

Criminal Law News

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Issue 75 January 2015

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Another change to the image of police officers in England and Wales

Leonard Jason Lloyd

As the years progress, we witness various changes within the police forces in England and Wales that have varying impacts on their image. These include variations in their powers, procedures and equipment that are often publicised on the mass media. Due to my particular interest in policing issues, a BBC News magazine monitor entitled '*Just how practical is a traditional Bobby's helmet?*' caught my eye whilst scanning through the news items that were published on 22nd January 2015. This article was centred on the recent decision of the West Yorkshire Police to discontinue the use of the traditional police helmet within their area over the next twelve months.

Without doubt, the traditional police helmet (known officially as the 'custodial helmet') is the most well known icon of the police service in England and Wales. So far, male police constables and sergeants on routine patrol duties, wear these helmets within the vast majority of police forces in England and Wales. This does not apply to Scotland and Northern Ireland where these helmets are not issued. All male police officers within those two countries wear 'flat caps' and this is the preferred option accepted by the West Yorkshire Police, where the overwhelming majority voted in favour of wearing caps instead of helmets.

So what are the reasons for the existing and future abolition of the custodial police helmet? Some of these have been cited in the above-mentioned BBC article which states that the helmets fall off easily (see further below) and cannot be worn in cars. An anonymous commentator who was a retired police officer defended the use of the custodial helmet stating that the sturdy badge on the front plus the extra height it provided gave 'presence' to those wearing it. Based on remarks made to me by serving male police constables and sergeants as well as my own observations, plus further comments expressed in the above-mentioned

article, another criticism is that the helmet is generally uncomfortable, especially in hot weather.

As mentioned above, helmets can fall off easily which can occur when officers are climbing over walls and fences, are running or involved in a struggle when one of the first things that often happens is that the helmet falls to the ground. These seem to defeat the purpose of headgear issued to protect the head. It should be mentioned that female police officers wear a reinforced bowler hat. This type of headgear does not have the disadvantages as helmets worn by males. As far as West Yorkshire is concerned, it has been stated that helmets will continue to be used during ceremonial events.

The BBC article pointed out that Thames Valley Police had discontinued using the custodial helmet nearly five years ago in favour of issuing flat caps, which are now worn by male constables and sergeants. The reasons for their discontinuance were cited in another internet source entitled '*Cops in caps 'look like they're from Burger King'*'. Initially, the article in the *Independent* newspaper was centred, not so much on the disuse of the custodial helmet, as the trial of headgear for both male and female police officers that was intended to replace it, namely baseball caps. Following a trial period and a later consultation, this idea was abandoned due to adverse public reaction. The public criticism included remarks that they were 'scruffy, casual and unprofessional' and this headgear resembled that worn in *Burger King*, by the *RSPCA*, and by some security guards. However, the consultation also disclosed that many members of the public stated that baseball caps were modern and practical, and police officers thought this headgear was comfortable, a better fit and more practical.

However, it is submitted that the favourable reaction of the police may have arisen when comparing the baseball caps with the custodial helmet.

The *Independent* article also cited a report published in the magazine the *Jane's Police Review* (a discontinued publication) where it was stated that:

'...The baseball caps were unsuitable for older police officers and were inappropriate for sombre jobs such as delivering the news of a death to bereaved relatives.'

A separate survey reported that 54% of officers would refuse to wear the baseball cap. (It should be mentioned that this particular headgear was considered unsuitable for officers on routine patrols. Baseball caps are often worn by firearms officers from police forces in the course of their specialised duties.)

I recall an announcement made in the media several years ago that the Home Office was reviewing the issue of police helmets with a view to replacing them with something more modern and practical. Unfortunately, I cannot recall the date of this announcement although I do remember that it attracted a lot of coverage in the newspapers. This included pictures of police helmets and other headgear worn by the police as well as a photograph of an officer from a force, which contained a mountainous area where (obviously in winter) he was wearing a fur hat. Nothing seemed to come of this exercise apart from a brief announcement that a smaller version of the police helmet was being considered, but nothing more on this issue seems to have happened since then. However, in recent years I have noticed that during cold weather police officers in some rural areas were wearing woollen hats.

Conclusion

Individual police forces have the option to decide what types of headgear are to be worn by their officers as far as patrol duties are concerned. It is submitted that if the issue of police helmets and their replacement with 'flat caps' were put to all police forces in England and Wales, responses similar to those in West Yorkshire and Thames Valley might be forthcoming. In support of this proposition I quote from an officer from the Merseyside Police who, referring to the police helmet stated that:

'It is cumbersome and faintly ridiculous. You cannot climb over a wall in a helmet. It is hot and makes your head ache because you have to jam it on when it is windy.'

