

Fall 2003
Volume 3, Issue I



WORKING PAPER

**CRIMINAL PROSECUTIONS FOR HIV EXPOSURE:
OVERVIEW AND ANALYSIS**

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Objectives: To obtain information on criminal prosecutions for HIV exposure in the United States, including: state and year, mode of exposure, type of law under which prosecution occurred, defendant and victim characteristics, and outcome. Methods: Cases were found through searches of popular press and legal archives at Westlaw and Lexis-Nexis, and information on each was analyzed using ACCESS. Results: There were few prosecutions relative to AIDS cases, and prosecutions varied over time and between states. Prosecutions for spitting, biting, and prostitution are excessive relative to AIDS cases attributable to these modes of exposure. Conclusions: The findings suggest that prosecutions are not likely to serve the public health purpose of reducing HIV transmission from those who know they are infected.

This research was supported by the CDC grant R62/CCR117977 and the Yale University Center for Interdisciplinary Research on AIDS (CIRA) grant 5 PO1 MH/DA56826 from the National Institute of Mental Health and the National Institute on Drug Abuse. The author gratefully acknowledges the work of Noah Messing, who conducted much of the initial research; Joan Altman, Amy Hozer, Emily Saslow, and Jennifer McSweeney for their work in collecting key data; and Kim Blankenship, Scott Burris, and Zita Lazzarini for reviewing earlier drafts and generally providing insight and guidance.

I. INTRODUCTION

Exposure of others by those who know they are infected with HIV is a growing public health concern [1], particularly following a series of studies indicating continuing sexual risk behavior among HIV+ individuals, often in the absence of disclosure to their sexual partners. Stein et al. found that 40% of a sample of HIV+ patients presenting at urban hospitals had not disclosed their HIV status to all sexual partners, and that among participants who did not disclose their status to their sexual partners, 57% used condoms less than all the time [2]. Similarly, Singh et al. found that more than half of HIV+ men and nearly half of HIV+ women studied had not disclosed their HIV status to a sex partner in the previous six months. Among those who reported practicing unprotected anal or vaginal intercourse during their most recent sexual encounter, 57% of men and 71% of women had not disclosed their HIV status to that partner. 59% of men and 60% of women reported that their most recent partner with whom they had unprotected intercourse was not known to be HIV+ [3]. Wenger et al. reported that 22% of HIV+ study participants stated that their last partner was known to be HIV negative or that they did not know their partner's status, and that they had had unprotected vaginal, anal, or oral sex with that partner. Among those whose partners were HIV negative, 24% of the partners were unaware that the subject was HIV+, while 41% of partners of unknown status were aware that the subject was HIV+ [4]. Another study showed that 23% of HIV+ subjects reported not using a condom with a person to whom their status was not disclosed [5].

Criminalization of knowing HIV exposure has been framed as a public health intervention to reduce transmission from those who know they are infected. Over the course of the AIDS epidemic new statutes have been written, and general criminal statutes re-interpreted, to allow for such prosecutions. Two public health rationales have been offered for criminalization: that it will serve as a deterrent to transmission between those who know they are infected and their sexual or drug using partners [6-11], and that it will serve as a type of quarantine mechanism by providing for incarceration of people who are known to place others at risk [12]. Public health arguments have also been levied against criminalization. It has been suggested that laws could potentially deter voluntary testing and disclosure [13, 14], that criminal cases divert funds and attention from more effective prevention methods [15], and that prosecution fails to address the causes underlying sexual risk behavior [16] and thus will do little to reduce it. In addition, the argument that incarceration will stop the transmission of HIV has been rendered somewhat questionable by research documenting occurrence of HIV risk behavior and transmission in prison [17-19]. In fact, four prosecutions have involved HIV exposure of prison or jail inmates by fellow inmates [20-23]. However, most discussion of criminalization has taken place in legal journals rather than public health forums, despite the claim that criminalization is, in part, a public health measure.

