The Criminalization of HIV: Time for an Unambiguous Rejection of the Use of Criminal Law to Regulate the Sexual Behavior of those with and at Risk of HIV

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Abstract

Throughout the HIV epidemic, criminal law has been invoked to deter and punish sexual transmission. The public health community has not favored the enactment of criminal laws specifically targeting people with HIV, nor endorsed the application of general criminal laws to HIV – but neither has it taken a vigorous stand against them. Meanwhile, governments continue to adopt HIV-specific criminal laws, and individuals with HIV continue to be prosecuted under general criminal law around the world. This comment argues that criminal law cannot draw reasonable, enforceable lines between criminal and non-criminal behavior, nor protect individuals or society from HIV transmission. In the protection of women, it is a poor substitute for policies that go to the roots of subordination and gender-based violence. The use of criminal law to address HIV is inappropriate except in rare cases where a person acts with conscious intent to transmit HIV and does so.

Since early in the HIV epidemic, criminal law has been invoked to deter and punish sexual transmission. "Criminalization of HIV" has taken the form both of HIV-specific criminal statutes and the application of general criminal law (such as assault) in matters involving exposure to or transmission of HIV. More than twenty-five years after the first AIDS diagnosis, criminalization has become a facet of public policy throughout the world, including the United States.[1, 2] Recently, criminalization has reached a new pitch in a "model law" on HIV crafted by West African parliamentarians, with support and assistance from the Action for West Africa Region HIV/AIDS Project (AWARE HIV/AIDS). Since its debut in N'Djamena, Chad, in 2004, the law's criminalization provisions have been enacted in at least eleven African countries. The N'Djamena provision criminalizes "willful transmission," which, despite the "willful," encompasses "transmission of HIV virus through any means by a person with full knowledge of his/her HIV/AIDS status to another person" regardless of whether the actor had any intention to do harm.[3(Art. 1)] National legislation commonly adds even broader elements, criminalizing exposure as well as transmission, and explicitly including mother-to-child exposure.[4 5] Amendments offered to the Singapore Infectious Diseases Act in 2007 propose to extend liability for sexual exposure even to one who is unaware of his infection but "has reason to believe he has, or has been exposed to the risk of contracting, AIDS or HIV."[6] In July, 2008, a Swiss court ruled that a person unaware of his infection but aware that a past partner had HIV was properly convicted of negligent transmission of HIV for having unprotected sex with a later partner. The court reasoned that Swiss public health guidelines created a standard of care that should be enforced by the criminal law.[7]

Leading public health agencies have never recommended criminalization, but neither have they taken an unambiguous, vigorous leadership position against it. UNAIDS has emphasized the problems with criminal law as an HIV-prevention tool, but also provided drafting guidance for legislators intent on ignoring its implicit advice.[8] The United States Agency for International Development effectively supports criminalization through its funding of the AWARE HIV/AIDS Project. Evidence and experience now compel the conclusion that criminalization of HIV is inconsistent with good public health practice and a due respect for human rights. This conclusion, in turn, compels systematic efforts to oppose criminalization and mitigate its negative effects.

We focus on criminalization of sexual exposure. Criminal law has also been directed against people who expose others by sharing syringes. Likewise, there is an increasing risk that criminal law will be crafted to punish mothers with HIV who refuse ARV prophylaxis, or breast-feed. The N'Djamena statute can be interpreted to do so, a position made explicit in the version enacted by Sierra Leone.[4] In the U.S., there have been prosecutions based on spitting, including a 2008 Texas decision in which the defendant was sentenced to thirty-five years in prison for spitting at a policeman.[9] While all these modes of exposure raise issues distinct from those involving sex, our general conclusion – that criminal law should not be used in the absence of a conscious intent to transmit HIV – holds true for them as well.

The Case against Criminalization

The central problem of criminalization is to draw reasonable, enforceable lines between criminal and non-criminal behavior. Criminal liability typically depends on a blameworthy state of mind. Actual injury to the victim may not be required, and even where required may be broadly defined to include infliction of fear or deprivation of autonomy. Most people would agree that the achieved intent to infect another with HIV is highly blameworthy, while exposing or infecting another when the actor reasonably does not know he is infected is innocent. The difficulty arises with cases falling between: people who know they are at risk but avoid being tested; people who know they are infected but occasionally have unprotected sex; people who know they are infected and regularly have sex without disclosing or taking precautions .

The severity of the risk and the harm are also more complicated matters than law makers, judges, lawyers and juries often seem willing to concede.[10] Risk of transmission varies with the type of exposure, the general health of the partners and the stage of infection, and in many circumstances may be low.[11, 12 13, 14] Where effective treatment is available, the risk is reduced both because individual infectiousness is significantly less[15] -- indeed, the Swiss Federal AIDS Commission went so far as to conclude, based on a review of the evidence, that people with HIV under proper ARV therapy and with no other STDs should be considered sexually non-infectious [16] -- and because the harm caused by infection is palliated by medical care.