So far, I am not aware of any other police forces that may have discontinued using the custodial helmet or may be considering this move. However, it is submitted that perhaps the custodial police helmet, which has existed for over 150 years, should now be viewed as an anachronism.

Greek passenger ferry, *Norman Atlantic*, disaster

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On 1 January 2015, there were still 98 passengers on board the burning car ferry, the Greek operated, Italian owned ferry, *Norman Atlantic*. Three days before, a fire had broken out on one of the car decks of the ferry, the *Norman Atlantic*.



Ferry, *Norman Atlantic*, being towed into the port of Brindisi, Italy on 2.1.2015. Source: Google.

According to the ferry's manifest, there were 120 tankers on board, and 4 were carrying olive oil, but according to one lorry driver, 20 were carrying olive oil.¹ It is common knowledge in the car ferry system that most of such ferries ignore safety limits and carry some 20 % extra weight on each journey. This was reported by some of the passengers who managed to escape before the Italian assault ship came to their rescue that some crew members were the first to escape the fire in a lifeboat amid suspicion that this incident is quickly appearing to be one of corporate manslaughter and corporate negligence. According to Italian TV reports, passengers noted that five crewmen were in the only lifeboat launched, in violation of rules that only three crew members should go with the evacuated passengers in each lifeboat.

¹ 2014 was a tumultuous year for oil, with Brent crude prices declining around 50 percent since June on the back of an over-supplied market and lack of global demand. From "old school" oil producers Russia and Saudi Arabia in the east to shale oil in California and oil sands in Alberta in the west, the glut of oil and its impact on currencies and economies has been felt across the world. When the Organization of Petroleum-Exporting Countries (OPEC) decided not to cut production when it met in November, the 12 major oil producers effectively threw down the gauntlet to the young guns of U.S. oil to see who could withstand the fall in prices and who would blink first and trim production. As of January 2, benchmark Brent crude was trading at \$57.58, having fallen from a high of around \$115 a barrel hit in mid-June.

One illegal immigrant who was rescued from the ferry told police that there were at least 12 stow-away illegal immigrants on board the car deck of the ferry and that he saw one illegal immigrant, a child, disappear in the water.² An Italian Navy helicopter-carrying assault ship was sent to the rescue and 214 persons were safely ferried to the port of Brindisi, Italy. Italian firefighters and investigators, brought in by helicopters, wearing protective gas masks against the smoke, boarded the burnt ferry, *Norman Atlantic*, to investigate the cause of the blaze and to search for bodies. Friday at the southern Italian port of Brindisi, where a second tug was tied to it to stabilize the wreck. The fire that broke out Sunday as the ferry travelled from Greece to Italy has killed at least 11 people. Italy says 477 passengers and crew were rescued, most by helicopters that plucked them off in gale-force winds and carried them to nearby boats.



Norman Atlantic ferry captain Argilio Giacomazzi with journalists outside behind his house gates in Campigli, Italy. Source: Yahoo News.

By Friday, 2 January 2014, according to police investigators, some 19 people are still unaccounted, in contrast to Italian reports of 99 persons missing. The fire started on the ferry car deck and it is possible that many more bodies will be found on that deck, including many unregistered migrants to Italy. Investigators have not yet found the ferry's data recorders. Four more people are now under investigation by the prosecutor's office in Bari, which is investigating the maritime disaster. In addition to the Italian ship's captain and the Italian head of the ferry manufacturer company, two other crew members and two representatives of the Greek ferry line *Anek*, which rented the *Norman Atlantic*, are under investigation. Italian

² Italian statistics reveal that in 2014, Italy rescued or discovered some 170,000 migrants and asylum seekers at sea as they tried to illegally migrate to Europe. See <http://news.yahoo.com/4-more-under-investigation-greek-ferry-fire-142116431--finance.html>, accessed on 2.1.2015.

newspapers, reportedly quoting from transcripts of the captain's questioning on Wednesday, 30 December 2014, said that Captain Argilio Giacomazzi told prosecutors that crews did not follow his orders in lowering the lifeboats and admitted that the car deck held too many vehicles, contrary to manufacturers specifications.

References

Philip Wilan, 'Fears grow for 98 missing after Greek ferry disaster', *The Times*, Thursday 1 January 2014, pg 28.

Editor, 'Could 2015 herald new oil world order?' *CNBC News*, 2-1-14.

