Title
American Bar Association Hearing – Racing the Closet

Permalink
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Publication Date
2010-10-01
In 2009, I published an article entitled *Racing the Closet*.¹ This article critiqued media stories on the “down low” or “DL,” the ostensible phenomenon of black men having sex with women, while secretly having sex with men and refusing to identify as gay. The DL has been trumpeted by numerous media outlets, including *The New York Times*, *Essence Magazine*, and *The Oprah Winfrey Show*—which did yet another alarmist story on this topic in the last few weeks.² The stories consistently identify DL men as a primary cause of HIV in black women, despite scant empirical support for the claim.

The media narrative on the DL, I argued, constructs a simplistic perpetrator-victim binary, in which black men are solely responsible for HIV transmission, black women are always helpless victims, and society and structural forms of discrimination are not visible at all. (Parenthetically, such stories also fail to account for white men on the DL, such as Sen. Larry Craig and Pastor Ted Haggard.)

In my article, I demonstrated a parallel between media DL discourse and HIV transmission laws. Like DL discourse, HIV transmission laws divide sexual couples into a perpetrator and a victim, deny the couple’s shared responsibility for its sexual decisions, and obscure some of the realities of sexual relationships.

I hope that my comments today help put a human face on the statistics and statutory provisions that often dominate debate on HIV transmission laws. I believe that the failure to attend to the human dynamics of sexual relationships helps explain why HIV transmission laws have had a minimal impact. At the outset, it is important to keep in mind the populations most severely affected by HIV/AIDS today. While AIDS was originally framed as a gay disease, increasingly, it is becoming a black and Latino

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² See id. at 1463 n.1.
disease, including black and Latino gay and bisexual men. With this impact in mind, how successful have HIV transmission laws been in curbing the prevalence of HIV?

Overview of impact of HIV transmission laws:

1. A key study found a mere 316 prosecutions over 15 years (included published judicial opinions and news reports).

2. There were roughly 21 prosecutions a year.

3. By contrast, there are 50,000 new infections each year (750,000 during 15-yr time period).

4. Interestingly, from 1986-2001 one-quarter of the states had no prosecutions.

5. Prosecutions typically aimed at people who had broken additional laws, that is, people already in the criminal justice system: at least 70%, according to one study. This focus on people already within the criminal justice system likely has a disparate race and class impact, although statistics on the identities of people who have been prosecuted are not available.

These numbers are even more striking when one considers the sweeping and indiscriminate scope of many laws.

- Some laws require disclosure of HIV status before engaging in many low or no-risk activities, including mutual masturbation or penetration with a sex toy. They apply to oral sex, which most public health experts consider to be low risk.

- They do not inquire into the HIV-status of the victim. In most states, an HIV-positive person commits a crime in not disclosing before sex, even if his partner is also HIV-positive or does not know her status.

- They do not require that the victim be actually infected through the exposure. Mere exposure to a small risk of infection is a felony, in many states.

- Most states do not consider whether the non-discloser used a condom.


They generally do not distinguish between high risk and low-risk sexual activities.\(^5\)

[See attached slide on differential risk of HIV infection based on sexual acts.] This variance in risk demonstrates the impersonal nature of the statutes. They do not consider whether one is a woman or a man, whether one is engaged in oral or anal sex, and whether one is engaged in insertive or receptive sex. Qualitative studies show that real people take these factors into account in deciding whether to ask about HIV status and whether to use a condom. Public health workers counsel people to consider these factors and focus on harm reduction—shifting people from high risk to low risk activities. Yet the laws are generally indifferent to these questions. They wrongly imply that it is common to obtain HIV through oral sex or masturbation, which exaggerates stigma, plays into public fears and undermines public health interventions.\(^6\)

Given the sweeping scope of these statutes, why do we see so few prosecutions? Why do HIV transmission laws have such minimal impact?

I want to highlight two main reasons. First, they require knowledge that one is HIV-positive (but generally not intent to infect). However, many of the people who have HIV do not know their status. As Cathy Cohen has demonstrated, the media and government initially portrayed HIV as primarily a problem among white gay men and, secondarily, intravenous drug users.\(^7\) This had adverse effects in that there are many men who have sex with men (or “MSM”) who are not white and/or do not consider themselves to be gay.\(^8\)

Further, many black heterosexual women contract HIV without being in a risk group. In one study, 80% of women who contracted HIV through sex with a man did not know or report that their male partners were in a high-risk group, such as drug users or

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\(^6\) See Galletly & Pinkerton, supra note 5, at 457.

bisexual men. These groups—black heterosexual women, and non-white and non-gay-identified MSM—are particularly likely not to know that they are HIV positive. For example, consider a CDC study on young black men who have sex with men in 6 major cities.

This 2002 study surveyed 920 black MSM, ages 15-22. The researchers asked the men if they knew their HIV status and then tested them. Overall, 16% tested positive. The key findings are as follows:

- 93% of those who were positive were unaware of their infection.
- Of those with unrecognized infection, 71% stated before testing that there was no chance, that it was very unlikely or unlikely that they were infected with HIV.
- 36% of the sample had never been tested for HIV; most of the remainder did not test regularly.

Those who had an unrecognized infection and had recently engaged in unprotected anal sex gave the following reasons for not using condoms:

- They “knew” they were HIV-negative (24%).
- They “knew” their partners were HIV-negative (20%).
- They thought their partners were at low risk of infection (35%).

