THE LEGACY OF CUERRIER ISSUES UNRESOLVED, QUESTIONS UNANSWERED

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A thesis submitted in conformity with the requirements
for the degree of Master of Laws
Graduate department of the Faculty of Law
University of Toronto

The Legacy of Cuerrier
Issues Unresolved,
Questions Unanswered

Ninoslav Mladenovic, Master of Laws, 2010
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A large body of jurisprudence has developed in Canada criminalizing the conduct of HIV positive persons who transmit or expose others to the HIV infection in an equivocal attempt to be seen to be doing something about individuals who are perceived to be driving the HIV epidemic. Convictions have been obtained for charges ranging from aggravated assault to, most recently, murder. The Cuerrier judgement, a landmark decision of the Supreme Court of Canada, left a number of issues unresolved. Given the ambiguities in the decision, this Thesis will address the unfortunate consequences resulting from the Cuerrier's decision. In particular, I will argue that while criminalization of non-disclosure may seem logical to many, at the same time it carries a significant public health consequences. The conclusion I will attempt to reach is that criminalization is an inadequate strategy to prevent further HIV infection, its increased use in practice is misguided, and counterproductive to public health goals, thus alternatives to the routine criminalization of HIV transmission that may enhance the goals of public health should be considered.

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I. Introduction

A large body of jurisprudence has developed in Canada criminalizing the conduct of HIV positive persons who transmit or expose others to the HIV infection in an equivocal attempt to be seen to be doing something about individuals who are perceived to be driving the HIV epidemic. Convictions have been obtained for charges ranging from aggravated assault to, most recently, murder.[1]

At the end of September 1998, the Canadian Supreme Court ruled in the case *R. v Cuerrier* that Henry Cuerrier, an HIV-positive British Columbian man, was guilty of two cases of aggravated assault in having unprotected sex with two seronegative women. Defining his actions as aggravated assault required proof that (i) his actions endangered the life of the complainants, and that (ii) the force must have been intentionally applied. Although both women consented to the sex with Cuerrier, the Crown successfully argued that their consent to having sex was nullified because Cuerrier obtained it through fraud – in other words, because he did not disclose his serostatus to them.[2]

This criminalization of non-disclosure may seem logical to many. But criminalization carries with it significant public health consequences: the risk of deterring individuals from seeking HIV testing by inducing fear of incarceration, an adverse effect on patient – provider relationships, a risk of lulling society into a false sense of protection by criminal law, and the in-

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[1] See for example: *R. v. Aziga*, 2005 O.J. No. 5983 (QL).

[2] Cuerrier, (1998), 127 C.C.C. (3rd) 1 (S.C.C.).

fringement of civil liberties. Instead, alternatives to the routine criminalization of HIV transmission that may enhance the goals of public health should be considered.

In this Thesis I will address the unfortunate consequences resulting from the decision in Cuerrier, and argue that defense of practicing *"safer sex"* should be expressly recognized by courts in subsequent cases, so as to provide a more manageable alternative to disclosure that still significantly reduces the risk of HIV transmission and protects the HIV-positive person from criminal prosecution. I will also argue that the justice system should take a contextual approach to assessing the *"dishonesty"* of not disclosing HIV-positive status, so as to acknowledge that disclosure is not always easily made, and in some circumstances may carry serious risk of physical or other kinds of violence. Finally, I will evaluate the justifications offered for criminalizing HIV transmission and exposure, arguments against such criminalization, thus alternatives to public health that may enhance the goals of public health.

Needless to say, this Thesis does not provide a fully detailed analysis of every possible nuance of the Cuerrier decision, or of the possible applications of the criminal law to every circumstance in which conduct may risk HIV transmission. Nor does the Thesis provide a comprehensive review of the current state of Canadian criminal law relating to HIV/AIDS. Rather, the Thesis provides an analysis of *R v. Cuerrier*, takes up the question of when an HIV-positive person risks (or may risk) criminal prosecution if they do not disclose their HIV-positive status, and considers whether and how Cuerrier decision should be applicable in different contexts.

II. The Case of *R. v. Cuerrier*

A. Factual Background

In August 1992, Cuerrier was told by a public health nurse that he was HIV-antibody positive, and that he should use condoms for sex and tell his sexual partners about his HIV-positive status. He said he could not disclose this in his small community. Soon after, he began a relationship with a woman identified in the decision as "KM," including frequent unprotected vaginal sex. Sometime either before, or within a week of, their first sexual encounter,[3] "KM" discussed sexually transmitted diseases (STDs) with Cuerrier. He told her of his recent sexual encounters with women who themselves had had numerous partners. "KM" did not specifically ask about HIV. Cuerrier told her he had tested HIV-negative several months earlier, but did not mention his recent positive test result. "KM" said at trial that she knew the risks of unprotected sex, including HIV and other STDs.

A few months later, both Cuerrier and "KM" had HIV-antibody tests. He tested HIV-positive; she tested HIV-negative. Both were told of Cuerrier's infection, and advised to use condoms for sex. "KM" was told she would need further tests because she might still test HIV-positive. Cuerrier said he did not want to use condoms, and that if "KM" still tested HIV-negative in a few months, he would look for a relationship with a woman who was already HIV-positive. They continued having unprotected sex for 15 months. "KM" later testified that: (i) she loved Cuerrier and did not want to lose him; (ii) as they had already had unprotected sex, she felt she was probably already infected; (iii) however, she would not have had sex with Cuerrier had she known his HIV status at the outset. At the time of trial, she tested HIV-negative.

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[3] Cuerrier, Case on Appeal, vol 1 at 8(b), 19.

A few months later, Cuerrier began a sexual relationship with a woman identified in the decision as "BH." After their first sexual encounter, she told him she was afraid of diseases, but did not specifically mention HIV. Cuerrier did not tell her he was HIV-positive. No condom was used for about half of their 10 sexual encounters. "BH" then discovered that Cuerrier was HIV-positive and confronted him, at which point he said he was sorry and should have told her. "BH" was not infected.

B. Relevant Statutory Provisions

Cuerrier was charged with two counts of aggravated assault. Section 265 of the Criminal Code provides:

(1) A person commits an assault when ... without the consent of another person, he applies force intentionally to that other person, directly or indirectly.[4]

Section 268 of the Criminal Code provides that:

(1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

(2) Every one who commits an aggravated assault is guilty of an indictable offense and liable to imprisonment for a term not exceeding fourteen years.[5]

At trial, the Crown argued that the consent of Cuerrier's two partners was not legally valid because they were unaware of his HIV-positive status. The chief argument was that his

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[4] *Criminal Code of Canada,* RSC 1985, c C-46, s 265(1).

[5] *Ibid*, s 268.

non-disclosure constituted *"fraud"* and that this fraud *"vitiated"* (i.e, rendered legally invalid) his partners' consent to sex. Therefore, the physical sexual contact was an assault. In defining the offense of assault, section 265(3)(c) of the Code states that:

For the purposes of this section, no consent [to physical contact] is obtained where the complainant submits or does not resist by reason of … fraud.[6]

The defense successfully moved before the trial judge for a directed verdict of acquittal, on the ground that the Crown had not made out the offense of assault because the complainants had consented to the sexual activity. The Crown appealed to the British Columbia Court of Appeal. The five appellate justices unanimously dismissed the Crown's appeal. The majority noted: "*The criminal law of assault is, indeed, an unusual instrument for attempting to ensure safer sex."*[7]

The Crown's submitted a question of law to the Supreme Court for consideration. The question was could the accused be tried on the original two charges of aggravated assault. The Court was not tasked with hearing the merits of the case and ordered a new trial.

C. The Judgement

The Supreme Court's decision focused solely on the question of whether an HIV-positive person's non-disclosure of their status can be considered *"fraud"* for the purposes of the criminal law of assault. Seven out of nine Supreme Court Justices heard the case. All concluded that Cuerrier's non-disclosure of his HIV-positive status could constitute fraud.

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[6] *Ibid*, s 265(3)(c).

[7] Cuerrier, (1996), 111 CCC (3d) 261 at 282 (per Prowse JA).

The Court was divided in their treatment of how the law should define fraud that vitiates consent to sex. Traditionally, courts in Canada had accepted the rule that fraud would make a person's consent to sex legally invalid (*"vitiated"*) only where the fraud related to the *"nature and quality of the act."*[8] This was reflected in Canada's Criminal Code until amendments to the Code in 1983 eliminated the crimes of *"rape"* and *"indecent assault,"* and instead defined a single offense of *"sexual assault."*[9]

The Court unanimously agreed that fraud as to the *"nature and quality of the act"* could still vitiate consent. However, they also decided this rule was inadequate and that the operative definition of *"fraud"* should be extended to cover the situation in the Cuerrier case. The justices adopted three different approaches.

1. Majority Decision

Justices Cory, Major, Bastarache, and Binnie JJ. set out a new approach for deciding what constitutes fraud that vitiates consent to physical contact (including sex). The prosecution must prove the following to establish fraud on the part of the accused person will render their partner's consent legally invalid:

(i) an act by the accused that a reasonable person would see as dishonest;

(ii) a harm, or a risk of harm, to the complainant as a result of that dishonesty; and

(iii) the complainant would not have consented but for the dishonesty by the accused.[10]

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[8] *Criminal Code of Canada*, R.S.C. 1970, c. 38, s. 1.

