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# The Boundaries of the Criminal Law: The Criminalization of the Non-Disclosure of HIV

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*In this paper, the author examines the trend toward the increased criminalization and punishment of persons with HIV who fail to inform their sexual partners of their HIV-positive status. Since the Supreme Court of Canada's decision in R. v. Cuerrier, such behaviour may constitute aggravated assault or aggravated sexual assault, the latter offence carrying a maximum sentence of life imprisonment. The paper surveys the Canadian case law and highlights the trend towards the imposition of increasingly harsh sentences.*

*After reviewing public-health and criminal law options for dealing with non-disclosure of one's HIV status, the author concludes that criminal law should only be invoked in the most serious circumstances and only where all other public health measures have been exhausted. Criminal law should be reserved for individuals who demonstrate a pattern of non-disclosure either over time or with different sexual partners. The author also explores the social and legal reasons behind the apparent contradiction that, despite the improved prognosis for persons with HIV, sentences for those who knowingly transmit the virus have become increasingly severe.*

*L'auteure de cet article examine la tendance à la criminalisation accrue et à l'imposition de sanctions plus sévères pour les personnes porteuses du VIH qui n'informent pas leurs partenaires sexuels de leur séropositivité. Depuis l'arrêt R. v. Cuerrier de la Cour suprême du Canada, un tel comportement peut constituer des voies de fait graves ou une agression sexuelle grave, cette dernière infraction étant passible d'une peine maximale d'emprisonnement à perpétuité. L'article passe en revue la jurisprudence canadienne et fait ressortir la tendance à l'imposition de sanctions de plus en plus sévères.*

*Après avoir examiné les aspects qui touchent la santé publique et les possibilités offertes par le droit pénal face à la non-divulgateion par quiconque de sa séropositivité, l'auteure arrive à la conclusion que des poursuites en droit pénal ne doivent être entreprises que dans les situations les plus graves et uniquement lorsque toutes les autres mesures en santé publique ont été épuisées. Le recours au droit pénal devrait être réservé aux individus qui omettent à répétition de révéler leur séropositivité au fil du temps ou avec différents partenaires sexuels. L'auteure examine en outre les motifs d'ordre social et juridique qui sous-tendent l'apparente contradiction entre le fait que malgré le pronostic de plus en plus favorable pour les personnes séropositives, les sentences imposées à ceux qui transmettent sciemment le virus sont de plus en plus sévères.*

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*Introduction*

Over the past two decades, the social construction of HIV/AIDS has gradually shifted away from a scourge that affects only gay men and IV drug users towards recognition that HIV/AIDS is an illness to which we are all susceptible. HIV/AIDS has defied attempts to draw lines on the basis of gender or sexual orientation. This is not to say that the illness has hit every community equally. In Canada, gay men and IV drug users are

still the most likely to be suffering from HIV/AIDS. However, the gap is narrowing.<sup>1</sup>

Despite this evolving construction of the illness, the criminal justice system has taken an increasingly harsh view of those who do not disclose their HIV-positive status to their sexual partners. In 1989, in one of the first criminal cases involving non-disclosure, Gordon Summer was convicted of one count of common nuisance and sentenced to one year of imprisonment plus probation after having sex with several complainants without disclosing his HIV-positive status.<sup>2</sup> Just over fifteen years later, in 2005, Johnson Aziga of Hamilton, Ontario was charged with two counts of first-degree murder in the deaths of two women from AIDS. Aziga allegedly had unprotected sex with both women without disclosing the fact that he was HIV-positive.<sup>3</sup> It was determined that there was enough evidence to require him to stand trial on these charges.<sup>4</sup> If convicted, Aziga faces mandatory life imprisonment with a twenty-five-year period of parole ineligibility.<sup>5</sup>

In this paper, I trace the journey from the relatively minor offence of common nuisance to murder, our most serious crime, for the same

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1. The state of the HIV/AIDS epidemic in Canada is described by the Public Health Agency of Canada:

[T]he number of heterosexual men and women infected through unsafe sex is also rising. More women are being diagnosed with HIV and AIDS than in the past and now represent an estimated 20 percent of all Canadians infected with HIV. Aboriginal people are also over-represented in the epidemic and are almost three times more likely to be infected by HIV than other Canadians. Other vulnerable groups include prisoners, at risk youth, and people from countries where HIV is endemic.

Public Health Agency of Canada, *The State of HIV/AIDS Epidemic in Canada* (Ottawa: Public Health Agency, 2006), online: Public Health Agency of Canada <[http://www.phac-aspc.gc.ca/media/nr-rp/2006/2006\\_05bk1\\_e.html](http://www.phac-aspc.gc.ca/media/nr-rp/2006/2006_05bk1_e.html)>. See also André Picard, "HIV rate soars among Vancouver's native drug users" *Globe and Mail* (1 February 2008), online: *Globe and Mail* <<http://www.theglobeandmail.com/servlet/story/RTGAM.20080201.waids01/BNSStory/National/home>>. This study revealed that the HIV rate among aboriginal IV drug users in Vancouver was twice as high as that of non-aboriginal IV drug users.

2. *R. v. Summer* (1989), 98 A.R. 191, A.J. No. 784 (Alta. Prov. Ct.) [*Summer*]. Two of the complainants tested positive for HIV.

3. He was also ordered to stand trial on thirteen counts of aggravated sexual assault against thirteen women, seven of whom went on to test HIV-positive. *R. v. Aziga*, [2005] O.J. No. 5983 (Ont. Ct. J.) (QL) [*Aziga*]. After several delays and changes of legal counsel, Aziga's trial began on 20 October 2008. See "Accused HIV Killer Pleads Not Guilty" *Hamilton Spectator* (7 October 2008) online: The Spec <<http://www.thespec.com/News/Local/article/44646>>. See also *R. v. Aziga* (2006), 42 C.R. (6th) 42 (Ont. S. Ct. J.) where dying declarations from the two complainants in the murder case were ruled to be admissible.

4. The basis for the first-degree murder charge was that the murders were planned and deliberate (s. 231(2) of the *Criminal Code*) or took place during aggravated sexual assault (s. 231(5) of the *Criminal Code*).

5. Because he is charged with more than one count of murder, if convicted, he would not be eligible to apply for a reduction in parole ineligibility after fifteen years.

conduct: failing to disclose one's HIV-positive status to one's sexual partner before having unprotected sex. While, unlike in the US, there has been no new targeted offence enacted in Canada for dealing with this type of conduct, courts and Crown prosecutors have taken an increasingly harsh view of such conduct using existing *Criminal Code*<sup>6</sup> provisions. Perhaps most importantly, the Supreme Court of Canada has opened the door to prosecutions through the crimes of aggravated assault and aggravated sexual assault, the latter carrying a maximum life sentence.<sup>7</sup>

The purpose of this paper is to determine whether it is appropriate to use criminal law as a tool for controlling and punishing the failure to disclose one's HIV-positive status to a sexual partner and, if so, how best to ensure that the net of criminal liability is not cast too wide. I undertook this project thinking that criminalization was appropriate in the context of non-disclosure but that murder charges were excessive. As I learned more about the issues, however, I came to recognize that criminalization raises very difficult questions around public health, stigma, race, and social disadvantage. I argue, therefore, that criminalization should only be used as a last resort when all other public health measures have failed to control the sexual behaviour in question.

Whether and how to criminalize the failure to disclose one's HIV status raises questions about the purposes of punishment in a particularly difficult context because of the disadvantage already experienced by persons with HIV/AIDS. The solutions are complicated by the fact that we are dealing with sexual activity where motivations are more difficult to assess. In the majority of these cases, the accused appears to be motivated by the desire to have (unprotected) sex, not by the desire to inflict harm.<sup>8</sup>

### 1. *The nature of HIV/AIDS*

Many of the academic papers referred to in this paper provide detailed descriptions of the scientific basis of HIV/AIDS<sup>9</sup> and thus I only highlight

6. R.S.C. 1985, c. C-46, ss. 268, 273 [Code].

7. Aggravated assault under s. 268 of the Code is punishable by a maximum term of fourteen years imprisonment. Aggravated sexual assault under s. 273 is punishable with a minimum term of four years imprisonment and a maximum life imprisonment.

8. See Harlon L. Dalton, "Criminal Law" in Scott Burris et al., eds., *AIDS Law Today: A New Guide for the Public* (New Haven: Yale University Press, 1993) 242.

9. See e.g. Damian Warburton, "A Critical Review of English Law in Respect of Criminalising Blameworthy Behaviour in Individuals" (2004) 68 J. Crim. L. 55 at 56-7; David P. Niemeier, "The Criminal Transmission of HIV/AIDS: A Critical Examination of Missouri's HIV-Specific Statute" (2001) 45 St. Louis U.L.J. 667 at 671-73; Amy L. McGuire, "AIDS as a Weapon: Criminal Prosecution of HIV Exposure" (1999) 36 Hous. L. Rev. 1787 at 1791-94; Jaclyn S. Hermes, "The Criminal Transmission of HIV: A Proposal to Eliminate Iowa's Statute" (2002) 6 J. Gender Race & Just. 473 at 475-78; Jody B. Gabel, "Liability For 'Knowing' Transmission Of HIV: The Evolution Of A Duty To Disclose" (1994) 21 Fla. St. U.L. Rev. 981 at 983-87.

a few facts which are necessary for the issues discussed hereafter. HIV is a retrovirus that destroys immune cells, particularly CD4+ T lymphocytes, and impairs overall immune response. Transmission of the virus may occur when the bodily fluids of an infected person cross the mucous membranes or get into the bloodstream of an uninfected individual. The most common means of transmission are vaginal and anal intercourse, sharing contaminated needles, and through blood transfusions. The virus is also transmissible to a child through breast-feeding, and *in utero* from a pregnant woman to her fetus. Casual contact, like sharing a toothbrush, will not result in transmission.<sup>10</sup> Despite several criminal charges based on biting and spitting in Canada and the United States, there are no recorded cases of the virus being transmitted through these mechanisms.<sup>11</sup>

In the presence of HIV, the immune system will produce antibodies to the virus, which is the basis for diagnostic tests for HIV; the point at which antibodies can be detected in the body is known as seroconversion. After infection with HIV, there is a period where an HIV test will not register a positive result because seroconversion has not yet occurred, although the individual can still transmit the virus to others. This period where the virus is undetectable can extend to several months, although more commonly seroconversion occurs within four weeks of infection.<sup>12</sup>

HIV, the virus that causes AIDS, is transmissible to another person but AIDS itself is not. AIDS is diagnosed when the number of CD4+ immune cells is below a certain level or when an HIV-positive individual suffers from one of a variety of severe opportunistic infections (e.g. Kaposi's sarcoma).<sup>13</sup> New drug combinations, if instituted early and followed rigorously, make it less likely that HIV will develop into full-blown AIDS, or will at least delay the onset of AIDS. The use of antiretroviral drugs

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10. "Human Immunodeficiency Virus (HIV)" *The Merck Manual for Healthcare Professionals* (November 2005), online: The Merck Manuals Online Medical Library <<http://www.merck.com/mmpe/sec14/ch192/ch192a.html>> [Merck].

11. Richard Elliott, "Criminal Law, Public Health and HIV Transmission: a Policy Options Paper" (Geneva: UNAIDS, 2002) at 24, online: UNAIDS <[http://data.unaids.org/Publications/IRC-pub02/JC733-CriminalLaw\\_en.pdf](http://data.unaids.org/Publications/IRC-pub02/JC733-CriminalLaw_en.pdf)> [Elliott, "Criminal Law, Public Health and HIV Transmission"]. While in detention, Johnson Aziga, after twice biting other inmates, was ordered into medical isolation. Despite the low risk of infection, the hearing judge rejected Aziga's claim that the isolation constituted cruel and unusual treatment or punishment under s. 12 of the *Charter*. See *R. v. Aziga*, [2008] O.J. No. 3052 (QL).

12. "Clinical Manual for Management of the HIV-Infected Adult: Primary HIV Infection" AIDS Education and Training Center: National Resource Center (July 2006), online: AETC: National Resource Center <[http://www.aids-ed.org/aidsetc?page=cm-108\\_testing](http://www.aids-ed.org/aidsetc?page=cm-108_testing)>.

13. Merck, *supra* note 10.

also dramatically reduces the risk of *in utero* transmission.<sup>14</sup> We are still learning about the impact of new medications on the lifespan of someone with HIV.<sup>15</sup>

Despite the fact that HIV is transmissible through sexual intercourse, the actual rate of transmission is lower than is generally assumed by the public. Although it is impossible to come up with definitive numbers, it is estimated, for example, that in vaginal intercourse where the male is infected with HIV, the risk is approximately one in 1000 that the female partner will acquire HIV in one act of sexual intercourse. Where the female partner is infected, the risk to the male is much lower, approximately one in 2000 for each act of intercourse.<sup>16</sup> The risk in anal intercourse is approximately one in fifty for the receptive partner (where the insertive partner is infected) and one in 2000 for the insertive partner (if the receptive partner is infected). When used correctly, condoms reduce the rate of transmission by ninety percent or more such that the risk to the receptive partner in anal intercourse is one in 500 instead of one in fifty.<sup>17</sup> Factors such as circumcision, the viral load of the infected partner, and the health of the uninfected partner influence the likelihood of transmission.<sup>18</sup> These numbers should be kept in mind when considering the risk created by certain kinds of conduct.

Non-disclosure, of course, does not transmit HIV. Rather, it is a proxy for not using a condom because we assume that disclosure would lead the uninfected partner to take precautions or refrain from having sex with the infected person.

## 2. Methodology

This paper reviews the criminal law cases in Canada over the past eighteen years, from 1989 until December 2007. These cases can be divided chronologically into two groups: those that were decided before the Supreme Court of Canada became involved in this area and those that came after the landmark decision of that Court in *R. v. Cuerrier*.<sup>19</sup> This

14. Public Health Agency of Canada, *Perinatal Transmission of HIV* (May 2004), online: Public Health Agency of Canada <[http://www.phac-aspc.gc.ca/publicat/epiu-aeipi/epi\\_update\\_may\\_04/7\\_e.html](http://www.phac-aspc.gc.ca/publicat/epiu-aeipi/epi_update_may_04/7_e.html)>.

15. Mike Stobbe, "Americans diagnosed with HIV can expect to live 24 years: study" *Globe and Mail* (10 November 2006), online: *Globe and Mail* <[www.theGlobeandMail.com/servlet/story/RTGAM.20061110.waids1110](http://www.theGlobeandMail.com/servlet/story/RTGAM.20061110.waids1110)>.

16. Carol L. Galletly & Steven D. Pinkerton, "Toward Rational Criminal HIV Exposure Laws" (2004) 32 *J.L. Med. & Ethics* 327 at 328.

17. *Ibid.* Although see *R. v. Mabior*, *infra* note 81.

18. Scott Burris et al., "Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial" (2007) 39 *Ariz. St. L.J.* 467 at 476.

19. [1998] 2 S.C.R. 371, [1998] S.C.J. No. 64 (QL) [*Cuerrier* cited to S.C.R.]

review is limited to cases where HIV played a vital role in the definition of the offence itself in contrast to cases, for example, where the accused was HIV-positive but that fact did not form part of the underlying charge.<sup>20</sup> This paper focuses on the failure to disclose one's HIV-positive status in the context of unprotected (vaginal or anal) intercourse. There are also cases involving biting, spitting and using HIV-positive blood as a weapon<sup>21</sup> but these cases are much smaller in number and are only mentioned where they are relevant to the issues involved in the sexual context.

I found approximately fifty cases involving non-disclosure in the sexual context suggesting that prosecution is still a relatively rare event in Canada, probably in large part due to difficulties in detecting such cases and in proving specific offences. The burden on the complainant in going to trial also creates a significant disincentive to prosecute. However, while the number of prosecutions remains relatively small, how the law responds to these most difficult cases has implications for all persons with HIV and, more broadly, for how our criminal justice system treats some of the most vulnerable members of society.

After reviewing the pre- and post-*Cuerrier* cases, the paper examines the arguments for and against the use of criminal law to control the failure to disclose one's HIV status. The paper then moves on to examine the role of public health law and criminal law respectively and to conclude that criminal law should only be utilized where all other options have failed to alter the conduct of the individual involved.

## I. *Canadian cases*

### 1. *The pre-Cuerrier case law*

Between 1989 and the Supreme Court of Canada's landmark decision in *Cuerrier* in 1998, I was able to find twelve cases dealing with individuals

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20. The presence of HIV can be an aggravating factor in sentencing for sexual assault generally. See e.g. *R v. Winn* (1998), 38 O.R. (3d) 159, O.J. No. 393 (QL) (C.A.).

