International Journal of Law in Context, 4,3 pp. 277–284 (2008) Cambridge University Press
doi: 10.1017/S1744552308003042 Printed in the United Kingdom

Review essay
Should we use the criminal law to punish HIV transmission?[1]

Intimacy and Responsibility: The Criminalisation of HIV Transmission
By Matthew Weait, London: Routledge-Cavendish, 2007.
xi+233 pp.
ISBN 978-1-904385-70-7 £19.95 paperback

Reviewed by Udo Schüklenk
Queen's University Department of Philosophy, Kingston, Ontario, Canada

1. Criminalising HIV Transmission

Legislators around the world are grappling with the question of whether or not the criminal law should be deployed in order to punish HIV transmission that is the result of voluntary sexual encounters between competent, consenting adults. A few years ago, when I was working in South Africa, that country's Law Reform Commission proposed to declare HIV transmissions that are the result of voluntary sexual encounters among competent consenting adults a criminal offence that ought to fall under the category of rape (Schüklenk, 2003). Rape and voluntariness do not go too well together, so – not being a lawyer – I was surprised about the seemingly otherworldly machinations of legal minds in the context of HIV/AIDS. Matthew Weait points out in his book *Intimacy and Responsibility: The Criminalisation of HIV Transmission* that many liberal democracies have made HIV transmission a criminal offence, among these Canada, Sweden, Germany, Norway, Denmark, the Netherlands, the UK and many others. In most countries, HIV infected people who demonstrably knew about their infection have been successfully prosecuted for transmitting HIV to their sexual partners.

Does society have good ethical reasons for wanting to punish HIV transmission? Does society have good ethical reasons for wanting to punish someone who recklessly subjects someone else to the risk of HIV transmission? My initial reaction would be that in some such cases probably we do. From a public health perspective it seems desirable to make subjecting someone to the risk of HIV infection punishable in order to deter people from acting recklessly. This, to my mind, would constitute the first of two – possibly interrelated – reasons for wanting to deploy the criminal law in the context of HIV transmission: *deterrence*. The second reason would apply in situations where the adults involved volunteered to have unsafe sex only because they were deceived by the HIV infected person about his or her status; that is, they did not consent to the infection risk: *punishing harm to others*.

It is unclear, however, why, other than for the already mentioned public health reasons, we should care about most cases of transmissions, seeing that they occur between volunteering,

1 I am deeply grateful to Jim Gallagher, Anita Kleinsmidt and Matthew Weait for critical or clarifying comments on an earlier draft of this manuscript. Ricardo Smalling suffered through endless hours of discussions about the subject matter of this review.

https://doi.org/10.1017/S1744552308003042 Published online by Cambridge University Press

consenting, competent adults. Surely the *volenti non fit iniuria* maxim should apply here, if anywhere (Schüklenk, 2009). Weait, a legal scholar at Birkbeck College, spends a great deal of time showing how the English courts have chipped away at this view. To his mind, my intuitions on the question of whether we should criminalise HIV transmission or whether we should criminalise subjecting someone recklessly to the risk of HIV infection do not withstand a more thorough critical analysis (Hare, 1981). Weait aims to demonstrate that 'the negative social impact of criminalisation . . . has the potential to outweigh any social benefits it might achieve' (Weait, 2007, p. 206). Furthermore, and to my mind mistakenly so, he believes that we should not accept a legal system that considers an HIV infection as 'in and of itself harmful – and, by implication, that those people who are HIV positive are somehow "damaged", "abnormal" and "lacking" – [he argues that if we treated an HIV infection as such] we risk reinforcing the stigma, shame and prejudice that those who are infected may feel and experience' (p. 112). It is implausible to interpret an infected person as 'abnormal',[2] 'damaged' or 'lacking'. Weait uses mention quotes as opposed to citation quotes, so it is unclear whether the interpretations he attacks actually exist, or, if they indeed exist, whether these are views held, for example, by fanatic religious fringe groups only.[3] It is perfectly reasonable to interpret an HIV infection as intrinsically harmful. At a minimum it means the infection with a delayed-onset serious chronic illness that currently results into, all other things being equal, an excess number of deaths among those infected (Bhaskaran *et al.*, 2008). If the underlying cause of these excess deaths is not 'in and of itself harmful', what would be?

