Prevention vs. Prosecution: Creating a Viral Underclass

October 18, 2011 By Sean Strub

Since the earliest days of the HIV/AIDS epidemic, we have known that 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 continue to face pre-judgment, marginalization and discrimination. Severe misunderstandings persist about the actual routes and actual risks of HIV transmission.

Earlier this year in Oregon, a city commissioner ordered an eight million gallon outdoor reservoir drained, after a security camera caught someone urinating in it. He said the $38,000 cost was justified because of concern that diseases like HIV could be in the urine. A Montana legislator in testifying in favor of that state's death penalty, noted that there are "new ways" to kill people. She said the death penalty in Montana was necessary to stop prisoners from making "little paper airplanes" and smearing them with spit or blood or urine or feces and throwing them at prison guards, attempting to kill them.

This kind of ignorance is stigmatizing. And 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 homophobia, racism and sexophobia.

Nothing drives stigma more powerfully than when government sanctions it through the enshrinement of discriminatory practices in the law or its application, like Jim Crow laws or apartheid. When the government statutorily stigmatizes, it is a collective statement of the society. It says this group is "less than". It sets an example for communities, encouraging stigmatization and discrimination. And it is wrong.

Yet that is exactly what has happened with HIV. We have created a viral underclass in the law, an underclass of persons who rights have been judged to be inferior to others, especially in regard to their right to sexual expression.

This viral underclass is a result of HIV criminalization, when people who have tested positive for HIV experience punishment, or a more extreme punishment, as well as 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.

Having different sets of laws for people with HIV is the most extreme manifestation of stigma. Thirty-four states now have HIV-specific criminal statutes.

It saddens me to say that, right now, we sit in the epicenter of this epidemic of injustice. There is no state in the country that has criminally prosecuted a greater percentage of its citizens with HIV--for something that should not be a crime in the first place--than has Iowa.

There are about 2,000 people with HIV in Iowa; nearly 2% of them have been prosecuted under Iowa's so-called HIV Criminal Transmission statute. I say "so-called" because the title of the statute is inappropriate. Criminalization prosecutions typically do not involve HIV transmission. In fact I was told last night that possibly just one of the cases prosecuted in Iowa was HIV actually transmitted.

It pains me to be critical of Iowa, because I am a native Iowan. I grew up in Iowa City and have deep roots here; I suspect I share an extraordinary pride in Iowa with many of you in this room. Even after living in New York for more than three decades, many of my friends there think of me first as an Iowan.

So when I talk about criminalization in Iowa, it comes from an Iowan who cares deeply about his home state and is hopeful that Iowa's progressive tradition of civil rights and social justice leadership will ultimately prevail and erase this ugly stain on our history.

When stigma is so great that it is even enshrined in the law, it shouldn't be a surprise that people with HIV internalize and accept this judgment, perpetuating a perception of those with HIV as toxic, highly infectious or dangerous to be around.

This has serious adverse ramifications for people with HIV, both in terms of their health as well as their civil liberties. It makes HIV prevention much more difficult and contributes to further spread of the virus rather than slowing it. In short, HIV-related stigma is a serious public health and civil liberties issue.

HIV criminalization is reflected mainly (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. But, instead, they create an “illusion of safety” for those who are HIV negative or who do not know their status, undermining the most basic message about sexual health, which is that every person ultimately must take responsibility for their sexual health and decision-making. By putting a disproportionate responsibility for sexual health on those who have HIV, it implies to others that they don’t have to take such responsibility.

Furthermore, these prosecutions focus primarily on the existence or lack of proof of disclosure (and on the viral 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.

Many of these statutes were passed because the original Ryan White Care Act, passed in 1990, included a recommendation from President Reagan’s AIDS Commission that requires states, in order to be eligible for Ryan White funding, to demonstrate an ability to prosecute what was called “intentional” HIV exposure or transmission.

Back then, simply having sexual contact with someone who had HIV was considered tantamount to “intentional exposure”; it was before we knew as much as we do today about how the virus is transmitted, before we had effective therapies, before we understood how an undetectable viral load makes sexual transmission exceedingly difficult or virtually impossible.

At the time, many states considered their existing assault and public health statutes adequate to meet what the Ryan White Care Act then required, but thirty-four states and territories 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 or no 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”.

HIV criminalization statutes are terrible public health policy because they discourage persons at risk from getting tested. They 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, often with great insult or abuse, and can jeopardizes one's employment, housing, relationships or even personal safety.

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.