21. *R v. Thissen* (1998), 31 W.C.B. (2d) 176 (Ont. Ct. Prov. Div.), aff'd [1998] O.J. No. 1982 (C.A.) (QL); *R v. Crane* (2005), 129 C.R.R. (2d) 225, [2005] A.J. No. 292 (Alta. Prov. Ct.) (QL); *R v. Tremblay*, (20 February 1994), Montréal 500-01-017674-935 (C.Q.) [*Tremblay*].



charged with various offences for having unprotected sexual intercourse without disclosing their HIV-positive status.<sup>22</sup>

There were a handful of other cases which included conduct such as donating blood knowing one is HIV-positive,<sup>23</sup> smearing HIV-positive blood on a prison guard,<sup>24</sup> biting,<sup>25</sup> and stabbing the complainant with a syringe allegedly filled with HIV-contaminated fluid.<sup>26</sup> There are other cases that defy easy categorization, for example, one which involved Criminal Injuries compensation for three women who had been infected with HIV from having sex with the same man, who had died prior to a verdict in his trial<sup>27</sup>; and two others dealing with whether the HIV-positive status of an accused who had been found not criminally responsible for a criminal offence could render her a significant threat to others and thus justify continued detention in a forensic psychiatric facility.<sup>28</sup>

In the pre-*Cuerrier* cases involving unprotected sexual intercourse, all the accused but one were male and all but two of the complainants were female.<sup>29</sup> Thus only two cases involved homosexual relationships. In seven of the twelve cases, the virus was actually transmitted to one or more complainants.<sup>30</sup> The majority of cases involved multiple complainants, thus suggesting that charges are more likely when the facts demonstrate a pattern of behaviour. The charges in these early cases varied, ranging from

22. This number includes the trial decision in *Cuerrier*. Each case has been counted only once regardless of how many levels of appeal it went through. *Summer*, *supra* note 2; *R. v. Wentzell*, [1989] N.S.J. No. 510 (N.S. Co. Ct.) (QL) [*Wentzell*]; *R. c. Langlois*, 1991 WL 1137838 (C.Q.) [*Langlois*]; *R. v. Lee*, [1991] 3 O.R. (3d) 726, [1991] O.J. No. 3648 (Ont. Ct. (Gen. Div.)) (QL); *R. v. Ssenyonga* (1993), 81 C.C.C. (3d) 257 (Ont. Ct. (Gen. Div.)) [*Ssenyonga*]; *R. v. Kreider* (1993), 140 A.R. 81, 1993 CarswellAlta 622 (Prov. Ct.); *R. v. Mercer* (1993), 84 C.C.C. (3d) 41, 110 Nfld. & P.E.I.R. 41 (Nfld. C.A.) [*Mercer*]; *R. v. Bonar*, unreported (Sec Salim Jiwa, "Mounties Allege HIV Man Negligent." *The Province (Vancouver)* (8 June 1994) A5) [*Bonar*]; *Tremblay*, *ibid.*; *R. v. Napora* (1995), 36 Alta. L.R. (3d) 22 (Alta. Q.B.) [*Napora*]; *R. v. Hollihan* (1998), 171 Nfld. & P.E.I.R. 133, 525 A.P.R. 133 (Nfld. Prov. Ct.) [*Hollihan*] and *R. v. Cuerrier* (1996), 83 B.C.A.C. 295, 141 D.L.R. (4th) 503, aff'g (1995), 26 W.C.B. (2d) 378.

23. *R. v. Thornton*, [1993] 2 S.C.R. 445 [*Thornton*].

24. *R. v. Lesieur* (1993), Quebec 200-01-008541 (Qc. S.C.).

25. *R. v. Mitchell*, [1998] O.J. 715 (Ont. Ct. J. (Prov. Div.)) (QL).

26. *R. v. Trudeau* (26 April 1994), Montreal 500-01-475-944 (C.Q.); *R. v. Tan* (23 May 1995), Edmonton (Alta. Q.B.), Ritter J., cited in Richard Elliott, *Criminal Law and HIV/AIDS: Final Report* (Montreal: Canadian HIV/AIDS Legal Network Society, 1997) [Elliott, *Criminal Law and HIV/AIDS*].

27. *Ontario (Attorney General) v. Ontario (Criminal Injuries Compensation Board)* (1995), 22 O.R. (3d) 129 (Ont. Sup. Ct. Just.) [Criminal Injuries Compensation Board].

28. *Chambers v. British Columbia (Attorney General)* (1997), 116 C.C.C. (3d) 406 (B.C.C.A.) [*Chambers*]; *R. v. Mitchell*, *supra* note 25. Note that the B.C. Court of Appeal held that this was not the basis for finding someone to be a significant threat whereas the Ontario Court of Justice disagreed.

29. The complainants were male in *Langlois*, *supra* note 22 and *Napora*, *supra* note 22.

30. *Summer*, *supra* note 2; *Wentzell*, *supra* note 22; *Langlois*, *supra* note 22; *Ssenyonga*, *supra* note 22; *Mercer*, *supra* note 22; *Napora*, *supra* note 22; *Bonar*, *supra* note 22.

common nuisance on the low end to criminal negligence causing bodily harm, sexual assault and aggravated assault on the more serious end.<sup>31</sup> There were convictions in six of the twelve cases: in two cases the accused died either before trial or before the outcome of the trial, and charges were stayed in one case. Two of the convictions were for common nuisance, two for criminal negligence causing bodily harm, and one conviction for assault causing bodily harm. The sixth conviction was for anal intercourse with a minor. Four of the six convictions were the result of guilty pleas.

The sentences varied as well, ranging from one year of imprisonment plus probation in the first case<sup>32</sup> to eleven years in *Mercer*,<sup>33</sup> which was the first case to impose consecutive sentences for more than one complainant.<sup>34</sup> Most of the other cases lay somewhere between these two extremes with a majority of offenders sentenced to penitentiary terms of imprisonment. The number of the complainants, the number of incidents of sexual activity, whether the virus was transmitted, and the trauma imposed on the complainant were considered relevant factors in sentencing.

The fact that the early cases involve a variety of charges is probably a reflection of the uncertainty about different elements of various offences which led to a bit of a hit-and-miss approach in choosing charges. The earliest cases utilized the charge of common nuisance, which involves conduct endangering the life, safety, or health of the public and is punishable by a maximum two years imprisonment. In *Summer*, the Alberta Provincial Court held that endangering the individual complainant could constitute endangering the public and hence the charge was made out.<sup>35</sup> In *Napora*,<sup>36</sup> by contrast, the Alberta Court of Queen's Bench held that there was no evidence that the accused had endangered the public (as

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31. In two of the cases involving means of transmission other than sexual, such as fighting or smearing blood, the accused was charged with attempted murder, although both accused were acquitted on this charge because the intent to kill required for attempted murder could not be established. See *Tremblay*, *supra* note 21.

32. *Summer*, *supra* note 2 (common nuisance).

33. The accused in *Mercer*, *supra* note 22, was charged with two counts of criminal negligence causing bodily harm. He received five years on the first count and six on the second. The reason the first count had a lower sentence was because the complainant continued to have unprotected sex with the accused after becoming aware of his HIV status because she assumed she was already infected by him.

34. Consecutive sentences can result in extremely high sentences in this context. See one of the later cases *R. v. Nduwayo*, 2006 BCSC 1972, [2007] B.C.W.L.D. 2910 [*Nduwayo*]. Truscott, J. sentenced the accused to twenty-five years based on seven consecutive sentences which was reduced to fifteen years on the basis of time served and the principle of totality. The individual sentences ranged from one to six years depending a number of factors including whether or not the virus was transmitted. Nduwayo was granted a new trial by the B.C. Court of Appeal. See *infra* note 96.

35. The position in *Summer*, *supra* note 2, was followed in *Hollihan*, *supra* note 22.

36. *Napora*, *supra* note 22.

opposed to simply the complainant) and thus the nuisance charge was not made out.<sup>37</sup> Later cases suggest that endangering the complainant suffices to constitute endangering the public.<sup>38</sup> This result makes sense not simply because the complainant is one member of that public but because future sexual partners of the complainant may also be endangered.<sup>39</sup>

A more serious charge found in the early cases is that of criminal negligence causing bodily harm pursuant to section 221 of the *Code*, a crime that requires the Crown to prove that the accused did some act (or an omission where there is a duty to act) which showed wanton or reckless disregard for the life or safety of another person. There is no freestanding offence of criminal negligence in Canada; rather criminal negligence is only criminalized where it causes death or bodily harm. Thus this offence is only useful where there is proof that the accused in fact transmitted the virus to the complainant. Criminal negligence causing death would only arise in the rare case where the complainant dies before the accused is tried. Homicide charges were extremely unlikely in the early cases because of the rule in Canada that, to convict an accused of a homicide offence, the Crown had to prove that the death occurred within a year and a day from the acts of the accused. This rule was repealed in 1999, thus opening the door to homicide charges.<sup>40</sup>

Causation is the most complex issue in criminal negligence or homicide offences. How does the Crown prove that the complainant was infected with HIV by the accused rather than some other source, such as a prior sexual partner? In many of the early cases, the accused pled guilty or at least admitted infecting the complainant(s), thus relieving the Crown of its burden to prove causation. In *Mercer*,<sup>41</sup> for example, where the accused was convicted of two counts of criminal negligence causing bodily harm, he acknowledged that he transmitted the virus to both women with whom

37. The Supreme Court of Canada upheld a conviction for common nuisance in *Thornton*, *supra* note 23, a case involving an HIV-positive accused donating blood without disclosing his status. In that case, even though the risk was very small that the blood would make its way into the blood supply, the endangerment of the public was more direct.

38. See *R. v. Williams*, 2003 SCC 41, [2003] 2 S.C.R. 134 [*Williams* (SCC) cited to S.C.R.].

39. The *Napora* Court explicitly rejected this view stating that the accused is not responsible for the future sexual partners of the complainant. This conclusion may have been influenced by the uncertainty as to whether the complainant was infected before having unprotected sex with the accused. "So, if [the complainant], a potentially infected person, had high-risk sex with [the accused] and then had high-risk sex with someone else, [the accused] cannot be held responsible for the [complainant's] conduct with the someone else." *Napora*, *supra* note 22 at para. 13.

40. *Code*, s. 227, as rep. by Bill C-51, *An Act to Amend the Criminal Code, the Controlled Drugs and Substances Act and the Corrections and Conditional Releases Act*, 1st Sess., 36th Parl., 1998, cl. 9 (assented to 11 March 1999), S.C. 1999, c. 5, s. 9.

41. *Mercer*, *supra* note 22.

he had numerous acts of unprotected sexual intercourse over an extended period of time. Similarly, in *Wentzell*,<sup>42</sup> also a criminal negligence case, the accused pled guilty and did not challenge the assertion that he had transmitted the virus to the complainant. In *Ssenyonga*, where the accused did challenge causation, the accused and each of the complainants were infected with a rare strain of HIV originating in Africa. The Crown argued that this similarity, along with a detailed tracing of the complainants' other sexual partners, was adequate to establish causation. The accused died while awaiting the judge's verdict and thus no final conclusion was reached on this issue. This technique of matching the DNA, known as "phylogenetics," was also used in the preliminary inquiry in *Aziga*,<sup>43</sup> where the accused was alleged to have had unprotected sex with thirteen women, seven of whom, along with the accused, were infected with a variety of HIV that was known to be endemic to Uganda, the accused's country of origin. Phylogenetics has also been used in United States prosecutions<sup>44</sup> and it is likely that this technique will be used with increasing frequency as its specificity increases and our understanding of the virus and how it is transmitted develops. It is important to note, however, that this technique can show similarities in the virus between individuals but cannot show the direction of transmission, i.e., who got the virus from whom or whether both an accused and a complainant acquired the virus from a third party.

The most common charge in the early cases is some form of assault, either sexual assault, aggravated sexual assault or aggravated assault. There have been six charges of some form of assault in the early cases but only two convictions. These offences do not have a causation requirement and thus, in theory, could apply whether or not the virus was transmitted. The biggest obstacle in these cases, up until 1998, was the proof of non-consent which is an essential element of all assault-based offences. In all of the cases at issue, the complainant appeared to have consented to sexual activity in the usual sense that we understand consent, i.e., the complainant, albeit with limited knowledge of the circumstances, wanted the sexual activity to take place.<sup>45</sup>

However, the doctrine of fraud can negate consent to a touching, either sexual or otherwise. This rule is codified in s. 265(3)(c) of the *Code* and has been developed at common law. At common law, fraud only negated consent where the fraud went to the nature of the sexual act or to the

42. *Wentzell*, *supra* note 22.

43. *Aziga*, *supra* note 3.

44. Thomas C. Shevory, *Notorious H.I.V.: The Media Spectacle of Nushawn Williams* (Minnesota: University of Minnesota Press, 2004).

45. *R v. Ewanchuk*, [1999] 1 S.C.R. 330, [1999] 5 W.W.R. 333.

identity of the sexual partner.<sup>46</sup> This was a very narrow exception and would not apply where the complainant knew that she or he was having sexual intercourse and with whom. The *Criminal Code* definition of fraud reflected this narrow view until 1983 when the crime of rape was replaced with sexual assault. Prior to that time, consent was vitiated where it was obtained "by false and fraudulent representations as to the nature and quality of the act." In 1983 this definition was replaced by s. 265(3)(c), which simply provides that there is no consent where the complainant submits by reason of fraud. The question raised in the early HIV cases was whether this legislative change was meant to abolish and/or broaden the previously established narrow definition of fraud.

Most of the early cases involving assault-based charges were unsuccessful because of the apparent consent given by the complainant to engage in sexual activity. In *Ssenyonga*, for example,<sup>47</sup> McDermid J. held that fraud could not vitiate consent in these circumstances because the complainants knew they were having sex with the accused and consented to that activity. The Court held that the law of assault is too blunt an instrument to control the spread of HIV.<sup>48</sup>

Overall, the small number of early cases reflects the uncertainty of the law in relation to consent. That uncertainty evaporates, although not without complications, after the Supreme Court of Canada decision in *R. v. Cuerrier*.

## 2. Re-thinking fraud and its relation to consent: *R. v. Cuerrier*

In the 1998 decision of *R. v. Cuerrier*,<sup>49</sup> the Supreme Court of Canada opened the door to prosecutions for various levels of assault in cases involving non-disclosure of HIV status. The accused had tested positive for HIV in August 1992 and had been instructed by a public health nurse to use condoms and to inform all prospective partners of his HIV-positive status. He rejected this advice saying that he would never have a sex life if he disclosed his HIV-positive status. Three months later he began an eighteen-month relationship with one of the complainants during which they had unprotected sex more than one hundred times. The accused told the complainant near the beginning of the relationship that he had tested negative for HIV months earlier. The following year, when the complainant developed hepatitis, both the complainant and the accused were tested

46. *R. v. Clarence* (1888), 22 Q.B.D. 23.

47. June Callwood, *Trial Without End: A Shocking Story of Women and AIDS* (Toronto: Knopf Canada, 1995). Callwood suggests that *Ssenyonga* may have transmitted the virus to as many as one hundred women.

48. *Ssenyonga*, *supra* note 22.

49. *Supra* note 19.

for HIV. The complainant tested negative and the accused positive. The accused was again warned about instructing his sexual partners as to his HIV-positive status. The two continued to have unprotected sex although the complainant testified that she would never have engaged in unprotected sex with the accused in the first place if she had known his HIV status.

Soon after this relationship ended, the accused started a new relationship and had unprotected sex with the second complainant without disclosing his HIV status. Like the first complainant, she testified at trial that, had she known of the accused's HIV status, she would not have had unprotected sexual intercourse with him. At the time of trial, neither woman had tested positive for HIV. The trial court and the British Columbia Court of Appeal held that the charge of aggravated assault could not be made out because the complainants had consented to the sexual activity with the accused.

The Supreme Court of Canada allowed the Crown appeal. It held unanimously that the accused's failure to disclose his HIV-positive status to the complainants constituted fraud and hence vitiated consent to sexual activity. The Court sent the case back to trial on the charge of aggravated sexual assault.<sup>50</sup>

Mr. Justice Cory, for the majority,<sup>51</sup> applied the criminal law definition of commercial fraud to the consent issue. The non-disclosure of the accused's HIV status was fraudulent because it involved a deceit which caused harm to the complainant. The majority was concerned about an overly broad interpretation of fraud that would encompass potentially trivial harms. In response to this concern it added a requirement that the harm in question must constitute a significant risk of serious bodily harm. Fraud that does not lead to a significant risk of serious harm might be the basis for a civil action but not for criminal liability for sexual assault. The majority held that, in getting rid of the express limits on the word fraud, Parliament had intended to get away from the narrow common-law definition. Despite this holding, the majority took a very narrow view of what constitutes harm.

The minority decision of then Madam Justice McLachlin (Gonthier J. concurring) took a narrower approach to fraud, upholding the common-law definition but extending it incrementally to include deception as to sexually transmitted diseases, because this kind of deception goes to the very nature of the sexual act. McLachlin J. was particularly critical of Cory J.'s imposed limit requiring a significant risk of serious bodily harm:

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50. The Crown decided not to retry the accused.

51. Major, Bastarache, and Binnie JJ. concurring.

This limitation, far from solving the problem, introduces new difficulties. First, it contradicts the general theory that deception coupled with risk of deprivation suffices to vitiate consent. A new theory is required to explain why some, but not all kinds of fraud, convert consensual sex into assault. Yet none is offered. Second, it introduces uncertainty. When is a risk significant enough to qualify conduct as criminal? In whose eyes is “significance” to be determined — the victim’s, the accused’s or the judge’s? What is the ambit of “serious bodily harm”? Can a bright line be drawn between psychological harm and bodily harm...?<sup>52</sup>

McLachlin J. would have returned to the pre-*Clarence* common law where deception about sexually transmitted diseases did negate consent. She would impose an objective test of whether the accused falsely represented to the complainant that he or she did not have HIV when he or she knew or *ought to have known* that this was false.<sup>53</sup>

Madam Justice L’Heureux-Dubé adopted the broadest definition of fraud which, in her view, best promoted sexual autonomy by enabling people to make their own choices about their bodily integrity. In her view, the essential issue was whether the dishonesty induced the complainant to consent:

[F]raud is simply about whether the dishonest act in question induced another to consent to the ensuing physical act, whether or not that act was particularly risky and dangerous. The focus of the inquiry into whether fraud vitiated consent so as to make certain physical contact non-consensual should be on whether the nature and execution of the deceit deprived the complainant of the ability to exercise his or her will in relation to his or her physical integrity with respect to the activity in question.<sup>54</sup>

The other members of the Court criticized L’Heureux-Dubé J.’s judgment as being too broad because it could criminalize deceptions which are too trivial to warrant criminal sanction. For example, if an individual lied about his marital status or about his feelings for the complainant and these lies induced the complainant’s consent, this could constitute fraud under L’Heureux-Dubé J.’s formulation.

