What role should criminal justice play in the fight against STIs?

David Gurnham

Can criminal justice make a positive contribution to the way states respond to sexually transmitted infections (STIs)? Sections 18 and 20 of the Offences Against the Person Act 1861 make it an offence punishable by imprisonment to inflict recklessly or cause intentionally any sort of grievous bodily harm. If particular STIs (such as herpes or HIV, the two infections to have attracted the attention of English criminal prosecutors to date) are harms to be taken at least as seriously as a broken leg then it makes sense to a criminal lawyer to treat both its intentional and ‘reckless’ transmission as a criminal offence.1 2 It comes, therefore, as something of a surprise to some lawyers that so much of the reaction amongst healthcare professionals disagree is whether punishing non-intentional transmission as a criminal offence is ever right in principle. That wrongdoers do not get incapacitated merely because they infect – and of notice about the potential for bias and prejudice to enter into the interpretation and application of the criminal law.4 5 The attitude of UNAIDS, the White House and others seems to be that the criminalisation of HIV worldwide is, like the criminalisation of sex workers, drug addicts and homosexuality, wrong because it exacerbates rather than tackles entrenched prejudice and marginalisation.6 7 8

A fundamental point over which criminal justice and public health have very different aims and admit of different measures of success, authority and proof. Whether these differences are so great as to be unbridgeable remains to be seen. A central plank of ‘retributivist’ theory. In countries where the particular vulnerability of women to HIV and other STIs is bound up with wider gender inequalities, taking a strongly principled line on the culpability of men who infect women may have an important normative role to play. Defenders of criminalisation insist that it is an appropriate way to respond to harm suffered by marginalised groups. In the English case of R v Kanzi, the Court of Appeal clearly saw its role as being to interpret the existing 19th century statute as offering something for people made vulnerable to serious harm by a sexual partner’s refusal or inability to disclose his/her HIV status or practice safer sex.1 7

Furthermore, to the extent that this involves prosecuting cases of reckless as well as intentional transmission, such a use of the criminal law is flatly rejected by international public health policy, for example by the Joint United Nations Programme on HIV/AIDS (UNAIDS).3 6 7 While the punishment of the rare instances of intentional transmission is ‘necessary to achieve justice’, punishing the much more common instances of transmission that is merely reckless ‘raises a serious concern about the potential for bias and prejudice to enter into the interpretation and application of the criminal law’.4 5 The attitude of UNAIDS, the White House and others seems to be that the criminalisation of HIV worldwide is, like the criminalisation of sex workers, drug addicts and homosexuality, wrong because it exacerbates rather than tackles entrenched prejudice and marginalisation.6 7 8

Additionally, there are questions about the practical consequences of criminalisation, namely deterrence, incapacitation and rehabilitation. Imprisonment does not ‘incapacitate’ offenders because behaviours that carry the risk of STIs such as unsafe sexual intercourse and drug-taking may take place inside jail as well as out.9 There is no evidence that the criminal law is an effective tool for ‘rehabilitating’ offenders in the sense of getting them to desist from engaging in risky sexual activities and drug-taking.4 5 A recent study in the USA also found that criminalisation did not seem to affect or influence individuals’ attitudes towards risky behaviour.8 Worse still, if the criminal law has any effect on future behaviour at all, then the signs are that it may very well be a negative one. Prompt diagnosis gives treatment a better chance of being effective; furthermore, increasing the proportion of people that know they are infected also seems to help to reduce risky behaviour significantly.9 Given that a prosecution for reckless transmission requires the defendant to know that he/she is infected, criminalisation acts as a disincentive for people (afraid of having their suspicions confirmed) to get tested and seek medical help.4 In the case of HIV, as Attia et al have reported, the infectivity of blood and other fluids where antiretroviral therapy has been started has been shown to be reduced by up to 92% in heterosexuals.10 There are thus real benefits to early diagnosis and therapy which criminalisation may actually be undermining.

Even if it is accepted that it may sometimes be appropriate to punish an individual for recklessly infecting a sexual partner, the idea of criminalisation undoubtedly suffered a new loss of credibility when David Golding was sentenced to 14 months imprisonment in the Northampton Crown Court for infecting his then girlfriend with herpes in August 2011. Herpes is a very common infection (most people will catch some form during their lives—an estimated 60% by the age of 25) without any of the serious or life-threatening symptoms that HIV may bring, and Golding’s sentencing was greeted with condemnation by public health and sexual health bodies.11 12 Criminalising herpes undermines the legitimacy of the law on both a principled and a practical level. First, criminalisation, and imprisonment in particular, should be reserved for the most serious crimes, which the transmission of herpes is not. Secondly, as the British Association for Sexual Health and HIV have warned, it is likely to risk further reducing the numbers of people willing to be tested and diagnosed for STIs.12

Whether or not the approaches of criminal justice to addressing the transmission of infections are fatally discredited by the evidence that they run counter to public health and anticedrimination initiatives really depends on one’s view of what criminal justice is for. We should perhaps not expect the two to be aligned, and, in other contexts, the appropriateness of criminalisation has tended not to be measured primarily by actual benefits to health or life or the changing of individuals’ behaviour. From this perspective, the appropriateness of criminalisation is determined according to whether the behaviour it seeks to punish is sufficiently serious as to invoke public censure: it is an aim that makes sense to criminal lawyers but may be something of a sideshow in the estimation of many healthcare professionals.

Correspondence to Dr David Gurnham, Centre for Social Ethics and Policy, School of Law, University of Manchester, Oxford Road, Manchester M13 9PL, UK, david.gurnham@manchester.ac.uk

Competing interests None.

Provenance and peer review Commissioned; internally peer reviewed.
REFERENCES

What role should criminal justice play in the fight against STIs?

David Gurnham

*Sex Transm Infect* 2012 88: 4-5
doi: 10.1136/sextrans-2011-050403

Updated information and services can be found at:
http://sti.bmj.com/content/88/1/4.full.html

**References**

These include:

This article cites 4 articles, 2 of which can be accessed free at:
http://sti.bmj.com/content/88/1/4.full.html#ref-list-1

Article cited in:
http://sti.bmj.com/content/88/1/4.full.html#related-urls

**Email alerting service**

Receive free email alerts when new articles cite this article. Sign up in the box at the top right corner of the online article.

**Notes**

To request permissions go to:
http://group.bmj.com/group/rights-licensing/permissions

To order reprints go to:
http://journals.bmj.com/cgi/reprintform

To subscribe to BMJ go to:
http://group.bmj.com/subscribe/