Fighting for Our Freedom

October 1, 2009 By Regan Hofmann

Catherine Hanssens is a lawyer and the executive director of The Center for HIV Law and Policy, a national resource and strategy center based in Manhattan for advocates around the country doing legal and policy work regarding HIV.

One of the organization's primary services is an online resource bank, which covers 33 different areas ranging from immigration to employment to criminalization. It also supports advocates working to bring comprehensive sexual health care to kids held in adolescent detention and foster care facilities around the country.

POZ editor-in-chief Regan Hofmann sat down with Hanssens to discuss the issue of the criminalization of HIV transmission.

It seems that there are more cases of HIV-positive people being criminalized. Is that true? Or are we just seeing more press on the issue?
There seems to be an increase of press coverage of people with HIV being prosecuted for supposedly having consensual sex without being able to prove that they disclosed their HIV status. It's also more likely that the extreme sentencing cases are the ones we're hearing about. It's hard to think of any disease or context in which someone would be put away for 20 years for what is basically an act of consensual sex where no one has been harmed. But the reporting in the mainstream press [about these cases] is informed by huge misunderstandings about how HIV is transmitted and a lot of ignorance about whom HIV affects and what drives the epidemic.

Is it fair to say that the stigma that still surrounds HIV is influencing how people with HIV are being treated in these cases?
Most of the HIV-specific criminal laws were adopted before 1990—less than a decade into the epidemic. They are a product of stigma and also perpetuate stigma. There's no case for the premise that criminalizing HIV or prosecuting people with HIV has any impact on the epidemic. There's absolutely no evidence that knowledge of laws affects what people do sexually. Sodomy laws didn't stop people from being gay; they didn't stop gay sexual activity. Any other law that has tried to criminalize or ban desire in some way has never been effective.

Criminalization not only deepens stigma but also acts as a disincentive for people to get tested. If you don't know your status then you can't be put away because you

didn't tell someone you were positive. As a nation, we're sending one message to people by telling them to get tested and yet a different message by locking up people who know their status. Is there any situation in which it would be acceptable not to disclose?
Every state has a different law about disclosure. Although data show that once people get tested their sex becomes more cautious and safer in terms of the likelihood of transmission, no data show that they disclose more. The data show that maybe half of the people who are positive don't necessarily disclose, but ultimately that's what's being criminalized—the proof of disclosure.

How does one prove [or disprove] disclosure? Assuming these acts are happening in private, isn't it possible for a disgruntled lover to claim he or she was never told that the partner was positive even if the person did disclose? How does that get addressed legally?
The things that you would want to do to protect yourself and your partner are not necessarily the things that are going to be rewarded in the courtroom. There is a disincentive to disclose because proof is a difficult thing. We once talked about the possibility of a consent form to document [a partner's] consent before each sexual encounter. But the prosecutions show that a person who has been tested and had his or her HIV status documented is automatically lower in terms of credibility, which is a function of stigma. The HIV-negative person could say, "I was drunk" or "It wasn't really explained to me." There are plenty of ways it could be construed to not be the type of protection you hope it would be.

Disclosure is not the equivalent of latex. A lot of these laws and reactions have to do with the deep-seated feeling that people living with HIV, gay people and drug users shouldn't be having sex. It's really an attack on people's sexuality. The thing that stops transmission is latex, not words. What's more important than disclosure is both people taking measures to prevent each other from harm.

We keep chasing down and reacting to pigheaded public policies that are a very poor substitute for what we know works. Criminalization is so much easier than talking about penises, vaginas and semen to adolescents. It's much easier politically than syringe exchange. Testing and identifying people—the notion of tag and release—is the centerpiece for prevention for positives; it's where we focus, because it's politically safer than doing something that works [to actually stop the spread of the disease].

You're saying that it's easier to lock people up than it is to teach people how to have sex and do drugs safely?
If you're sexually active, it's like driving a car—one presumes that you have an education that prepares you for a healthy, sexually active adulthood. But as many as two thirds of new infections have been caused by people who have not been tested, and about 25 percent of those are people who are newly infected. Prosecutors don't focus on any of those people—and I'm not suggesting that they should. But it's frustrating that we're focusing the attention on people who actually have been tested instead of having the hard conversations and implementing the policies that [work].

Why is there such a difference between laws governing disclosure and exposure of HIV and human papilloma-virus (HPV)? Do any laws criminalize those who don't disclose their HPV status?

There are laws that make it a misdemeanor when people with an infectious disease have sexual intercourse. New York has such a law that says anyone with a sexually transmitted disease who has intercourse with another person can be punished. The important thing to remember is that those laws are rarely if ever used. But the [difference between HIV and HPV] is stigma. HPV is not necessarily associated with gay men. It's not necessarily associated with IV drug users or people of color. The notion that we need a whole other set of standards and separate laws [to prosecute the nondisclosure of HIV] reveals that it's not the intent to harm that results in a lot of prosecutions, but rather the ignorance about how transmissible HIV is and a revulsion for people who are affected by HIV.

Recently a woman told me she was raped and that she was afraid to tell her assailants that she was HIV positive because she thought that the stigma surrounding HIV would cause them to be more aggressive with her. However, when the police asked her if she told them she was positive, she lied because she was worried about being locked up for nondisclosure. This illustrates the double standard and the impossibility of these situations. So I have to ask, what do we need to do?

As individuals, we can be vocal about our views. I firmly believe that prosecuting people on the basis of what they do or don't disclose is wrong unless we're talking about intention to do harm or HIV transmission is involved. There is absolutely no evidence that these laws have done anything positive. But the possibility that these laws could be doing harm is absolutely enough reason to get rid of them. People need to let their elected officials know what they think of these laws and their impact on testing, treatment and disclosure.

Folks need to lean on their elected officials and their public health officials and the people with the real power to influence things. The Centers for Disease Control and Prevention should issue very clear information about transmission—what does and doesn't cause transmission—and about the public health implications of stigma. If the state health departments that are so aggressive about [expanding HIV] testing would be equally aggressive about reforming criminalization laws, it would really make a difference. We should push them to do this, and we should push our representatives at AIDS service organizations to prioritize this.

The other thing that we should do as a community is to be accurate about the way we talk about HIV.

For example, in the case of the man who spit on a police officer in Texas, most newspapers failed to report that there's never been a case of someone contracting HIV from being spat upon. The police officer was never in danger. That's the crux of the story. It doesn't absolve the guy, but we need to separate the medical and scientific facts from the hysteria.

We do an awful lot to feed misunderstandings about HIV by being sloppy about the way we talk about things. We inadvertently perpetuate some of the stupidity that keeps stigma alive.

Finally, what should people living with HIV do if they find themselves charged with criminal transmission?

It varies depending on the type of charge [they are facing] and where they live. Our website, hivlawandpolicy.org, has a chart that was created by Lambda Legal that has an up-to-date description of current criminal laws. It's important to get advice quickly. You need someone who knows the local laws and criminal justice system and is an experienced criminal defender. But you also need someone who understands HIV. Prosecutors and public defenders can be just as ignorant about the virus, how it's transmitted and the risk of transmission. You should either talk to a local AIDS service organization or contact our organization and we would try to identify advocates in a particular jurisdiction who can help.

Need to find a lawyer who specializes in HIV-related issues? Go to aclu.org, hivlawandpolicy.org or lambdalegal.org.

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