Regardless of the significant differences among the three judgments, *Cuerrier* makes clear that failure to disclose that one is HIV-positive constitutes fraud negating consent. None of the justices explicitly drew a

52. *Cuerrier*, *supra* note 19 at para. 48.

53. *Ibid.* at para. 70.

54. *Ibid.* at para. 16.

distinction between non-disclosure and deliberate lying about one's HIV status.<sup>55</sup>

The expansion of the doctrine of fraud addresses the non-consent element of assault charges. However, aggravated assault, the charge in *Cuerrier*, requires that the accused endanger the life of the complainant. The majority held that *Cuerrier* had endangered the lives of the complainants by knowingly exposing them to the risk of infection by HIV. In the context of aggravated assault, therefore, we are left with a double requirement of risk of harm. First, in order to negate consent to establish an assault of any level, the Crown must prove that there was a significant risk of serious bodily harm. In order to establish that there was an *aggravated* assault, the Crown must establish that the conduct endangered the life of the complainant.

The double requirement of risk of harm in *Cuerrier*—first to establish an assault, and then to establish *aggravated* assault—means that where it cannot be proven beyond a reasonable doubt that the complainant was HIV-negative at the time of the sexual relationship with the accused, it will not be possible to prove even the lowest form of sexual assault because that offence requires proof of a significant risk of serious bodily harm in order to establish fraud. If the complainant tests positive for HIV, the fact that she had a negative test prior to sex with the accused is no guarantee that she was not in the window of time between the presence of the virus in the blood and its detectability through testing. The need for the Crown to establish that the complainant was not HIV-positive at the time they had sex opens the door to and in fact requires the Crown to go through the complainant's sexual history (and possibly drug-use history) in some detail. This is humiliating for the complainant and her other sexual partners. It may also be difficult to trace every sexual partner and to have them tested for HIV, especially where their consent is not forthcoming.

The Crown will have a much easier time proving its case where the complainant never tests positive for HIV. Sexual history evidence will not be necessary where the complainant does not have HIV and the risk of harm will be much easier to prove because it is obvious that unprotected sex endangers a complainant who is HIV-negative. Thus, complainants for whom there is a higher risk that they were HIV-positive before engaging in sexual activity with the accused, such as gay men, sex workers or IV drug users, will have less recourse to the criminal justice system. If we require the Crown to prove beyond a reasonable doubt that the complainant was

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55. Only the minority decision of McLachlin J. referred to a false representation although she does not make clear whether non-disclosure is equivalent to misrepresenting one's HIV status.



HIV-negative when she had sex with the accused and that she contracted the virus from the accused, it may never be possible to meet the *Cuerrier* requirements for such complainants. If the law is going to criminalize the failure to disclose one's HIV-positive status in order to respect the right of the complainant to make his or her own decision about engaging in high-risk activity, then surely it should do so for all complainants, not just those who we can be sure were not infected previously. This is particularly true given that persons at highest risk tend to be those members of groups already facing disadvantage in our society. Sex workers, for example, are particularly vulnerable to sexual violence. The non-disclosure cases following *Cuerrier* illustrate the importance of the complainant's HIV status in conviction as well as other troublesome issues.

### 3. *Post-Cuerrier developments*

#### a. *Introduction*

I found thirty-eight cases where charges were laid after the Supreme Court's decision in *Cuerrier* and before December 2007, over a threefold

increase from the earlier period.<sup>56</sup> All but three of the accused in this later group were male. At least eight cases included male complainants (one case had both male and female complainants). Several cases involved multiple complainants, particularly where the complainants were female. Of the

56. For the purpose of completeness, some references are made to cases after December 2007. However, none of these cases are included in the analysis of the numbers. Where a case citation has not been found a reporting newspaper is cited followed by, in parentheses, the name of the accused, the court or province, and, where available, the docket number and judge. *Williams* (SCC), *supra* note 38; *R. v. Edwards*, 2001 NSSC 80, (2001) 194 N.S.R. (2d) 107 [*Edwards* cited to CarswellINS]; *R. v. S.(F.)*, 2006 CarswellOnt 1539 (C.A.) [cited to CarswellOnt], aff'g 2005 CarswellOnt 8329 (Sup. Ct. Just.), aff'g 2004 CarswellOnt 8210 (Ct. Just.) [*S.(F.)*]; *R. v. Walkem*, [2007] O.J. No. 186 (Ct. Just.) (QL) [Walkem]; *R. v. Williams (Ian)*, 2006 CarswellOnt 833 (Ct. Just.) [*Williams (Ian)*]; *R. v. Clarke* (20 May 2005), Toronto 606/04 (Ont. Sup. Ct. Just.); *R. v. Booth*, 2005 ABPC 137, 382 A.R. 116 [*Booth*]; *R. v. Trevis Smith*, [2007] S.J. No. 116 (Sask. Prov. Ct.) (QL); aff'd. 2008 SKCA 61; *R. v. MacKay*, 2007 CarswellOnt 2532 (Sup. Ct. Just.); *Nduwayo*, *supra* note 34; *Aziga*, *supra* note 3; *R. v. Rene Smith*, 2004 BCCA 657, 206 B.C.A.C. 262; *R. v. DeBlois*, [2005] O.J. No. 2267 (Ont. Ct. Just.) (QL) [*DeBlois*]; *R. v. Murphy*, 2005 WL 3385170 (Ont. Sup. Ct. Just.) [*Murphy*]; *R. v. Lamirande*, 2006 MBCA 71, 2006 CarswellMan 224 [*Lamirande*]; *R. v. Charbonneau* (18 June 2002), Ottawa 01/13048 (Ont. Ct. Just.); *R. v. Miron* (2000), 174 Man. R. (2d) 52, [2000] M.J. No. 500 (Man. Prov. Ct.) (QL) [*Miron* cited to Man. R. (2d)]; *R. v. Agnatuk-Mercier*, [2001] WL 34066691 (Ont. Sup. Ct. Just.) [*Agnatuk-Mercier*]; Douglas Quan, "Man with HIV Guilty of Assault: Gatineau Man Failed to Disclose Status Before Having Sex" *Ottawa Citizen* (21 October 2000) C4 (Eric Maisonneuve; Qc. Sup. Ct., Lapointe J.); Chris Purdy, "Judge Warns HIV-Positive Man to Curb his Sex Habits" *Edmonton Journal* (28 March 2001) B4 (Fabian Bear; Alta. Q.B., Trussler J.); "Man Sentenced to Six Years for HIV Infection" *Vancouver Sun* (7 June 2001) A5 (Mario Morin; Qc., Trudel, J., 410-01-006308-992); "Man Jailed for Infecting 3 with HIV" *Toronto Star* (28 June 2002) A4 (Egard Monge; Ont., 27 June 2002, Gilthero J.); "Woman with AIDS had Unprotected Sex" *Calgary Herald* (21 December 2002) A13 (Lounge Wanderingspirit; Alta., Peck J.); "Male Prostitute Sentenced to 16 Years for Spreading HIV" *National Post* (21 January 2003) A11 (Calvin Chartier; Qc., 500-01-6309-014); "HIV-positive Man Pleads Guilty to Aggravated Assault after Having Unsafe Sex" *Canadian Press* (14 July 2003) (Edward Kelly; Ont., 13 July 2003, McGrath J.); "Man with AIDS gets jail after unprotected sex" *Daily News* (Halifax) (1 May 2004) (Navrumba Djamali; Qc., 500-01-000091-022, Garneau J.); "HIV-positive Winnipeg Man jailed for 2 years for having sex with woman" *Canadian Press* (18 May 2004) (Marc Bedard; Man.); "HIV-positive Toronto man charged with assault for having unprotected sex" *Canadian Press* (17 May 2005) (Michael Stevens; Ont.); "HIV-positive man avoids jail for assault: Victims, accused all mentally challenged" *Windsor Star* (5 January 2006) C7 (Normand Beaudoin; Ont., Ratushny J.) [*Beaudoin*]; Don Lajoie, "Judge tosses HIV assault case" *Windsor Star* (10 March 2006) A3 (Ian McKenzie; Ont. Sup. Ct. Just., Donohue J.); Doug Schmidt "'I'm clean,' he told victims: Some given pills and blacked out" *Windsor Star* (28 April 2007) A1 (Carl Leone; Ont., Demarco J.); "HIV-positive Winnipeg man may have had sex with as many as 45 people: police" *Canadian Press* (7 April 2006) (Clato Mabior; Man.); "HIV perp gets 40 months for sex with 4 T.O. women" *Toronto Sun* (10 March 2007) 3 (Howard Matthews; Ont., Marshall J.); Matthew Ramsey "Woman charged with assault: Charge alleges prostitute had unprotected sex" *Province* (Vancouver) (24 August 2006) A28 (Michelle Whonnock; B.C.); "HIV-positive woman charged with assault" *Globe and Mail* (23 March 2007) A17 (Robin Lee St. Clair; Ont.); Sam Pazzano "Jail Urged for HIV Wife: Ex-stripper who infected husband blames her own ignorance" *Toronto Sun* (11 July 2007) 12 (Suwalee Iamkhong; Ont., Ducharme J.); Sunny Freeman "HIV-positive youth jailed after deceiving partner" *Vancouver Sun* (4 November 2007) B1 (J.M.L.; B.C., Brecknell J.); Robin Perelle "HIV case in court" *Xtra West* (12 September 2007), online:

thirty-eight, information is available on the outcome of the prosecution in thirty-one of the cases. The remaining seven are either ongoing or I was unable to find the necessary outcome information. All of those thirty-one accused were charged with either aggravated assault or aggravated sexual assault. In some cases other charges were also laid including nuisance,<sup>57</sup> criminal negligence causing bodily harm,<sup>58</sup> and even murder.<sup>59</sup> Of the thirty-one cases, convictions were obtained in twenty-six, there were four acquittals<sup>60</sup> and there was one case where the accused was acquitted on the HIV-related count but convicted of sexual assault causing bodily harm after having sex with and transmitting gonorrhea to his five-year-old daughter.<sup>61</sup> More than half of the twenty-six convictions involved guilty pleas. The virus was transmitted in fifteen of these thirty-one cases to at least one complainant and often to more than one.

b. *The Supreme Court's second look: R. v. Williams*

The invocation of criminal law seems most appropriate where there has been lasting harm caused to the complainant. Yet, as described above, cases involving HIV-negative complainants will be easier to prosecute than those where the complainant contracts the virus. This dilemma is highlighted by the 2003 decision of *Williams*,<sup>62</sup> where the Supreme Court of Canada again addressed the criminal liability of a man who, knowing he was HIV-positive, engaged in repeated acts of unprotected sex without disclosing his status.

*Williams* was charged with aggravated assault, common nuisance, and criminal negligence causing bodily harm. The accused had lived with the complainant, during which time they engaged in unprotected sex. Approximately six months into the relationship the accused tested positive for HIV. He did not tell his partner that he had tested positive nor did he reveal his relationship with her to his doctors. He continued to have unprotected sex with the complainant for another twelve months. Thus, unlike in *Cuerrier*, the accused engaged in unprotected sex with the complainant both before and after he learned of his HIV-positive status. The complainant tested HIV-positive two years after the relationship ended. The complainant had tested negative around the time the accused had been tested but because it may take up to six months for HIV to be detectable

57. *Williams* (SCC), *supra* note 38; *Booth*, *ibid.*; *Beaudoin*, *ibid.*

58. *Nduwayo*, *supra* note 34; *Williams (Ian)*, *supra* note 56.

59. *Aziga*, *supra* note 3.

60. *Agnatuk-Mercier*, *supra* note 56; *R. v. Bear*, as described by Purdy, *supra* note 56; *Edwards*, *supra* note 56, *R. v. McKenzie*, as described by Lajoie, *supra* note 56.

61. *S.(F.)*, *supra* note 56.

62. *Supra* note 38.

in the blood, she could have been HIV-positive even though she tested negative. Thus it was impossible to determine whether the complainant had been infected *before* the accused discovered he was HIV-positive or after. If she was infected before he discovered his status, the Crown could not prove that he endangered her life (*actus reus*) at a time when he knew he was HIV-positive (*mens rea*).

At trial, Williams was convicted of aggravated assault and nuisance but acquitted of criminal negligence causing bodily harm. The Newfoundland and Labrador Court of Appeal, in a two to one decision, quashed the conviction for aggravated assault and substituted a conviction for attempted aggravated assault.<sup>63</sup> The Supreme Court of Canada unanimously agreed with the majority of Court of Appeal.

Binnie J., for the Court, held that Williams could not be convicted of aggravated assault because that offence requires, as part of the *actus reus*, that the accused *endanger* the life of the complainant. In order for the *actus reus* and the *mens rea* to go together, this endangerment had to take place *after* the accused knew he was HIV-positive. Expert evidence suggested that it was likely that the complainant was infected before the accused knew with certainty of his HIV-positive status. Thus, there was at least a reasonable doubt about whether, when he endangered her, he knew his HIV-positive status.<sup>64</sup> The Court pointed to the apparent paradox that Cuerrier was convicted of aggravated assault even though he did not transmit the virus to either complainant whereas Williams, who did transmit the virus, could not be convicted of the completed offence. The Court's explanation was that timing was critical:

The paradox is resolved, however, when it is recognized that in *Cuerrier*, the accused was deceitful about his HIV status from the beginning of the sexual relationship whereas here, at the likely time of the complainant's HIV infection, she was freely engaging in unprotected sex with a partner who was unaware of his own HIV condition and certainly unaware that he was placing the complainant at risk.<sup>65</sup>

63. *Williams v. R.*, 2001 NFCA 52, 158 C.C.C. (3d) 532 [*Williams* (NFCA)].

64. There is also a significant question about the *mens rea* for attempts which has been discussed elsewhere. See generally Isabel Grant, "Developments in Substantive Criminal Law: The 2003-2004 Term" (2004) 26 Sup. Ct. L. Rev. 215 at 239-49; Simon Verdun-Jones & David MacAlister, "Unprotected Sexual Intercourse with Knowledge of HIV-Positive Results: Attempted Aggravated Assault of the Need for Legislative Reform" (2003) 13 C.R. (6th) 257.

65. *Williams* (SCC), *supra* note 38 at para. 54.

c. *Problems with Cuerrier and Williams**The HIV-positive complainant*

It is troubling that, had Williams never infected the complainant, he could have been convicted of the completed offence of aggravated assault. This problem is highlighted by its impact on sentencing. The maximum sentence for aggravated assault is fourteen years while the maximum for attempted aggravated assault is seven years. Nonetheless, Williams argued at his sentencing appeal that the absence of proof of harm (once he became aware of his status) should be considered a mitigating factor, even though he admitted transmitting the virus to the complainant. It was the fact that the complainant was HIV-positive that necessitated the attempt conviction yet because of the timing problems, he was able to argue that he had not harmed the complainant.<sup>66</sup> Although not mentioned in the Supreme Court of Canada judgment, Williams was also convicted of two counts of the completed crime of aggravated assault in separate proceedings relating to two other complainants to whom he failed to disclose but did not infect.<sup>67</sup>

The result in *Williams* appears counterintuitive when one considers that criminal law generally punishes people whose conduct causes harm more severely than those whose conduct does not. In fact, several cases cite the fact that the virus was transmitted as an aggravating factor in sentencing.<sup>68</sup> The Court's logic results in a further marginalization of potentially HIV-positive women, denying them the right to be informed of the HIV status of their sexual partners.

In the Newfoundland Court of Appeal, Wells C.J. (in dissent) had taken the position that, unless it was shown that the complainant was HIV-positive at the time the accused learned of his status, then he did *create a risk* of endangering her life. Wells C.J. alluded to the fact that requiring proof that an HIV-positive complainant was not infected at a particular date puts a heavy, if not impossible, burden on the Crown.

[The Crown's] burden should not be expanded to require the Crown to also do the impossible and prove, with certainty, that the complainant was

66. *Williams* (NFCA), *supra* note 63. The Court of Appeal imposed the sentence for the substituted verdict of attempted aggravated assault while considering Williams' appeal from sentences imposed for aggravated assault against two additional complainants.

67. *R. v. Williams*, 2004 NLCA 24, 184 C.C.C. (3d) 193, aff'g [2001] N.J. No. 169 (Nfld. S.C. (T.D.)) (QL). The trial judge had imposed a sentence of three years imprisonment for one complainant and four years for the other to be served consecutively. The Court of Appeal imposed an additional three years for the attempted aggravated assault. Thus, Williams received a sentence of ten years in total. Unlike the trial judge, the Court of Appeal refused to reduce the overall sentence below ten years.

68. See e.g. *Williams (Ian)*, *supra* note 56 and *Walkem*, *supra* note 56.

not infected prior to November 15, 1991. In the present state of medical science that can never be proven. Recognition of the uncertainty as to the complainant's HIV status does not automatically constitute reasonable doubt as to whether the appellant, on the basis of the standard set out in *Cuerrier*, endangered the life of the complainant. That standard, it should be remembered, is: exposing one's sexual partner to the risk of HIV infection.<sup>69</sup>

In *Williams*, the Supreme Court of Canada did state that the accused could have been convicted of simple assault or sexual assault. But is this right according to the Court's own requirements? In order to negate consent after *Cuerrier*, there has to be a significant risk of serious bodily harm. If the complainant was already infected, or if there was a reasonable doubt that she was, fraud cannot be established and therefore no level of assault can be proven.<sup>70</sup>

The problem in *Williams* comes primarily from the specific harm requirement to negate consent in *Cuerrier*. However, the result in *Williams* was not unavoidable. The *Williams* Court could have found that having unprotected sexual intercourse when one is HIV-positive always endangers one's partner, whether or not the partner is HIV-negative, recognizing that endangerment does not require certainty of harm but rather a real risk of harm. The Court in *Williams* raised but did not decide whether or not a person who is already HIV-positive can be "endangered" by further exposure to potentially different strains of HIV given that every time the virus is transmitted there is a potential for mutation. Thus, for example, if the new strain were a drug-resistant one, the complainant's life could be in greater danger even though he or she was already HIV-positive.