Editor, 'Firefighters board still-burning ferry in Italy', *Yahoo News*, 2-1-15.

South Korean Ferry Disaster: 300 people killed

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Systematic and regulatory failings caused this disaster

On Tuesday, 28 April 2014, the South Korea President had herself travelled to Ansan, south of Seoul, to pay her respects at the memorial for the hundreds of schoolchildren who died in the disaster. The South Korean President had apologised for this ferry disaster and had apologised for her government's failure to prevent this ferry disaster that left some 300 people dead or missing. The South Korea's Prime Minister had previously resigned over the tragedy. The President, Ms Park Geun-Hye, voiced profound regret at the *systemic and regulatory failings* that contributed to the perishing of the 6,825-tonne *SS Sewol* on 16 April, 2014.

New central government agency promised for major disasters in South Korea

Ms. Park said that she would create a central government agency to ensure better coordination in rescue efforts in major disasters. She vowed to eliminate what she and the local news media called a government stronghold, in which retirees from ministries and regulatory agencies receive jobs in industry lobbies.

The collusive links between the regulatory agencies and the industries, forged through these retirees, have long been blamed for widespread corruption and lax safety enforcement of the kind that caused many nuclear power plants to be shut down last year.

Ms Parks said:

'I feel so regretful for having been unable to correct such long-running evils and letting an accident like this take place. I don't know how to apologise for the failure to prevent this accident and for the insufficient first response. I am sorry to the people and heavy-hearted that many precious lives were lost.'

Allegations of corruption

Ms Park's government had been criticised over perceived corruption and alleged lax safety standards that may have led to the disaster, with claims that the ferry was overloaded and the passenger list inaccurate and incomplete. Relatives of the more than 100 passengers still missing have blasted the response to the destroyed ferry, and alleged that delays in launching the rescue had cost lives. There is little doubt that this ferry disaster was a result of a combination of the poor work ethics of the crew; loopholes in safety standards; lax regulatory enforcement and allegedly compromised industry watchdogs, whose top ranks are said to be filled with retirees from government ministries.

Whistle-blowing mechanism had been in place

A former employee of the *Chonghaejin Marine Company*, the operator of the ferry, had previously alerted the government to corruption and lax safety measures. Writing on a government whistle-blowing website in January 2014, the former employee reported violations by *Chonghaejin Marine*, including the overloading of ships, the covering-up of accidents and poor treatment of contract workers, including failing to pay their wages, the *Hankyoreh* newspaper had reported. The South Korea government said it had helped to resolve the complaints concerning non-payment of wages to contract workers. It was silent as to the other matters revealed by this whistle-blower.

South Korea's emergency response system

The ferry disaster investigators had raided the offices of vessel traffic controllers following allegations that their slow response had contributed to the high death toll in the *Sewol* ferry disaster. It was alleged that a coast guard emergency dispatcher had delayed early rescue efforts by asking a student who called for help on his cellphone to provide coordinates. Vessel traffic controllers are accused of failing to monitor the ferry's whereabouts even after it was tilting and drifting in a waterway known to be dangerous. It has been established that when the *Sewol* set sail from Incheon, west of Seoul, on April 15, 2014, it was top-heavy with newly constructed cabins to its upper decks; overloaded; with cargo was poorly secured, and crew members had kept inadequate records of passengers. Of the 476 people on board the *Sewol*, there were 325 students from the same high school in Ansan. Only 75 of the students were rescued.

The decision of *R v H* [2014] EWCA Crim 1555: a critical analysis

Sally Ramage³

Putting aside emotional reactions to this case, as reported officially, we are reminded of youth conduct disorders which this crown court trial and appeal at the Royal Courts of Justice was completely silent on, and which the writer contends is the crux of this case, and not the technical matters of expert witnesses. The official view on childhood conduct disorder is as follows:

'Conduct disorders are characterised by a repetitive and persistent pattern of anti-social, aggressive or defiant behaviour.⁴ Young people with conduct disorder may exhibit excessive levels of fighting or bullying, cruelty to other

³ See BMA Board of Science (2006).