Weait's line of reasoning is very much in sync with that of many of the larger NGOs working in the field, including the Canadian HIV/AIDS Legal Network and the Terrence Higgins Trust in the UK (Canadian HIV/AIDS Legal Network, 2008). However, there is no AIDS activist policy consensus on this issue. For instance, the Australian Federation of AIDS Organisations, the country's peak AIDS NGO, holds the view that 'criminal prosecution may be appropriate in situations where a person deliberately misrepresents their serostatus and/or deliberately or recklessly exposes others to the risk of HIV transmission' (AFAO, 2007). A middle ground is held by the Deutsche AIDS Hilfe (DAH), an umbrella organisation of German AIDS organisations. The DAH is opposed to the deployment of the criminal law (Strafrecht) as a means of HIV prevention; it seems, therefore, to reject the public health argument. The organisation is also opposed to burdening exclusively the infected person with the responsibility for HIV transmission prevention. However, it also considers that in some circumstances HIV transmission should reasonably be held to be of a criminal kind, for instance in cases of deliberate deception of the previously uninfected person by the infected person (DAH, 2008). The crux of the problem is, of course, whether such an eminently sensible policy position can be operationalised for regulatory purposes. How would one *ever* be able to prove one way or another that a deception or disclosure did or did not take place (Syms, 2008)?

Joel Feinberg has proposed a sensible rule of thumb when investigating questions such as the one at hand: 'It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) *and* there is probably no other means equally effective at no greater cost to other values' (Feinberg, 1984, p. 26). Using this yardstick then, let us see what arguments Weait marshals against the criminalisation of HIV transmission.

2 Abnormal simply means a deviation from a statistical average. In that sense one could reasonably describe the infected person as abnormal, because the infection constitutes a deviation from the average, but surely this is not what Weait has in mind; rather he is concerned about a normative judgment identifying infected people as abnormal (as in undesirable). For an illuminating discussion of this see Schüklenk, Stein, Kerin and Byne (1997).

3 Weait provides no references for his assertion that HIV infected people are considered 'damaged', 'abnormal' and 'lacking' by anyone.

https://doi.org/10.1017/S1744552308003042 Published online by Cambridge University Press

2. The Case Against Criminalising HIV Transmission

Much of this book is based on an analysis of some of the fourteen individuals who have been prosecuted in Britain to May 2007. However, most space is dedicated to a detailed chronology of the court case that led to Feston Konzani, a 28-year-old Malawian asylum seeker, being successfully prosecuted for the unlawful and malicious infliction of serious bodily harm against a woman by means of reckless transmission of HIV. Mr Konzani, knowing about his infection, chose to have unsafe sexual relations with various women in the UK, some of whom eventually seroconverted, among them a woman who met him as a 15-year-old teenager. At no time did Mr Konzani disclose his STI to any of his sexual partners. To some extent this case was about the question of whether someone could reasonably be claimed to have given voluntary informed consent to the risk of HIV infection if the infected person has not disclosed their status.

2.1 The Argument from Forensic Science

This case provides Weait with sufficient ammunition to make his first argument against the criminalisation of HIV transmission. He evaluates the current scientific state of the art and demonstrates, convincingly to my mind, that it is for all intents and purposes virtually impossible to prove that HIV infected person *A* during unsafe sex with HIV infected person *B* was the cause of *A*'s infection. *A* could well have been infected a long time ago by another sex partner; quite conceivably, *A* might have been the cause of *B*'s infection. The state of forensic science, relying on phylogenetic analysis, at the time of writing, is such that we are unable to demonstrate incontrovertibly that *B* was the cause of *A*'s infection (Pillay, Rambaut, Geretti and Brown, 2007). Despite this, 'all those sentenced and imprisoned in England and Wales for having infected their sexual partners with HIV have been convicted under s 20 of the Offences Against the Person Act 1861' (p. 115). For that, the prosecution 'must prove that the defendant did in fact cause serious bodily harm to another person and that, at the relevant time, he was aware of the risk of causing some degree of bodily harm' (p. 115). Weait is rightly pointing out that scientifically the proof of causal responsibility is impossible at this point in time in most cases. This argument is contingent on particular circumstances of forensic science's capabilities that are bound to change over time, hence it does not amount to an in-principle argument against the criminalisation of HIV transmission. What it does suggest, however, is that convictions based on current phylogenetic analyses amount to miscarriages of justice.[4] One way around this problem, used in numerous jurisdictions around the world, is to punish knowingly subjecting someone to the risk of HIV infection.