Another possibility would be to have found that *Williams*' failure to disclose his HIV-positive status was a continuing act or omission which became criminal when he learned he was HIV-positive and continued not to disclose his status. As in *Fagan v. Commissioner of Police of Metropolis*,<sup>71</sup> the argument would be that the *mens rea* would be superimposed on an ongoing course of conduct and at the moment he learned of his status and continued to have unprotected sex without disclosing that status, the offence was complete.

69. *Williams* (NFCA), *supra* note 63 at para. 113.

70. In *Deblois*, *supra* note 56, the accused had unprotected sex with the complainant and she subsequently tested positive for HIV. The accused was convicted of attempted aggravated sexual assault presumably because it was impossible for the Crown to prove beyond a reasonable doubt that the complainant was not infected with the virus prior to her relationship with the accused.

71. [1969] 1 Q.B.D. 439, (1968), 52 Cr. App. R. 700; *R. v. Cooper*, [1993] 1 S.C.R. 146, [1993] S.C.J. No. 8.

Finally, the Court could have retreated from *Cuerrier*, holding instead that endangerment is necessary for aggravated assault but not for simple assault. This would allow for sexual assault cases to proceed even where it could not be proven beyond a reasonable doubt that the complainant was HIV-negative at the time of the sexual activity.

*The accused's knowledge of his or her HIV status*

In *Williams*, the Supreme Court suggested that if the accused had been aware of a significant risk that he was HIV-positive, this knowledge might have been adequate to trigger the disclosure requirement. In setting out the importance of when Williams became aware of his HIV status, the Court stated:

The most important date in this case is November 15, 1991. On that date, the respondent learned that he was HIV-positive. *I do not overlook the possibility that prior to November 15, 1991 he might have anticipated at least the risk of an HIV-positive outcome, perhaps by October 16, 1991 when he was called in for the test, but we have no satisfactory proof of that.* The critical date for the purpose of establishing fraud to vitiate consent (*Criminal Code*, s. 265(3)(c)) is when the respondent had sufficient awareness of his HIV-positive status that he can be said to have acted 'intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them'.<sup>72</sup>

Does the Court mean that, if there were adequate proof that Williams knew of the risk that he had HIV, he would have had a legal duty to disclose that risk to his sexual partners? What would be required to constitute a sufficient risk in this context? What about an individual who knows or suspects that one of his or her former partners is infected? How would such a standard be applied to people in high risk groups such as sex workers or IV drug users? Could it then be argued, for example, that all IV drug users sharing needles must know that they are at high risk of HIV? What about individuals who have recently arrived in Canada from a country with a particularly high incidence of HIV infection?

72. *Williams* (SCC), *supra* note 38 at para. 27 [emphasis added; citations omitted]. The issue of whether knowledge of a risk that one is HIV-positive is sufficient has been considered in more detail in England in the context of recklessly transmitting HIV. See e.g. Samantha Ryan, "Reckless Transmission of HIV: Knowledge and Culpability" (2006) *Crim. L. Rev.* 981. Ryan argues against criminalization where the accused is aware of a risk that he or she is HIV-positive but does not have actual knowledge because this could place a discriminatory burden on persons in high-risk groups such as gay men, IV drug users or those from sub-Saharan Africa. She also argues that the Crown should be required to prove that the accused knew that HIV could be transmitted through the type of sexual contact at issue in the case.

The Ontario Court of Appeal has recently held, relying on *Williams*, that wilful blindness with respect to one's HIV status is sufficient for prosecution.<sup>73</sup> In particularly disturbing circumstances, a father was charged with sexual assault causing bodily harm for transmitting gonorrhea to his five-year-old daughter. He was also charged with aggravated sexual assault for possibly exposing his daughter to HIV. The accused refused to be tested for HIV even though there was evidence that his long-term partner, the girl's mother, was HIV-positive and that she had not had sex with anyone but the accused for five years.

The Crown adduced some evidence from which a trier of fact could infer that, in July 2001, the appellant was HIV-positive...[and] there is some evidence from which a trier of fact could find that, by July 2001, the appellant knew he was HIV-positive. His sexual partner had told him that she was HIV-positive. In the face of that information, the appellant deliberately refused to be tested to confirm his HIV status. The common sense inference that the appellant knew he was HIV-positive follows the same chain of reasoning that permits the court in a criminal context to infer knowledge through wilful blindness.<sup>74</sup>

In one English prosecution, Kouassi Adaye pled guilty to a charge of recklessly inflicting grievous bodily harm even though he had never received an HIV-positive diagnosis prior to his arrest.<sup>75</sup> The evidence was that he had been advised to take the test but had not done so. As will be discussed below, this willingness to find wilful blindness may challenge the assertion of those opposed to criminalization that criminalization will deter testing. Individuals preferring to remain "unsure" of their status may no longer be immune from prosecution.

The issue of whether actual knowledge should be required is a difficult one. As we see from *S.(F.)* discussed above, someone who commits a sexual assault should not be allowed to avoid prosecution by refusing to get tested, particularly where there is some evidence that the accused is HIV-positive. At the same time, a determination of who closed their eyes

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73. *S.(F.)*, *supra* note 56.

74. *Ibid.* at para.18. The Court of Appeal went on to hold that, even though there was no scientific evidence that HIV could be transmitted by the minimal penetration of the victim's vagina, the accused clearly created a risk that transmission could occur and that this was sufficient to send him back to trial on the charge of aggravated sexual assault. At the new trial the accused was convicted of sexual assault causing bodily harm and sexual interference but was acquitted on the HIV related charge of aggravated sexual assault. See also Sam Pazzano, "Despicable dad: HIV-positive man guilty of sex with daughter, 5" *Toronto Sun* (14 October 2006) 5.

75. Catherine Dodds et al., "Grievous harm? Use of *Offences Against the Person Act 1861* for sexual transmission of HIV" Briefing Paper, (October 2005) at 26, online: Sigma Research <<http://www.sigmaresearch.org.uk/downloads/report05b.pdf>>.



to the knowledge that they could be HIV-positive could bring into play potentially discriminating stereotypes about HIV and its likely carriers. If wilful blindness is to be sufficient, we should maintain a rigorous subjective standard and not turn wilful blindness into a *de facto* negligence standard of who *ought to have known* their HIV status.<sup>76</sup> We should also be cautious about extending the *mens rea* to recklessness where the accused could be aware of the possibility he or she was HIV-positive. Accepting a recklessness standard could cast the net too wide particularly for persons in high-risk groups.

*Is there a duty to disclose where a condom is used?*

The most significant question that remains unanswered after *Cuerrier* and *Williams* is whether the use of a condom reduces the risk to such an extent that non-disclosure no longer constitutes fraud. Any coherent social or legal policy should attempt to minimize harm and encourage responsible sexual behaviour. The use of condoms is still the best means, short of abstinence, of minimizing the risk of transmission of HIV in sexual activity. *Cuerrier* leaves unclear the important question of whether an accused who wears a condom, but fails to disclose his status, should be subjected to criminal liability. The majority suggested, without explicitly deciding, that if an accused wore a condom, the risk of harm might not be significant enough to establish fraud and thus that there might not be a requirement to disclose:

To have intercourse with a person who is HIV-positive will always present risks. Absolutely safe sex may be impossible. Yet the careful use of condoms might be found to so reduce the risk of harm that it could no longer be considered significant so that there might not be either deprivation or a risk of deprivation.<sup>77</sup>

McLachlin J., in her concurring minority judgment, explicitly stated that her test for fraud negating consent would not include protected sex because there needs to be a high risk or probability of transmitting the disease to warrant criminalization.

Even with a condom there is a real, albeit small, risk of it failing. The majority failed to address the issue of whether the HIV-positive partner should be the one to decide whether that is a risk the complainant should take. If a condom breaks and the virus is transmitted, are we going to tell the complainant that the sexual activity did not present a significant risk

76. *R. v. Malfara*, 2006 CanLII 17318 (Ont. C.A.) has recently affirmed the subjective component to wilful blindness.

77. *Cuerrier*, *supra* note 19 at para. 129.

of harm to her although it did transmit HIV? Nor did the majority explore what “careful” use of condoms entails. At what moment does the duty to disclose arise? If a condom breaks, does the potential accused need to then quickly disclose his HIV-positive status? Does lawful sexual activity suddenly become aggravated sexual assault if the condom falls off or is not used effectively? Or is it enough to simply attempt to use a condom to avoid criminal responsibility? Is there a line to be drawn between criminal behaviour (non-disclosure in the context of unprotected sex) and deceitful, but non-criminal, behaviour (non-disclosure in the context of protected sex)?

In *Edwards*—a post-*Cuerrier* decision<sup>78</sup>—the judge proceeded on the assumption that the only issue was whether the sex with the complainant was “unprotected,” thus concluding that, had a condom been used, there would have been no assault. The trial judge concluded that the Crown had failed to prove beyond a reasonable doubt that the men engaged in unprotected sex and hence failed to prove non-consent.<sup>79</sup>

With respect to whether non-disclosure in the context of protected sex is criminal, *Edwards* held that this issue should be left to Parliament. Similarly in *Agnatuk-Mercier* the judge noted that in order to convict the accused “it must be established by the Crown beyond a reasonable doubt that unprotected sex with him, took place.”<sup>80</sup> The Court took a different approach in *R. v. Mabior*,<sup>81</sup> where McKelvey J. convicted the accused on counts involving protected sex when the accused had a detectable viral load. The accused was acquitted only on counts involving protected sex where the evidence indicated that the accused had an undetectable viral load. The trial judge found that condoms had a failure rate of 20% and that this was sufficient to constitute a significant risk of serious bodily harm.

### *The appropriate charge*

There is still a lack of clarity about the most appropriate charges. In *Williams*, the Supreme Court of Canada did not disturb the conviction for common nuisance but did not discuss the charge. We know that a charge of aggravated assault or aggravated sexual assault will be made out where the accused does not disclose his status and where the complainant was

78. *Edwards*, *supra* note 56.

79. *Ibid.* at para. 24.

80. *Agnatuk-Mercier*, *supra* note 56 at para. 7. In a New Zealand case, *Police v. Dalley*, [2005] NZAR 682; 2005 NZAR LEXIS 9 [Dist. Ct. Wellington] the accused was charged with nuisance for having unprotected oral sex and protected vaginal sex. He was acquitted on the basis that he had taken reasonable steps to meet his duty of reasonable care.

81. 2008 MBQB 201.

not HIV-positive at the time of the assault. Where there is a reasonable doubt about the complainant's status at the time of unprotected sexual intercourse, attempted aggravated assault may be appropriate, although the Supreme Court also (questionably) suggested that sexual assault would have been an alternative.

It is not clear from these cases why some cases involve the charge of aggravated assault while others involve the charge of aggravated sexual assault for virtually the same conduct. *Cuerrier* itself involved aggravated assault but there is nothing in the judgment to suggest that a charge of aggravated sexual assault, a crime with a higher maximum sentence, could not also have been made out. Aggravated sexual assault is one of the designated offences prescribed under section 490.011 of the *Code* which requires sex offender registration, whereas aggravated assault is not.<sup>82</sup> Publication bans on the name of the complainant are also mandatory when requested in the context of aggravated sexual assault<sup>83</sup> but, in the context of aggravated assault, the ban must be proven "necessary for the proper administration of justice."<sup>84</sup> These reasons may influence some of the charge-laying decisions but there are likely other factors contributing to the selection of the charge.

## II. *Arguments for and against criminalization*

A wise nation would consider whether in [prosecuting individuals who put others at risk of contracting HIV] we advance the public health... If, on the other hand, criminalisation serves to undermine our overall public health response to the HIV epidemic, then we must seriously question whether the gains from criminalisation are worth it.<sup>85</sup>

Despite the uncertainties after *Cuerrier* and *Williams*, one fact is clear. The Supreme Court of Canada has considered the wilful transmission of HIV in three cases<sup>86</sup> and denied leave to appeal in a fourth case in which the Newfoundland Court of Appeal had raised a sentence from thirty months to over eleven years. In all three cases, the Court upheld convictions, albeit in *Williams*, only for an attempt. Thus we have a clear indication from the Court, without a single dissenting voice, that criminal law is an appropriate

82. *Sex Offender Information Registration Act*, S.C. 2004, c.10 [SOIRA]. Section 4 requires "sex offenders" or persons subject to one or more orders under section 490.019 of the *Code* to register and report regularly at a designated reporting centre. Under s. 3 of the SOIRA, a crime of a sexual nature consists of one or more acts that are sexual in nature or committed with the intent to commit an act or acts that are sexual in nature and constitute an offence.

83. See *Code*, s. 486.4

84. *Code*, s. 486.5.

85. Dalton, *supra* note 8 at 255.

86. Thornton, *supra* note 23; *Cuerrier*, *supra* note 19; and *Williams* (SCC), *supra* note 38.

tool to use in the most serious cases involving an accused who knows he is HIV-positive but refuses to disclose that status to sexual partners. The majority of the Supreme Court of Canada has given short shrift to the various arguments against criminalization although some of the arguments are briefly discussed by McLachlin J. in her minority judgment in *Cuerrier*. It is to the arguments both for and against criminalization that the paper now turns.

Although the prosecution of persons who fail to disclose their HIV-positive status to their sexual partners is now entrenched in Canadian criminal law, it is nonetheless helpful to return to the basic question of whether criminalization is appropriate at all before considering the various options for criminalization. These arguments have not yet been canvassed fully either in our highest court or in Parliament and yet go to the heart of why we punish people in the criminal justice system.

The failure to disclose one's HIV-positive status can have a devastating impact on one's sexual partners. There are references in the case law to women having abortions<sup>87</sup> or attempting suicide<sup>88</sup> because of their fear of HIV. In every case, lives are thrown into turmoil. Even with a much-improved prognosis if treatment is instituted early, there is still no cure for HIV/AIDS and the treatments can be difficult to endure. For those for whom the diagnosis is not made early on, there is still the prospect of full-blown AIDS. The judicial and prosecutorial desire to recognize this harm and punish the accused is understandable, particularly where the virus has been transmitted.

Three arguments are used most frequently by the courts to justify criminalization: incapacitating the accused, deterrence, and retribution and denunciation. The language of rehabilitation, or concern for the accused's welfare, is starkly absent in these cases. The primary purpose is to remove the accused from society so that he will not be able to continue to engage in unsafe sexual practices. Related to this purpose is the need to deter others from engaging in similar conduct. Finally, the cases reflect the desire for retribution and the need to denounce the wrong done to the complainants. Denunciation recognizes the importance of law in setting normative standards when it comes to sexual behaviour which endangers another person. The arguments against criminalization, by contrast, usually relate to the impact of criminalization on the population of persons with HIV, such as their decision to get tested, and to the social stigma associated

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87. *Mercer, supra* note 22.

88. See e.g. *Miron, supra* note 56, and *Mercer, supra* note 22.

with HIV. There are also numerous practical difficulties in prosecuting such offences.

1. *Arguments supporting criminalization*

a. *Isolating the accused*

The most immediate concern in these cases for prosecutors is to stop the accused from engaging in unsafe sexual practices. In most of the cases discussed in this paper, the accused failed to disclose his HIV-positive status to more than one complainant. In *Aziga*, for example, in addition to the two counts of murder, the accused has been charged with thirteen counts of aggravated sexual assault relating to thirteen different women, seven of whom he was alleged to have infected with HIV. In a majority of cases, increasingly coercive public-health mechanisms, from counselling to orders not to participate in sexual activity, had been exhausted and had failed to change the behaviour of the accused.<sup>89</sup> These cases reflect the sense of frustration on the part of prosecutors and courts. In *Mercer*, for example, the Newfoundland Court of Appeal stated:

Individuals who have proven themselves capable of paying no heed whatsoever to competent and authoritative medical instruction as to the measures absolutely essential to the protection of others from HIV infection represent a grave danger to society and they cannot be allowed to circulate freely in it for fear that they will continue to knowingly infect other unwitting partners with impunity.<sup>90</sup>

Putting the accused in jail does isolate him from the community and most opportunities for heterosexual sex, at least for the duration of the sentence. However, judges tend to ignore the vulnerability of the prison population given the high incidence of HIV and the prevalence of high-risk sexual and drug-use practices in our penitentiaries.<sup>91</sup> We may simply be shifting the risk from one community to a more vulnerable (and less visible) one

89. See *Cuerrier*, *supra* note 19; *Williams* (SCC), *supra* note 38; *Mercer*, *supra* note 22; and *Ssenyonga*, *supra* note 22.

90. *Mercer*, *supra* note 22 at para. 78.