II. METHODS

To track and evaluate prosecutions for HIV exposure, a Microsoft ACCESS database was created that provides a uniform set of information about each prosecution, as well as

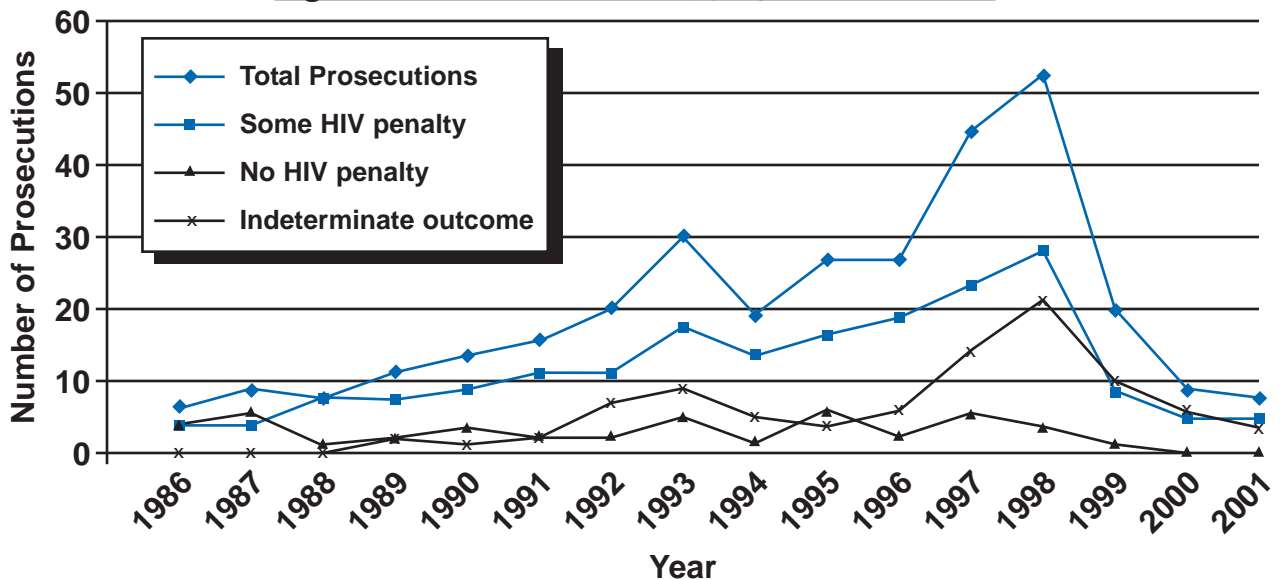
information on state legislation on HIV exposure. The data about prosecutions includes the state and year of the prosecution, the mode of exposure, whether HIV was transmitted, defendant characteristics, victim characteristics, the specific crime the defendant was charged with and/or convicted of, whether the charge was HIV-specific (i.e. a charge created through an HIV exposure criminal statute), and the sentence. This database has been completed through August 2001. Cases were identified through searches of popular press archives, law review articles, and case reporters at Westlaw and Lexis-Nexis, and through popular press archive searches at newslibrary.com. Because many cases are not reported in either case reporters or the popular press, this is assumed not to constitute an exhaustive review of all criminal prosecutions for HIV exposure occurring in the United States thus far. However, it is believed to represent a reasonable cross-section of cases. There may also be some error introduced by relying on popular press sources for accurate information about court cases, but cross-checking between different news sources did not reveal inconsistencies in reporting on specific cases, so the error rate is believed to be low. The results of preliminary analysis of this database are presented in this paper.

III. RESULTS

At the present time, 28 states appear to have, or have had, some type of HIV-specific criminal transmission statute. In these states, HIV exposure may be classified as the criminal offense of "knowing exposure to HIV," "criminal HIV exposure," or other variations. Many of these same states have also prosecuted HIV exposure under traditional criminal law. This has been done in cases of specific types of exposure that are not usually covered under HIV exposure statutes, such as spitting.

