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Criminal Law: Implications of HIV Testing

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Argument in a nutshell:

- **Knowledge** about HIV positive status may be **positively correlated** with beneficial individual and population health outcomes; but
 - **Knowledge or suspicion of HIV status, or refusal to learn about HIV status** when testing is offered, may be **positively correlated with the imposition of criminal liability** for reckless HIV transmission or exposure.
 - There is **no evidence** that criminalizing reckless exposure or transmission is positively correlated with beneficial individual and population health outcomes.
 - There is a real possibility that criminalizing exposure and transmission may have an **adverse impact** on individual and public health outcomes, especially for vulnerable groups.
- SO: The development of policy around testing must acknowledge the potential disbenefits / risk to individuals of criminalizing reckless transmission, and**
- **IF** we want to **encourage more people to test**, we must ensure that the knowledge that they, and their clinicians, have about them (whether this is a decision not to test or a positive test result) **does not – through criminalization – become yet another means of reinforcing stigma**, prejudice and popular misconception.

Context 1: Health

- **Compliance** with ARV therapy positively correlated with reduced risk of transmission
- **Access** to available ARV therapy depends on HIV+ diagnosis
- **Diagnosis** depends on HIV testing
- **Testing + treatment** positively correlates to:
 - limiting spread of HIV within populations
 - health of diagnosed person
- **Resistance testing** of those diagnosed HIV+ helps identify optimally effective treatment

Context 2: Law

- In most jurisdictions, **criminal liability** for HIV transmission and / or exposure exists
- Such liability depends on **transmission / exposure** having occurred
 - Intentionally
 - Recklessly, or (more rarely)
 - Negligently
- **Widespread agreement** - if not universal – that intentional transmission may legitimately be criminalized
- **Far less agreement** that reckless / negligent transmission should be criminalized
- However, most jurisdictions allow for the **prosecution** of reckless onward transmission and / or exposure

Liability for reckless transmission / exposure

Recklessness = unjustifiable risk-taking

Two approaches:

Subjective	Objective
<ul style="list-style-type: none">Defendant liable if he was aware of HIV positive status and of the risk being taken	<ul style="list-style-type: none"><i>Weak:</i> Defendant liable if he was aware that he might be HIV positive and of the risk being taken if this were so<i>Strong:</i> Defendant liable if he ought to have been aware of HIV positive status and in fact takes a risk

Testing and Recklessness Liability

Subjective approach means that **only those who have tested HIV positive and understand the risks** can be criminally liable and legitimately punished.

- **Conforms with liberal principles** requiring fault / blame before imposing criminal liability – but contra-indicated with public health logic?
- And **what about people who test positive but where there is no effective treatment?** (Higher risk of onward transmission, greater possibility of being criminalized)
- And **people who, because of their civil or other status, cannot access VCT?** (Cannot be caught by subjective tests)

Objective approaches result in the **criminal liability of those who do not know their HIV positive status *for a fact*** (but who ought to realize their risk) and so

- **Have the potential to discriminate** against those who are members of high-prevalence (vulnerable) communities
- **Potentially implicates anyone who is undiagnosed** and who has ever had unprotected sex with someone about whose HIV positive status they are unsure.

Implications for opt-in and opt-out HIV testing

Opt-in testing

- Subjective approach to liability may have the effect of dissuading (or at least not positively encouraging) people to come forward for testing
- A weak objective approach “catches” those who have been advised by clinicians to test (based on presenting symptoms) but have not tested
 - Clinicians / health advisors potentially implicated in the criminalization of their patients
- Strong objective approach “catches” almost anyone – and so provides no incentive to test (although no evidence that it is a *disincentive*)

Implications for opt-in and opt-out HIV testing

Opt-out testing

- Risk that refusing a test may be taken to have implicitly indicated that they believe they may be HIV+ (and don't want to know) – and therefore objectively reckless
- In an opt-out testing regime, clinicians encouraging people to have knowledge that could result in their criminalization (where subjective test applies)

Conclusions

- **If we want to increase testing**, or the offering of testing, we need to recognise that this may contribute indirectly to the criminalization of reckless HIV exposure and transmission
- **Those who approve of criminalizing** reckless exposure and transmission of HIV **need to recognise that this may constitute a barrier** to the goal of increased testing, especially among vulnerable populations
- HIV exposure and transmission **MUST** be seen through the lens of public health policy and **NOT** as a problem for which the criminal law can provide a solution.

The criminalization of HIV has been a strange, pointless exercise in the long fight to control HIV. It has done no good; if it has done even a little harm the price has been too high. Until the day comes when the stigma of HIV, unconventional sexuality and drug use are gone, the best course for criminal law is to follow the old Hippocratic maxim, 'first, do no harm.'

(Burris et al, 2007: 49)

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