[9] *Code*, above note, s. 273.1. See also: *An Act to Amend the Criminal Code (Sexual Assault)*, S.C. 1992, c. 38, s. 1.

[10] Cuerrier, *supra*, note 3 at 49.

The Court then considered how these might be applied in the context of non-disclosure of HIV-positive status before sexual activity. The Court concluded that dishonesty does not mean just *"deliberate deceit"* about something, but can also include *"non-disclosure"* of information:

> *"in circumstances where it would be viewed by the reasonable person as dishonest ... This ... can include the non-disclosure of important facts ... The deadly consequences that non-disclosure of the risk of HIV infection can have on an unknowing victim, make it imperative that as a policy the broader view of fraud vitiating consent ... should be adopted. Neither can it be forgotten that the Criminal Code has been evolving to reflect society's attitude towards the true nature of the consent.... In my view, it should now be taken that for the accused to conceal or fail to disclose that he is HIV-positive can constitute fraud which may vitiate consent to sexual intercourse ... It would be pointless to speculate whether consent would more readily follow deliberate falsehoods than failure to disclose. The possible consequence of engaging in unprotected intercourse with an HIV-positive partner is death. In these circumstances there can be no basis for distinguishing between lies and a deliberate failure to disclose."*[11]

As non-disclosure of HIV-positive status can legally be considered *"dishonesty"* that amounts to fraud, it can vitiate consent to sex:

> *"Without disclosure of HIV status there cannot be a true consent. The consent cannot simply be to have sexual intercourse. Rather it must be consent to have intercourse with a partner who is HIV-positive. True consent cannot be given if there has not been a disclosure by the accused of his HIV-positive status. A consent that is not based upon knowledge of the significant relevant factors is not a valid consent."*[12]

Having decided that non-disclosure (and not just deliberate deceit) can amount to *"dishonesty,"* the Court then turned to the question of when the duty to disclose exists. Not disclosing HIV-positive status cannot be objectively considered *"dishonest"* unless there is a duty to disclose.

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[11] Cuerrier, *supra*, note 3 at 47, 49, citing *R. v. Olan*, [1978] 2 SCR 1175; *R. v. Théroux*, [1993] 2 SCR 5; *R. v. Zlatic*, [1993] 2 SCR 29.

[12] *Ibid* at 50.

As noted above, the traditional rule was that the only kind of fraud that would render consent to an act of physical contact legally invalid was fraud as to the identity of the person doing the act or fraud as to the *"nature and quality of the act"* (i.e, was it a sexual act, or something else). For example, the Ontario Court of Appeal had ruled that there was fraud vitiating consent where a man falsely held himself out to be a doctor and purported to conduct gynecological examinations of several women; the women consented to a medical examination, but received something different.[13] On this rule, the consent of a person to engage in sexual activity was not rendered invalid by their partner's fraud, as long as the fraud did not alter the basic nature of the act as sexual.

However, the Court rejected that rule as too narrow, and so struggled to create a new rule for defining the circumstances in which dishonesty will be considered fraud in the criminal law. In answering the question of when there is a duty to disclose, the Court considered the second requirement of fraud that it has identified: *"that the dishonesty result in deprivation, which may consist of actual harm or simply a risk of harm."*[14]

The Court thus sets out a new approach to defining fraud in the context of criminal assault, based on *"risk of harm."* However, the Court immediately cautioned against an overly broad approach:

> *"Yet it cannot be any trivial harm or risk of harm that will satisfy this requirement in sexual assault cases where the activity would have been consensual if the consent had not been obtained by fraud. For example, the risk of minor scratches or of catching cold would not suffice to establish deprivation [harm]. What then should be required? In my view, the Crown will have to establish that the dishonest act (either falsehoods or failure*

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[13] Cuerrier, *supra*, note 3, citing *R. v. Maurantonio*, [1968] 1 OR 145, 65 DLR (2d) 674 (CA).

[14] Ibid.

> *to disclose) had the effect of exposing the person consenting to a significant risk of serious bodily harm. The risk of contracting AIDS as a result of engaging in unprotected intercourse would clearly meet that test. In this case the complainants were exposed to a significant risk of serious harm to their health. Indeed their very survival was placed in jeopardy. It is difficult to imagine a more significant risk or a more grievous bodily harm."* [15] (emphasis added)

The phrase *"significant risk of serious bodily harm"* is the crux of the decision. Yet the vagueness of this test raises further questions for HIV-positive people, while also suggesting possible limitations on the application of this precedent in future cases. The Court has indicated there may be circumstances in which the risk of harm is not great enough to require disclosure:

> *"The extent of the duty to disclose will increase with the risks attendant upon the act of intercourse. To put it in the context of fraud, the greater the risk of deprivation the higher the duty of disclosure. The failure to disclose HIV-positive status can lead to a devastating illness with fatal consequences. In those circumstances, there exists a positive duty to disclose. The nature and extent of the duty to disclose, if any, will always have to be considered in the context of the particular facts presented."*[16]
>
> *"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 risk of deprivation [i.e, harm or risk of harm]. To repeat, in circumstances such as those presented in this case, there must be a significant risk of serious bodily harm before the section can be satisfied. In the absence of those criteria, the duty to disclose will not arise."*[17]

The judgment is clear that this standard is also *"sufficient to encompass not only the risk of HIV infection but also other sexually transmitted diseases which constitute a significant risk of serious harm."*[18]

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[15] Ibid.

[16] Cuerrier, *supra*, note 3 at 50-51.

[17] *Ibid.*

[18] *Ibid.* at 53.

Finally, in order to secure a conviction for assault, the prosecution must prove a third element: the causal connection between the HIV-positive person's non-disclosure and their partner's consent to sex. As Cory J. writes for the majority:

> *"In situations such as that presented in this case, it must be emphasized that the Crown will still be required to prove beyond a reasonable doubt that the complainant would have refused to engage in unprotected sex with the accused if she had been advised that he was HIV-positive. As unlikely as that may appear, it remains a real possibility. In the words of other decisions it remains a live issue."*[19]

To sum up, the Supreme Court ruled that disclosure of HIV-positive status is required by the criminal law before one engages in sexual activity that poses a *"significant risk"* of transmitting HIV. As a result of the Court's decision, it is clear that unprotected vaginal or anal intercourse poses a *"significant"* risk for the purpose of the criminal law. However, the Court also suggested that *"careful use of a condom"* may lower the risk sufficiently that it is no longer *"significant"* and therefore disclosure would not be required. While this remains unsettled in the law, people with HIV/AIDS face uncertainty about the obligations imposed by the law, upon pain of criminal prosecution.

2. *Minority Judgments*

As noted above, the traditional rule was that fraud as to the *"nature and quality of the act"* would vitiate consent to sex. Writing for herself and Gonthier J., McLachlin J. concluded this rule should simply be expanded by adding another category of fraud that will vitiate consent: *"the common law should be changed to permit deceit about sexually transmitted disease that in*

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[19] *Ibid.* at 51.

duces consent to be treated as fraud vitiating consent under s. 265 of the Criminal Code."[20]

McLachlin J. reflects a sentiment shared by the entire Court when she states:

> *"In the case at bar, I am satisfied that the current state of the law does not reflect the values of Canadian society. It is unrealistic, indeed shocking, to think that consent given to sex on the basis that one's partner is HIV-free stands unaffected by blatant deception on that matter. To put it another way, few would think the law should condone a person who has been asked whether he has HIV, lying about that fact in order to obtain consent. To say that such a person commits fraud vitiating consent, thereby rendering the contact an assault, seems right and logical."*[21]

In McLachlin J's view, expanding the definition of fraud in this way is consistent with the long-standing rule that fraud as to the *"nature and quality of the act"* will vitiate consent:

> *"Where the person represents that he or she is disease-free, and consent is given on that basis, deception on that matter goes to the very act of assault. The complainant does not consent to the transmission of diseased fluid into his or her body. This deception in a very real sense goes to the nature of the sexual act, changing it from an act that has certain natural consequences (whether pleasure, pain or pregnancy), to a potential sentence of disease or death. It differs fundamentally from deception as to the consideration that will be given for consent, like marriage, money or a fur coat, in that it relates to the physical act itself. It differs, moreover, in a profoundly serious way that merits the criminal sanction. This suffices to justify the position ... that deception as to venereal disease may vitiate consent."*[22]

In her own minority judgment, L'Heureux-Dubé J. proposed to go much further. In her view, whether the fraud in question carried a harm or risk of harm was irrelevant. If the accused acted in a way that can objectively be described as dishonest, and this induced their partner to consent to contact, then there was no legally valid consent. According to L'Heureux-Dubé J., for the purposes of the crime of assault:

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[20] *Ibid.* at 37.

[21] *Ibid.* at 33.

[22] Ibid at 35-36.

