From Unsafe to Ill

Who’s responsible for new infections? Criminalization says it’s the PWA. Prevention says both partners. Right now, criminalization’s winning

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Moderated by Catherine Hanssens, director of the AIDS Project, Lambda Legal Defense and Education Fund, New York City

The Panel:

Dennis DeLeon, PWA, executive director of the Latino Commission on AIDS, New York City
Joseph Sonnabend, AIDS physician and researcher, director of Stuyvesant Poly Clinic, New York City
Ron Bayer, Professor of Public Health at Columbia University, New York City
Uffe Gartner, prevention educator, AIDES, Copenhagen, Denmark
Stephen Gendin, PWA, president of Community Prescription Services and *POZ* vice-president, New York City
Meurig Horton, PWA, epidemiologist and former member of WHO’s Global AIDS Program, London, England

Bareback sex. PWAs with privileges. “AIDS Monster” Nu-shawn Williams and his 50-plus girlfriends.... Over the past year, as the happy-face “end of AIDS” choir has faded, the whine of resentment at the “special” status of HIV has risen to a vengeful roar. There is no better example of the contradictory feelings fueling this “AIDS exceptionalism” backlash than the rush to criminalize the transmission of HIV. Already, 27 states have laws that make an HIV positive person who engages in acts ranging from spitting to unprotected sex liable to criminal prosecution and a long prison sentence, whether or not infection occurs. Backers have tended to peddle such laws as prevention measures, necessary evils directed against people who know they have HIV but recklessly, even intentionally, endanger others. But more and more, supporters of criminalization -- and the current explosion of transmission-related bills in all 50 state legislatures -- argue simply that punishment of PWAs is its own best end. POZ asked Ron Bayer, who coined the term “AIDS exceptionalism,” and six far-flung activists to consider this national mood to call in the cops.

Catherine Hanssens: The growing trend to criminalize HIV transmission is, to say the least, not very popular among people with HIV. Ron, you’ve been an outspoken advocate of such laws. Make the case.

Ron Bayer: It’s quite simple. The question to ask is, do people with HIV have a responsibility to

their sex partners not to transmit the virus? I'll state my position very clearly: I think they do. It's not enough to say, "He or she didn't ask -- I have no obligation to tell." People with HIV must do more.

Dennis DeLeon: The painful truth is, many in the AIDS community have long been reluctant to even acknowledge this moral obligation, let alone act on it. Thinking of yourself and your sexuality as a danger to others is very burdensome.

Bayer: Now, let me add that I also think people with, say, herpes have the same obligation, except that herpes, as bad as it is, is not fatal. The moral burden is, to a great degree, determined by the awfulness of the consequence.

DeLeon: So, would you say that if HIV becomes a chronic -- rather than fatal -- disease, the moral burden will be lessened?

Bayer: I certainly do. But let's personalize this dilemma for a moment. Imagine, say, a heterosexual couple in which the man finds out he's infected. He doesn't tell his wife -- not for malicious reasons, but because he's afraid she'll leave him. So she becomes infected. And now, seeing her life taken from her, she turns to the public prosecutor and says, "It's not first-degree murder, but his reckless endangerment has taken my life. I want the state to do something." I believe this woman has a right to feel that her husband injured her and deserves to be punished.

DeLeon: I think what Ron says about punishment is inevitable. There's a hunger for justice. And that's why we're going to have these laws. Because no one can deny this woman's claim that she was wrongfully treated.

Bayer: By *punishment* I mean *retribution*. It's an appropriate goal for society.

Hanssens: But before making policy or passing law, we should be rationally thinking out what our goal is: Is it punishment or is it public health? Does punishment have a role to play in public health?

Bayer: No one in their right mind believes that retribution for this woman will affect the pattern or rate of HIV transmission. Criminalization is not a public-health measure designed to slow the spread of HIV.

DeLeon: I am absolutely convinced that within the year we'll have a law in many states that makes it a crime to transmit the virus knowingly. It's inevitable. But there's no reason that such a law should as a matter of course lead to names reporting and partner notification.

Joseph Sonnabend: Well, you may want to disconnect criminalization from public-health measures such as names reporting and partner notification, but the current political climate being what it is, you can't -- the two are inextricably connected. If criminalization happens in the United States, universal mandatory testing can't be far behind. It's as simple as that.

