



Punishment is Not a Public Health Strategy: The Criminalization of Viral Hepatitis

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HIV+ Since 1988/HCV Cured 2005

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<http://hivmodernizationmovement.org/>

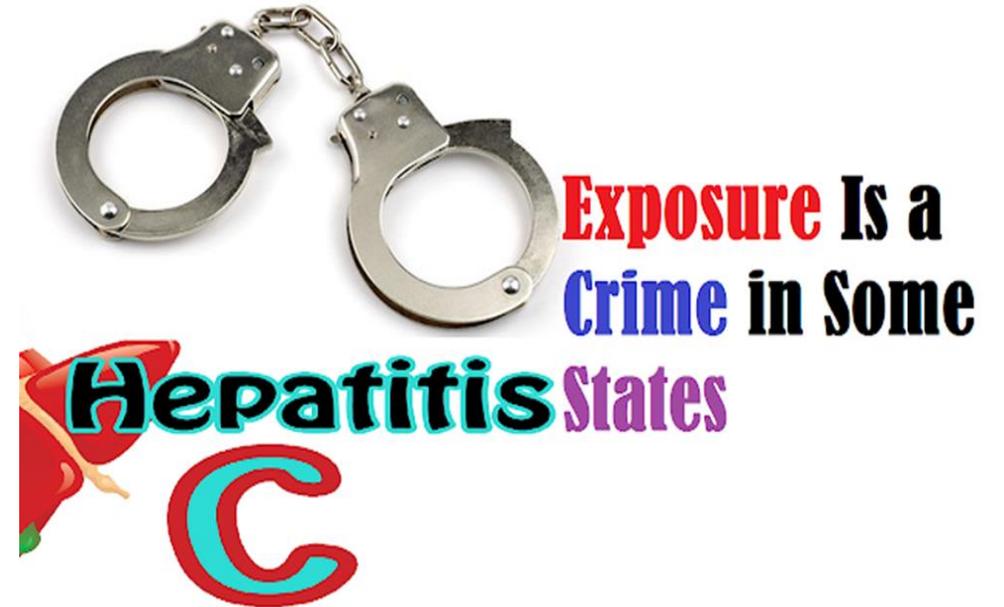
Background

- The **HIV Modernization Movement- Indiana** has been focused on modernizing Indiana's HIV criminal laws and related public health policy since 2016. (Part of a national movement)
- **HIV Criminalization is** the arrest, prosecution, and imprisonment of people living with HIV (PLHIV) for things that are perfectly legal or only minor crimes for people who have not tested positive Laws include:
 - Non-disclosure of HIV status prior to consensual sex or needle sharing.
 - Exposure to bodily fluids while HIV-positive.
 - Sex solicitation while HIV-positive.
 - Many cases involve acts that pose zero risk of HIV transmission, including spitting, biting, scratching, oral sex, sex using proven prevention methods.



Background

- Recently there has been a growing movement to similarly **end the unjust criminalization of people living with viral hepatitis**. Several developments have led to this movement:
 - The criminalization of viral hepatitis as an HIV criminal law reform strategy in Iowa (2014)
 - States proposing new criminal laws that target viral hepatitis exposure (e.g., South Dakota in 2018, Michigan in 2014)
 - Prosecutions of people for viral hepatitis exposure (ongoing)
 - Major increases in burden of viral hepatitis due to opioid crisis (ongoing)
- Most laws criminalizing viral hepatitis came about at the same time as those targeting HIV.



Over View of Viral Hepatitis Criminalization



■ What is criminalized?

- Law may apply to viral hepatitis generally (e.g., Ohio) or it may enumerate specific kinds of hepatitis (e.g., Idaho targets HBV) or do both (Indiana)
- Transmission is typically *not* required

■ What kinds of behaviors are targeted?

- Short answer is all the same things we see in HIV criminal laws!
 - Spitting, biting and other forms of bodily fluid exposure (including things not known to transmit hepatitis such as urine) -- often specific to interactions with law enforcement or correctional personnel.
 - Sex without prior disclosure of status and/ or Needle-sharing
 - “Knowing exposure” = just about anything goes

■ What is the punishment?