> *"fraud 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 ... Where fraud is in issue, the Crown would be required to prove beyond a reasonable doubt that the accused acted dishonestly in a manner designed to induce the complainant to submit to a specific activity, and that absent the dishonesty, the complainant would not have submitted to the particular activity, thus considering the impugned act to be a non-consensual application of force ... The dishonesty of the submission-inducing act would be assessed based on the objective standard of the reasonable person. The Crown also would be required to prove that the accused knew, or was aware, that his or her dishonest actions would induce the complainant to submit to the particular activity."*[23]

These two minority approaches are (perhaps) simpler to define and apply than the *"significant risk of harm"* approach adopted by the majority. However, the incrementalist approach proposed by McLachlin J. offers no principled reason for singling out HIV/STDs as an additional category of fraud that vitiates consent – as opposed to any other sort of fraud that might lead a person to consent to sex. And as all the other justices are at pains to point out, the approach proposed by L'Heureux-Dubé J. *"vastly extends the offense of assault"*[24] and *"would trivialize the criminal process by leading to a proliferation of petty prosecutions instituted without judicial guidelines or directions."*[25] As McLachlin J. succinctly puts it in her critique of L'Heureux-Dubé J's position: *"what constitutes deception is by its very nature highly subjective. One person's blandishment is another person's deceit, and on this theory, crime."*[26]

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[23] Ibid at 16-17.

[24] *Ibid* at 28 (per McLachlin J).

[25] *Ibid* at 51 (per Cory J).

[26] *Ibid.* at 28-29.

The Cuerrier judgement left a number of issues unresolved. For example, where sexually transmitted diseases are the concern, will using protective measures like condoms sufficiently reduce the risk to take any non-disclosure out of the realm of fraud? In the majority decision, Cory J. noted without deciding the matter that "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 neither deprivation or risk of deprivation." Justice McLachlin would exclude protected sex, on the grounds that there needs to be a high risk of probability of transmitting the disease. The only case to directly consider this issue has concluded that failing to disclose one's health status before engaging in protected sex does not amount to fraud vitiating consent.[27]

The decision not to clearly address this issue was unfortunate, for it left a rather important question unanswered, and raised several more as to its possible interpretation and application in context of sexual activity. What constitutes a legally *"significant risk"* of HIV transmission? Does public policy require that the provisions of public health acts and regulations be used to the exclusion of the Criminal Code? Will there be a valid consent in the absence of disclosure? How the application of the criminal law can be tailored to ensure that the goals of public health are not impeded by the routine criminalization? Given the ambiguities in the decision, I will explore the issues that remain unresolved, and attempt to answer some of these questions in the following Chapters.

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[27] *Edwards,* [2001] N.S.J. No. 221, 194 N.S.R. (2nd) 107 (N.S.C.C.).

III. What Constitutes a Legally "Significant Risk" of HIV Transmission?

As noted above, the Supreme Court ruled that an HIV-positive person may be prosecuted for the crime of assault if they engage in unprotected sex without disclosing their serostatus. The Court ruled that it would be *"dishonest"* to not disclose this fact if the sexual activity presented a *"significant risk of serious bodily harm."*[28] As a result, their partner's consent to sex can be said to have been obtained by *"fraud."* This means their consent is not legally valid and the physical contact is an *"assault."* The most obvious, unanswered question raised by the Cuerrier decision is: what constitutes a legally *"significant"* risk of HIV transmission?

The Court's judgment in Cuerrier indicates that, in Canadian criminal law, unprotected vaginal intercourse (and therefore presumably anal intercourse) will be considered to carry a legally *"significant"* risk of HIV infection. This means there is an obligation to disclose HIV-positive status before engaging in this activity. The Court stated that *"in the case at bar, the failure to disclose the presence of HIV put the victims at a significant risk of serious bodily harm."*[29] Legal assessments of *"risk"* in this area should be consistent with available epidemiological conclusions regarding the risks of transmission associated with various sexual activities, because antiretroviral therapy plays a key role in decreasing HIV transmission. Namely, the emerging epidemiological evidence clearly indicates the following:

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[28] Cuerrier, *supra*, note 3 at 128 (per Cory J).

[29] *Ibid*. at 51.

(i) The lower a person's viral load, the less likely they are to transmit HIV;[30]

(ii) Antiretroviral therapy can virtually eliminate vertical transmission of HIV wherever it is fully implemented;[31]

(iii) Antiretroviral therapy reduces transmission of HIV in heterosexual couples by over 90%;[32]

(iv) Antiretroviral therapy has been shown to reduce HIV transmission at the population level;[33]

(v) Antiretroviral therapy has been shown to reduce HIV transmission among people who use injection drugs;[34]

(vi) The universal test and treat strategy is projected to reduce new infections by 95% within ten years and to reduce HIV prevalence to less than 1% within 50 years.[35]

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[30] Quinn TC, Wawer MJ, Sewankambo M et al. for the Rakai Project Study Group. Viral load and heterosexual transmission of human immunodeficiency virus type 1.N Engl J Med 2000; 342: 921 & 929. See also: Tovanbutra S, Robison V, Wongtrakul J et al. Male viral load and heterosexual transmission of HIV-1 subtype E in northern Thailand. J Acquir Immune Defic Syndr 2002; 29: 275 & 283.

[31] von Linstow ML, Rosenfeldt V, Lebech AM, et al. Prevention of mother-to-child transmission of HIV in Denmark, 1994 & 2008. HIV Med. 2010 Feb 8. [Epub]. See also: De Cock KM, Fowler MG, Mercier E, et al. Prevention of mother-to-child HIV transmission in resource-poor countries: translating research into policy and practice. JAMA 2000; 283: 1175 & 1182.

[32] Attia S, Egger M, Müller M, et al. Sexual transmission of HIV according to viral load and antiretroviral therapy: systematic review and meta-analysis. AIDS. 2009; 23(11): 1397 & 1404. See also: Donnell D et al. ART and risk of heterosexual HIV-1 transmission in HIV-1 serodiscordant African couples: a multinational prospective study. Seventeenth Conference on Retroviruses and Opportunistic Infections, San Francisco, abstract 136, 2010.

[33] Fang C, Hsu H, Twu S, Chen M, Chang Y, Hwang J, Wang J, Chuang C. Decreased HIV transmission after a policy of providing free access to highly active antiretroviral therapy in Taiwan J Infect Dis 2004;190(1): 879 & 885. See also: Montaner JS, Hogg R, Wood E, et al. The case for expanding access to highly active antiretroviral therapy to curb the growth of the HIV epidemic. Lancet 2006;368(9534):531 & 536.

[34] Wood E, Kerr T, Marshall B, Li K, Zhang R, Hogg RS, Harrigan PR, Montaner JSG. Longitudinal community plasma HIV-1 RNA concentrations and incidence of HIV-1 among injecting drug users: prospective cohort study. BMJ 2009;338:b1649.

[35] Granich RM, Crowley S, Vitoria M, et al. Highly active antiretroviral treatment for the prevention of HIV transmission. J Int AIDS Soc 2010 13: 1.

This epidemiological data is based on prospective cohort analysis, and shows that provision of antiretroviral treatment to HIV infected patients could be an effective strategy to achieve population-level reductions in HIV transmission. At the same time, it provides the basis of current, widely accepted guidelines for assessing the risks of HIV transmission and for counseling practices and public education regarding preventing and reducing the risk of HIV infection. In Canada, *"the levels of risk of various activities are organized into four categories, based on the potential for transmission of HIV and the documented evidence that transmission has actually occurred. These categories of HIV transmission are: no risk; negligible risk; low risk; high risk ... If these categories or levels were represented graphically on a continuous line, negligible and low risk would be much closer to the no risk end of the continuum. There is no "middle" level of risk.*[36]

With respect to sexual activity, these widely accepted guidelines for risk assessment identify only *"insertive or receptive penile–anal or penile–vaginal intercourse without a condom...*, [or] *receptive insertion of shared 'sex toys'"* as representing a *"high"* risk of transmission. Other activities are either classified as *"low risk"* (including unprotected oral sex and insertive intercourse with a latex barrier) or *"negligible risk"* (including oral sex with the use of a latex barrier), or carry *"no risk"* of HIV transmission.[37]

Although ambiguous and open to further interpretation in some respects, the Cuerrier decision does permit or require at least two conclusions.

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[36] Canadian AIDS Society. HIV Transmission: Guidelines for Assessing Risk (5th ed). Ottawa: Canadian AIDS Society, 2004, at 18.

[37] *Ibid.* at 24, 25, & 27.