But the objective risk, to the extent it can be accurately determined in any given situation, is hardly determinative in policy making, in court, or in human behavior. Risk assessments are more heavily influenced by psychological and social biases than objective statistics.[17] The riskiness (and therefore blameworthiness) of sexual behavior

depends on the observer's perceptions of the value and importance of sex, the responsibilities and capacities of sex partners for self-protection, and the applicable norms of sexual behavior and disclosure. Every day, millions of people have unprotected sex with partners they must assume might be infected. They evidently rate the risks and benefits of sex differently than people who pass judgment on sexual behavior in the criminal justice system. The result is that conduct that for large numbers of people seems "normal" or "acceptable" – i.e., sex without protection despite the presence of risk – exposes those who actually do have HIV to criminal prosecution – and, in many jurisdictions, to severe criminal penalties, including life imprisonment.[2, 10]

There are also concerns about fair treatment of defendants. Along with biased risk assessments, judges and juries may consciously or unconsciously take into consideration the race, nationality or social position of the accused. Commentators have raised this concern in connection with cases involving prisoners (like the recent Texas spitting case) who receive extremely harsh sentences for acts posing no real risk of HIV transmission.[18] Concern is borne out by more intensive scrutiny of trial transcripts in sexual transmission cases.[10]

Liability based on something less than achieved intent to harm another is inconsistent with a rational, desirable norm of personal responsibility in matters of sexual risk. HIV and other STIs are sufficiently prevalent that in most settings rational people operating with genuine autonomy should now expect that exposure is a normal risk of sexual behavior. Except where coercive sexual subordination occurs, the spotlight should be on both sexual partners' responsibility, not that of the partner with HIV alone.

Intentional infliction of harm through a sexual act undertaken with the conscious desire to infect another justifies a criminal penalty not because the likelihood of harm is greater or the obligation of self-protection any less than in many other comparable situations, but because the actor has deliberately – and successfully -- set out to harm another. The achieved intention is neither more nor less blameworthy because the means chosen is sex, and the average likelihood of success relatively low. In this sense, criminalizing intentional behavior that transmits HIV falls well within the parameters of criminal liability as it existed in most jurisdictions before the epidemic.

But the means chosen is relevant, since regulation of sex implicates rights of privacy, autonomy and self-expression. Everyone has the fundamental right to a consensual sex life and to form a family. Absent a compelling justification such rights should not be significantly abridged. Protecting people from a significant risk of harm is a sufficient justification for necessary and effective limits on personal freedom. It cannot however, be credibly argued that HIV criminalization serves an important protective purpose, individually or socially.

Public health interventions built around voluntary testing and counseling, outreach, and the training of peer opinion leaders have all been shown to be effective in promoting disclosure or safer sex.[19] In contrast, the public health evidence fails to support criminalization as an effective tool, and gives sober reinforcement to those who fear that criminalization may make HIV epidemics worse. No discernable connection can be found between criminalization and a jurisdiction's prevalence of HIV. The only study that examined the impact of criminalization on the sexual behavior of people with

and at risk of the disease was not able to show that the application of criminal law is beneficial.[20]

The study considered a number of likely reasons that criminalization is a poor public health tool. Prosecution has been unsystematic and has involved only isolated cases;[2] this is true in developed countries[10] and is likely to be even more apparent in developing countries with limited prosecutorial resources. Most transmission comes from people who do not know their status,[21] with studies suggesting that the greatest risk is in the period immediately following initial infection.[21-23] Transmission can occur even if the actor complies with the law by disclosing infection and/or practicing safer sex. Most people, including those with HIV, already believe that it is wrong to expose others to HIV without disclosure and consent, and these beliefs are apparently not strengthened by criminalization. While the study found no negative effect on testing or disclosure, it did find that laws criminalizing non-disclosure might encourage people to substitute disclosure for safer sex (i.e., follow the law by disclosing infection, but then behave unsafely with a willing partner). Qualitative research among people living with HIV in the United Kingdom found that highly publicized prosecutions were indeed stigmatizing, and perceived as undermining public health efforts to encourage safer sex.[24] Finally, criminalization may result in the use of confidential health records as evidence of the defendant's knowledge of his/her HIV status, entangling public health agencies and health care providers in law enforcement efforts to the detriment of other interventions.[25]

Nor is criminalization an effective way of protecting vulnerable populations from coercive or violent behavior, such as rape, that can transmit HIV. For one thing, sexual violence is already criminalized. While an offender's knowledge that he had HIV at the

time of the attack may properly be considered an aggravating factor, the notion that a separate, HIV-specific offense would materially add to deterrence is implausible. More importantly, criminal laws do nothing to address women's subordinate socio-economic position, which makes it more difficult for them to insist upon safe sex with non-monogamous partners, particularly husbands, and may make it dangerous for them to disclose their own infection. Criminalization is a poor substitute for improving women's status and offering serious protection of women's rights to sexual decision-making and physical safety.