91. According to Correctional Service Canada's (CSC) 2004 statistics, HIV infection rates in inmates are more than ten times higher (1.8%) than the general Canadian population (0.13%). Correctional Service Canada, "A Health Care Needs Assessment of Federal Inmates in Canada" in *Canadian Journal of Public Health* (March/April 2004) Supplement at S32-S33, online: <[http://www.cpha.ca/shared/cjph/archives/CJPH\\_95\\_Suppl\\_1\\_e.pdf](http://www.cpha.ca/shared/cjph/archives/CJPH_95_Suppl_1_e.pdf)>.

where individuals have even fewer resources available for protection from HIV.<sup>92</sup> As one writer states:

Rather than preventing an accused from engaging in further activity that may transmit HIV, incarceration places that person in the milieu where it is more, not less, likely that transmission will occur. Furthermore, prisons are not hermetically sealed environments: inmates receive conjugal visits from partners, and in most cases those serving prison sentences will eventually be released into the community. It is dangerous to ignore that risky activities within prisons may serve as a conduit for further transmission outside prison populations.<sup>93</sup>

Unless we plan to detain such individuals for life, it is not clear that incarceration of the few will protect the health of the many.<sup>94</sup> Long sentences also raise the spectre of persons dying of AIDS in prison. Where the accused himself has AIDS, even shorter penitentiary terms may be *de facto* a life sentence. In the early cases, long sentences (and shorter lifespans) masked the problem of what to do with such individuals when they had served their full sentence. When HIV/AIDS was inevitably a terminal illness, a sentence such as that in *Mercer*<sup>95</sup> or *Nduwayo*<sup>96</sup> made it likely that the offender would not outlive his sentence. However, with advances in treatment and the associated increased lifespan, the

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92. Inmates in Canadian prisons do not have access to needle exchange programs and the safer tattoo pilot project was cut in 2006 by the federal government. Canadian HIV/AIDS Legal Network, "Stepping Up: Annual Report 2006-1007" (Toronto: Canadian HIV/AIDS Legal Network, 2007) at 6, online: Canadian HIV/AIDS Legal Network <<http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1093>>.

93. Elliott, *Criminal Law and HIV/AIDS*, *supra* note 26.

94. National Commission on Acquired Immune Deficiency Syndrome, "Report on HIV disease in correctional facilities" (Washington D.C.: The Commission, 1991) at 36.

95. *Supra* note 22 at para. 105. The Court of Appeal imposed a sentence of eleven years and three additional months for breach of his bail conditions.

96. *Supra* note 34. His twenty-five year sentence was reduced to fifteen years based on the totality principle. The B.C. Court of Appeal has since ordered a new trial on the basis of errors in the trial judge's charge relating to credibility. See *R. v. Nduwayo*, 2008 BCCA 255.

question arises of how to deal with such individuals after their period of imprisonment.<sup>97</sup>

b. *Deterrence*

The majority in *Cuerrier* indicated that criminal law has a role to play in deterring non-disclosure and in protecting the public from “irresponsible individuals who refuse to comply with public-health orders to abstain from high risk activities.”<sup>98</sup> The language of general deterrence, blended with retribution, drove the Supreme Court of Canada majority in *Cuerrier*:

[Criminal law] provides a needed measure of protection in the form of deterrence and reflects society’s abhorrence of the self-centered recklessness and the callous insensitivity of the actions of the respondent and those who have acted in a similar manner. The risk of infection and death of partners of HIV-positive individuals is a cruel and ever present reality. Indeed the potentially fatal consequences are far more invidious and graver than many other actions prohibited by the *Criminal Code*. The risks of infection are so devastating that there is a real and urgent need to provide a measure of protection for those in the position of the complainants. If ever there was a place for the deterrence provided by criminal sanctions it is present in these circumstances.<sup>99</sup>

The harsh approach taken to effect general deterrence is heightened by the courts’ dread and fear of HIV. In *Mercer*, the Newfoundland Court of Appeal referred to the accused’s crimes as “catastrophic and dreadful”<sup>100</sup> and of “monumental proportions.”<sup>101</sup> In raising the sentence of thirty months imposed by the trial judge to eleven years, the Court acknowledged that eleven years was tantamount to life imprisonment for the accused given his medical status, but the Court wanted to send a message that individuals may risk imprisonment that exceeds their life expectancy if their actions

97. See Christopher Park, “Empowering people living with HIV in Europe: manifesto, mantra or mirage?” in Srdan Matic, Jeffrey E. Lazarus & Martin C. Donoghoe, eds., *HIV/AIDS in Europe: Moving from Death Sentence to Chronic Disease Management* (Copenhagen: World Health Organization, 2006) at 15-26.

In the recent case of Carl Leone, the Crown has made an application to have the accused designated as a dangerous offender and thus subject to indeterminate incarceration. Don Lajoie, “Crown questions Leone assessment” *Windsor Star* (14 February 2008), online: Canada.com. Leone received fifteen consecutive sentences totaling forty-nine years but was not found to be a dangerous offender. His sentence was reduced to eighteen years on the basis of the principle of totality. The judge cited the fact that Leone had pleaded guilty to spare his victims the trauma of testifying. See Caroline Alphonso, “Man Gets 18 Years for Spreading HIV” *Globe and Mail* (5 April 2008) A6.

<<http://www.canada.com/windsorstar/story.html?id=e5f5fffe-e30c-480a-8dd9-bbb6ac816308&k=75134>>. See also Schmidt, *supra* note 56.

98. *Supra* note 19 at para. 141.

99. *Ibid.* at para. 142.

100. *Supra* note 22 at para. 52.

101. *Ibid.* at para. 85.

“wreak a life sentence upon their unwitting partners.”<sup>102</sup> The Court wanted to ensure that the accused was never in a position to repeat his conduct.

Whether this tone will diminish now that HIV/AIDS is no longer inevitably fatal remains to be seen.<sup>103</sup> The sentences imposed in more recent cases suggest that developments in treatment have not tempered the harsh judicial response, and the apparent increase in the number and seriousness of charges laid suggests that prosecutors continue to take these cases very seriously.<sup>104</sup>

The argument for deterrence is premised on the assumption that the fear of prosecution will lead individuals to disclose their HIV status to their sexual partners who will in turn insist on safer sex or withhold consent. But, is this a legitimate assumption? The fact that medical and educational efforts and even coercive public-health mechanisms have failed to alter the behaviour of the accused in these cases might lead one to suspect that the small likelihood of criminal prosecution would be insufficient to alter the behaviour in question. The incidence of sexual assault generally, despite its much clearer and more widely known criminalization, brings the criminal law’s ability to regulate sexual activity through deterrence into question.

[Statements supporting deterrence] contain the assumption that people living with HIV will have a clear and detailed understanding of the precise ways in which such convictions are obtained (i.e. what constitutes liable activity and what does not). It also presumes that people living with HIV will prioritise concerns about legal liability ahead of sexual impulse, privacy, and a desire to not be defined by, or discriminated against because of their HIV infection.<sup>105</sup>

The very premise underlying the deterrence argument is suspect, particularly in the sexual context. As Professor Dalton states:

The notion that we can deter Paul from engaging in risky sex by punishing Peter assumes a great deal that may not be true. It assumes that Paul engages in a rational risk calculation; that he is future oriented; that he will focus on what happens to Peter; that he has come to grips with his HIV status and the fact that he might pose a transmission risk to others; and that he is fully accepted the fact that for the rest of his life he will

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102. *Ibid.* at para. 103.

103. Stobbe, *supra* note 15. This article states that an American diagnosed with HIV/AIDS can expect to live an average of twenty-four years after diagnosis with the health expenditure of about \$600,000 US.

104. One could speculate that the growing awareness that HIV is not necessarily fatal has increased the rate of non-disclosure. In other words, the vigilance we saw regarding safer sex in the 1980s-90s may be slipping and disclosure seen as less necessary.

105. Dodds et al., *supra* note 75 at 9.



face more than occasional rejection by potential sex partners.<sup>106</sup>

Of course similar concerns could be raised about deterrence in the sexual assault context generally. My point here is simply that criminalization is unlikely to serve a widespread deterrent function when dealing with sexual activity. A recent American empirical study, for example, found that persons at high risk for HIV (both those who had been tested and those who had not) did not alter their sexual practices (i.e., disclosure and the use of condoms) based on whether they believed the law required disclosure.<sup>107</sup>

c. *Retribution, denunciation, and the symbolic function of law*

I suggest that much of the judicial concern with deterrence discussed above masks the underlying desire for retribution. There is a clear message in the case law that the devastation caused to the complainants must be publicly acknowledged and denounced through a harsh punitive response to the accused. This is strongly expressed in *Miron*:

It is clear and it [sic] acknowledged that [the accused's] actions have had a devastating and emotional damage to these victims, one that can probably never be measured. One can only imagine how unspeakable the horror must be for these individuals upon learning of Mr. M.'s disease. They may very well be left wondering whether or not they have all been sentenced to death and as Mr. M. himself described when he said that he was the judge, jury and executioner.<sup>108</sup>

The urge to punish or seek retribution is evident in the cases. There is a sense that the nature and seriousness of the risks involved demand a response from the system even if that response is not going to contribute to the public health fight against the illness. There is an unarticulated undercurrent in the case law that the accused involved are bad people from whom potential complainants must be protected, and not people who, in difficult circumstances themselves, made very bad choices.

The desire for retribution overshadows the complexity of the relationships involved in these cases, portraying the accused as an evil predator and (usually) the complainant as the innocent prey. Many authors have identified the tendency to divide those who acquire HIV/AIDS into two groups. On the one hand, there is the recipient or victim who acquires the virus unknowingly and "innocently" while, on the other hand, there are those who are complicit in their own demise. The "innocent" include

106. *Supra* note 8 at 252.

107. Burris et al., *supra* note 18.

108. *Supra* note 56 at para. 22.

those who have contracted the virus from a blood transfusion, perinatally or from a long-term heterosexual relationship. IV drug users, same-sex partners and sometimes those who contracted the virus from “casual” heterosexual activity are in the blameworthy group. Similarly, there is a tendency to create distinct categories of those who transmit the virus and those who acquire it. As stated by American author Thomas Shevory:

Although AIDS has generated a plurality of discourses and responses, in the “mainstream” it is still too often reduced to a simple morality play in which “innocents” and “victims” are continuously threatened by moral reprobates and evil pleasure seekers.<sup>109</sup>

Someone who has led a lifestyle of which the court disapproves is more likely to be treated harshly. In *Wentzell*,<sup>110</sup> for example, the Court treated as an aggravating factor in sentencing the fact that “the offender has led a very promiscuous sexual life both of the heterosexual and homosexual nature before meeting the complainant. Some of this was professional sex.”<sup>111</sup> This lifestyle tells one nothing useful about the accused’s blameworthiness for the incidents on which the charges were based.

The concept of blame is not unique to the accused. Complainants also run the risk of blame in the sexual transmission cases. For example, the Ontario Criminal Injuries Compensation Board reduced by forty percent the award for three complainants who had been infected by the same accused because the Board concluded that a reasonable person would not have had unprotected sex with the accused until knowing him for a longer period.

The Board does not consider it reasonable to a trust one’s life to an almost complete stranger on such a brief acquaintance. Given the dangers of unprotected sexual activities a reasonable person would require a much longer period of trust building. Furthermore the Board does not consider it sufficient to simply ask the sexual partner for an HIV status. One does not need the protection of such a question against an honest person and the question does not protect against a dishonest person.<sup>112</sup>

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109. *Supra* note 44 at 11.

110. *Supra* note 22 at paras. 7, 25.

111. *Ibid.* at para. 7.

112. *Criminal Injuries Compensation Board, supra* note 27 at para. 71. This is disturbingly reminiscent of the view expressed in sexual assault cases that “loose women ask for it.” It is also not reflected by the facts. The Board failed to acknowledge that some of the complainants thought they were in relatively permanent stable relationships with the accused.

The Ontario Divisional Court overturned the reduction, noting that “the conduct of the accused was so outrageous that any lack of prudence on the part of the victims pales into oblivion.”<sup>113</sup>

If we have learned anything over the past two decades with HIV/AIDS, it is that there is no “us” and “them.” We cannot divide people into those who transmit the virus and those who acquire it because we are all potential transmitters and potential recipients. Even the most blameworthy accused has acquired the virus, quite possibly him or herself a “victim” of failure to disclose.<sup>114</sup> Recent studies have established that HIV is most likely to be transmitted during the period in which the individual does not know yet that he or she is HIV-positive, a fact which raises huge challenges for prevention strategies.<sup>115</sup>

Closely related to retribution is the idea that criminal law can serve a symbolic function in reflecting societal values. In other words, the criminalization of non-disclosure reflects society’s values about appropriate sexual behaviour. Thus, it could be argued that even if criminal law does not contribute to curbing the spread of HIV/AIDS, it is still legitimate as a normative mechanism for representing shared social values.

## 2. Arguments against criminalization

### a. The impact of criminalization on behaviour

Many of the arguments against criminalizing the non-disclosure of HIV status by persons with HIV focus on the impact of criminalization on the behaviour of persons with or at risk for HIV. One of the central arguments is that the potential for criminal prosecution will drive people underground and deter them from getting tested (and properly treated) for HIV. Because criminal liability only attaches if the accused knew that he or she was infected with the virus, persons who do not know their HIV status cannot be prosecuted criminally. Therefore, it is argued, people will go untested, thus increasing the risk both to themselves and to their sexual partners.

113. *Ibid.* at para. 73.

114. In fact, the complainant in *Williams* (SCC), *supra* note 38, was herself later charged with aggravated sexual assault due to her failure to disclose her HIV status to two male complainants, neither of whom contracted HIV. She received a conditional sentence of twelve months, and three years probation. She was diagnosed “as suffering from Mood Disorder due to HIV Infection with Hypomanic Features, at the time of the offence” (*Murphy*, *supra* note 56, at para. 16). Before pleading guilty, Murphy spoke of having nothing but “hatred” for Williams, the man who had infected her, describing him as “ruthless.” (Sonia Verma, “Jennifer Murphy describes her life” *Toronto Star* (16 April 2005) A10).

115. Lisa Priest, “Newly Infected Spread Half of HIV: McGill study finds high-risk people often don’t know they have virus” *The Globe and Mail* (2 March 2007), online: <http://www.theglobeandmail.com/servlet/story/RTGAM.20070302.wxhiv02/BNStory/specialScienceandHealth/home>.

This position is expressed in the intervener factum in *Cuerrier* submitted by various AIDS groups:

[A] policy of mandatory disclosure will dissuade at least some of those at greatest risk of HIV infection from being tested so that they can honestly say that they do not know their HIV status and to protect the confidentiality of this information.<sup>116</sup>

As with deterrence generally this assertion is very difficult to prove or negate. Certainly in the early days of HIV/AIDS, there was little incentive to be tested given the paucity of treatment options available and the stigma associated with infection. Now that drug combinations can significantly extend and improve the quality of life for people with HIV/AIDS, the incentive for testing is greater. There is a myriad of factors that play into the decision to be tested. Three of the primary reasons are the need to know one's status in order to seek treatment for oneself; the need to know one's status in order to modify one's sexual behaviour with others; and the concern by a pregnant woman for the health of her fetus. Presumably only those who are planning not to seek treatment and not to disclose their HIV status would be deterred from getting tested. Those who plan to act responsibly with regard to disclosure would have no reason to avoid testing. Furthermore, a conscious decision not to get tested, because of the fear of the results of testing, could be taken as wilful blindness with respect to whether one is HIV-positive.<sup>117</sup>

The majority of the Court in *Cuerrier* rejected out of hand the suggestion that criminalization may deter people from getting tested by the criminalization of non-disclosure. It assumed that everybody would want to know whether or not they are infected and whether or not treatment is available even though treatment is not a cure. McLachlin J., by contrast, did briefly acknowledge the possibility of an impact on testing; however she also suggested that criminalization could actually encourage disclosure.<sup>118</sup> The *Mercer* Court also rejected the argument that imprisoning people with HIV who fail to disclose their status would deter people from getting tested. Neither Court cited any literature to back up its position.

My view is that we should be cautious about relying on deterrence either to support or oppose criminalization. On the one hand, criminalization is

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116. *Cuerrier*, *supra* note 19 (Factum of the Interveners, Canadian AIDS Society, Persons with AIDS Society of British Columbia and Canadian HIV/AIDS Legal Network at para. 28).

117. *S.(F)*, *supra* note 56 at para. 21.

118. McLachlin J. noted that *Mercer* (*supra* note 22) already established the offence of criminal negligence causing bodily harm (where the virus is transmitted) and that there was no evidence that this had decreased the rate of testing. *Cuerrier*, *supra* note 19 at para. 74.

unlikely to deter large numbers of people from failing to disclose. On the other hand, it is unlikely that criminalization deters significant numbers of persons from getting tested for HIV, particularly when prosecutions are still relatively rare.<sup>119</sup>

b. *Responsibility for avoiding HIV*

Another argument against criminalization is that everyone should be responsible for taking precautions against HIV, such as through condom use. Criminalizing non-disclosure on the part of HIV-positive individuals sends the wrong message because it reinforces the idea that the HIV-positive partner has the sole responsibility for practising safer sex and creates a false sense of security among potential complainants.<sup>120</sup>

The majority judgment in *Cuerrier* gave short shrift to the argument that criminalization could interfere with the public-health message that everyone needs to take precautions against HIV. The Court held that those who know they are HIV-positive do bear the greater responsibility for practising safer sex: "that responsibility cannot be lightly shifted to unknowing members of society who are wooed, pursued and encouraged by infected individuals to become their sexual partner."<sup>121</sup>

The argument that people would become complacent and develop a false sense of security on the basis that they are being protected by the criminal law is not convincing.<sup>122</sup> Criminal law operates primarily after an illegal act has been committed. The fact that sexual assault, for example, is a crime does not lead women to feel they are somehow protected from it. However, the argument that everyone is responsible for practising safer sex cannot be so easily dismissed.

There is no doubt that, in an ideal world, everyone would be able to insist on condom use and take responsibility for his or her own protection.

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119. Given that criminalization does not appear to have a significant impact on people's sexual practices one might suspect that it is unlikely to have a significant impact on testing decisions. This fact is conceded in a recent empirical paper that opposes criminalization:

[H]ow plausible is it that people who do not let the prospect of criminal liability influence their sexual behavior would be affected by criminal law in their health-seeking behavior? There is little in the data on why people delay or avoid testing that suggests that fear of criminal or other legal consequences is a major factor. ... [T]his is not to say that law may not be a small factor for many, and even a decisive factor for a few, but the decision to test seems to have other, more immediate drivers that probably swamp any effect on law in most instances. (Burriss et al., *supra* note 18 at 512-13.)