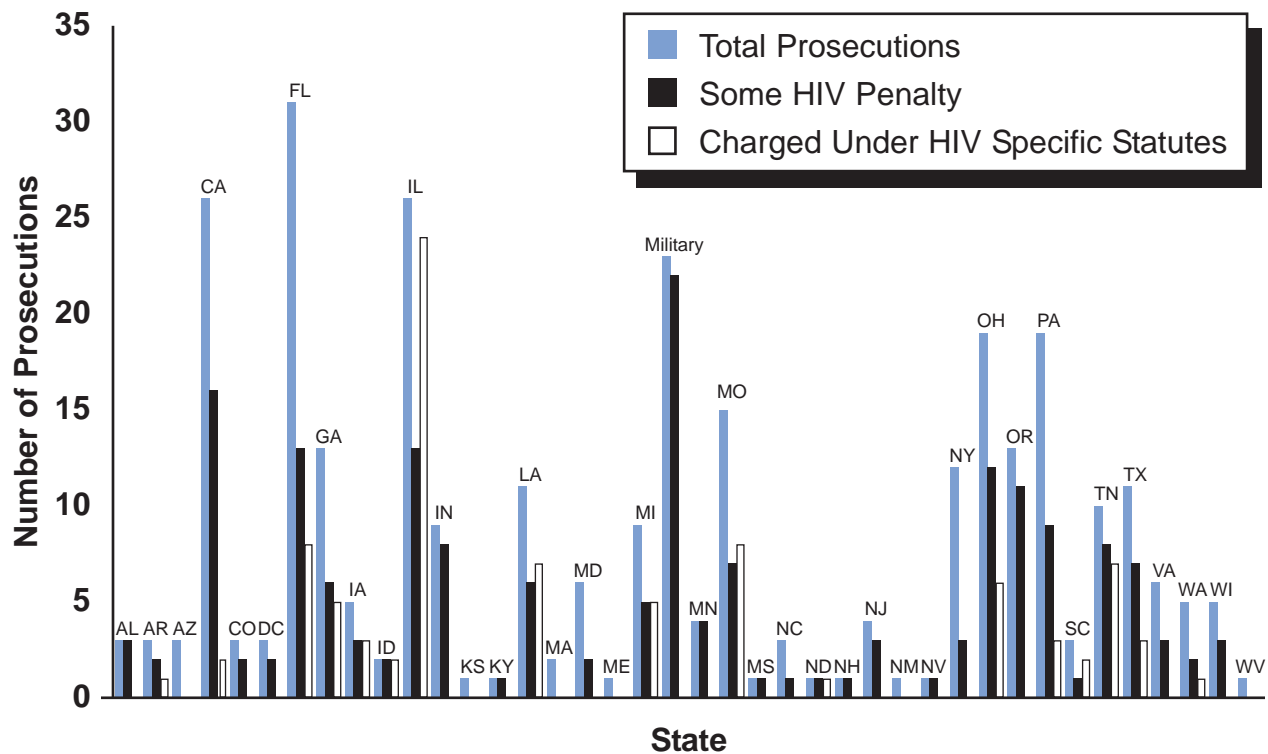
We found 316 instances of prosecution for HIV exposure occurring in 39 states and the military. There has been variation over time in the number of cases per year, with a peak in 1998 and an apparent drop-off since then (see Figure 1).

Figure 1: Prosecutions Per Year, With Outcome



There is also significant variation by state in the number of prosecutions attempted, the number of convictions attained, and the type of criminal charges brought against offenders. For purposes of intra-state comparison, military cases were excluded because of biases arising from the fact that the cases receive little popular press attention and were therefore found through legal sources that are more likely to report on cases in which there were convictions. Figure 2 shows the total number of prosecutions in each state, the number in which charges were brought under an HIV-specific statute, and the number of prosecutions that resulted in some penalty related to the HIV exposure.

Figure 2: Cases by State: Total Number of Prosecutions, Outcome, and HIV Charge



States that have an HIV exposure statute have a higher average number of prosecutions than states lacking an HIV exposure statute: an average of 2.0 cases in states without legislation vs. 8.7 cases in states with legislation. The range was 0-13 in states without legislation and 0-26 in states with legislation. Prosecutions were only marginally more likely to result in some HIV penalty in states with HIV-specific legislation vs. without (56% and 53%, respectively).

A. Defendants:

There were only 300 defendants in these 316 cases because there were 14 defendants who were prosecuted twice and one who was prosecuted three times. The defendants included 239 men, 56 women, 2 transsexuals, and 3 individuals of unknown gender (first name unavailable). Information on race/ethnicity was virtually never available. The defendants included 15 prison, jail, or juvenile detention center inmates. There were 44 prostitutes (4 of whom were prosecuted for biting or spitting).