First, a single act of unprotected vaginal or anal intercourse carries a legally *"significant"* risk of HIV transmission. Not disclosing HIV-positive status before engaging in these activities can result in criminal liability. While Cuerrier dealt with a case of vaginal intercourse, *"the risk of HIV infection from anal intercourse is even greater than that from vaginal intercourse, due to the increased fragility of the membranes in the rectum and the risk of trauma (cuts, abrasions) in this area."*[38]

Second, it makes no legal difference if the HIV-positive partner who engaged in unprotected vaginal or anal intercourse was insertive or receptive. It is true that the Cuerrier case was one in which an HIV-positive man exposed female sexual partners to the risk of infection, and available evidence indicates that *"women have a greater risk of becoming infected during vaginal intercourse than men due to a higher concentration of HIV in semen than in vaginal fluid, the large surface area of the vagina and cervix, and the fragility of the membranes in these areas."*[39] It is unclear whether there would be a duty to disclose HIV-positive status if a person engaged on many occasions in protected anal or vaginal intercourse, or unprotected oral sex, with the same partner. Nevertheless, it is important that this aspect of the decision be properly understood by HIV-positive people and others. As the law remains uncertain and not yet clear on this point, the only sure way to avoid criminal liability for engaging in sexual activity that carries a risk *("high" or "low"*) is to disclose HIV-positive status.

An example that these ambiguities remain, is the Mabior case, where an HIV positive man faced numerous criminal charges, including charges of aggravated sexual assault related to

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[38] *Ibid.* at 24-25.

[39] *Ibid*. at 23-24.

his failure to disclose his HIV status to numerous HIV negative women prior to sexual intercourse.[40]

The Mabior case is the most thorough analysis by a court of what *"significant risk"* means. The judge examined in detail evidence about effectiveness and appropriateness of condom use, and viral load:

> *"The latter date was the last reading of a viral load on the accused' files. The issue of infectivity and possible transmission, even with a condom, must be considered. With respect to the condom there can, of course, be failure, breakage or improper utilization. That being said, there was "a lower risk" when protection was utilized according to medical and scientific evidence. I am persuaded that the combination of an undetectable viral load and the use of a condom would serve to reduce the risk below what would be considered a significant risk of serious bodily harm. The facts and medical evidence in this case have brought me to the conclusion that consent would not, in this particular circumstance, be vitiated."* [41]

So, according to this judge, an HIV positive person does not have a duty to disclose his HIV status prior to intercourse if he uses a condom and his viral load at the time of intercourse is undetectable. It is unclear whether this will become the law for HIV positive people in Canada – for a number of reasons: (i) this was a decision of a Manitoba trial court; (ii) the decision was appealed and is yet to be confirmed by an appeal court; (iii) other courts are still free to interpret *"significant risk of serious bodily harm"* differently.

In this Chapter I argued that Courts should only consider *"high risk"* activities, as defined in current risk-assessment guidelines, as posing a legally *"significant"* risk of HIV transmission for the purposes of the criminal law. Those activities that carry only a *"low"* or *"negli-*

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[40] *R. v. Mabior* (2008) MBQB 201, 78 W.C.B. (2d) 380.

[41] *Ibid*. at 117.

gible" risk should not be considered *"significantly"* risky in a legal sense and should therefore not sustain a criminal prosecution for nondisclosure of HIV-positive status. To this end, I also explained why legal assessment of risk should follow epidemiological conclusions, by providing evidence that combined antiretroviral therapy can reduce HIV RNA in both the plasma and genital fluids of infected people, and that effective viral suppression has been associated with a significant reduction of infectivity.

IV. Does Public Policy Require that the Provisions of the Public Health Act and Regulations be Used to the Exclusion of the Criminal Code?

In Cuerrier, the organizations intervening before the Court urged that, if the Court were to impose criminal liability for non-disclosure of HIV-positive status, this should not extend so far as to impose an unqualified duty to always disclose HIV-positive status.[42] The key public health message regarding HIV prevention has always been, and continues to be, the need to assume that all sexual partners may be HIV-positive and, accordingly, to practice *"safer sex"* with all partners, thereby significantly reducing the risk of HIV transmission. Interveners submitted that any duty imposed by the criminal law should be consistent, rather than at odds, with this public health message.[43] The criminal law should not always demand full disclosure by HIV-positive people of their serostatus.

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[42] The BC Persons with AIDS Society (BCPWA) and the BC Civil Liberties Association (BCCLA) intervened to make submissions against the use of criminal sanctions.

[43] The BCCLA intervened again, and the BCPWA, the Canadian AIDS Society (CAS), and the Canadian HIV/AIDS Legal Network filed a joint intervention.

Rather, instead of disclosure being required in every circumstance, it should be enough to avoid criminal liability if an HIV-positive person takes precautions to reduce the risk of HIV transmission (e.g, practicing safer sex). The Supreme Court did not rule definitively on this question. However, the judgment contemplates that this *"safer sex"* defense may be accepted:

> *"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 risk of deprivation [i.e, harm or risk of harm]. To repeat, in circumstances such as those presented in this case, there must be a significant risk of serious bodily harm before the [assault] section can be satisfied. In the absence of those criteria, the duty to disclose will not arise."* [44]

According to current risk-assessment guidelines, the use of condoms for vaginal or anal intercourse lowers the risk of that activity from *"high"* to *"low."*[45] This statement should be considered a direction to lower courts and to prosecutors that an HIV-positive person is not subject to criminal liability for not disclosing their status as long as they do not engage in *"high risk"* activity. While condom use is only one method of reducing the risk of transmission, it is the only one explicitly referred to in the Court's judgment in Cuerrier. However, it seems logical and likely that, if condom use were accepted as lowering the risk enough that it is no longer legally *"significant,"* then the same treatment would and should be afforded to other *"safer sex"* practices that lower the risk to the level of *"low"* risk or below.

Even without treatment, sexual HIV exposure leads to HIV transmission much less often than generally presumed. In fact, much more often than not, sexual exposure to HIV does not

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[44] Cuerrier, *supra*, note 3 at 50-51.

[45] HIV Transmission: Guidelines for Assessing Risk, *supra*, note 36 at 24-25.

result in HIV transmission.[46] Although it is possible for one act of unprotected sexual intercourse to transmit HIV, the risk of this happening is low and varies according to various factors, the most important of which is the viral load – i.e. the amount of HIV in the relevant bodily fluid of the HIV-positive person.[47] Other factors include: the type of sexual activity (anal, vaginal or oral sex); whether the HIV-positive person is the insertive or receptive partner; the presence (or absence) of other sexually transmitted infections in both the HIV-positive and the HIV-negative partner; whether (or not) the male sexual partner of an HIV-positive individual is circumcised.[48] Consequently, the individual virological, immunological and epidemiological elements can only be small pieces of a much larger puzzle.

Of course, the use of male or female condoms (protected sex) reduces the risk of HIV exposure and transmission so substantially – regardless of any of the above factors – that the risk is estimated to be unquantifiable.[49]

Calculating the risk of HIV transmission through sexual contact is a difficult task because although it is possible to generalize from studies that include large numbers of people, and assess risk reasonably confidently, these data cannot be relied upon to assess individual risk, because individual risk depends on too many variables. However, the most recently published guideli-

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[46] Powers KA et al. Rethinking the heterosexual infectivity of HIV-1: a systematic review and meta-analysis. Lancet Infect Dis 8: 553 & 563, 2008.

[47] Quinn CT et al. Viral load and heterosexual transmission of human immunodeficiency virus type 1. New England Journal of Medicine 342 (12): 921, 2000.

[48] *Ibid*. at 929.

[49] Varghese B et al. Reducing the risk of sexual HIV transmission: Quantifying the per-act risk for HIV on the basis of choice of partner, sex act, and condom Use. Sexually Transmitted Diseases. 29(1): 38 & 43, 2002.

nes[50] to assess the risk of HIV transmission, per sexual exposure without a condom, estimate the following:

Vaginal (risk for the woman being penetrated)		0.1%-0.2% (1 in 1000 – 1 in 500)
Vaginal (risk for the man doing the penetration)		0.06% (1 in 1,666)
Anal (risk for the man or woman being penetrated)		0.1%-3% (1 in 500 – 1 in 33)
Anal (risk for the man doing the penetration)		0.06% (1 in 1,666)
Oral (risk for the man or woman performing fellatio)		0-0.04% (0 – 1 in 2,500)

Furthermore, the Cuerrier decision itself – dealing directly with the issue of non-disclosure of HIV-positive status in the context of sexual activity – indicates a narrower approach is warranted in defining what constitutes a *"significant"* risk. As noted above, Cory J. for the majority suggested that careful condom use might sufficiently lower the risk that disclosure is not required. Elsewhere in the majority judgment, he also cautions against *"trivializing"* the criminal process, emphasizing that *"it cannot be any trivial harm or risk of harm that will satisfy"* the requirement of a risk of harm for imposing criminal liability:

> *"The existence of fraud should not vitiate consent unless there is a significant risk of serious harm. Fraud which leads to consent to a sexual act but which does not have that*

[50] Fisher M et al. UK Guideline for the use of post-exposure prophylaxis for HIV following sexual exposure. International Journal of STD & AIDS 17: 81 & 92, 2006.

