

# *Criminalizing H.I.V. Transmission?*

## **Thesis Statement**

Criminalization of HIV transmission is warranted in limited circumstances. Circumstances of malicious intent to harm others by transmitting or terrorizing people with the use of HIV should be charged thoroughly. Medical and technological advances have occurred making the disease dramatically less contagious. The process of prosecuting HIV positive individuals with undetectable viral loads having consensual sex with or without a condom absent resulting infection should not be cause for prosecution.

## **Scope of the Paper**

The United States territories have tried over three hundred cases in regards to HIV transmission, charging individuals with newly enacted laws or laws already on the books. Most of the cases involved resulted after sex was consensual between two consentable individuals and with the use of a condom. However, because the infected party fails to notify the other party of his/her status they become liable for the responsibility of the safety of both parties, and in addition criminally negligent. The State of Iowa has some of the harshest laws in regards. [1] The states laws demand that the infected party must notify anyone in any circumstance of their infection or face felony charges of twenty-five years and mandatory registration as a sex offender. In a majority of the tried cases infection did not result, condom or not. This is true in other cases nationwide as well. Years of medical advances have resulted in treatment adherent individuals having little to no active virus inside their body to infect anyone by any means. [2]

## **Argument**

In today's society HIV is still seen as the death sentence it was seen as when the first case became public. There has and was a mass hysteria and a phobia of the disease. It is surmised that individuals with the disease are in fact infected with imminent "death." Some people are ignorant enough to believe that a spit or a touch from an infected individual may prompt prophylaxis at the nearest emergency room. In fact you may have already been touched or shared spit with an infected person and not been infected. How? Current treatment regimens are rendering the virus dormant. The virus loses its ability to infect. HIV infected individuals are living longer and healthier lives with current medications. Current medications no longer distinguish the infected from the uninfected. The infected look normal, have no signs, and may even be a close friend at work. It is also very possible that a loved one could be affected but afraid to tell. They may be handling the stigma associated with the disease alone yet adherently. In order to live treatment is necessary. In order to become enormously less infectious a negative viral load must be accomplished by adhering to medications, doctors' orders

and treatment for the long term. [3] Infected individuals realize that they want to live, because they are actually infected. On the other hand the uninfected have unprotected intercourse willingly, causing a false sense of security and with no potential liability.

After an infected person reaches a negative viral load, the body begins to heal itself and returns to that of once before, absent any disease. At this point most infected people are considered “normal.” They want to go out and live a “normal” life. This would include working a job, dating, and doing most other activities people are entitled to do whether infected or not. Safe sex is recommended to all individuals as a matter of public health. Safe sex is “supposed” to minimize risk from infection of any STD and unwanted pregnancy, but condoms are not guarantees. Consenting sex is a chance taken by both parties taken in order to satisfy a sexual appetite sometimes with a mislaid assurance similar to purchasing a lottery ticket. In one instance, sex with an HIV infected treatment adherent individual with an undetectable level of virus in the body has as much a chance of winning the Powerball than infecting someone with the disease. If condoms are used the odds are even lower.

Twenty or more years ago HIV gained a gruesome reputation as the disease of imminent death. It was a killer disease with infections becoming rampant and infections resulting in mass funerals. It was somewhat similar to the plague. Modern treatments helped little and the infected looked infected by way of ulcers, skin discoloration, weight loss, early aging, and various infections of any and all body parts. At that time there was no conceivable way to rid the United States of the disease and it became feared. As a result states began to enact laws to stop infected individuals from infecting uninfected people. This was now a crime with the new laws on the books. As the disease became highly uncontagious the stigma and the now unjustified laws remained.

There are instances in which people infected with HIV have deliberately infected others for whatever psychological reason. Most of these people have been prosecuted. For example, a man in New York by the name of Nushawn Williams intentionally tried to infect over three hundred women. [4] He was prosecuted to the fullest extent using only the available laws, not laws specific to HIV. He has a lifetime sentence in effect. He ended up infecting sixteen women. It is believed that he was not treatment adherent purposely. These cases are extremely rare and in the instant case New York didn't, and still does not have any law on the books specifically targeting HIV infectivity. New York officials find it to be unnecessary and discriminatory. Nevertheless, every state has laws that could be used to prosecute a person that maliciously infects and intends to harm an individual without targeting the HIV infected solely. [5] They don't impose penalties such as Felony convictions or lifetime sex offender registration like Iowa does or in over ten other states, but the penalties are stiff enough to match the charge without targeting. Conversely, Washington State had a similar issue with a crazed maniac maliciously infecting individuals, prompting the state to use HIV specific laws for prosecution. [6] Nevertheless, the circumstances are rare.

Many individuals are becoming infected at much younger ages than when the epidemic started. However, the majority are of all ages, races, creeds, and sexual

orientations. The ways people may be infected can be by rape, tainted blood supply, birth, consensual sex, and needle injections. People who are infected by no fault of their own are not allowed to explore life with a new person with the current stigma and laws. They may be deterred from having children as well. They are penalized for being a victim. All HIV infected are victims. Nobody thinks they will be a victim but we must take responsibility for our own actions. The risk exists whether HIV is eradicated or not. There are so many diseases of the human body contracted through various means. Admission of positive status to potential sex partners would create instantaneous liability even absent a resulting infection or protective measures. This does not leave room for uncoerced admission, therefore the laws are counterproductive. The uninfected person could claim that they were not informed in retaliation or just because, absent actual transmission, with prosecution inevitable for the infected and wrongfully so. The laws put the responsibility of safe sex on the infected, unfairly.

