HIV and the Law  
  
a Law school outline *by* corbin dodge  
  
Got Outlines?   
 [corbin-dodge.com](http://www.corbin-dodge.com)  
  
Fall 2014 | Professor Nechman | South Texas College of Law

Table of Contents

ABOUT THIS OUTLINE 2

Syllabus 3

Testing Confidentiality 8

Disclosure to Persons 8

Disclosure in the Courtroom 9

Disclosure to Health Care Providers 9

Insurance Related Laws 9

Use in Criminal Trials 9

Employment 11

Labor and Employment 11

Doctrine of Employment at Will 11

Americans w/ Disabilities Act 11

The Criminalization of the Transmission of HIV/AIDS 13

Recklessness and Consent 13

Knowledge and Disclosure 13

Immigration 15

Brief History of US Law 15

History of the HIV Exclusion 15

Effect of Elimination of HIV Exclusion 15

Overview of Categories 15

Access to the US 15

Former Law 16

Lawful Permanent Resident-Immigrant Categories 16

Tips 17

ABOUT THIS OUTLINE

**A Note About this Outline**

* My outlines utilize the styles feature in Microsoft Word. An investment of your time in learning how to use the styles feature will allow you to use some of Microsoft Words most powerful features. But be warned, styles can be tricky. The styles that are used in this document are demonstrated below. The Table of Contents can be dynamically updated because it is based on these styles. To learn more about the benefits of using styles, as well as tips and tricks, visit\_\_\_\_\_. For more outlines, visit [www.corbin-dodge.com](http://www.corbin-dodge.com).

**FAQs**

* **How do I apply a different font to any style?**   
  On the main menu, select Format/Style. Highlight the style that you would like to modify. Select modify. Choose your font. Make sure that the option to “Automatically update style” is not checked. Click Apply.
* **How do I update the Table of Contents?**
* Right-click and select “Update Field.” Choose the option to update all page numbers.

H1 (optimized for Helvetica, 16 pt)

H2

* **List paragraph (+Bold) (Optimized for Helvetica 9pt)**
  + List paragraph
    - List paragraph (+ indent)
      * List paragraph (+ indent)
        + etc.

H3

* **List paragraph (+Bold)**
  + List paragraph
    - List paragraph (+ indent)
      * List paragraph (+ indent)
        + etc.

Syllabus

**COURSE DESCRIPTION/SYLLABUS**

**Seminar: HIV and the Law**

**Fall Semester 2014: Course No. 10164**

**Class: Tuesdays, 7:45 pm to 9:45 pm**

**Room 3039**

**Instructor: John A. Nechman**

[**jnechman@stcl.edu**](mailto:jnechman@stcl.edu)

**Katine & Nechman L.L.P.**

**1834 Southmore Blvd**

**Houston, Texas 77004**

**713-808-1000 (Office) / Fax: 713-808-1107 / Cell: 832-837-9880**

[**jnechman@lawkn.com**](mailto:nechlaw@yahoo.com)

**STCL Office: No. 713-659-8040, ext. 1613, Office 739**

**Office Hours: By appointment and from 7:00 to 7:45 pm, Tuesdays**

**I can also meet by appointment at my law office (address above)**

I. Introduction

This seminar will explore how the law impacts the epidemic known as Acquired Immune Deficiency Syndrome (AIDS) since it was first identified in this country in 1981. All too often, discussions about HIV/AIDS are based on faulty information, prejudice and fear. I will attempt to sift through some of this misinformation in a quest to better understand some of the important issues raised by the advent of this illness. In addition to surveying the historical development of HIV-related jurisprudence, I will also review major federal, state, and local HIV-related legislative trends as well as how politics, religion, culture, science, and public opinion have shaped the development of HIV-related law. Also, whenever possible, I will pass on to you practical information and advice on the topics being discussed. Class discussion will focus on readings that I will post to STANLEY, and I will supplement the readings with weblinks or articles sent via e-mail, videos, guest speaker presentations, and optional excursions.

The seminar will require you to research, write, and present to your peers a substantial, scholarly paper (20 to 30 pages) on a topic of your choosing (with my input and approval). Successful completion of the course results in the award of 2 semester hours of credit and fulfills the college’s “substantial writing requirement.”

