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Criminalising consensual sexual behaviour in the context of HIV: Consequences, evidence, and leadership

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This paper provides an overview of the use of the criminal law to regulate sexual behaviour in three areas of critical importance: (1) HIV exposure in otherwise consensual sex, (2) sex work and (3) sexual activity largely affecting sexual minorities. It analyses criminal law pertaining to these three distinct areas together, allowing for a more comprehensive and cohesive understanding of criminalisation and its effects. The paper highlights current evidence of how criminalisation undermines HIV prevention and treatment. It focuses on three specific negative effects of criminalisation: (1) enhancing stigma and discrimination, (2) undermining public health intervention through legal marginalisation and (3) placing people in state custody. The paper also highlights gaps in evidence and the need for strong institutional leadership from UN agencies in ending the criminalisation of consensual sexual activity. This paper serves two goals: (1) highlighting the current state of research and emphasising where key institutions have or have not provided appropriate leadership on these issues and (2) establishing a forward-looking agenda that includes a concerted response to the inappropriate use of the criminal law with respect to sexuality as part of the global response to HIV.

Keywords: criminalisation; HIV; stigma; sexuality; law; human rights; LGBT

Introduction

Criminal law is one of the primary mechanisms employed by the state to control individual behaviour. Historically, states have used this mechanism to punish non-procreative consensual sex. While these restrictions have diminished significantly over the last few decades, some sexual behaviours continue to be criminalised even if consensual. In the context of the global HIV epidemic, the use of criminal law to regulate sexuality introduces a critical challenge: the inappropriate use of criminal law can undermine HIV prevention, treatment, care and support initiatives and weaken critical public health interventions.

This paper provides an overview of the use of the criminal law to regulate sexual behaviour in three areas of critical importance with respect to HIV: (1) HIV exposure in otherwise consensual sex, (2) sex work and (3) sexual activity largely affecting sexual minorities (For lack of better terminology we use the term ‘sexual minority’ to refer to men who have sex with men [MSM], women who have sex with women

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[WSW] and members of the lesbian, gay, bisexual and transgender [LGBT] communities). Significantly, this paper looks at the criminal law of these three distinct areas together as opposed to taking a singular issue approach. This strategy allows for a more comprehensive and cohesive understanding of criminalisation and its effects. Further, individuals who are prosecuted under the various criminalisation statutes do not neatly fit into the designated classifications that (among other things) activists use to organise or epidemiologists use to categorise people. Examining these issues together bridges misleading singular categories such as 'sex worker' or 'person living with HIV' that often fail to represent the complexity of an individual's experience with the criminal law. For example, an individual may be a sex worker, an MSM and be HIV positive. In some legal regimes, he might be prosecuted for any one of the criminalised sexual acts outlined above.

In discussing the three areas outlined earlier, the paper highlights current evidence of how criminalisation undermines HIV prevention and treatment. We focus on three specific negative effects of criminalisation: (1) enhancing stigma and discrimination, (2) undermining public health intervention through legal marginalisation and (3) placing people in state custody. The paper also highlights gaps in evidence and the need for strong institutional leadership from UN agencies in ending the criminalisation of consensual sexual activity. In doing so, this paper serves two goals: (1) highlighting the current state of research and emphasising where key institutions have or have not provided appropriate leadership on these issues and (2) establishing a forward-looking agenda that includes a concerted response to the use of the criminal law with respect to sexuality as part of the global response to HIV.

The discussion presented in this paper emerged from a meeting entitled *Sex, Rights, and the Law in a World with AIDS*, held in Cuernavaca, Mexico, from 23 to 25 February 2009 (Ogden, Rao Gupta, Warner, and Fisher 2011). This gathering was a component of the AIDS 2031 initiative and was held in partnership with the International Center for Research on Women, the United Nations Development Program (UNDP) and the Global Coalition on Women and AIDS. Its goal was to advance long-term thinking and action on the prevention of sexually transmitted HIV, by exploring the social and structural barriers to the prevention of sexually transmitted HIV and to effective, gender-transformative and human rights-based approaches to treatment, care and support (Ogden, Rao Gupta, Warner, and Fisher 2011). The meeting explored the interactions of laws and policies that constrain rights or empower people to reduce vulnerabilities and foster resilience in the context of a long-term response to HIV. The criminalisation of HIV transmission and exposure, sex work and sexual minorities were identified as critical issues throughout the meeting.

Although we focus on the criminalisation of HIV exposure in otherwise consensual sex, sex work and sexual activity, we acknowledge that the criminalisation of other behaviours – including but not limited to drug use and abortion – also have important implications for people living with or vulnerable to HIV and for human rights (deBruyn 2003, Bourgois *et al*. 2005). As such, we would advocate a comprehensive position on the appropriate, limited use of the criminal law informed by evidence and human rights. A unified response among issue-specific advocacy groups may ultimately be a critical component in creating legal environments supportive of HIV prevention, treatment, care and support, and of the rights of people living with or affected by HIV.

