

## HIV/AIDS epidemic and sexual risk behaviors. The Italian case

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### Abstract

**Aim.** According to the WHO latest data, at the end of 2021, the number of people with HIV/AIDS reached figures of real epidemic, ranging around 37.7 million, of which 1.5 million new infected and 680.000 died of AIDS. There has been, therefore, a change in epidemiology that reveals unprecedented social dynamics and processes, confirming the apprehensions of the European center for disease control and prevention (ECDC) and doubts of the WHO about ineffectiveness of prevention policies, especially considering the role of social networks, people unwillingness to test and frequent cases of late diagnosis. But what most worries is the highest rate of infections recorded, as anticipated, after condomless intercourses especially among MSM that seem to define the main way of HIV/AIDS spread.

**Results.** Barebacking fits in with this context: it is a practice particularly diffuse among men who have sex with other men (MSM) and encouraged by appearance and spreading of thematic websites and sexually explicit websites and invests the international community as a high impact epidemiological factor in relation to HIV/AIDS epidemic.

**Conclusions.** The phenomenon shows a significant sociological relevance due to the complexity of reasons and situational factors, as well as the implications and consequences that it causes both in terms of relationships and social dynamics on public health, producing effects on many and different levels of analysis, including the legal one.

**Keyword.** HIV/AIDS epidemic, sexual risk behaviors, barebacking, man who have sex with other man (MSM), public health.

### 1. Introduction

In Italy, the public debate on sensitive topics, very often, takes on an ideological crusade tones. At times, it turns into a subject of an almost complete removal, at the risk of denying the rights of the citizens or compromising quality and safety of the general conditions of life. That reveals a general cultural and political inadequacy of the Italian society. It's exactly what has happened with themes such as end of life decisions, medically assisted procreation and civil unions and what is probably going to happen with the phenomenon of barebacking, practice particularly common among MSM (men who have sex with other men) belonging to the millennial generation, which is the main way of spreading of HIV/AIDS in the world. Just for these reasons the phenomenon has a sociological relevance, not only for the consequences that determines both at individual and social level (just think of the tragedy of disease and lack of solving treatment, antiretroviral apart, as well as the heavy costs in which the healthcare organizations incur) but also for the legal implications that it reveals.

This paper – referring to the latest scientific evidence and to a sociological approach – offers the idea for a reflection on a phenomenon that for a long time has been left out from the Italian public debate and that, instead, deserves special attention at least for three reasons: first, because it reveals profound evils such as increasing social isolation and loneliness, stigmatization and discrimination against vulnerable social groups; second, because it represents an etiological factor with a high epidemiological impact on HIV/AIDS epidemic; third, because the bareback behaviors configure proper crimes on which jurisprudence has been called to express itself.

### 2. Epidemiological situation: an overview

According to the US Centers for disease control and prevention of Atlanta (CDC) and the World health organization (WHO) the HIV/AIDS epidemic – despite the severity of the Covid-19 pandemic – continues to be a major global public health issue. Although advances in biomedical research and new therapies (that slow down or avoid the transition to full-blown stage), the number of new infections, although recording small decreases, remains high. Indeed, in areas such as Eastern Europe, Central Asia and Sub-Saharan Africa the epidemic goes on growing assuming the substantial character of a real pandemic. According to the WHO latest data, at the end of 2021, the number of people with HIV/AIDS reached figures of real epidemic, ranging around 37.7 million, of which 1.5 million new infected and 680.000 died of AIDS (WHO, 2021).

But if, on the one hand, the global epidemiological indicators seem to provide first hints of decline of the HIV/AIDS, on the other hand, they reveal that new infections are growing particularly among MSM in the US (especially blacks), in Western Europe, Australia and sub-Saharan Africa. There has, therefore, been a change in epidemiology that reveals unprecedented social dynamics and processes, confirming the apprehensions of the European center for disease control and prevention (ECDC) and doubts of the WHO about ineffectiveness of prevention policies, especially considering the role of social networks, people unwillingness to test and frequent cases of late diagnosis. But what most worries is the highest rate of infections recorded, as anticipated, after condomless intercourses especially among MSM and that seem to define the main way of HIV/AIDS spread: several studies show that barebacking behaviors among MSM are the basis of 68-69% of all new infections and 49% of all people with HIV/AIDS in the USA (CDC, 2021; Reisner *et al.* 2009). A real epidemic, often forgotten by institutions<sup>1</sup> and ignored by the younger generations, that continues to cause concern in the world due to its epidemiological dimensions, as shown in the following table.

