Full-Court Press on HIV Criminal Laws

Scott A. Schoettes outlines the battle being waged in state courts throughout America over HIV criminalization. He discusses recent victories and current efforts to end prosecutions that single out people living with HIV for more severe charges.

July 20, 2012 By Reed Vreeland

Scott A. Schoettes is the HIV project director for Lambda Legal, an organization that has been a longtime legal champion of HIV-positive people and LGBT civil rights. In his work for the organization, he recently filed a brief in *The People of the State of New York v. David Plunkett*, an HIV criminalization case heard by the New York Court of Appeals, which is the highest court in the state. The case involved David Plunkett, who was charged in 2006 with aggravated assault on a police officer—a felony premised on the use of a "dangerous instrument." He bit a policeman who was trying to arrest him after an outburst at his doctor's office. Plunkett eventually pleaded guilty to all the charges against him but reserved the right to appeal the aggravated assault charge.

During the high court appeal, the prosecution argued that Plunkett's saliva, because of his HIV-positive status, fit the definition of a dangerous instrument or deadly weapon. On behalf of the defense, Schoettes and Plunkett's attorney, Audrey Baron Dunning, argued not only that there is overwhelming medical evidence showing saliva does not transmit HIV, thereby eliminating its "dangerousness," but also that under New York Penal Law neither the human body nor its constituent parts or products can be considered a dangerous instrument. In other words, a dangerous instrument must be something external to the body, because a person cannot choose to go somewhere without his hands, teeth—or in this case, saliva.

After hearing the case, the New York Court of Appeals sided with Schoettes and ruled on June 7, 2012, to dismiss the aggravated assault charge against Plunkett on the grounds that saliva is part of the human body and could not be used to heighten Plunkett's criminal liability. Plunkett was released from the Sing Sing Correctional Facility on July 19, 2012.

In the interview below, Schoettes explains the implications of the Plunkett decision and calls on people living with HIV to become more engaged in the fight to repeal HIV-specific legislation and to end disproportionately harsh prosecutions based on a person's HIV status.

Can you explain why the Plunkett case is classified as an HIV-criminalization prosecution?

There are two ways that prosecutions are brought against people living with HIV based on their HIV status. One of them is through general criminal laws, and that's what we had in the Plunkett case. The other way is through HIV-specific criminal law.

Since New York State does not have any HIV-specific criminal laws, when [HIV criminalization] prosecutions are brought up, they're brought under generally applicable criminal laws, like the aggravated assault law. For example, you could charge someone with aggravated assault for various reasons, if someone is using any kind of dangerous instrument [such as a baseball bat or a crowbar]. What makes it an HIV criminalization case is when the so-called "dangerous instrument" is the person's HIV.

What did the New York Court of Appeals decide?

They ruled that one's saliva, because it is a substance that is part of one's body that is just naturally present, cannot be considered a dangerous instrument under New York law and that the case would therefore not support a charge under the aggravated assault statute. So no longer will prosecutions be able to be brought against people living with HIV under this statute because they bit someone, or because they spit at someone. Even if there was blood in their mouth during either of those instances, whether it was a biting situation or a spitting situation, it would not be possible to bring a prosecution because, in my reading of this decision, it applies to blood as well as to saliva.

How will this decision impact HIV-criminalization prosecutions in other states?

It's really hard to say what impact this decision will have in terms of other states. It's not binding in any other state because each state has its own criminal laws that are interpreted by its own high court. To my knowledge, it is the first case that makes it so clear that a bodily substance, like saliva or blood [or semen, etc.], should not be considered a dangerous instrument under the law. And the rational behind that is important, too—a person's behavior should not be made criminal simply because they have a condition. There should be something else required, like an intent to actually transmit that condition. So this decision could potentially influence the decision [of other state courts if they are] looking to interpret the [assault with a dangerous instrument or deadly weapon] statute in their state.

And how do HIV-specific criminal laws work?

Some states have laws that specifically call out HIV and make it a crime to expose or potentially expose another person to HIV. A lot of these [HIV-specific] laws were passed prior to the introduction of [modern antiretroviral therapy, as well as pre-exposure prophylaxis, or PrEP, and post-exposure prophylaxis, or PEP], and a lot of them came into existence when there was a mandate from the federal government attached to Ryan White funding. It said that in order to receive Ryan White funding [for HIV-related services] the state had to have a way of addressing the intentional transmission of HIV. Unfortunately, a lot of states took that to mean that they had to have an HIV-specific law. That was not the case, obviously, because not all states decided to

create an HIV-specific law. The other piece is that the "intentional" piece kind of fell away. So a lot of the statutes that now exist, they're not addressing the intentional transmission of HIV. They oftentimes don't address transmission at all.

Is it likely there could be a criminalization case that would be brought to the U.S. Supreme Court?

