Criminalization 101

November 3, 2010 By Sean Strub

Over the last several years, as I've talked to a wider circle of advocates, people with HIV and policy leaders about HIV criminalization, it has become apparent to me that many people are not well-informed on the topic. Some instinctively favor prosecuting people with HIV for not disclosing their HIV status prior to intimate contact, but these opinions usually evolve quickly as a person learns more about the issue.

Here's a background piece I have been using--and continuing to modify--to introduce the issue to others. It is a bit lengthy for a blog post. If you would like a footnoted and properly formatted version emailed to you, just shoot me a note at sstrub (at) hivlawandpolicy.org. I look forward to any comments or suggestions.

Sean

AIDS Stigma and the Creation of a Viral Underclass

Since the earliest days of the HIV/AIDS epidemic, social stigma has been a major obstacle to accessing care and implementing effective HIV prevention policies. Even as fear of contagion from casual contact has lessened, profound stigma persists. People with HIV face pre-judgment, marginalization, discrimination and severe misunderstanding about the means and actual risks of transmission.

Many people with HIV internalize and accept this judgment, and the perception of those with HIV as toxic, highly infectious, or dangerous to be around is perpetuated. This has serious adverse ramifications for those individuals, as well as on the broader effort to combat the current HIV epidemic and protect sexual freedom. In short, HIV-related stigma is a serious public health and civil liberties issue.

Stigma discourages people at risk from accessing care --including testing for HIV--and it discourages people who know they have HIV from disclosing that fact to potential sexual partners and others. Much of this stigma is based in racism and homophobia.

Nothing drives stigma more powerfully than when government sanctions it through the enshrinement of discriminatory practices in the law or its application. That is what has happened with HIV, resulting in the creation of a viral underclass of persons with rights inferior to others, especially in regard to their sexual expression.

After nearly 30 years of the epidemic, people who have tested positive for HIV continue to experience punishment, exclusion from services and a presumption of guilt or wrongdoing in a host of settings and for a host of practices that are, for those who have not tested positive for HIV, unremarkable.

This is reflected perhaps most dramatically (but not solely) in the criminal prosecutions of people with HIV who are unable to prove they disclosed their HIV positive status to partners prior to sexual contact. The ostensible purpose of these statutes is to deter HIV-positive people from putting others at risk.

The inherent problem with these laws is that they focus primarily on the existence or lack of proof of disclosure (and on the health status of the person who has been tested for HIV), not on the nature of the exposure, the actual level of risk present, or whether HIV was transmitted. Consequently, and as studies of the impact of these laws have demonstrated, they do nothing to advance their intended purpose.

The legal obligation to disclose is, in significant part, a function of the original Ryan White Care Act, passed in 1990. That legislation required states, in order to be eligible for Ryan White funding, to demonstrate an ability to prosecute potential HIV exposure and transmission, which was a recommendation from President Reagan's AIDS commission's report. This requirement was dropped from the 2000 renewal of the Ryan White Care Act, but the criminalization statutes it initially prompted remain in force.

Many states (including New York) considered their then-existing assault and public health statutes adequate to meet what the Ryan White Care Act then required, but thirty-two states have added HIV-specific laws to their criminal codes. These vary widely from state to state, both in terms of what they punish as well as the sentencing provisions.

However, even in states without HIV-specific statutes, criminal law (and in one recent case, an anti-terrorism statute) has been used to prosecute and incarcerate people with HIV for behavior that posed little risk of transmission. In these cases, HIV, or the blood, semen or saliva of a person with HIV, often is characterized as a "deadly weapon."

The actual risk of HIV transmission is typically not a factor in these prosecutions; the use of condoms or other prevention measures does not necessarily preclude prosecution. Heterosexual men of color are the most likely to be prosecuted under HIV criminalization statutes.

Typically, sentencing is vastly disproportionate to the harm caused or the level of risk present in the sexual encounter. For example, in Iowa, a person convicted for failing to disclose his HIV positive status was required to register as a sex offender for the rest of his life. This may be the first time someone has been required to register as a sex offender for having engaged in a consensual sexual act with another adult.

The ethical obligation of people with HIV to disclose health factors that put sexual partners at risk

was codified in the Denver Principles , the historic 1983 manifesto that launched the people with HIV/AIDS empowerment movement.