A. First Phase of the Seminar (8/19—10/28)

During the first 12 weeks of the semester, the assigned readings and our class discussions will cover a range of issues that have piqued my interest and attracted the attention of courts and legislators.

Also during this time period, you will begin to research and draft your paper, and you will begin to prepare a presentation that you will make to class during the final 2 weeks of the semester. I will schedule at least 1 class where I will be available to work with you one-on-one on your papers.

B. Second Phase of the Seminar (11/4--11/18)

During this phase of the course, you will make a presentation to the class on a topic of your choosing (with my approval). At least one week before the day of your presentation, you must distribute to me and all other students in our class via e-mail (using STANLEY) an outline of the topic that you expect to cover during the presentation. During the presentations, the class will ask questions and attempt to provide the presenters with additional suggestions that could be incorporated into the final draft of the papers. More details about the papers and presentations appear below.

**II. COURSE REQUIREMENTS AND GRADING**

As stated above, during the first part of the semester, I will expect each of you to complete all of the reading assignments and come to the seminar prepared to discuss those materials. In the second part of the semester, I will expect each of you to prepare an outline, make a presentation to the class, and write a 20-30 page paper on a topic related to the class content.

A. Grading Criteria

Quality of your in-class presentation: 15%

Your attention to the presentations of your colleagues 5%

Daily class participation 10%

Final paper 70%

B. Attendance Policy and Class Participation

I expect all of you to attend each session of the seminar and participate regularly. The interest and instructiveness of the seminar will depend on your participation. In a class of this nature, students who are unprepared, do not show up, or fail to prepare adequately for their presentations hurt the educational experience of their classmates. ***For these reasons, attendance is mandatory, and class preparation and participation will count in your final grade.*** **THE MAXIMUM NUMBER OF ABSENCES IN THIS CLASS IS TWO.** Three absences will result in my dropping you from the class.

I often pass out handouts in class, and if you are absent, I will not save handouts for you. Also, I may assign cases on which I will expect you to be able to lead the class discussion. Consistent failure to contribute to discussions or adhere to assignments or deadlines will impact your daily class participation grade.

**III. PAPERS, OUTLINES, PRESENTATIONS, COMMENTARIES**

A. Basic Requirements for the Papers and Presentations (see more detailed rules below)

Each student in the seminar will make a presentation and research and write a paper on a topic related to HIV issues and the law. The final version of your paper must be between 20 and 30 pages of double-spaced text, including footnotes (see rules below).

You need not worry about making your topic sufficiently "legal." Of course, a paper that calls for a legal analysis of statutes and case law is appropriate (e.g., analyzing statutes that allow a state to prosecute a person who has unprotected sexual relations with another after the person is informed that he/she has AIDS; the propriety of penalizing a sexual offender with AIDS more severely where the offender engaged in the wrongful act with knowledge of his/her illness; the validity of court orders requiring suspected sexual offenders to undergo mandatory HIV testing, etc.). A topic that examines a legal issue from a different perspective (such as from a social science perspective) might be equally appropriate (e.g., Would proposed reductions in eligibility requirements in the Texas Department of Health justify the benefits gained, and what will be the effect on the Texas HIV Medication Program? What effect is a statute that mandates HIV testing of prostitutes likely to have if adopted?) Whichever you choose, all of you will find it helpful to reach beyond purely legal resources for information valuable to your analyses.

When choosing a topic, be sure that:

\* You are really interested in it. If you are not, your fellow students and I will not be, either.

\* You do not choose a topic that is too broad for a 20-30 page paper.

\* Do not write a paper that only reports what others have said before--you must choose a topic that allows you to present your own original view on the issue you explore.

\* Your paper is not a recycled version of research you did previously for another course, a journal, a job, or any other purpose. It must entail substantial fresh research and thought.

Great Resources: Fajans, Elizabeth, et. al., ***Scholarly Writing for Law Students: Seminar Papers, Law Review Notes and Law Review Competition Papers*** (West).

