Sex Crime

More HIV-positive people are being criminally prosecuted for not disclosing their HIV status before sexual encounters—sometimes even when there is no intent to harm and no transmission occurs. We're also getting locked up for not disclosing to dentists and for spitting, biting, marrying—even failing to take meds. Out-of-date laws and inconsistencies around the world make the spectrum of what constitutes criminal behavior dangerously out of sync with science and confusing for those of us living with the virus. A look at how criminalization backfires as a strategy for stopping the spread of HIV and the information you need to know to stay free.

October 1, 2009 By Jennifer Morton, Oriol R. Gutierrez Jr. and Regan Hofmann

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In 1990, in the dark, early days of the AIDS epidemic, Gregory Smith was sentenced to 25 years in prison for spitting at and biting two prison guards, allegedly exposing them to HIV. Given that no transmission occurred and that there was empirical data indicating that transmission was highly unlikely, it seemed an unfair verdict. But, back then the general public was unclear on how HIV could—and couldn't—be spread, a fact that resulted in considerable hysteria around those living with the virus and the threat they allegedly posed. Neither the doctors and lawmakers involved in the case nor the media covering it educated the public about the lack of risk posed by spitting and biting. Smith and his, as it turned out, non-deadly saliva marked one of the first highly publicized cases of an "AIDS offender," and at a time when an HIV diagnosis almost inevitably meant a death sentence, few people, let alone juries, or judges—maybe even understandably—cared to split hairs over relative, versus actual, risk.

Flash forward nearly 20 years. In 2008, Willie Campbell was sentenced to 35 years in a Texas prison for spitting on a police officer, allegedly exposing him to HIV. Given that no transmission occurred and given that we now definitely know how HIV is and isn't spread, it seemed a grossly unfair verdict. Considering that the defendant claimed to want to hurt the police officer, there were certainly grounds for punishment. But locking him up for a quarter of a century? The fact that people living with HIV today are being given similar disproportionately harsh verdicts as they were decades ago points to the ongoing problem of HIV-related stigma and its impact on the criminalization of HIV transmission. This year, in Toronto, Johnson Aziga was convicted on two counts of first-degree murder and 10 counts of aggravated assault for transmitting HIV to two partners, both of whom eventually died from AIDS-related illness. Aziga set a worldwide precedent by being the first HIV-positive person charged with first-degree murder for HIV transmission.

It is time that the public's understanding of HIV aligns with scientific evidence and high time that new laws are established to address the complex and nuanced nature of risk and responsibility between two people engaging in consensual sex when HIV is present.

It’s not just that it’s unfair; criminalization of potential and actual HIV transmission is backfiring as a prevention and public health measure. Putting someone in prison might stop that person from spreading HIV to the general public, but it has a ripple effect that could impact far more lives. Repeatedly sentencing HIV-positive people in ways that are dramatically disproportionate to the risk and outcome of their actions makes people afraid to get tested and treated for HIV. And it makes it less likely that people will disclose their HIV status to others—all of which enhances the possibility that HIV will be spread. If people are not afraid of getting locked up for having HIV, they might be more receptive to the idea of knowing their status. And, if they’re positive, they might be more likely to tell others and seek treatment that could lower their viral load and render them less infectious—which could mitigate the spread of the disease even if they—or their partners—don’t practice safer sex 100 percent of the time.

Without a doubt, HIV-positive people who know their status have a responsibility to keep others safe. But that responsibility should not be one-sided. Even if both partners had an HIV test, for example, and genuinely believed they are negative, that might not be the case. Given the lag time between exposure to HIV and when the body has produced the antibodies to the virus that result in a positive test for HIV, someone could be carrying HIV and not even know it. Understanding this scientific truth, all people should then realize that unprotected sex invariably involves risk, and that the risk must be accepted by both parties. This is true regardless of what questions you ask your partners, what their answers are, and whether or not they’re telling—or know—the truth.

According to the Global Criminalisation Scan (gnpplus.net/criminalisation), only eight U.S. states have no laws criminalizing exposure to or transmission of HIV (they are: Hawaii, Maine, Massachusetts, Nebraska, New Mexico, Rhode Island, Vermont and Wyoming). Only six U.S. states (California, Kansas, Maryland, Oklahoma, South Dakota and Washington) have laws that *only* criminalize exposure to HIV with intent (though what constitutes intent can vary). Throughout the rest of the country, the laws differ, but you should know that you can be charged in many states for not disclosing before sexual activity (which includes kissing in some states like Iowa!) even if you have no intent to harm and HIV isn’t transmitted. Thirty-six states have prosecuted HIV-positive people for criminal HIV exposure or transmission, but only 28 states have specific HIV-related criminal or public health laws.

For a sense of the complexity and breadth of different state laws, consider this: In Arkansas, people who are HIV positive must alert their physicians and dentists of their status before receiving any health care services. Failure to do so is a class A misdemeanor. In Missouri, performing an act of prostitution, which is normally a class B misdemeanor, becomes a class B felony if the prostitute knew beforehand that he or she was infected with HIV. Also in Missouri, a person can be sentenced to death if he or she transmits the virus as a result of exposure without disclosure. Using a condom is not a defense. In Oklahoma, it is a felony for any person, after becoming infected with a sexually transmitted infection (STI) and before being pronounced cured by a physician in writing, to marry any other person or to expose any other person to the STI.

Many of the criminal transmission laws were written in the late 1980s when then-President Ronald Reagan called for the establishment of the President’s Commission on the Human

Immunodeficiency Virus Epidemic. The commission encouraged states to write criminal laws to impose an “affirmative” responsibility on people who tested positive to disclose their HIV status to potential sex partners. There was a hook: Only states that created criminal penalties for exposure to and transmission of HIV received federal dollars for AIDS care and education.