120. *Cuerrier*, *supra* note 19 (Factum of the Intervener, the British Columbia Civil Liberties Association, at para. 28.) In *Wentzell*, *supra* note 22 at para. 13, two doctors testified in opposition to criminalization for precisely this reason.

121. *Cuerrier*, *supra* note 19 at para. 144.

122. A recent study found no evidence to indicate that the existence of HIV laws leads people to assume they are safe. Burriss et al., *supra* note 18 at 511-12.

However, given the pervasive inequality, especially in heterosexual relationships, is this a realistic expectation? Globally, more than fifty percent of all HIV/AIDS cases are women. While the rate of infection for women in North America has not yet reached that of men, the incidence in young women is increasing faster than in any other group. The majority of these women have been infected through heterosexual sex. This fact raises many issues unique to women because of their relative powerlessness in their sexual lives compared to men. Women may not be in a position to insist on condom use. Women in abusive relationships, women involved in prostitution, young women, and women living in poverty and/or social isolation may all have particular difficulties in insisting on condom use. Loppie and Gahagan assert that women in Canada as elsewhere “have been relegated to positions of social, political and economic subordination that are mediated by race and class” and that this subordination “inhibits women’s capacity to protect themselves from exposure to HIV.”<sup>123</sup> Thus, the reality for women may be that they cannot always take the best precautions available to prevent transmission of HIV/AIDS; rather they must rely on their male partners to cooperate.

The role of gendered imbalances of power in heterosexual sexual relationships and how that relates to HIV/AIDS is a complex one. We know that women are at a greater risk of acquiring HIV from vaginal intercourse with an infected man than men are from vaginal intercourse with an infected woman because of the higher concentration of HIV in sperm and the increased surface area of the vagina.<sup>124</sup> We also know that women are more likely to be subjected to violence from their sexual partners.<sup>125</sup> Violent or forced sex in turn is more likely to transmit the virus.<sup>126</sup> Furthermore, the very fact of being HIV-positive can put a woman at particular risk of violence:

Women living with HIV face some unique challenges connected to HIV and sexual violence, particularly those who are in an abusive relationship.

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123. Charlotte Loppie & Jacqueline Gahagan, “Stacked against us: HIV/AIDS statistics and women” (2001) 21 *Can. Woman Studies* 6 at 6, cited in Joanne Csete, “Vectors, Vessels and Victims: HIV/AIDS and Women’s Human Rights in Canada” (Toronto: Canadian HIV/AIDS Legal Network, 2005) at 29, online: Canadian HIV/AIDS Legal Network <<http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=529>>.

124. Csete, *ibid.* at 14. See also Health Canada, “HIV/AIDS EPI Updates” (Ottawa: Health Canada, April 2003) at 18-20, online: Health Canada <[http://www.phac-aspc.gc.ca/publicat/epiu-aeipi/hiv-vih/pdf/epiact\\_0403\\_e.pdf](http://www.phac-aspc.gc.ca/publicat/epiu-aeipi/hiv-vih/pdf/epiact_0403_e.pdf)>.

125. Michelle Teti et al., “The Links between Violence against Women and HIV/AIDS: Ecosocial and Human Rights Frameworks Offer Insight into US Prevention Policies” (2006) 9 *Health and Human Rights* 41.

126. Csete, *supra* note 123.

Disclosure of a woman's HIV status to her partner can increase her susceptibility to sexual and physical violence. Knowledge of her HIV status can give her abuser further control in the relationship. For example, her abuser may use her HIV status against her by threatening to tell others. HIV-positive women may stay in abusive relationships because of decreased self-worth and because they believe that no other person would want to have a relationship with them.<sup>127</sup>

Women also bear the added burden of the risk that the virus will be passed on to their children through childbirth or breast-feeding. The assertion that everyone should insist on careful condom use is based on a construction of heterosexual relationships as involving two equal participants with equal power to assert in the context of sexual activity. This view of equality in sexual relationships is expressed in the following passage by Matthew Wait who argues forcefully against criminalization:

If a person agrees to participate in the kind of sex which carries the risk of HIV infection (and most sex is safer rather than safe) and is infected, we must question whether it is right to attribute sole responsibility to and punish the person who transmits the virus, when that would not have happened but for the other person's willingness to accept that risk. We must question the extent to which they are passive in the process of transmission and the extent to which they ought to be characterized as innocent victims. We must question whether it is always, irrespective of context, right to assert that it is something which is done to them.<sup>128</sup>

Wait suggests that a woman's willingness to trust her sexual partner or her failure to insist on precautions is as causally responsible for transmission as the failure to disclose.<sup>129</sup> However, I would argue that the pervasive sex inequality that exists in heterosexual relationships in particular renders Wait's position unrealistic.

### c. *Stigma*

Persons with HIV/AIDS face discrimination in a variety of contexts such as housing, employment, and access to services. The fact that the rate of HIV infection is higher among several social groups who already face discrimination compounds the disadvantage experienced by persons

127. Voices of Positive Women, "FYI: Voices of Positive Women Newsletter" (Toronto: Voices of Positive Women, August 2004) at 2, online: Voices of Positive Women <[http://www.vopw.org/voicesweb/aug04\\_fyi.pdf](http://www.vopw.org/voicesweb/aug04_fyi.pdf)>.

128. "Taking the Blame: Criminal Law, Social Responsibility and the Sexual Transmission of HIV" (2001) 23 J. Soc. Welfare & Fam. L. 441 at 451.

129. *Ibid.*

with HIV.<sup>130</sup> In the early days of HIV, concerns were expressed that criminal prosecutions would disproportionately affect persons in high-risk populations, such as the gay community, who have already borne the brunt of the social stigmatization of HIV. It is thus worthy of note that a large majority of prosecutions in Canada to date have involved heterosexual transmission, primarily from men to women. On the one hand, the small number of same-sex prosecutions makes it appear that homosexual men are not being targeted for criminalization. On the other hand, it could be argued that the fact that prosecutions are more likely in the heterosexual context reflects a lack of concern about potential homosexual complainants.<sup>131</sup> The rarity of gay complainants could reflect a lack of concern about their physical integrity and stereotypes about their promiscuity and their assumption of risk. One could speculate that who is charged with these crimes is as much about the characteristics of the complainants as it is about the accused. This trend has been noted in other countries as well:

There is also a generalized hierarchy of injured parties implied in these cases: while all victims are consistently constructed as having been victimized, not all complainants are in fact victims. Subtle distinctions are made about the credibility and the importance of the particular complainant. From the standpoint of the prosecution's goal of conviction, witnesses have different value in bringing home the absolute villainy of the accused. For example a woman who makes a single transgression with an infected sexual partner becomes a more credible witness because she validates the idea that the AIDS criminal alone is committing the crime of infection.

... Drug injectors are not considered credible in a court of law. By virtue of their addiction, they are thought to have lost their selves and therefore their citizenship. Sex workers are already too criminal themselves to sustain their position as an innocent party to a crime. Thus, it is no accident that most cases that are prosecuted possess strikingly similar characteristics.<sup>132</sup>

Race also appears to play a role in these prosecutions. While both the American and the Canadian cases seem to indicate a high number of

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130. According to the Public Health Agency of Canada, an "estimated 51% of all infections at the end of 2005 were attributed to men who have sex with men (MSM), 17% to IV drug users (IDUs), 27% to heterosexuals, 4% to MSM/IDUs and the remaining to other exposures categories." Public Health Agency of Canada, "Populations at Risk" (2005) Online: Public Health Agency of Canada <[http://www.phac-aspc.gc.ca/aids-sida/populations\\_e.html](http://www.phac-aspc.gc.ca/aids-sida/populations_e.html)>.

131. Mark D. Fefer, "HIV: Criminal Intent" *Seattle Weekly* (1 December 2004), online: [Seattle Weekly](http://www.seattleweekly.com/2004-12-01/news/hiv-criminal-intent.php) <<http://www.seattleweekly.com/2004-12-01/news/hiv-criminal-intent.php>>.

132. Heather Worth, Cindy Patton & Diane Goldstein, "Introduction to Special Issue Reckless Vectors: the Infecting "Other" in HIV/AIDS Law" (2005) 2 *Sex. Research & Soc. Pol'y*: J. of N.S.R.C. 3 at 7.



accused men of African descent being charged, it is impossible to confirm this impression with the limited information available. In *Ssenyonga* the accused was black and all the complainants were white. The only case in which murder charges have been laid in Canada also involves an African accused and Caucasian victims. Perhaps the most well-known Canadian accused, former Saskatchewan football player Trevis Smith, was also black. In a New York case that attracted huge media interest, a young Afro-American man, Nushawn Williams, was prosecuted after infecting a number of white women. As one columnist put it when discussing the Nushawn Williams case: "In the story of Williams, pop culture's holy Trinity of sex, race, and danger was perfectly realized."<sup>133</sup>

Similarly, in Seattle, Anthony Whitfield, an Afro-American, was convicted of seventeen counts of first-degree assault (which requires "intent to inflict great bodily harm") and was sentenced to 178 years in prison for failing to disclose to his sexual partners that he was HIV-positive. The majority of complainants in *Whitfield* were Caucasian women.<sup>134</sup> A Seattle newspaper article links the focus on heterosexual sexual activity with race arguing that heterosexual transmission, at least in the United States, is more common than same-sex transmission in the Afro-American population.<sup>135</sup>

It is difficult to know whether race is a determinative factor in laying charges or whether there is some other variable connected to race. At least one English study has suggested that non-disclosure of one's HIV status may be more common among persons of African descent.<sup>136</sup> What is the impact of criminalization on the already significant stigma borne by persons with HIV? On the one hand, it could be argued that it is necessary to punish small numbers of persons who demonstrate a pattern of reckless conduct regarding transmission of the virus in order

133. JoAnn Wypijewski, "The Secret Sharer: Sex, Race, and Denial in an American Small-Town" (July 1998) 297:1778 *Harper's Magazine* 35.

134. *Washington v. Whitfield* (16 May 2006), 32655-8-II (App. 2d. Div.) online: FindLaw <[http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=wa&vol=2006\\_app/326558MAJ&invol=4](http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=wa&vol=2006_app/326558MAJ&invol=4)>. See also Kai Wright, "Barely Legal" (July 2006) *Poz Magazine* online: Poz: Health, Life & HIV <[http://www.poz.com/articles/1056\\_7014.shtml](http://www.poz.com/articles/1056_7014.shtml)>; Fefer, *supra* note 131.

135. Fefer, *supra* note 131. It is difficult to generalize about race from the U.S. cases because of the high rate of imprisonment of Afro-American men and the high rate of HIV transmission in prisons there.

136. Jonathan Elford et al. "Disclosing your HIV Status: The Role of an Ethnicity among People Living with HIV in London" (Paper presented to the XVIth International AIDS Conference in Toronto, Canada, 14 August 2006) online: International AIDS Society <<http://www.aids2006.org/pag/Abstracts.aspx?AID=9498>>. In the Canadian context, we know that the rate of HIV/AIDS is higher in Aboriginal communities. It would also be useful to know whether Aboriginal Canadians are more likely to be targeted for prosecution. The cases examined in this study did not appear to support this possibility.

to distinguish them from the large majority of individuals with HIV who are responsible in sexual activity. In other words, if we do not punish the few who are irresponsible, we taint the many who are not. As Winifred Holland states:

If we do not use the criminal law then there will be public outrage at high-profile cases like *Ssenyonga* where individuals have recklessly infected others. Such outrage will be aimed indiscriminately at all individuals who are HIV infected. We need an outlet for expression of outrage at such willful or reckless behavior.<sup>137</sup>

On the other hand it could be argued that criminalization unduly stigmatizes all persons with HIV/AIDS as being potential criminals, painting them as irresponsible and dangerous, as vectors of disease, and as a population that must be identified and removed from society.

Criminalization of some HIV-infected persons alters the relationship we have to all HIV-positive people because they are viewed, simply by virtue of their HIV-infected status, as criminals-in-waiting. One slipup, in the heat of the moment, and they will then be found guilty of an AIDS-related crime.<sup>138</sup>

In this regard, it is interesting that most HIV/AIDS groups firmly oppose criminalization except where the accused deliberately set out to transmit the virus. In a recent English study, for example, the authors interviewed groups of persons who had been diagnosed as being HIV-positive to determine their views on the criminalization of HIV transmission. The majority of statements made (ninety percent) were opposed to the trend towards criminalization. Concerns were raised that prosecutions minimize the importance of shared responsibility for safer sex and increase the stigma experienced by persons with HIV.<sup>139</sup>

Another troubling question is why there are cases involving the criminal transmission of HIV and not other illnesses. For example, during the SARS outbreak, there was no discussion of criminalizing people who may not have acted responsibly in following public-health directions. In the summer of 2007, there was a lot of attention given to a man who got on an international airline flight while suffering from a virulent form of tuberculosis.<sup>140</sup> There was no serious discussion of

137. "HIV/AIDS and the Criminal Law" (1994) 36 *Crim. L.Q.* 279 at 288.

138. Worth, Patton & Goldstein, *supra* note 132 at 9.

139. Catherine Dodds & T. Keogh, "Criminal Prosecutions for HIV Transmission: People Living with HIV Respond" (2006) 17 *Int'l J. of STD & AIDS* 315 at 315.

140. See generally John Lauerman, "TB case shows safety gap" *Edmonton Journal* (8 June 2007) A19; Tu Thanh Ha "Fellow Travellers Sue TB carrier" *Globe and Mail* (13 July 2007) A7.

charging him criminally even though the risk he created was probably greater than one act of unprotected sex by a person who is HIV-positive. We must question what it is about HIV/AIDS that warrants its exceptional treatment.<sup>141</sup> Is it because it is about sex? Is it because HIV/AIDS started in and is still associated with the gay community and IV drug users despite its proliferation in the heterosexual community? The “uniqueness” of HIV among communicable diseases generally is troubling and indicates that, for the preservation of social justice, the state must take great care in using the criminal law to regulate HIV/AIDS transmission.

d. *Practical difficulties in prosecuting non-disclosure cases*

As has been mentioned above, there are numerous hurdles in prosecuting one of these cases including issues relating to causation and the need for sexual history evidence. There are other practical difficulties. In several of the cases, for example, the accused had died either before trial<sup>142</sup> or before the verdict was delivered.<sup>143</sup> This difficulty will arise less frequently now that recent developments in drug combinations have extended the lifespan for many people suffering from HIV/AIDS.<sup>144</sup> Any trials where no guilty plea is forthcoming require a huge investment of time and money on the part of the Crown, and energy and distress on the part of the complainant.

Another serious problem with such prosecutions relates to the confidentiality of medical and counselling records. Counselling records may be the only way to prove that the accused was aware of the risks of unprotected sex. We have already seen in the sexual assault context generally the difficulty created by accused persons seeking the counselling records of complainants. We will now have to face Crown counsel seeking access to medical and counselling records of potential accused persons and arguments about the chilling effect this will have on people seeking counselling and, correspondingly, on contact tracing.

The access to records issue is particularly problematic in the context of HIV/AIDS because counselling is where people can discuss their difficulties with disclosure and receive counselling on safer sex practices. If the potential future disclosure of confidential material damages the relationship of trust, we all lose. Likewise, if the complainant is HIV-positive, the necessity for sexual history evidence (which may include

141. For a discussion of treating HIV/AIDS as an exceptional condition see Mary Anne Bobinski, “HIV/AIDS and Public Health Law” in Tracey Bailey, Timothy Caulfield & Nola M. Ries, eds., *Public Health Law & Policy in Canada* (Markham: Butterworths, 2005) 165 at 174-75, 212-13.

142. See *Bonar*, *supra* note 23.

143. *Ssenyonga*, *supra* note 22.

144. See e.g. *Stobbe*, *supra* note 15.

counselling records relating to her and her previous sexual partners) has the potential for abuse and may well discourage women from agreeing to testify in such prosecutions.

*Ssenyonga*, albeit a pre-*Cuerrier* case, demonstrates a number of the problems involved in HIV/AIDS prosecutions. The accused was an immigrant from Africa and was charged with three counts of criminal negligence causing bodily harm, aggravated sexual assault, common nuisance, and the administration of a noxious substance. Through various stages of the trial, the judge dismissed all but the criminal negligence charges. The trial was long, complex, and costly. Of the numerous women *Ssenyonga* may have put at risk, including at least ten of whom were allegedly infected, only three were willing to testify against him. Their primary concern, according to one author, was that their identities could be revealed publicly, particularly if the sexual assault charges were rejected by the trial judge. Several of them had not disclosed their HIV status to their families.<sup>145</sup> The prosecution also had to ensure that every sexual partner of each of the complainants was interviewed and tested negative for HIV. Because *Ssenyonga* had developed AIDS by the time of trial, there were repeated interruptions in the trial for him to seek medical treatment and, ultimately, he died only days before the verdict was to be rendered. Thus a multimillion-dollar prosecution and a significant trauma for the complainants did not reach a conclusion.

### 3. *Setting limits on the scope of criminalization*

There are numerous difficult boundary issues that challenge our ability to set rational limits on criminalization. Those relating to condom use and, more specifically, condom failure have been addressed elsewhere. How far will the disclosure obligation extend? What if the accused's viral load is so low that the virus is almost undetectable, thus decreasing the risk of transmission? Is that risk of harm significant enough to negate consent?<sup>146</sup> Or, is any risk of HIV transmission such a serious risk that it can still

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145. Callwood, *supra* note 47. The sexual assault charges were thrown out on the basis that the complainants consented to the sexual activity but the trial judge agreed to maintain the publication ban on the complainants' names.