### HIV/AIDS in 2020

WHO region	Adult HIV prevalence (%), 2020	People living with HIV, 2020	People acquiring HIV, 2020	People dying from HIV-related causes, 2020
<b>African Region</b>	3.6 [2.9–4.2]	25 400 000 [20 700 000–30 300 000]	880 000 [590 000–1 300 000]	460 000 [320 000–680 000]
<b>Region of the Americas</b>	0.5 [0.3–0.6]	3 700 000 [2 800 000–4 600 000]	150 000 [110 000–210 000]	45 000 [30 000–63 000]
<b>South-East Asia Region</b>	0.2 [0.2–0.3]	3 700 000 [2 800 000–4 400 000]	100 000 [71 000–130 000]	82 000 [55 000–130 000]
<b>European Region</b>	0.4 [0.4–0.5]	2 600 000 [2 300 000–3 000 000]	170 000 [140 000–200 000]	40 000 [31 000–51 000]
<b>Eastern Mediterranean Region</b>	<0.1 [<0.1–0.1]	420 000 [370 000–550 000]	41 000 [35 000–60 000]	17 000 [14 000–24 000]
<b>Western Pacific Region</b>	0.1 [0.1–0.2]	1 900 000 [1 400 000–2 400 000]	120 000 [78 000–150 000]	41 000 [24 000–63 000]

Source: WHO (2021). *Global progress report on HIV, viral hepatitis and sexually transmitted infections, 2021. Accountability for the global health sector strategies 2016–2021: actions for impact.* In <http://apps.who.int/iris/bitstream/handle/10665/342808/9789240030985-eng.pdf>

### 3. Phenomenon of Barebacking

The barebacking phenomenon (also defined as bareback sexual behavior) originally was referred to condomless heterosexual intercourse, i.e. unprotected (by the American slang “riding a horse without a saddle”). Nowadays, however, it mainly defines the growing phenomenon of condomless sexual behavior, intentional, between MSM subjects aware of the high risk of HIV/AIDS infection (Blackwell, 2015; Frasca, Dowsett, Carballo-Diéguez 2013, Houston *et al.* 2012)<sup>2</sup>.

It is a phenomenon that – encouraged by the advent and the spreading of websites and sexually explicit media (SEM)<sup>3</sup>, invests the international community as a high epidemiological impact factor with regard to the HIV/AIDS epidemic (FitzGerald, Rayter, 2012: 197-200; Weeks, 2011: 12-13). In the specific instance: the phenomenon reveals important relations with the trend of the HIV/AIDS epidemic; is mostly widespread among MSM subjects; is significantly

<sup>1</sup> Only recently Italy has started to contribute to economic activities of the Global fund and, as is clear from the Report to Parliament on the implementation of the strategies set to face up to HIV in 2013, resources are scanty.

<sup>2</sup> It should be noted that not all condomless intercourses can be defined as bareback: just think to monogamous relationship or to intercourses between sero-concordant subjects, or to intercourses between individuals under alcohol or drugs influence, or between victims of depression or “the passion of the moment” and, finally, to cases of unaware breaking of condom (Carballo-Diéguez *et al.* 2009; Carballo-Diéguez *et al.* 2011).

<sup>3</sup> Internet has been a *key driver* for widespread proliferation of websites pro-barebacking and pro-HIV transmission. As in other sexual phenomena, the network has enabled the creation of online reality where barebackers, “bugchaser” and “giftgiver”, escape discrimination and loneliness, participating in a community that meets the needs of identity, acceptance and belonging, creates the conditions for offline relationships (Ashford, 2010; Frasca *et al.* 2012; da Silva, Iriart, 2012; Berg, 2009; Adam *et al.* 2008; Johnson *et al.* 2008).

characterized in a socio-cultural meaning, revealing intimate ties with more complex social dynamics and deep psycho-emotional roots (Frasca *et al.* 2012; da Silva, Iriart, 2012; Berg, 2009; Adam *et al.* 2008; Johnson *et al.* 2008).