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Criminalisation of HIV exposure, sex work and sexual activity: legal frameworks

As illustrated in the paper by Ogden, Rao Gupta, Fisher, and Warner (2011) in this volume, a health-enabling environment shapes individual and community-level HIV resilience, and appropriate laws and policies are integral to this environment. Laws and policies can contribute to a coordinated, organised state response to ensure respect for, protection of and fulfilment of fundamental human rights. However, laws and policies pertaining to HIV are not neutral in their creation or effect; they are influenced by politics and ideologies related to sexuality, and they affect different populations uniquely. Sex workers, sexual minorities, drug users and people living with HIV – the populations that are primarily affected by HIV (particularly within concentrated epidemics) – have the most to gain or lose from laws and policies regulating sexuality.

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Criminalisation of HIV exposure and transmission during consensual sex[1]

The use of the criminal law to prosecute exposure and transmission of HIV is likely rooted in concerns about the rapid spread of HIV in many countries, the failure of traditional HIV prevention efforts to stop the epidemic, and the particular vulnerability of women who are infected through sexual violence or by partners who do not reveal their HIV status (Jürgens *et al*. 2009). Laws criminalising HIV transmission and exposure exist in Western Europe, Australia and New Zealand, Asia and most recently Africa, where at least 25 countries have recently adopted HIV-specific legislation criminalising HIV transmission and/or exposure and some others are considering similar legislations (GNP 2010). Canada has also played a leading role with the first prosecutions of people living with HIV in 1989 and an important Supreme Court decision in 1998 which set the stage for the more than 125 prosecutions for HIV non-disclosure that have now taken place in Canada (Symington 2009, Mykhalovskiy *et al*. 2010). The majority of the African national laws on criminalisation are based on a model law developed at a workshop organised by Action for West Africa Region-HIV/AIDS in N'Djamena, Chad in 2004 that recommended criminalizing 'the transmission of HIV virus through any means by a person with full knowledge of his/her HIV/AIDS status to another person.'

United Nations Programme on HIV/AIDS (UNAIDS) reports that 56 countries have laws that criminalise HIV transmission and/or exposure (UNAIDS 2010). Many more use general criminal law provisions to prosecute individuals for transmitting HIV. Still others are developing criminal laws specific to HIV/AIDS. The criminalisation of HIV transmission and/or exposure started in the USA with the first recorded prosecutions in 1987 (Fitting 1987, Lacayo and Winbush 1987, Stauter 1988) and the first HIV-specific laws enacted in the same year (Sullivan and Feldman 1987, Bernard 2010). By 2005, at least 36 European countries had either an HIV-specific criminal law or had used existing general offences to prosecute people living with HIV (Bernard 2010). Three countries dominate the prosecutions in Europe, however: Austria, Sweden and Switzerland each have had more than 30 prosecutions, respectively, for the transmission of HIV (Greater Network of People Living with HIV/AIDS 2005). Laws that criminalise HIV transmission and exposure are often found in national HIV/AIDS laws (e.g., Government of Sierra Leone 2007, Government of Uganda 2008); however, provisions criminalising HIV transmission

are also often included under the umbrella of sexual offence laws (Government of Kenya 2006, Government of Rwanda 2008). In addition to a crime in and of itself, exposure or transmission of HIV can be an aggravating offence to other crimes, including sex work and sexual assault (Lambda Legal 2010).

Criminalisation of sex work

One hundred and sixteen countries have laws that make some form of sex work illegal (UNAIDS 2010). There is great diversity among the legal regimes used to regulate and/or criminalise sex work as well as the categorisation of these laws. For the purposes of this discussion, we offer the following four characterisations: (1) complete criminalisation, (2) partial criminalisation (abolitionist), (3) decriminalisation and (4) legalisation (Halley *et al*. 2006). Complete criminalisation prohibits all acts related to sex work including: solicitation, the purchase of sex and living off of the earnings of sex work. Partial criminalisation prohibits acts related to sex work except the selling of sex itself. Decriminalisation of sex work is the full repeal of all criminal laws related to sex work and the acts immediately surrounding sex work. Legalisation or regulation that falls beyond criminalisation of sex work may decriminalise aspects of sex work but often includes a host of public health and other regulatory mechanisms. These regulations may even be coercive, such as laws requiring mandatory testing of sex workers. Most legal approaches to sex work cannot be broken down neatly into these distinct categories.

Criminalisation of consensual sexual activity

Laws that criminalise consensual sexual activity have negative consequences for sexual minorities. These laws rarely explicitly refer to MSM, WSW or LGBT communities. Instead, statutes prohibiting crimes against nature, unnatural offences or sodomy are disproportionately applied to marginalised groups. Seventy-nine countries currently have sodomy laws or other legal provisions criminalising homosexuality (UNAIDS 2010). At least seven countries maintain the death penalty for consensual same-sex practices (O'Flaherty and Fisher 2008). From a human rights and public health perspective, there have been recently both signs of progress and major setbacks in this area. In July 2009, the Delhi High Court, India, overturned Section 377 of India's penal code, which has penalised homosexuality in India since 1861 (Timmons 2009). In December 2008, 66 nations supported a joint statement before the United Nations urging all nations to 'promote and protect human rights of all persons, regardless of sexual orientation and gender identity' (Human Rights Watch 2008). Around the same time, Uganda's Parliament considered an Anti-Homosexuality Bill that would punish homosexuality by life imprisonment or even death.

