

**18. K.J.M.Smith, Sexual Etiquette, Public Interest and the Criminal Law, 42(4) Northern Ireland Legal Quarterly 309, 1991.**

This article examines the potential and desirable role which the criminal law, both in its existing and possibly reformed state, might play in controlling the sexual transmission of the AIDS virus.

**Existing Offences Criminalising the Sexual Transmission of Disease**

The only existing forms of liability that seek directly to criminalise certain risky conduct in order to prevent the transmission of disease are those relating to contagious diseases and quarantine regulations set out in public health legislation. Beyond these specifically targeted regulatory provisions is a diverse collection of crimes where, although preventing the transmission of disease is not a central objective, each offence arguably carries such a potential use. More particularly, these offences include some forms of assault, endangering life or injuring another by administering a "destructive or....noxious thing", obtaining sexual intercourse by deception, and the rather more remote possibilities of rape and attempted murder. For some of these offences the informed consent of the victim or endangered party to run the risk of infection may have a bearing on liability.

**Public Interest, Prosecutorial Policy and Criminal Sanctions**

Looking back over the range of criminal liability which might attach to sexual contact where one partner puts at risk or infects the other with a sexually transmittable disease, it is apparent that the English law's attitude is at most ambivalent. Until the last decade, the only likely basis of any prosecution would have been the contacting of venereal disease. For reasons which are necessarily largely speculative, reported cases where such prosecutions have been pursued are almost non-existent. This state of affairs can probably be attributed to the running together of three factors : unclear substantive law, unenthusiastic prosecutorial policy and apparent public indifference.

As for the substantive law, the least unnatural route to criminalising transmitting disease has been some form of aggravated assault. Endangering life or injuring another by administering a destructive or noxious thing may well, as suggested, provide prosecution vehicle, but the strained or awkward use entailed makes it an unrealistic proposition for any but the most desperate or vindictive of prosecutors. To a lesser extent this is true of using procuring sexual intercourse by false pretences.

**Health Regulations and Criminal Penalties**

Public health offences occupy, in some senses, the territory between full (or recognised) criminal status and civil proceedings. The use of these regulations to contain or eliminate contagious or infectious diseases has a long and, generally, highly respectable pedigree. It has been strenuously argued by some commentators, that regulation of sexual conduct to limit AIDS virus transmission, if carried out, ought to be through the mechanism and under the guise of public health provisions rather than by enlisting the criminal law.

The potential for the fostering and shaping of new attitudes which, it has been argued, the criminalising of endangering behaviour could assist in producing, would be lost or greatly reduced if public health regulations rather than the criminal law were used to this end. The criminal law is the most visible and unequivocal statement of the social rejection of certain forms of behaviour : this important function cannot be realistically performed by public health regulations.