



The Criminalisation of HIV Transmission

Dr Matthew Weait

Senior Lecturer in Law and Legal Studies
Birkbeck College, University of London

“Concern about [HIV testing and criminal prosecution] should not be a barrier to testing.” (UK National Guidelines for HIV Testing 2008)

“... he was specifically advised, wasn't he, about a number of things: the fact that he was infected and what this was going to mean to him, how this would be monitored, the treatment he would receive, the future for him, and, of course, crucially, the risk that he posed to others. He was specifically told that he must always have safe [sic] sex and he was also specifically advised, wasn't he, and you will remember this, that he should tell people he was going to have sex with. He must tell these people that he was HIV positive.”
(Prosecution counsel in *R v Konzani*)

“'Recklessness' in this context means that a defendant foresaw that the complainant might contract the infection via unprotected sexual activity but still went on to take that risk.” (Crown Prosecution Guidelines)

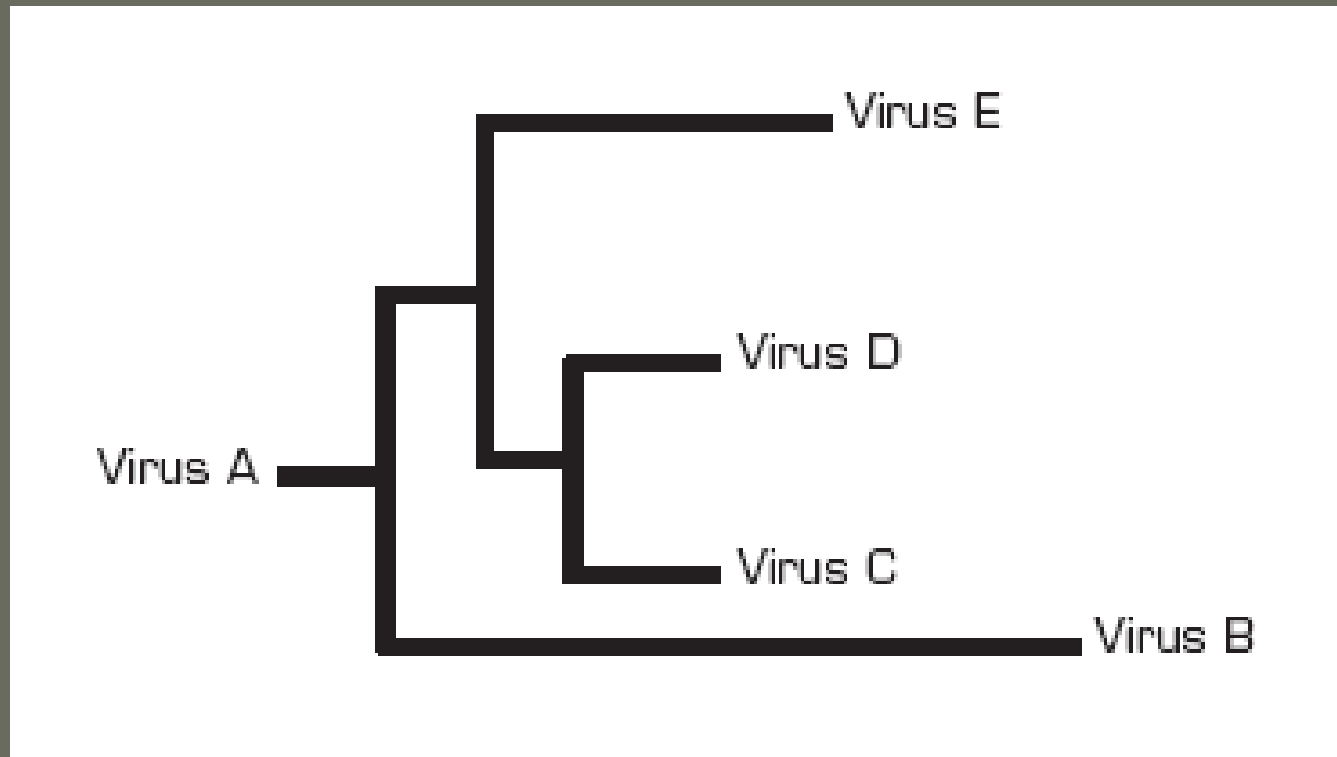
Context 1: Health

- Compliance with ARV therapy positively correlated with reduced risk of onward transmission through reduction in viral load
- Access to available ARV therapy depends on HIV positive diagnosis
- Diagnosis depends on HIV testing
- Testing + treatment positively correlated with
 - limiting spread of HIV within populations; and
 - health of diagnosed person
- Resistance testing of those diagnosed HIV positive helps identify optimally effective treatment

