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# “Criminalization Creep”: A Brief Discussion of the Criminalization of HIV/AIDS Non-disclosure in Canada

Erin Dej and  
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## Overview: What We Know

The criminalization of HIV exposure or transmission began in Canada in the late 1980s. Although the number of people charged with HIV exposure/transmission has risen consistently over the past two decades, there is little critical social-scientific research on the topic in the Canadian context, with a few notable exceptions.<sup>1</sup> The goal of this research note is to take stock of the Canadian criminal justice system’s prosecution of individuals who knowingly expose a sexual partner to HIV without disclosing their positive sero-status. By framing the current state of the law within a socio-legal/critical criminological perspective, we can begin to make connections between different bodies of work and set the foundation for future research in this field.

Social-science literature on HIV/AIDS stems from various fields of inquiry, in particular research coming out of Africa. This body of work focuses on the interpersonal relationships among family members and community members where HIV/AIDS is prevalent; gendered analyses of African women’s ability to protect against and receive counselling and treatment for HIV/AIDS; and the globalization of HIV/AIDS and its impact on people living in poverty.<sup>2</sup> Given the history of the HIV/AIDS epidemic and the ongoing stigmatization of people living with HIV/AIDS, research focusing on the situation in Western nations targets the practices of men who have sex with men (MSM), including research identifying stigma coming from

<sup>1</sup> B.D. Adam, R. Elliott, W. Husbands, J. Murray, and J. Maxwell, “Effects of the Criminalization of HIV Transmission in *Cuerrier* on Men Reporting Unprotected Sex with Men,” *Canadian Journal of Law and Society* 23, 1/2 (2008), 143; M. Weait, *Intimacy and Responsibility: The Criminalization of HIV Transmission* (Abingdon, UK: Routledge–Cavendish, 2007).

<sup>2</sup> C. Arndt and J.D. Lewis, “The Macro Implications of HIV/AIDS in South Africa: A Preliminary Assessment,” *South African Journal of Economics* 68, 5 (2000), 380; I. Sussler and Z. Stein, “Culture, Sexuality, and Women’s Agency in the Prevention of HIV/AIDS in South Africa,” *American Journal of Public Health* 90, 7 (2000), 1042; C. Patton, *Globalizing AIDS* (Minneapolis: University of Minnesota Press, 2002); H. Worth, C. Patton, and M.T. McGehee, “Legislating the Pandemic: A Global Survey of HIV/AIDS in Criminal Law,” *Sexuality Research and Social Policy* 2, 2 (2005), 15.

within and outside the gay community<sup>3</sup> and its impact on one's ability and/or willingness to seek health care.<sup>4</sup> There is some literature on barebacking and "gift-giving" practices<sup>5</sup> whereby predominantly homosexual men seek out sexual partners with discordant HIV statuses in order to control when and how they contract the virus. Research examining the impact of the criminalization of HIV exposure/transmission on sexual practices and disclosure among MSM is growing;<sup>6</sup> included in this body of literature is an assessment of the (im)practicality of using the criminal law to enforce disclosure.<sup>7</sup>

Much of the existing legal research on HIV/AIDS is American and looks at specific legislation criminalizing exposure/transmission and at the ineffectiveness of US law in discouraging risky activities.<sup>8</sup> Research demonstrates that laws criminalizing HIV/AIDS non-disclosure (whether they be HIV-specific laws, as in many US states, or those that use existing criminal codes, as in Canada and the United Kingdom) dismiss the opportunity for public-health and harm-reduction responses to the HIV/AIDS epidemic.<sup>9</sup> There is sparse Canadian research on the criminalization of HIV non-disclosure, but much of what does exist examines the law's effect on the sex practices

<sup>3</sup> C. Courtenay-Quirk, R.J. Wolitski, J.T. Parsons, and C.A. Gómez, "Is HIV/AIDS Stigma Dividing the Gay Community? Perceptions of HIV-Positive Men Who Have Sex with Men," *AIDS Education and Prevention* 18, 1 (2006), 56; D.D. Reidpath and K. Yee Chan, "A Method for the Quantitative Analysis of the Layering of HIV-Related Stigma," *AIDS Care* 17, 4 (2005), 425.

<sup>4</sup> R.O. Valdiserri, "HIV/AIDS Stigma: An Impediment to Public Health," *American Journal of Public Health* 92, 3 (2002), 341; D. Rao, T.C. Kekwaletswe, S. Hosek, J. Martinez, and F. Rodriguez, "Stigma and Social Barriers to Medication Adherence with Young Urban Youth Living with HIV," *AIDS Care* 19, 1 (2007), 28.