Strunk and White, ***The Elements of Style***

B. Outlines

Prior to making your presentation, each of you must submit to me and your colleagues an outline of your paper. You must send it to me and all of the other students in our class via e-mail at least one week prior to your scheduled presentation. We will thus have sufficient time to consider the outline prior to your presentation. Each of you must read each others' outlines and come to the “presentation seminars” prepared to ask questions and provide comments concerning the chosen topics (see below).

The outline should give a clear understanding of the topic and your tentative analysis. The better your outline, the better the comments you will receive from your colleagues, and (one expects) the better your final paper will be due to the input. Your outline may be as detailed as you wish; a simple or disorganized outline that does not provide enough details or insight to allow your colleagues or me to come up with potentially helpful comments will negatively impact your presentation grade.

C. Presentations

Approach the presentation as you would an oral argument. Give an introduction with historical background and set forth your thesis, then present evidence. Use handouts and visuals as needed (let me know in advance of any technical needs, such as Power Point). Time yourself carefully and be prepared for questions. DO NOT READ YOUR PRESENTATION—you should be comfortable enough to lead a class discussion on the topic.

Each presenter will have no more than 15 minutes, but you MUST save at least 5 minutes for questions and comments, so your presentation must be timed to end within 10 minutes. **All presentations will be scheduled for the 14th class (a drawing will determine the order of presentations).**

D. Commentaries

All non-presenters must serve as commentators on presentations. All non-presenters must review the outline submissions of the presenters before the presentations and be prepared with questions and comments (non-presenters may have to do some minimal research for topics with which they have little familiarity). Comments should expand on aspects of the paper that may need further development. One could, for example, push the counter argument in an effort to encourage the presenter to more effectively cover an issue, or perhaps suggest a closely-related but not-fully-developed theme that could help strengthen an argument. Failure to engage in any discussion at all with presenters may lead me to conclude that the silence results from not preparing for the presentation, and this will have a negative impact on that student’s overall grade. In determining the “commentator grade,” I will, of course, take into consideration poorly-developed outlines that fail to provide proper commentary opportunities.

Those absent from a presentation or who do not provide any comments during a presentation or who feel their in-class comments were weak may provide additional comments via e-mail. Such comments must be sent to the entire class via STANLEY within 24 hours of a presentation. I will consider these comments when determining the “commentator grade,” but I will hold them to a higher standard than comments shared during the presentations.

In addition to the feedback you receive from the class at the time of your presentation, I will provide comments to each presenter via e-mail immediately after the presentations with suggestions on additional materials or ideas you might want to consider or incorporate into your final paper.

**IV.** **ADDITIONAL REQUIREMENTS FOR PAPERS/PRESENTATIONS**

A. Choosing Paper Topics/Topic Choice Due Date

You may choose your own paper topic, but I must approve your choice. The number of possible topics is huge, and presumably, you have a particular interest that led you to take the course.

You must submit a short description of your paper topic to me via e-mail by our **fourth class meeting**. A one-to-three paragraph typed description or short outline will suffice. You may submit this earlier than the topic due date, and I should then be able to let you know if I have approved the topic before the due date.

B. Date/Time of Presentations to Be Set by Drawing

On **the second class meeting**, I will draw lots to see who will present first, second, and so on.

I will prepare a list of all approved topics and the dates for each presentation and distribute the list to the class on or before the **fifth class meeting**.

C. Rules for Papers

* **SUBMIT THE PAPER TO ME VIA EMAIL BEFORE THE DEADLINE**
* The paper must be 20—30 pages in length, including footnotes.
* The paper must be double-spaced with 11-point or 12-point type and reasonable margins
* Footnotes (publication quality, *Bluebook* citation form) are required (not endnotes)
* You must have a cover page, table of contents, an introduction, and bibliography. I also suggest Appendices, but I do not require them.
* **WITHOUT EXCEPTION, any paper submitted after the deadline as shown on the syllabus will suffer a one letter grade reduction and an additional letter grade reduction for every forty-eight hours thereafter that the paper is late. You are required to make sure that I have received the paper, and I will e-mail you with notice of same AFTER I have received the paper. If you have not received this notification, you must assume that I have not yet personally received your paper, and you are responsible for following up to determine why. KEEP A COPY OF YOUR PAPER AND PROOF OF E-MAILING IT IN CASE THE ORIGINAL IS LOST!! If you wait to submit your paper at the last minute, you assume the risk and consequences of it being lost in cyberspace.**
* Students may cite the lecture notes, interviews, guest speakers, and the Internet
* I expect extensive research. Use a variety of sources, including magazines, newspapers, the Internet, and journals from disciplines other than law. Of course, I also expect citation to traditional legal resources
* You may make an appointment to view/use materials in my office (see address, first page)