The impact of criminal law on vulnerable communities and people living with HIV

The health of a population and of an individual is a product of the interaction between 'human beings, social systems, and environments' (Burris 2004). This is true with respect to HIV: access to HIV prevention, care, treatment and support are contoured by interactions between people, social systems and environments.

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Likewise, the health, dignity and rights of people living with HIV are protected or violated by the prevailing systems, policies and interactions. The criminal law is a critical component of the framework of laws and policies that affects HIV risk behaviour (Lazzarini *et al*. 2002).

The goals of criminal law are generally considered to be: incapacitation, retribution, rehabilitation and deterrence (Burris *et al*. 2007). These goals are realised through a series of legal mechanisms including arrests, prosecution, trials, imprisonment and dispute resolution. In the context of public health and HIV in particular, laws regulating sexuality have often been adopted on the assumption that they would incapacitate or rehabilitate people who have risked transmitting HIV, or to deter those who might otherwise risk transmitting HIV. However, such laws have never been shown to have their intended effect. They are also inconsistent with broader public health goals to reduce the spread of HIV and with a human rights-based approach to public health (Burris *et al.* 2007, Cameron 2009, Gruskin and Ferguson 2009).

The following section of the paper outlines the impact of criminal laws on already marginalised populations with regard to HIV through several modalities: first, by enhancing stigma and discrimination and violence; second, by creating legal barriers to programme delivery for vulnerable populations and HIV positive people; and third, by sending people into state custody where they lose continuous access to HIV prevention, care, treatment and support and may be placed at even higher risk of contracting HIV.

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Stigma and discrimination

Criminalisation sends a normative signal about certain populations, including people living with HIV, as potentially criminal or dangerous. This stigma and discrimination interferes with prevention, care and treatment goals of HIV programmes (Piot *et al*. 2009).

Stigma and discrimination are most often perpetuated by the media, which also play a key role in establishing and perpetuating social norms and expectations (Persson and Newman 2008) with headlines such as, 'HIV Sex Crime Acrobat Faces Court', 'HIV Timebomb' and 'Jailed for 10 years, the one man HIV epidemic' (Reynolds 2008, Nehanda Radio 2011). Sex workers face particular forms of stigmatisation in the media, which often blame them for spreading HIV; a Tennessee newspaper, for example, declared an HIV positive woman a 'walking felony' (Knox News 2009). Analysis of newspaper reports on the criminalisation of HIV has revealed that many focus disproportionately on racial and ethnic minorities, perpetuating the stereotype of these individuals as criminals (Reynolds 2008, African Caribbean Council on HIV/AIDS 2010). The impact of stigma and discrimination on sexual minorities in health care settings has been well documented (Brooks *et al*. 2005). In particular, these studies suggest that for sexual minorities a variety of stigmas, including those based on sexuality and potentially HIV status, contribute to layered discrimination and fear of discrimination in the context of health services (Maluwa *et al.* 2002, Parker 2003). This stigma may also drive individuals living with HIV away from necessary health services, a particularly concerning result given the discrimination this community already experiences in health care settings. For sex workers, extreme stigma, discrimination and marginalisation have led to violence.

According to reports by sex workers, such violence is more prevalent in contexts where sex work is criminalised (Van Beelen and Rakhmetova 2010). Sex workers in 11 countries in Eastern Europe report that they suffer from high levels of physical and sexual violence from police officers and that the lack of protection from police encourages violence from the general population (Crago *et al*. 2010). When sex work is criminalised, sex workers have little protection from their abusers (Canadian HIV/AIDS Legal Network 2007).

In and of itself, the documented negative impact of criminal laws that contributes to stigma, discrimination and increased violence against vulnerable populations weighs heavily against the use of criminal law to regulate sexual behaviours among consenting adults. This conclusion is reinforced by the argument that criminalisation contributes to on-going marginalisation, undermines access to health services and leads to poor health outcomes.

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Legal marginalisation as a barrier to health services

By compounding the stigma and discrimination experienced by marginalised populations such as sex workers and sexual minorities, criminal law also obstructs the delivery of health services. In some circumstances, criminal law may even prohibit the effective prevention, treatment, care and support activities. For example, criminal law may prohibit condom distribution to MSM, where such sexual activity is prohibited.

