




13<sup>th</sup> Annual Conference of the  
National HIV Nurses Association (NHIVNA)



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**Criminalisation and HIV**  
NHIVNA Conference  
Liverpool June 2011

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## Scope of Presentation

- Focus on the criminalisation of transmission (also applies to any other serious STI)
- International and national context
  - How and why are we criminalising HIV?
- The law relating to transmission in England and Wales
- Particular issues:
  - Evidence (how can we prove that X infected Y?)
  - Testing and knowledge of status (how does knowing your status impact on your criminal responsibility?)
  - Disclosure and consent (does disclosing status to a partner make a difference?)

**LOCAL NEWS** TV

**Theater of the absurd**

### HIV positive Michigan man fights bioterrorism charge after allegedly biting neighbor

Published 11 May 2010

**Daniel Allen of Michigan got into a fight with his neighbor; the neighbor complained that Allen bit him during the fight; when, a few days later, Allen admitted in a TV interview that**

County jury convicted the 42-year-old of harassment of a public servant for spitting into the eye and open mouth of Dallas Officer Dan Waller in May 2006.

As Campbell was being arrested for public intoxication, he began to resist and kicked at the computer screen in the police vehicle, Officer Waller testified during the two-day trial.

**Dallas County Sheriff Willie Campbell**

**Also Online**

[HIV transmission fact sheet](#)  
• from CDC

intentional criminal  
– the crime is at least partially  
consequence  
– public health  
forward  
coercive

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## Situation in UK (to 2010)

- **England and Wales**
  - Liability ONLY for transmission
  - 16 people indicted (plus one for Hep B)
  - 2 women
  - 11 pleaded or found guilty
  - Many more that are discontinued
- **Scotland**
  - Liability for transmission AND exposure
  - 4 people
  - All men
  - 3 pleaded or found guilty
  - 1 Not Guilty by Reason of Insanity

## Why / What / How?

- Why do we use criminal law against people with HIV
- What do we hope to achieve?
- How do we hope to use the criminal law to achieve it?

## (1) Different ways of seeing

- **HIV exposure and transmission may be interpreted and addressed**
  - Scientifically (epidemiologically / virologically)
  - Medically (as an opportunity for prevention / treatment)
  - Morally (as a wrong, as a threat to the health and wellbeing of others)
  - Legally (as a crime deserving punishment)
- **We may understand / view those who transmit HIV as**
  - The target of prevention and treatment strategies
  - People in need of care, support, and education
  - Threats to public health
  - “Monsters”, “Beasts” “Assassins”, and “Predators” who deserve social censure and severe punishment
  - Legitimate targets for sensationalist media coverage

## Examples of UK Press Coverage



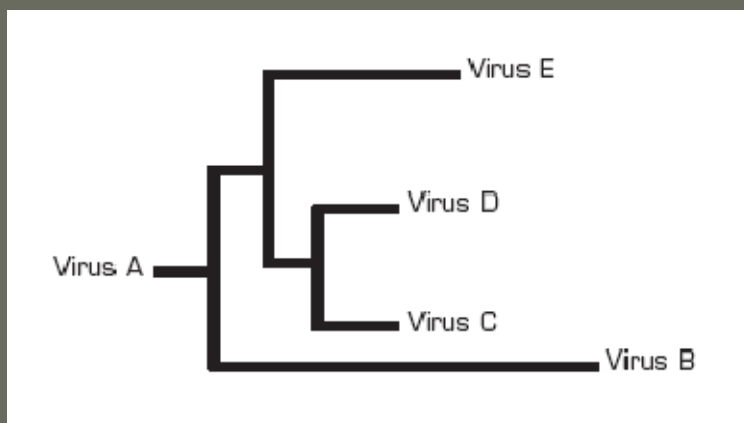
## (2) Social and Philosophical Justifications

- **Criminalisation enables the incapacitation of offenders.** By incarcerating people with HIV, people in the wider community are protected from transmission and the risk of transmission.
- **Criminalisation provides an opportunity for the rehabilitation of offenders.** Being confronted with offending conduct will change the behaviour of people with HIV by making them realise that what they have done is wrong.
- **Criminalisation is a powerful and effective way of articulating social disapproval for conduct.** Punishing people with HIV for exposure and transmission is justified because their behaviour is morally reprehensible.
- **Criminalisation deters convicted individuals and others from engaging in risk-taking behaviour.** The threat of punishment will prevent people with HIV from engaging in activity which carries the risk of onward transmission.

## The Law and its Application

- Successful prosecutions have all been for reckless transmission under OAPA 1861
  - No such offence as “biological GBH”
  - A great deal of press mis-reporting (intentionally / deliberately etc)
- The prosecution must prove beyond reasonable doubt
  - That X was the cause of Y’s infection
  - That X was reckless with respect to causing that infection
- X will not be liable if Y consented to the risk of transmission
  - That consent must be “conscious and willing”

## Proving Causation: Phylogenetic Analysis



From Bernard *et al* (2007)

## Sarah Porter

- Pleaded guilty to infecting a partner
- Sentenced to 3.5 years in jail
- Original complainant HIV-negative
- Police investigated until they found a boyfriend who tested HIV positive
- She pleaded guilty when confronted with the phylogenetic analysis evidence



