

is there a role for criminal law in HIV prevention?

why criminal law for HIV exposure?

Throughout the AIDS epidemic in the US, there has been repeated debate over the need for laws that punish individuals who know they are HIV+ and expose another person to HIV (sometimes referred to as intentional or knowing HIV exposure). Much of this debate has been at the extremes – criminalization of all HIV exposures or none at all. But a sounder position in this debate may be found between the extremes.

The primary means by which HIV is spread (sexual behavior and drug use) are already controversial areas in both the legal and public health fields. Research, social norms, and personal values about sex and drug use – and consequently about HIV and its prevention – vary greatly. Not surprisingly, the issue of using criminal law to punish HIV exposure is hotly contested.

Analysis of laws, cases and public opinion polls shows support for legislation that condemns at least some behaviors that expose others to HIV, such as laws that add extra penalties to violent crimes like rape or assault when the perpetrator is HIV+. Yet the way many HIV exposure laws are currently written could have serious negative impacts on HIV+ people. Justification for some of these laws has been based on incorrect perceptions of transmission risk, thus potentially criminalizing behavior that poses little or no threat of spreading HIV. Further, no evidence exists that using criminal law is an effective approach to HIV prevention.

The question that arises, then, is how criminal HIV transmission laws and public health efforts can work in greater harmony to achieve the best possible outcomes for a given community.

what are the laws?

While there are no federal laws on HIV exposure, Congress has provided explicit support for such efforts at the state level. In 1990, the Ryan White CARE Act, which provides states funds for AIDS treatment and care, required every state to certify that its criminal laws were “adequate to prosecute any HIV infected individual” who knowingly exposes a person to HIV. (The requirement was removed in 2000 after all states had certified that they had such laws.)¹

States have taken three general approaches to making HIV exposure by a person who knows they are HIV+ a crime: 1) Adopt HIV-specific laws; 2) Rely on existing STD laws; and 3) Use general criminal statutes such as assault or reckless endangerment.¹

HIV-specific laws: As of May 2005, 24 states have laws that specifically punish HIV exposure as a separate crime; however, there is substantial variation among these laws. Many HIV-specific laws address sexual activity, needle sharing and blood donation. Less often, these laws address other activities such as biting and spitting that have little or no risk of spreading HIV. Most of these laws do not require that the HIV+ person actually infect someone else – only that that person engage in a behavior knowing that it could put someone else at risk for contracting HIV. Penalties for breaking the law range from a minimum of one year to a maximum of life in prison.^{2,3}

Twelve of these states also have laws that specifically identify HIV exposure as grounds for enhancing a sentence for an existing crime (such as sexual assault or prostitution). Three additional states have these enhancement laws, but do not have laws that identify HIV exposure as a separate crime.

The wide range of behaviors addressed and possible penalties show the challenge of creating HIV-exposure laws. While laws that are more broadly worded allow for more flexibility, more specific laws may provide for protection against misuse. Finding a balance is particularly hard in a field such as HIV/AIDS, where knowledge about the virus, its transmission and how to prevent transmission continues to advance and change.

STD laws and general statutes: Six states rely on existing STD laws and 17 states have neither HIV nor STD laws and instead rely on general criminal laws. However, HIV does not always fit easily within the scope of general criminal laws.⁴ For example, assault is generally defined in the law as an unwanted touching, and is poorly suited to the consensual nature of the behaviors that can result in exposure to HIV.

Says who?

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why use the law?

Criminal law reflects society's interest in protecting people from serious harm.⁵ In the case of HIV exposure, criminal law may be used to deter HIV+ people from behaviors that would expose others to HIV and thus create a potential harm. This kind of potentially harmful behavior is similar to other actions prohibited by criminal laws.

Criminal laws are sometimes used to reflect a community's standards for socially acceptable behavior. Some HIV exposure laws require that an HIV+ person disclose her/his HIV status to a partner before engaging in any high-risk activities. In this way, the law is used to establish an expected standard of behavior for a particular group, and may share goals with public health policies.⁶

Criminal laws may be used to encourage HIV+ persons to stop engaging in high-risk behaviors that expose others to HIV. However, at present there is no published evidence that criminal laws have been able to achieve any goal but retribution in the context of intentional HIV exposure.

what are concerns?

At present, no studies show that criminalizing HIV transmission is an effective HIV prevention approach.⁷ In addition, many people do not know about HIV laws in their state. Unless people are aware of the laws, the statutes will not affect behavior.

Among those people who are aware of such laws, the statutes may create greater stigma against a disease about which much fear and misunderstanding already exists. In addition, the threat of criminal prosecution may discourage people from HIV testing, counseling and treatment.⁸ In this way, criminal laws could work against public health efforts, because people who do not know their HIV status may be more likely to engage in high-risk behaviors, and, therefore, may increase the spread of HIV.⁹

There are also concerns about stigma and discrimination in sentencing for HIV exposure convictions. Under some of the more extreme criminal HIV exposure laws, sentences can be as long as 10 to 25 years. Some people prosecuted for exposing others to HIV have received these long sentences, even when the victim was not infected.¹⁰

Many laws specifically punish someone for failing to disclose his/her HIV+ status to a partner. But HIV+ people may be taking steps to prevent the spread of HIV even if they do not disclose their status. Also, many factors may influence a person's ability to disclose HIV infection in a relationship. One survey of HIV+ persons found that 42% of gay men, 19% of heterosexual men, and 17% of women reported having sex without disclosing their HIV.¹¹ In addition, research shows that disclosing HIV status is not necessarily associated with using condoms or other risk reduction activities.¹²

how can we find a balance?

Laws used to punish HIV exposure vary widely from state to state. While some aspects of the laws support public health efforts, other parts may contradict them. There must be a balance between criminal law and public health goals, so that both may function as effectively as possible.

For community agencies and those who serve HIV+ people, it is important to raise awareness that such laws exist. Increased awareness of the laws may support the laws' goal of deterring risky behaviors, and may allow HIV+ individuals to have a greater voice in the development of laws that affect them directly.

Among legislators and policy makers, several steps can be taken to find a balance. In states that do not have HIV-specific laws, creation of such laws is not necessary. Numerous states have been able to take legal action on this issue using general statutes. In fact, UNAIDS specifically recommends against singling out HIV in this way.¹³

For those states with HIV-specific laws, legislators can strike a balance by supporting laws that reflect prevention measures and accurate medical knowledge about HIV transmission. At present many laws establish punishable behaviors without considering prevention guidelines issued by the CDC (such as condom usage). Additional protections could be incorporated by having laws that target only persistent offenders after less restrictive public health measures fail to achieve behavior change.

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