⁴ Liabo, K. and Richardson, J. (2007) *Conduct Disorder and Offending Behaviour in Young People: Findings in Research*, London: Jessica Kingsley Publishers.

people and to animals, severe destructiveness to property, repeated lying, unusually frequent and violent temper tantrums, and defiant provocative behaviour. The behaviours that are associated with conduct disorder major violations of age-appropriate social expectations and are more severe than ordinary childish mischief or adolescent rebelliousness. The diagnostic criteria for conduct disorder are similar but not identical to anti-social personality disorder. According to the International Classification of Diseases (ICD 10) (WHO 1994) and DSM-IV (APA 1994) diagnostic criteria), conduct disorder usually occurs during childhood or adolescence, whereas anti-social personality disorder is not diagnosed in people under the age of 18. Furthermore, according to ICD-10 and DSM-IV criteria, any diagnosis should distinguish between early-onset (symptoms present at age 10) and late-onset conduct disorder (absence of symptoms before age 10). The diagnostic criteria are also similar to oppositional defiant disorder ('ODD'), which according to ICS-10 usually occurs in younger children and 'does not include delinquent acts or the more extreme forms of aggressive or dissocial behaviour (WHO 1994). ODD is generally seen as milder than, and a risk factor to developing conducts disorder.⁵

A long and serious study of the case report of *R v H* [2014] immediately brought the 20 texts listed as recommended further reading to mind. This case immediately reminded the writer of a very sad and serious set of events which occurred in the United Kingdom a couple of decades ago in which a young female doctor incorrectly diagnosed a baby with child sex

⁵ The aetiology of conduct disorder is complex. ICD-10 and DSM-IV are silent as to the listing of these complexities.

abuse which led to all the children in the particular village being examined and diagnosed with having been sexually molested and all the children, like the story of the *Pied Piper*, were wickedly removed from their parents' homes, fostered and adopted, too late to mend the broken vessels that constituted that community when years later, with much zeal, heart-ache and cost, this diagnosis was proved wrong.

Were this to have happened in the United States of America, the parents would have received one billion pounds sterling in compensation for hasty, neurotic, criminal and cruel acts caused by one female doctor who herself should have been at least examined for mental illness and struck off.

Sex abuse does occur in the United Kingdom, especially with acknowledged wide use of Internet pornography which over time seems to have dulled many British men's sense of morals and ethics and prosecutions over the past 16 years is evidence that law enforcement is enthusiastic in efforts to bring alleged sex offenders to justice, since the 1998 report *Speaking up for Justice*, which made 78 proposals to encourage and support vulnerable or intimidated witnesses and to help them give their best evidence in criminal cases.⁶

However, this father and former family doctor, now cut off from his caring profession in his prime, has never had any evidence in court of any pornography on his computers or in his house and it appears that local police were enthusiastic in bringing down a middle class

⁶ Those provisions that required legislative action were included in the *Youth Justice and Criminal Evidence Act 1999*. Victims of sexual offences are automatically considered eligible for special provisions unless they tell the court that they do not want to be eligible. Those special provisions include being asked questions through an intermediary, giving evidence from a separate room via a television link, giving evidence through an interview recorded on video before the trial, and having cross-examination recorded on video before the trial. Those provisions can give much-valued security and support to victims of sexual abuse.

man as also evidenced in the new statistics in *Police Professional*, February 2015 Issue, that the UK now has one of the highest statistics in convictions for sex abuse.

The picture overall seems somewhat confused. In direct contradiction to this, as if we live in a schizophrenic country, money trumps this matter because the UK Internet servers have license to provide pornography to adult viewers who pay for the service; there are hundreds of pole dancing strip clubs around the United Kingdom who, provided they pay the very large licence fee, are free to trade as such; pornography publications abound in the United Kingdom; sex shops pay to openly advertise sex ‘toys’ on national television in the United Kingdom; there are national television channels which, if a customer pays, can join a sex channel which reveals naked women talking sexily and in pornographic poses, etc.

To return to the matter of child violence, a BBC programme on Thursday evening, 12 February 2015, revealed the horrendously frequent incidents of little children who continuously assault their parents in their violent rages against parental control of bedtimes etc. One child took a cleaver knife to his poor mother. When one considers the positions of the parents of child X in *R v H*, one can understand their reluctance and feelings of failure and shame as being the cause of not calling in professional help because they themselves were doctors.⁷ Some of the children with conduct disorder are simply ones who have grown progressively out-of-control by indulgent parents,⁸ the consequence of which is a complex

⁷ See laws relating to Parental Control Orders; Parental Responsibility Orders; ‘naming and shaming’; etc.

