Outline for Panel One HIV Symposium

Allison Nichol: HIV Criminalization 101

This presentation will rely on data from the CDC available here: https://www.cdc.gov/hiv/policies/law/states/exposure.html and the following article co-authored by the CDC and the DOJ Civil Rights Division available here: https://link.springer.com/article/10.1007/s10461-014-0724-0

-- There are 33 states that have one or more HIV-specific criminal laws. In addition, in some states, individuals who have been convicted under those laws may face involuntary civil commitment after incarceration or be registered as sex offenders. These laws criminalize non-disclosure of known HIV-positive status in connection with engaging in certain behaviors such as while sharing needles, while engaging in sex work (regardless of risk of the act), or during the commission of a sex crime. Others criminalize behavior such as biting, spitting, and the throwing of bodily fluids by individuals who know they are HIV-positive, often in the context of interaction with law enforcement or corrections officials. Finally, the majority criminalize the failure to disclose known HIV-positive status in connection with engaging in adult consensual sexual behaviors of various types.

-- The majority of these laws were enacted at a time when far less was known about risk, likelihood, and mode of transmission of the virus and at a time when the quality of life and lifespan of an individual with the virus was vastly different than it is currently. In fact, HIV medications and treatments have significantly changed the course of HIV infection since the early days of the epidemic. With daily medication, regular laboratory monitoring, and lifestyle changes (e.g., exercise, adequate sleep, smoking cessation), HIV can be manageable as a chronic disease. People living with HIV can enjoy healthy lives. As a result, certain of these laws do not accurately reflect the current science of transmission, do not account for risk reduction behaviors and medical protocols that greatly reduce transmission risk, and do not reflect that, with testing and treatment, HIV may be a manageable medical condition.

-- HIV criminal laws should reflect the current science of transmission, require specific intent to transmit and for transmission to have occurred.
Peter Perkowski HIV Criminalization and U.S. Military Policies

-- While each branch of the Armed Services has its own policy governing whether and under what circumstances a servicemember who acquires HIV may continue to serve, in every branch servicemembers living with HIV face both serious barriers to career advancement and a multitude of ways in which their private consensual sexual behavior can subject them to prosecution under the Uniform Code of Military Justice (UCMJ). Once it becomes known by the military that a servicemember has acquired HIV, the servicemember is given an Order to Follow Preventive Medicine Requirements, commonly known as a “Safe Sex Order.”

-- The Safe Sex Order, among other restrictions, imposes strict liability for a servicemember’s failure to disclose their HIV positive status and strict liability for failure to use condoms. The Safe Sex Order does not account for whether or not there is an actual risk of HIV transmission involved with the specific sexual behaviors a servicemember engages in, nor does it acknowledge the reduction or elimination of risk by use of anti-retroviral therapy, condoms, pre-exposure prophylaxis (for an HIV negative partner). This Safe Sex Order instruction was revised in 2014 and could have been revised at Section (2) to more accurately reflect the modern science of transmission by stating, “to use proper methods to prevent the transfer of the virus,” but it was not.

-- Military Prosecutions under Article 128 and United States v. Gutierrez

In addition to a prosecution for violation of a Safe Sex Order under Articles 90 or 92 of the Uniform Code of Military Justice (UCMJ), those violations have also triggered prosecutions for assault and aggravated assault under Article 128 of the UCMJ.

However, the basis for these aggravated assault prosecutions were soundly and unanimously rejected by the Court of Appeals for the Armed Forces in United States v. Gutierrez, 74 M.J.61 (C.A.A.F. 2015).

In Gutierrez the court found that consensual sexual activity undertaken while HIV positive, in violation of the terms of a safe sex order (in this case, failure to
disclose and inconsistent use of a condom), was insufficient to support a conviction for aggravated assault under Article 128.

It did, however, find that it could support a conviction for assault consummated by battery, a lesser included offense under Article 128, because the court determined that failure of the defendant to disclose his HIV status meant his sexual partners could not provide meaningful informed consent and, therefore, the sexual activity could constitute offensive touching.


--Recent prosecutions and their outcomes will also be discussed.

Meghan Maury   Intersections with HIV Criminalization

- HIV Criminalization Beyond Non-Disclosure: Advocacy Toolkits on the Intersections with Sex Work and Syringe Use is the sum of two toolkits designed for advocates who care about ending the disproportionate criminalization of people living with HIV. The toolkits highlight the intersections between advocacy for HIV criminal law reform, sex work decriminalization, and safe syringe access. These different advocacy communities share many common goals and constituencies, yet do not generally work in close collaboration or collectively strategize. The toolkits underscore the ways in which certain HIV criminal laws specifically target sex workers and people who inject substances but also how these laws and those that prohibit sex work and drug use represent the systemic criminalization of safety and survival of Black and Brown bodies and of sexual and gender minorities.

- The toolkits discuss the many ways in which these issues are connected and outline concrete steps advocates can take to strengthen their intersectional advocacy. They were developed in consultation with a broad range of stakeholders and organizations.
- The documents are available for download here: