FROM: Gary Daniels, Chief Lobbyist, ACLU of Ohio
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RE: Ohio Laws Criminalizing HIV

The American Civil Liberties Union of Ohio respectfully submits the following comments to the Ohio Criminal Justice Recodification Committee with suggestions for changes to Ohio's laws criminalizing HIV.

Having a chronic illness should not create a basis for you to be criminally prosecuted, but that's exactly what Ohio's Criminal Code does to people living with HIV. This unfair treatment has no basis in modern-day science or public health research, and, in fact, undermines public health.

The early days of the AIDS epidemic were terrifying. No one understood how this infection spread or what treatment worked. That fear of the unknown resulted in many bad laws being passed and bad policies being implemented. Thankfully, living with HIV today is much different than it was 30 years ago. However, the laws have not been changed to reflect medical advancements in our understanding and treatment of HIV.

Based on solid and irrefutable medical science, we now understand that HIV is no longer a death sentence, but rather a treatable, chronic illness like diabetes or other autoimmune disorders. In fact, "as of 2013, a 20-year-old with the HIV virus who is on ART (antiretroviral therapy) and is living in the United States or Canada has a life expectancy into their early 70's, a life expectancy that approaches that of general population."¹

As noted above, many of the laws that criminalize HIV in the Ohio Revised Code were promulgated during a time of fear before any of the scientific advances that have now transformed the nature of HIV. We are now presented with an incredible opportunity to update our state laws to reflect current best medical practices and to support public health research. Failure to make these changes could have devastating consequences to public health.

¹ Samji, H., A. Cescon, R. S. Hogg, S. P. Modur, K. N. Althoff, K. Buchacz, A. N. Burchell, et al. 2013. "Closing the gap: Increases in life expectancy among treated HIV-positive individuals in the United States and Canada." PLoS ONE 8 (12).

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For example, there are more than 300,000 people living with HIV in the U.S. who are unaware of their infection status.² Studies show that fear of a positive result is a disincentive to seeking testing.³ The National HIV/AIDS Strategy for the United States,⁴ recognizes that HIV stigma is a barrier to HIV testing, and the Centers for Disease Control (CDC) has asserted that HIV "stigma hampers prevention."⁵ The possibility of criminal prosecution increases the stigma and creates further disincentives for testing.

Arguments that criminalizing HIV will help prevent the disease are not supported by reality. Public health models of HIV prevention recommend that people get tested and obtain medical care as quickly as possible if test results are positive. People in the U.S. who were infected with HIV but remained undiagnosed because they did not seek testing were linked to 30.2 percent of new infections.⁶ We know that stigma contributes to people not pursuing testing. Testing is the first step toward getting into treatment. Treatment provides risk-reduction opportunities to reduce transmission in the future. Criminalization laws like those found in Ohio's Revised Code contribute to this stigma, disincentive testing, and provide no documented effectiveness in reducing HIV transmission. Because the laws that criminalize HIV require that a person know he or she has HIV, they have the perverse effect of deterring testing and people are less likely to become aware of their status if they know that doing so could lead to criminal penalties.

Additionally, these laws do not consider the actual risks of HIV transmission, how transmission occurs, or whether a person intends to transmit the virus. The CDC acknowledges that "the majority of these criminalization laws were passed before antiretroviral therapy, which can reduce the risk of HIV transmission by up to 96 percent."⁷ Antiretroviral therapy suppresses the HIV virus, reducing it to undetectable levels in the body, making transmission very unlikely to impossible.⁸

According to the CDC, HIV is spread from one infected person to another through direct contact with bodily fluids, including blood, semen, pre-seminal fluid, rectal fluids, vaginal fluids, and breast milk. These are the only bodily substances that carry the HIV virus, and in order to be transmitted, a person must come into contact with these fluids by being

² Janssen, R S., Holtgrave, D R., Valdiserri, R O., Shepherd, M., Gayle, H D., De Cock, K M. 2001. The serostatus approach to fighting the HIV epidemic: Prevention strategies for infected individuals. *American Journal of Public Health*, 1019-1024.

³ Valdiserri RO, Holtgrave DR, West GR. 1999. "Promoting early HIV diagnosis and entry into care. *AIDS*." *AIDS*, 2317-2330.

⁴ <https://www.whitehouse.gov/sites/default/files/uploads/NHAS.pdf>

⁵ Valdiserri, R. 2002. "HIV/AIDS stigma: An impediment to public health." *American Journal of Public Health*, 341-342.