The analysis of evidence, along with the reports of major international organizations, seems to confirm that the phenomenon of barebacking is a significant indicator of change in lifestyle and behavioral patterns for those MSM who predominantly belong to Millennials and aged between 25 and 44 (57%) (CDC, 2020: 12). In fact, the results of several studies suggest a worrying situation that sees, on the one hand, only a slight decrease in new HIV infections in the world (24% between 2019 and 2020)<sup>4</sup> and, on the other, a risk widening among MSM subjects, especially in that age bracket (ECDC, WHO Regional Office for Europe, 2021: XII; Adam *et al.* 2008; Berg, 2009; Carballo-Diéguez *et al.* 2011; Carballo-Diéguez *et al.* 2009).

Compared to the incidence of the phenomenon, it appears central the role played by the so-called SEM, i.e. sites with explicit sexual content. Several study results suggest, in fact, a significant association between use of SEM and incidence of barebacking by MSM subject enduring conditions such as social vulnerability, HIV seropositivity, use of drugs or alcohol before or during sex, looking for new sexual experiences, affirmation of masculinity through sex, age between 32 and 34 (Frasca *et al.* 2012; Træen *et al.* 2015; Rosser *et al.* 2013; Klein, 2012; Klein, 2011; Halkitis, Parsons, 2003; Houston *et al.* 2012). Studies agree that barebacking practices are reinforced by continued exposure to SEM and to its explicit bareback content (odds ratio with peaks until to 12.59) and that they show a significant relationship with a general situation of social vulnerability (observed in over 58% of cases), characterized by phenomena such as loneliness and social isolation, racism, homophobia, depression (Berg 2009; da Silva, Iriart, 2012; Adam *et al.* 2008; Frasca *et al.* 2012; Carballo-Diéguez *et al.* 2011; Houston *et al.* 2012). Finally, according to other studies, factors related to social and cultural change seem to play a more complex role, identifying in barebacking a rejection of norms imposed by the society, especially about safe sex (Adam *et al.* 2008; Berg 2009; Carballo-Diéguez *et al.* 2011; Carballo-Diéguez *et al.* 2009; Yep, Lovaas, Pagonis, 2002).

In Italy, the lack of a specific criminal law protection<sup>5</sup>, has made many MSM and LGB (lesbian, gay and bisexual) subjects even more vulnerable, being already victims of various forms of homophobic violence, stigmatization and discrimination, creating the conditions to a serious problem of public safety with cascade connection on health, ranging from physical and sexual assaults to personal injury, from death (or murder) to psychological distress, from eating disorders to drug abuse and suicide (Lingiardi, Nardelli, Drescher, 2015; Pelullo *et al.* 2013).

That fact, over time, has significantly contributed to the spreading of a phenomenon so-called cruising – that, unlike that practiced online through SEM, we could define as cruising offline – practiced in public places (public sex environments - PSE) and that, according to literature and evidence on the theme, sets also up a significant risk factor in the HIV/AIDS spreading (Lewnard, Berrang-Ford, 2014; Yang *et al.* 2014; Lyons *et al.* 2010; Frankis, Flowers, 2009; Frankis, Flowers, 2006; Frankis, Flowers, 2005).

This contributes, on the one hand, to deteriorate the epidemiological situation of sexually transmitted infections (STI) and, on the other hand, reveals legal implications related to modalities and occasional meetings, making those who have been victims of “hate crimes”<sup>6</sup>, in some cases, responsible in turn of crimes.

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<sup>4</sup>The report *HIV/AIDS surveillance in Europe 2021 – 2020 data*, shows a 24% drop in the rate of newly diagnosed HIV cases between 2019 and 2020. This drop is largely due to reduced HIV testing during 2020 as a result of Covid-19 restrictions and disruptions to services (ECDC, WHO Regional Office for Europe, 2021).