Hanssens: Ron, you said a moment ago that no one in their right mind would confuse punishment with public health. But that business about "in their right minds" may be too big a leap to make because right now in New York we have fifty-four transmission-related bills pending in the state legislature. And there's nothing unusual about New York. Most of these bills not only make exposing another to HIV a criminal offense but also include names reporting and partner notification. One even criminalizes consensual sodomy. But out of all these bills, only one has anything to do with prevention. *One in fifty-four*!

Bayer: Clearly we want the best law possible. It's time for people committed to civil liberties to face reality and ask, "How can we craft a law that's the least dangerous to people with HIV, but recognizes the victim's hunger for justice?"

Hanssens: Many civil libertarians disagree. They would rather challenge that law than try to make it harder to challenge when it's actually applied.

Uffe Gartner: In Denmark, where I come from, we passed a law in 1994 that criminalized HIV transmission. It was in the midst of political hysteria: A guy had been fooling around with a lot of girls, and these girls took him to court using the laws that existed, but the laws didn't work. Still, people felt there should be a serious consequence for this guy, so a law was passed very fast -- in three months. And now everybody says that the law is useless.

Meurig Horton: Was the guy black?

Gartner: He was Hispanic.

Horton: Well, this is not a trivial point. The case of Nushawn Williams -- which is like a dark cloud hanging over this whole discussion -- is similar to that case and many cases in other countries. In New Zealand two years ago, a positive man from Africa was prosecuted for attempted murder after having unprotected sex with a number of white women. In Finland last year, a sub-Saharan African man was charged with attempted murder after having unsafe sex with over a hundred women. In all these cases, it is a black man who is perceived to be infecting white women.

Bayer: Uffe, why do you say the Danish law was useless?

Gartner: The law said, "What is punishable is having unprotected sex knowing you are HIV positive." So it was making *knowingly* transmitting the virus illegal rather than the act of unprotected sex itself. In the example of the wife, it's impossible to prove that the husband transmitted HIV to her *before* he got tested. So no court can ever say that he knowingly infected her. That was the problem we ended up with in Denmark: Although none of the women got infected, they were still able to prosecute the man because he knew he had HIV.

Hanssens: Exactly. Opponents argue that these laws create a terrible Catch-22: You're not criminalizing unprotected sex that results in the actual transmission of HIV, or even just the exposure -- you're criminalizing knowledge of HIV status in combination with unprotected sex. Now, let's consider another married-couple example: Say the husband knows he could have been

exposed, but doesn't bother to get tested -- he doesn't want the responsibility of knowing. So transmission occurs. Are the ethical and criminal-liability issues different from those in the first? Certainly the public health consequence -- infection -- is the same.

Bayer: I would ask that a bit differently: Do you think that someone who doesn't know they have HIV commits the same moral wrong as someone who knows?

Gartner: Not the same, but an even worse one. Because that person denies they're a danger. Again, that's the contradiction in this law: The people who take responsibility to find out if they have HIV are the ones who are going to be punished.

Hanssens: So, we need to ask, how does the fear of prosecution affect people's willingness to get tested?

Bayer: The question is, why won't people come forward for testing? Because they believe something dreadful will happen to them. That if the state has their name, they will lose their job, their insurance, their partners -- and history shows that all those fears are ill-founded.

DeLeon: That's just not true, Ron.

Bayer: It's not state health departments that release information to insurance companies, landlords or partners. It's blabbing doctors and blabbing counselors.

DeLeon: How can you say there's no risk in giving your name and getting tested when you have legislators proposing to criminalize HIV infection? The reality I deal with as a PWA is the political threat to use that information. Even the CDC's own study in San Francisco found that one of the major obstacles for people considering getting tested was fear of someone having their name.

Sonnabend: It's one thing to say you have a moral obligation and to enforce community consensus. It's another thing to make a law against it -- that's where I draw the line. If we start to confuse the two -- as is happening in many states now -- we seriously undermine prevention strategies.

Horton: I agree. Safe-sex negotiations are based on an assumption of equality -- that each person is responsible for their own protection. The view that transmission is -- alone or primarily -- the responsibility of the positive person is wrong-headed. It creates a demand for prevention strategies that assume both that the presumed negative has a right to know their partner's status and that the presumed positive has a responsibility to know and a duty to protect. This has been shown, time and again, to be unworkable.

Gartner: For my part, I disagree with the entire premise of Ron's argument. I see no moral problem in one person transmitting HIV to another because I see it as a mutual responsibility whenever two people have sex.

Bayer: So, in my example, the wife bears responsibility for becoming infected?