146. See *R. v. McKenzie*, as described by Lajoie, *supra* note 56, where the trial judge rejected this defence but acquitted the accused for other reasons. He stated "it seems to be a fragile defence. All it reveals is the state of the blood tested on the day in question, not two weeks earlier, not two weeks later.... To rely on slips of paper from a lab seems fraught with hazard." See more recently, *Mabior*, *supra* note 81, where the trial judge did consider the accused's undetectable viral load but only where the accused was wearing a condom. The trial judge held that the use of a condom along with an undetectable viral load negated the Crown's allegation of fraud. However, where the accused did not wear a condom, a low or undetectable viral load was not sufficient to negate fraud.

negate consent? What if the accused does not know what his viral count is?

As we have seen in the sexual assault context, the involvement of alcohol will inevitably complicate matters. What if the accused was too intoxicated to understand the need for disclosure to the complainant? Sexual assault is a general intent offence suggesting that only extreme intoxication could negate the fault requirement. However, section 33.1 of the *Criminal Code* limits the defence of extreme intoxication in the context of crimes that interfere with or threaten to interfere with the bodily integrity of another person.

To what extent does the accused have to ensure that the complainant understands the information being disclosed? What if the accused does disclose his status but the complainant is too intoxicated to understand? What if the complainant has a mental disability which precludes her from understanding the risks of HIV involved in unprotected sex even though she may be capable of consenting to sex generally?<sup>147</sup>

Similarly, issues may arise regarding an accused's mental state. What if the accused suffers from AIDS-related dementia or is drug-addicted? One problem that has arisen in several jurisdictions is what to do with the individual who has a pre-existing psychiatric or mental disability who is also HIV-positive and who has demonstrated an inability or unwillingness to engage in safer sexual practices. In Calgary, for example, two such individuals are being detained indefinitely under public health legislation and given constant supervision.<sup>148</sup> In New Zealand, a man with an intellectual disability has been detained for several years for failing to disclose his HIV status. He was originally charged criminally and given a suspended sentence. However, this sentence was eventually quashed and he has been detained indefinitely since 1999 in a health facility under

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147. In one case in this sample, the complainant was a young woman with the cognitive ability of a child in grade two. See *Lamirande*, *supra* note 56, where the Manitoba Court of Appeal overturned the sentence of forty months and gave the accused a conditional sentence. The trial judge had noted that the guilty plea was made necessary by the unreliability of the complainant as a witness. It was this fact that led the trial judge to conclude, in rejecting a joint submission for a conditional sentence, that the complainant's particular vulnerability made the accused especially culpable. (*R. v. Lamirande* (2006), 199 Man. R. (2d) 299 at para. 35 cited in *Lamirande*, *supra* note 56 at para. 18).

148. One has been diagnosed with schizophrenia the other with fetal alcohol syndrome. The individuals are in a community facility and one of them goes out to work supervised on a regular basis. Telephone interview with Barbara Ross, Manager, Harm Reduction & Special Projects, Calgary Health Region (13 June 2007).

the New Zealand *Health Act*,<sup>149</sup> apparently at a cost over double that of imprisonment in a maximum-security prison in New Zealand.<sup>150</sup>

It should also be recognized that criminalizing one aspect of the transmission of HIV may have repercussions for the criminalization of other forms of transmission. For example, what about the HIV-positive woman who declines to take AZT during her pregnancy and gives birth to an HIV-positive child?<sup>151</sup> There are also questions surrounding criminal liability for the sharing of needles by drug users and the transmission of HIV through medical procedures.<sup>152</sup>

Some commentators<sup>153</sup> argue that sexual transmission should only be criminalized where the accused actually intends to transmit the virus, not where the intention is merely to have unprotected sex.<sup>154</sup> This distinction is difficult to draw, however, in part because of the challenge of proving that an individual's purpose was to transmit the virus but also because the distinction between the deliberate and the unintentional is not clear-cut. For example, what about the person whose purpose is to have sex, who knows that there is a significant risk of transmitting the virus, but simply does not care about that risk? On the other hand, what about the person who wants to transmit the virus but who knows that HIV is not necessarily transmitted by every act of unprotected sex? Is there an important difference in blameworthiness between these two? Is there a legally significant difference between the person who says "I'm going to

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149. "Truscott's Sentence Cut After Fifth Escape" *The Press (Christchurch)* (15 June 2001) 6; Joanna Norris, "Placement of Patient Challenged" *The Press (Christchurch)* (30 December 2004) 4.

150. "\$355,000 to keep gay man isolated" *The Dominion (Wellington)* (16 December 2000) 12. For a description of this case see Alastair MacDonald & Heather Worth, "Mad and Bad: HIV Infection, Mental Illness, Intellectual Disability, and the Law" (2005) 2 *Sex. Research & Soc. Pol'y: J. of N.S.R.C.* 51. The authors cite studies suggesting that high-risk sexual behaviours are more common among persons with major mental disorders and persons with psychiatric illnesses are more likely than others to be HIV-infected. As mentioned above, courts in Ontario and British Columbia have taken different positions on whether a person who is HIV-positive can be detained under mental health legislation on the basis that they have a mental disorder which makes it more likely that they will transmit HIV. See *Chambers*, *supra* note 28, and *Mitchell*, *supra* note 25.

151. We have already seen one case in Hamilton of a mother [an immigrant from Africa] whose children have been permanently removed from her care and who has been convicted of failing to provide the necessities of life to her newborn child on the basis that, having followed medical advice during her first pregnancy, she failed to tell her doctors during her second delivery that she was HIV-positive. Her second child went on to test positive for HIV. *R. v. Ifejika*, 2006 ONCJ 356, 2006 CarswellOnt 5911. She was sentenced to six months served conditionally in the community followed by three years probation.

152. See e.g. Catherine Waldby et al., "Medical Vectors: Surgical HIV Transmission and the Location of Culpability" (2005) 2 *Sex. Research & Soc. Pol'y: J. of N.S.R.C.* 23.

153. Elliott, "Criminal Law, Public Health and HIV Transmission," *supra* note 11 at 27.

154. The California HIV statute adopts this position. Cal. Health & Safety Code § 120291 (West 2007).

give HIV to everyone I can"<sup>155</sup> and the person who simply says "I don't care how many people I infect"?

### III. *Legal options for addressing non-disclosure*

Public health and criminal law measures are the two primary mechanisms for state involvement in the failure to disclose one's HIV status. In this section I examine our existing public health mechanisms and explore some of the options for criminalization.

#### 1. *Public health*

The most obvious alternative to criminalization is to rely exclusively on the public health system to facilitate disclosure and safer sex practices. The effectiveness (or lack thereof) of provincial public health legislation plays an important role in assessing the appropriate response to those who fail to disclose their HIV status. The Federal/Provincial/Territorial Advisory Committee on HIV/AIDS identified the advantages of resort to a public health system over the use of criminal law:

- Public health provides greater scope for prevention and more opportunities for surveillance of HIV
- Confidentiality is maintained to a greater extent in a public health approach
- There is less stigmatization of persons with HIV
- HIV is less likely to be driven underground in a public health framework.<sup>156</sup>

It is important to note at the outset that public health law works best when those subject to it are cooperative. While public health legislation has coercive mechanisms for use in extreme cases, the various provincial regimes are structured around cooperative measures and prevention and detection at a community level.<sup>157</sup>

155. These words by an accused were apparently used to convict him of first-degree assault because they proved his intention to spread the virus; see Fefer, *supra* note 131.

156. Ronda Bessner, "Persons who Fail to Disclose their HIV/AIDS Status: Conclusions Reached by an Expert Working Group" (1 March 2005) 31:5 *Canada Communicable Disease Report*, online: Public Health Agency of Canada <<http://www.phac-aspc.gc.ca/publicat/ccdr-rmtc/05vol31/dr3105ea.html>>.

157. See Leslie E. Wolf & Richard Vezina, "Crime and Punishment: Is There a Role for Criminal Law in HIV Prevention Policy?" (2003-2004) 25 *Whittier L. Rev.* 821 at 831.

The scope of public health powers is linked to the classification of the disease type. For example, in most provinces,<sup>158</sup> HIV is designated as a “reportable” or “communicable” disease. When dealing with more easily transmissible “virulent” diseases, the power to prevent transmission is more far-reaching.

The goal of public health law, in this context, is to stem the spread of HIV/AIDS and to facilitate treatment, education, and contact tracing. There are provisions relating to HIV-positive individuals who refuse treatment, such as the taking of blood samples and bodily fluids without consent, as well as the power to communicate confidential health information to family members for the protection of their health.

Provincial public health laws all include some form of written order or “warrant” issued by a public health official requiring an HIV-positive individual to “take or refrain from taking an action.”<sup>159</sup> These written orders can range from requiring an individual to submit to forced medical treatment,<sup>160</sup> mandatory counselling,<sup>161</sup> or to desist from any activity that may spread HIV.<sup>162</sup> A written order may require an individual to refrain from having unsafe sex, or to disclose his or her HIV status prior to engaging in sexual relations. If an individual fails to adhere to a written order, several provinces<sup>163</sup> include powers to detain or isolate identified individuals for an indefinite period of time.<sup>164</sup>

The Ontario *Health Protection and Promotion Act* allows a medical officer of health to issue a written order requiring a person to “take, or to refrain from taking, any action.”<sup>165</sup> According to a 1996 study, forty-five written orders were issued from 1985 to the end of 1993 to HIV-positive

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158. For the statutory language see *Health Act Communicable Disease Regulation*, B.C. Reg. 4/83; *Health Act*, R.S.N.B. 1973, c. H-2 at s. 6(1)(o); *Communicable Diseases Act*, R.S.N.L. 1990, c. C-26 at section 2(a) [*Newfoundland and Labrador Diseases Act*]; *Communicable Disease Regulations*, R.R.N.W.T. 1990, c. P-13, s. 1.1 [*Northwest Territories and Nunavut Diseases Regulations*]; *Specification of Communicable Diseases Regulation*, O. Reg. 558/91; *Public Health Act*, R.S.P.E.I. 1988, c. P-30, s. 1(b); *Public Health Act*, S.S. 1994, c. p-37.1 at s. 2(f) [*Saskatchewan Health Act*]; *Public Health and Safety Act*, R.S.Y. 2002, c. 176, s. 1.

159. *Ontario Health Protection and Promotion Act*, R.S.O. 1990, c. H-7, s. 22(1)(3) [HPPA].

160. *Newfoundland and Labrador Diseases Act*, *supra* note 158, s. 15.

161. *Saskatchewan Health Act*, *supra* note 158, s. 34(1).

162. HPPA, *supra* note 1, s. 22(3).

163. See e.g. *Communicable Disease Regulation*, Alta. Reg. 238/85; *British Columbia Health Act*, R.S.B.C. 1996, c. 179; *Northwest Territories and Nunavut Diseases Regulations*, *supra* note 158; *Diseases and Dead Bodies Regulation*, Man. Reg. 338/88R.

164. *Public Health Act*, R.S.A. 2000, c. P-13, s. 40(1) [*Public Health Act (Alberta)*].

165. HPPA, *supra* note 159, s. 22.



individuals.<sup>166</sup> In comparison, between 1999 and 2003, at least fifty-five such orders were issued.<sup>167</sup>

In 2003, a working group of experts in the field of HIV/AIDS, organized by the Federal/Provincial/Territorial Advisory Committee on HIV/AIDS, endorsed the Calgary Health Region's model for dealing with non-disclosure of HIV status.<sup>168</sup> This model begins with the least intrusive approach and continues through various steps each of which involves increasingly more coercive intervention. Initial efforts focus on counselling and education, then move to the provision of services, to a public health order to an apprehension order and/or isolation order, and finally, where all else has failed, the possibility of criminal liability.

Public health orders specify the conditions under which the individual with HIV must disclose his status and the steps that must be taken to protect sexual partners.<sup>169</sup> If those measures fail, more intrusive conditions can be applied mandating treatment and disclosure and prohibiting particular sex acts.<sup>170</sup> Should this order not be sufficient, an apprehension order can be issued providing for the person to be arrested and evaluated at a health institution. This apprehension expires after seven days unless an isolation order is imposed.<sup>171</sup> With an isolation order, the person must be re-examined every seven days to determine whether release is appropriate.<sup>172</sup> Finally, punitive proceedings can be brought under Alberta's *Public Health Act* for violating a medical order. If criminal action is warranted, the guidelines suggest the offence of public nuisance, which has a maximum penalty of two years imprisonment.<sup>173</sup> Calgary currently has two HIV-positive individuals, both with pre-existing mental disabilities, who are required by the Medical Officer of Health to live in a facility and be under twenty-four-hour supervision.<sup>174</sup>

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166. Richard Elliott, "Public Health and 'The Unwilling and Unable'" (1996) 2 Can. HIV/AIDS Pol'y & Law Newsletter.

167. This data is for thirty-one Ontario health units, out of a possible thirty-seven. There is no available data for the number issued between 1993 and 1999. Debbie Sheehan, "Use of Section 22s for Individuals Who Are HIV Positive: Ontario Public Health Unit Benchmarking Survey" (2005) [unpublished, on file with author].

168. Bessner, *supra* note 156.

169. These orders are governed by *Public Health Act (Alberta)*, *supra* note 164, s. 29.

170. Telephone interview with Barbara Ross, Manager, Harm Reduction & Special Projects, Calgary Health Region (13 June 2007); *Public Health Act (Alberta)*, *ibid.*, s. 29.

171. *Public Health Act (Alberta)*, *ibid.*, ss. 40-41.

172. *Ibid.*, s. 44.

173. Bessner, *supra* note 156.

174. Apparently both are unable to take the necessary measures to prevent transmission of HIV. See, *supra* note 149.

Given the incurability of HIV/AIDS it is difficult to see the circumstances under which, short of the death of the individual involved, a public health order could be rescinded. In Ontario, for example, an order under section 22 of the *Health Protection and Promotion Act*<sup>175</sup> has no time limits and no mechanism for determining whether the order should be lifted. A 1997 report by the Ontario Advisory Committee on HIV/AIDS concluded that “the endpoint of a section 22 order against a person with HIV would be the adoption of behaviors that minimize or eliminate the risk of disease transmission to others.”<sup>176</sup> There are also jurisdictional issues. An order made in one province may not be enforceable in another. Difficulties can even arise if the individual in question moves from one health region to another. Public health mechanisms are less likely to provide the procedural and evidentiary protections available to an accused in the criminal justice system. Proof beyond a reasonable doubt and the right to a full hearing are not part of the public health regime.

Coercive public health measures work best where there is a definable illness that can be treated and cured within a reasonable period of time throughout which the individual is detained. HIV/AIDS is a lifetime problem and cannot be dealt with by a short period of detention. Similarly, forced treatment is not a feasible solution because anti-retroviral drugs have to be taken on a regular schedule and for life. Quarantine is also not realistic with an illness that is not very easily transmitted. Monetary fines provided for by some public health legislation seem pointless in achieving the goal of full disclosure, not to mention the fact that many people with HIV/AIDS are already economically disadvantaged.<sup>177</sup>

Those whose behaviour public health efforts can modify are those for whom criminal law is unnecessary. However, public health measures and the threat of criminalization probably both fail to alter the behaviour of those few who need their behaviour modified the most. An individual who refuses to follow the advice given by public health officials and doctors regarding disclosure and safer sex practices may well not be influenced by an order requiring such practices. In a large majority of the cases discussed in this paper, public health measures, including orders to refrain from

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175. Section 22 orders are similar to the public health orders discussed above. These orders are limited to whatever is “reasonable and probable” to address the health risk that the individual embodies. *HPPA*, *supra* note 159, s. 22(2)(c).

176. Ontario Advisory Committee on HIV/AIDS, “Reducing HIV Transmission by People with HIV Who Are Unwilling or Unable To Take Appropriate Precautions” (Toronto: Ontario Advisory Committee on HIV/AIDS, 1997) at 18.

177. Monetary fines were imposed in *Ssenyonga* but were not paid.

high-risk conduct, had been invoked against the accused before criminal charges were laid.

There is no question that public health law is a better model for dealing with the majority of individuals who are attempting to adapt to their illness responsibly. Public health law is not particularly well suited, however, to change the behaviour of the small population of individuals who fail to disclose their HIV status in the face of clear orders to do so. We can only hope that putting adequate resources into education and support services will keep this number of individuals at a minimum. The outstanding question is how to deal with the small group of individuals for whom public law regimes are ineffective.

## 2. *Criminal law*

There is a small range of cases in which the use of criminal law is a necessary last resort because the potential harm to complainants from failure to disclose is very serious and interferes with their health and autonomy in a profound way. Failure to disclose can also disproportionately affect women who are at greater risk of HIV from heterosexual sex and who are less likely to be able to insist on condom use. Requiring disclosure does not put an undue burden on the accused. If an accused finds it too difficult to disclose his or her HIV status, he or she should simply avoid unprotected sexual intercourse.