The ethical obligation of people with HIV to disclose health factors that might 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, including a recognition of and respect for their right to fulfilling sexual and intimate relationships, is critical to combating stigma and preventing HIV transmission.

I believe that criminalizing the sexual conduct of those living with HIV, hepatitis, HPV, Epstein-Barre virus or other sexually transmitted pathogens, is justified only when there is evidence that an individual intended to harm another person. Existing state and federal criminal laws and assault statutes are adequate to deal with these extremely rare cases. Prosecutions in these instances should focus on the proof of intent to harm and the extent of 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.

They define us principally, if not solely, as viral vectors, potential infectors who must be tagged, monitored, regulated and controlled. They dehumanize us, fail to recognize the complexities of human relationships and treat HIV uniquely, different from other sexually transmitted pathogens which, if left untreated, can also seriously harm or kill a person.

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.

Nearly 4,000 women in the US died of cervical cancer last year. Almost all of them got it from

strains of HPV, the human papilloma virus that causes genital warts. Yet we don't prosecute people for failing to disclose they have HPV because HPV is not associated with an outlaw sexuality, with gay people, with anal intercourse, with people of color or with people who use drugs.

And if we did pursue such prosecutions, we couldn't build prisons large enough because about 70% of the sexually active adult population, at some point, carry strains of HPV.

Why doesn't Iowa have a "HPV Criminal Transmission Statute" or a "Hepatitis Criminal Transmission" statute? Some would consider hepatitis even less desirable to contract than HIV. If I was HIV negative and had to choose between having HIV or Hep C, I would go for the HIV.

The most publicized HIV criminalization cases are almost always accompanied by inaccurate, inflammatory or hysterical media coverage. Sometimes they are driven by political ambitious prosecutors eager to feed the public's blood-thirst to punish The Other.

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 make it more difficult to create a safe environment for people at risk to get tested and people with HIV to disclose their status.

They punish the person who is responsible and finds out their HIV status, yet those who are positive who do not know their status are vastly more likely to transmit HIV. Ignorance of one's HIV status is the best defense in criminalization cases; if you do not know you are positive, you cannot be prosecuted. We are increasingly hearing on the street "take the test and risk arrest"

In many communities the most difficult demographic to get tested are young African American men who have sex with men. A large percentage of these men have already had an unpleasant and sometimes unjust interaction with the judicial system. Getting tested just adds a liability to their lives, making them vulnerable to any sexual partner who claims they did not disclose.

Many of these criminalization cases are revenge cases, sometimes boiling down to he said/she said/he said. At POZ we conducted an online survey, 2000 people with HIV responded. One of the questions asked whether they ever had a circumstance where they believed they had disclosed their HIV positive status in advance, to someone with whom they had been intimate, but afterwards that person claimed they did not disclose. Not in a criminal context, just in the course of their lives. 28% said this had happened to them, a number that, if anything, I think is low, at least compared to anecdotal evidence I hear from people with HIV I know.

May people with HIV are now taking steps to protect themselves legally. They require sex partners to sign a document acknowledging that they know the person has HIV. Some people save their text or email messages where they disclosed; others take partners with them to doctor's appointments, asking their physician to note in their patient record that the partner knows the person has HIV. I even have heard about some commercial sex workers who save the condoms their clients use, in order to prove that a condom was used in the event they are charged with criminal exposure. These are absurd measures, demeaning measures, but unfortunately becoming necessary in response to demeaning and absurd prosecutions.

Iowa's statute is particularly broad, but other state's statutes, prosecutions and sentencing are just as bad or even worse. Not just for "failure to disclose", but also as pile-on charges or increased charges or penalties for people with HIV charged with other criminal offenses. Punishment in these cases is typically vastly disproportionate to any actual harm:

Texas does not have an HIV specific statute, but they 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, was charged 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."

Monique Howell, in Charleston, found out she was positive while she was in the Army, pregnant and in the middle of getting divorced. Her counseling post-test comprised of a long paragraph her commanding officer was required to read to her and have her sign and acknowledge. That was it. No other counseling. She knew nothing about HIV, she was in shock, worried about her baby, trying to figure out how HIV came into her life. She had never used any drugs, was monogamous with her husband. She is a person of deep faith, both her father and grandfather are pastors. Six months after her diagnosis, she had sex with another soldier. She told him to use a condom, twice, but he refused. The Army found out and prosecuted her for failing to disclose; she was facing 8 to 10 years in prison. Her partner testified that he was equally at fault and didn't want anything to happen to her. She testified that she wanted to tell him, but she just couldn't get the words out of her mouth. "They were on the tip of my tongue" she said, "but I just couldn't make my mouth form the words. So I told him he needed to use a condom". Fortunately, the charges

were ultimately dropped, for other reasons, but she got kicked out of the service and, as she describes it, became thought of as “an AIDS monster” by some in her community.