D. J. Nechman’s LAWS of Grammar:

\* Avoid the use of “There is” or “There are” or “It is”

\* Avoid the passive tense whenever possible

\* Be concise (avoid sounding like a contract); do not repeat numbers [i.e. nine (9)]

\* No slang/cliches/informal words (unless necessary to meaning; then use “\_” marks)

\* No abbreviations (except very common ones or ones you specify early in the paper)

\* Use transition words

\* Avoid “I” and “you” (unless you are providing a personal story)

\* Avoid vague terms (“good,” “bad,” “things”)

\* No sexist language (“A judge should do his best(,)” “Policemen help control…”)

\* Do not end a sentence with a preposition

\* In titles, capitalize all first and last words and words over 4 letters in length (except for articles, prepositions, and conjunctions)

**The final draft of your paper is due IN MY STCL E-MAIL ACCOUNT (YOU SHOULD MAIL IT TO BOTH MY E-ADDRESSES) ON OR BEFORE THE END OF THE DAY DECEMBER 8, 2014**

Welcome to the HIV and the Law class! I look forward to exploring this fascinating and important area of the law with you over the course of the semester.

Class & Paper Tips

* **Room:** Library, 4th Floor, Room 3023 in the corner **Contact Info:**
* **Exam Format:** Paper only
* **Do:**
* **Don’t:**
* **Presentation:**
  + Aim for 10-12 minutes to present, then use the remainder of the time for questions *It goes by really fast!*
  + You can skip a formal slideshow during your presentation and still make an A
  + Run a google search for “HIV law” then click ‘Search tools’ and narrow the scope of the search to a more recent date to find relevant recent news for paper topic inspiration.

Testing Confidentiality

* In order for a Ct to exercise jurisdiction over a person or entity, it must have **Subject Matter Jurisdiction** over the controversy
* First, is there jurisdiction under state law, including state “long-arm” statutes?
* Does the ∆ have such *“continuous and systematic contacts* w/ the forum state such as to justify the Cts exercise of *general jurisdiction?*
* Did the ∆ *purposefully avail* himself of the forum?
* Second, is the exercise of this jurisdiction constitutional *(does not violate fair play & substantial justice)*?