<sup>5</sup> M.L. Crossley, "Making Sense of 'Barebacking': Gay Men's Narratives, Unsafe Sex and the 'Resistance Habitus,'" *British Journal of Social Psychology* 43, 2 (2004), 225; C. Grov, "Make Me Your Death Slave': Men Who Have Sex with Men and Use the Internet to Intentionally Spread HIV," *Deviant Behavior* 25, 4 (2004), 329.

<sup>6</sup> B.D. Adam and A. Sears, "Negotiating Sexual Relationships After Testing HIV-Positive," *Medical Anthropology* 16 (1994), 63; Adam et al., "Effects of the Criminalization of HIV Transmission in *Cuerrier*"; E. Mykhalovskiy, G. Betteridge, and D. McLay, *HIV Non-disclosure and the Criminal Law: Establishing Policy Options for Ontario* (Toronto: Ontario HIV Treatment Network, 2010); Z. Lazzarini, S. Bray, and S. Burris, "Evaluating the Impact of Criminal Laws on HIV Risk Behavior," *Journal of Law, Medicine and Ethics* 30, 2 (2002), 239.

<sup>7</sup> I. Grant, "The Boundaries of the Criminal Law: The Criminalization of the Non-disclosure of HIV," *Dalhousie Law Journal* 31 (2008), 123; I. Grant, "Rethinking Risk: The Relevance of Condoms and Viral Load in HIV Non-disclosure Prosecutions," *McGill Law Journal* 54 (2009), 389; R. Elliott, *After Cuerrier: Canadian Criminal Law and the Non-disclosure of HIV-Positive Status* (Montreal: HIV/AIDS Legal Network, 1999); C.L. Galletly and S.D. Pinkerton, "Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV," *AIDS and Behavior* 10, 5 (2006), 451.

<sup>8</sup> Lazzarini et al., "Evaluating the Impact of Criminal Laws on HIV Risk Behavior"; Worth et al., "Legislating the Pandemic"; H.L. Dalton, "Criminal Law," in *AIDS Law Today: A New Guide for the Public*, ed. S. Burris, H.L. Dalton, J.L. Miller, and Yale AIDS Law Project, 242-62 (New Haven, CT: Yale University Press, 1993); Galletly and Pinkerton, "Conflicting Messages."

<sup>9</sup> Galletly and Pinkerton, *ibid.*; G. Kinsman, "Responsibility as a Strategy of Governance: Regulating People Living with AIDS and Lesbian and Gay Men in Ontario," *Economy and Society* 25, 3 (1996), 393.

of gay men and MSM and the human/legal rights of individuals charged.<sup>10</sup> There is a dearth of research examining the discursive construction of risk, agency, responsibility, sexuality, victimhood, and identity in the socio-legal realm; Matthew Weait's work in the United Kingdom is a notable exception.<sup>11</sup>

There is a larger body of literature on the politics of HIV/AIDS and its use as a technique for "Othering" certain at-risk populations. Few studies examine how gender and class are reconstituted in discourses on HIV/AIDS; however, there is some work on the racialization of HIV/AIDS, including theories on the presentation of those diagnosed with HIV/AIDS as African male monsters.<sup>12</sup> Some of the most theoretically sophisticated work examines how the criminalization of non-disclosure is a moralizing discourse that emphasizes heteronormativity and individual responsibility, consent, and trust in sexual relationships with differing levels of intimacy.<sup>13</sup> Among these works, only Weait's research uses a social constructivist perspective to investigate HIV/AIDS as a cultural and personal identity marker and the criminalization of non-disclosure as a reductionist approach to public health management.<sup>14</sup> Criminalizing non-disclosure re-emphasizes the stigma associated with HIV/AIDS<sup>15</sup> and fails to consider the shifting subjectivities, socio-historical contexts, and specific social interactions that discursively constitute seropositivity. In order to situate this discussion, we must first examine HIV in the Canadian context.

### *HIV in Canada*

According to the Public Health Agency of Canada, as of December 2009 there were approximately 65,000 people living with HIV in Canada, an increase of more than 14% since 2005. Of those 65,000 individuals, about 26% are unaware they are infected with HIV.<sup>16</sup> Infection rates are not declining; on the contrary, different populations are becoming more susceptible to HIV

<sup>10</sup> Adam et al., "Effects of the Criminalization of HIV Transmission in *Cuerrier*"; R. Elliott, "Criminal Law and HIV/AIDS: Update V," *Canadian HIV/AIDS Policy and Law Review* 6, 1/2 (2001), 19.

<sup>11</sup> Weait, *Intimacy and Responsibility*.

<sup>12</sup> M. Singer, "The Politics of AIDS," *Social Science and Medicine* 38, 10 (1994), 1321; A. Persson and C. Newman, "Making Monsters: Heterosexuality, Crime and Race in Recent Western Media Coverage of HIV," *Sociology of Health and Illness* 30, 4 (2008), 632; A.J. Lemelle, "Linking the Structure of African American Criminalization to the Spread of HIV/AIDS," *Journal of Contemporary Criminal Justice* 19, 3 (2003), 270.