Evidence suggests that sexual minorities have great difficulty in accessing health services (Melles and Nelson 2010). A 5000-person study conducted by the Global Forum on MSM found that only 39% of MSM had easy access to free condoms and 57% said that it was difficult or impossible to access other essential services as well (Global Forum on MSM & HIV 2010). UNDP recently reported that in the Asia-Pacific Region 90% of MSM and transgender individuals do not have access to HIV prevention and care services (UNDP 2010). Data on WSW are sparse in the context of HIV, a concern for those seeking to better understand the trends and dynamics leading to vulnerability of HIV among WSW (Melles and Nelson 2010). Police harassment of MSM organisations is also rampant (Human Rights Watch 2010). Human Rights Watch (2010) has reported escalating reports of violence in the form of police abuse and arbitrary detention, physical threats, assault, verbal abuse by private individuals, blackmail, extortion and robbery against MSM in Senegal. A now high-profile instance of police harassment of public health organisations serving MSM eventually lead to the political mobilisation responsible for the repeal of India's sodomy laws. The petition was based, in part, on the on-going harassment of public health workers seeking to do outreach amongst MSM.

Criminalisation of HIV exposure and/or transmission has an impact on service delivery for HIV-positive individuals. Although there is a dearth of empirical research, anecdotal evidence and statements by networks of positive individuals indicate that criminalisation deters HIV testing by introducing fear of prosecution and undermines honest relationships with service providers when positive individuals fear disclosures might be used as evidence against them (Tan 1999).

Laws that criminalise HIV exposure and/or transmission may have a specific impact on women because of community gender dynamics. Women are often tested first for HIV because they are more likely to seek health care for pregnancy,

childbearing and childcare. However, because of their relative lack of power or decision-making within a relationship, they may fear disclosure of their HIV status to their partners. HIV-positive women may then face the double threat of violence or abandonment from their partners and families, as well as fear of criminal prosecution. Because these concerns inhibit them from disclosing their status to their partners, such women are even more vulnerable to prosecution (Open Society Institute 2008, Csete *et al.* 2009, Jürgens *et al.* 2009, Ahmed 2011). Furthermore, legislation could be used to prosecute mothers who transmit HIV to their children (Open Society Institute 2008, UNAIDS 2008, Csete *et al*. 2009, Jürgens *et al*. 2009). Criminal laws impede the creation of an environment where women feel safe seeking testing or treatment for their HIV status. As a result, they place the health of women, their partners and their children at risk.

Sex workers are particularly vulnerable to HIV transmission in many settings around the world (Vuylsteke *et al*. 2009). Rather than curbing transmission of HIV, the criminalisation of sex work can impede HIV-prevention goals by diminishing access to prevention methods, care, treatment and support services and programmes, both on the part of clients and providers (Open Society Institute 2008). In contexts where sex work is criminalised, fear, stigma and discrimination against sex workers on the part of service providers can reduce both the quantity and quality of services that sex workers receive. In Kenya, for example, laws prohibiting sex work have discouraged sex workers from accessing sexual and reproductive health care services for fear that their name, HIV status, or other information will be made available to police (Federation of Women Lawyers Kenya 2008). Law enforcement officials have also used the classification of sex work as a criminal behaviour to target sex workers for arrest and mistreatment; prevention methods may even be used against sex workers, such as where condom possession can be used as proof of intent to engage in sex work (Lutnick and Cohan 2009). This is the case in Washington, DC, where Prostitution Free Zones allow police greater ability to search and arrest people suspected of sex work (Different Avenues 2008). In contexts where criminal laws against sex work are severe, such as in Cambodia, NGOs report that sex workers are harder to reach with outreach activities and information, and sex workers have reported that they have stopped carrying condoms for fear of arrest (Human Rights Watch 2010).

Local laws can also impede service delivery to sex workers. Such laws include prohibitions on loitering, indecent exposure and public nuisance. In addition to restricting sex work, these laws often enable police harassment, exploitation and brutality against sex workers (Federation of Women Lawyers Kenya 2008, Vuylsteke *et al.* 2009).

The legal marginalisation of various communities vulnerable to contracting HIV undermines health services. As the next section argues, this vulnerability increases when individuals enter state custody.

State custody

Additional negative consequences arise when criminalisation results in a member of a vulnerable group or HIV-positive person entering state custody such as prison, jail or detention. Particularly in low- and middle-income countries, HIV-positive individuals can often lose access to treatment services in prison and be exposed to the leading

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causes of death related to HIV, including tuberculosis. For example, Palepu *et al.* (2004) demonstrate that people living with HIV with a history of incarceration in the first 12 months of initiating Highly Active Anti-Retroviral Therapy (HAART) are more likely to be non-adherent and less likely to receive HIV-1 RNA suppression. In most of the developing world, access to HIV treatment in prison is rare or entirely unavailable (Wilson *et al*. 2007). In prison, stigma and discrimination are perpetuated by the on-going segregation of HIV-positive prisoners. Moreover, sexual minorities generally face high rates of sexual violence in prison, increasing risk of contracting HIV and an inability to practice safe consensual sex due to unavailability of condoms and lubricant (Jürgens 2006, Wilson *et al*. 2007).

Some criminal law regimes that affect sex work enable government and non-governmental organisations to utilise a 'raid and rehabilitate' model, often resulting in large numbers of sex workers being subjected to abuse in state-run detention facilities. Overs (2009) has documented the violence experienced by sex workers in Cambodian rehabilitation centres. These rehabilitation centres expose sex workers to a range of abuses, including sexual violence, deprivation of food and inability to access necessary care.

