Low Blows

Nondisclosing HIVers are being sent to the slammer for having sex. Arthur S. Leonard tracks a terrifying trend.

March 1, 2000 By Arthur S. Leonard

The list keeps growing: Charles Jones, 17 years, in Tennessee; Jerome Murphy, five years, in Illinois; Louis C. Saunders, 40 months to 10 years, in Washington, DC; Steven Hancock, four months and a year's probation, in Kentucky. What do these recently convicted criminals have in common? Each knew that he had HIV and ran afoul of laws against exposing others to the risk of infection. In some cases, there was no evidence that the virus was actually transmitted to the defendants' sexual partners, and prosecutors sought conviction even when condoms were used. This alarming development begs the question: Should the long arm of the law be used to counter behavior that could spread HIV?

To date, when legislators, judges and juries have weighed in on the question, their answer has tended to be a resounding, pounding yes. Many of these prosecutions take place not under HIV-specific laws but under more general statutes that make it a crime to expose others to serious injury. Those that do mention HIV—or that refer to "infectious diseases"— tend to be ambiguous, making it a crime to "knowingly expose" somebody to infection from a communicable disease.

More than 20 states have passed HIV-specific laws criminalizing intentional "exposure" without informed consent. In general, the trend is toward harsher laws. Last November, for example, the Wisconsin State Assembly gave preliminary approval to a bill sponsored by Rep. Mark Gundrum (R) that would create a new criminal penalty for any HIVer who has sexual contact without first disclosing status. Whether or not the "victim" is infected as a result of the defendant's conduct has no bearing on liability. As with most HIV laws, the Wisconsin bill makes no mention at all of safer sex—anyone who has HIV can be convicted even if he or she uses protection—nor is "sexual contact" defined with any precision. The bill would also forbid any HIVer from sharing a needle with anyone else. The maximum prison sentence for violation would be 25 years, with an additional 15 years of close supervision. Gundrum compared HIVers having sex without disclosing their status to their partner with "slipping cyanide into someone's drink when they aren't looking."

Kentucky has proved to be every bit as punitive as Wisconsin. When refusing in December 1998 to reverse Steven Hancock's prison sentence for knowingly exposing his sexual partner to HIV, the Kentucky Court of Appeals rejected his argument that he did not break any law because she consented to have sex with him with full awareness of his HIV status. "In light of the deadly nature

of HIV," the decision reads, "Hancock's contentions that M.L.B. [the woman's initials] consented to sexual intercourse with him and that she knew he was HIV positive had no bearing on the issue of whether the indictment stated a chargeable offense."

At the hearing in Tennessee where he received his 17-year sentence for "exposing" three women to HIV and transmitting the virus to a 17-year-old girl, Martin Jones allowed that he was "sorry to the victims, each one of them," and that he had not disclosed his HIV status because he feared being rejected by the women. The prosecutor hailed the lengthy prison sentence, claiming that it would raise awareness among HIVers that they have a "responsibility" to their sexual partners. But Jones' attorney, Russ Greene, argued that the Tennessee statute will backfire, placing as it does a premium on an individual's remaining ignorant of his or her HIV status. The irony is, had Jones not known that he was HIV positive, he couldn't have been convicted. Publicizing criminal prosecutions of HIVers for having sex could discourage people not only from getting tested but also from getting treated, profoundly undermining public health.

The legislative and judicial record in dealing with HIV as a subject for criminal law has shown a less-than- ideal understanding of the mechanics of HIV transmission. To read the statutes, one would think that condoms and other barrier contraceptives—which are rarely mentioned—are irrelevant to transmission risk, and that every "exposure," however slight or speculative, creates a tangible risk of HIV infection. And the public health arguments by advocates for HIVers seem to cut little ice with legislators or judges. As the list of criminals lengthens, the effect on all HIVers will get even more chilling.

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