⁸ Editor, ‘The children who beat up their own mums and dads: More than 50 kids under 13 have been prosecuted for attacking their parents in London alone’, *Daily Mail*, 4 October 2013. See www.dailymail.co.uk/news/article-2443827/Over-50-children-aged-13-prosecuted-attacking-parents-London.html, accessed 13 February 2015. See also Brooke, C., ‘Parents who live in fear of attacks from their children’, *Daily Mail*, 31 October 2010, at www.dailymail.co.uk/news/article-1325384/Parents-live-fear-attacks-children.html, accessed on 13 February 2015.

mix of power over the parents by such a child; the thrill of wielding such power over adults; and the progression to psychopathy in such children.⁹

Bad children

Bad children become bad adults and this phenomenon stretches across all strata of society. Furthermore it has been established that there is a link between age and crime over the life span.¹⁰ Bearing in mind that the legal age of criminal liability in the UK is age 10, we find that since the year 2013, the statistics of the children under age 14 who had been prosecuted and those between ages 14 to 17¹¹ were as follows:

Child domestic violence offences prosecuted

Age range	Time period	Prosecutions
under 14	2010-2011	216
14-17 years	2010-2011	3,144
under 14	2011-2012	148
14-17 years	2011-2012	2,643
under 14	2012-2013	118
14-17 years	2012-2013	3,144

***Parentline Plus* charity**

Between the years 2008 to 2010, the charity *Parentline Plus* had received 22,537 telephone calls from mothers and fathers who were struggling to cope with their children's extremely violent behaviour. According to research the violence in children who abuse their parents peak from age 13 to 15. According to *Parentline Plus* research this child violence occurred every single day; 50 percent of such violent children destroyed property

⁹ The Crown Prosecution Service had warned that this violence epidemic was not only present in poorer families

¹⁰ Coomber, R., Donnermayer, J.F., McElrath, K, and Scott, J. (2015) *Key concepts in crime and society*, London: SAGE Publications, page 76.

¹¹ In 2013, the UK's Home Office ruled that cases involving 16 to 17 year old children who committed domestic abuse will be included in domestic violence statistics because the fear was that these thousands of cases were being wrongly ignored as being domestic violence.

and 20 percent were drinking alcohol. According to an *Independent* article¹², one of the factors why children beat up their parents is their size. Modern children are well fed in the UK and some of the assaulted parents complained that even as young as 11 years old, their daughters were almost impossible to handle physically. Other factors include early signs of mental illness, alcohol and other substance abuses. Some experts say that there is a collapse in social authoritative boundaries today, as children are pampered and given access to the Internet at a young age. If a child sees her mother abusing alcohol, she loses respect for that parent and may also begin practising alcohol abuse, especially in a middle class family where the problem is not one of lack of finances.

Tip of the iceberg phenomenon

The recorded phenomenon of children beating up their parents is most likely the tip of the iceberg in the UK. Because sociologists are aware that this explosion of parent abuse is shameful and largely kept within the family, several Online help centres have emerged to help parents to cope, *Parentline Plus* and *hand in hand parenting*¹³ being two such websites. Child disorders that manifest themselves in property damage, parental assault and self-assault are often treated medically as follows:¹⁴

¹² Editor, 'What's behind an alarming rise in physical assaults on parents by their offspring?' *Independent*, 13, November 2013 at www.independent.co.uk/voices/comment/what's-behind-an-alarming-rise-in-physical-assaults-on-parents-by-their-offspring-8937629.html, accessed on 13 February 2014.

¹³ See www.handinhandparenting.org/who-we-are/mission-vision-core-beliefs/ accessed on 10 February 2015. The latter website provides advice for parents to learn to connect to their children and diffuse flare-ups. Although their advice is for caring for children under age 7, the advice is useful for caring of children of all ages.

¹⁴ James Chandler, MD, FRCPC, 'Anxiety disorders in children and adolescents', at www.jameschandlermd.com/anxiety/anxiety_disorder.pdf, accessed on 1 February 2015.

Drug	Brand name	Usual dosage	comment
Fluoxetine	Prozac	1mg/kg of body weight	Can be dissolved in water
Paroxetine	Paxil	20-60 mg per day	Dissolved in water. May cause weight gain.
Citalopram	Celoxa	20-40 mg per day	Not soluble
Sertraline	Zoloft	3mg per 1 kg of body weight	Soluble
Fluvoxamine	Luvox	3 mg per 1 kg of body weight	Not soluble
Escitalopram	Cipralext	10-20 mg per day	No studied in children
Duloxetine	Cymbalta	30-60 mg per day	Few case studies

Child sexuality

The case never questioned whether the child could possibly have been having sex with another child.¹⁵ The dearth of literature about this subject creates gap in public knowledge about the development of such sexually assaultive behaviour and the professional and legal issues accompanying this little spoken-of violent child behaviour. For decades there has been much interest in the juvenile sex offender in the United States but not at all in the United Kingdom. Interest in the sexually assaultive behaviour of juveniles has a long history (Atcheson and Williams, 1954; Cook, 1934; Doshay, 1943; Waggoner and Boyd, 1941). In 1964, a study by Mohr, Turner and Jerry (1964) showed that child sex offenders pose a long-term risk. Initially child sex was seen not as violence but as innocent behaviour and this misconception was due to a profound lack of knowledge concerning social and psychological aspects of sexual development in adolescence. Available estimates show that 20% of rapes are committed by juveniles with penetration in 59% of juvenile sex offenses.

