When, if ever, should one be criminally liable for infecting another person with a disease?

As we continue to live in the midst of a global pandemic, our present scenario makes it vital to address the ambiguity that arises with respect to criminal liability and the spread of infectious diseases. One may argue simply that infecting another person with disease should directly result in facing the harsh consequences of criminal liability. However, it is important to consider whether this approach works *in favour* of achieving the public health goals laid out by the World Health Organisation (WHO).[1] Instead, one can look towards the alternative approach of applying public health laws; forces, duties and legislation that not only ensure accountability, but also promote the health and safety of an individual, as well as the wider public.

Prior to exploring the validity of this approach, one must establish both the elements of public health law, and that of criminal liability. Public health law is constituted by classifying transmissible disease (e.g. defining the legal provisions of specific diseases), imposing legal duties on people to either identify, report or treat diseases, and enabling public health officials to work towards preventing and treating diseases.[2] To be held criminally liable, on the other hand, a crime tends to consist of three main elements; *actus reus*, the Latin term for "guilty act", *mens rea,* the Latin term for "guilty mind", and finally, a concurrence of both these elements.[3] In other words, one must commit a criminal act with malicious intent to be held liable under the statutes of criminal law.

While laying emphasis upon the second element of criminal liability, namely *mens rea* or "guilty mind", one would realise that criminalising the spread of disease raises major practical concerns with regards to the unduly difficulty of proving both malicious intent, and an infectious transmission itself. An example of this was seen in 1997, when a Cypriot defendant Pavlos Georgiou was sentenced to fifteen months in prison for allegedly infecting a British woman named Janet Pink with HIV-1. Pink met the defendant in January 1994, whilst on a holiday to Cyprus, and discovered she had contracted the virus from him in October 1994. However, she continued her

relationship with him until July 1996, at which point she had developed AIDS. Claiming she was unaware of the defendant's HIV-positive status, she reported him to Cypriot authorities in the following months, and he was found guilty.[4] From this example, one can see how cases concerning the transmission of disease are highly circumstantial, and lack the element of proving malicious intent without a reasonable doubt. The sheer lack of solid evidence in such cases is so extreme that a wrongful conviction becomes highly likely. In fact, the Centers for Disease Control and Prevention reported that of the total number of guilty verdicts in cases concerning disease transmission, 48% turned out to be wrongful convictions.[5] These aforementioned factors illustrate the need for laws that favour the education and necessary treatment for communicable diseases, rather than the punishment of patients that criminal sanctions condone.

To counter this however, in Professor John Spencer's Wyng-Hatton Lecture at the University of Hong Kong,[6] he acknowledged the difficulty of proving *mens rea* in such cases, but contested that this same burden of proof can also be applicable to sexual offence-related crimes. Although this may be true to an extent, it is important to note that the primary issue with sexual offence-related crimes is that a very limited number of perpetrators are *convicted* for the crimes they commit, in the first place. Moreover, Research for the Home Office depicts that only 4% of the sexual-offense related crimes that are reported to the UK police result as wrongful accusations.

Holding an individual criminally liable for infecting disease is also rather counterproductive, as the very objectives of criminal law such as incarceration, have proved to have an opposite, negative effect especially in cases with sexually transmitted diseases (STIs). The Joint United Nations Programme on HIV/AIDS (UNAIDS) has estimated that prisoners are five times more likely to be HIV-positive than those who are not incarcerated. Additionally, practically speaking, prisoners aren't completely isolated from the outside world; a vast majority are permitted conjugal visits, meaning the infection has the potential to spread outside prisons, as well. UNAIDS further

conducted studies in 2018 that conclude that recent incarceration can result in an individual having an 81% increase in HIV risk, and a 62% increase in a risk of contracting the hepatitis C virus as well.[7] This goes to show that the main consequence of criminal liability, namely incarceration, has only increased the risk of disease transmission, whereas imposing mandatory quarantine periods under public health law would not only prevent disease transmission, but would also promote the mental and physical wellbeing of the patient.

One may argue, however, that incarceration is one of the only known ways to instill discipline, act as retribution and hold one accountable for their wrongdoings. But, a study conducted by the Pew Center on the States shows that 40% of ex-convicts land up in prison in the first three years after their release.[8] In cases such as disease transmission, the only sustainable alternative to encourage public health is instilling policies that do not force punishment as a consequence, but require rehabilitation for the benefit of both the individual and the wider community. Unlike many other cases, with cases of disease transmission, incarceration becomes simply a matter of punishment as there is no tangible positive outcome that benefits the health and safety of the individual, or even the public.

Another reason why one should not be held criminally liable for infecting another person with a disease is because the harsh statutes under criminal law are a huge deterrent for carriers to get tested or even treated. To prove this, one can look towards the HIV/AIDS and Human Rights *International Guidelines*; a set of protocols that were produced by UNAIDS and the UN High Commissioner for Human Rights. Producers of the *Guidelines* concluded that, *"people will not seek HIV-related counselling, testing, treatment and support if this would mean facing discrimination, lack of confidentiality or other negative consequences…"*[9] From this, one can infer that one's disease-positive or, in reference to the above conclusion, HIV-positive status, having a risk to be

exposed during possible criminal prosecution, can be a major disincentive to getting tested or treated for their disease.

Regardless of the claim that criminal liability has shown to result in carriers being disincentivized to the prospect of testing and/or treatment, many, including Professor John Spencer argue that the reckless spreading of disease should be a criminal offense. Professor Spencer further contests that such recklessness includes not only knowing about a risk, but also being *"willfully blind"* to it. Although this may be true, it simply does not change the fact that potential criminal prosecution only increases a carrier's fear to come forward for testing and/or treatment. Criminal liability does nothing but demonise a debilitating illness; it punishes someone who is also a victim to the disease, and further perpetuates the pre-existing stigma that infectious diseases carry. In contrast, public health law creates a scope for initiatives that would work to spread awareness about these diseases and how to control them.

In conclusion, criminal liability should not be applicable in *any* instance of disease transmission. Not only is it unreasonably difficult to prove the *mens rea,* or the malicious intent of disease transmission beyond a reasonable doubt, criminal liability is also quite simply counterproductive, as its main consequence of incarceration has only proved to extend the threat of transmission, and risk public health and safety. Further, the unduly severe statutes under criminal law deter carriers from getting themselves tested or seeking treatment for their disease, due to fear of discrimination and a threat to the exposure of their privacy. It is clear that instead, legal systems should look towards instilling public health law policies that are primarily focused on preventing disease and promoting individual and public health. The world needs education, not punishment in order to combat disease transmission and achieve our public health goals.

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