<sup>13</sup> M. Weait, "Taking the Blame: Criminal Law, Social Responsibility and the Sexual Transmission of HIV," *Journal of Social Welfare and Family Law* 23, 4 (2001), 441; B.D. Adam, "Constructing the Neoliberal Sexual Actor," *Culture, Health and Sexuality* 7, 4 (2005), 333; D. Lear, "Sexual Communication in the Age of AIDS: The Construction of Risk and Trust Among Young Adults," *Social Science and Medicine* 41, 9 (1995), 1311; C. Dodds, "Messages of Responsibility: HIV/AIDS Prevention Materials in England," *Health* 6, 2 (2002), 139.

<sup>14</sup> M. Foucault, *The Birth of the Clinic: An Archaeology of Medical Perception* (New York: Vintage, 1973); A. Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Stanford, CA: Stanford University Press, 1991).

<sup>15</sup> E. Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Englewood Cliffs, NJ: Prentice Hall, 1963); C. Patton, *Inventing AIDS* (New York: Routledge, 1990).

<sup>16</sup> Public Health Agency of Canada, *HIV and AIDS in Canada* (Ottawa: Ministry of Health, 2010), 1–2.

exposure/transmission. Heterosexual women are the fastest-growing sub-population contracting the virus, most often through injection drug use and/or exposure from sexual relationships.<sup>17</sup> This fact reflects the trend that most cases of non-disclosure involve men accused of exposing a female sexual partner to HIV or transmitting the virus to women. Infection concentrates in seven key populations: Aboriginal peoples; gay men and MSM; injection drug users; people from countries where HIV is endemic; prisoners; women; and at-risk youth.<sup>18</sup> MSM remain the single most affected population in Canada, making up almost 42% of all persons living with HIV. The proportion of HIV diagnoses attributed to heterosexual contact has increased since 1998 and as of 2009 represented approximately 31% of new infections.<sup>19</sup> Although Aboriginal peoples make up only 3.8% of the Canadian population, estimates suggest that they represent 25% of Canadians living with HIV/AIDS.<sup>20</sup> Moreover, there is growing evidence that significant HIV transmission occurs in prisons. Common activities in prison, such as sharing drug-injection equipment, tattooing, and having unprotected sex, are synonymous with high risks of transmission.<sup>21</sup> Despite this knowledge, there are few available harm-reduction services for prisoners, such as opioid substitution treatment (e.g., methadone) or syringe exchange, to minimize the risk of transmission.<sup>22</sup> In 2006, Correctional Services Canada abandoned a pilot project to provide safe tattoo parlours in prison.<sup>23</sup>

### Canada's Criminalization Record

It was only after HIV began to make its way from at-risk populations into the general population that two ideological transformations occurred in the fight against HIV/AIDS. First, public-health and health-promotion initiatives began to target the wider population, rather than at-risk groups alone, with messages suggesting that "AIDS was everyone's concern."<sup>24</sup> Second, there was a shift in how to respond to HIV/AIDS, whereby the criminal law began to encroach upon what had hitherto been considered a public health concern by prosecuting individuals thought to have knowingly exposed a sexual partner to HIV or transmitted the virus to another person. Scholars and activists describe the increasing number of criminal cases involving

<sup>17</sup> J.M. Simoni, P. Demas, H.R.C. Mason, J.A. Drossman, and M.L. Davis, "HIV Disclosure among Women of African Descent: Associations with Coping, Social Support, and Psychological Adaptation," *AIDS and Behavior* 4, 2 (2000), 147.

<sup>18</sup> CÂTIE, *HIV in Canada: Trends and Issues That Affect HIV Prevention, Care, Treatment and Support* (Ottawa: Public Health Agency of Canada, 2010).

<sup>19</sup> Public Health Agency of Canada, *HIV and Aids in Canada*, 3–4.

<sup>20</sup> *Ibid.*, 6.

<sup>21</sup> R. Elliott, "Steps Forward, Backward, and Sideways: Canada's Bill on Exporting Generic Pharmaceuticals," *Canadian HIV/AIDS Policy and Law Review* 9, 3 (2007), 15; R. Jürgens, A. Ball, and A. Verster, "Interventions to Reduce HIV Transmission Related to Injecting Drug Use in Prison," *The Lancet: Infectious Diseases* 9, 1 (2009), 57.

<sup>22</sup> Elliott, *ibid.*

<sup>23</sup> N. Awofeso, "Legal Prison Tattooing Centers: Viable Health Policy Initiative?" *Journal of Public Health Management and Practice* 16, 3 (2010), 240.