2.2 The Argument from Risk and Recklessness

Weait's next argument is somewhat hidden in a lengthy section on risk, recklessness and HIV. We hear a lot about the risk society, and are taken on a postmodern journey including various excursions on women, ethnicity and homosexuality. Certain groups of people are considered to be risky or reckless in the context of HIV transmission and so are more likely targets for the criminal justice system. Weait has an unfortunate habit in this section of making sweeping generalisations including 'it is unsurprising that it is women's bodies . . . that are – within the discourse that frames the heterosexual HIV pandemic – characterised as the source of infection' (p. 132). The sources of this insight are theoretical texts by Catharine Mackinnon from 1982 (pre-dating AIDS) and by the Australian philosopher Elisabeth Grosz from 1994 (very much the heydays of the heterosexual AIDS hysteria in the Western world). One anecdotal case is deployed to underscore this point. I doubt that it does the work it is supposed to do. The mass media would undoubtedly happily drag *anyone* into the limelight who has infected someone else with a serious illness by means of sex. After all, the ingredients are ideal for any red top; sex and death are known to sell independently of each other, combined they are unbeatable.

4 Thanks to Matthew Weait for pointing this out to me.

https://doi.org/10.1017/S1744552308003042 Published online by Cambridge University Press

Weait goes on in this vein, we learn about the 'Otherness' of Blacks (Africans and Caribbeans) in the UK, and about racist British media reports. Weait criticises the 'racialisation (and, more particularly the "Africanisation" [sic]) of HIV and AIDS' (p. 137). While I am very sympathetic to Weait's concerns about sexism, racism and homophobia, and while I have no reason to doubt his claims about racism in the British mass media, I am tempted to suggest he might wish to consider another look at the epidemiological data coming out of Southern African and Caribbean nations, and the disproportionate contributions men coming from such backgrounds make to the pandemic's continuing success in developing countries as well as developed countries. It is difficult to avoid the conclusion that the virus is fairly efficiently transmitted by many African and Caribbean men. Not coincidentally, and frequently not voluntarily, women are more often than not at the receiving end of this behaviour.

Weait's excursus on AIDS and gay men pretty much represents the state of discussions in the late 1980s to mid 1990s. Among other valuable lessons in the history of AIDS we are being reminded that initially AIDS was called GRID (or Gay Related Immune Deficiency). While it is probably true that at the time homophobia drove much of the media's, and probably less so the regulatory, response to AIDS, I doubt that that remains true today.

So, while these lengthy excursions do not add a great deal to the argument on risk, Weait's analysis itself is worthy of serious consideration. He suggests that the criminalisation of HIV transmission is an attempt by the criminal justice system to manage and control risk within a broadly liberal framework that is aimed at protecting the citizen's body's integrity. The idea of recklessness plays an important role in the prosecution of some HIV infected people in Britain (pp. 28ff.). Weait explains that English law defines someone as reckless, with regard to a particular consequence, if the defendant 'was aware of the risk of that consequence occurring, and . . . [if] the risk-taking conduct was unjustified in the circumstances' (p. 117). It is evident, given these criteria, that there is no objective fact of the matter, rather whether or not someone acts recklessly, in the eyes of a jury, is a subjective decision formed among the members of the jury in a given trial.