- Ranges but often is a serious felony (e.g., in Georgia, can face up to 20 years in prison)

PUNISHMENT IS NOT A PUBLIC HEALTH STRATEGY

AN OVERVIEW OF STATES CRIMINALIZING VIRAL HEPATITIS

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STATES
WITH LAWS/
ENHANCEMENTS
SPECIFIC TO LAW
ENFORCEMENT/
CORRECTIONS



13
STATES

have laws that
criminalize viral
hepatitis.

All 13 of these states
also criminalize HIV.

TYPE OF HEPATITIS CRIMINALIZED:

-  Hepatitis B and C
-  Hepatitis B
-  General/Unspecified

STATES THAT SPECIFICALLY CRIMINALIZE:

-  Sex
-  Needle Sharing
-  Bodily Fluid Exposure
-  States with laws written broadly enough so that people living with viral hepatitis could be arrested for sex, needle sharing or bodily fluid exposure

Indiana Laws that Criminalize PLHIV/PLH

IC 16-41-7-1 / IC 35-45-21-3

HIV/HBV “Carriers” “duty to warn” (DTW) [i.e., disclose one’s HIV/HBV status prior to unprotected sex and sharing syringes] and “failure to warn” persons at risk.

IC 16-41-14 & 12 / IC 35-45-21-1

Donation, sale, or transfer of semen/blood/plasma when HIV+

IC 35-42-2-1 / IC 35-45-16 *Battery/Malicious Mischief by bodily fluid when HIV+/TB/Hepatitis (sentence enhancement)*



Duty to disclose: IND. CODE§ 16-41-7-1



Duty to disclose: IND. CODE§ 16-41-7-1 (2018)

People living with **hepatitis B** have a duty to “warn” both past and present sexual and needle sharing partners of their disease status and advise that the partner seek health care or counseling. Although the statute is intended to apply to "high risk activity" that has been "*demonstrated epidemiologically to transmit a dangerous communicable disease,*" these terms are not further defined.

Knowingly or intentionally violating the disclosure statute amounts to a **Level 6 felony**.

Recklessly violating or failing to comply with the duty amounts to a Class B misdemeanor. In either case, each day a violation continues constitutes a separate offense.

Exposure to bodily fluids: Battery and Malicious Mischief



Battery: IND. CODE § 35-42-2-1 (2018)

It is a **Level 6 felony** for someone to place "bodily fluid or waste" on another person in a "rude, angry or insolent manner" if they "knew or recklessly failed to know" that the material was "infected with hepatitis."

If the exposed person was a public safety official, then this offense is a **Level 5 felony**.

For someone who does not have hepatitis (or another enumerated health condition), the same conduct is punished as a Class B misdemeanor or a Level 6 felony, respectively.

Malicious mischief: IND. CODE § 35-45-16-2 (2018)

A person who recklessly, knowingly, or intentionally places "bodily fluid or fecal waste" that is "infected with infectious hepatitis" in a location with the intent that another person will involuntarily touch or ingest the bodily fluid or fecal waste may be charged with malicious mischief, a **Level 6 Felony**. If the offense results in transmission of hepatitis, it is a **Level 5 felony**. For someone who does not have hepatitis (or another enumerated health condition), the same conduct is punished as a Class B misdemeanor (touch) / Class A misdemeanor.

