Full-Court Press

Scott A. Schoettes of Lambda Legal outlines the battle being waged in U.S. courts over HIV criminalization.

September 25, 2012 By Reed Vreeland

Scott A. Schoettes is the HIV project director for Lambda Legal, a longtime legal champion of HIV-positive people and LGBT civil rights. He 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, the highest court in the state. HIV-positive David Plunkett was charged in 2006 with aggravated assault on a police officer—a felony premised on the use of a "dangerous instrument"—when he bit a policeman who was arresting him. Plunkett pleaded guilty to all charges but then appealed.

The high court agreed with Schoettes that neither the human body nor its constituent parts or products can be considered a dangerous instrument. They dismissed 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 this summer.

Here, Schoettes discusses the implications of the Plunkett case and offers his perspective on HIV criminal prosecutions.

Why was the Plunkett case 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.

[Based on the high court ruling,] 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 impact 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 rationale 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.

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. To get 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 are not addressing the intentional transmission of HIV. They oftentimes don't address transmission at all.

Could an HIV criminalization case 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.

Do you think HIV criminalization discourages people from getting tested?
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. [This establishes] an incentive for people who think that they might be HIV positive but want to remain sexually active [to not find out 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.

Have you thought about an alternative legal framework?
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 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. People with HIV need to be aware of these laws. 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.

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

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