The Denver Principles also recognize sexual freedom as a fundamental human right, noting that people with HIV have a right “to as full and satisfying sexual and emotional lives as anyone else.” Fully integrating people with HIV into society, in part by allowing them to have fulfilling sexual lives without the risk of incarceration, is critical to combating the stubborn stigma that remains an enormous obstacle to preventing new HIV infections.

Criminalizing the sexual conduct of those living with HIV is justified only when there is evidence that an individual intended to harm another person. Existing state and federal criminal laws are adequate to deal with these extremely rare cases. Prosecutions in these instances should focus on the proof of intent to harm and the resulting injury. HIV-specific criminal laws perpetuate the persistent public perception that those with HIV, solely by virtue of their infection with HIV, are inherently dangerous and pose a unique and significant risk to the community.

The fact that HIV is associated with homosexuality and communities of color has made it easier to “punish” people with HIV, an example of how a person’s race, sexuality or sexual expression is used to form policies that isolate individuals and limit their freedoms.

Examples of Prosecutions

The most publicized HIV criminalization cases are often driven by politically ambitious prosecutors and inflammatory or hysterical media coverage. These prosecutions feed into the public’s ignorance and anxiety about HIV, reinforce negative stereotypes about people with HIV, and send conflicting messages about the real risks of HIV transmission in a given circumstance.

They depict people with HIV as dangerous potential infectors who must be controlled and regulated, making it more difficult to create a safe environment for people at risk to get tested and people with HIV to disclose their status.

The Iowa case provides a sobering illustration of the problem. The person with HIV who was charged with failing to disclose his status to a sexual partner was a 34-year old gay man who had been a volunteer with a local AIDS organization. He met a male partner online and went to his house. The person with HIV was on anti-retroviral therapy, had an undetectable viral load and used a condom when anally penetrating his partner. He posed little or no risk of transmitting the virus to his partner.

When the partner later heard that the man he had been intimate with had HIV, he went to the county prosecutor and pressed charges. The person with HIV was convicted under Iowa’s extreme statute and sentenced to 25 years in prison. Fortunately, advocates were successful in getting the sentencing reviewed and after serving eleven months, he was released on five years’ probation.

However, he still must register as a sex offender for the rest of his life, is subject to wearing an

ankle monitoring bracelet and cannot leave his home county without permission from the court. He may not be around children (including his nieces and nephews) without adult supervision. He must, for the rest of his life, take lie detector tests every six months that ask intimate questions, including whether he wears women's clothing and if he is attracted to children or animals. He is prohibited from viewing any kind of pornography or even visiting social networking sites, like Facebook.

Iowa's statute is particularly broad--in theory, it could cause a person with HIV who kissed another person without disclosing their HIV positive status to be sentenced to as much as 25 years in prison--but other state's statutes and sentencing are equally as absurd.

Texas convicted Willie Campbell, an HIV positive man, for "assault with a deadly weapon" and sentenced him to 35 years in prison after he spat on a police officer who was arresting him for public intoxication.

Gregory Smith was within a year of his release from a New Jersey prison (after serving time for burglary) when he was charged with attempted murder, assault and terroristic threats following an incident in which he allegedly bit and spat on a guard at the county jail where he was held (Smith denied the charges). An additional 25 years was added to his sentence; he subsequently died of AIDS while incarcerated.

In late 2009, Michigan charged Daniel Allen, who has HIV and was involved in an altercation with a neighbor, under laws designed to combat terrorism, including "possession of a harmful biological agent". Prosecutors equated his HIV infection with "possession or use of a harmful device."

A man in Ohio is serving 40 years for failing to disclose to a girlfriend that he was HIV positive. He claims she knew he was positive and only went to a prosecutor after he stopped dating her and moved in with another woman.

An interesting note about the cases described above: none of them resulted in anyone actually acquiring HIV.

A New Strategic Approach

Historically, the discussion among advocates and policy leaders concerning criminalization statutes has most often been focused on the civil liberties concerns involved in such extreme prosecution and sentencing of consenting adults for sexual acts, including those that present no risk of HIV transmission. Yet a growing realization by advocates and health policy leaders that HIV criminalization is also a serious public health challenge has helped propel the issue to the forefront.