Disclosure to Persons

* **Overview**
  + 18 states cover the notification of persons the doctor reasonably believes is at risk for infection from the patient
  + TX doesn't have this duty to warn. In the CL
  + Must try to convince pt first
  + Some allow disclosure to police officers, ER personnel, and other public servants who come into contact w/ the pt
* **Kansas**
* **Conneticut**
  + PD officer may warn partner if reasonably believes there’s a significant risk
  + **C.G.S.A.** **§ 19a-584. Informing and warning of known partners of possible exposure to the HIV virus. Disclosure of HIV-related information to public health officers**
    - (a) A public health officer (PHO) may inform or warn partners of an individual that they may have been exposed to HIV [when]:
      * (1) The PHO reasonably believes there is a significant risk of transmission to the partner;
      * (2) The PHO has counseled the protected individual regarding the need to notify the partner and the PHO reasonably believes the protected individual will not inform the partner;
      * (3) The PHO has informed the protected individual of such officer's intent to make such disclosure. The PHO may also warn or inform a partner at the request of a protected individual. When making such disclosure to the partner the PHO shall provide or make referrals for the provision of the appropriate medical advice and counseling for coping with the emotional consequences of learning the information and for changing behavior to prevent transmission or contraction of HIV infection. The PHO shall not disclose the identity of the protected individual or the identity of any other partner. The PHO, making a notification, shall make such disclosure in person, except where circumstances reasonably prevent doing so. The PHO shall make a good faith effort to notify the partner of the risk of HIV infection. The PHO shall have no obligation to warn or inform, identify or locate any partner.
    - (b) A physician may warn or inform a known partner of a protected individual if both the partner and the protected individual are under the physician's care or the physician may disclose confidential HIV-related information to a PHO for the purpose of informing or warning partners of the protected individual that they may have been exposed to HIV, under the following conditions:
      * (1) Physician reasonably believes there’s a significant risk of transmission to the partner;
      * (2) Physician has counseled the protected individual regarding the need to notify the partner and the physician reasonably believes the protected individual will not inform the partner;
      * (3) Physician has informed the protected individual of such physician's intent to disclose it to the PHO’s partner. The physician may also warn or inform a partner at the request of a protected individual. When making such disclosure to the partner the physician shall provide or make referrals for the provision of the appropriate medical advice and counseling for coping with the emotional consequences of learning the information and for changing behavior to prevent transmission or contraction of HIV infection. The physician or PHO shall not disclose the identity of the protected individual or the identity of any other partner. The PHO or physician making a notification shall make such disclosure in person, except where circumstances reasonably prevent doing so. Upon receiving such a request for assistance, the PHO shall make a good faith effort to notify said partner of the risk of HIV infection. The physician or PHO shall have no obligation to warn or inform, identify or locate any partner. The physician shall have no obligation to disclose information to a PHO for the purpose of warning or informing a partner.
    - (c) …**Public Health Officer** = an employee of the Dept of Public Health designated by the commissioner or if authorized by the commissioner, a local health director, or such director's designee.

Disclosure in the Courtroom

* **Overview**
  + 20 states have specific laws on courtroom discovery of HIV/AIDS info
  + Most have measures by which the Ct limits the disclosure as much as reasonably possible
* **Florida**
  + “No court of this state shall issue [a discovery] order unless the court finds that the person seeking the test results has demonstrated a compelling need for the test results which cannot be accommodated by other means. In assessing compelling need, the court shall weigh the need for disclosure against the privacy interest of the test subject and the public interest which may be disserved by disclosure which deters blood, organ, and semen donation and future human immunodeficiency virus-related testing or which may lead to discrimination. This paragraph shall not apply to blood bank donor records.” Fla. Stat. § 381.004(3)(9)(a).

Disclosure to Health Care Providers

* **Overview**
  + 21 states specifically allow for the sharing of HIV/AIDS info b/w health care providers
  + Include disclosure to blood banks and organ transplant organizations
* **California**
  + (a) Notwithstanding [§ 120980](https://a.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000213&cite=CAHSS120980&originatingDoc=N97A147E02C9711E38B7FCBEC42381BB8&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), the results of an HIV test that identifies or provides identifying characteristics of the person to whom the test results apply may be recorded by the physician who ordered the test in the test subject's medical record or otherwise disclosed without written authorization of the subject of the test, or the subject's representative as set forth in [§ 121020](https://a.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000213&cite=CAHSS121020&originatingDoc=N97A147E02C9711E38B7FCBEC42381BB8&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), to the test subject's providers of health care, as defined in [§ 56.05 of the Civil Code](https://a.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000200&cite=CACIS56.05&originatingDoc=N97A147E02C9711E38B7FCBEC42381BB8&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), for purposes of diagnosis, care, or treatment of the patient, except that for purposes of this section, “providers of health care” does not include a health care service plan regulated pursuant to Chapter 2.2 (commencing with [§ 1340](https://a.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000213&cite=CAHSS1340&originatingDoc=N97A147E02C9711E38B7FCBEC42381BB8&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))) of Division 2. Cal.Health & Safety Code § 120985

