Effects of the Criminalization of HIV Transmission and Exposure

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Introduction

The criminalization of HIV transmission and exposure by multiple national and municipal governments across the globe has led to a thorough discussion of the benefits and detriments of using legal action to combat the pandemic (Bird and Brown, 2001). Because HIV historically has been a particularly deadly disease, and has continued to stymie attempts to deliver a cure, legislatures and executives of many different nationalities have concluded that prevention by policymaking is necessary to quell the spread of the virus. The results of these efforts have been compiled by public health organizations across the globe and have found to have mixed results upon their jurisdictions. Several factors hinder the effectiveness of legal code in reducing HIV transmission, including (1) the shift in likelihood of at-risk individuals to undergo HIV testing, (2) the tendency of socio-economic issues to supersede compliance, and (3) the discouragement of HIV positive individuals to cooperate in health studies or medical proceedings when legal ramifications are present.

Support for Non-criminalization

It is quite common for developed public health organizations to oppose the use of legal action against HIV positive individuals in all but the most obvious cases of criminal misconduct. Intentional and malicious infection of an individual by an HIV-positive person is, logically, condemned by these organizations. However, in all but the most obscure cases, crimes of this type are usually prosecutable by existing laws. Sexual assault is already criminal, as is criminal fraud, knowledgeable endangerment of children and adults, and criminal negligence. The purpose of HIV-specific criminal legislation steps into other, less concrete areas of misconduct. HIV-positive individuals who knowingly expose others without transmitting HIV have been prosecuted, as well as those who have reason to suspect contraction of HIV but refuse to undergo testing, or those who expose newborn children to HIV via breastfeeding (Newman, 2013).

The primary arguments against legal policy in the gray areas of morality are borne of pragmatism: because these laws provide mostly cathartic justice for the wronged does not necessarily guarantee they dissuade those with the disease from acting in a destructive manner. In fact, quite the opposite is often true. For individuals who are at risk and have strong desires or needs to participate in dangerous acts, testing for HIV puts them at a position of knowledge and therefore fault if legal authorities are involved (Bird and Brown, 2001). This disproportionately impacts those of lower socioeconomic standing, including sex workers, intravenous drug users, or the young urban poor. The stresses of

lower-class living can compound the problems involved with high risk behavior, and a sense of disillusionment with legal authorities can cause at-risk individuals to distrust the health system and refuse testing (Burris and Cameron, 2008).

Additionally, socioeconomic forces in developing states can often put at-risk individuals in no-win situations. In conservative regions, such as in West Africa, diagnosis of HIV can result in ostracism on the part of the family or community, and often this deterrent alone is sufficient to prevent voluntary testing. However, when criminalization extends to those who have only marginal knowledge of their risk of infection, some members of society are left in a catch-22. A mother expected to breastfeed her children could be prosecuted for unknowingly infecting her children. An infected husband could be prosecuted for having unprotected sex with his wife. Because it is often socially unacceptable for individuals to not comply with these behaviors, they find themselves stuck between prison and isolation, and thus are likely to avoid government-run health organizations (Burris and Cameron, 2008).

In extreme cases, as seen with the Glenochil Prison incident in Scotland, dramatic decline in self-identification on the part of infected individuals has been seen as legal processes become involved. As Bird and Brown concluded in their study, even mild declines in the rates of testing and treatment by infected individuals increased the rate of new infections in Scotland by as much as 33%. Quantitative evidence such has this has propelled health organizations in Britain and internationally to discourage the adoption of HIV-specific criminal legislature and push for repeals in areas with existing policy (Bird and Brown, 2001).

Benefits of Legal Penalties

It has to be stated that in some cases, legal action involving the transmission of HIV is necessary and helpful. In general, these cases are covered by existing criminal laws, but loopholes do exist that need to be closed in many areas. Most will agree that cases of extreme negligence or fraud that involve in an at-risk party's contraction of HIV does merit legal recompense. Such situations can be labeled "blameworthy", and the definition of these blameworthy acts must be clearly defined by law (Burris and Cameron, 2008).

The motivation behind the support of HIV-centric laws dual-sided: it aims to protect the healthy, functioning populace, in addition to deterring those with HIV from transmitting the disease. In many cases, it is believed that good will or a sense of social responsibility are insufficient to prevent some individuals from acting recklessly with their condition. As such, compulsory compliance with codified guidelines seems to provide an alternative route to maintaining

a healthy decline in the incidence of HIV in many areas (Newman, 2013).

Social considerations must also be taken into account when laws are passed. Generally, elected leaders that write these laws are supported by a local constituency, and these voters can have ideals that vary widely. So, to prevent losing their elected positions and to ensure continued popular support, officials are forced to create legislation that sits in an ideological middle ground. Although this can be challenging to accomplish, successful legislation can serve to create long-term behavior changes in a population center, giving both infected persons and at-risk individuals guidelines to follow in order to prevent further disease proliferation. In particular, laws that determine a limited and clear definition of blameworthy behavior, such as the definitions proposed by the Presidential Commission Report of 1988, and defined in the proposed CARE Act of 1990, serve to clearly define the boundary between criminal negligence and innocent happenstance (Newman, 2013). These definitions place great value on communication of HIV infection with a partner and, along with total consent among all involved sexual partners, define basic precautions (like condom use) that must be taken to satisfy the legal obligations of the infected person(s).

Conclusions

In large part, the public health community has protested the use of the law to combat HIV transmission. This is largely for good reason–the problems associated with HIV proliferation are personal and life-changing, and often compounded by inflexible legal involvement. Because social constraints so often outrank legal concerns among the at-risk population, using policy to regulate HIV incidence is often ineffective and can be detrimental to progress. Although it is necessary to use legal penalties against those who maliciously infect other persons, most cases in which HIV-transmission or exposure is criminalized can already be resolved with existing policy.

Quantitavtive evidence that has emerged relating the advent of HIV laws in multiple municipalities and an increased rate of incidence of the virus is perhaps the most damning. It cannot be argued that the primary goal of health organizations is to safeguard the people of the world from pandemics such and HIV, and as such laws which directly contradict this goal are inherently unacceptable. Penal policy has its place in disease prevention, but it must act in a limited sense, monitored closely by health officials and lawmakers alike.

Bibliography

SM Bird and AJL Brown. Criminalisation of hiv transmission: implicaitons for public health in scotland. *British Medical Journal*, 323(7322):1174–1177, 2001.

S Burris and E Cameron. The case against criminalization of hiv transmission. *Journal of the American Medical Association*, 300:578–581, 2008.

SJ Newman. Prevention, not prejudice: The role of federal guidelines in hiv-criminalization reform. *Northwestern University Law Review*, 107(3):1404–1436, 2013.