Horton: That's not the question I would ask. As an epidemiologist, my aim is to have the biggest impact possible in preventing HIV transmission, not to pass judgments of guilt or innocence in individual cases. Before we talk about punitive measures, we must provide services. Even Sweden, which has a very coercive HIV policy, gives people treatment, welfare benefits and social workers before locking them up.

DeLeon: I want to pose a weird dilemma that all this creates. If I have unsafe sex with somebody with hepatitis C, he can report me, and I'm vulnerable to criminal prosecution. But if *he* gives *me* hep C -- which I could die from -- there's no penalty.

Sonnabend: Ron made the point about the gravity of the condition.

DeLeon: All I'm saying is, once we begin to criminalize HIV, I don't see us turning back from other diseases. But I have a question for Stephen Gendin: You wrote an essay in *POZ* about having bareback sex and the conflicted feelings it provoked in you. And you got a lot of, er, *feedback*, is the best way to put it. You seem to believe that there's a moral difference between two people with the same serostatus having bareback sex and two people with different serostatuses.

Stephen Gendin: Yes. I think it goes back to the issue of responsibility. If my partner and I have made an informed decision, then I don't feel I'm morally culpable. And I think the number of seroconversions in the United States would go down dramatically if people did in fact disclose their status to each other every time they had sex.

DeLeon: But what if somebody said to you, "You know, I'm HIV negative but I still want to have the unsafe sex."

Gendin: I wouldn't do that -- in most cases. [*Laughter around the table*.] But what bothers me about this entire discussion -- the reason I've been so silent -- is that we're talking about these laws outside the context of what is really happening with AIDS in this country. And what's really happening is, the behavior of a group of HIV positive people is being criminalized while virtually no support is being given to people in not having that behavior. It would be one thing if we had perfect HIV prevention, and still there were people who were "acting irresponsibly." But we're not in that situation at all. I mean, I see the criminalization debate as a red herring -- it diverts us from addressing the real problems with prevention and care. It allows us to feel like we're solving the crisis by going after these very specific and very weird situations when we're avoiding the much bigger problems that lead to most HIV transmissions.

Hanssens: What would you rather see officials and advocates focusing energies and spending resources on?

Gendin: Well, the average 24-year-old, positive or negative, thinks that HIV is no big deal -- a chronic, manageable disease, no worse than herpes. That's a shocking thing to say, but I believe it's true. Someone who is 24, knows they're positive and is having unprotected sex doesn't necessarily feel like they're doing anything wrong. And someone who is 24 and negative doesn't feel like they're risking their lives. So I have a hard time saying, "Lock 'em up," when as a society,

we've done nothing to let these young people know the seriousness of HIV. And I think our resources would be much better spent educating young people than incarcerating them.

Bayer: We already spend vast sums of money on prevention and education in the United States. Part of the problem is, it's clearly very difficult to do. And in many places they have more money than they know how to use effectively because the fact is, they don't know what they're doing. I think part of the problem at this stage of the epidemic is that so many AIDS service organizations have put their heart and soul into gaining access to medical care and turned their back on prevention.

DeLeon: It's naïve to say that there's more than enough money for prevention. Just look at all the legal restrictions against discussing -- let alone distributing -- condoms in schools. These barriers -- and there are many -- prevent what money there is being used effectively. But underlying this discussion is the fact that by now many people have lost sympathy for PWAs. There's the growing attitude of "Why are we giving fancy apartments and special services, candlelight dinners, dog walkers to PWAs? After all, they behaved irresponsibly -- shooting up drugs, being promiscuous, barebacking?" People are getting tired of giving money to AIDS organizations, and they don't see any end in sight.

Horton: Hold on. There *are* prevention success stories. Northern European countries have done well, among both the gay community and injection-drug users. Australia has had extraordinary success and pretty well stopped its epidemic -- HIV has remained highly focused in the original groups that were infected. Now, the reasons for that success have far more to do with community mobilization and the quick filtering of models already developed in the gay community to drug users. But what I see in the United States in terms of prevention is an unmitigated disaster. While there's been very good treatment activism here, for many years prevention activism basically hasn't existed. Instead there's been a professionalizing of prevention. Another reason for the failure here is that you had an epidemic of AIDS cases very much sooner. In Europe, we had an explosion of HIV before we saw much AIDS. So we had a community response to asymptomatic HIV infection and to prevention issues rather than to the need for treatment and care.