Insurance Related Laws

* **Overview**
  + 16 states have specific code sections dealing w/ of HIV/AIDS info
  + Consent to test
  + Severe limits; some disclosure to re-insurers
* **Texas**
  + They’re req’d to inform you before they do an HIV test
* **Delaware**
  + (a) No insurer shall request or require that an applicant submit to an HIV test unless the insurer first:
    - (1) Obtains the applicant's prior written informed consent;
    - (2) Reveals to the applicant the use to which the HIV test results may be put and entities to whom test results may be disclosed pursuant to [§§ 7404](https://a.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000005&cite=DESTT18S7404&originatingDoc=N2D34F500B86311DB8E46AD894CF6FAAB&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) and [7405](https://a.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000005&cite=DESTT18S7405&originatingDoc=N2D34F500B86311DB8E46AD894CF6FAAB&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) of this title; and
    - (3) Provides the applicant with written information approved by the Department of Health and Social Services, such as the brochure “HIV and AIDS” published by the American Red Cross, or its successor, or a similar brochure.
  + 18 Del.C. § 7403
* **Arkansas**
  + (a) A person with acquired immunodeficiency syndrome (AIDS) or who tests positive for the presence of human immunodeficiency virus (HIV) antigen or antibodies is infectious to others through the exchange of body fluids during sexual intercourse and through the parenteral transfer of blood or blood products and under these circumstances is a danger to the public. A.C.A. § 20-15-904

Use in Criminal Trials

* + Cts will not apply anti-disclosure laws in situations where ∆ violated an anti-transmission law
  + In *Scroggins v. State* 401 se2d 13 (1990)(Georgia) TrCt allowed evidence that ∆ tested positive for HIV after ∆ bit an arresting officer and then said he was positive.
  + Usually biting cases involve prison officials and an inmate
  + NY TrCt refused to submit a ∆ charged w/ rape & sodomy to determine if he was positive when he allegedly committed the crime *Doe v. Connell,* 583 N.Y.S.2d 707

**Human Immunodeficiency Virus Services Act V.T.C.A., Health & Safety Code § 85.001**

*New Times, Inc v. John Doe* 183 S.W.3d 122

* + Texas does have a confidentiality statute.
  + (5) “**Test** **result**” means any **statement** that indicates that an **identifiable** **individual** has or has not been **tested** for AIDS or HIV infection, antibodies to HIV, or infection with any other probable causative agent of AIDS, including a **statement** or assertion that the**individual** is positive, negative, at risk, or has or does not have a certain level of antigen or antibody. V.T.C.A., Health & Safety Code § 81.101
* *Santa Rosa Health Care v Garcia*
  + Confidentiality
* *Thapar v Zezulka*
  + *Texas Supreme Court held that there is no common-law duty to notify the wife of a patient that she was at risk of contracting HIV due to the receipt of contaminated blood by her husband*
  + *i.e.* No duty to warn in Texas
    - Not even when theres a spousal relationship or when their marriage is recognized in another state
  + If you’re a physician that’s concerned after laboratory testing reveals that a spouse has tested positive for HIV, these are your options:
    - Encourage patient to disclose to their partner
    - If they won’t 🡪 physisican may ask permission to disclose it to the partner
    - And if that doesn’t work, then the physician can turn to the TX partner notification programs…basically turn it over to the state to decide
  + Whether a mental health professional at a hospital may be held liable for negligence for failing to warn when a patient makes specific threats of harm. Does the hospital have a duty to tell that party?
  + Ct declined to adopt a duty to warn b/c the confidentiality statute protecting the health of mental health professionals makes it unwise to disclose
  + Terasoff doctrine
* **V.T.C.A., Health & Safety Code § 81.051. Partner Notification Programs; HIV Infection**
* **V.T.C.A., Health & Safety Code § 81.050. Mandatory Testing of Persons Suspected of Exposing Certain Other Persons to Reportable Diseases, Including HIV Infection**

Employment

Labor and Employment

Doctrine of Employment at Will

**Effect:** Employment relationship can be terminated w/o cause at the will of the EE or the EM

* + Employer doesn't have to be reasonable
  + Termination at will can be for any reason or no reason at all
* **Way back when,** an HIV+ dx was an excluded preexisting condition. The only option was to go to the TX Health Ins. Risk Pool