There were numerous cases in which the defendant was HIV negative or of unknown HIV status at the time of the offense. In two cases this was irrelevant: in one, the defendant was convicted of first degree felony assault for injecting his son with blood containing the HIV virus, and in another, the defendant was convicted of attempted second degree murder for injecting his ex-mistress with blood containing the HIV virus. In two other cases, defendants were charged because of their relationship to HIV+ third parties: one for promoting the services of a prostitute who was HIV+, and one for allowing rescue workers to perform artificial resuscitation on her husband without warning them that he was HIV+. Defendants tested HIV negative in 8 exposure cases. There were also a number of cases involving syringe injection or threats in which the contents of the syringe were never tested to see whether they contained the HIV virus.

In 3 cases, defendants only tested HIV+ at the time of their trial, and there was no strong evidence that they knew of their HIV status at the time of committing the offense [24, 25, 26]. In one of these cases, in which the defendant had received a penalty enhancement because he was HIV+, the court determined on appeal that no evidence had been presented to prove that at the time of the offense, the defendant had HIV, knew he had the virus, and had received risk counseling [27]. In another case, however, the trial court sentenced the defendant to 40 years when the guideline sentence was 12-17 years, stating that "this defendant, having been an admitted homosexual for years, knew or should have known the likelihood of his having AIDS as a result of these homosexual contacts..." [28]. On appeal, the Court of Appeals agreed that, "because of his life-style, Cooper knew or should have known that he had been exposed to the AIDS virus," and upheld his sentence [29].

B. Prosecutions by Type of Exposure:

a. Unconsensual sex/cases of unclear consent:

There were 75 cases of prosecutions for non-consensual sex (see Table 1, next page), as well as 23 in which consent was unclear either because the victim was below the legal age of consent or because from limited information available it appeared that the sex was probably not consensual. Three cases involved both unconsensual partners and partners of unclear consent, giving a total of 95 cases involving unconsensual or not clearly consensual sex. Seven of the individuals in these cases were also prosecuted for consensual sex with other partners, so their cases are tabulated in the summaries of consensual sex, as well. Twenty-two of these cases appeared to have been prosecuted under HIV-specific criminal statutes, involving charges such as criminal exposure to HIV and reckless conduct by a person with HIV.

Among these 95 cases, we were unable to determine the outcome of 20 cases (see Table 2, on page 7) for summaries of all case outcomes). In one additional case, the defendant died before completion of the trial. In 7 other cases, there were news reports that the individual was convicted on some charge, but there was insufficient information to determine whether the conviction was for HIV exposure or for some other charge.

There were convictions in 42 cases. There were five cases in which HIV charges were dropped or dismissed. In two cases, this was because the charges involved attempted murder, and intent to cause harm could not be proven. In one case, the "victim" was a man who had gotten an

Table 1: Prosecutions and Outcomes by Mode of Exposure:

	Total prosecutions		Total with some HIV penalty		
	#	As % of all prosecutions	#	Conviction rate within exposure category	Convictions as % of all prosecutions of known outcome (n = 228)
Sexual exposure	211 ¹	67.0	138	64.8	60.5
Prostitution	40	12.7	22	55.0	9.6
Solicitation of prostitutes	1	0.3	1	100.0	0.4
Consensual sex	84	26.6	64	76.2	28.1
Unconsensual sex, unclear consent	95	30.1	58	61.1	25.4
Spitting, biting, or scratching	75	23.4	32	42.7	14.0
Spitting	24	7.6	8	33.3	3.5
Biting	49	15.5	24	49.0	10.5
Scratching	1	0.3	0	0.0	0.0
Selling blood	5	1.6	4	80.0	1.8
Syringe injection or threat	12	3.8	5	41.7	2.2
Needle-sharing	0	0.0	0	0.0	0.0
Mode of exposure unknown	2	0.6	0	0.0	0.0
Other mode of exposure ²	10	3.5	3	30.0	1.3
No alleged exposure ³	2	0.6	2	100.0	0.8
<i>Total number of cases</i>	316 ⁴	100.0	184	N/A	80.7

¹The subcategories in this group total to more than 213 because some defendants had both consensual and non-consensual partners.