The question then arises of what form of criminalization is most appropriate: should HIV-specific statutes be enacted, as a majority of American states have done, or is it more appropriate to prosecute persons under existing criminal provisions? In the United States, twenty-nine states have enacted specific laws to criminalize various forms of transmission and/or exposure to HIV.<sup>178</sup> The vague language and wide range of punishments adopted by various state legislatures have led to

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178. This number includes all states that specifically mention HIV or refer to STIs generally. It excludes states that only prohibit the specific activity of blood and organ donation by HIV-positive individuals. See Ala. Code § 22-11A-21 (2007); Ark. Code Ann. § 5-14-123 (West 2007); Cal. Health & Safety Code § 120291 (West 2007); Colo. Rev. Stat. § 18-7-201.7 (West 2007); Fla. Stat. § 384.24 (West 2007); Ga. Code Ann. § 16-5-60 (West 2007); Idaho Code § 39-608 (West 2007); Ill. Comp. Stat. ch. 720, § 5/12-16.2 (West 2007); Ind. Code Ann. § 35-42-1-9 (West 2007); Iowa Code § 709C.1 (West 2007); Kan. Stat. Ann. § 21-3435 (2006); Ky. Rev. Stat. Ann. § 529.090 (West 2007); La. Rev. Stat. Ann. § 14:43.5 (West 2007); Md. Health-Gen. § 18-601.1 (West 2007); Mich. Comp. Laws Ann. § 333.5210 (West 2007); Mo. Rev. Stat. § 191.677 (West 2007); Mont. Code Ann. § 50-18-112 (2005); Nev. Rev. Stat. Ann. § 201.205 (West 2007); N.J. Stat. Ann. § 2C:34-5 (West 2007); N.Y. Public Health Law § 2307 (West 2007); N. Dak. Cent. Code § 12.1-20-17 (Bender 2005); Ohio Rev. Code Ann. § 2903.11 (West 2007); Okla. Stat. tit. 21, § 1192.1 (West 2007); Pa. Stat. Ann. tit. 18, § 5902 (West 2007); S.C. Code Ann. § 44-29-145 (2006); S. Dak. Codified Laws § 22-18-31 (2007); Tenn. Code Ann. § 39-13-109 (West 2007); Utah Code Ann. § 76-10-1309 (West 2007); Va. Code Ann. § 18.2-67.4:1 (West 2007); Wash. Rev. Code Ann. § 9A.36.011 (West 2007).

constitutional challenges of HIV-specific statutes in six states, all of which have been unsuccessful.<sup>179</sup>

There is a range of behaviours criminalized by HIV-specific statutes in the United States. Some narrower statutes, such as that in California,<sup>180</sup> require a specific intent to transmit HIV, as opposed to a disregard of the risks, while others require proof that the accused knew not only that he or she was infected but also that his or her actions were likely to transmit the virus.<sup>181</sup> The California statute only applies to unprotected sexual activity whereas the vast majority of states do not distinguish between protected and unprotected sexual activity. Other states have more expansive legislation, such as Tennessee which only requires the HIV-positive individual to knowingly engage in intimate contact. Any evidence of consent from the at-risk party must be presented as an affirmative defence with the burden of proof on the accused.<sup>182</sup>

The penalties attached to these statutes also vary widely, although not necessarily according to the seriousness of the conduct criminalized. The Maryland offence, for example, is a misdemeanour with a maximum three years imprisonment, even though the offence requires the accused to knowingly transfer or attempt to transfer HIV.<sup>183</sup> This requirement is more onerous for the prosecution than Tennessee's offence, which is a Class B felony carrying a sentence of fifteen to thirty years.<sup>184</sup> In Iowa, the offence is comprised of the same elements and carries a similar sentence to the Tennessee statute but with the additional consequence of having to register as a sex offender.<sup>185</sup>

Virtually all states also use general criminal law provisions to prosecute non-disclosure of HIV. There does not appear to be a significant difference in punishment between the HIV-specific and the general criminal offences. Nor do HIV-specific offences appear to have increased the number of prosecutions, at least in the early days. In a 2001 study of the criminal HIV exposure prosecutions, there was no relationship found between the number of prosecutions for HIV exposure and whether the state used

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179. See *Illinois v. Russell*, 630 N.E.2d 794 (Ill. 1994); *Iowa v. Keene*, 629 N.W.2d 360 (Iowa 2001); *Missouri v. Mahan*, 971 S.W.2d 307 (Mo. 1998); *Guevara v. Superior Ct. (Cal.)*, 62 Cal. App. 4th 864 (App. 6<sup>th</sup> Dist. 1998); *Louisiana v. Gamberella*, 633 So. 2d 595 (La. App. 1<sup>st</sup> Cir. 1993); *Washington v. Stark*, 832 P.2d 109 (Wash. App. 1992).

180. Cal. Health & Safety Code § 120291 (West 2007).

181. Fla. Stat. § 384.24 (West 2007).

182. Tenn. Code Ann. § 39-13-109 (West 2007).

183. Md. Health-Gen. Code Ann. § 18-601.1 (West 2007).

184. Tenn. Code Ann. § 39-13-109, § 40-35-112 (West 2007).

185. Iowa Code § 709C.1 (West 2007).

general criminal law or an HIV specific statute. HIV-specific statutes only accounted for one-third of all convictions.<sup>186</sup>

Is an HIV-specific offence the best option for Canada? Since the Supreme Court of Canada has opened up prosecutions for sexual assault, aggravated assault and aggravated sexual assault, and given the availability of the offence of nuisance, there is little need in Canada for an HIV-specific offence. HIV offences run the risk of being found discriminatory because they select out one medical condition, and not even the most transmissible condition, for criminal sanction. Furthermore, because of the demographics of HIV/AIDS, such laws run the risk of selecting out particularly vulnerable populations for criminal sanction. In the United States, for example, there are states that single out HIV-positive sex workers for criminalization.<sup>187</sup> Concerns about the use of HIV-specific offences are cogently articulated in the following article:

The creation of new laws specific to HIV is also worrisome because it isolates a single disease as uniquely unmanageable. Legal and medical reasoning works largely by analogy, a feature that works to protect specific diseases and individuals from becoming exceptional and stigmatized. The construction of AIDS-specific law, however, suggests that, in this case, there is no analogical situation – a dangerous move on the part of our public health and legal systems, both because it is harder to repeal than to pass laws and because this new construction of exceptionality will not only affect AIDS policy for many years to come it also defines a new paradigm for future legal responses to other diseases that may present.<sup>188</sup>

The United Nations in its *International Guidelines on HIV/AIDS and Human Rights*, while opposed to criminalization, recommends that if criminalization is to be implemented it should be through general criminal laws and not HIV-specific statutes.<sup>189</sup>

The advantages of a legislative option are obvious: clarity, predictability, and notice to potential accused persons. Nonetheless, if one looks at the history of criminalization in this area, legislation usually adds to the scope of criminal liability rather than narrowing it. The previous private

186. Zita Lazzarini, Sarah Bray & Scott Burris "Evaluating the Impact of Criminal Laws on HIV Risk Behaviour" (2002) 30 J.L. Med. & Ethics 239 at 247.

187. See Colo. Rev. Stat. § 18-7-201.7 (West 2007); Pa. Stat. Ann. tit. 18, § 5902 (West 2007); Utah Code Ann. § 76-10-1309 (West 2007).

188. Worth, Patton & Goldstein, *supra* note 132 at 4.

189. Office of the United Nations High Commissioner for Human Rights and Joint United Nations Programme on HIV/AIDS. *International Guidelines on HIV/AIDS and Human Rights*, 2006 Consolidated Version, UNAIDS at 29.

members' bills introduced in the Canadian Parliament on this issue, for example, were both more expansive than the law as set out in *Cuerrier*.<sup>190</sup>

One of the problems with the existing state of the law in Canada is the degree of prosecutorial discretion regarding which cases to prosecute and with what charges. As we have seen, charges range from common nuisance to first-degree murder for virtually the same conduct. In between these two extremes are sexual assault, criminal negligence offences, aggravated assault, and aggravated sexual assault. The range of sentences is likewise enormous. Whether an accused will have to register as a sex offender may also depend on the charge laid.<sup>191</sup> This discretion might seem to militate in favour of a specific law dealing with failure to disclose one's HIV status in order to provide consistency. However the American experience suggests that the existence of HIV-specific laws does not necessarily discourage prosecutions under general criminal offences. In fact they may simply add one more tool to a prosecutor's arsenal, leading to an even wider net of criminalization.

If we reject the need for an HIV-specific law, how should existing *Criminal Code* provisions be utilized most effectively? It is clear that the Supreme Court of Canada in *Cuerrier* was determined to find a mechanism for prosecuting the failure-to-disclose cases within the existing law. The potential for expansion of the definition of fraud was the most straightforward option. As we have seen, one of the most difficult issues in the fraud context relates to the Court's requirement of a significant risk of serious bodily harm to negate consent, which in turn makes prosecution more difficult where the complainant tests HIV-positive.

There are arguments in support of maintaining the significant risk requirement. By requiring the Crown to prove that the complainant was HIV-negative at the time she or he had unprotected sex with the accused, we will limit prosecutions to cases involving the most serious endangerment, assuming that people who are HIV-negative are endangered more than those who are not.

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190. There have been two private member's bills. Bill C-290, *An Act to amend the Criminal Code (exposure to Human Immunodeficiency Virus)*, 2nd Sess., 33rd Parl., cl. 1, which did not pass first reading after its introduction on 2 May 1988, criminalized "knowing" exposure with a maximum sentence of two years imprisonment. Bill C-354, *An Act to amend the Criminal Code (transmission of HIV)*, 1st Sess., 35th Parl., cl. 1, which passed a first reading on October 25, 1995 but did not get to second reading, would have criminalized all sexual intercourse and any potential bodily fluid transmission for HIV-positive individuals regardless of whether the transmission is known to transmit HIV. For example, dry kissing could result in seven years imprisonment, whereas partaking in proven modes of transmission could lead to life in prison. This bill also proposed preventing consent as an available defence. See Richard Elliott, *Criminal Law and HIV/AIDS*, *supra* note 26.

191. See *SOIRA*, *supra* note 82.

However, it makes no sense to convict an accused of an attempt where the virus is transmitted but of the completed offence where it is not. Determining whether the complainant was HIV-negative at the time of the sexual relationship will inevitably transform trials into a forum for airing the sexual history of complainants, which can only add to their traumatization. Until we are sure that these complainants cannot be harmed by further exposure to HIV, excluding them from the scope of culpability is problematic. If we say that proving the complainant was HIV-negative is an element of the *actus reus*, there could be a corresponding *mens rea* component that the accused must have known that the complainant was HIV-negative, an element that could add more digging into the sexual history and behaviour of the complainant and could rely heavily on stereotyped assumptions. Retaining the significant risk of serious bodily harm requirement suggests that there is a duty to disclose one's HIV status only to partners who are HIV-negative, an unworkable standard on which persons with HIV can base their sexual behaviour. The duty to disclose should not depend upon the HIV status of the complainant.

On balance, I would recommend that we reject the requirement of a significant risk of serious bodily harm in order to negate consent. I realize that removing this requirement has the potential to broaden the scope of liability, although only for the lowest offence of sexual assault because endangerment would have to be proven for aggravated assault or aggravated sexual assault.

The Supreme Court of Canada to date has shown no inclination to remove this requirement. There are, however, other options. For example, if the Court is wedded to the requirement of a risk of significant harm as a way of limiting fraud generally, it could develop the possibility raised in *Williams* (and adopted by Wells C.J. in the Court of Appeal) that unprotected vaginal or anal intercourse always endangers an unknowing complainant whether or not the Crown can prove the complainant was HIV-negative at the time. Thus, by definition, unprotected sex by an accused who is HIV-positive and knows the risks would, in the absence of disclosure, constitute sexual assault.<sup>192</sup>

Parliament, unlike the Supreme Court, is not constrained by *Cuerrier* and *Williams*. As discussed, it could enact an HIV-specific offence. In order to be seen as a compromise between these statutory offences and the status quo, Parliament could work with *Cuerrier* and expand the

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192. If the harm requirement is maintained, it is important to recognize that bodily harm includes psychological harm. See the definition of bodily harm in section 2 of the *Code* and *R. v. McCraw*, [1991] 3 S.C.R. 72.

legislative definition of non-consent in the sexual assault context to deal with these cases. Section 273.1(2) sets out certain circumstances where no consent is obtained for the purposes of sexual assault. This section, for example, states that there is no consent where the complainant is incapable of consent or if the accused abused a position of trust, power, or authority. A provision could be added that provides no consent is obtained where the accused, knowing that he carries a sexually transmitted disease, engages in unprotected vaginal or anal sex without disclosing his medical status to the complainant. The advantage of this option is that it gets away from concerns about an overly broad definition of fraud to apply in other contexts. Such a provision would not be limited to HIV but could apply to all sexually transmitted diseases. The majority of cases could then be prosecuted under simple sexual assault without the causation obstacles created by the Supreme Court of Canada's definition of fraud. Sexual assault is the most appropriate charge because it respects the autonomy of the complainant to decide with whom to engage in sexual activity. Sexual assault also has more appropriate penalties than aggravated sexual assault and removes the need to track every sexual partner of the complainant. In the most extreme cases, where it could be proven that the complainant was infected by the accused the more serious charge of sexual assault causing bodily harm or aggravated sexual assault could be considered.<sup>193</sup>

### *Conclusion*

The decision of whether or not to criminalize non-disclosure forces us to confront the values we expect our criminal justice system to uphold. Deterrence in this context is too speculative; incapacitation may just shift the risk to another vulnerable population in our penitentiaries and rehabilitation is not even on the table. We are left with retribution and the denunciatory function of law as the primary purposes of criminalization in this context. I do not want to minimize the importance of these functions. No one would suggest, for example, that we decriminalize sexual assault because of its uncertain deterrent value. However, the criminalization of sexual assault generally does not implicate the potential problems which arise out of the criminalization of non-disclosure of one's HIV status: the possibility of driving HIV-positive individuals away from counselling

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193. Even though it might seem inconsistent with my recommendations on significant harm, I would exclude from liability cases in which a condom was used because the public interest in promoting the use of condoms outweighs the public interest in criminalizing the failure to disclose where a condom is used. See Swiss Institute of Comparative Law, *Comparative Study on Discrimination against Persons with HIV or AIDS* (Strasbourg: Council of Europe, 1993), which concluded that non-disclosure should not be criminalized if safer sex precautions were used.



and education and adding to the stigma they already experience. One commentator has even suggested that current patterns of criminalization will drive potential accused away from long-term, stable relationships towards the anonymous one-night stands which are less likely to be prosecuted.<sup>194</sup>

Despite the arguments against criminalization, I am repeatedly brought back to the complainants whose lives have been devastated by the callous betrayal of someone they may have loved and trusted, and the real threat to their health. Some complainants probably could and should have insisted on condom use; others were not in a position to do so. While not every betrayal between intimate partners should be criminalized, the failure to disclose one's HIV status in the context of unprotected sex creates a serious risk of harm imposed knowingly by the accused.

Criminal law is a blunt instrument and should be limited, in this context, to those accused who demonstrate a pattern of non-disclosure, either with one complainant over time or with more than one complainant, and a failure to practice safer sex. The criminal law should not be invoked unless public health measures have been exhausted and have failed to modify the behaviour of the potential accused. Requiring that public health measures be utilized first will ensure that criminal proceedings are only brought against persons who are aware of their HIV status, who are aware of the dangers of unprotected sex, and who have been cautioned about the consequences of failing to take preventive measures. Clear prosecutorial guidelines should be developed in every province and territory to ensure a cautious approach to laying charges in this area.<sup>195</sup> The dangers of over-criminalization must be kept front and centre when deciding who should be prosecuted.<sup>196</sup>

The move towards criminalization has been entrenched by our courts and is unlikely to be reversed. We nonetheless must be realistic about what criminalization can accomplish. It is not likely that criminalization will encourage many more people to disclose their HIV-positive status nor is it likely to discourage the spread of HIV in society. As one jurist put it: "[o]ver-enthusiasm [in] enacting laws on AIDS may make some people feel better. But it will have precious little impact on controlling the spread of

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194. See e.g. Waldby et al., *supra* note 152.

195. One possibility might be able to require the consent of the provincial Attorney General before laying charges.

196. See also David L. McColgin & Elizabeth T. Hey, "Criminal law" in David Webber, ed., *AIDS and the Law*, 3d ed. (New York: John Wiley & Sons, Inc.) 259 at 262.

this epidemic.”<sup>197</sup> At best, criminalization results in the incarceration of a small number of persons for whom the public health system and its powers are inadequate to control their sexual behaviour, and perhaps provides some small measure of justice for some complainants. Criminalization also sends a message about the behaviours society refuses to tolerate.

Ultimately, whatever option we adopt, it will fall to police and Crown prosecutors to use the criminal law in this context with great restraint. I would argue that murder charges are excessive in this context given the uncertainties surrounding transmissibility, treatment, and prognosis. Murder is our most serious crime and should be reserved for our most serious offenders.

At the outset of this paper, I raised an apparent contradiction in the recent trend in Canada towards harsher forms of criminalization. On the one hand, we are coming to recognize that HIV/AIDS is a disease process and not a moral judgment. We are also learning that, with timely access to medication, being HIV-positive is not necessarily a death sentence. On the other hand, the frequency and severity of charges laid in the non-disclosure context appear to be on the rise with charges as serious as aggravated sexual assault and murder now being laid. How can this apparent contradiction be reconciled? Part of the answer probably lies in the fact that the Supreme Court of Canada has opened the door to very serious charges. However, there may be more to it. I would suggest that the increasing severity of criminal sanctions may be a result of the fact that HIV/AIDS is no longer seen as merely “a gay disease” or a disease of IV drug users. It is now potentially a disease that can affect anyone. That a large majority of Canadian prosecutions involve heterosexual couples, and not gay men, IV drug users or women involved in prostitution, highlights the fact that certain groups as complainants may have better access to justice than others. In cases where convictions were not obtained, it is not unusual to see references to the complainant’s promiscuity or other related behaviour that reflects on his or her credibility. It would appear from the Canadian data that cases in which complainants represent middle-class Canada are more likely to be prosecuted and more likely to result in a conviction. In some ways, HIV/AIDS may be more frightening now precisely because the “us” and “them” dichotomy has broken down.

HIV/AIDS deals with the breakdown of boundaries. Medically, it affects the immune system, the body’s boundary against illness. Socially, it has artificially, and unjustifiably, created boundaries around certain

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197. Mr. Justice Michael Kirby, “Legal implications of AIDS” (1990) 16 Commonwealth L. Bull. 620 at 627.

groups. Legally, it implicates the boundaries between public health and criminal law. While I have concluded that the criminal law has a role to play in some cases of non-disclosure, those responsible for administering criminal justice must be cautious about creating further boundaries and must ensure that the force of the state is used with caution and justice.