<sup>24</sup> Persson and Newman, "Making Monsters."

HIV/AIDS non-disclosure as a kind of “criminalization creep.”<sup>25</sup> We argue that because there was a sharp and significant increase in the number of individuals charged after 2004, what we have seen is less a kind of criminalization creep than a dramatic jump in the number of cases. They hypothesize a number of potential reasons for this jump, including a political shift toward conservatism and a more punitive “law and order” agenda. The growing use of the criminal justice system is not reducing participation in risky activities and consequent HIV exposure.<sup>26</sup> It does, however, perpetuate discriminatory myths about individuals with HIV/AIDS that are rooted in an irrational fear of the virus and those who contract it—namely, that they are sexually promiscuous and even predatory. At the same time, the criminal law provides a false sense of security by suggesting we are better protected from HIV as a result of criminal justice measures. In fact, however, using the criminal law is counterproductive to HIV prevention efforts, since some individuals may be reluctant to be tested for fear of bearing the legal responsibility of disclosure. In addition, using the criminal justice system to address a public-health concern increases the stigma and discrimination felt by people living with HIV/AIDS.<sup>27</sup>

Organizations such as the HIV/AIDS Legal Network attempt to document prosecutions for HIV/AIDS non-disclosure—a difficult task, given that there is no systematic method of monitoring charges laid. In Canada, the number of charges stemming from not disclosing one’s HIV status during a sexual encounter has increased steadily since the 1980s. As of February 2011, approximately 115 people have faced charges for non-disclosure of HIV sero-positivity during a sexual encounter, and thus for knowingly exposing someone to or transmitting the virus. Of these, Mykhalovskiy and Betteridge found that 69% of known cases occurred between 2004 and 2010.<sup>28</sup> The majority of these cases involve HIV-positive men having unprotected sex with women; approximately 20 cases involve HIV-positive men who had sexual relations with another man. Of particular interest to us are a reported 12 cases in which an HIV-positive woman was charged with non-disclosure during a sexual encounter with a man.<sup>29</sup> The majority of prosecutions have taken place in Ontario, although there are cases throughout the country.

There is no specific law against HIV exposure/transmission in Canada, although some US states and some European and African countries have

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<sup>25</sup> L. Mar, *Legal Network News* (Toronto: Canadian HIV/AIDS Legal Network, 2007), 8.

<sup>26</sup> Adam et al., “Effects of the Criminalization of HIV Transmission in *Cuerrier*”; C. Dodds, A. Bourne, and M. Weait, “Responses to Criminal Prosecutions for HIV Transmission among Gay Men with HIV in England and Wales,” *Reproductive Health Matters* 17, 34 (2009), 135.

<sup>27</sup> Patton, *Inventing AIDS*.

<sup>28</sup> Eric Mykhalovskiy and Glenn Betteridge, “Who? What? Where? When? And with What Consequences? An Analysis of Criminal Cases of HIV Non-disclosure in Canada,” *Canadian Journal of Law and Society* 27, 1 (2012).

<sup>29</sup> *Criminal Law and HIV Non-disclosure in Canada* (Toronto: Canadian HIV/AIDS Legal Network, 2011).

created criminal codes especially addressing HIV/AIDS non-disclosure. In Canada, charges are laid against the accused using already established criminal codes. Mykhalovskiy and Betteridge's finding that there has been a significant jump in the number of charges provides an additional analytic layer to Elliott's original conceptualization of "criminalization creep." In fact, not only are increasing numbers of people being charged but the offences with which they are charged are becoming increasingly harsh—despite the fact that the sexual incidents themselves did not become more egregious. Beginning in the early 1990s, those accused of non-disclosure, and thus of knowingly exposing a sexual partner to or transmitting HIV, were charged with causing a nuisance or transmitting a noxious thing. The gravity of charges steadily increased to include assault, aggravated assault, aggravated sexual assault, and, in 2009, murder.<sup>30</sup> Currently, the charge most commonly laid is aggravated sexual assault. Sexual assault becomes "aggravated" when the victim's life is endangered. It is curious that charges have become more severe as advancements in anti-retroviral therapy have allowed individuals with HIV/AIDS to lead longer and healthier lives than ever before, so that HIV/AIDS is no longer considered the death sentence it once was.