⁶ Frellick, M. 2015. Lapses in diagnoses, care tied to 91% of new HIV infections. *Medscape Medical News*, Retrieved from <http://www.medscape.com/viewarticle/840266>.

⁷ Lehman, J., Carr, M., Nichol, A., Rusanchez, A., Knight, D., Langford, A.,...Mermin, J., Gray, S., et al. 2014. "Prevalence and public health implications of state laws that criminalize potential HIV exposure in the United States." *AIDS Behavior*, 997-1006.

⁸ Centers for Disease Control and Prevention. Retrieved from <https://www.aids.gov/hiv-aids-basics/hiv-aids-101/how-you-get-hiv-aids/>.

directly injected into the bloodstream (like by a needle or syringe) or by the fluid coming into contact with a mucous membrane, soft, moist areas just inside the openings to your body (i.e. the mouth, vagina, rectum, or penis).⁹

Ohio laws that criminalize HIV do not take into account the variable risk of exposure in different sexual activities. Ohio laws also fail to consider whether a person is on antiretroviral therapy, a factor that makes transmission very unlikely. "Here are the average chances of contracting HIV based on common types of exposure without factoring in how condoms or medical treatment would reduce risk even further."¹⁰

Activity	Risk-per-exposure
Vaginal sex, HIV positive female-to-male	4 in 10,000
Vaginal sex, HIV positive male-to-female	8 in 10,000
Anal sex between men, receptive partner HIV positive	7 in 10,000
Anal sex between men, insertive partner HIV positive	82 in 10,000
Receptive fellatio (giving a man living with HIV a "blow job")	0 to 4 in 10,000
Insertive fellatio (getting a "blow job" from a person living with HIV)	0
Injecting drug use	63 to 240 in 10,000

Because Ohio's laws that criminalize HIV do not consider intent, risk of transmission, or even whether transmission actually occurred, and because the existence of such laws actually deters people from being tested, the following sections of the Ohio Revised Code should be updated to reflect modern best medical and public health practices and research. It is time that Ohio takes steps to reduce the spread of HIV rather than hinder efforts to combat the disease through outdated criminal laws.

Felonious assault (O.R.C. 2903.11) – Felonious assault is a felony of the second degree, unless the victim is a peace officer or BCI investigator when it is a felony of the first degree. Section (B) (1-3) should be removed:

"No person with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome shall knowingly:

- 1) Engage in sexual conduct without disclosure prior to sexual conduct*
- 2) Engage in sexual conduct with a person whom the offender knows or has reasonable cause to believe lacks the mental capacity to appreciate the significance of the knowledge*

⁹ Centers for Disease Control and Prevention. Retrieved from <https://www.aids.gov/hiv-aids-basics/hiv-aids-101/how-you-get-hiv-aids/>.

¹⁰ The Center for HIV Law & Policy. Retrieved from <http://www.hivlawandpolicy.org/resources/why-are-we-putting-people-jail-having-hiv-a-grassroots-guide-hiv-criminalization-facts>

3) *Engage in sexual conduct with a person under 18 years of age who is not the spouse of the offender*

This section criminalizes what would otherwise be consensual adult sexual interaction, including sexual conduct (defined by O.R.C. 2907.01) that carries no risk of HIV transmission.

Additionally, the provision does not take into consideration whether the HIV virus was actually transmitted and/or whether the person living with HIV used risk reduction methods like taking antiretroviral therapy or using a condom. This is an automatic charge without taking into account the relevant circumstances. By allowing people living with HIV to be charged under felonious assault laws even where there is virtually no risk of actual HIV transmission, our state perpetuates the stigma that hampers prevention efforts that ultimately discourages people from getting tested.

By removing Section (B) (1-3), felonious assault charges can still be brought against someone who is living with HIV, who intends to spread the virus, and who does so under (A) (1): "No person shall knowingly do either of the following: (1) Cause serious physical harm to another or to another's unborn." This will force our legal system to prove intent and take a person's risk-reduction measures into consideration.

Loitering to engage in solicitation (O.R.C. 2907.241) – If a person loiters with purpose to solicit another to engage in sexual activity, it is a misdemeanor of the third degree. If the person loitering is living with HIV, then it is a felony of the fifth degree. Section (B) should be removed:

"No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall engage in conduct in violation of division (A) of this section."

By removing section (B), loitering to engage in solicitation remains a crime, but substantial additional penalties are not attached because someone is living with HIV. Living with HIV should not come with additional penalties that mean the difference between 30 days in jail and a misdemeanor record and 6-12 months in prison with a felony record.