## Recklessness (1)

- The conscious taking of an unjustifiable risk:
  - X must be aware of the risk of causing bodily harm to Y
- Two possible interpretations of “conscious” in this context:
  - That X was aware that he *might* be HIV positive and that unprotected sex with a partner carried with it the risk of transmission
  - That X knew *for certain* that he was HIV positive and that unprotected sex with a partner carried with it the risk of transmission

**Certain** knowledge is what the Court of Appeal appears to have confirmed (but unclear that it is what prosecutors believe (CPS Guidance 2008 – the problem of “wilful blindness”))

## Implications of criminalisation for clinicians and health advisors

- **Safer sex advice can provide the basis for the prosecution’s case: (From Konzani’s trial):**

“... 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.**”

## Recklessness (2)

- What does **unjustifiable** risk taking mean in this context? Relevance of
  - Condom use ...?
  - Undetectable viral load ...?
- (See CPS Guidance)
- Has to be seen in context of consent and disclosure:

## Consent to risk

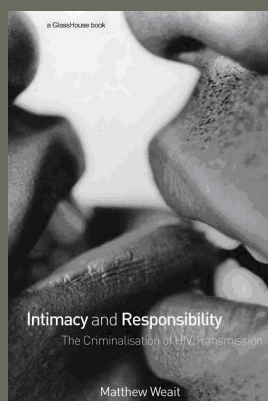
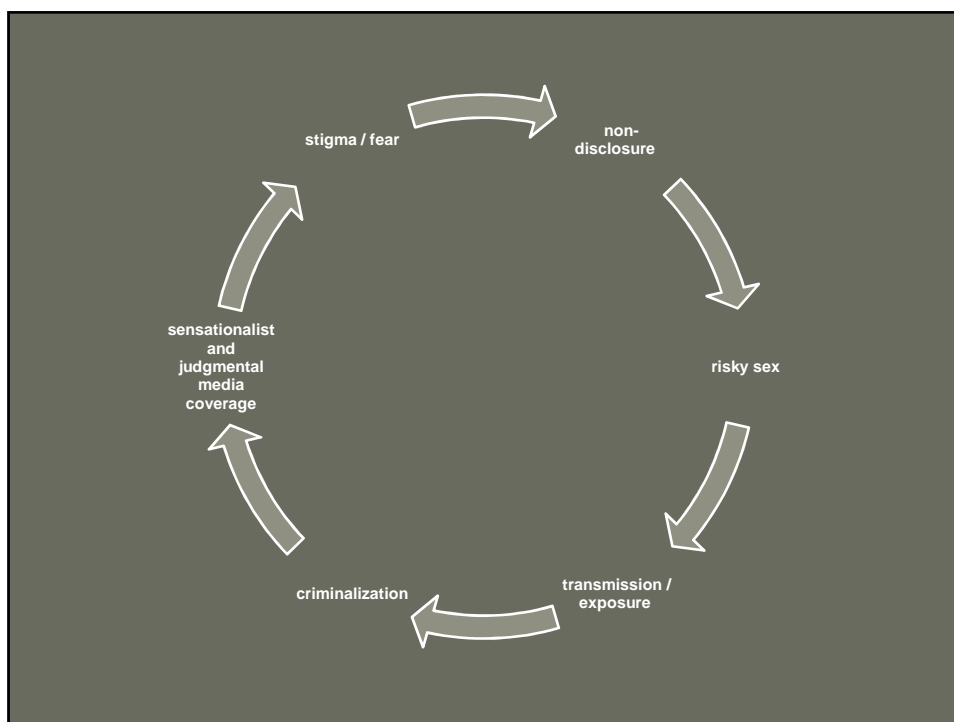
- Consent to the risk of transmission provides a full defence
- But what does consent mean?
  - General knowledge of risks associated with unprotected sex?
  - Specific knowledge of the risk of HIV transmission that sex with **this** person involves?
- Specific knowledge – and that effectively means disclosure (see Konzani trial ...)



Q: Did you ask him about his previous sexual partners, whether he had had any girlfriends before?  
 A: No.  
 [...]  
 Q: What did you know about him before you agreed to have sex with him?  
 A: Not much.  
 Q: Why did you have unprotected sex with him when you had been taught about the safety of using a condom at school?  
 A: I don't know.  
 Q: Did you realise you were taking a risk of becoming pregnant?  
 A: Yeah.  
 Q: Were you prepared to take that risk?  
 A: Yeah.  
 Q: Did you realise you were taking a risk of catching a disease?  
 A: Yeah.  
 Q: And were you prepared to take that risk?  
 A: (No reply)  
 Q: Are you able to answer that question, please, [name of witness]?  
 A: Yeah.  
 Q: What is your answer?  
 A: Yes, I was, yeah.  
 Q: You knew you were taking a risk?  
 A: Yeah.

### Disclosure may be ethically laudable, but ...

- The law cannot manage complexity (and so is ill-suited to determining whether anything other than explicit verbal statements constitute disclosure)
- The law cannot easily contemplate the idea of disclosure as *process* that may take place over time
- The law is not interested in the well-documented barriers to disclosure (fear of violence etc)
- an obligation of prior disclosure may result in
  - People assuming (wrongly) that non-disclosing partners are HIV negative (why would they risk a criminal conviction by *not* saying anything?)
  - PLHIV being afraid to disclose *after* sex if, for example, a condom fails (and so preventing the partner from accessing PEP where it is available)



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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**Global Commission on HIV and Law:**

<http://www.undp.org/hiv/comissiononhivandthelaw/index.shtml>

## References and Further Reading

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