

Criminalizing Health-Related Behaviors Dangerous to Others? Disease Transmission, Transmission-Facilitation, and the Importance of Trust

Leslie Pickering Francis · John G. Francis

Published online: 10 December 2011
© Springer Science+Business Media B.V. 2011

Abstract Statutes criminalizing behavior that risks transmission of HIV/AIDS exemplify use of the criminal law against individuals who are victims of infectious disease. These statutes, despite their frequency, are misguided in terms of the goals of the criminal law and the public health aim of reducing overall burdens of disease, for at least three important reasons. First, they identify individual offenders for punishment, a paradigm that is misplaced in the most typical contexts of transmission of infectious disease and even for HIV/AIDS, despite claims of AIDS exceptionalism. Second, although there are examples of individuals who transmit infectious disease in a manner that fits the criminal law paradigm of identification of individual offenders for deterrence or retribution, these examples are limited and can be accommodated by existing criminal laws not devoted specifically to infectious disease. Third, and most importantly, the current criminal laws regarding HIV/AIDS, like many other criminal laws applied to infectious disease transmission, have been misguided in focusing on punishment of the diseased individual as a wrongful transmitter. Instead of individual offenders, activities that enhance the scale of disease transmission—behaviors that might be characterized as ‘transmission facilitation’—are a more appropriate target for the criminal law. Examples are trafficking in human beings (including sex trafficking, organ trafficking, and labor trafficking), suppression of information about the emergence of infection in circumstances in which there is a legally established obligation to disclose, and intentional or reckless activities to discourage disease treatment or prevention. Difficulties remain with justifications for criminalizing even these behaviors, however, most importantly the need for trust in reducing overall burdens of disease, problems in identifying individual responsible offenders, and potential misalignment between static criminal law and the changing nature of infectious disease.

Keywords Criminalization · Infectious disease · HIV/AIDS · Trafficking · Disease transmission

L. P. Francis (✉) · J. G. Francis
University of Utah, Salt Lake City, UT, USA
e-mail: francisl@law.utah.edu