Context 2: Law

- In most jurisdictions there exists criminal liability for HIV transmission and / or exposure
- Such liability depends on transmission / exposure having occurred
 - Intentionally
 - Recklessly, or (more rarely)
 - Negligently
- There is widespread, if not universal, agreement that intentional transmission may legitimately be criminalized
- There is far less agreement that reckless / negligent transmission should be (see recent WHO, UNAIDS consultations)
- However – most jurisdictions allow for the prosecution of those who are reckless as regards onward transmission and / or exposure (E & W – only transmission)

Causation and Phylogenetic Analysis



From Bernard *et al* (2007)

A problem ...

- C and D start a sexual relationship at T1
- 6 months later C tests positive for HIV
- 3 months later (T2) D tests positive for HIV
- D confronts C and asks if, prior to T2, C knew he was HIV positive
- C admits that he did know
- D goes to the police and recounts the narrative from his perspective
- Police interview C and draw inference that he is cause of D's infection
- C arrested, charged, and phylogenetic analysis undertaken. This shows that the strains of HIV are closely related.
- C pleads guilty because he believes the source of his infection is a relationship that happened before he met D.
- C is sentenced to imprisonment.
- **PROBLEM!** It is perfectly possible that it was D who infected C. The fact that C discovers his HIV positive status first is logically unrelated to the source of infection.

Another problem ...

- C and D may both have been infected by E, or separately by E and F
- Where C and D are non-monogamous, or where one of them is, it is possible that *neither* is the source of the other's infection; but the *narrative trajectory* suggests otherwise.
- Problem made worse if C and D share geographically limited pool of partners with HIV – probability of both being infected independently with same strain is higher
- Potential for miscarriage of justice in cases involving non-monogamous partners

Liability for *reckless* transmission

- Recklessness = unjustifiable risk-taking
- Two approaches
 - Subjective
 - Objective (weak and strong versions)
- Subjective approach:
 - Defendant liable if he was aware of HIV positive status and of the risk being taken
- Objective approach (weak):
 - Defendant liable if he was aware that he might be HIV positive and of the risk being taken if this were so
- Objective approach (strong):
 - Defendant liable if he ought to have been aware that he might be HIV positive and in fact takes a risk

Testing and Recklessness Liability

- A subjective approach means that only those who have tested HIV positive and understand the risks can be criminally liable
 - Conforms with liberal principles requiring fault / blame before imposing criminal liability
 - Contra-indicated with public health logic?
- Objective approaches result in the criminal liability of those who do not know their HIV positive status *for a fact*, and so
 - Has the potential to discriminate against those who are members of high-prevalence 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