> *significant risk might ground a civil action. However, it should not provide the foundation for a conviction for sexual assault ... The phrase "significant risk of serious harm" must be applied to the facts of each case in order to determine if the consent given in the particular circumstances was vitiated. Obviously consent can and should, in appropriate circumstances, be vitiated. Yet this should not be too readily undertaken. The phrase should be interpreted in light of the gravity of the consequences of a conviction for sexual assault and with the aim of avoiding the trivialization of the offense. It is difficult to draw clear bright lines in defining human relations particularly those of a consenting sexual nature. There must be some flexibility in the application of a test to determine if the consent to sexual acts should be vitiated. The proposed test may be helpful to courts in achieving a proper balance when considering whether on the facts presented, the consent given to the sexual act should be vitiated."*[51]

While in the minority, McLachlin J's judgment (for herself and Gonthier J.) in Cuerrier also supports the conclusion that disclosure should not be required if safer sex is practiced. While taking the position that non-disclosure of HIV/STDs should be considered a fraud that vitiates consent to sex, she also adds that her approach would only expand the scope of criminal liability to a limited extent:

> *"Again, protected sex would not be caught; the common law pre-Clarence required that there be a high risk or probability of transmitting the disease: Sinclair, supra. These observations largely displace the fear of unprincipled overextension [of the criminal law of assault] that motivated the majority in Clarence to exclude deceit as to sexually transmitted disease a basis on which fraud could vitiate consent."* [52]

In the result, six of the seven justices who heard the Cuerrier case have suggested that the person who does not disclose their HIV-positive status but who practices safer sex should not be subject to criminal prosecution for non-disclosure.

In this Chapter I argued that in interpreting Cuerrier as applying only to nondisclosure before engaging in *"high risk"* activity, Courts should expressly recognize a *"safer sex"* defense,

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[51] Cuerrier, *supra*, note 3 at 52-54.

[52] *Ibid* at 29, citing *R. v. Clarence* (1888), 22 QBD.

meaning that HIV-positive people who use condoms for penetrative sex or who otherwise modify their conduct so as to avoid *"high risk"* activities should not be criminally liable if they do not disclose their serostatus. To this end, I also demonstrated that the probability of transmission of HIV per sexual contact varies according to type of sexual practice, presence of sexually transmitted infections, stage of HIV disease, and plasma HIV RNA concentration in the infected partner - elements that can only be small pieces of a much larger puzzle.

V. Current Trends to Risk Analyses in Comparative Jurisdictions

Lacking guidance from Canadian courts, I will now look to the approaches elsewhere to attempt to propose a solution.

In at least one jurisdiction the per-act risk of (in this case, oral and anal) transmission is now not considered to be significant enough to prosecute even when HIV transmission has occurred without prior disclosure. "*Unprotected sexual contact by people with HIV may be accompanied by the possibility of the transmission of HIV,"* wrote the Supreme Court of the Netherlands in a January 2005 ruling, *"but this does not mean that the probability of this is appreciable – apart from exceptional risk-exacerbating circumstances."*[53]

In January 2008, a consensus statement from the Swiss National AIDS Commission (EKAF) said that, as long as someone has had an undetectable viral load (which they defined as less than 40 copies/ml) for at least six months; remains adherent to their HIV treatment; is evalu-

[53] "AA" [January 2005 judgment of Supreme Court of the Netherlands].

ated regularly by their doctor; and has no other sexually transmitted infections; then they are *"not sexually infectious, i.e. cannot transmit HIV through sexual contact."*[54]

Although the idea that effective treatment has a major impact on transmission on a population (rather than an individual) level is not new, HIV experts had never before make a public statement on the effect of treatment on transmission on an individual level. Australasian experts have rejected the statement, while agreeing that the per-act risk is incredibly low; another set of experts note that *"denying an effect of treatment on risk of transmission would be dishonest and futile."*[55]

Can the Swiss statement, and the notion of treatment's effect on transmission risk, be used as a defense for people who are accused of exposure when on a stable regimen with an undetectable viral load? Two recent court cases suggest it can.

In May 2008, the US Court of Appeals for the Armed Forces spent some time discussing whether an HIV-positive soldier who had previously pleaded guilty to criminal HIV exposure charges could set aside his guilty plea following testimony from a military doctor that he was *"highly unlikely"* to be able to transmit HIV given his extremely low viral load. Although the majority did not agree, and did not allow his guilty plea to be set aside, two members of the appeals panel found this expert testimony valid enough to question HIV exposure laws given evolving scientific knowledge of HIV transmission, and said that if the case had been an appeal of a verdict, they would have quashed the conviction.[56]

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[54] Vernazza P et al. Les personnes séropositives ne souffrant d'aucune autre MST et suivant un traitment antirétroviral efficace ne transmettent pas le VIH par voie sexuelle. Bulletin des médecins suisses 89 (5), 2008.

[55] Garnett GP and Gazzard B. Risk of HIV transmission in discordant couples. Lancet 372: 270-71, 2008.

[56] *U.S. v. Dacus* (2008), C.A.A.F. No. 07-0612, Crim. App. No. 20050404

In July 2008, Queen's Bench Justice Joan McKelvey, who presided over the trial of Clato Mabior in Winnipeg, Canada, seriously considered up-to-date science on the effect of HIV treatment on the risks of HIV exposure. However, she wasn't convinced:

> *"I have found the medical and scientific evidence to be very persuasive that even with an undetectable viral load, there remains a risk of transmission of HIV with resultant endangerment of life ... This is particularly so given the medical evidence that other influences or factors such as STDs or the use of female contraception can affect or 'spike' a viral load."* [57]

She also noted that the Swiss statement – and the publicity about it – took place three years after the events for which Mr. Mabior was on trial.[58]

Anecdotal evidence indicates that many individual doctors have been saying in private and to patients that the Swiss statement is essentially correct, and so an individual who has been counseled in this way could state that they honestly believed that he or she was not infectious. However, a court may also have to separate the science of the Swiss statement (i.e. deciding whether exposure to HIV could have taken place) from other sections of the Swiss guidance. This is because the Swiss recommend disclosure before any unprotected sex, and say that the decision whether or not to abandon condoms should be made by the HIV-negative partner.[59] This reflects ethical issues underpinning not only Canadian, but many HIV-disclosure laws globally.

In that respect Wolf and Vezina have written that a fundamental flaw in HIV exposure laws is that these laws *"reflect society's interest in protecting individuals from physical harm. Those who intentionally or recklessly expose others to HIV infection create a substantial but pre-*

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[57] *Supra,* note 40 at 117.

[58] *Ibid.* at 143 and 151.

[59] Swiss Aids Federation. Advice Manual: Doing without condoms during potent ART. January 2008.

ventable harm. Their intentional behavior is similar to other actions prohibited by criminal statutes, such as assault and battery with fists or a weapon; thus, it would be inconsistent with the purpose of criminal law to exclude this behavior completely from its scope."[60]

However, they argue, although each single act of HIV exposure can be punished, each single act of HIV exposure does not do the same kind of harm as assault with a fist or a weapon. A single – and often many – acts of HIV exposure may not result in the uninfected partner becoming HIV-positive.[61]

Furthermore, the UN Guidelines on HIV/AIDS and Human Rights specifically address the issue of criminal laws, advising states to ensure that, if criminal offenses are applied to conduct that transmits or risks transmitting HIV, then *"such application should ensure that the elements of foreseeability, intent, causality and consent are clearly and legally established to support a guilty verdict and/or harsher penalties."* [62] Interpreting Cuerrier so as to confirm the safer-sex defense suggested by a majority of the Supreme Court would provide a clear(er) definition for Canadians of that conduct which is prohibited by the criminal law and that which is permitted. As McLachlin J. emphasized in her judgment:

> *"the criminal law must be clear ... [I]t is imperative that there be a clear line between criminal and non-criminal conduct. Absent this, the criminal law loses its deterrent effect and becomes unjust."* [63]

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[60] Wolf LE and Vezina R. Crime and punishment: is there a role for criminal law in HIV prevention policy? 25 Whittier L. Rev. 821, 2004.

[61] *Ibid.*

[62] Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Prgramme on HIV/AIDS, International Guidelines on HIV/AIDS and Human Rights: 2006 Consolidated Version, Second International Consultation on HIV/AIDS and Human Rights (Geneva, September 23-25, 1996) and Third International Consultation on HIV/AIDS and Human Rights (Geneva, July 25-26, 2002). Geneva: UNAIDS, 2006.

[63] Cuerrier, *supra*, note 3 at 34 (per McLachlin J).

Finally, an interpretation of Cuerrier that recognizes a *"safer sex"* defense would be consistent with the principle of restraint in the use of the criminal law. Richard Pearshouse of the Canadian HIV/AIDS Legal Network, in an overview of Africa's move towards criminalization writes:

> *"The pressure on legislators and governments in jurisdictions across the globe to produce a legal response to HIV is enormous. However, laws pertaining to HIV, even those dressed in the garb of human rights, are not always progressive. These laws can be instrumental in promoting effective initiatives to address the HIV/AIDS epidemic, but they can also impede such initiatives."*[64]

South Africa's first openly HIV-positive public figure, Justice Edwin Cameron of the Supreme Court of Appeal, goes further. He argues that laws criminalizing behavior that may transmit HIV are *"the product, not of rational public health choices, but of irrational fears, which provide an inveterately poor basis for rational lawmaking."*[65]

Recognizing a *"safer sex"* defense would also be consistent with existing guidelines for assessing HIV transmission risks and with the standard advice disseminated to the public as to the riskiness of various sexual practices and the need to reduce risks by practicing safer sex. This would, to the greatest extent possible, align the decision in Cuerrier with existing public health education and prevention efforts. UNAIDS is so alarmed by these and similar developments that it strongly suggested that alternatives to criminal sanctions should be explored:

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[64] Pearshouse R. Legislation contagion: the spread of problematic new laws in Western Africa. HIV/AIDS Policy & Law Review 12 (2/3), December 2007.