Vulnerable communities who are already likely to be exposed to HIV are often at increased risk in detention facilities where sexual violence is high and condom usage is low (United Nations Office on Drugs and Crime 2008). Sexual violence against prisoners, particularly against MSM and transgender individuals, increases vulnerability to HIV (NCLR *et al.* 2010). Finally, in detention settings, HIV positive individuals experience high levels of stigma and discrimination and often lack access to necessary care, treatment, and support.

Challenges in gathering evidence

Although these arguments make a strong case against criminalisation, there is a dearth of research demonstrating a clear connection between changing criminal laws and health outcomes. It is difficult to find empirical support for the proposition that a change in the law will, for example, decrease stigma and discrimination or reduce vulnerability. The lack of empirical evidence is due in part to the difficulty in measuring health outcomes as they are affected by changes in the law coupled with a lack of investment in research issues seen to be politically contentious. Further, the very populations that are most at risk of being prosecuted and suffering the consequences of criminalisation are often those with few resources to advocate research on changing laws. The lack of empirical evidence allows governments to ignore these important but politically controversial issues.

The political challenges of research on the HIV epidemic are not new. During the early part of the epidemic in the USA, politically motivated neglect of the gay community impeded efforts to focus research on gay men. This was challenging then for the same paradoxical reasons it remains difficult to advocate for research on the impact of criminalisation today: how does one demonstrate the importance of research when the data do not exist to suggest such research is important (Epstein 2003)? Because criminalisation affects similarly marginalised communities the same question remains – particularly in countries where commitment to working with vulnerable communities is lacking.

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Institutional leadership

Barriers to gathering evidence that directly link law, health behaviours and health outcomes have left open the possibility of competing political agendas to influence the strength of UN positions against criminalisation. In turn, institutional leadership has varied considerably on the topic of criminalisation at the cost of an appropriate legal response to the HIV epidemic. There are several circumstances where institutions have not effectively taken on the issue of criminalisation, to the detriment of marginalised populations. UN bodies have responded to the current criminalisation crisis through the very slow process of legislative reform and technical assistance to lawyers working on legal reform. Second, UN agencies are not addressing issues comprehensively. The case of the new UN Women Access to Justice report is a case in point. The report calls for the decriminalisation of HIV transmission and homosexuality but neglects calling for a decriminalisation of sex work (UN Women 2011). Third, both politics and evidence have shaped the guidance given by UN agencies. This is best demonstrated by the UNAIDS Guidance Note on HIV and Sex Work, which shifted from a statement calling for decriminalisation to a 2007 Guidance Note devoid of any mention of criminalisation (Ahmed 2011). While the UNAIDS Strategic Report from 2011 to 2015 prioritizes the reduction of punitive laws and practices regarding HIV transmission, sex work, drug use and homosexuality (UNAIDS 2010), there is on-going concern from civil society organisations that UN agencies have not maintained the necessary level of commitment to adequately address this issue.

Despite the political difficulty of addressing these issues, however, UN agencies have begun various processes that may signal a sea change. The 2009 UNAIDS Action Framework on Universal Access for MSM makes a statement in favour of decriminalisation. The Global Commission for HIV and the Law has actively mobilised states and civil society to speak of the legal issues undermining an effective HIV response including an examination of laws that criminalise consensual sex. The WHO is also formulating a policy document on Human Rights and Sexual Health to comprehensively address criminalisation of consensual sexual conduct from a health and human rights perspective. The most recent joint publication of WHO, UNAIDS and UNDP calls for legislators and other government authorities to establish antidiscrimination and protective laws, derived from international human rights standards, in order to eliminate discrimination and violence faced by MSM and transgender people and to reduce their vulnerability to HIV infection. In the context of this discussion, the agencies acknowledge that criminalisation is a legal barrier that increases the vulnerability of MSM and transgender individuals (WHO 2011). UNAIDS continues to consolidate technical expertise to ensure that evidence underpins the debates on criminalisation and has taken a lead role in ensuring officials, including judges, at the local level are committed to using the law in a manner that respects the rights of people living with HIV and vulnerable communities.

Increasing evidence that criminal laws pertaining to consensual sex undermine the HIV response requires that the UN play an active role in supporting research, ensuring technical assistance in law-making processes, and providing comprehensive guidance and training to governments, Ministries of Justice and judges. While this paper does not review each of the responses of the UN agencies to criminalisation,

these few examples highlight the on-going need for a unified and consistent response to criminalisation.

Conclusion

A brief survey of available evidence, including evidence generated by networks of individuals most affected by the HIV epidemic, demonstrates that criminalisation of consensual sex undermines the effectiveness of HIV/AIDS programmes. In particular, these criminal statutes increase stigma and discrimination, the mistreatment of HIV-positive people and the likelihood of exposure to harm for those in custody. Despite the difficult political environment, clear institutional leadership on issues of criminalisation is critical. This, in turn, requires investment in research on the impacts of criminal law on HIV. Acknowledgement of the harms of criminalisation, institutional leadership and a commitment to action and research will provide a vital framework to address the criminalisation of sexuality from a cross-issue, unified, rights-based and evidence-informed position.