### *Cuerrier*

The Supreme Court of Canada set the precedent for the criminalization of HIV exposure/transmission in 1998 with *R v Cuerrier*. Henry Cuerrier had unprotected sex with two women, on separate occasions, without disclosing that he was HIV-positive and while knowing the risks of unprotected sex. In fact, both women asked Cuerrier about his HIV status, and he lied, claiming to have a negative sero-status. Neither woman contracted HIV, so the case also set the precedent with respect to bringing charges for exposure to HIV.<sup>31</sup> At trial, Cuerrier was acquitted of two counts of aggravated assault; the judge found that because the women had consented to sexual relations with Cuerrier, no assault had taken place.<sup>32</sup> The BC Court of Appeal upheld this verdict: writing for the majority, Judge Prowse stated that the purview of Cuerrier's actions cannot be considered assault, but recommended that Parliament create a new Criminal Code offence specific to HIV/AIDS non-disclosure.<sup>33</sup> The Supreme Court, however, reversed the decisions of the lower courts on the grounds that the women could not have freely consented because their consent was based on fraudulent information.<sup>34</sup>

The Supreme Court's decision in *Cuerrier* set the precedent for future cases of HIV exposure/transmission by creating the parameters for determining whether fraud has occurred in a given situation. First, the accused must

<sup>30</sup> Grant, "Boundaries of the Criminal Law"; Mykhalovskiy et al., *HIV Non-disclosure and the Criminal Law*.

<sup>31</sup> For an in-depth legal analysis of the evidentiary differences that come from exposure or transmission cases see Grant, *ibid*.

<sup>32</sup> *R v Cuerrier* (1995), 26 WCB (2d) 378.

<sup>33</sup> *R v Cuerrier*, [1996] BCJ No 2229 (QL), 83 BCAC 295, 136 WAC 295, 141 DLR (4th) 503, 111 CCC (3d) 261, 3 CR (5th) 330.

<sup>34</sup> *R v Cuerrier*, [1998] 2 SCR 371.

have knowledge of his or her HIV-positive status and of the ways in which HIV/AIDS can be transmitted. Second, dishonesty must occur: the accused must either deceive the other person about or fail to disclose his or her HIV-positive sero-status. The third and most ambiguously defined criterion is that a “significant risk of serious bodily harm” must arise as a result of the dishonesty. As we discuss below, the medical knowledge used to assess risk and the different sexual activities constituted as sufficiently risky represent a major site of contention in Canada’s legal system. Fourth, the dishonesty on the part of the accused must be found to have “caused” the other person to consent;<sup>35</sup> ultimately, the Crown must prove that the complainant would not have consented to sexual activity had he or she been aware of the accused’s HIV-positive status.

### *After Cuerrier*

Because the Supreme Court did not define the principle of “significant risk of serious bodily harm” in the *Cuerrier* decision, the lower courts are left to interpret its meaning, which has led to inconsistent application of this principle in common law. Discrepancies between cases exist as a result of two broad but related issues: first, an unclear definition of which activities pose a significant risk; and, second, an evolution of the principle itself, given scientific advances in anti-retroviral treatment. There are several glaring contradictions in how risk is assessed for various sexual activities.<sup>36</sup> For example, there is ambiguity in cases in which the sexual activity consists of unprotected oral sex. In both *Edwards* and *Charron*,<sup>37</sup> the courts found that oral sex did not constitute a significant risk of bodily harm because the risk of transmission is too low to be considered “significant.” Conversely, Johnson Aziga<sup>38</sup> was found guilty of first-degree murder after transmitting HIV to two women who later died of AIDS.

Because *Cuerrier* was decided in 1998, when scientific evidence on HIV/AIDS was still in its infancy, the Supreme Court heard no evidence concerning viral load and how it may alter the “riskiness” of various sexual activities. *Viral load* is the number of copies of a virus—in this case HIV—in a millilitre of blood. A high viral load indicates that HIV is reproducing and that the disease is progressing; when viral load is low or undetectable, the chance of transmitting HIV is minimal. Because there is no indication in *Cuerrier* as to how to incorporate viral load in assessing significant risk, lower courts have struggled to make sense of contemporary scientific evidence. For example, in *R v JT* the accused had unprotected anal sex after lying to the

<sup>35</sup> AIDS Saskatoon, *HIV Disclosure and the Law: A Community Workshop* (Saskatoon: Canadian HIV/AIDS Legal Network, 2010).

<sup>36</sup> Mykhalovskiy et al., *HIV Non-disclosure and the Criminal Law*.

<sup>37</sup> *R v Edwards*, [2001] NSJ No 221, 2001 NSSC 80, 194 NSR (2d) 107, 50 WCB (2d) 255; *R v Charron*, Cour du Québec, District de Longueuil, Chambre criminelle, 706-01-010423-024, 1 mai 2008, as cited in Stephanie Claivaz-Loranger, “Panel—Criminalization of HIV Non-disclosure: New Developments and Community Responses,” *HIV/AIDS Policy and Law Review* 15, 1 (2010), 74.