8 See, e.g., William D. Mosher et al., Sexual Behavior and Selected Health Measures: Men and Women 15–44 Years of Age, United States, 2002, 362 ADVANCE DATA FROM VITAL & HEALTH STAT., (Nat'l Ctrs. for Health Statistics), Sept. 15, 2005, at 1, 13 (finding that almost 4% of Americans defined there sexuality as “something else” when the other options were heterosexual, homosexual and bisexual and that blacks and Latinos were disproportionately likely to choose “something else”).


• Condoms were not available (43%).\textsuperscript{11}

As this study suggests, HIV transmission statutes miss the ball in assuming that all positive people know their status. Through public health interventions, we can try to reach people like the men in this study, who underestimated their risk and did not get tested sufficiently. Studies suggest that about 25% of people living with HIV do not know of their status.\textsuperscript{12} Moreover, HIV-positive people who are unaware account for a disproportionate share of transmission to negative partners—at least half and as much as two-thirds.\textsuperscript{13} This is because people who learn they are positive generally change their sexual behavior and may gain access to medication [highly active antiretroviral therapy [HAART], which can reduce their viral load to low or undetectable levels.\textsuperscript{14} However, HIV transmission statutes work at cross-purposes with this goal—if people know about the law, they may avoid learning their status because of the legal risks attached to knowledge.

Another second reason for the failure of HIV transmission laws is that they are generally out of synch with the realities of many sexual relationships and the shared responsibility for dealing with HIV. As I describe in Racing the Closet, there are three themes that emerge from the literature on condom usage and safe sex negotiation. First, sexual partners often do not discuss HIV and under some circumstances, the positive and negative partner might act under contradictory assumptions.\textsuperscript{15} Instead of

\textsuperscript{11} This finding suggests an alternative public policy approach—make free condoms widely available and emphasis the importance of condom usage regardless of whether the partner discloses his or her HIV status.

\textsuperscript{12} See, e.g., Gary Marks et al., Estimating Sexual Transmission of HIV from Persons Aware and Unaware that They Are Infected with the Virus in the USA, 20 AIDS 1447, 1447-1449 (2006).

\textsuperscript{13} See Gary Marks et al., Meta-Analysis of High-Risk Sexual Behavior in Persons Aware and Unaware They Are Infected with HIV in the United States, 39 J. ACQUIRED IMMUNE DEFICIENCY SYNDROME 446, 448 (2005).

\textsuperscript{14} See id.

\textsuperscript{15} See Robinson, supra note 1, at 1522-1523.
encouraging all people to ask about HIV status and use condoms, as public health experts do, HIV transmission statutes place the burden entirely on the positive partner. This may lead a negative person wrongly to assume that his partner would say something if he were positive, even though the other might assume that if his partner were negative and intent on staying negative, he would bring up HIV or condoms.

Second, relationship status matters. The degree of intimacy in a relationship appears to determine the extent to which a positive partner discloses his HIV status, but intimacy also increases the likelihood of unsafe sex. Positive men are most likely to disclose when in a relationship, while they tend to feel a lesser obligation to casual sexual partners.\textsuperscript{16} But disclosure does not always lead to safe sex. HIV transmission statutes are wrong to assume that if a person discloses that he is positive, the negative partner will react by demanding condom usage. For example, a study of heterosexual male and female college students indicated that the more positively subjects felt about their sexual partner with respect to love, trust, and commitment, the less likely they were to be influenced by the fear of AIDS in deciding whether to use condoms.\textsuperscript{17} The law’s general failure to say anything about condoms, and focus solely on disclosure as a cure-all, is a serious mistake.\textsuperscript{18}

Third, context matters. Positive people may assume that sex partners in certain casual sex markets, such as gay neighborhoods like the Castro in San Francisco, public sex venues or sex clubs, are themselves positive or expect not to have a discussion about HIV before sex.\textsuperscript{19}

I raise these issues not to suggest that the HIV-positive partner has done nothing wrong if he fails to disclose his HIV status, but to argue that the other partner might share some responsibility. This discussion also illuminates reasons why the other partner might not press charges even if she learned of the illegal failure to disclose. Such a person might accept some responsibility for failing to insist on using a condom in

\textsuperscript{16} See \textit{id.} at 1524.

\textsuperscript{17} Constance J. Pilkington et al., \textit{Is Safer Sex Necessary with a “Safe” Partner? Condom Use and Romantic Feelings}, 31 J. SEX RES. 203 (1994).

\textsuperscript{18} See, \textit{e.g.}, Robinson, \textit{supra} note 1, at 1531.

\textsuperscript{19} See \textit{id.} at 1524-1525.
light of a context indicating heightened risk. Especially where the person does not become infected as a result of unprotected sex (which is entirely probable based on a one-time exposure), she is likely not to turn to the criminal law and submit to the invasion of privacy required to bring a case against her HIV-positive sex partner.

I hope that I have shown that HIV transmission laws are not an effective or comprehensive means of reducing HIV transmission. Indeed, in addition to leading to just a handful of prosecutions, they may be counter-productive in signaling that only HIV-positive people are responsible for transmission and giving people who are uncertain of their HIV status a reason not to know. Instead of tinkering with these laws, government should attack the race and class disparities that shape HIV transmission and health care through public health interventions. HIV transmission statutes, however, are likely to distract from, and potentially undermine, such efforts and give legislators a false sense that they have reduced HIV prevalence. Thank you.