¹⁵ Freud, S. (1905) *Three essays on the theory of sexuality* (translated by James Strachley in 2011), New Jersey, United States: Martino Fine Books. See also, Bromberg, D.S., and O'Donohue, W.T.(eds) (2014) *Toolkit for working with juvenile sex offenders*, London: Academic Press. See also, Barbaree, H.E., Hudson, S.M., and Seto, M.C. (1993) *The juvenile sex offender*, London: Guilford Press.

Glossing over mental retardation of child

The caselaw report of *R v H* [2014] EWCA Crim 1555 glossed over the lack of educational progression of child X. The caselaw report incorrectly painted a picture of a good and virtuous child X for whom ‘butter would not melt’, which is inconceivable of a strong young girl who could destroy all the furnishings in her bedroom in one angry outburst; nor did it mention any tests for alcohol abuse in the child; nor were teachers called to give evidence of behaviour at school, when in fact this child drove her mother to drink, and her father to return home in fear of what he would find. Most tellingly, the caselaw report mentioned that after the defendant was driven to leaving the marital home and breaking up his marriage, an occurrence that is caused by most of such violent child behaviour, that child X behaved even worse than when the father lived there. There was no sexual abuse of her then- her behaviour was just a progression of the behaviour she wreaked on her family from the beginning. Courts could have issued orders for the assessment and treatment of child X, as also a practitioner in an emergency situation could.

Conclusion

So why did it take a non-experienced female newly qualified psychologist and an allegedly sexually abused female’s hearsay to bring this General Practitioner to his demise and subsequently financially ruining the whole family’s future permanently?

Was the alleged sexually abused schoolgirl at the special school where child X was sent to after two years, a ‘patsy’ put there by local police to say those things?

The Criminalization of HIV

Throughout the HIV epidemic, criminal law has been invoked to deter and punish sexual transmission. The public health community has not favored the enactment of criminal laws specifically targeting people with HIV, nor endorsed the application of general criminal laws to HIV – but neither has it taken a vigorous stand against them. Meanwhile, governments continue to adopt HIV-specific criminal laws, and individuals with HIV continue to be prosecuted under general criminal law around the world. This comment argues that criminal law cannot draw reasonable, enforceable lines between criminal and non-criminal behavior, nor protect individuals or society from HIV transmission. In the protection of women, it is a poor substitute for policies that go to the roots of subordination and gender-based violence. The use of criminal law to address HIV is inappropriate except in rare cases where a person acts with conscious intent to transmit HIV and does so.

Since early in the HIV epidemic, criminal law has been invoked to deter and punish sexual transmission. “Criminalization of HIV” has taken the form both of HIV-specific criminal statutes and the application of general criminal law (such as assault) in matters involving exposure to or transmission of HIV. More than twenty-five years after the first AIDS diagnosis, criminalization has become a facet of public policy throughout the world, including the United States.

Recently, criminalization has reached a new pitch in a ‘model law’ on HIV crafted by West African parliamentarians, with support and assistance from the Action for West Africa Region HIV/AIDS Project (AWARE HIV/AIDS).

National legislation commonly adds even broader elements, criminalising exposure as well as transmission, and explicitly including Amendments offered to the Singapore Infectious Diseases Act in 2007 propose to extend liability for sexual exposure even to one who is unaware of his infection but ‘has reason to believe he has, or has been exposed to the risk of contracting, AIDS or HIV. In July, 2008, a Swiss court ruled that a person unaware of his infection but aware that a past partner had HIV was properly convicted of negligent transmission of HIV for having unprotected sex with a later partner. The court reasoned that Swiss public health guidelines created a standard of care that should be enforced by the criminal law.