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Note

1. The discussion in this paper is limited to HIV exposure in the context of otherwise consensual sex. Coerced or forced sex (i.e., sexual assault and rape) is criminal behaviour irrespective of the HIV status of the perpetrator and this paper does not address these acts of sexual violence.

References

African Caribbean Council on HIV/AIDS ACCHO, 2010. *Criminals or victims*[online]. Available from: http://www.accho.ca/pdf/ACCHO_Criminals_and_Victims_Nov2010.pdf [Accessed 3 August 2011].

Ahmed, A., 2011. Feminism, power, and sex work in the context on HIV/AIDS: consequences for women's health. *Harvard Journal of Law and Gender*, 34, 225–258.

Bernard, E., 2010. HIV and criminal law. NAM. Available from: http://www.aidsmap.com/The-evolution-of-global-criminalisation-norms-the-role-of-the-United-States/page/1442035/ [Accessed 28 September 2011].

Bourgois, P., Rhodes, T., Singer, M., Friedman, S., and Strathdee, S., 2005. The social structural production of HIV risk amongst injecting drug users. *Social Science and Medicine*, 61 (5).

Brooks, R., Etzel, M., Hinojos, E., Henry, C., and Perez, M., 2005. Preventing HIV among Latino and African American gay and bisexual men in a context of HIV-related stigma, discrimination, and homophobia: perspectives of providers. *AIDS Patient Care STDS*, 19 (11), 737–744.

Burris, S., 2004. Governance, microgovernance and health. *Temple Law Review*, 77, 335–361.

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Burris, S., Beletsky, L., Burleson, J., Case, P., and Lazzarini, Z., 2007. Do criminal laws influence HIV risk behavior? An empirical study. *University of Arizona State Law Journal*, Temple University Legal Studies Research Paper No. 2007-3 [online]. Available from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=977274 [Accessed 13 March 2011].

Cameron, E., 2009. Criminalization of HIV transmission: poor public health policy. *HIV/AIDS Policy and Law Review*, 14 (2).

Canadian HIV/AIDS Legal Network, 2007. *A human rights-based commentary on UNAIDS guidance note: HIV and sex work* [online]. Available from: http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=780 [Accessed 13 March 2011].

Crago, A.L., Rakhmetova, A., and Shields, A., 2010. The police beat you up, demand money, and will detain you until you pay. Police violence against sex workers in 11 countries in Europe and Central Asia. Global Network of Sex Work Projects. *Research for Sex Work*[online], (12). Available from: http://www.nswp.org/sites/nswp.org/files/research-for-sex-work-12-english-russian_0.pdf [Accessed 13 March 2011].

Csete, J., Pearshouse, R., and Symington, A., 2009. Vertical HIV transmission should be excluded from criminal prosecution. *Reproductive Health Matters*, 17 (34), 154–162.

deBruyn, M., 2003. Safe abortion for HIV-positive women for women with unwanted pregnancy: a reproductive right. *Reproductive Health Matters*, 11 (22), 152–161.

Delhi High Court, 2009. *Naz Foundation (India) Trust v. Government of NCT of Delhi & others*. WP(C) No.7455/2001, Date of Decision: 2 July 2009.

Different Avenues, 2008. Move along: policing prostitution in Washington DC. Available from: http://www.differentavenues.org/images/stories/move%20along%20executive%20summary.pdf [Accessed 28 September 2011].

Epstein, S., 2003. Sexualizing governance and medicalizing identities: the emergence of 'state-centered' LGBT health politics in the United States. *Sexualities*, 6 (2), 131–171.

Federation of Women Lawyers Kenya, 2008. *Documenting the human rights violations of sex workers in Kenya* [online]. Available from: http://www.soros.org/initiatives/health/focus/sharp/articles_publications/publications/fida_20081201/fida_20081201.pdf [Accessed 9 March 2011].

Fitting, T., 1987. Criminal liability for transmission of AIDS: some evidentiary problems. *Criminal Justice Journal*, 10 (69), 69–97.

Government of Kenya, 2006. Sexual Offences Act of 2006.

Government of Rwanda, 2008. Law on the Prevention and Punishment of Gender Based Violence 2008.

Government of Sierra Leone, 2007. Sierra Leone's Prevention and Control of HIV and AIDS Act of 2007.

Government of Uganda, 2008. The HIV/AIDS Prevention and Control Bill of 2008.

Greater Network of People Living with HIV/AIDS. Europe and Terrence Higgens Trust, 2005. *Criminalisation of HIV transmission in Europe* [online]. Available from: http://www.gnpplus.net/criminalisation/rapidscan.pdf [Accessed 13 March 2011].

Gruskin, S. and Ferguson, L., 2009. In their own words: government regulation of sex and sexuality. *Reproductive Health Matters*, 17 (34), 108–118.

Halley, J., Kotiswaran, P., Shamir, H., and Thomas, C., 2006. From the international to the local in feminist legal responses to rape, prostitution/sex work, and sex trafficking. *Harvard Journal of Law and Gender*, 29 (2), 336–423.

