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978-1-107-09182-5 - Criminalising Contagion: Legal and Ethical Challenges of Disease  
Transmission and the Criminal Law

Edited by Catherine Stanton and Hannah Quirk

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## CRIMINALISING CONTAGION

The use of the criminal law to punish those who transmit disease is a topical and controversial issue. To date, the law (and the related academic literature) has largely focused on HIV transmission. With contributions from leading practitioners and international scholars from a variety of disciplines, this book explores the broader question of if and when it is appropriate to criminalise the transmission of contagion. The scope and application of the laws in jurisdictions such as Canada, England and Wales, and Norway are considered; historical comparisons are examined; and options for the further development of the law are proposed.

CATHERINE STANTON is Lecturer in Law at the University of Manchester.

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## CAMBRIDGE BIOETHICS AND LAW

This series of books was founded by Cambridge University Press with Alexander McCall Smith as its first editor in 2003. It focuses on the law's complex and troubled relationship with medicine across both the developed and the developing worlds. Since the early 1990s, we have seen in many countries increasing resort to the courts by dissatisfied patients and a growing use of the courts to attempt to resolve intractable ethical dilemmas. At the same time, legislatures across the world have struggled to address the questions posed by both the successes and the failures of modern medicine, while international organisations such as the WHO and UNESCO now regularly address issues of medical law.

It follows that we would expect ethical and policy questions to be integral to the analysis of the legal issues discussed in this series. The series responds to the high profile of medical law in universities, in legal and medical practice, as well as in public and political affairs. We seek to reflect the evidence that many major health-related policy debates in the United Kingdom, Europe, and the international community involve a strong medical law dimension. With that in mind, we seek to address how legal analysis might have a trans-jurisdictional and international relevance. Organ retention, embryonic stem cell research, physician-assisted suicide, and the allocation of resources to fund healthcare are but a few examples among many. The emphasis of this series is thus on matters of public concern and/or practical significance. We look for books that could make a difference to the development of medical law and enhance the role of medico-legal debate in policy circles. That is not to say that we lack interest in the important theoretical dimensions of the subject, but we aim to ensure that theoretical debate is grounded in the realities of how the law does and should interact with medicine and healthcare.

*Series Editors*Professor Margaret Brazier, *University of Manchester*Professor Graeme Laurie, *University of Edinburgh*Professor Richard Ashcroft, *Queen Mary, University of London*Professor Eric M. Meslin, *Indiana University**Books in the series*Marcus Radetzki, Marian Radetzki, Niklas Juth  
*Genes and Insurance: Ethical, Legal and Economic Issues*Ruth Macklin  
*Double Standards in Medical Research in Developing Countries**(continued after Index)*

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For Margot  
and  
In Memory of T. E. Yates

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## FOREWORD

MARGARET BRAZIER AND LAWRENCE O. GOSTIN

Not so very long ago, when the authors of this Foreword were young lawyers, the notion of a book on criminal liability and disease transmission would have been close to risible for two reasons. First, in the richer and developed parts of the world, scientists were claiming that we had all but conquered deadly threats of contagious diseases. Vaccinations, better public health measures, and above all the magical anti-microbial medications had reduced contagious diseases to little more than inconveniences. (This idea turned out to be badly flawed, as the world has continued to experience successive threats of novel infections, most recently the Ebola virus.) Second, even if a wiser medically qualified friend had pointed out to us the hubris of any view that humankind had defeated all the viruses and bacteria that share our planet, we would have given short shrift to any suggestion that infected individuals should be subject to criminal penalties for risking transmission of the infection to others. How wrong we were.

In 2016 it is all too clear that contagious diseases never went away and continue to ravage much of the world, particularly affecting lower-income countries in sub-Saharan Africa, Asia, and Latin America. Little has been done to research vaccines and treatments for endemic diseases (such as malaria, tuberculosis, and yellow fever) or emerging threats such as novel influenzas, corona viruses (e.g., SARS and the currently circulating Middle East Respiratory Disease), and haemorrhagic fevers (such as Ebola virus). In the fortunate West, which could afford potentially expensive medical interventions, for several decades killer diseases such as septicæmia, and once-fatal scarlet fever responded to antibiotics whilst the viral killers such as polio and influenza were combated with vaccinations and anti-viral drugs. Now, travel and the mass movement of people bring the killer diseases of the developing world to the doorsteps of Europe and North America. Our profligate use of antibiotics has led the Chief Medical Officer of England to warn that all too soon antibiotic resistance will render many infectious diseases untreatable – a view shared by the World Health Organization. The emergence of antibiotic-resistant

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staphylococcal infections means that a septic scratch may kill again and routine surgery will become more dangerous. Too many viruses as yet do not respond to vaccination, and at the same time growing numbers of people reject vaccination for themselves and their children. Diseases are dangerous.