Leading public health agencies have never recommended criminalization, but neither have they taken an unambiguous, vigorous leadership position against it. UNAIDS has emphasized the problems with criminal law as an HIV-prevention tool, but also provided drafting guidance for legislators intent on ignoring its implicit advice. The United States Agency for International Development effectively supports criminalisation through its funding of the AWARE HIV/AIDS Project. Evidence and experience now compel the conclusion that criminalization of HIV is inconsistent with good public health practice and a due respect for human rights. This conclusion, in turn, compels systematic efforts to oppose criminalization and mitigate its negative effects.

Criminal law has also been directed against people who expose others by sharing syringes. Likewise, there is an increasing risk that criminal law will be crafted to punish mothers with

HIV who refuse ARV prophylaxis, or breast-feed.

In the US, there have been prosecutions based on spitting position made explicit in the including a 2008 Texas decision in which the defendant was sentenced to thirty-five years in prison for spitting at a policeman. While all these modes of exposure raise issues distinct from those involving sex, our general conclusion – that criminal law should not be used in the absence of a conscious intent to transmit HIV – holds true for them as well.

The central problem of criminalisation is to draw reasonable, enforceable lines between criminal and non-criminal behavior. Criminal liability typically depends on a blameworthy state of mind. Actual injury to the victim may not be required, and even where required may be broadly defined to include infliction of fear or deprivation of autonomy. Most people would agree that the achieved intent to infect another with HIV is highly blameworthy, while exposing or infecting another when the actor reasonably does not know he is infected is innocent. The difficulty arises with cases falling between: people who know they are at risk but avoid being tested; people who know they are infected but occasionally have unprotected sex; people who know they are infected and regularly have sex without disclosing or taking precautions .

The severity of the risk and the harm are also more complicated matters than law makers, judges, lawyers and juries often seem willing to concede. Risk of transmission varies with the type of exposure, the general health of the partners and the stage of infection, and in many circumstances may be low. Where effective treatment is available, the risk is reduced both because individual infectiousness is significantly less. The Swiss Federal AIDS Commission went so far as to conclude, based on a review of the evidence, that people with HIV under

proper ARV therapy and with no other STDs should be considered sexually non-infectious and because the harm caused by infection is palliated by medical care. But the objective risk, to the extent it can be accurately determined in any given situation, is hardly determinative in policy making, in court, or in human behavior. Risk assessments are more heavily influenced by psychological and social biases than objective statistics. The riskiness and therefore blameworthiness of sexual behaviour depends on the observer's perceptions of the value and importance of sex, the responsibilities and capacities of sex partners for self-protection, and the applicable norms of sexual behavior and disclosure.

Millions of people have daily unprotected sex with partners they must assume might be infected. They evidently rate the risks and benefits of sex differently than people who pass judgment on sexual behavior in the criminal justice system. The result is that conduct that for large numbers of people seems normal or acceptable, meaning that sex without protection despite the presence of risk exposes those who actually do have HIV to criminal prosecution and, in many jurisdictions, to severe criminal penalties, including life imprisonment.

There are also concerns about fair treatment of defendants. Along with biased risk assessments, judges and juries may consciously or unconsciously take into consideration the race, nationality or social position of the accused. Commentators have raised this concern in connection with cases involving prisoners (like the recent Texas spitting case) who receive extremely harsh sentences for acts posing no real risk of HIV transmission. Concern is borne out by more intensive scrutiny of trial transcripts in sexual transmission cases.

Liability based on something less than *intent to harm another* is inconsistent with a rational, desirable norm of personal responsibility in matters of sexual risk. HIV and other sexually transmitted infections are sufficiently prevalent that in most settings rational people operating with genuine autonomy should now expect that exposure is a normal risk of sexual behavior.

Except where coercive sexual subordination occurs, the spotlight should be on both sexual partners' responsibility, not that of the partner with HIV alone.

Intentional infliction of harm through a sexual act undertaken with the conscious desire to infect another justifies a criminal penalty not because the likelihood of harm is greater or the obligation of self-protection any less than in many other comparable situations, but because the actor has deliberately and successfully set out to harm another. The achieved intention is neither more nor less blameworthy because the means chosen is sex and the average likelihood of success relatively low. In this sense, criminalizing intentional behavior that transmits HIV falls well within the parameters of criminal liability as it existed in most jurisdictions before the epidemic.

Rights of privacy, autonomy and self-expression

The means chosen is relevant, since regulation of sex implicates rights of privacy, autonomy and self-expression. Everyone has the fundamental right to a consensual sex life and to form a family. Absent a compelling justification such rights should not be significantly abridged. Protecting people from a significant risk of harm is a sufficient justification for necessary and effective limits on personal freedom. It cannot however, be credibly argued that HIV criminalization serves an important protective purpose, individually or socially.

