Media Hysteria and HIV Criminalization

May 7, 2009 By Sean Strub

Germany's media have recently been in a frenzy over the arrest of pop star Nadja Benaissa. Her offense? Failing to disclose her HIV-positive status to three partners with whom several years ago she had unprotected sex (presumably intercourse without a condom). One of her accusers claims he acquired HIV from her.

In the United States, we have had a similar phenomenon when media-created hysteria—in conjunction with ignorant or ambitious prosecutors and politicians—frightens the public and brands people with HIV solely as vectors of disease or as "AIDS monsters." This has prompted more than half the states to pass criminalization statutes, resulting in wildly unjust prosecutions and sentencing.

Last year Willie Campbell was sentenced to 35 years in a Texas prison for spitting at a police officer. Gregory Smith died in a New Jersey prison while serving a 25-year term for allegedly spitting at a prison guard. In another case, a mother's HIV status was cited by a judge to deny her custody of her child. There have already been several hundred prosecutions in the United States for failing to disclose one's positive status and, so far, more than 200 convictions.

Before embarking on a solo career, Nadja Benaissa was the lead singer of No Angels, Germany's biggest-selling girl band. She is 26 years old, biracial (Moroccan father and German mother) and was raised Muslim. She is an attractive young woman and was in a singing group with a "bad girl" reputation. Her arrest—shortly before she was to go on stage one evening—was clearly intended to maximize publicity.

The details of her case are not all known, but it is likely that sexism as well as racial and/or religious prejudice factored in her arrest, especially in its high-profile timing. Race has typically played a role in prosecutions in the United States (both Campbell and Smith are African American). We have not yet had a high-profile failure-to-disclose prosecution in America of a celebrity or affluent person, but we surely will.

While one of those accusing Benaissa claims to have acquired HIV from her, it has not been proved. Whether transmission actually occurred, whether there was an "intent to infect" and whether the accused is on antiretroviral (ARV) treatment or even has a detectable viral load are typically irrelevant to the decision to prosecute. In some states, even using condoms or other risk reduction techniques does not preclude prosecution.

Too few have spoken out in opposition to criminalization statutes. It is indicative of a persistent and pervasive bigotry against the HIV-positive community, the poor, people of color and sexual minorities—all those categories that most conveniently comprise “the other.”

From a public health perspective, HIV criminalization is terrible policy because it discourages people from getting tested. You cannot be prosecuted for “knowingly exposing” another to HIV if you do not know you have it. That is a powerful incentive not to get tested. Yet it is important that people know their HIV status, in part because knowledge of one’s status promotes more responsible sexual behaviors.

Knowing one’s status also enables a person with HIV to commence ARV treatment to restore or safeguard his or her health. Treatment itself dramatically reduces the likelihood of HIV transmission. Those with HIV who cannot, will not or do not want to disclose their HIV status may consider treatment in order to minimize risk to others.

ARV treatment is so successful at reducing the risk of HIV transmission that last year the Swiss federal AIDS commission said that, under specific circumstances, the risk for sero-discordant heterosexual couples is so remote as to render condoms unnecessary. Those conditions require that the couple be monogamous, the partner with HIV be on treatment and have an undetectable viral load for at least six months and that neither partner has another active sexually transmitted infection.

A few weeks ago, Deutsch AIDS-Hilfe, the largest AIDS nongovernmental organization in Germany, issued a position paper that essentially supports the Swiss findings, suggesting that, in certain circumstances, ARV treatment might be as effective as condoms at preventing transmission.

Criminalization of people with HIV, especially when combined with media hype, fuels the stigmatization that creates a viral apartheid, keeps people with HIV at the margins of society and contributes to the continued spread of the virus.

It gives people who do not know their HIV status, or who are HIV negative, a false sense of security while putting the burden of disclosure and safety disproportionately on those living with the virus. For effective prevention, this public health responsibility must be shared by all partners equally.

Why not prosecute those who expose others to human papillomavirus (HPV), which causes virtually all cervical cancers as well as anogenital cancers and some cancers of the mouth and throat? Like HIV, these cancers are often fatal. HPV does not even require sexual intercourse to be transmitted. Must people disclose they have that virus—or all sorts of other potentially infectious conditions—before having intimate contact with another?

What about people who are born with HIV? If we are all born equal, why are they born with a disclosure obligation they must carry their entire lives, required by law to precede any sexual contact? We can and must combat HIV without creating a privileged class of HIV negative people who have greater rights than those of us who are positive.

The complicated dynamics of disclosure and intimate contact often make it difficult, impossible or dangerous to disclose. People with HIV are often in a weaker position to negotiate safer sex. They fear rejection. Knowledge of their HIV status by others can lead to loss of employment or housing and even result in violence.

The ethical obligation to disclose has been enshrined in the people with HIV/AIDS empowerment movement since 1983, when it was specifically included in the movement's founding manifesto, The Denver Principles.

No one should intentionally put another person at risk, and the rare cases where a person acts with the intent to transmit the virus to an unknowing partner deserve the attention of the law. Fortunately, those cases are few and far between.

Criminalizing the failure to disclose—regardless of the level of risk actually present or whether transmission takes place—does not facilitate greater honesty and responsibility between sex partners. Because they so powerfully fuel stigma and discourage HIV testing, criminalization statutes contribute to the spread of HIV.

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