In none of these cases I have described was HIV transmitted.

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.

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. Under federal statutes, 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 common amongst African Americans charged with cocaine possession. The result is much longer sentences for African-Americans convicted of cocaine offenses.

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Several years ago, the Swiss Federal AIDS Commission issued an important statement, which was endorsed unanimously by its then current members as well as by the group’s previous board chair. That statement said sero-discordant couples--where one’s positive and one’s negative--do not need to use condoms when three conditions are met:

If the person with HIV is undetectable and has been so for at least six months.

There are no other STD’s present in the relationship

The couple is monogamous

The Swiss statement is not beyond criticism; the research they surveyed was mostly on heterosexual couples. They claimed that under the scenario described, there was “no” risk of transmission. It would have avoided some criticism if they instead said there was “virtually no” risk or that the risk was “nil”. But they point out that the science supporting their statement is far broader and deeper than the science that supported President Reagan’s Secretary of Health and

Human Services, Margaret Heckler, when in 1984 she held a press conference and declared that saliva and kissing could not transmit HIV. There are one or two cases the CDC recognizes that were transmitted this way. But the chance is so remote, requires such a peculiar and unusual set of circumstances, that we are comfortable saying HIV isn't transmitted by kissing or saliva. This is how the Swiss statement views the risk of transmission under the circumstances described, as so remote they are comfortable saying there is no risk.

Many of you are familiar with the case of a young man in Iowa who was sentenced to 25 years after a one-time sexual contact with a partner who claimed he hadn't disclosed. This person had an undetectable viral load AND he used a condom. There was no chance he could have infected this person. Some of you in this room are friends of his or have worked with him.

Fortunately, after about a year in jail, the judge reconsidered the 25 year sentence and let him out on five years probation but required, for the rest of his life, that he register as a Sex Offender in Iowa.

I'm not going to review the circumstances of his case or the details of his prosecution, but I do want to share some information about what the Iowa statute and his conviction, and particularly the sex offender registry, means in his life today.

I want to do that, because there is an effort underway in Iowa, initiated by CHAIN and people in this room, to repeal this statute. That effort needs the support and participation of everyone in this room. The arguments against the phenomenon of HIV criminalization are clear and, I believe, convincing. But we also need to remember what the effect of such injustice is on the lives of those who are criminalized.

And we, as Iowans, need to take responsibility for what we, collectively as a state, are doing to people like the young man in the case I have referenced. Because, in a moment, when I describe what the state of Iowa is doing to him, I want us to remember that it is Iowans who must take responsibility for this injustice and it will be Iowans who change the law that led to this.

This person had to leave Iowa in large part because of the requirements of Iowa's sex offender registry. He was lucky to get a job in Texas and Iowa agreed to allow his probation to be transferred to Texas. Texas does not require him to register as a sex offender and, in fact, what he was convicted of in Iowa is not a crime in Texas. (Although, as I noted, if someone with HIV is charged with assault or some other crime, they are likely to receive a much more extreme punishment).

I saw this young man last week in San Antonio. He wants to return to Iowa. There are people here, including counselors and medical professionals, who are important to him and have helped him cope with the challenges in his life. Most of all, he misses his family and friends.

But he can't come back because he can't live under the cruel punishment Iowa imposes on those on the state's sex offender registry.

He did not quality for the lowest level category of sex offender--those at the least risk of committing another offense--because his "victim" was a man. If his sexual partner had been a woman, he would have qualified for a lesser sex offender classification, with less onerous requirements.

At his category of sex offender in Iowa, he is subject to being required to wear an ankle-monitoring bracelet, although budget constraints in Iowa seemed to have put that requirement on ice. He could not leave his home county without permission from the court.

He may not be around children--even his own nieces and nephews--without adult supervision. But that has translated into him spending almost no time around the nieces and nephews because he doesn't want to risk his sibling's custody arrangements. He carries pictures and talks about his nieces and nephews all the time. They are deprived of a gentle, caring and loving Uncle who is devoted to them.