<sup>38</sup> *R v Aziga* (4 April 2009), Hamilton CR-08-1735, as cited in Claivaz-Loranger, *ibid.*

complainant by stating that he was HIV negative. Interestingly, in all cases tried in Canada that involved unprotected anal sex, the accused was the receiver. Medical evidence adopted by the Court shows that the risk of transmitting the virus during unprotected sex is 0.06% when the HIV-positive person is the receiver, but 0.82% when the sero-positive individual is the inserter. In *JT*, because the accused was the receiver, the risk of transmitting HIV was equivalent to the risk posed when the HIV-positive person penetrates the victim while wearing a condom.<sup>39</sup> Although the Supreme Court's decision in *Cuerrier* suggests that the proper use of a condom may reduce the risk of harm sufficiently that it should no longer be considered a significant risk, the BC Court of Appeal allowed the case against the accused in *JT* to move forward, stating that *Cuerrier* merely set out a "proposition of law" about what may be considered significant risk but that, rather than being prescriptive, the issue of risk should be decided on a case-by-case basis.<sup>40</sup>

In *Wright*,<sup>41</sup> the BC Court of Appeal again struggled with how to account for viral load in an overall assessment of significant risk. Although expert witnesses noted that an undetectable viral load can virtually eliminate the risk of transmission, the Court determined that a determination of risk need not take individual viral load into account. Moreover, and similarly to the Court in *JT*, the Court concluded that assessments of risk can be conducted only on a case-by-case basis. These inconsistencies among courts as to how to proceed post-*Cuerrier* have caused much debate among legal scholars, judges, and lawyers—as is most visible in *Mabior*.

*Mabior*<sup>42</sup> challenges the common law set in the *Cuerrier* decision. As mentioned above, the majority ruling in *Cuerrier* stated that "... the careful use of condoms might be found to so reduce the risk of harm that it could no longer be considered significant."<sup>43</sup> Many cases have followed this precedent, whereby undisclosed sexual activity without condom use constitutes a significant risk but there is no duty to disclose one's HIV-positive status when condoms are used (e.g., *Nduwayo*; *Walkem*; *Edwards*).<sup>44</sup> *Mabior* faced 17 charges, including 12 charges of aggravated sexual assault. The instances vary in nature, although in none of the cases did *Mabior* disclose his HIV-positive status. *Mabior* was convicted on charges involving instances when he had a detectable viral load but used a condom, as well as those involving instances when he did not use a condom but had an undetectable viral load; he was acquitted only in those instances when he used a condom *and* had an undetectable viral load. At trial, the Court

<sup>39</sup> *R v JT*, 2008 BCCA 463; E. Vittinghoff, J. Douglas, F. Judson, D. McKirnan, K. MacQueen, and S.P. Buchbinder, "Per-Contact Risk of Human Immunodeficiency Virus Transmission between Male Sexual Partners," *American Journal of Epidemiology* 150, 3 (1999), 306.

<sup>40</sup> *JT*, *ibid.* at paras 18–20.

<sup>41</sup> *R v Wright*, [2009] BCCA 514 at paras 39–40; see also Mykhalovskiy et al., *HIV Non-disclosure and the Criminal Law*.

<sup>42</sup> *R v Mabior*, [2010] MJ No 308, 2010 MBCA 93; [2008] MBQB 201, 230 Man R (2d) 184.

<sup>43</sup> *Cuerrier* at para 129.

<sup>44</sup> *R v Nduwayo*, [2010] BCJ No 1787, 2010 BCSC 1277; *R v Walkem*, [2007] OJ No 186, 73 WCB (2d) 145; *Edwards* [2001].

decided that engaging in sexual activity without disclosing his HIV-positive sero-status either while wearing a condom or with an undetectable viral load alone can be categorized as a “significant risk of bodily harm” as set out in *Cuerrier*. The Court claimed that because condoms could potentially be stored improperly, break, be used improperly, or fall off during intercourse, this uncertainty warrants categorizing the activity as a significant risk.<sup>45</sup> Thus, *Mabior* has the potential to set the precedent that the test for non-disclosure is *no risk* rather than *low risk*.

The Manitoba Court of Appeal reversed the trial decision, stating that “significant risk means something other than an ordinary risk. It means an important, serious, substantial risk.”<sup>46</sup> The Quebec Court of Appeal followed suit in *R v DC*,<sup>47</sup> in which a woman’s conviction for aggravated assault and sexual assault were overturned when the Court concluded that her viral load was low enough to characterize the risk of transmission as minimal. At the time of writing, *Mabior* and *DC* are jointly heading to the Supreme Court of Canada.<sup>48</sup> This will be an opportunity for the Supreme Court not only to clarify the meaning of “significant risk of serious bodily harm” but also to assess the role of viral load in the legal understanding of risk.<sup>49</sup> The outcome of *Mabior* and *DC* may substantially alter the legal landscape of the criminalization of HIV exposure/transmission in Canada—either by narrowing the scope of what is considered “risky” in the age of advanced medical knowledge of HIV/AIDS, or by identifying risk so broadly as to ensure the expansion of the existing trend toward “criminalization creep.”