Soliciting after positive HIV test (O.R.C. 2907.24) – If a person solicits someone for sex, it is a misdemeanor of the third degree. If the person soliciting someone for sex is living with HIV, then it is a felony of the third degree. Section (B) should be removed:

"(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall engage in conduct in violation of division (A) of this section."

For the same reasons articulated above on the loitering provisions, solicitation would still be a crime, but additional penalties are not attached simply because someone is living

with HIV. Merely talking to someone while living with HIV—regardless of the content of that conversation—should not come with additional penalties that means the difference between 30 days in jail with a misdemeanor record and up to five years in prison with a felony record, especially when HIV transmission will not occur.

Prostitution (O.R.C. 2907.25) – If a person is found guilty of prostitution, it is a misdemeanor of the third degree. If the person engaging in sexual activity for hire is living with HIV, it is a felony of the third degree. Section (B) should be removed:

“No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall engage in sexual activity for hire.”

The definition of sexual activity is providing sexual activity in exchange for anything of value. Sexual conduct (O.R.C. 2907.01) includes by definition sexual acts that carry no or negligible risks of HIV transmission. At best, this statute is overbroad. At worst, it again criminalizes a status – living with HIV – and hinders prevention efforts. There is no language about intent, disclosure, or taking part in risk-reduction methods like antiretroviral therapy or using a condom. Persons living with HIV are automatically charged with felonious criminal behavior without taking into account any relevant circumstances, including the actual risk of spreading the virus.

It is the reality that some people will make their money in sex work. It is absolutely critical to public health that sex workers get tested and into treatment if they are living with HIV. This law discourages testing and treatment.

Testing and treatment for venereal diseases and HIV (O.R.C. 2907.27)

“(iv) If the accused tests positive for HIV and the accused was charged with, and was convicted of or pleaded guilty to, a violation of section 2907.24, 2907.241, or 2907.25 of the Revised Code or a violation of a municipal ordinance that is substantially equivalent to any of those sections, the test results also shall be reported to the law enforcement agency that arrested the accused, and the law enforcement agency may use the test results as the basis for any future charge of a violation of division (B) of any of those sections or a violation of a municipal ordinance that is substantially equivalent to division (B) of any of those sections.”

If the committee decides to make changes to the above codes then this section will need reviewed and adjusted accordingly. If the additional penalties related to living with HIV are removed from the soliciting, loitering, and prostitution sections, then tests results will no longer need to be reported to law enforcement agencies.

Harassment with bodily substance by an inmate (O.R.C. 2921.38) – Whoever violates this is guilty of a felony of the fifth degree. If the person found guilty is living with HIV, then it

is a felony of the third degree. The following section (C) needs changed to reflect current science about HIV transmission:

“(C) No person, with knowledge that the person is a carrier of the virus that causes acquired immunodeficiency syndrome, is a carrier of a hepatitis virus, or is infected with tuberculosis and with intent to harass, annoy, threaten, or alarm another person, shall cause or attempt to cause the other person to come into contact with blood, semen, urine, feces, or another bodily substance by throwing the bodily substance at the other person, by expelling the bodily substance upon the other person, or in any other manner.”

The CDC categorizes “the risk of transmission of HIV from biting, spitting, or throwing body fluids, even in the absence of risk reduction measures, as negligible, defined as exposure routes that are technically possible but unlikely and not well documented.”¹¹

Imagine two prisoners who both spit on a corrections officer. One is not living with HIV so 6-12 months is added onto his sentence after being found guilty. For the exact same conduct (even though HIV cannot be transmitted through spitting on someone), the prisoner living with HIV is given an additional 9-36 months, as much as six times the jail time for the same crime. The only difference is one prisoner is living with HIV. There is no rational reason for enhancing the sentence of a person living with HIV for doing things that cannot transmit the virus.

The ACLU of Ohio has long fought against discrimination of people living with HIV. Even though medical advances have greatly improved people’s lives, people living with HIV still experience discrimination in employment, housing, and especially when their lives intersect with the criminal justice system. Ohio has a chance to reduce the amount of discrimination and bring our criminal code in line with medical, science, and public health best practices.

If you have questions or want more information, you can reach us at gdaniels@acluohio.org, agavula@acluohio.org, or 614-586-1959. Thank you for your time and attention.

¹¹ Centers for Disease Control and Prevention, Retrieved from <http://www.cdc.gov/hiv/policies/law/risk.html>