He may not have "casual sex", whatever that is. He can only have sex in the context of a relationship the state of Iowa deems appropriate. For the rest of his life, he must take regular lie detector tests, administered by the state of Iowa, that ask degrading and humiliating questions about his sexual behaviors and thoughts, including whether he is a peeping Tom or wears women's clothing, or wants to be tied up or is attracted to children or attracted to animals. When he has these lie detector tests and when the state asks him about his sexual contacts, he must report every detail, where they met, what they did, when and how he disclosed.

He is prohibited from viewing pornography or even visiting Facebook and other online social networking sites. He may not have alcohol in his house and must agree to have his computer seized and searched at any time without a warrant. There are a whole series of classes and therapy sessions he is required to attend, which he must pay for. They sometimes have cost more than he could make at his minimum wage job.

He has told me that the medical care, therapists and counseling he received in Iowa was mostly from people he felt were exceptionally professional and empathetic and from which he derived great benefit. But not all of them. One therapist or counselor raised the prospect of requiring him

to undergo “phallometric testing”. Do you know what that is? It involves the placement of a electronic measuring device on his penis and then showing him pictures of different sexual scenarios to see what stimulates him. These are your tax dollars at work.

After his conviction, he was lucky to find a low-paying hourly wage job working at a motel near Waterloo. Not many employers like hiring convicted felons, let alone those on the sex offender registry. But sometimes the state required he attend classes or other sessions and gave him less than 24 hours notice; making it difficult to meet the requirements of regular employment. He faced choosing between violating his probation or losing his job.

He is suffering a cruel, punishment; at a recent conference sponsored by the UNAIDS High Level Commission on HIV and the Law, it was called “medieval”. Imagine if those funds were instead available for HIV prevention efforts or care. While you’re all facing budget cuts, our legislators are wasting a fortune with an extreme punishment that is not effective for actions that should not be criminal offenses in the first place.

What he was convicted of is no different from what many people with HIV do all the time. They have undetectable viral loads, they use condoms, and when there is such a remote chance of transmission, if any at all, they do not necessarily feel a moral or ethical obligation to disclose.

If you think that is wrong, and believe it should be a crime, then I hope you will be consistent and also support prosecution of those who fail to disclose they have things like HPV, CMV, Epstein Barre or other viral agents that can be transmitted sexually and can cause serious health problems. I suspect if that were enforced as vigorously as Iowa has gone after people with HIV, a lot of people in this room might be in jail.

We all understand the public health interest in controlling the risk of exposure to pathogens like tuberculosis that can be casually transmitted, in a public conveyance. But that is fundamentally different from sexually transmitted pathogens, which require the active assumption of some risk by the party involved.

When people have sex, they are taking risks and not just HIV risks.
When they make a decision to engage in intimate contact they are also making a decision to accept certain risks--those known and unknown--that accompany such an action.

A growing realization by advocates and health policy leaders that HIV criminalization is a serious public health challenge has helped propel this issue to the forefront. 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.

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

"... 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.

It isn't going to be easy. Survey research shows tremendous public support for these statutes, even amongst gay men. But those numbers change quickly when people become educated about HIV criminalization and begin to understand how unjust these statutes are, how they are not effective, how they are driving stigma and new infections.

The National Alliance of State and Territorial AIDS Directors, NASTAD, was the first organization of public health professionals who issued a statement in opposition to HIV criminalization. I thank Randy Mayer and Iowa Department of Public Health for their role in that process. Their leadership is to be commended.

U.S. Representative Barbara Lee about two weeks ago introduced legislation in Congress to review and ultimately lead to reform of HIV criminalization statutes. A year ago the UN appointed a High Level Commission on HIV and the Law, looking at criminalization and other legal barriers to fighting AIDS. Their report--which is expected to strongly criticize criminalization statutes--is expected early next year.

The effort in Iowa is not going to be easy and will require a lot of education and a lot of people speaking out who might typically remain silent. I hope everyone hear can become amongst those adding their voice to the efforts by CHAIN, State Senator Matt McCoy, Rhea, Tammi, Randy and others. To my knowledge, Iowa is the only state with an HIV-specific statute where the effort to change it has garnered so much momentum.

Not long ago I heard someone refer to the LGBT movement as the country's "last great civil rights battle" and I pointed out to him that if he only opened his eyes and ears, he would understand that

we are, right now, today, seeing the beginning of a new way to oppress and divide people, a new injustice perpetrated by the state upon citizens, by cutting up and dividing the population based on the viruses a person carries. Creating citizens with rights superior to others, based on the viruses in their bodies.

Instead of being a leader in injustice, Iowa has the opportunity to become a leader in reform and a leader in stopping this very dangerous and slippery slope. As Iowans, that should make us all proud.

Thank you.

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