In recent years the courts in the United States and in other countries have seen an influx of HIV related cases and appeals. The defendants are receiving harsh penalties for having unprotected sex not resulting in infection to the unknowing party. On appeal the convictions are being amended. The case of Nick Rhoades started in 2009 when he was sentenced to 25 years in prison and placed on the sex offender registry for the remainder of his life. [7] He was undetectable and did not spread the virus during his unprotected encounter. His chances of passing the virus were nearly zero. He appealed his conviction and the court amended his sentence. He was sentenced to a year in prison and mandatory sex offender registration indefinitely. The Supreme court of the land has yet to pick up any similar cases but State Supreme Courts are. It is obvious that the penalties are too severe and discriminatory.

## **Conclusion**

In conclusion, not disclosing HIV status should be a right to privacy issue. Prosecution without intent is not a part of a good public health policy. There is no way that an infected person should be recklessly or maliciously exposing people to the virus by any means. There were and are laws, before HIV specificity, sufficiently targeting individuals who attempted to terrorize or harm people in most any chargeable form. These same laws can be used to prosecute culpable HIV cases. There is no need for every HIV infected person to be stigmatized and discriminated against by these laws. Most infected are treatment adherent and are responsible. Human nature may call for a sexual relation that is both unplanned and unthoughtout, but the consensual decision to engage in that activity should ultimately rely on both parties. The HIV infected person should be protected from liability and in reverse. The bottom line is, if current medications are indeed rendering HIV deactivated, and impassable, then criminal prosecution is unwarranted, there is no "intent to harm" malicious or otherwise. Sex is not a crime, knowingly being infectious and risking infectivity to others based on that knowledge should be a crime. A 1998 Supreme Court of Canada case set a precedent for all cases in that country in regards.[8] If there is a "significant risk of exposure" sex

becomes nonconsensual based on the fact that no reasonable person would willingly take the chance of catching the disease from a “sick” person. The treatment adherents are not “sick” with the help of modern medicine. Nevertheless, intent at the very least must be proven by medical evidence, mental status, and various other external evidence in order to properly prosecute. Absent criminal intent, HIV transmission and exposure should be moot.

## End notes

1. Iowa Code § 709C.1 Class B Felony 1. A person commits criminal transmission of the human immunodeficiency virus if the person, knowing that the person's human immunodeficiency virus status is positive, does any of the following : *a.* Engages in intimate contact with another person. *b.* Transfers, donates, or provides the person's blood, tissue, semen, organs, or other potentially infectious bodily fluid for transfusion, transplantation, insemination, or other administration to another person. *c.* Dispenses, delivers, exchanges, sells, or in any other way transfers to another person any nonsterile intravenous or intramuscular drug paraphernalia previously used by the person infected with the human immunodeficiency virus. It is an affirmative defense that the person exposed to the human immunodeficiency virus knew that the infected person had a positive human immunodeficiency virus status at the time of the action of exposure, knew that the action of exposure could result in transmission of the human immunodeficiency virus, and consented to the action of exposure with that knowledge.

2. Bennett-Carlson R, Faria D, Hanssens C. Ending and defending against HIV criminalization A manual for advocates: vol. 1, state and federal law and prosecutions. New York: Center for HIV Law and Policy and Positive Justice Project (2010)

3. Csete J, Pearshouse R, Symington A. Vertical HIV Transmission should be excluded from criminal prosecution. *Repro. Health Matters* 17(34), 154-162 (2009)

4. The People of the State of New York v. Nushawn Williams (1998), Defendant Appellate Division of the Supreme Court of the State of New York, 255 A.D.2d 1014 679 N.Y.S.2d 924

5. Nushawn charged with Reckless Endangerment in the 1st degree ("under circumstances evincing a depraved indifference to human life" engaging in conduct which created a grave risk of death to another person) and Attempted Assault in the 2nd degree. He was also charged with Sexual Misconduct. S 120.25 Reckless endangerment in the first degree. S 120.04 Assault in the 2nd degree. 130.20 Sexual misconduct. He received 7-12 years and is now being confined indefinitely under The Sex Offender Management and Treatment Act S. 3318. The law allows the civil confinement of dangerous sexual predators who have finished a prison sentence.

6. Wash. Rev. Code Ann. § 9A.36.011 Class A Felony 66 Wn. App. 423 (1992) 832 P.2d 109 THE STATE OF WASHINGTON, Respondent, v. CALVIN EDWARD STARK, Appellant.

The Court of Appeals of Washington, Division Two. July 13, 1992.

7. State of Iowa v. Nicholas Rhoades (2006)

8. *Her Majesty The Queen v. Henry Gerard Cuerrier* [1998] 2 S.C.R. 371

9. A Swiss study concludes that unprotected sex between a positive person on antiretroviral treatment and without an STI, and an HIV-negative person, does not comply with the criteria for an "attempt at propagation of a dangerous disease" according to section 231 of the Swiss penal code nor for "an attempt to engender grievous bodily harm" according to section 122, 123 or 125.

"Swiss Study On HIV Positive." - *Swiss HIV Cohort Study*. SHCS. Web. 1 May 2012.

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