Barely Legal

It’s many a positive person’s worst fear: Your lover takes you to bed and then takes you to court. Kai Wright navigates the tangled sheets of HIV criminalization.

July 1, 2006 By Kai Wright

Don McDaniel’s dates with Gary Wayne Carriker (not pictured here) were some of the best he’d ever had—or so he told Carriker in a letter last year. The pair had gone out a few times and eventually had oral sex. McDaniel, HIV negative, learned soon thereafter that the charming young med student was HIV positive. “It did not overly concern me when you told me of your status,” McDaniel wrote to Carriker.

Carriker’s HIV status would, however, become of great concern to Atlanta-area law enforcement when McDaniel had a change of heart and Carriker was charged with “felony reckless conduct” for those oral encounters as well as for having had anal sex with two other men (one with a condom, the other without) without first telling them he had HIV. Under Georgia law, each such charge carries up to ten years in jail.

The 27-year-old Carriker was hardly the first American to trip in the mishmash of criminal codes inspired by the idea of HIV as a weapon. Hundreds of people living with HIV have been jailed in the past ten years for acts as minor as spitting on someone and as serious as rape. The most extreme prosecutions (especially those involving willful acts) grab national headlines and rile communities. But it’s the more nuanced cases that cause the most anxiety for positive people.

Scenarios like the one that unfolded in Atlanta’s gay community last year reveal how a national web of poorly crafted statutes continues to leave even the most conscientious HIV positive Americans in grave legal jeopardy.

The truth about the Carriker case seems to remain buried in the private bedroom banter of the defendant and his dates. According to extensive reporting on the case by the Atlanta-based weekly *Southern Voice*, Carriker originally insisted that he had disclosed his HIV positive status to all three of them before engaging in any sex act. Carriker tested positive in June 2003, the *Voice* reported, six months before he met the first of the three men, John Withrow, online. Withrow claims Carriker answered yes to the standard chat-room query about whether he was “drug- and disease-free.” Only they know whether more was said, but Withrow says that Carriker came clean only after they stopped going out.

It’s also unclear what Carriker assumed about the risks his partners might incur by having unprotected sex with him. Most experts agree that oral sex has a negligible risk, although the Centers for Disease Control and Prevention (CDC) cites “a few cases” in the epidemic’s history where HIV has been transmitted that way. The Gay and Lesbian Medical Association puts the chance of a negative person contracting HIV from a positive person in a single act of oral sex at 1 in 10,000. Carriker’s doctor testified that his viral load was low enough that he was less likely to pass on the virus through oral or anal sex, especially if he was the receptive partner.

If Carriker did not tell his partners, was it because he thought the reduced risk left him off the hook? The court apparently never examined the particulars of the sex he had with these three specific men—whether Carriker was insertive or receptive, for instance—and none of his partners has subsequently tested positive.

Had the courts chosen to delve into the particulars, though, nothing about sex positions or relative levels of infectiousness would have mattered. This gray area is irrelevant in the black-and-white calculus of prosecuting someone for failing to disclose that he or she is HIV positive prior to a sexual encounter—which is at this point a crime in every single state in the nation.

Sixteen years ago, Congress included a provision in its first iteration of the Ryan White CARE Act requiring that all states receiving federal AIDS dollars devise a way to prosecute people who know they’re positive and expose others to the virus without telling them they’re doing so. The provision was deleted from the CARE Act during its 2000 reauthorization, but the question of federal mandate was academic by then. The transformation of state laws was already under way.

University of Connecticut School of Medicine ethics scholar Zita Lazzarini leads a research team examining the criminal codes spawned by the 1990 law and the impact they’ve had. According to Lazzarini’s 2002 review, 27 states explicitly make it a crime to knowingly expose another person to HIV. The remaining states have assured Congress that existing criminal statutes, such as those governing assault, are adequate. Lazzarini points out that 25 states already had laws dating back to the early 20th century that criminalized exposing someone to any communicable disease, 19 of which explicitly mention sexually transmitted diseases.