Public health interventions built around voluntary testing and counselling, outreach, and the training of peer opinion leaders have all been shown to be effective in promoting disclosure or safer sex. In contrast, the public health evidence fails to support criminalization as an effective tool, and gives sober reinforcement to those who fear that criminalisation may make HIV epidemics worse.

No discernable connection can be found between criminalisation and a jurisdiction's

prevalence of HIV. The only study that examined the impact of criminalisation on the sexual behaviour of people with and at risk of the disease was not able to show that the application of criminal law is beneficial. The study considered a number of likely reasons that criminalization is a poor public health tool. Prosecution has been unsystematic and has involved only isolated cases; this is true in developed countries and is likely to be even more apparent in developing countries with limited prosecutorial resources.

Most HIV transmission comes from people who do not know their status, with studies suggesting that the greatest risk is in the period immediately following initial infection. Transmission can occur even if one party complies with the law by disclosing infection and/or practicing safer sex. Most people, including those with HIV, already believe that it is wrong to expose others to HIV without disclosure and consent, and these beliefs are apparently not strengthened by criminalisation. No study has found that laws criminalising non-disclosure would encourage people to substitute disclosure for safer sex. Qualitative research among people living with HIV in the United Kingdom has found that highly publicised prosecutions were stigmatising, and undermined public health efforts to encourage safer sex.

Criminalisation would also result in the use of confidential health records used without consent as evidence of the defendant's knowledge of his/her HIV status, entangling public health agencies and health care providers in law enforcement efforts to the detriment of other interventions.

Criminalisation is not an effective way of protecting vulnerable populations from coercive or violent behaviour, such as rape which that can transmit HIV. Sexual violence is already criminalised. While an offender's knowledge that he had HIV at the time of the attack may properly be considered an aggravating factor, the notion that a separate, HIV-specific offence

would materially add to deterrence is implausible.

Criminal laws do nothing to address women's subordinate socio-economic position, which makes it more difficult for them to insist upon safe sex with non-monogamous partners, particularly husbands, and may make it dangerous for them to disclose their own infection. Criminalisation is a poor substitute for improving women's status and offering serious protection of women's rights to sexual decision-making and physical safety. Coercive measures like mandatory testing and criminalisation may fall unfairly and disproportionately on women. There is a tendency to attribute responsibility for infection to the first person in a couple to be diagnosed, which in resource poor-settings will generally be women who present for ante-natal testing. In sub-Saharan Africa, most HIV diagnoses occur amongst women, some of whom report violent reactions by spouses and others. The subordinate social and economic status of women in Africa and elsewhere places them in a dilemma: unable to disclose their status because of the risk of violence or ostracism, they face the possibility of prosecution as a result of their failure to disclose.

In light of epidemiological and human rights considerations, the use of criminal law to address transmission of HIV is unacceptable and inappropriate except in extreme cases where it can be shown that a person acted with the conscious intent to transmit HIV and in fact does so. For such cases, the existing criminal law suffices; no HIV-specific statute is needed.

Legal concepts of reckless or negligent exposure, which such statutes frequently import are incapable of rational, fair application across the range of cases of this sort, and fail adequately to circumscribe the risk of criminal liability.

The use of criminal law can never be justified where a person with HIV took risk-reducing measures or could not reasonably have used them. Criminal law is never appropriately

applied to the behaviour of people who do not know their HIV status.

The scale of the epidemic explains the current rash of HIV-specific criminal statutes. Nevertheless, such statutes propagate the stigmatising view that people with HIV are irresponsible and worthy of blame. Criminalisation may be politically popular, particularly when presented as part of a ‘model’ law that includes positive elements like protection against discrimination, or as a quick and visible solution for politicians who are under pressure to take action.

Most HIV-specific criminal laws are defective even on their own terms, written in unclear ways or covering conduct that poses no risk. Both defective HIV-specific statutes and general criminal laws leave room for police and prosecutorial discretion. Policy guidance and training can be deployed to guide that discretion away from the inappropriate use of criminal law. The joint United Nations Programme on HIV/AIDS is well-positioned to take the lead internationally, in partnership with organizations of persons themselves living with HIV.

The burden of proof should be placed on proponents of criminalisation to show that it meets public health goals. The risk that criminalisation enhances stigma and creates disincentives for testing and treatment impacts hardest on women, particularly in Africa. In the overwhelming majority of cases, HIV is not spread by criminals, but by consensual participants in a sexual act, neither of whom knows their HIV status. The blunt use of HIV-specific criminal statutes and prosecutions is to be avoided.

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