

When Sex is a Crime and Spit is a Dangerous Weapon: Responding to the Criminal Prosecution of People Who Test HIV Positive



HISTORY OF HIV CRIMINAL LAWS

- HIV-specific legislation began in Washington state in 1988.
- Most HIV-specific laws (26) adopted by early 1990s.
- Surface Purpose: deter HIV-positive individuals from transmitting HIV; punish those who do.

Elements of HIV-Specific Criminal Laws

- 32 states have a version, including sentence enhancement.
- Person being charged knows that s/he is HIV-positive.
- Typically, actual transmission is unnecessary; exposure is enough.
- Some laws: proof of consent is defense
- Some laws punish no/negligible risk (spitting, biting, and scratching)

CRIMINAL LAWS, GENERALLY

Under general criminal law:

❖ **THREE** elements must be present for an assault or murder conviction:

- **Conduct**
- **State of mind**
- **Causation**

❖ **State of mind and causation are more difficult to prove than conduct.**

HIV CRIMINAL LAWS

States attempted to overcome the difficulties of applying traditional criminal law to HIV-related sexual activity and other acts people fear by introducing HIV-specific laws.

(Although traditional criminal law has been used for conviction and significant sentences)

NY PUBLIC HEALTH LAW SEC. 2307

A person who, knowing himself to be infected with an infectious venereal disease, has sexual intercourse with another is guilty of a misdemeanor.

NJ STATUTES SEC. 2c:34-5

A person who knows he/she is HIV positive and commits an act of sexual penetration without the informed consent of the other party is guilty of a crime in the 3rd degree.

CA HEALTH & SAFETY CODE SEC. 120291

Any person who, knowing he/she is HIV positive, engages in unprotected sexual activity without disclosing his/her status to his/her partner and acts with specific intent to infect the other person is guilty of a felony.

ESSENTIAL DEFINITIONS

MISDEMEANOR

- A law that imposes a punishment of one year or less usually is considered a misdemeanor

FELONY

- If a law provides for imprisonment for longer than a year, it is usually considered a felony

INFORMED CONSENT

- Having the essential information relevant to knowing the primary consequences of agreeing to a course of action

Whom do HIV criminal laws target?



Nearly twenty–five percent of HIV criminal prosecutions between 1986 and 2001 involved behavior with little or no risk of transmission, such as biting, spitting, and scratching.



Mostly minorities, sex workers, and prisoners; hetero sex, but increasingly MSM



<http://www.hivlawandpolicy.org/resources/view/456>

The Facts of HIV Criminal Laws & Prosecutions

- No reduction in the spread of HIV or the risk-taking behavior of people living with HIV (source of most new infections = uninformed).
- Criminalize behavior that is otherwise legal.
- Intent to transmit HIV or otherwise do harm to a contact is rarely part of the fact pattern.

HIV Criminal Laws & Prosecutions: More Facts

- State laws that make it a misdemeanor for those with STIs to have sexual contact with others virtually never enforced.
- Exposure and transmission of Hepatitis C, HPV have not been the subject of criminal prosecutions.
- Treat risk as one-directional, i.e., risk to person with HIV via exposure to STIs, HPV, etc. never a factor in prosecutions.

The Impact of Laws

- “Law changes behavior by signaling the underlying attitudes of a community or society.”
- “Because people are motivated to gain approval ... the information signaled by legislation and other law affects their behavior.”

R.H. McAdams, “An Attitudinal Theory of Expressive Law,” Oregon Law Review (2000)

The Impact of Laws

- Sodomy Laws
 - Few prosecutions, but severely stigmatizing, encouraged/supported discrimination in multiple aspects of everyday life
- Prosecutions against crack users vs. cocaine
 - Impact of racism and other constructions of “other-ness” to inform prosecution priorities

The Significance of Government-Enforced Stigma

- Stigma difficult to eliminate, but it should be clear whose side the government is on
- Government participation in the shaming of its citizens subverts ideal of dignity, equality
- Reinforces severe misconceptions about the nature and transmissibility of HIV
- Reinforces an “us versus them” response