Canadian common law on HIV exposure/transmission evolved further when Johnson Aziga became the first person to be charged and then convicted of (two counts of) first-degree murder. Aziga had unprotected sex with several women and was initially charged with 11 counts of aggravated sexual assault; but when two of the women who had contracted HIV died of HIV-related illnesses, the charges were upgraded to first-degree murder. The implication of the first-degree murder charge is that Aziga wilfully and knowingly attempted to transmit the HIV/AIDS virus to these women with the intention of using the virus as a murder weapon.<sup>50</sup> Since *Aziga*, charges have been laid against others for attempted murder, again demonstrating the ongoing evolution in terms of the severity of offences with which we are charging HIV-positive individuals and the tension this trend creates with the similarly evolving state of modern medical knowledge about HIV/AIDS.

<sup>45</sup> Grant, “Rethinking Risk.”

<sup>46</sup> *Mabior*, [2010] at para 127.

<sup>47</sup> *R v DC*, [2010] QJ No 13599, 2010 QCCA 2289.

<sup>48</sup> *R v Mabior*, [2010] SCCA No 492; *R v DC*, [2011] SCCA No 137.

<sup>49</sup> Grant, “Rethinking Risk.”

<sup>50</sup> Lazzarini et al., “Evaluating the Impact of Criminal Laws on HIV Risk Behavior”; Rebecca Ruby, “Apprehending the Weapon Within: The Case of Criminalizing the Intentional Transmission of HIV,” *American Criminal Law Review* 36 (1999), 313.

### Future Directions for Research

The cases outlined above suggest an increasingly punitive and more frequent use of the criminal law to deal with HIV exposure/transmission in cases of non-disclosure. Of course, not all instances of HIV/AIDS non-disclosure end up in the criminal justice system. Research investigating how and why some situations invoke criminal justice intervention while others do not is warranted. Specifically, despite widespread research studying the effects of criminalization on the disclosure practices of MSM,<sup>51</sup> the majority of criminal prosecutions target heterosexual relationships. Future research must dissect not only under what circumstances the criminal justice system intervenes but also how juridical knowledge shapes and is shaped by scientific and social discourses about HIV/AIDS. Drawing attention to the socio-historical, cultural, and temporal ways in which the state constructs and responds to the virus, including through the criminal justice system,<sup>52</sup> requires further exploratory work that positions the law within the broader social context and evaluates the conditions that led to the emergence and increased use of the criminal justice system. Mykhalovskiy and Betteridge's contribution to this issue of *CJLS/RCDS* is the first effort to do so.

Relatedly, there is abundant research on HIV/AIDS in prison, much of which highlights the high rates of HIV/AIDS among incarcerated populations. Key discussions centre on prisoners' ability to receive and adhere to antiretroviral treatment in prison; the potential for transmission in prison; and the risk of transmitting HIV/AIDS to the community upon release.<sup>53</sup> There is some literature on incarcerated women with HIV/AIDS, but it focuses primarily on the risk of transmission for injection drug users. Research specific to women is essential, not only because women are the largest and fastest-growing subgroup currently contracting HIV but also because there are already higher rates of HIV/AIDS among women prisoners than among male prisoners or the general public.<sup>54</sup> Of the handful of Canadian studies of HIV/AIDS in prison, most have the overall goal of assessing the number of HIV/AIDS cases in an individual prison. While the higher rates and potential for transmission of HIV/AIDS in prison is being documented, there have been no examinations of how imprisonment affects those living with HIV/AIDS—especially those convicted in non-disclosure

<sup>51</sup> Adam and Sears, "Negotiating Sexual Relationships after Testing HIV-Positive"; Mykhalovskiy et al., *HIV Non-disclosure and the Criminal Law*; Adam et al., "Effects of the Criminalization of HIV Transmission in *Cuerrier*."

<sup>52</sup> Patton, *Inventing AIDS*.

<sup>53</sup> J. Nicholson-Crotty and S. Nicholson-Crotty, "Social Construction and Policy Implementation: Inmate Health as a Public Health Issue," *Social Science Quarterly* 85, 2 (2004), 240; C.P. Krebs and M. Simmons, "Intraprison HIV Transmission: An Assessment of Whether It Occurs, How It Occurs, and Who Is at Risk," *AIDS Education and Prevention* 14, 5 (2002), 53; O.A. Grinstead, B. Zack, B. Faigles, N. Grossman, and L. Blea, "Reducing Postrelease HIV Risk among Male Prison Inmates," *Criminal Justice and Behavior* 26, 4 (1999), 453.