[65] Cameron E. Using the law in the AIDS epidemic: sword or shield? Birkbeck College, London, 28th June 2007.

> *"Instead of applying criminal law to HIV transmission, governments should expand programs which have been proven to reduce HIV transmission while protecting the human rights both of people living with HIV and those who are HIV-negative."*[66]

To recap, the Supreme Court acknowledged that education and interventions by public health authorities are available to respond to those who do not disclose their HIV-positive status and engage in risky activity, but ruled that the criminal law has a deterrent role to play when public health efforts are unsuccessful. Notwithstanding, the concern remains that, among other detrimental effects, such a policy will deter people (particularly people at higher risk) from getting tested, as well as impede education and undermine counseling efforts to assist with changing behavior to reduce the risk of transmission. Similarly, the burden of criminalization will fall disproportionately upon those already marginalized and powerless communities, which can result in a vicious circle of stigma and blame, often exaggerated by sensationalist media reporting.

VI. Will There be a Valid Consent in the Absence of Disclosure?

The Supreme Court has indicated in Cuerrier that there is no duty to disclose unless there is a *"significant"* risk of transmission. However, might there also be circumstances in which an HIV-positive person will not be required to disclose their serostatus to a sexual partner, even though they are engaged in an activity where there is a significant risk of transmitting HIV? The Court does not address this question, and therefore no definitive answer can be given. People with HIV/AIDS need to be aware that there is no clear indication in the law, as it currently stands, as to whether some circumstances may mean that disclosure is not required.

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[66] UNAIDS/UNDP. Summary of main issues and conclusions: international consultation on the criminalization of HIV transmission, 31 Oct-2 Nov, 2007. UNAIDS, September 2008.

However, this question may be of particular concern to HIV-positive people who may find themselves in situations where disclosure of their serostatus is not simply difficult but also dangerous; this would include people who sell sex for money, prisoners, people who use drugs, and women (or others) in abusive relationships, or in settings where they have little legal status (i.e. immigrants). The HIV-positive person may be concerned that disclosing their status will prompt physical violence from a sexual partner. This concern is particularly relevant in the case of HIV-positive women. For example, due to power imbalances within relationships most women are unable to practice safer sex, since condoms are a male-controlled prevention method.[67]

It will often be the case that someone who risks violence or abuse upon disclosure of their HIV-status is also limited in their ability to ensure that precautions such as the use of condoms or other *"safer sex"* practices are taken to reduce the risk of transmission to a sexual partner. In such circumstances, would the "*reasonable person*" consider it *"dishonest"* for an HIV-positive person to not disclose their status?

What if the HIV-positive person indicates they wish to practice safer sex, but the other participant refuses and there is a risk of violence if the HIV-positive person persists with the request? An obvious example would be that of a sex worker with HIV/AIDS whose client refuses to use condoms and who might become violent if the matter is pushed too far. What if a person goes so far as to indicate the possibility that they may be HIV-positive – thereby putting the other participant *"on notice"* – but stops short of actual disclosure? Is the person *"dishonest"* if they

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[67] Clayton M et al. Criminalizing HIV transmission: is this what women really need? 17th International AIDS Conference, Mexico City, abstract WEAE0102, 2008.

do not disclose under such circumstances? The Cuerrier decision offers no clear or easy answers to these questions, and people with HIV/AIDS should not be left with the impression that these issues are settled.

In Cuerrier, both the majority and minority justices expressed the view that imposing criminal sanctions would have some effect in deterring unprotected sex without disclosure of HIV-positive status, and would thus assist in protecting those who would otherwise be placed at risk. The Court dismissed concerns raised by the interveners that criminally punishing people for not disclosing their HIV-positive status: first, would be unlikely to have any significant deterrent effect on unsafe sex without disclosure and would therefore be of little protective benefit to those at risk of infection; second, does not address the underlying reasons why people (women, sex workers, drug users, and prisoners in particular) may find themselves with little or limited ability to ensure that safer-sex precautions are taken; and third, compounds the already significant difficulties of disclosing HIV-positive status.

Unfortunately, the Cuerrier judgment does not provide much, if any, consideration of how a *"duty to disclose"* may actually be experienced by people living with HIV/AIDS. The Court does not address the competing factors that may weigh against imposing a duty to disclose in some circumstances. Instead, in dismissing these concerns, the majority took the view that the 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 ... If ever there was a place for the deterrence provided by criminal sanctions it is present in these circumstances. It may well have the desired effect of ensuring that there is disclosure of the risk and that appropriate precautions are taken ... It is true that all members of society should*

> *be aware of the danger and take steps to avoid the risk. However, the primary responsibility for making the disclosure must rest upon those who are aware they are infected. I would hope that every member of society no matter how "marginalized" would be sufficiently responsible that they would advise their partner of risks. In these circumstances it is, I trust, not too much to expect that the infected person would advise his partner of his infection. That responsibility cannot be lightly shifted to unknowing members of society who are wooed, pursued and encouraged by infected individuals to become their sexual partners."*[68]

It remains to be seen whether courts will recognize that disclosing HIV-positive status may be particularly difficult in some circumstances, and therefore be more lenient in assessing whether not disclosing is *"dishonest."* While the Supreme Court did not consider this question in any detail, the majority does indicate some support for a contextual approach in stating that *"the nature and extent of the duty to disclose, if any, will always have to be considered in the context of the particular facts presented."*[69] This is consistent with guidelines for partner notification recognizing that the process of partner notification must consider the person's circumstances.[70]

The second Supreme Court of Canada case about HIV (non)disclosure and the criminal law, Williams, was decided in 2003, where the accused was charged with aggravated assault for having unprotected sex with his partner without informing her that he was HIV positive.[71] At the Supreme Court, a conviction on this charge was found to be untenable because the accused and the complainant had been sexually active for several months before the accused learned of his status, and it could not be established beyond reasonable doubt that his failure to inform actually en-

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[68] Cuerrier, *supra*, note 3 at 54-55.

[69] *Ibid* at 50.

[70] Federal/Provincial/Territorial Advisory Committee on AIDS. Guidelines for Practice for Partner Notification in HIV/AIDS. Ottawa: Minister of Health, 1997.

[71] *R. v. Williams*, (2003) S.C.J. No. 41, (2003) 2 S.C.R. 134 (S.C.C.).

dangered the complainant's life, as it was possible that she has been infected prior to the moment at which his fraudulent conduct vitiated her consent.[72] Nonetheless, the Court was content to convict the accused of attempted aggravated assault for his conduct after becoming aware of his infected status, on the ground that he had the required intent for an attempt:

> *"The crime of attempt, as with any offense, requires the Crown to establish that the accused intended to commit the crime in question: R. v. Anico (1984) 1 S.C.R. 225 at pp. 247-48. The requisite intent is established here ... The respondent, knowing ... he was HIV positive, engaged in unprotected sex with the complainant intending her thereby to be exposed to the lethal consequences of HIV."*[73]

The facts in Williams are similar to Cuerrier, albeit with one significant difference: in this case, the accused's sexual contact with his partner had begun prior to his knowing about testing HIV positive. He continued having sex with her without disclosing this fact , and she ended up contracting the disease. Matters have been confused even further by the subsequent decision of the Supreme Court in Williams, a judgement that raises few new questions about fraud and its relationship to consent: (i) Can someone who is aware he may be HIV positive be criminally charged and convicted for not disclosing (e.g., people who decide not to test so they don't have to disclose)? (ii) Can a HIV positive person be charged for failing to disclose his or her status to another HIV positive person? (iii) Does re-infection with HIV pose a *"significant risk of serious bodily harm"* or endanger the person's life?

As regards to the actual knowledge *vis-a-vis* awareness of one's HIV status, the Court reasoned that the Crown can prove the mental element of the crime of aggravated sexual assault if it can prove the person acted recklessly:

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[72] *Ibid*. at 41.

[73] *Ibid*. at para 62 (emphasis in original).

> *"Once an individual becomes aware of a risk that he or she has contracted HIV, and hence that his or her partner's consent has become an issue, but nevertheless persists in unprotected sex that creates a risk of further HIV transmission without disclosure to his or her partner, recklessness is established."*[74]

The difficulty was that it could not be proven beyond a reasonable doubt that her exposure to the disease occurred subsequent to his obtaining knowledge of his own status , at the point where consent would be vitiated by fraud. What is of importance here is the Court's conclusion that the accused's conduct vitiated complainant's consent. On this point the Court succinctly concluded that Cuerrier was definitive, and that the accused's failure to disclose his HIV status rendered the complainant's consent inoperative. While this may seem compelling initially, there is reason to be concerned that it implicitly represents a rather startling reversal of Cuerrier. Professor Stewart has convincingly argued that a correct application of Cuerrier test should have lead to the accused's acquittal for attempted aggravated assault.[75] His reasoning is simple. The test of the majority in Cuerrier required both dishonesty *and* a significant risk of serious bodily harm. Dishonesty was certainly established, but given the finding that it was impossible to establish whether the complainant's life had been endangered by the conduct, how it could be said that she was put at risk of serious bodily harm by the fraud?