Human Rights Watch, 2008. *UN: General Assembly statement affirms rights for all* [online]. Available from: http://www.hrw.org/en/news/2008/12/18/un-general-assembly-statement-affirms-rights-all [Accessed 9 March 2011].

Human Rights Watch, 2010. *Fear for life: violence against gay men and men perceived as gay in Senegal* [online]. Available from: http://www.hrw.org/en/node/94450/section/1 [Accessed 13 March 2011].

International Gay and Lesbian Human Rights Commission, 2001. *India: reports of police raids and sodomy arrests* [online]. Available from: http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/733.html

Downloaded by [American University Library] at 08:42 06 August 2012

Jürgens, R., 2006. From evidence to action on HIV/AIDS in prisons: a report from the XVI International AIDS Conference. *Infectious diseases in corrections report* [online]. Available from: http://www.idcronline.org/archives/sept06/article.html [Accessed 13 March 2011].

Jürgens, R., Cohen, H., Cameron, E., Burris, S., Clayton, M., Elliott, R., Pearshouse, R., Gathumbi, A., and Cupido, D., 2009. Ten reasons to oppose the criminalisation of HIV exposure or transmission. *Reproductive Health Matters*, 17 (34), 163–172.

Knox News, 2009. *HIV-positive Knoxville woman a walking felony* [online]. Available from: http://www.knoxnews.com/news/2009/jun/30/hiv-positive-knoxville-woman-a-walking-felony/ [Accessed 11 July 2010].

Lacayo, R. and Winbush, D., 1987. Law: assault with a deadly virus. *Time* [online]. Available from: http://www.time.com/time/magazine/article/0,9171,965000,00.html [Accessed 1 September 2011].

Lambda Legal, 2010. *HIV criminalisation: state laws criminalizing conduct based on HIV status* [online]. Available from: http://www.lambdalegal.org/our-work/publications/general/state-criminal-statutes-hiv.html [Accessed 13 March 2011].

Lazzarini, Z., *et al.*, 2002. Evaluating the impact of criminal laws on HIV risk behavior. *The Journal of Law, Medicine & Ethics*, 30, 239–253.

Lutnick, A., and Cohan, D., 2009. Criminalization, legalization or decriminalization of sex work: what female sex workers say in San Francisco, USA. *Reproductive Health Matters*, 17 (34), 38–46.

Maluwa, M., Aggleton, P., and Parker, R., 2002. HIV- and AIDS-related stigma, discrimination, and human rights: a critical overview. *Health and Human Rights*, 6 (1), 1–18.

Melles, M. and Nelson, J., 2010. *Overlooked and at risk: lesbian, gay and bisexual youth in the Caribbean* [online]. Advocates for Youth. Available from: http://www.advocatesforyouth.org/storage/advfy/documents/overlooked_lgbt_youth_caribbean.pdf [Accessed 13 March 2011].

Mykhalovskiy, E., Betteridge, G., and McLay, D., 2010. HIV non-disclosure and the criminal law: establishing policy options for Ontario. Working paper series, Section 3, 26–39.

NAM, 2010. *HIV and the Criminal Law. In* E. Bernard, ed.

National Center for Lesbian Rights (NCLR), National Center for Transgender Equality (NCTE), American Civil Liberties Union (ACLU), Transgender Law Center (TLC), and Lambda Legal, 2010. *Preventing the sexual abuse of lesbian, gay, bisexual, transgender and intersex people in correctional settings* [online]. Available from: http://www.nclrights.org/site/DocServer/PREA_Standards_Comments_-_ACLU__Lambda__NCLR__NCTE__TLC_.pdf?docID=7542 [Accessed 3 August 2011].

Nehanda Radio, 2011. *HIV sex crime acrobat Zaburoni faces court* [online]. 7 January 2011. Available from: http://nehandaradio.com/2011/01/07/hiv-sex-crime-acrobat-zaburoni-faces-court/ [Accessed 13 March 2011].

O'Flaherty, M. and Fisher, J., 2008. Sexual orientation, gender identity and international human rights law: contextualising the Yogyakarta principles. *Human Rights Law Review*, 8 (2), 207–248.

Ogden, J., Rao Gupta, G., Fisher, W.F., and Warner, A., 2011 Looking back, moving forward: towards a game-changing response to AIDS. *Global Public Health*, 6 (S3), S285–S292.

Ogden, J., Rao Gupta, G., Warner, A., and Fisher, W.F., 2011. Revolutionising the AIDS response. *Global Public Health*, 6 (S3), S383–S395.

Open Society Institute, 2008. *Ten reasons to oppose the criminalisation of HIV exposure or transmission* [online]. Available from: http://www.soros.org/initiatives/health/focus/law/articles_publications/publications/10reasons_20080918/10reasons_20081201.pdf [Accessed 9 March 2011].