Weait offers a sensible analysis of the consequences of such an understanding of recklessness in the context of his argument about the role of the criminal justice system in a post-enlightenment, post-modern society. Juries tasked with determining whether a defendant has acted recklessly need to evaluate the reasonableness of such a person's actions. Is it then reckless if a gay man transmits HIV in a sauna setting, even though he used a condom during sexual intercourse (assume it broke or slipped off)? Any juror's judgment on this issue will be coloured by media representations of the defendant. As Weait points out, 'because people living with HIV have been demonised and marginalised, because they represent the paradigm Other, because they exist both as representatives of a "dangerous class" [sic] and as discrete individuals with whom intimate relationships can be formed, . . . it will be all but impossible for them to avoid the accusation (or the verdict) that an incident of onward transmission was *their* [sic] responsibility and no other's' (p. 164). This in turn would prevent a fair treatment of the defendant in question. It would also unjustly place the burden of protection entirely on the shoulders of the HIV infected individual, a person already likely to be marginalised in society for the reasons Weait has outlined. Weait's suspicions of the criminal justice system are probably not unjustified, when he notes that it is 'at the very least unsurprising that the first transmission cases in the UK were brought against, respectively, a convicted drug user, three black African male migrants, a Portuguese immigrant heroin addict, a white man who infected a woman in her eighties, a gay man and two heterosexual women, one of whom had a history of sexual relationships with Afro-Caribbean men' (p. 146).

2.3 The Argument from Consent, Knowledge and Disclosure

Many AIDS NGOs as well as public health experts have argued that it does not make much sense to burden the infected person *alone* with the responsibility for not transmitting the virus to their sexual partner(s). After all, the person who became infected could well have voluntarily given first person

https://doi.org/10.1017/S1744552308003042 Published online by Cambridge University Press

informed consent to the infection risk as opposed to the infection itself, in which case the transmission would have been a fairly straightforward case of harm to self. Any defendant would have to be acquitted of criminal charges. Much depends, in other words, on the question of whether a defendant can reasonably claim that the claimant consented to the risk of HIV transmission. A corollary of this is another question, namely whether the person was reasonably knowledgeable of the risk she ran by having unprotected sexual intercourse with the defendant, and indeed whether or not the infected person had disclosed material information about his HIV status to their sexual partner. It is worth keeping in mind that the words we use to describe what is happening in this context are far from neutral. Consider whether an infection is *actively passed on* (this surely is implied when we say that the virus was transmitted by someone) by the infected person or *actively acquired by* the initially uninfected person. Does the nature of this act change subject to whether consent was given, knowledge existed and disclosure was provided?

Weait points out that in two major legal cases (*Dica*[5] and *Konzani*[6]) the defendants argued that the complainants were voluntarily engaging in unsafe sex with them, which formed the basis for their mistaken belief that the complainants consented to the risk of HIV acquisition. It seems to be the case that the English courts permit consent-based defences against criminal charges in the context of HIV transmission. The obvious problem is: whom should the jury believe? The defendant who argues that his sexual partner voluntarily accepted the risk of HIV acquisition or the complainant who insists that she was not informed about the risk, and had she known she would not have taken it. Invariably there will be two different accounts of the same event, and there is no way to establish the facts of the matter, because the consent giving took place in private between two competent adults. The Court of Appeal in the *Konzani* case held essentially that 'those who do not willingly consent to the risk, but who willingly choose to *run* [sic] the risk, are not to be held responsible for the consequences of doing so' (p. 180). However, it also held that for consent to exist, and to be meaningful, it required the HIV infected person to disclose the infection to his sexual partners. In the Court's words: 'She cannot give an informed consent to something of which she is ignorant' (p. 181). Weait is highly critical of this view, because to his mind it is possible for someone to give meaningful consent to an infection risk without that disclosure. For instance, one of the women in the *Konzani* case conceded that she was aware of the fact that the prevalence of HIV is significantly higher among heterosexual African men when compared to heterosexual Caucasian men. Weait rightly questions why we should assume that her consent to have sexual relations with Mr Konzani was uninformed with regard to the risk of HIV infection.