*As in other states, Indiana's law relies on confusing and over-expansive terminology. The battery statute does not define "bodily fluid." Under malicious mischief, *"body fluid" is defined as blood, saliva, sputum, semen, vaginal secretions, human milk, urine, sweat, tears, and any other liquid produced by the body.*

PENALTY	TIME	FINE	EXAMPLE	CURRENT HEPATITIS LAWS
Class B Misdemeanor	180 days jail	\$1K	<ul style="list-style-type: none"> Public Intoxication Battery by Bodily Fluid Malicious Mischief by bodily fluid/ touch 	<ul style="list-style-type: none"> Reckless HBV Nondisclosure
Class A Misdemeanor	1 year jail	\$5K	<ul style="list-style-type: none"> 30g Marijuana Possession Battery by bodily fluid & bodily injury Malicious Mischief by bodily fluid/waste and ingest 	
Level 6 Felony	6 months jail-2.5 years prison	\$10K	<ul style="list-style-type: none"> Vehicle Theft Battery by bodily fluid & moderate bodily injury 	<ul style="list-style-type: none"> Knowingly or Intentional HBV Nondisclosure Battery by bodily fluid with Hepatitis Malicious Mischief by bodily fluid/waste, involuntarily touch or ingest and Hepatitis
Level 5 Felony	1-6 years prison	\$10K	<ul style="list-style-type: none"> Involuntary Manslaughter Battery by bodily fluid & serious bodily injury - "Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; (4) permanent or protracted loss or impairment of the function of a bodily member or organ; or (5) loss of a fetus. 	<ul style="list-style-type: none"> Battery by bodily fluid with Hepatitis and public official Malicious Mischief by bodily fluid/waste, involuntarily touch or ingest and Hepatitis <u>transmission</u>

Overview of Viral Hepatitis Criminalization: What Are The Problems?



- **Unfair**
 - Unlike most other crimes against the person, prosecutor does not have to prove intent to harm/intent to transmit disease (no *mens rea*)
 - Excessively punitive relative to comparable types of harm
- **Unscientific**
 - Criminalize conduct posing no, negligible, and low risk
 - Promote misconceptions and stigma toward viral hepatitis
 - Conflict with public health aims of universal vaccination for hepatitis A and B, treatment access and cure for hepatitis C
- **Disproportionately affect marginalized communities:**
 - Currently and formerly incarcerated people
 - People who inject drugs
 - People living with HIV (nearly 25% US PLHIV experience HCV coinfection)
 - People of color, including Asian and Pacific Islanders

* See “Specific Populations Affected by HIV, AIDS, and Viral Hepatitis” SAMHSA (2015) found at: <https://www.samhsa.gov/hiv-aids-viral-hepatitis/specific-populations> or “Viral Hepatitis: Populations and Settings” CDC (2018) found at: <https://www.cdc.gov/hepatitis/populations/index.htm>

Case Study: Viral Hepatitis Criminalization in OHIO



State of Medicaid Access Grade: **D**

- Ohio has a law that makes it a **third-degree felony** for someone living with viral hepatitis or HIV to cause another person to come into contact with their blood, semen, urine, feces, or another bodily substance. **The punishment is up to three years of prison time.**
- **At the same time, between 2013 and 2016, the rate of hepatitis C cases in Ohio more than doubled**, going from 86.3 cases per 100,000 population to 205.3 cases per 100,000 population. In January 2018, a man with hepatitis C was charged with four felonies for spitting at first responders during the course of an arrest.
- **Ohio also has stringent Medicaid restrictions on treatment that include liver damage, sobriety and prescriber restrictions that limit many of the individuals targeted by these criminalization laws from receiving curative medications.**
- Currently, Ohio Medicaid Fee-for-Service **requires at least moderate liver damage** (fibrosis) of F2 or greater and **imposes a six month sobriety period** on beneficiaries. Ohio Medicaid also **requires a specialist to prescribe medication.**

Case Study: Ohio

CLEVELAND

Avon Lake man with Hepatitis C arrested after spitting in Cleveland officer's face, mouth

- Outcome of case: 27-year old defendant pleaded guilty to one count of harassment with a bodily substance and was sentenced to 18 months.
 - Originally he was charged with four counts of harassment with bodily substance from a single encounter with first responders—he faced a maximum penalty of 12 years.
- From one of the police officer complainants:
 - “I’ve never had this much anxiety in my entire life due to this, having to go through all this testing for Hepatitis C, because he was knowingly trying to infect us.”

I-Team: Police officers get justice for man's disgusting attack

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How do these laws come to be?