²This includes throwing a blood-soaked towel, throwing feces, putting blood in someone's coffee, splashing blood, and licking.

³These are 2 cases in which individuals convicted on completely unrelated charges (car theft, forgery) were offered probation only on the condition that they would inform their sex partners of their HIV+ status, even though no particular incident of exposure was alleged. They are not "convictions" in the legal sense, but for these purposes are treated as equivalent since they involve the imposition of a legal penalty and potential further criminal sanctions due to HIV+ status.

⁴While there were a total of 316 prosecutions, the tabulation by modes of exposure totals to 317 because of a case in which a man was prosecuted for both prostitution and blood sales.

HIV+ woman drunk and had sex with her when she was intoxicated, resulting in her being charged for criminal HIV exposure. Charges were dropped when he admitted that he was not certain he had sex with her, and neither of them was able to recall the incident. In one case an attempted murder charge was dropped when the defendant turned out not to be HIV+. One case was dropped because the victim refused to testify.

Table 2: Case Outcomes

Outcome	Number	As % of all prosecutions
Defendant died before trial or sentencing, or was too ill to be tried	8	2.5
Unable to determine whether conviction was for HIV charges or non-HIV charges	8	2.5
Outcome unknown	72	22.8
<i>Total with no determinate conclusion to the case</i>	<i>88</i>	<i>27.8</i>
Convicted on HIV charges	164	51.9
Convicted under HIV-specific criminal statute	55	17.4
Convicted of other, non-HIV charges as well	33	10.4
HIV led to penalty enhancement in sentencing	21	6.6
<i>Total with some HIV-related penalty</i>	<i>184</i>	<i>58.2</i>
Acquitted of HIV charges, or HIV charges dropped/dismissed	30	9.5
Convicted only of non-HIV charges and no penalty enhancement for HIV exposure	14	4.4
<i>Total with no HIV-related penalty</i>	<i>44</i>	<i>13.9</i>
<i>Total number of cases</i>	<i>316</i>	<i>100.0</i>

b. Consensual sex:

There were 84 prosecutions for HIV exposure through consensual sexual activity. These included 4 cases in which the defendant died before trial or was too ill for trial, and 10 cases in which we were unable to determine the outcome of the case. There were 5 cases in which individuals were acquitted or the HIV charges were dropped. In one case the case was dropped when the HIV+ individual's sex partner tested negative for HIV, in another case when two inmates who had accused a third inmate of exposing them to HIV refused to testify, in another case because the defense lawyer cast doubt on the victim's assertion that she had not been informed of her partner's HIV status, and in two California cases the judges threw out the charges because California law does not explicitly prohibit people who are HIV+ from having sex unless they intend to transmit the virus.

There were 65 convictions. Twenty-six of these appeared to have been under HIV exposure statutes and the remainder under non-HIV-specific criminal statutes (e.g. as assault), but it was not possible to make this determination in every case.

c. Prostitution:

Prosecutions for prostitution accounted for 40 prosecutions. Thirty-three of those prosecuted for prostitution were female, accounting for 59% of all prosecutions of women, and 7 were male. Twenty-three of the cases were prosecuted under HIV-specific criminal statutes.

The outcome of 5 of the cases is unknown, and in one case the accused died before trial. These cases resulted in convictions for HIV exposure in 21 instances. The charges in these cases were felony prostitution (felony rather than misdemeanor because of HIV exposure), criminal transmission of HIV, reckless endangerment, committing an act of prostitution while HIV+, attempted criminal transmission of HIV, and criminal attempt to endanger another person. In two cases, defendants agreed to plea bargains in which they publicized their HIV status on television in exchange for HIV charges being dropped. In one instance, sentencing was affected by a man's HIV status, although HIV did not affect the charges against him [30].

Defendants were acquitted of HIV charges, or the HIV-related charges were dropped in 12 cases. In one case this was because no one came forward to admit having sex with a woman who was charged with reckless endangerment, and in another case because the witness refused to testify. In another case, charges were dropped in exchange for the woman agreeing to get drug treatment and cease prostitution. In one case, charges were dropped because there was no evidence that the woman, who had tested negative for HIV four times, was HIV+. The defendant was acquitted in one case because a woman was charged with attempted manslaughter and the court held that prostitution while HIV+ could not be equated with intent to kill [31]. In one case, a man was indicted for promoting the services of a prostitute he knew to be HIV+. Charges were dropped in his case and that of the prostitute when the witness refused to testify [32-33].