HIV-specific laws vary widely in breadth and depth, resulting in a legal minefield. In three states, for instance, the law is limited to a sentence enhancement on existing crimes—upping the penalty for, say, prostitution or sexual assault if you happen to be HIV positive. But a handful of states cast a much wider net, generally criminalizing the act of potentially exposing someone to HIV without defining much about what that means, even in situations where experts agree that the risk is tiny.

In Georgia, Louisiana, Ohio, Pennsylvania and South Dakota, it’s a felony just to spit on someone if you’re positive. In Maryland, serodiscordant sex is basically illegal because if you know you’re positive and do anything that might expose someone else—even if you disclose and there’s negligible risk of transmission—you can be prosecuted for a misdemeanor.

Four states with HIV-focused laws don’t address the question of disclosure; they focus on what you

do, not what you say. But choosing to wear a condom during sex will protect you from prosecution only in California and North Dakota. “Safer sex is not necessarily legal sex,” Lazzarini says. “It’s clearly less risky to have [unprotected] oral sex than it is to have [unprotected] vaginal or anal sex, but the law does not make that distinction.”

None of these laws requires that HIV actually be transmitted for a crime to have occurred. And only six states require prosecutors to show “intent”—California, Idaho, Louisiana, South Dakota, Virginia and Washington. In the remaining states with HIV-specific laws, the defendant just needs to know he or she is positive and have done something that might have exposed others to the virus.

Disclosing before sex is the linchpin in Georgia, where Gary Wayne Carriker ultimately pleaded guilty and got off easier than most. He is now serving four years in prison (two in Atlanta and two in a neighboring county), with twin eight-year probation terms awaiting him when he gets out. Lazzarini has found that the minimum-time-served requirement for people convicted under HIV criminalization codes averages 14.3 years.

Yet actual prosecutions are relatively rare under these laws. Reviewing legal and media databases between 1986 and 2001, Lazzarini’s team found 316 HIV-related prosecutions. “You have to either really work at it to get prosecuted,” says civil rights lawyer Ronald Kuby, “or you have to be extremely unlucky.” When these HIV cases do go to trial, however, the conviction rate is relatively high: 80% of the cases that researchers could trace to a conclusion ended in some sort of sentencing.

So what makes you “unlucky”? “Are these cases started by somebody who’s disgruntled because they think they’ve been exposed?” Lazzarini asks. Or is there a bigger picture? Nearly a fifth of all prosecutions occurred between 1997 and 1998, during the period when the high-profile case of New York’s Nushawn Williams was prominent in the news.

Williams’ case is a standout among a crop of cases that raise the specter of race. Prosecutions involving HIV positive people of color are often accompanied by a media spectacle—turning them into public floggings that have been particularly intense in a series of cases involving black men from urban areas accused of having sex with white women from rural areas. During the Williams uproar, which involved dozens of mostly teenage girlfriends, national media outlets used loaded language to describe the new monstrous threat. Williams was called everything from “bogeyman incarnate” to “super infector.”

In 2004, a black man named Anthony Whitfield from Washington state was sentenced to 178 years in prison for, as his public defender put it to the *Seattle Weekly*, “spreading AIDS to a bunch of white women.” Seventeen women accused Whitfield of having had sex with them without first disclosing. Last August, news reports from Milford, Iowa, suggested that the tiny, largely white town might host the next installment in this series. Police there had just locked up Dewayne Boyd, a black man, and charged him with having had sex with four women—including his wife—without disclosing that he had HIV. As one Milford resident told the Des Moines Register, “What bothers me

is that people are saying, 'It's that black guy.'"

Whatever else it takes to prompt prosecutions, two elements are clearly needed: someone looking to file charges and a prosecutor willing to carry them forward. And that, argues AIDS Law Project of Pennsylvania's David Webber, who is also editor of the *AIDS & Public Policy Journal*, should have more people concerned about the direction of prevention policy. In a 2004 paper in his journal, Webber warned that the beefed-up partner notification programs that the CDC has promoted in recent years may unwittingly lead many people with HIV into a trap.