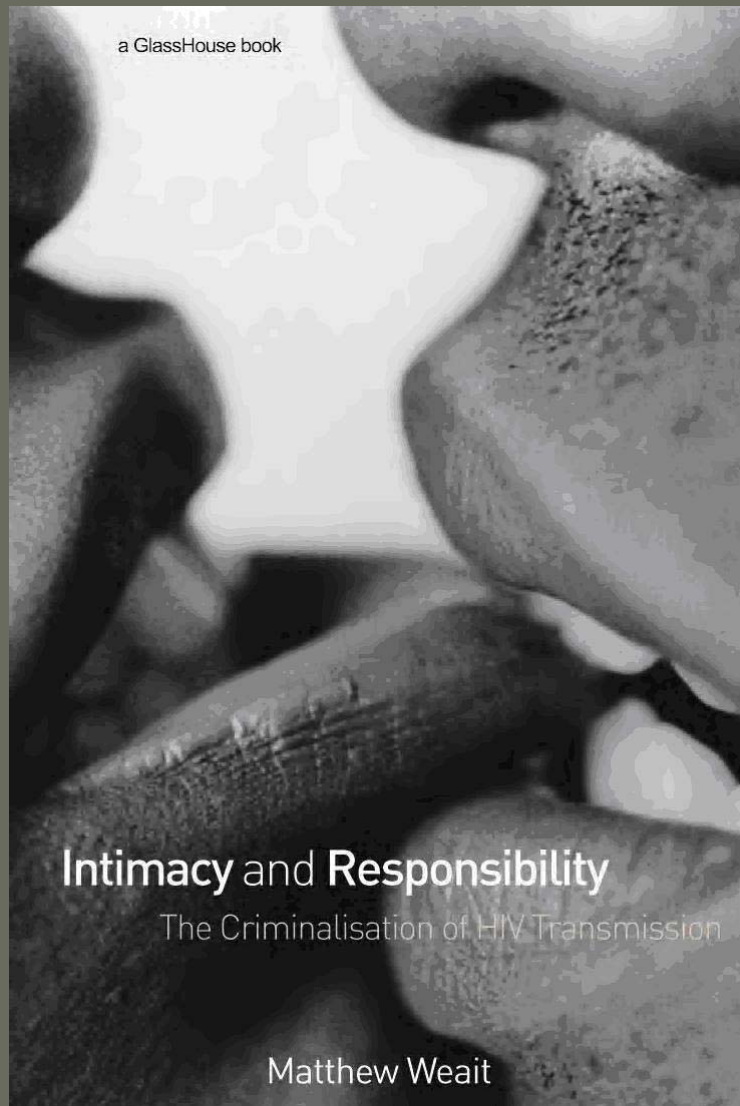
- Opt-in testing
 - Subjective approach to liability may have the effect of dissuading (or at least not positively encouraging) people to come forward for testing
 - Weak objective approach “catches” those who have been advised by clinicians to test (based on presenting symptoms)
 - Strong objective approach “catches” almost anyone – and so provides no incentive to test

Opt-out testing

- There is the risk that (some) people who refuse a test may be taken to have implicitly indicated that they believe they may be HIV positive (and don't want to know) – and therefore objectively reckless
- Clinicians are, in an opt-out testing regime, encouraging people to have knowledge that could result in their criminalization (where subjective test applies)

Concluding Observations

- Increasing testing rates positively correlated with lowering onward transmission and health of individuals who are in fact HIV positive
- Where subjective tests of recklessness exist testing correlated with potential criminalization
- If we want to encourage higher rates of testing / normalization of testing we need to ensure that knowledge of status does not render people who have potentially risky sex into criminals
- We do not want criminal law to render vulnerable and hard-to-reach high prevalence communities at greater risk of criminalization (an effect of objective tests)
- Public health objectives are incommensurate with the retributive goals of criminal law, and this provides a strong justification for the decriminalization of reckless / negligent HIV transmission and exposure.



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.' (Burriss *et al*, 2007: 49)

Matthew Weait

m.weait@bbk.ac.uk

References

- **Useful Materials**

- The Crown Prosecution Service policy on prosecuting cases involving the sexual transmission of infection can be found here:

- <http://www.cps.gov.uk/publications/prosecution/sti.html>

- The UNAIDS / UNDP Policy Brief can be found here:

- http://data.unaids.org/pub/BaseDocument/2008/20080731_jc1513_policy_criminalization_en.pdf

- The WHO Consultation Report can be found here:

- http://www.euro.who.int/Document/SHA/crimconsultation_latest.pdf

- **Further Reading**

- Weait, M. (2007) [Intimacy and Responsibility: the Criminalisation of HIV Transmission](#), Abingdon: Routledge-Cavendish.

- Bernard, E., Geretti, A-M, van Damme, A., Azad, Y. and Weait, M. (2007) [HIV forensics: pitfalls and acceptable standards in the use of phylogenetic analysis as evidence in criminal investigations of HIV transmission](#) *HIV Medicine*, 8, 382–387.

- Weait, M. (2005) 'Knowledge, Autonomy and Consent: R v Konzani' *Criminal Law Review*, October: 763-772.

- Weait, M. (2005) 'Criminal Law and the Sexual Transmission of HIV: R v Dica' *Modern Law Review* 68(1): 121-134