Prosecutions for prostitution stood out in that the defendants' behavior often involved no real exposure to HIV, and in some instances there were convictions even when the defendants had informed their customers of their HIV+ status. In one case, a Pennsylvania woman was convicted despite the fact that she told the undercover officer who solicited her that she could not have unprotected sex with him because she carried the AIDS virus [34]. In another case, a scuffle began when undercover cops were arresting a prostitute, and she began to bleed slightly. She warned officers to be careful because she was HIV+, and to wash the blood off. She also had condoms in her purse. She was charged with, and pleaded guilty to, criminal transmission of HIV [35]. We found no cases other than in situations of prostitution in which individuals who disclosed their HIV status, refused to engage in high-risk sexual activity, and generally not only failed to demonstrate intent to transmit HIV but in fact demonstrated caution, were convicted of an HIV exposure crime. This discrepancy appeared to be due to the fact that statutes creating the offense of prostitution while HIV+ generally criminalize the act of prostitution after a positive HIV test, not exposure to the HIV virus during the act of prostitution. Statutes applicable to consensual sex and other modes of exposure, on the other hand, typically refer to exposure to the virus.

d. Solicitation of prostitutes:

Prosecutions against HIV+ individuals who patronized prostitutes were noticeably absent: there was only 1 case in which an HIV+ individual was prosecuted for solicitation of prostitutes. In this case, an adult HIV+ man was convicted of two counts of sexual exploitation of a minor and two counts of patronizing a juvenile prostitute for having sex with 16-year-old male prostitutes without informing them of his HIV status. He was sentenced to 7.5 years incarceration when the

usual charge for first time offenders on the charges would have been ninety days. He was granted clemency and died in a hospice shortly thereafter [36].

e. Selling blood:

We found five instances of prosecutions for sales of blood while HIV+. There were convictions on HIV-related charges in four of these cases. In the other case, an HIV+ man was acquitted by jury because he was charged with attempted murder, a charge then reduced to attempting to poison a pharmaceutical product, but the jury determined that he had not attempted to do anything other than earn money [37].

f. Syringe injection/threat:

We found 12 instances of prosecutions for threatening with syringes or injecting with syringes. In 6 of these cases, the defendant actually injected or jabbed someone with the syringe. In two cases, the victims were actually infected with HIV [38-39]. In the other 6 cases, no injection occurred. We were unable to determine the outcomes of five cases. In one case, a charge of criminal transmission of HIV was dropped when the victim tested negative for HIV, and the defendant died shortly after [40]. There was an acquittal in one case, and there were convictions on HIV charges in five cases. Sentences ranged from five years incarceration to life imprisonment (in one of the cases in which the victim developed AIDS). In the majority of cases, it appeared that the contents of the syringe were not tested to determine whether the HIV virus was actually present in the syringe.

g. Spitting:

We found 24 instances of prosecutions for spitting. Most people who were spat upon in these cases were law enforcement officers (15 cases). Some cases involved health care personnel (4 cases) or other civilians (5 cases). We were unable to determine the outcome of 9 of these cases, and the defendant was deemed too ill for trial in an additional case. The defendants were acquitted or the charges dropped in 6 cases, either because there was no evidence that the defendant was actually HIV+ or because of doubts about the transmissibility of HIV through saliva.

There were convictions for HIV exposure in 8 cases, in which there were two convictions for attempted murder, two for criminal exposure to HIV, one for assault with a deadly weapon, two for assault, and one for battery by body waste (the body waste charge was said to be the result of the defendant "flail[ing] about in a successful attempt to shake her tears, nasal mucous and saliva onto the officers" [41]). The sentences imposed ranged from 90 days in jail [42] to 25 years incarceration [43] to life imprisonment [44]. The two individuals convicted of criminal exposure to HIV cases received the lightest sentences. There were no instances in which HIV transmission occurred through spitting.

h. Biting:

There were 49 prosecutions for biting. Again, the majority of "victims" were law enforcement personnel (31 cases). HIV transmission occurred in one biting case. This was the first case of documented HIV transmission through a bite in the United States and only the second world-

wide [45]. We were unable to determine the outcome of 17 of the biting cases. In one additional case, the defendant died before trial. Defendants were acquitted or the HIV charges were dropped in 8 cases. The most common reason was that the defendant turned out not to be HIV+. In one case, the defendant successfully sued the police for taking and testing his blood without his consent or a warrant, and prevented his HIV status from being used as evidence of intent to kill [46]. In two cases, charges were dropped because of the improbability of HIV transmission through biting.