Gartner: For my part, I have to say I'm quite shocked coming to the United States for the first time. I've been in New York for only a week, going to gay bars and sex clubs, and I don't see safe-sex materials, condoms or lubricant. In Europe you see them everywhere. Here, I've seen three silly posters on my whole trip. How you can say you're doing prevention among gay men?

Bayer: I must tell you all that I find this conversation astonishing. We are talking as if the epidemic in the United States at this point is primarily driven by transmission among gay men. In fact it is driven by black and Hispanic drug users and their sex partners. Sure, there's HIV transmission among young gay men, and when someone says, "It's no big deal to get HIV," it is tragic. But the problems we must solve go far beyond the specific ones confronting gay men.

Hanssens: That solution will have to wait for another discussion, if ever, because we're almost out of time. Two final questions: Are criminalization and coercive measures a train that has left the

station? And is there a way to reinvigorate real prevention?

Bayer: These bills that criminalize HIV transmission will certainly be passed. But unless there's a sharp turn to the right politically, there's no reason to fear that we'll see mass prosecutions or mandatory testing. We didn't see them in the '80s at the height of the Reagan era, and we won't see them now. With regard to prevention, the real challenge is for AIDS service organizations to mobilize the energy and commitment to tackle prevention. They have to care enough about those not infected to raise the argument.

Sonnabend: Sadly I have to agree that criminalization is well on its way. But in my view, the additional danger is that whoever is driving criminalization is ultimately interested in getting mandatory testing for the whole population. I also think these laws will result in discrimination against those who are least able to protect themselves. As far as prevention goes, our efforts have failed abysmally. The only hope will come not from organizations, but from the communities themselves. But it's important to point out that by now prevention has been very much undermined by the right-wing agenda that sends the message that not only is multiple sex or promiscuity going to kill you but -- with or without a condom -- it's morally wrong. This is terribly discouraging. So it's really up to the communities at risk to rally. The fact that they've done wonderful things in the past should hearten them.

Horton: Criminalizing HIV, yes, I think that's inevitable here. Of course, as most of us around this table have been saying, it's perfectly useless in fighting the actual epidemic, but it will justify the hunger for retribution. And what would I do about it? Well, I think the first thing is, ban *Oprah Winfrey* and all the talk shows that encourage people to just sit back and blame others without ever examining their own assumptions. And yes, we need to mobilize prevention activism and reassert that safe sex does work. It really does. It doesn't work perfectly or universally, but in an imperfect world it's the best thing we have.

DeLeon: As I've said, I'm convinced that the criminalization train has left the station. The only hope of derailing it is if the AIDS community stops acting in a very defensive way on most of these issues and instead takes the moral high ground. We're afraid to say things are morally wrong and morally right. We must say that people who are infecting others must curb their behavior voluntarily. We must say, forcefully and publicly, that they're irresponsible. About prevention, all I have to add is, it sucks.

Gendin: I agree that criminalization is coming, but I don't agree with Dennis on the moralizing. What I'm afraid of in terms of HIV education is that first we're criminalizing, and then we're moralizing, and only after that are we educating. Or we're never educating -- we don't get to that. And in an environment where people are either being locked up or being told they're evil, it's very hard to teach effective prevention. It's awful to imagine, but there will be more and more talk shows where people who bareback are yelled at onstage by hundreds of people. And that will pass as HIV education.

Gartner: Well, I wouldn't know if the criminalization train has left the station or not, since I just

arrived here myself on the afternoon train. But I can tell you that the Danish people lost a lot of innocence when they collaborated with the government to make their anti-HIV law. Under prevention, well, I just say, get started, though it seems quite late, especially as far as gay men are concerned. I mean, sixty percent of all gay men in New York City are already infected.

Hanssens: I'll limit my closing remarks to this: One of the fifty-four bills pending in Albany would make Stephen Gendin a criminal for having unsafe sex.

Gendin: Only *one*?

Hanssens: So far. But what I want to ask is, if that passes, how will such a law affect not only your personal life but your freedom to speak about barebacking and other prevention issues? Will you be at risk of conspiracy to commit a crime under New York law? As we all know, gay sex is, in the hierarchy of values, less valued than heterosexual sex, and this is evident when you look at who has been prosecuted so far -- overwhelmingly people of color, prisoners, gay men. And when you're a gay person of color in jail, forget it. Lambda defended an HIV positive, gay, African-American prisoner who died in prison while serving a sentence of twenty years for biting somebody. This is the awful reality that results when society's so-called hunger for justice is actually implemented.