- Of the thirteen states that currently criminalize viral hepatitis, two primary approaches:
 - Simultaneously criminalizing hepatitis alongside HIV within the same piece of legislation OR criminalizing hepatitis along with other infectious or communicable diseases, which may include HIV.
 - Adding hepatitis onto an existing statute that criminalizes HIV.

Case Study: Viral Hepatitis Criminalization in IOWA



State of Medicaid Access Grade 2018: **D**



- In 2014, Iowa amended its HIV criminalization law to expand the scope of criminalized conditions to include viral hepatitis, meningococcal disease, and TB—the idea is that this constitutes a shift away from “HIV exceptionalism” or singling out HIV for especially harsh treatment under the criminal law.
- **It is a felony in the state to recklessly transmit hepatitis to someone else**—reckless exposure that doesn’t result in transmission is still a serious misdemeanor.
- Just two years later, Iowa experienced the largest number of people diagnosed with hepatitis C since reporting began, including the largest number and proportion of people 30 and under who were diagnosed with hepatitis C.
- **On top of criminalization laws, Iowa Medicaid maintains liver damage, sobriety and prescriber restrictions that limit many people with hepatitis C from accessing treatment.**
- Currently, Iowa Medicaid requires a **three month period of sobriety from alcohol and substance use** and then the prescriber must provide counseling regarding alcohol and substance use and education to prevent transmission. Iowa Medicaid also requires at severe liver damage (fibrosis) of F3 or greater and requires a liver, infectious disease or digestive disease specialist to prescribe treatment.

Case Study: Viral Hepatitis Criminalization in SOUTH DAKOTA



State of Medicaid Access Grade: **F**

- **South Dakota has some of the most harsh Medicaid access restrictions on hepatitis C treatment in the U.S.** Currently, the state imposes liver damage, sobriety and prescriber restrictions that limit individuals living with hepatitis C from receiving curative medications.
- Currently, **South Dakota Medicaid requires at least severe liver damage** (fibrosis) of F3 or greater, **imposes a six month sobriety period**, and also **requires a specialist to prescribe** medication.
- In the 2018 session, South Dakota legislators introduced SB 93, a bill that would have created a new HCV criminal statute to run parallel with the state's HIV criminal law, making donation, needle sharing, or exposing another person to blood a **Class 3 Felony, punishable by up to 15 years' incarceration**.
- **Fortunately, that piece of the bill failed, but it may be a sign of what's to come and shows why we must take action now to resist new efforts to criminalize health status.**

How do these laws come to be?



■ South Dakota and SB 93 (2018)

- That chapter 22-18 be amended by adding a **NEW SECTION** to read:
- Any person infected with hepatitis C who intentionally exposes another person to infection by:
 - (1) Transferring, donating, or providing blood, tissue, organs, or other potentially infectious body fluids or parts for transfusion, transplantation, or other administration to another in any manner that presents a significant risk of hepatitis C transmission;
 - (2) Dispensing, delivering, exchanging, selling, or in any other way transferring to another person any nonsterile intravenous or intramuscular drug paraphernalia that has been contaminated by the person; or
 - (3) Throwing, smearing, or otherwise causing blood to come in contact with another person for the purpose of exposing that person to hepatitis C infection & is guilty of a Class 3 felony.

■ Class C Felony = up to **15 years incarceration**

Indiana State Medicaid Access Grade: B



- Currently, Indiana Medicaid does not have sobriety restrictions to initiate treatment.
- If the patient is re-infected due to illicit drug use, the Medicaid member must be sober for 1 year in order to qualify for retreatment.
- Although there is no sobriety restriction to initiate treatment and current/recent drug use is not a contraindication to HCV treatment, many providers will not treat an individual who is currently using drugs.
- Treatment must be administered by a specialist or in consultation with a specialist (including Hepatitis C Project ECHO participants)
- As of now, the liver damage restriction is stage 2 fibrosis or higher.
- All of the above are Medicaid restrictions. Starting July 1, the fibrosis score restriction is expected to be removed.
- 9 Legal SSPs in the state



State Legislative Solutions to Ending Structural Level Stigma



- Repel - Eliminate Disease-specific criminal laws
- Modernize laws to cover only intent to harm and reflect advances in science (Dept. of Justice guidance) and avoid criminalizing diseases that were not already criminalized.
- Decriminalize / Remove penalties (e.g., no felonies or lesser felonies)
- Prosecutorial discretion to stop HIV/Hepatitis criminal prosecutions and minimize harm.