Stewart contends that the Court - intentionally or otherwise - may have actually adopted the broad test for fraud suggested by L'Heureux-Dubé J. in Cuerrier.[76] Williams committed an act of dishonesty in circumstances where it was impossible to prove that he put the complainant

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[74] *Ibid*. at para 64.

[75] Hamish Stewart, "When Does Fraud Vitiate Consent? A comment on *R. v. Williams*" (2004) 49 Crim. L.Q. 144.

[76] *Ibid*. at 155-156.

at significant risk of serious harm. As such, all that can be said of his conduct was that he did not disclose a fact that would have caused the complainant to refuse consent.

Whether this reading of Williams will ultimately prevail remains unclear. The existing body of criminal law likely applicable to such a question may be less amenable to acknowledging the difficulties surrounding disclosure in some circumstances. The closely related defenses of duress and necessity are applicable in those situations in which a person's otherwise criminal conduct is *"morally involuntary"* and lacks *"moral blameworthiness"* because, in the circumstances, they lack any other "*realistic choice."*

In the case of the common law defense of duress,[77] the court will consider whether the person accused of a crime (e.g, assault for engaging in sexual activity without disclosing HIV-positive status) was acting solely under compulsion of threats of death or serious bodily harm to herself or another person, whether she believed they would be carried out, whether they were so serious that they might have caused a reasonable person in the same situation to act in the same manner, and whether the accused had an *"obvious safe avenue of escape."* [78]

In the case of the defense of necessity, the court will consider whether the person faced *"imminent risk"* (not limited to the threat of bodily harm) and there was *"no reasonable legal alternative to disobeying the law."*[79] The defense also requires that *"the harm inflicted must be*

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[77] The statutory defense of duress set out in s 17 of the Criminal Code is not available when the accused is charged with certain specific offenses (e.g, aggravated assault or sexual assault), and is therefore not likely to apply in most cases where a person is criminally prosecuted for exposing another person to the risk of HIV infection.

[78] *R. v. Ruzic* (1998), 128 CCC (3d) 97 (Ont CA), leave to appeal granted March 25, 1999, SCC Bulletin 1999, at 492.

[79] *R. v. Perka*, [1984] 2 SCR 233, 14 CCC (3d) 385.

less than the harm sought to be avoided."[80] Finally, this defense is not available where the dangerous situation was clearly foreseeable to the reasonable person and should therefore have been avoided at an earlier time.

Whether an HIV-positive person facing criminal charges based on their non-disclosure advance either of these existing defenses, or argue for a contextual approach to analyzing the *"dishonesty"* of non-disclosure, or both, courts will inevitably end up assessing the accused person's conduct in the circumstances surrounding the non-disclosure. Is the accused credible in claiming she feared threats of violence would be carried out were she to disclose? Could she have withdrawn from the relationship before engaging in unprotected sex without disclosing? Was there some alternative course of action that would not have placed the other person at *"significant"* risk of HIV infection? Would a reasonable person have acted similarly in light of the threats of harm?

These are difficult criteria to satisfy in most circumstances. While some courts may have some understanding for HIV-positive people who does not disclose their status before unprotected sex because they fear physical violence from their partner, no solid legal conclusion can be offered at this point as to whether such a defense would succeed, and this uncertainty should be acknowledged.

In this Chapter I argued that Courts should adopt a contextual approach in interpreting and applying Cuerrier. Such an approach should include a recognition that, even if an activity poses a *"significant risk"* of transmitting HIV, an objective assessment of whether not disclosing

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[80] *Ibid.*

is *"dishonest"* should be made only in light of all the circumstances of the case. Where an HIV-positive person honestly believes there is a risk of physical violence to them if they disclose their status to a sexual partner, then it should not be considered *"dishonesty"* sustaining criminal liability if they do not disclose their status. I also argued that a contextual analysis should not necessarily be limited to the risk of physical violence; all the circumstances of the case should be assessed in determining whether not disclosing was *"objectively dishonest,"* and other adverse consequences of disclosure may suffice to relieve against a duty to disclose. Thus, Courts should consider Cuerrier as requiring disclosure of HIV-positive status before engaging in activity posing a *"significant"* risk of transmission, if that status is known to the accused as a result of scientifically accepted confirmatory testing procedures. The decision should not be taken as extending a duty of disclosure beyond disclosure of a known HIV-positive status.

VII. Informed Consent and The Law of Assault

As Cuerrier criminalizes non-disclosure of HIV-positive status, it would appear that someone could only be convicted of assault if they have actual knowledge of their HIV infection. However, it is theoretically possible that a prosecutor might, in a future case, seek to expand the scope of criminal liability to someone who was *"willfully blind"* as to whether or not they are HIV-positive and whose conduct posed a significant risk of transmission to another. The most obvious scenario might be that of a person who has frequently engaged in high-risk activities and manifests symptoms likely indicative of HIV infection, and who either gets tested but does not return for results, or avoids getting tested altogether and therefore does not have a confirmed di

agnosis. In characterizing non-disclosure of known HIV-positive status as *"dishonesty,"* the Court ruled:

> *"A consent that is not based upon knowledge of the significant relevant factors is not a valid consent. The extent of the duty to disclose will increase with the risks attendant upon the act of intercourse. To put it in the context of fraud, the greater the risk of deprivation [i.e, harm] the higher the duty of disclosure. The failure to disclose HIV-positive status can lead to a devastating illness with fatal consequences. In those circumstances, there exists a positive duty to disclose. The nature and extent of the duty to disclose, if any, will always have to be considered in the context of the particular facts presented."*[81]

This raises the question: what are the *"significant relevant factors"* upon which consent to sexual activity is based? Is it only known HIV-positive status (or infection with another STD that poses a "*significant risk of serious bodily harm"*) that needs to be disclosed in order to ensure a sexual partner's valid consent? Could the underlying principle in Cuerrier be invoked in support of a prosecution argument that a person who is willfully blind of their infection with HIV or another serious STD vitiates their partner's consent to sex if they do not *"put their partner on notice"* that they may be infected? It is arguable that, to many people, knowing that their sexual partner had signs or suspicions of HIV/STD infection could be a *"significant relevant factor"* in deciding whether to engage in certain kinds of sexual activity. That their partner does not know for certain that they are HIV-positive does not make the actual risk of transmission any less *"significant."*

Taking the criminal law to such a conclusion could, in effect, mandate disclosure of not merely known HIV-positive status but of past high-risk behaviors and/or other factors that may mean the person is HIV-positive. It is questionable whether the offense of assault could or should

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[81] Cuerrier, *supra*, note 3 at 50.

be stretched so far as to criminalize non-disclosure of not just a known infection, but even non-disclosure of facts giving rise to a suspicion of infection. It could be theoretically possible on a traditional criminal law analysis, and there may well be future cases in which the prosecution advances such an argument. However, expanding the law of assault this far would be to criminalize a vast number of sexual encounters and would render the law even more uncertain and impractical.

Indeed, the British Columbia Court of Appeal in Cuerrier refused to develop the law of assault in this fashion. Its ruling on this point about *"informed consent"* was not considered by the Supreme Court; in overturning the British Columbia Court of Appeal's decision, the Supreme Court reversed its ruling simply on the issue of whether non-disclosure could constitute a *"fraud"* under the criminal law. The British Columbia Court of Appeal correctly refused to expand the scope of the criminal law this far:

> *"[A]s a matter of policy, I have grave reservations about importing the concept of informed consent, as it has been developed primarily in medical malpractice cases, into the criminal law of assault. There is a recognized legal duty on a doctor to inform his or her patient of risks associated with medical procedures in order to permit the patient to given an informed consent to treatment. There is no recognized duty, enforceable through the criminal law power of the state, which requires a person to provide full disclosure of all known risks associated with sexual intercourse to his or her sexual partner as a condition precedent to the partner giving an effective consent to sexual intercourse. The criminal law of assault is, indeed, an unusual instrument for attempting to ensure safe sex ... Taken to its logical conclusion, [such an approach] seeks to impose criminal liability on an accused for failure to make full disclosure of any information which could reasonably be relevant to the question of whether the complainants would consent to sexual intercourse.... [I] am of the view that such an approach is fraught with difficulties insofar as the criminal law of assault is concerned."*[82]

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[82] Cuerrier, *supra*, note 7 at 282 & 283 (BCCA, per Prowse JA).