Weait offers a couple of other reasons aimed at weakening the strength of the duty-to-disclose standard, including that there is no 'necessary correlation between disclosure to a partner and subsequent safer sex with that partner' (p. 188), that HIV infected people might think that others should protect themselves, or that it might be inappropriate in some circumstances to talk about one's infection, and of course the fear of rejection. None of these reasons strikes me as particularly convincing. The issue surely is not whether there is a logical (i.e. 'necessary') connection between disclosure and risk avoidance, but whether such information in many cases would have the desired impact, namely safer sex (or no sex at all). There can be no doubt that disclosure would increase the number of people opting for protective measures of some kind or other. From a public health point of view it is unhelpful to ask the question of whether that would necessarily (i.e. in all cases) be so. It would not always be so, but that surely isn't the point of requiring disclosure. Equally, one could agree that the sexual partners of HIV infected people have a duty to protect themselves and still believe that they are entitled to make informed choices based on disclosure. Perhaps to enable them to protect themselves

5 *R v. Dica* [2004] 2 Cr App R 28.

6 *R v. Konzani* [2005] 2 Cr App R 198.

https://doi.org/10.1017/S1744552308003042 Published online by Cambridge University Press

even better, perhaps in order to enable them to make an informed choice. Respect for them as individuals requires us to provide information that could reasonably be held to be material to their decision-making. The arguments from embarrassment and/or fear of rejection are, while one empathises with such individuals, not persuasive either. It is doubtful that a moral argument in favour of non-disclosure could be based on the fact that many infected people just would not feel too good about having to disclose. It might be unpleasant and frustrating for an HIV infected person to discover that people she would like to have sexual intercourse with reject her advances once they know about her STI, but no doubt people are very much entitled to make such choices.

Weait has chosen Immanuel Kant as his philosophical punching bag. He believes that the argument in favour of disclosure is built on the Categorical Imperative never to use other people as means to one's own ends (pp. 190f., 201). Weait is mistaken here. Kant's formula demands that we treat other people never *merely* as means to our ends but always *also* as ends in themselves (Kant, 1964, p. 96). This cannot be applied straightforwardly to our problem scenario. If two people agree to have unsafe sex with each other and they do so knowingly and voluntarily, each is making his partner's objectives his own objectives, and so both cease to be *mere* means. The HIV issue simply does not enter into the equation here since it is immaterial to the means–ends construct altogether. A sexual partner would have been merely a means to an infected person's end if that person's objective (his deliberate, considered intent) would have been to use that unsuspecting person in order to transmit HIV. This is not what usually drives infected people to have unsafe sex. Kant's other formula requires that we should act always in such a way that we can also will that the maxim guiding me becomes a universal law (Kant, 1964, p. 70). As it is, HIV infected people could hold consistently that their non-disclosure behaviour should become the societal rule, and that the duty to protect (themselves) falls onto each person him- or herself. No conflict with Kant there either.

Weait is concerned that this move by the Court of Appeal would have negative consequences in public health terms, because it might well lull people into a false sense of security (i.e. 'my sex partner hasn't disclosed that he is HIV infected; and that is what the law requires of him if he is infected, so I can safely have unsafe sex with him') (p. 182). This argument strikes me as important, because it speaks directly to Feinberg's public interest based criterion. If there is a significant probability that the criminalisation of HIV transmission could translate into an increase in the number of infections, the criminalisation of HIV transmission would be counterproductive. Whether or not that is the case we do not know. It is probably fair to say that the deterrence effect of the criminal law *usually* works, or else it would not exist. It is unfortunate that we do not have strong empirical evidence one way or another in order to settle this question, but we do have a strong prima facie reason to deploy the criminal law in this context. Weait is also at his weakest here as his empirical evidence consists of anecdotal cases as opposed to epidemiological data. It is perhaps not insignificant, however, that only *very few cases* have been prosecuted in the UK, Canada, Australia and other countries. This suggests to me that in most cases people who *acquired* HIV accepted responsibility for their actions and did not seek some legal kind of recourse. Possibly the small number of cases that exist today *are* a true representation of cases where the virus was indeed unethically *transmitted* to unsuspecting, uninformed sexual partners.