Indeed, coercive measures like mandatory testing and criminalization may fall unfairly and disproportionately on women. There is a tendency to attribute responsibility for infection to the first person in a couple to be diagnosed, which in resource poor-settings will generally be women who present for ante-natal testing. In sub-Saharan Africa, most HIV diagnoses occur amongst women, some of whom report violent reactions by spouses and others.[26, 27] The subordinate social and economic status of women in Africa and elsewhere places them in a dilemma: unable to disclose their status because of the risk of violence or ostracism, they nonetheless face the possibility of prosecution as a result of their failure to disclose.

A Clear, Principled Stand against Criminalization

Given the social-psychological complexities of blameworthiness, risk and harm, and in light of epidemiological and human rights considerations, the use of criminal law to address transmission of HIV is unacceptable and inappropriate except in extreme (and

rare) cases where it can be shown that a person acted with the conscious intent to transmit HIV and in fact does so. For such cases, the existing criminal law suffices; no HIV-specific statute is needed. Legal concepts of reckless or negligent exposure, which such statutes frequently import,[5] are incapable of rational, fair application across the range of cases of this sort, and fail adequately to circumscribe the risk of criminal liability. The use of criminal law can never be justified where a person with HIV took risk-reducing measures or could not reasonably have used them. Criminal law is never appropriately applied to the behavior of people who do not know their HIV status.

These are propositions of policy, but they rest on empirical evidence, practical experience and a set of underlying positive values. Sexual expression and reproduction are valuable aspects of life for most people, including people with HIV. We support the proposition that people who know they have HIV have a moral obligation to protect others when they engage in sexual or other potentially transmissive behavior and when their material circumstances make it possible for them to disclose without risk of violence. We also believe that people who do not know their status have a moral obligation to protect themselves and others when they engage in sexual behavior and can take protective action without fear of victimization. And these responsibilities are mirrored in those of society as a whole, which has an obligation to provide an environment in which these behaviors are feasible and are rewarded. In particular, we emphasize the critical importance of addressing the subordination of women, who may be exposed to violence and dispossession as they seek to fulfil their moral duties of care for others.

The Politics of Criminalization

The scale of the epidemic helps explain the current rash of HIV-specific criminal statutes. Nevertheless, such statutes propagate the stigmatizing view that people with HIV are irresponsible and worthy of blame. The spread of the N'Djamena law across western Africa, along with continued prosecutions elsewhere, have convinced us of the need for sustained action to reverse the tide of criminalization. While criminalization of HIV may reflect stigma, we acknowledge that it is often carried out by people committed to preventing HIV and punishing anti-social behavior. Criminalization may be politically popular, particularly when presented as part of a "model" law that includes positive elements like protection against discrimination, or as a quick and visible solution for politicians who are under pressure to take action. Or it may proceed because of a lack of a clear lead from international organizations and experts. Whatever the cause, an effective public health and human rights response to criminalization is overdue, and has at least three elements.

First, we must be clear that criminalization is bad policy: framing the problem of HIV's spread in terms of criminal behavior does nothing to stop the epidemic and does a great deal to muddy prevention messages and undermine the supportive social environment needed to stop HIV. Jurisdictions should not adopt criminalization statutes, policies or practices, and those that have already done so should reverse course. Prosecutions arising from voluntary sexual behavior should only be brought in cases of intentional transmission of the virus. The goal of international organizations and experts

should not be to help jurisdictions to write "good" HIV-specific criminal laws, but to have governments rescind those that exist or agree not to enforce them.

Second, efforts against criminalization should be linked to advocating and implementing positive policies that meet the needs that drive the demand for criminalization, especially protecting women from infection. Policies should truly protect women against violence and promote equal status of women in marriage, inheritance, access to credit and employment; and addressing cultural practices such as dry sex, multiple concurrent partners and "wife inheritance" that render women more vulnerable to HIV infection.

Finally, while we emphasize avoiding criminalization entirely, if this is politically unattainable we advocate for vigorous efforts to reduce the damage of HIV criminalization. Most HIV-specific criminal laws are defective even on their own terms, written in unclear ways or covering conduct that poses no risk.[18] Both defective HIV-specific statutes and general criminal laws leave room for police and prosecutorial discretion. Policy guidance and training can be deployed to guide that discretion away from the inappropriate use of criminal law. The joint United Nations Programme on HIV/AIDS is well-positioned to take the lead internationally, in partnership with organizations of persons themselves living with HIV, but national and even local health agencies should see this as a an opportunity for cooperation with law enforcement.

Conclusion

The case against criminalization is strong, built not just on research and experience but also a commitment to human rights. While more data will be useful, the burden of proof should be placed on proponents of criminalization to show that it meets public health goals. Prominent here is the risk that criminalization enhances stigma and creates disincentives for testing and treatment, and that its impact falls hardest on women, particularly in Africa – whom, paradoxically, proponents of criminalization aim to protect.

In the overwhelming majority of cases, HIV is not spread by criminals, but by consensual participants in a sexual act, neither of whom know their HIV status: people, in short, acting in ways that most would recognize as ordinary. Within the constraints imposed by their knowledge, resources and environment, people generally do their best to protect themselves and others. Society's obligation is not to condemn them, but to create the conditions in which safe behavioral choices become rational and desirable. The blunt use of HIV-specific criminal statutes and prosecutions, we submit, does the opposite.

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