Western efforts at disease control have been firmly rooted in policing from the start. The German doctor Johann Peter Frank first spelled out government authority for maintaining a healthy citizenry in a series of turn-of-the-19th-century volumes aptly titled *A System of Complete Medical Police*. America's response to AIDS has included a healthy dose of that paternalism, to be sure. But the unique stigma associated with HIV drove public health officials and state legislators, for many years, to go the extra mile to protect the privacy of anyone who tests positive. Those cautious times are now history.

As this story goes to print, the CDC is in the final stages of rewriting HIV testing guidelines to eliminate the need for written consent in most health care settings and to withdraw the recommendation that counseling accompany testing. New York City is spearheading what may become a national effort to allow health workers to pull the individual medical records of people with HIV and track them down with questions about both their treatment and behavior. And the CDC is in the third year of its "Prevention for Positives" campaign, which has moved the focus of prevention efforts toward getting positive people to cough up the names of others they suspect to be at risk.

The CDC has highlighted some effective strategies, like training those who test positive to recruit others in their social networks who are also likely to test positive. But that's not what prevention aimed at positive folks looks like everywhere. "We've had several patients come to us in a tizzy because of a note on their door," says Barbara Harper, who does testing and education at Montgomery AIDS Outreach in Alabama, where the local health department serves notice that people with HIV must tell the state whom they've exposed to HIV. "Folks just don't think they have to talk to the health department about this, and they do," says Harper—because Alabama has a mandatory partner notification law.

The result is a roundly distrustful environment surrounding HIV testing and disclosure, according to Harper. People with HIV resist giving health officials information, and people who get notified that they've been exposed are more interested in retribution than health care.

Webber worries that as the CDC reaches beyond those who have newly tested positive and contacts those who might have known they're infected for some time, the pursuit of public health will fan criminal justice's flames. Says Webber, "I would tell any client coming to me for advice about the threat of prosecution that we really don't know what the risk is. But I would recommend that they be careful."

Being careful is not always easy. “There’s general protection there for those nice people who aren’t suspected of crimes,” Webber says of HIV privacy laws. Kuby considers it “more of a theoretical problem,” given the small crop of existing cases, but agrees that the laws present a worst-case legal scenario. “You never want to be in a position of putting your word against somebody else,” he says. “You walk in as a defendant knowing that your word is going to be suspect.”

The only way to avoid that setup in HIV disclosure cases, Kuby says, is to document the other party’s informed consent—that he or she not only is complicit in the act, but also understands the risks involved. “It’s a little weird,” he acknowledges, but it’s about the only shield available to someone worried about being charged. He suggests consent could be casually documented by, say, recording it with a cell-phone video camera.

To date, HIV criminalization laws have mostly been used to interrupt what Webber calls “fairly egregious” behavior. He sees a pattern of prosecutions “where public health officials felt like they were at the end of their rope.” But even then, those cases appear to originate in law enforcement agencies rather than health departments.

Lazzarini’s team is now studying how the laws have affected high-risk behavior and taking a closer look at partner notification systems and their impact. The research has yet to produce definitive results. But Lazzarini echoes the concerns of other prevention gurus that criminalization sends a troubling message to anyone considering an HIV test. “If we think we’re accomplishing prevention, we’re silly,” says Webber. “If anything, we’re sending the message that you shouldn’t get tested.”

Still, even many positive people support the prosecution of people like Carriker. “Let him rot,” one wrote in a letter to the *Southern Voice*’s editor. “They both should have gotten tested, and that is the responsibility of both parties; but to legally absolve this coward Gary Wayne Carriker for not telling people he could make them sick is ludicrous.”

Webber allows that people with HIV have no right to choose what risks their sex partners take. But making the matter a legal one introduces a difficult set of questions for public health. “If you think it’s OK sometimes to have people prosecuted,” he asks, “where do you draw the line?”

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