2.4 The Argument from Responsibility

In order to be held legitimately responsible for one's actions, in a liberal society, one needs to have acted autonomously (i.e. competently and voluntarily). Weait seems to question this cornerstone of liberal approaches to justice by means of deploying well-known feminist critiques of the very idea that there could be such a thing as the paradigmatic autonomous individual liberal that legal scholars have created. These critiques are well-known and reincarnate in surprising contexts from Amitai Etzioni's communitarianism to the *Ubuntu* chants of African philosophers and much of recent virtue ethics' theorising (e.g. Etzioni, 2006). Essentially the arguments converge around the

https://doi.org/10.1017/S1744552308003042 Published online by Cambridge University Press

claim that individuals are not what they are made out to be by liberal theoreticians. The charge is that for a liberal justice system to succeed we need to disconnect the individual from his lived experiences – or as Weait puts it (p. 204):

> 'those premises deny – or at the very least marginalise – the relevance of my gender (male), my class (middle), my sexuality (gay), my colour (white), my ethnicity (Caucasian), and my political status (British citizen). They ignore – or at the very least marginalise – the relevance of time in which I am living, my biography, my relationships, my character, and my political and spiritual beliefs. They are premises which assume that the individual human being is the locus – or at the very least the starting point – of an inquiry, but demand a prior distillation of homeopathic intensity.'

The question remains: even if we accepted the arguably powerful criticisms of standard liberal approaches to personhood, why would this translate into a persuasive argument in favour of the decriminalisation of HIV transmission in circumstances of recklessness?[7] An individual's ethnicity, sex, upbringing, etc. have a bearing on his conduct in this context, but unless Weait implies that these forces are sufficiently powerful to render a person's conduct non-autonomous, all he is really saying that these things influence us in our behaviours. The stark choice here then seems to be to ascribe responsibility to competent adults for their conduct, or to declare them incompetent. I don't think the latter move is justifiable.

3. Salus Populi Suprema Lex Esto

Weait's contribution to this debate is important. The analysis he provides in *Intimacy and Responsibility* is valuable in the ongoing discussions about the criminalisation of HIV transmission as a useful tool in terms of public health objectives. Alas, I am not convinced. If Weait's first argument is factually correct, arguably we need a moratorium on the sentencing of people prosecuted on the grounds of reckless transmission of HIV. If causality cannot be proven beyond reasonable doubt, convictions are currently lacking a scientific foundation. However, this is not an in-principle reason against criminalising HIV transmission but at best a call for refinement of the forensic science underlying the evidence provided in court proceedings.

The types of cases that have been prosecuted in most Western countries so far suggest that in the overwhelming number of cases sexual partners who seroconverted after unsafe sex with an infected person have not aimed to see their sex partner punished. They accepted responsibility for their failure to insist on safer sex, and so the *volenti* principle seems to have won the proverbial day. However, among the few cases that have been prosecuted, it is worth acknowledging that previously uninfected people have been harmed by partners who acted in one way or another unethically. I remain troubled by many of Weait's arguments in this context. I accept that it might be difficult for many infected people to advise their sexual partners of their infection. It is tremendously difficult, and in some contexts it might even lead to violence against the infected person. Cultural, religious and any number of other reasons may limit an infected person's capacity to tell her sexual partners, but at the same time, there can be no doubt that an infection with HIV constitutes very significant harm (both to self and to others). Even if we accept that AIDS these days is a chronic, manageable illness for most people living in the developed world, and that the days of excess deaths among HIV infected people are soon to be numbered, it will still remain a disease that severely impacts negatively on an infected person's quality of life. Unless we wish to declare HIV infected people incompetent due to the societal pressures many are arguably facing, we should hold them

7 For example, a 28-year-old man who knows himself to be HIV infected and insists on not using condoms with his 15-year-old girlfriend does seem to be a paradigmatic case of someone who is reckless – incidentally this view is unrelated to the colour of his skin, or his 'Otherness'!