This is one of our challenges, because this issue does not lend itself to resolution at the U.S. Supreme Court. A case involving HIV criminalization would end up in the Supreme Court if we were trying to have a law declared unconstitutional. That would be a challenging thing to accomplish.

It's hard to believe that bad medical information—such as stating that saliva is infected with and can transmit the "AIDS virus"—could be rendered in a court's decision in New York State in 2009. Do other HIV criminalization prosecutions fail to understand the basic facts about HIV?

There is a lot of misinformation out there. It's hard to know how many of the prosecutions across the country are being based on erroneous information.

How are you giving accurate medical and legal information to lawyers and judges?

There are several initiatives under way to try and get this information more widely distributed. One of the ways of doing that is through a resource guide for courts dealing with legal issues involving HIV. That, hopefully, will help educate the bench about HIV. I think the last version of it was put out in 1993.

Then there's also a project under way to engage prosecutors in a discussion and hopefully publish some guidelines for prosecutors dealing with HIV-related prosecutions, so that they are better informed when they're making the decision about whether it is appropriate to bring a charge against someone.

The third thing that we're hoping to get started on this year with the Positive Justice Project is to get more information to defense attorneys who may actually be handling defense in these cases. Then they might be able to bring the [appropriate] argument to the court at an earlier point to cut off inappropriate prosecutions much earlier in the proceedings.

Do you think that HIV criminalization discourages people from getting tested for HIV?

Yes. It's important to realize that if we stigmatize the condition in the way that we do, that we are actually discouraging people from testing. Right now, under a lot of the HIV-specific laws, you cannot be convicted unless you know that you are HIV positive. So there is an incentive built in for people who think that they might be HIV positive but want to remain sexually active [to not explore their HIV status]. If they don't want to be limited by the condition or don't want to risk being sent to prison for a long period of time, oftentimes people simply do not get tested. [HIV-

specific criminal laws are not] protecting public health.

What would you say to someone scared about getting HIV from someone who knows he or she has the virus?

[When it comes to sex,] there's responsibility on both parts. We all have to protect ourselves. One of the problems with the HIV criminalization laws is they provide a false sense of security to people because they think, "Well, if this person has HIV they're going to tell me." But that doesn't account for the approximately 20 percent of people living with HIV who don't know that they have HIV. So people shouldn't be counting on what their partner does or doesn't tell them. That's just a bad decision about your individual sexual health. If this is something that you are concerned about, you need to protect yourself.

Have you thought about an alternative legal framework that could replace the one we have now?

If it's just reckless conduct that we are trying to address and prevent, then we should have a system that is tailored to that kind of act, and the punishment for that reckless conduct should fit both the recklessness of the conduct and the real consequences. The way the system is set up right now, we actually punish the person who has no intent to harm anyone the same as we punish someone who may be out there intentionally trying to spread HIV.

It would make sense to me that if we were going to have a system for addressing unprotected sex without disclosure, that it should apply not only to HIV but to other conditions that could have similar consequences—HPV [human papillomavirus] is one that comes to mind. So it shouldn't be HIV-specific. Also, the punishment should fit the crime, and if there's no proof that there was any intent to harm anyone, well, then maybe we should be looking at a misdemeanor for the first time that this happens. Maybe there should [be mandatory counseling and] not any actual criminal sentence in terms of incarceration for that act. Perhaps, if there's a second time, then maybe there's a different level.

We have other systems in which we use tiers of punishment depending on both the intent and the consequences. Drunk driving is one that comes to mind in terms of what we do when someone is engaged with what we consider reckless conduct by getting behind the wheel of a car while intoxicated. We don't send them to 25 years in jail the first time that we catch them doing that. We need to be looking at a system that more appropriately tailors any punishment—if there's going to be criminal punishment—to the actual culpability of the conduct in question.

How does HIV criminalization affect the average person living with HIV?

Ignorance is no defense. There are a lot of these laws in a lot of states, and I know a lot of HIV-positive people who are completely unaware of them and engage in conduct that potentially could violate these laws. So people with HIV need to be aware that these laws are out there; they need to help us advocate for change in these laws so that we don't end up with people serving 25-year

sentences for engaging in safe sex with another consenting adult. We are looking to change the laws so that a person living with HIV doesn't end up on the opposite side of a prosecution that they had no idea could ever be brought against them.

So yes, it's going to be step by step, and we're not going to get it all done in one fell swoop. But we've got to start somewhere, and this [decision] is an important step along that journey to dismantling these unjust laws that have been targeting people with HIV for many years.

To hear from three people who have faced HIV criminalization prosecutions, click here.

To read about U.S. Representative Barbara Lee's efforts on Capitol Hill to get states to reconsider and eliminate HIV-specific criminal laws, click here.

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