<sup>54</sup> C. Chandler and C. Kingery, "Yell Real Loud: HIV-Positive Women Prisoners Challenge Constructions of Justice," *Social Justice* 27, 3 (2000), 150.

cases—or of the cumulative effects of the combined stigma of being an HIV-positive and criminalized person.

Of particular interest to us is the absence of a gendered analysis focusing on women accused of knowingly exposing a sexual partner to or transmitting the virus.<sup>55</sup> Although existing studies document the steady increase in women's HIV/AIDS diagnoses, particularly in Africa,<sup>56</sup> none has examined the impact of criminalizing HIV/AIDS non-disclosure on women as either the victim or the accused. Instead, most research that mentions women in discussions of the criminalization of non-disclosure does so to highlight the negative impact of mandatory disclosure laws, such as stigmatization, social ostracism, and threats of violence, typically from male partners.<sup>57</sup> Some feminist literature has examined the impact of HIV sero-positivity on a woman's ability to negotiate her sexual activities, also noting that risk-management strategies often ignore the lived reality that many women are exposed to HIV/AIDS through injection drug use.<sup>58</sup> While feminist and other critical scholars argue that risk-reduction strategies should focus on supporting and empowering women,<sup>59</sup> strategies that attempt to curb women's risk perpetuate gendered assumptions that women are solely responsible not only for their own health but also for that of their partners.<sup>60</sup> Interestingly, this messaging is antithetical to criminalization efforts that responsabilize the HIV-positive individual only. These issues, along with other research questions relating to the various stakeholders involved, discourses about AIDS in the twenty-first century, and the use of risk theory to assess the nature of these discourses, will allow us to analyse the criminalization of HIV/AIDS non-disclosure from an interdisciplinary perspective in order to make sense of its legal, political, and social consequences.

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<sup>55</sup> A. Bredström, "Intersectionality: A Challenge for Feminist HIV/AIDS Research?" *European Journal of Women's Studies* 13, 3 (2006), 229.

<sup>56</sup> R.K. Jewkes, K. Dunkle, M. Nduna, and N. Shai, "Intimate Partner Violence, Relationship Power Inequity, and Incidence of HIV Infection in Young Women in South Africa: A Cohort Study," *The Lancet* 376, 9734 (2010), 41; K. Peltzer, T. Mzolo, N. Mbelle, L. Tsoai, N. Lewa, and N. Ncitakalo, "Dual Protection, Contraceptive Use, HIV Status and Risk Among a National Sample of South African Women," *Gender and Behaviour* 8, 1 (2010), 2833.

<sup>57</sup> C. Garcia-Moreno and C. Watts, "Violence against Women: Its Importance for HIV/AIDS," *AIDS* 14, suppl. 3 (2000), S253; A.C. Gielen, K.A. McDonnell, J.G. Burke, and P. O'Campo, "Women's Lives after an HIV-Positive Diagnosis: Disclosure and Violence," *Maternal and Child Health Journal* 4, 2 (2000), 111.

<sup>58</sup> Hortensia Amaro, "Love, Sex, and Power: Considering Women's Realities in HIV Prevention," *American Psychologist* 50, 6 (1995), 437.

<sup>59</sup> *Ibid.*

<sup>60</sup> Campbell, "Male Gender Roles and Sexuality."

### Abstract

This research note begins by situating some of the major areas of inquiry within social-science research on the criminalization of HIV/AIDS non-disclosure. The evolution of the use of this criminal justice measure in the attempt to regulate HIV/AIDS transmission illustrates what has been termed “criminalization creep,” whereby steadily increasing numbers of people are charged with increasingly severe crimes. We outline some of the key and precedent-setting cases in Canadian law in order to explore the problematic of criminalization and suggest avenues for future research on this subject.

**Keywords:** criminalization of HIV non-disclosure, criminalization creep, HIV non-disclosure cases in Canada

### Résumé

Ce bref essai commence par situer certains des plus importants domaines d'enquête au sein de la recherche en sciences sociales sur la criminalisation de la non-divulgation de la séropositivité à l'égard du VIH/sida. L'évolution du recours à cette mesure de justice pénale afin d'essayer de réglementer la transmission du VIH/sida illustre ce qu'Elliott a appelé *criminalization creep* (le glissement de la criminalisation), alors que l'on constate une augmentation constante du nombre de personnes accusées de crimes de plus en plus graves. Nous décrivons brièvement certains cas importants qui ont créé des précédents dans le droit canadien, afin d'explorer la problématique de la criminalisation et de suggérer des possibilités pour les futures recherches à ce sujet.

**Mots clés :** non-divulgation du VIH, glissement de la criminalisation, Canada

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