<sup>5</sup> In fact, the existing set of rules on STI and, in particular, HIV/AIDS, in despite of being abundant, is mainly characterized in social and health terms through laws, recommendations, decrees, notes and guidelines that provide cognitive and management tools about monitoring and control over STI, as well as assistance, privacy and protection in workplace for people who live with HIV (Istituto Superiore di Sanità, Suligo, Salfa, Palamara, 2020; Istituto Superiore di Sanità, Luzi, Colucci, Suligo 2012: 6-28). In October 2021 the Italian Parliament rejected a bill S 2005 against homophobia and transphobia, upholding preliminary of unconstitutionality submitted by different parliamentary groups. The bill intended to introduce the aggravating circumstances of homophobia in crimes motivated by hatred and violence based on sexual orientation, gender identity and disability. In addition, the Italian set of rules lack the recognition of social relevance of families of same-sex and their children. This prevents many people to enjoy basic human rights to self-realization (the so-called “indirect discrimination”), fueling discriminatory dynamics and processes of stigmatization (the so-called “direct discrimination”) toward MSM and LGB subjects (Amnesty International, 2021: 15-23; Pesce, 2015).

<sup>6</sup> The “hate crime” term was officially used the first time in 2003 by the Organization for Security and Cooperation in Europe (OSCE) to indicate the crimes based on prejudice, discrimination and hatred generated by factors such as race, ethnic origin, sexual orientation, religion, social status, political affiliation (Pesce, 2015).

#### 4. Legal implications. The Italian case

In Italy, according to the data of Centro operativo AIDS of the Istituto superiore di sanità (ISS), in December 2020 were reported 1.303 new diagnoses of HIV (in 2019 were 2.473<sup>7</sup>) and 352 new diagnoses of AIDS. The regions with the highest incidence were Aosta Valley, Liguria, Autonomous Province of Trento and Lazio. 79.9% of cases, are adult males with a median age of 40 years; 20.1% of cases, are adult females with a median age of 40 years, although the highest incidence was observed among people aged between 30 and 49 years old. According to these data, the greater part of new HIV diagnoses can be attributed, in 88.1% of all reports, to unprotected sex (42.4% heterosexual, 45.7% MSM). Testing, motivated in 17.2% of cases by sexual risk behavior, reveals an HIV infection in 20.3% of cases (Istituto superiore di sanità, 2021: 8-11)<sup>8</sup>.

As already said, although barebacking is characterized by conscious and intentional behaviors and choices, it doesn't always imply mutual awareness. Indeed, in some cases, the MSM subject who practice barebacking – revealing a certain vision of life, soaked by individualism, inadequate knowledge on clinical-therapeutic and underestimation of ruinous consequences arising from infection – prefer to keep unaware of their HIV status possible partners, setting up legal frameworks imputable to different situations provided for by the Italian Penal Code (Frasca, Dowsett, Carballo-Diéguez, 2013; Carballo-Diéguez, Bauermeister, 2004).

The increasing prevalence of barebacking has driven several Western countries to face up a controversial issue, that represent a big challenge for the criminal law, through actions ranging from closing saunas, clubs and thematic bars (as happened, for example, in Canada) to adoption of specific criminal law diffused to every state in the USA<sup>9</sup>, till to judicial decisions taken by the Courts of the Netherlands, England and Wales, emphasizing the *custos morales* role (guardian of morals) and focusing on the issue of conscious contagion with reference to “safe, healthy and consensual” principle (Ashford, 2010; Lehman *et al.* 2014; van Kouwen, Bruinberg, 2006; Weait, 2005).

In Italy<sup>10</sup> there isn't a specifically criminal law on this subject. But as emerge from the latest decisions of the courts, the behaviors of HIV+ subjects who intentionally expose to infection risk their sexual partners (situations referable to barebacking) identifies specific model fact situations provided for by the Penal code. In particular, it is possible to invoke crimes such as “murder”, provided for by article 575 (in this case aggravated by the awareness of transmission risk as well as explicitly provided for by article 577 relative to aggravating circumstances; “bodily injury” provided for by article 582 and aggravating circumstances provided for by article 583; and “involuntary manslaughter” provided for by article 589, increased by *dolus eventualis* (possible malice) which also constitutes crime for which penalties lighter than those for “murder” are provided.

In this connection, line of decisions gives useful ideas for consideration, starting with the fact that decisions on case of HIV transmission are characterized by a substantial uniformity based on recognition of *dolus eventualis*<sup>11</sup> as psychological feature of subject that infects his partner (unaware of his HIV seropositivity) through condomless

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<sup>7</sup>It must be reiterated that the number of new diagnoses of HIV infections relative to 2020 could be underestimated due to the repercussions of the Covid-19 pandemic. The decrease in cases could be connected to one or more of the following factors: fewer tests performed (less spontaneous access to the test, less testing by the health service, fewer screening initiatives), greater delay in notification and, finally, a real decrease in HIV incidence due to government restrictions to contrast the Covid-19 pandemic (Istituto Superiore di Sanità, 2021: 7).