These cases resulted in convictions in 23 cases. Charges in these cases included attempted murder, assault with a deadly weapon, aggravated battery, criminal transmission of HIV, reckless endangerment, and aggravated assault. Sentences ranged from probation to 25 years incarceration [47]. In one case, the conviction was vacated on appeal because the court agreed that the prosecution had failed to establish that the defendant had "knowingly" attempted to cause serious harm by attempting to transmit HIV [48].

i. Scratching, licking:

There was only one scratching case, in which a man, described as "an AIDS activist" in newspaper accounts, was charged with aggravated assault when an officer sustained a scratch after dragging him from a protest at City Council chambers. Charges were ultimately dropped [49]. A woman was charged with battery for licking a police officer on her cheek while being arrested, but we were unable to determine the outcome of this case [50].

j. Miscellaneous charges:

There were 10 cases in which HIV exposure did not fall into the categories described above. These included: throwing a blood-soaked towel, allowing an off-duty police officer to perform CPR on an HIV+ man without warning him that he was HIV+, putting HIV+ blood in a corrections officer's coffee, flicking/ hurling/ splattering blood (4 cases), forcing someone to lick HIV+ blood off a knife, and throwing fecal matter. There were convictions in 3 of these cases.

k. No HIV exposure:

In two additional cases, HIV exposure was never officially alleged, and HIV exposure charges were not filed, but HIV+ individuals were granted probation (on charges of car theft in one case and credit card forgery in the other) only on the condition that they inform their sex partners of their HIV status.

IV. CONCLUSION:

From the above findings, it appears doubtful that criminalization of HIV exposure will serve any significant public health purpose, in terms of deterring HIV exposure or constraining the transmission of HIV. In approximately 200 cases, it appeared unlikely that offenders were amenable to deterrence, because their behavior was illegal or of questionable legality regardless of any alleged HIV exposure, or they were already at risk of arrest or involved in the criminal justice system – 95 people whose sex partners were non-consenting or whose consent was unclear, 40 prostitutes, 15 inmates, and 63 people who spat or bit, almost all of whom were getting arrested or were in the process of committing some type of criminal assault at the time they spat or bit. The argument that prosecution constrains continued HIV exposure is called into doubt by the number of people who were repeat offenders (16 prosecutions were of repeat offenders), and by evidence of HIV transmission in prisons and jails [17-19].

There were also many cases that raised serious questions of whether deterrence was worth the costs to offenders. Spitting, biting, and scratching made up 23% of the total, and convictions in some cases resulted in 25-year or life sentences. But there is clearly little to no public health rationale for such punishment. Finally, a central question to be addressed is whether criminal laws could ever exert an influence on sexual behavior equivalent to that exerted by other social and personal factors, such as desire and the need for intimacy [51], risk of violence resulting from disclosure [52], and difficulty disclosing one's HIV status, in part due to fears of discrimination [53, 54].

Public health is not the only driving force behind criminalization, of course, and so opponents of criminalization have addressed a variety of concerns in addition to traditional public health concerns of disease prevention. Some have argued that the laws and prosecutions will increase stigmatization of people with HIV/AIDS [11], and that existing prejudice against HIV+ individuals or groups with a higher rate of HIV infection, such as drug users or men who have sex with men, may bias prosecutions [55]. On the other hand, non-public health based arguments have also been put forth in favor of criminalization. Some who question the ability of prosecution to either deter or incapacitate HIV transmission suggest that criminal laws are nevertheless necessary to allow for punishment of people who knowingly expose others to HIV [6, 8]. Ultimately, legal, ethical, and pragmatic arguments for and against criminalization will have to be weighed, but it appears that public health goals do not clearly justify the current system of prosecutions and punishment.

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