Americans w/ Disabilities Act

* + Mandated equality for opportunities and treatment
  + Must accommodate essential job functions
    - An accommodation is reasonable & req’d 🡪 only if it enables EE to perform an essential function of the job.
  + **Minimum # of Employees:** Must have 15+ EEs
  + **Governed by the:** Equal Opportunity Commission (EOC)
  + Was pivotal, has since been amended
  + Until 2008, there was a question as to whether HIV qualified as a disability was in issue
    - It went up before the SupCt
  + Since 2008 🡪 per se disability
    - SupCt said it was an impairment but didn’t go as far as to say that it was a disability
    - Became entitled to accommodations from EMR (so long as reasonable and not unduly burdensome)
  + EMR has a right to know why
* **First Steps**
  + Keep a log or a diary of general treatment
    - Good to start before disclosure and following disclosure
  + Tape recordings
    - A person may record another individual, w/o their knowledge, so long as you’re a party to the conversation
  + Live W’s who are credible
  + Self-serving emails
* **Process**
  + Best to have the person requesting the accommodation write the EMR a letter on their own personal letterhead
  + Suggest they hand deliver it
  + If they have a bad feeling about disclosing it 🡪 This is where the log, recordings, etc, come in handy
  + EMR does not have a duty to provide a reasonable accommodation immediately
    - But it’s a risk if they don’t
* **After Receiving Accommodations**
  + Afterward, it’s important they continue their usual job function
  + They suggest to advise the client not to quit
    - Even if they’re going through hell/things turn bad
    - Remaining employed is a critical part of it
      * If they quit 🡪 doesn’t help
      * If the EMR fires them 🡪 may be better than if the EE quit
  + Don’t sign anything until the atty reviews it
  + Don’t cash anything “ ”
* Randall’s on Shepherd and Westhiemer was a big supporter of the LGBT community, but they lost a lot of business after firing an employee in their deli after discovering their HIV status. Ended up changing their policy.
* **For more information:**[*Americans with Disabilities: Practice & Compliance Manual*](https://a.next.westlaw.com/Browse/Home/SecondarySources/TextsTreatises/CivilRightsTextsTreatises/AmericanswithDisabilitiesPracticeComplianceManual?originationContext=AutoComplete&contextData=(sc.Default)&transitionType=CategoryPageItem)
* **Federal Medical Leave Act**
  + Must have 50+ EEs
  + Importance of having a will
    - Etcetc,
    - For same sex couples -- > Lack ability to determine inheritance w/o a will
    - Guardianship 🡪 Help manage your life

# The Criminalization of the Transmission of HIV/AIDS

* **Case Law**
  + Prosecution under CL
  + Under HIV-Specific Statutes
  + Under State STD Laws
* **TX Laws on HIV Transmission**
  + No HIV-specific laws in TX
  + Uses the assault statute
  + Increased to aggravated assault when it involves …significant harm???
  + But not aggravated sexual assault
  + Has used assault w/ a deadly weapon
    - Usually the genitals
    - But it has also been applied to the mouth
  + Doesn’t generally have to show specific intent…
    - …unless it is an attempted murder case
  + **Recent TX Case Study:**  Philippe Padieu
* Most states don’t have a specific intent req’t
* **Criminal Theory and Objectives of Criminalization**
  + Incapacitation
  + Rehabilitation
  + Deterrence
    - * **Missouri**
        + Has the death penalty as a punishment option
        + § 191.677

Exposure 🡪 5-15 yrs

* + - * + Prostitution: § 567.020
      * **Kansas**
        + 21-3435
        + statute only applies to m/m sex
      * **Iowa**
        + *Nick Rhoades v. State of Iowa:* Ct recognized that HIV + individuals ….taking anti-viral meds on a regular basis…have a very slim chance of being able to transmit (or something like that)
      * **CA:**  Max 7 yrs; high burden
        + One must show specific intent to infect
        + Use of protection is an absolute bar
        + *See link to CA case on stanley*
      * **Some Other states:** Have capital murder as a punishment option
      * e.g.,once you get tested 🡪 if you don’t disclose & they get infected 🡪 Subject to criminal charges
  + Retribution
  + England: Mohammed Dica, *another “HIV assassin”* …equivaleted to be “like running down the streets w/ a hammer smashing peoples heads in”

Recklessness and Consent

* + Recklessness: taking an unreasonable or unjustifiable risk that transmission may occur

Knowledge and Disclosure

How do you prove they knew of their status?