Iowa, Colorado, California, North Carolina, Illinois, Michigan, Texas

Perfect Public Health Storm

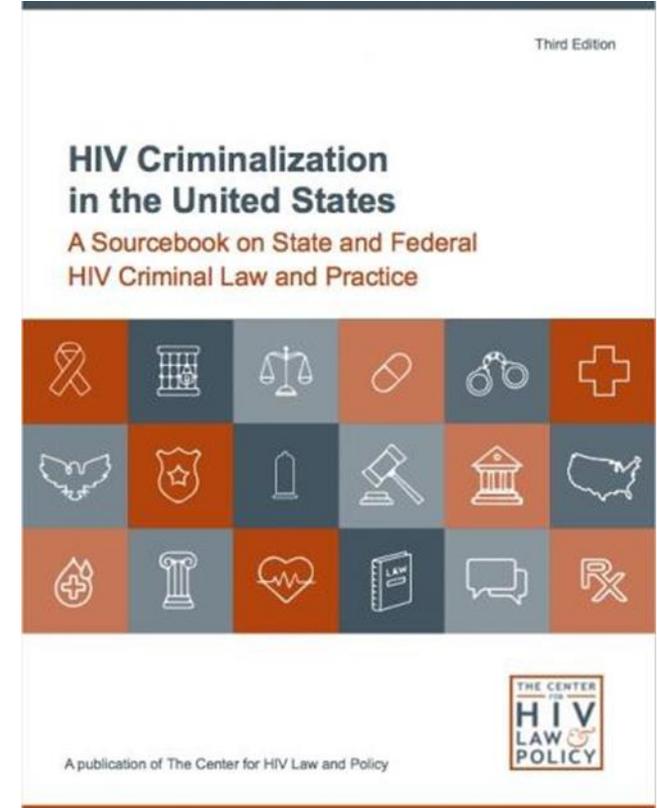


- Viral Hepatitis has been on the rise in the U.S. and the treatment access is often not meeting that need.
- Most states prohibit the possession of drug paraphernalia, and syringe access remains inadequate.
- Viral hepatitis is related to our correctional crisis, and incarcerating people based on their disease status will exacerbate this existing problem; An estimated 1 in 3 inmates in U.S. prisons and jails is living with hepatitis C. However, less than 1% of those diagnosed with hepatitis C in corrections are receiving treatment.
- We must resist carceral approaches and instead promote intersectional advocacy to build solutions for people who inject drugs and people living with viral hepatitis

Criminalizing someone's health status should never be a solution to a public health challenge.

Resources: The Criminalization of Viral Hepatitis in the United States

- The “*Punishment is Not a Public Health Strategy: The Criminalization of Viral Hepatitis in the United States*” fact sheet is available as a resource for advocates here: <http://nvhr.org/sites/default/files/.users/u34/Criminalization%20Fact%20sheet%208.20.18.pdf>
- *HIV Criminalization in the United States: A Sourcebook on State and Federal HIV Criminal Law and Practice*: Contains information on the criminalization of HIV as well as other infectious diseases, including viral hepatitis / <http://www.hivlawandpolicy.org/sourcebook>
- National Viral Hepatitis Roundtable / <https://nvhr.org/>
- Harm Reduction Coalition / <https://harmreduction.org/>
- Center for HIV Law and Policy / <https://www.hivlawandpolicy.org/>



CRIMINALIZATION=STIGMA

“There is no greater form of stigma than that which is enshrined in the law”

(Sean Strub)

SERO+

Comments or Questions?



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<http://hivmodernizationmovement.org/get-involved/>