<sup>8</sup> According to the latest estimates by the Joint United Nations Programme on HIV and AIDS (UNAIDS), in Italy today there are about 120.000-150.000 people living with HIV infection, including those who haven't yet been diagnosed (UNAIDS, 2020).

<sup>9</sup> Beyond different federal acts of confederate states, the legislative approach of decision makers in the US is united by the same strategies with HIV subjects: on the one hand, they aim to care and protection (promotion of screening, privacy protection and tutelage of sensitive and personal data); secondly, they aim to criminalize and punish their sexual behaviors when they knowingly expose others to infection risk (Lehman *et al.* 2014).

<sup>10</sup> Italy is among the so-called “Civil law countries” and is characterized by specific model fact situations, sometimes, different if compared to other legal system belonging to “Common law jurisdiction”.

<sup>11</sup> In fact, according to the “risk acceptance” setting, so that a penal liability as *dolus eventualis* subsists, is not enough a mental representation of a real possibility that the event will occur, but it is necessary that offender acts, knowingly accepting risk of the event, keeping up his conduct even at the cost of causing the very event itself. As Penal Certiorary asserts in judgment n. 38388, dated 03.10.2012, *dolus eventualis* (controversial figure that, in Italian Penal Code, is on the verge of “willful misconduct” or “with premeditation” that, according to article 61, n. 3-Penal Code, involves a mere increase in sentence) it assumes that subject acts without intent to commit crime, whereas, otherwise, he would act with “willful misconduct”.

intercourse (Aimi, 2013). On this point, we must remember the Penal Certiorary judgment n. 38388, dated 03.10.2012 (contagion from husband to wife) and Penal Certiorary judgment n. 44712, dated 01.12.2008 (infection between heterosexual partners)<sup>12</sup>.

As regard to barebacking, particularly significant is the Penal Certiorary judgment n. 13388, dated 26.03.2009 concerning a case of HIV/AIDS transmission occurred as a result of condomless intercourses between MSM subjects. According to the sentence:

“... a police inquiry carried out on computer – device through which the injured party (initial capital, F.) had contacted the defendant (initial capital, R.T.) on a thematic site – had led to find that the R.T. presented himself under the nickname ‘omissis’ and, although aware to be sick, he was looking for partners for unprotected sex ...”.

Thus, in breach of law (Penal Code, article 522), the Court had affirmed the responsibility of defendant to have infected HIV to F., pointing up that:

“... in point of fact, trial courts – having considered as a fact the intercourse between R.T., HIV+, and F. through unprotected complete anal penetration – have applied scientific principle according to which just one unprotected anal intercourse with a sick person, can infect the bottom subject”.

This judgment is particularly significant because, as the Certiorary court has pointed out:

“... R.T. was well aware of his illness, and nevertheless he was looking for partners inclined to share extreme erotic experiences, characterized by a morbid elation to expose themselves to mortal risk ... As this Court has repeatedly considered (see Penal Certiorary judgment n. 30425, dated 04.06.2001, and the wide range of references enclosed therein), such behavior exactly corresponds to juridical scheme of “*dolus eventualis*”, because it provides express acceptance of extreme consequences of conduct, that would seem nearly to be hoped; besides, appeal against judgment has also ascertainment that F. had wanted penetration, but on condition that it was protected; for his profession of ‘omissis’ in fact, F. (the injured party) was well aware of the high risk of a condomless intercourse”.

### 5. Some considerations

Ultimately, fear of marginalization risk, desertion and damaging of emotional and sexual life, on the one hand (as in the case of first two sentences), and barebacking practices, conscious and intentional, secondly (as in the case of third judgment), seem to configure the reasons of a deliberate act that reveals a growing social dangerousness, arousing worries in different areas of public life, not only in medicine but also in legal system. Growing emergency linked to HIV/AIDS epidemic has made the theme of aware contagion of great interest for criminal lawyers with regard to legitimacy and opportunity to resort to repression in order to stem the spreading of disease, whose potential harmful consequences could turn out to be devastating for the so-called primary legal goods, foremost people’s health, as provided for by the Italian Constitution, article 32 (Manfredi, 2017; Aimi, 2013).