A legal obligation to disclose HIV-status to sexual partners

- Not req’d to disclose in TX

How is the level of risk determined

* + Mandatory Testing of Criminal Offenders
  + Testing rapists and other sexual offenders
  + Testing prostitutes and their customers
    - Not done anymore
    - Judges will still use HIV awareness classes as part of the judgment against johns
  + Testing persons who assault the police

Texas Crime Victim Rights

* AIDS & Sentencing
  + Reduce or enhance criminal sentences for those who are +
  + Parole: Mandatory disclosure as a condition of parole

Immigration

Brief History of US Law

History of the HIV Exclusion

* **1993-01/2010** – All HIV +, non-resident foreign nationals were classified as inadmissible to the US unless you qualified for a waiver b/c DHS classified HIV as a communicable disease of public health significance INA 212(a)(1)(A)(i)
* **1987** – Last amnesty under Pres Reagan who issued an Executive Order excluding HIV+ aliens, which President Bush Extended.
  + - It included a humanitarian waiver which was later eliminated in a showing of anti-gay animus.
      * A judge could use discretion
      * e.g., might be considered if been here for 20 yrs – will die if sent away
* **1993** - Congress codified the HIV+ exclusion, signed by Clinton. He later tried to eliminate it
* **July 2008** - Congress eliminated the specific HIV ground of exclusion from the Immigration & Nationality Act
* **July 2009** - Health & Human Services proposed HIV be removed from the list of “communicable diseases of public health significance”
* **Jan 2010** – HHS finalized the regulatory change

Effect of Elimination of HIV Exclusion

* **Today**
  + HIV test no longer part of the medical exam for permanent resident applications
  + They shouldn’t inquire about HIV status
  + Applicants ***should*** not be denied a visa, admission to US, or permanent residence *solely on the* basis on HIV status
  + First Int’l AIDS conference in 15 yrs is planned in HIV exclusion
    - 20 yr boycott

Overview of Categories

* **US Citizens**
  + Born in US **or**
  + Naturalized here
* **Aliens**
  + Lawful permanent residents —Immigrants (Green Card holder)
  + Non-immigrants: Persons temporarily allowed in the US
    - Student visas
      * F-1 Students
      * J-1 Exchange Students
    - Work visas
    - B-2 visitors (tourists)
  + Refugees/Asylees/temp protective status (TPS)
  + Illegal aliens

Access to the US

* **Did you know…?**
  + If you came in legally 🡪 Can marry US citizen & become citizen
  + If you came in illlegally 🡪 Can’t marry US citizen & become citizen

**HIV/AIDS & Naturalization**

* + It’s not and never was an issue for naturalization
  + …
* **Non-Immigrants**
  + Foreign national applicants don’t have to submit to medical exams to obtain visa (but can be req’d to take HIV test as a pre-requisite to entering the US)
  + …

Former Law

* **The Old Special Waivers for Non-Immigrants INA 212 (d)(3)**
  + 30 day entry
    - there was a waier IF
      * asymptomatic
      * visiting for 30 days or less
      * persona has sufficient assets (such as insurance to cover medical bills if they get sick while here
        + this was a substantial burden to overcome
      * Won’t poise a danger to public health
        + Might have to sign that you won’t have sex while here
      * If denied 🡪 What Ct has jsd? You just had to beg and plead
* **Event** **Waivers for Non-Immigrants**
  + If deemed to be in the public interest, the Atty Gen. could authorize blanket waivers for all foreign nationals to participate in designated events

Lawful Permanent Resident-Immigrant Categories

* Family-based
  + Sponsored by US Citizen
    - Parent
    - Spouse
    - Son/daughter – married or unmarried
    - Sister/brothe
  + Sponsored by lawful permanent resident
    - ….
* Employment-based
* Diversity lottery
* Investment
* Asylum/refugee
* Cancellation of removal
* Registry
* Others: CAA VAWA, etc
* The Irish get more visas than any other country in the world 🡪 b/c of the kennedys