An important step was the recognition of the need for changing HIV criminalization statutes in President Obama's National HIV/AIDS Strategy, released this past July:

"... Since it is now clear that spitting and biting do not pose significant risks for HIV transmission, many believe that it is unfair to single out people with HIV for engaging in these behaviors and (they) should be dealt with in a consistent manner without consideration of HIV status. Some laws criminalize consensual sexual activity between adults on the basis that one of the individuals is a person with HIV who failed to disclose their status to their partner. CDC data and other studies, however, tell us that intentional HIV transmission is atypical and uncommon...(these laws) may not have the desired effect and they may make people less willing to disclose their status by making people feel at even greater risk of discrimination... In many instances, the continued existence and enforcement of these types of laws run counter to scientific evidence about routes of HIV transmission and may undermine the public health goals of promoting HIV screening and treatment."

Advocates who focus on the serious public health ramifications of HIV criminalization can help repeal or end reliance on criminalization statutes and other criminal laws that persecute and stigmatize people with HIV. They can also help educate law enforcement, prosecutors and the media, ultimately lessening HIV-related stigma and discrimination. This is no way involves abandonment of civil liberties principles, but rather broadens and recalibrates the focus of advocacy to the public health consequences of ignoring them.

HIV Criminalization is Bad Public Health Policy

HIV criminalization statutes are terrible public health policy because they discourage persons at risk from getting tested. Those with HIV who are aware of their HIV positive status are more responsible in their sexual behaviors than those who are unaware they have HIV ; testing is a basic tool of HIV prevention as well as an essential gateway to care.

Criminalization statutes also make it more difficult for persons with HIV to disclose their HIV status. Those who know they have HIV already suffer significant discrimination and stigma. Disclosing one's HIV status can be emotionally difficult, risking rejection from family and friends, sometimes with great insult or abuse, and often jeopardizes one's employment, housing, relationships or personal safety. Criminalization of HIV legitimizes the ignorance, homophobia, racism and sexophobia that fuels inflated fears of HIV and those who have HIV.

Criminalization undermines efforts to prevent new HIV infections and provide access to care in multiple ways: Ignorance of one's HIV status is the best defense against a "failure to disclose" prosecution, which creates a powerful disincentive to getting tested and learning one's HIV status.

Young African American men who have sex with men are among those at highest risk of acquiring HIV, yet also among the most difficult to get tested. The prospect of prosecution for failing to disclose--especially since these prosecutions often boil down to a "he said, he said" or "he said, she said" situation--is a powerful and likely growing disincentive to taking an HIV test.

Most new infections are caused by sexual contact with persons who have not been tested and are unaware that they have HIV, yet only those who have taken responsibility and gotten tested are

subject to prosecution.

Prosecuting the failure to disclose one's HIV status undercuts the most basic HIV and STD prevention message: that every person must take responsibility for his or her own sexual health.

Prosecuting the failure to disclose values the "right" to an illusion of safety, for those who are HIV negative or who do not know their HIV status, over the privacy rights of those who have HIV.

A legal obligation to disclose one's viral status prior to intimate contact creates a particular inequity for those who were born with HIV. If we are all born equal, why is it that this group must carry throughout their lives a legal obligation to disclose their viral status prior to engaging in intimate contact?

Unconscious Racism, Homophobia in HIV Criminalization

Prosecuting the failure to disclose HIV, while not prosecuting the failure to disclose other sexually-transmitted diseases, also reflects unconscious racism and homophobia. Human papilloma virus (HPV) provides a useful contrast.

HPV causes a number of cancers, including almost all of the cervical, rectal and anal-genital cancers. Cervical cancer alone killed 4,000 women in the U.S. in 2009; every year hundreds of thousands of other women in the U.S. are diagnosed with cervical dysplasia, which is caused by HPV and is a precursor to cervical cancer.

According to the Centers for Disease Control, by the age of 50 more than 80% of American women will have contracted at least one strain of genital HPV (although many or most may not know it). Yet unlike HIV, HPV is not specifically associated with marginalized groups.