Despite the lack of specific rules, but revealing a significant legal attention on the subject, the cited judgments confirm the sociological and criminal relevance of a phenomenon whose “perverse side-effects” (Boudon, 1981: 15-17) testify, on the one hand, the propensity of those who practice barebacking to commits pecific crimes (model fact situations); secondly, a current social and cultural change, which invests the deepest recesses of human being, his physical and moral integrity, to which the legal system responds with legal proceedings and actions aimed to limit its consequences (Ferrari, 1997: 315-321; Friedman, 1978: 439-473; Luhmann, De Giorgi, 2007: 166-201). But what is still missing in Italy is the capability to face up sensitive topics in the context of public debate in order to ensure rights to people and avoid consequences and effects that reveal ruinous, perverse and, often, irreversible.

However, analysis of the phenomenon of barebacking provides the opportunity for a public discussion on relationships and dynamics that link increasing phenomena of discrimination and stigmatization of vulnerable groups and the progressive erosion of social cohesion, the widespread phenomena of loneliness and social exclusion (Holt-Lunstad *et al.* 2015). But also presses the government and health authorities to face up an emergency phenomenon that, due to the epidemiological, socio-cultural, legal and economic implications, is likely to become very heavy in terms of overall sustainability of the systems (French *et al.* 2015; Trapero-Bertran, Oliva-Moreno, 2014; Colombo *et al.* 2013; Rizzardini *et al.* 2012)<sup>13</sup>.

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<sup>12</sup> In the specific case of these two judgments, Certiorary – pointing out a *dolus eventualis* situation in consciously HIV transmission – refers to a real balance with which the subject could consciously subordinate the life or the victim physical integrity to pursuit of selfish end not to affect the prosecution of his relationships revealing his seropositive status or adopting safer sex (Aimi, 2013).

<sup>13</sup> Several studies show that the costs of treatment for HIV/AIDS patients represents a significant burden on health

The HIV/AIDS epidemic, represents a dramatic problem for contemporary societies, a “collateral damage” reminding to Zygmunt Bauman, that calls government and health authorities for a general review of strategies to face up the epidemiological challenges related to dynamic relations connected with new technologies, cultural change and new sexual habits.

While recognizing the complexity of the phenomenon and being aware that the latest scientific literature reports of experimental measures<sup>14</sup>, it becomes of overriding importance to protect the public interest through educational interventions to make the phenomenon adequately known, as well as its implications and consequences; but also through specific multilevel public policies able to face up the growing phenomena of discrimination, homophobia and stigmatization of people already at risk of marginalization, as well as through specific legislative interventions aimed to sanction deviant behavior (sometimes encouraged by diffusion of social media and SEM) who knowingly and intentionally compromise life of millions people, very often unaware of the real risks they run into (Bauman, 2014: 35-38; Nussbaum, 2006: 171, 321).

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resources. A recent study carried out on some European countries gives back the idea of direct medical costs (hospitalization, antiretroviral treatments and other medications, laboratory tests, specialist visits, etc.) really greedy, as well as varying. So, in terms of annual average costs, ranging from € 11,638.38 of Spain to € 32,109.62 of Germany, from € 14,821.02 of France to € 6,399.23 of Italy up to € 25,339.7 of UK (Trapero-Bertran, Oliva-Moreno 2014).

<sup>14</sup> It's about experimental interventions realized by internationally prestigious centers such as the Semel Institute for Neuroscience and Human Behavior, Center for Community Health, California University (Los Angeles); the Center for AIDS Intervention Research, Medical College of Wisconsin, (Milwaukee); the Department of Psychiatry, John Stroger Hospital of Cook County (Chicago); the Division of HIV/AIDS of Prevention, CDC (Atlanta), the Graduate School of Public Health, University of Pittsburgh (Pennsylvania). In particular, it's about “peer education” and “multi-media social marketing” interventions that, according to scientific evidence, can reduce more than 50% the MSM *condomless* meetings and make people aware of safe sex behaviors, from condom use to testing (Kelly, 2004; Li *et al.* 2013; Mavedzenge, Luecke, Ross, 2014; Wei *et al.* 2011; Johnson *et al.* 2008).

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