Overs, C., 2009. Caught between the tiger and the crocodile: the campaign to suppress human trafficking and sexual exploitation in Cambodia. Available from: http://apnswdollhouse.files.wordpress.com/2009/03/caught-between-the-tiger-and-the-crocodile.pdf [Acessed 28 September 2011].

Palepu, A., Tyndall, M., Chan, K., Wood, E., Montaner, J.S., and Hogg, R.S., 2004. Initiating highly active antiretroviral therapy and continuity of HIV care: the impact of incarceration and prison release on adherence and HIV treatment outcomes. *Antiviral Therapy*, 9 (5), 713.

Downloaded by [American University Library] at 08:42 06 August 2012

Parker, R., 2003. HIV and AIDS-related stigma and discrimination: a conceptual framework and implications for action. *Social Science & Medicine*, 57 (1), 13.

Persson, A. and Newman, C., 2008. Making monsters: heterosexuality, crime and race in recent western media coverage of HIV. *Sociology of Health and Illness*, 30, 632–646.

Piot, P., Kazatchkine, M., Dybul, M., and Lob-Levyt, J., 2009. AIDS: lessons learnt and myths dispelled. *The Lancet*, 374 (2985), 260.

Reynolds, R., 2008. Presentation at International AIDS Conference. *Race and immigration: determinants of a sound policy* [online]. Available from: http://www.stigmaindex.org/download.php?id=31 [Accessed 31 January 2011].

Stauter, R.L., 1988. United States v. Moore: AIDS and the criminal law. The witch hunt begins. *Akron Law Review*, 22 (4), 503–524.

Sullivan, S.K. and Feldman, M.C., 1987. Imposing criminal liability on those who knowingly transmit the AIDS virus: a recommendation for legislative action. *University of Dayton Law Review*, 13 (3), 489–509, cited in NAM, 2010, *HIV and the Criminal Law. In*: E. Bernard, ed. (As of today, thirty-four states of the United States and two territories have HIV-specific criminal statutes and thirty-six states have reported proceedings in which HIV-positive people have been arrested and/or prosecuted for consensual sex, biting, and spitting [see Center for HIV Law and policy]).

Symington, A., 2009. *Criminalisation confusion and concerns: the decade since the Cuerrier Decision. HIV AIDS Policy & Law Review*, 14 (1) [online]. Available from: http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=940 [Accessed 3 June 2009].

Tan, D., 1999. The Cuerrier decision: public health and the criminalization of HIV serostatus non-disclosure. *University of Toronto*, 76 (3), 170–173.

Timmons, H., 2009. India overturns gay sex ban [online]. *New York Times*. Available from: http://www.nytimes.com/2009/07/03/world/asia/03india.html [Accessed 9 March 2011].

UNAIDS, 2008. Criminalisation of HIV transmission: policy brief. Available from: http://data.unaids.org/pub/basedocument/2008/20080731_jc1513_policy_criminalization_en.pdf [Accessed 28 September 2011].

UNAIDS, 2010. Making the law work for the HIV response: a snapshot of selected laws that support or block universal access to HIV prevention, treatment, care and support [online]. Available from: http://www.unaids.org/en/media/unaids/contentassets/documents/priorities/20100728_HR_Poster_en-1.pdf [Accessed 13 March 2010].

United Nations Development Program (UNDP), 2010. *Punitive laws limit access to HIV prevention and care services in Asia Pacific* [online]. Available from: http://content.undp.org/go/newsroom/2010/may/punitive-laws-limit-access-to-hiv-prevention-and-care-services-in-asia-pacific.en [Accessed 9 March 2011].

United Nations Office on Drugs and Crime, 2008. HIV and AIDS in places of detention: a toolkit for policymakers, programme managers, prison officers and health care providers in prison settings. Available from: http://www.who.int/hiv/pub/idu/detention_toolkit.pdf [Accessed 28 September 2011].

UN Women, 2011. Progress of the world's women: in pursuit of justice. Available from: http://progress.unwomen.org/ [Accessed 28 September 2011].

van Beelen, N., and Rakhmetova, A., 2010. Research for sex work 12: sex work and violence. Available from: http://www.nswp.org/sites/nswp.org/files/research-for-sex-work-12-english-russian_0.pdf [Accessed 28 September 2011].

Vuylsteke, B., Das, A., Dallabetta, G., and Laga, M. 2009. Preventing HIV among sex workers. *In*: K. Mayer and H.F. Pizer, eds. *HIV prevention: a comprehensive approach* [online]. Available from: http://www.jhsph.edu/bin/o/s/MayerandPizer_HIVPrevention_eBookNov2008.pdf#page=417 [Accessed 28 January 2011].

Wilson, D., Ford, N., Ngammee, V., Chua, A., and Kyaw Kyaw, M., 2007. HIV prevention, care, and treatment in two prisons in Thailand. *Public Library of Science Medicine*, 4 (6), 204.

World Health Organization (WHO), 2011. *Prevention and treatment of HIV and other sexually transmitted infections among men who have sex with men and transgender people: recommendations for a public health approach* [online]. Available from: whqlibdoc.who.int/publications/2011/9789241501750_eng.pdf [Accessed 1 September 2011].

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