Because HIV is associated with anal intercourse, gay men, African Americans and injection drug users , racism, homophobia and sexophobia are inextricably linked with HIV-related stigma, discrimination and criminalization.

The disproportionate prosecution and punishment of potential HIV exposure or transmission is somewhat analogous to the disproportionate prosecution and sentencing of those convicted of possession of "crack" cocaine versus those charged with possession of powder cocaine. Until recently, the possession of one hundred times as much powder cocaine--the most prevalent form of the drug among Caucasians--is required to trigger the comparably harsh sentences mandated for possession of tiny amounts of crack cocaine, which is more prevalent among African Americans. The result is much longer sentences for African-Americans convicted of cocaine offenses.

Beyond a Failure to Disclose: AIDSphobia in the Criminal Justice System

In the U.S. there have been more than 200 "failure to disclose" convictions and they have gotten

the bulk of media and community attention. But HIV criminalization is more than just “failure to disclose” prosecutions. It also includes prosecutions for non-sexual behaviors.

Spitting poses no risk of HIV transmission . Yet in the past two years, there have been at least six criminal convictions of people with HIV in the U.S. for spitting.

Theoretically, biting can transmit HIV, but the handful of such cases recorded by the Centers for Disease Control all involved “extensive tissue tearing and damage and presence of blood”. Saliva and tears sometimes contain a low level of virus, yet no cases of transmission by saliva or tears have ever been reported. As a practical matter, it is the person biting, rather than the person bitten, who is at the greatest risk of acquiring the virus.

Criminalization is also reflected in “pile-on” charges and more aggressive prosecution or sentencing of persons with HIV charged with other crimes.

In 2009, a woman with HIV in Maine who was eligible for release from a federal prison for an offense unrelated to HIV was sentenced to continued confinement when the judge learned that she was HIV positive and pregnant. The judge sought to “protect” the fetus from potential infection by having the jail supervise the woman’s treatment. Although legal advocates (including the Center for HIV Law and Policy) secured her release shortly thereafter, the inclination of a federal judge to confine a woman with HIV to prison, despite testimony that she was engaged in appropriate prenatal care, reveals ignorance and an inclination to criminalize illness by even the most educated and privileged members of our society.

Stigma driven by HIV criminalization promotes many manifestations of illegal discrimination against people with HIV, including prohibitions on certain occupations and licensing.

Implementation of a strategy to challenge and defeat this stigma head-on, in partnership with organizations combating HIV/AIDS, racism, homophobia and sexism, as well as those fighting to protect sexual freedoms, is critically needed and long overdue.

Positive Justice Project

The Center for HIV Law & Policy (CHLP) has been a primary resource for public health and political leaders, attorneys and advocates interested in HIV-related discrimination and criminalization. Their Resource Bank, is a comprehensive database of quality memoranda, research, reports, legal guides, court and agency decisions, pleadings and briefs, policy analyses and recommendations and other materials of importance to people living with HIV and their advocates.

Now CHLP has launched the Positive Justice Project, a community-driven, multidisciplinary collaboration to end government reliance on an individual’s positive HIV test result as proof of intent to harm, and the basis for irrationally severe treatment in the criminal justice system. The Positive Justice Project has several important objectives:

- Broader public understanding of the stigmatizing impact and other negative public health consequences of criminalization and other forms of discrimination against people with HIV that occur under the guise of addressing HIV transmission.
- Community consensus on the appropriate use of criminal and civil law in the context of the HIV epidemic.
- Clear statements from lead government officials on the causes and relative risks of HIV transmission and the dangers of a criminal enforcement response to HIV exposure and the epidemic.
- A broader, more effective community-level response to the ongoing problem of HIV-related arrests and prosecutions.
- Reduction and eventual elimination of the inappropriate use of criminal and civil punishments against people with HIV.

Since the earliest days of the epidemic, stigma has encumbered an effective response to the HIV epidemic. Stigma sanctioned in the law is its most extreme manifestation.

A significant and important contribution to reducing the spread of HIV can be achieved by combating HIV criminalization and the stigma it engenders.

Persons interested in getting involved with or supporting the Positive Justice Project can email: sstrub (at) hivlawandpolicy.org or fightcrim (at) hivlawandpolicy.org for further information.

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