https://doi.org/10.1017/S1744552308003042 Published online by Cambridge University Press

accountable for their harmful actions. Treating HIV infected people first and foremost as persons, and treating HIV no different to how we treat the transmission of other life-threatening infectious illnesses, are important steps towards normalising AIDS. The degree of an individual's culpability and the recognition of their individual circumstances should reasonably be reflected in their sentence rather than the conviction.[8]

Weait, as well as various major AIDS NGOs, makes the claim that the criminalisation of HIV transmission is likely counterproductive in public health terms. The evidence in support of this contention remains elusive. There is an interesting question buried in this: Who has to prove their case, the state that criminalises HIV transmission or those opposed to such measures? It seems to me that it is the opponents of criminalisation who have to prove their case. The reason for this is that the criminal law's deterrence effect has been demonstrated time and again. It is arguably the main reason for criminal justice systems to exist in liberal societies. If an argument is made that in a specific context (e.g. where sex is involved) the deterrence effect does not work, empirical evidence must be provided.

Weait is justifiably concerned about all sorts of biases against the groups of people seen to be 'Other' by mainstream society. I cannot see how any of this constitutes a sound reason against the criminalisation of HIV transmission. Surely one would have to ensure that people with such biases do not populate jury benches, but that is where that argument ends. Even though I am very sympathetic to the concerns that drive many of Weait's arguments, I cannot see that he made a convincing in-principle case for a policy shift toward the decriminalisation of HIV transmission.

References

AFAO (2007) *Position Paper: Criminal Prosecution of HIV Transmission*. Newtown: AFAO, 28 March 2007, p. 3.

BHASKARAN, K., HAMOUDAH, O., SANNES, M., BOUFASSA, F., JOHNSON, A. M., LAMBERT, P. C. and PORTER, K. (2008) 'Changes in the Risk of Death After HIV Seroconversion Compared with Mortality in the General Population', *Journal of the American Medical Association* 300(1): 51–59.

CANADIAN HIV/AIDS LEGAL NETWORK (2008) *Criminal Law* www.aidslaw.ca/EN/issues/criminal_law.htm [last accessed 2 July 2008].

DEUTSCHE AIDS HILFE (DAH) (2008) Personal communication Dr Karl Lemmen, 8 July 2008.

ETZIONI, A. (2006) 'HIV Sufferers Have a Responsibility' in W. Parmet and P. Illingworth (eds) *Ethical Health Care*. Upper Saddle River, NJ: Pearson Prentice Hall, 234–244.

FEINBERG, J. (1984) *The Moral Limits of the Criminal Law: Harm to Others*. New York: Oxford University Press.

HARE, R. M. (1981) *Moral Thinking: Its Level, Methods and Point*. Oxford: Oxford University Press.

KANT, I. (1964) *Groundwork of the Metaphysics of Morals*. New York: Harper and Row.

PILLAY, D., RAMBAUT, A., GERETTI, A. M. and BROWN, A. J. L. (2007) 'HIV phylogenetics', *British Medical Journal* 335: 460–461.

SCHÜKLENK, U. (2003) 'Unsafe sex isn't rape', *Business Day* (RSA) 23 January 2003.

SCHÜKLENK, U. (2009, in press) 'AIDS', in H. Kuhse and P. Singer (eds) *Companion to Bioethics (2nd edition)*. Oxford: Wiley-Blackwell.

SCHÜKLENK, U., STEIN, E., KERIN, J. and BYNE, W. (1997) 'The Ethics of Genetic Research on Sexual Orientation', *Hastings Center Report* 27(4): 6–13.

SYMS, S. (2008) 'Criminalizing HIV May Only Fuel the Epidemic', *Xtra.ca* 17 July 2008. www.xtra.ca/public/viewstory.aspx?AFF_TYPE=1 & STORY_ID=5153 & PUB_TEMPLATE_ID=7 [last accessed 18 July 2008].

8 I owe this insight to Jim Gallagher.

https://doi.org/10.1017/S1744552308003042 Published online by Cambridge University Press