The 1990 Ryan White CARE Act made it possible for states to get funds for care and education of HIV, but by then, 32 states had created laws to specifically address HIV and all 50 states claimed they had laws in place to handle HIV transmission.

We have made enormous headway on the HIV treatment front, but when it comes to the general public’s understanding of HIV transmission we have a long way to go. Criminalization and disproportionately severe sentencing of people living with HIV are proof positive that society’s (and our legal system’s) comprehension of HIV is lacking. And, thanks to HIV-related stigma, HIV-positive people are often viewed as “guilty until proven innocent.” Three factors are supposed to play critical roles in determining sentences in cases of potential exposure to and/or transmission of an STI: intent, actual risk and outcome. But when people living with HIV stand trial, these factors are often obliterated in a flurry of fear, misunderstanding and discrimination.

While it’s difficult to track the exact number of HIV criminalization cases (as many are not reported) there is no question that the subject has been appearing in media coverage more frequently of late. Even the scope of what can and can’t be criminalized in relation to HIV seems to be growing.

It is important to know that the concept of criminalizing people with HIV is expanding beyond pre-intimacy disclosure. Recently, in Mississippi a woman was denied custody of her child because she is positive, and in Maine, a judge extended an HIV-positive pregnant woman’s incarceration to ensure she would get antiretroviral treatment in prison and
decrease the risk that her child would be born positive. (She has since been released and will have the baby in a hospital.)

In many other countries, the situation is even worse. In Sierra Leone, women can be fined and jailed for passing the virus onto their children. In Guinea, Guinea-Bissau, Mali and Niger, a mother can be criminally charged if she doesn’t take steps to prevent HIV transmission to her baby, including taking antiretroviral meds. In Egypt, several people were arrested for merely being HIV positive. Globally, fifty-eight countries have laws to prosecute HIV transmission; 33 others are considering passing such laws; of those, 20 are in Africa.

What can HIV-positive Americans do to protect themselves? In theory, one defense is “informed consent.” If you can get a person to indicate that you have made it perfectly clear that you have HIV, and do so in front of a witness, such proof of disclosure may hold up in court. But unfortunately, many states do not define what constitutes “informed consent.”

You could ask the people to whom you disclose to sign a letter stating that they have been told—and acknowledge— that you’re HIV positive. It will need to be notarized (stamped by a

notary public at the time of signing) to be effective. Another method is to tape record (or videotape, say, with your cell phone or a digital camera) your disclosure. Remember: For an audio or video file to be admissible evidence in court, you must state, on the file, that you request permission for the conversation to be recorded and the other person must verbally agree and state his or her full name.

You could also invite a friend to be present when you disclose to a potential partner. That friend should be willing to stand witness to the disclosure should charges ever be brought against you. Or you could take a potential partner to your doctor to educate him or her about HIV and its potential risks—so you have a witness to his or her awareness of your status.

Of course, it is also a good idea to use a condom. While not a legal defense in some states, condoms reduce the risk of spreading HIV. Historically, fewer people have been prosecuted for nondisclosure prior to sex when a condom was used.

Most important, the HIV community must lobby local, state and federal government officials and lawmakers to rewrite (or better yet, abolish) the laws that criminalize HIV transmission. Contact your mayor, your congress people, your state senators and their staff. Educate them about HIV risks and transmission, and hold their feet to the fire to ensure that all people living with HIV are not unfairly punished.

Those who have the power to put us away need to hear that locking up positive people will not only not stop the spread of the disease, but that, ironically, doing so may mean more people will contract HIV. And that would be a real crime.

Want to report your own incidence of HIV criminalization? Tell your story on criminalhivtransmission.blogspot.com.

DON'T THROW AWAY THE KEY

The following are comments posted on POZ.com by readers in response to various news stories and opinion pieces on the subject of criminalizing people living with HIV.

It's a shame that we have to live in a world where we're afraid to start relationships for fear that we'll end up in jail and be treated like murderers.

Living in Fear, NY

It should only be unlawful for someone with HIV to knowingly and intentionally fail to disclose to a partner before engaging in any sexual activity that carries a reasonable risk of transmission. If no infection is transmitted, it should not be criminalized.

David, Helsingborg, Sweden

I believe that people should never take the risk of unprotected sex with someone they do not

know, and if they do, and get HIV, they only have themselves to blame and should not be able to prosecute anyone.

Michael Haslett, City Withheld

Both parties are responsible for his or her own sexual safety. Why does the responsibility fall on the person who is positive? There is a moral responsibility for a positive person to not deliberately infect a negative person, but outside of rape, you cannot infect a person that doesn't allow it.

Greg, Davenport, FL

Criminalizing people for just having HIV/AIDS is outrageous. But purposely infecting someone should be a crime. I hope they really clarify what constitutes a crime and what doesn't as far as HIV and AIDS is concerned.

IamStone, Mulberry, AR

I was assaulted by an aggressive driver, who during his assault poked his finger in my mouth. I bit him causing a laceration. I was charged with assault, and there were prosecutors who wanted me charged with Iowa's AIDS battery law. There was no intent, and no real risk of transmission—yet HIV was still allowed as an issue at trial.

Donald Baxter, Iowa City

I've known [unsafe sex] to happen a few times when drugs/alcohol is involved. Even if someone insists they "don't care," I use a condom. It's a pact I made with myself from the beginning.

Susan, Boston

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http://beta.docker.poz.com/article/HIVtransmission-crime-laws-17279-1521