Protecting citizens from danger is one of the functions of the criminal law. Prohibitions preventing the editors of this work taking out their anger at our delay in producing this Foreword by punching us in the nose are central to criminal laws dealing with offences against the person. So, given what we have said about the resurgent danger of infectious disease, maybe it is no more than common sense to say that if the weapon is disease, rather than a fist, that should not matter too much. If we know we have a virulent strain of influenza and still go to visit our frail Aunt Doris, then embrace her, and thus fatally infect her, is our gross negligence any less culpable than if we had shoved past her on the stairs and knocked her down, as a result of which she died of her injuries? As the chapters in this book demonstrate, the relationship between criminal law and contagion is much more complex than our simple example suggests, and the imposition of criminal sanctions can drive epidemics underground, actually increasing the threat to wider populations.

Until repealed in 2010, public health legislation in the United Kingdom included a criminal sanction where the accused exposed another to a notifiable disease in a public place. That sanction to our knowledge was little used, if at all, in modern times. The trigger for resort to the criminal law to combat contagion was the emergence of the HIV pandemic and the international moral panic to which the pandemic gave rise. Across the world, prosecutions were brought against people who it was alleged had intentionally or recklessly infected another, usually a lover, with HIV. Worse yet, many criminal laws penalized behaviour risking transmission, even if the partner or contact never became infected.

The contributors to this work offer a number of different accounts and perspectives on the role of the criminal process in relation both to HIV and other infections more broadly. The very nature of the HIV pandemic, however, has distorted fundamental conceptions of risk behaviours and the law. In its early years, representations of individuals living with HIV/AIDS as dangerous and irresponsible, and sent to wreak vengeance on humankind inspired fear and horror. Misunderstandings of HIV/AIDS led many to think that it could be spread with the ease of the common cold: by a handshake or a kiss or even by using the same toilet seat. The initial presence of HIV among the gay community, and among people from,

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or who had had sexual relations with people from, a number of African countries created racial and sexual stereotypes. Above all, the fact that HIV was a sexually transmitted disease resulted in the stigmatisation of those who contracted and carried this virus. People living with HIV were seen as dangerous. The gradual realisation by the public and the media that HIV could be contracted by means other than sexual intercourse (e.g., from childbirth, contaminated blood products, contaminated drug injection equipment, or even in the course of certain kinds of surgery) did little to diminish the perception that many people living with HIV/AIDS were somehow blameworthy. The stereotypes led to two distinct visions of persons living with HIV/AIDS: the 'guilty', who contracted HIV from sex or by sharing drug injection equipment, and the 'innocent' who were infected by say Factor 8, as part of treatment for haemophilia or through perinatal transmission.

Against this background, as the chapters in this book show, the criminal process intruded on disease prevention and control. The book contains diverse views and marries theoretical analysis with practical critique. The authors challenge understandings of criminal law's norms and process, as well as the motivations behind the stances of those who applaud the role of the criminal law and those who decry it. In examining the work as whole, the questions raised take us well beyond the starting point for this insightful work, leading us to reflect on the emphasis on individual responsibility rather than on governmental duty. It forces us to ponder whether solutions are merely a matter of national sovereignty, or whether there should be a global norm against the criminalisation of individuals who risk transmission of infection – as UNAIDS powerfully urges. Criminalising a person living with HIV/AIDS or the frightened family concealing a sick relative with Ebola remains deeply controversial. Even in cases where the individual acts with malice, the mere fact that society resorts to the criminal law draws attention away from the responsibility of governments and all-of-society, especially the most powerful. Following the tragic cases of those infected with HIV after receiving medical treatment with infected blood products, in the United Kingdom, a brief investigation by the Crown Prosecution Service resulted in no criminal proceedings. In France, senior doctors and managers were held criminally responsible for the delays and cover-ups that resulted in more people being infected by HIV-contaminated blood products, but their political masters were for the most part exonerated. The resort to the criminal process in France does not seem to have prevented other similar scandals.

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Individuals bear responsibility for actions that endanger others. Individuals equally bear responsibility to protect their own health, and thus, as we shall see in the context of the chapters on HIV transmission, the question is not only whether X should have acted to protect Y, but also what should Y have done to protect herself? Again, UNAIDS counsels everyone to protect themselves against sexual transmission or sharing injection equipment. In an inter-connected world, health is the responsibility not only of governments primarily but also of national and international organisations. Should one be tempted to blame the family who fails to report their fears that a child has Ebola, one first needs to reflect on how well the local, national, and global community will care for the child and family? Will the child be treated insofar as treatment is accessible? Will the family be protected or driven out of their community? The questions are not that different from those which have plagued the debate on HIV transmission. If X agrees to be tested, if X discloses his sero-positive status to those who need to know, will his privacy be safeguarded and will his job be safe? If X is in treatment with a negligible viral load or if X wears a condom, is there any role for the criminal law?

The public health community often thinks of disease prevention and control as primarily, if not solely, a scientific concern. We must also consider if there is a role for law, particularly criminal law, and, if so, in what limited circumstances? The role of the criminal law in public health at one time was unthinkable. Today, it is a matter of major national and global importance.