Criminal Laws, Disempowerment & Public Health

- Communicates that those in power see PWHA as “less than,” toxic; stigma affects health
- Likely to affect extent to which PLWHA stand up to stigma: hide vs. disclose, avoid testing (and “tagging”) vs. entry into care
- Shaming is an inappropriate public health intervention, period

Criminal Laws, Disempowerment & Public Health

- Does nothing to protect women, and in some environments women more likely to be prosecuted
- Tacitly discourages individual responsibility for protecting one's health
- Encourage reliance (and blame) on others rather than individually-controlled protection from disease

The role and responsibility of public health community

- Ensure evidence-based approach to disease control
- Provide sound public education and ensure understanding of all public health threats
- Treat like risks alike
- Take vigorous public stand against laws and policies that negatively target and stigmatize PLWHA

**RISK OF HIV INFECTION
VIA
UNPROTECTED SEX
WITH PERSON WHO IS HIV+**

**WHAT IS THE RISK THAT YOU WILL
ACQUIRE HIV THROUGH ANY ONE SEX
ACT?**

**EXCLUDING OTHER FACTORS, THE RISK
DEPENDS ON THE TYPE OF SEX YOU HAVE,
for starters...**

HIGHEST RISK OF HIV TRANSMISSION

UNPROTECTED RECEPTIVE ANAL SEX WITH A KNOWN HIV POSITIVE PARTNER:

- **Less than 1% (.82%), or about 1 in a 120**
- **However, risk varies depending on factors, from 1 in 50 to 1 in 400**
- **Some people get infected after only one or two sexual contacts with an HIV positive partner**
- **ART is a game-changer: since 076, have known that treatment affects viral load affects risk of transmission**

VERY LOW RISK OF HIV TRANSMISSION

UNPROTECTED RECEPTIVE ORAL SEX WITH A KNOWN HIV POSITIVE PARTNER:

- about 1 in 2,500 acts of unprotected oral sex
- Again, estimates of actual individual risk vary

**RISK OF HIV TRANSMISSION VIA UNPROTECTED
RECEPTIVE VAGINAL SEX
WITH A KNOWN HIV POSITIVE PARTNER:**

- **about 1 in 1,000 acts of unprotected sex**
- **Again, estimates of actual individual risk vary**
- **High viral load is a major risk factor for HIV transmission**
- **Heterosexual HIV transmission may increase about 2-5 fold for every 10-fold increase in viral load**

CHALLENGES TO DECRIMINALIZATION

- “Friendly Fire”
 - Mischaracterizations of HIV transmission risk, e.g., “high risk” to describe something that is unlikely to occur 99% of the time
 - Mischaracterizations of the law, e.g., “criminal transmission laws” really are “failure to prove disclosure laws”
 - Unhelpful characterizations of advocacy e.g., “decriminalizing HIV transmission”

CHALLENGES TO DECRIMINALIZATION

- Silence of Public Health Community
 - To date, unwilling to publicly affirm evidence that would support advocacy for repeal or end of HIV-based prosecutions
 - Need clear statements on:
 - Real transmission risks
 - Inability of criminal law to protect against HIV transmission

CHALLENGES TO DECRIMINALIZATION

- Inconsistency of Public Health Community
 - Inconsistent position on role of federal and state health officials in advocating for change in the law (silent on criminal laws as barriers, while very active on advocacy to change HIV testing laws)
 - Inconsistent positions on characterization of HIV as serious/deadly vs. chronic/manageable in public policy debates

CHALLENGES TO DECRIMINALIZATION

■ Community attitudes

- Anecdotally, many support prosecution of those who they believe infected them
- Embrace of concept of “exceptionalism”
- Acceptance of stigmatizing conditions on RWCA funds
- Acceptance of prevention strategies that place burden of ending epidemic on PLWHA
- Lower priority afforded human rights in public discourse and policy development

CHALLENGES TO DECRIMINALIZATION

- Community attitudes and knowledge
 - Broad misunderstanding of the nature and transmissibility of HIV persists
 - Lack of sympathy for “intentional transmitters”
 - Current way of discussing the problem of HIV criminalization is inadequate, ineffective
 - Need to rethink how we communicate and educate about HIV, especially in the context of the criminal justice system

**FOR MORE INFORMATION -- OR TO
GET INVOLVED -- ON
DECRIMINALIZATION, CONTACT:**

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