At one point, the prosecution in Cuerrier argued that for reasons of *"public policy,"* the law should not recognize a person's consent to unprotected sex with an HIV-positive person even if they were aware of their partner's HIV-positive status. In making this argument, the prosecution relied upon a previous Supreme Court decision stating that, on *"public policy"* grounds, the law would not allow a person to legally consent to *"serious hurt or non-trivial bodily harm."*[83]

As it this relies, the Supreme Court judgment in Cuerrier makes it clear that it is legally possible for a person to consent to engage in activity that carries a *"significant risk"* of HIV infection if they are aware of their partner's HIV-positive status. As already noted above, the Court ruled that:

> *"In situations such as that presented in this case, it must be emphasized that the Crown will still be required to prove beyond a reasonable doubt that the complainant would have refused to engage in unprotected sex with the accused if she had been advised that he was HIV-positive. As unlikely as that may appear, it remains a real possibility. In the words of other decisions it remains a live issue."* [84]

As just noted above, the Court's majority emphasized that the prosecution must prove beyond a reasonable doubt that the complainant would not have consented to unprotected sex had they known their partner's HIV-positive status. After all, in Cuerrier, the Supreme Court rejected the argument that the two women gave valid consent to sex because, to their knowledge, Cuerrier might have been HIV-positive, the complainants were both aware of the risk of sexually transmitted diseases, and they ran the risk of possible HIV transmission by having unprotected sex

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[83] Cuerrier, *supra*, note 3, citing *R. v. Jobidon*, [1991] 2 SCR 714, 66 CCC (3d) 454.

[84] Cuerrier, *supra*, note 3 at 51.

with him. The Court stated that *"true consent cannot be given if there has not been a disclosure by the accused of his HIV-positive status."*[85]

In all likelihood, in order to raise a reasonable doubt as to the claim that the complainant would not have consented to sex if the accused had disclosed their HIV-positive status, I conclude to this point that credible evidence would be required establishing that the complainant indicated their consent to high-risk sex with a person they knew was HIV-positive (and not just might be).

VIII. Alternatives to Criminalization: Merits and Demerits

A number of authors have come up with frameworks, principles, goals, and analytical tools to evaluate public health efforts, and a number of common themes emerge from their work.[86] In this Chapter, I will use these common themes to evaluate the arguments for and against criminalization of HIV transmission and exposure. Incorporating the framework by *Childress et al*.[87], and Singer's analysis of the SARS outbreak,[88] I will use the following factors in the analysis: effectiveness, least infringement, protection of communities from undue stigmatization; proportionality, necessity, and protection of public from harm.

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[85] *Ibid.* at 50.

[86] See for example: UNAIDS Policy Paper; Open Society Institute, "10 Reasons to Oppose the Criminalization of HIV Exposure or Transmission," 2008.

[87] *James F. Childress et a*l., "Public Health Ethics: Mapping the Terrain" (2002) 30 J.L. Med. & Ethics 170.

[88] *Peter A. Singer et al*., "Ethics and SARS: Lessons from Toronto" (2003) 327 British Medical Journal 1342.

A. Arguments For and Against Criminalizing HIV Transmission

Before turning to the arguments against criminalizing HIV exposure and transmission, it is helpful to examine why criminalization was introduced in the first place. Criminal law serves many purposes: deterrence, denunciation, rehabilitation, and retribution. [89] Each of these purposes is reflected in the two typical justifications for criminalizing HIV transmission.

The first justification for criminalizing HIV exposure and transmission is that it will reduce transmission rates by providing an incentive to infected individuals to change their behavior. The second is that incarceration will isolate an HIV positive individual from the rest of society, thereby reducing that individual's ability to further spread the virus, thereby reducing transmission. The first justification, that behavioral change will result, I will discuss further below, whereby showing that HIV positive individuals are not deterred by the prospect of criminal sanction.

The second justification is problematic because there is evidence that the incarceration of individuals with HIV actually serves to increase transmission, at odds with the public health goals it seeks to achieve. This is in contravention of the goals of public health to protect the public from harm and to use effective interventions. The rate of HIV in prisons is ten times higher than in the general population,[90] which is the result of a number of factors. The use of incarceration as a means of reducing transmission is not the least restrictive option available, and therefore undermines public health ethics.

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[89] UNAIDS, "Criminal Law, Public Health and HIV Transmission: A Policy Options Paper," June 2002, at page 20.

[90] Canadian HIV/AIDS Legal Network "Health care costs in prisons rising fast," (2009) 14:1 *HIV/AIDS Policy & Law Review*, at page 24.

First, HIV positive inmates in Canada face difficulties in properly taking highly active antiretroviral treatment (*"HAART"*), although such medications are available to inmates. The situation is described in an info sheet on HIV/AIDS and hepatitis C in prisons:

> *"Anecdotal evidence, epidemiological studies and coroners' inquests have shown that interruptions in HAART occur in prisons, both federally and provincially. Prisoners report going without their HAART medications for days, not getting their does at the prescribed time of day, and not getting the correct dose. Doses are missed because medications are not reordered, prisoners are too ill to get their medications from health services, lock-downs prevent them from getting to health services, and steps are not taken to ensure access to medications in segregation."*[91]

The same info sheet notes that 90 to 95% of doses of HAART must be taken according to specific directions in order to ensure that the medication operates effectively to suppress HIV. The suppression of HIV is critical to ensuring the health of the patient, and in ensuring the reduced transmissibility of the infection to others. The proper use of HAART, by ensuring both individual health and community protection, must be promoted in order to meet public health goals, both within and outside of jails. Impediments to HAART caused by incarceration raise concerns of distributive justice, as an already marginalized group faces barriers treatment that are not present in society at large, threatening their health and well being as well as the safety and health of their community.

Second, health promotion in detention facilities may fall short. While products designed to encourage safe-sex are available in federal penitentiaries, a number of provinces do not offer the same products as widely or discretely. In Alberta, for example, a request must be made to the prison health service for condoms. In New Brunswick, Nunavut and Prince Edward Island, con-

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[91] Canadian HIV/AIDS Legal Network, "HIV and Hepatitis C in Prisons: Care, treatment and support" 2008, at page 1.

doms and dental dams are not made available in prisons.[92] As of 2007, no detention facilities in Canada offer needle and syringe programs, despite international evidence that such programs do not increase drug use and are effective in controlling the spread of HIV and Hepatitis.[93] Like the impediments to HAART, a lack of access to products that promote both individual and community health and safety impede the satisfaction of public health goals.

Finally, the justification that incarceration will reduce HIV transmission is erroneous as it this relies on outdated rationale that HIV will lead to death in a short period of time. As Grant notes, incarceration was once viewed as a "*de facto*" life sentence due to the short life expectancy of HIV positive inmates.[94] The reality is that inmates with HIV will be released into the community. Incapacitation will serve no purpose in reducing transmission, but due to impediments to HAART and preventive measures, will likely increase transmission and compromise the health of all inmates. This does not reflect the need for efficacy in public health interventions.

1. Ineffective at Reducing Transmission

Commentators cite empirical evidence to show that the majority of HIV transmissions will not be affected by the deterrent power of the criminal law.[95] This is for two reasons.

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[92] Canadian HIV/AIDS Legal Network, "HIV and Hepatitis C in Prisons: Prevention: condoms" 2008.

[93] Canadian HIV/AIDS Legal Network, "HIV and Hepatitis C in Prisons: Prevention: needle and syringe programs" 2008.

[94] Isabel Grant, "The Boundaries of the Criminal Law: the Criminalization of the Non-disclosure of HIV" 31 Dalhousie L.J. 123, at page 14.

[95] UNAIDS/UNDP Policy Brief: "Criminalization of HIV Transmission" (Geneva 2008), at page 2, citing Bunnell R et al (2006) "Changes in Sexual risk behavior and risk of HIV transmission after antiretroviral therapy and prevention interventions in rural Uganda" AIDS 20:85-92, and Marks G. et al (2005) "Meta-analysis of high-risk sexual behavior in persons aware and unaware they are infected with HIV in the United States: implications for HIV prevention programs" *Journal of Acquired Immune Deficiency Syndromes* 39:446-53.

First, the majority of new HIV cases are the result of transmission by a person who is unaware that they are HIV positive.[96] The vast majority of transmission occurs by individuals who have recently acquired the virus, and are therefore both unaware of their infection, and have a very high viral load making them extremely infectious.[97]

Second, there is evidence to suggest that the criminal law has little power to affect risk behavior in sexual setting.[98] This evidence suggests that the deterrent power of criminal sanctions will not influence individuals to change their behavior, and people are instead motivated to change their behavior based on the view that it is wrong to infect others with the virus.[99] As Grant points out, even using criminal sanctions as a last resort will not be effective in reducing HIV transmission, as the few individuals who refuse to comply with public health orders and instructions will unlikely be swayed to change their behavior with the threat of criminal sanction.[100] Further, there is no data supporting the deterrent effect of criminal sanction, with no

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[96] Report of the WHO European Region Technical Consultation in collaboration with the European AIDS Treatment Group and AIDS Action Europe on the criminalization of HIV and other sexually transmitted infections, Copenhagen, 16 October, 2006, at page 15, citing UNAIDS & Inter-Parliamentary Union, *Handbook for Legislators on HIV/AIDS, Law and Human Rights* (Geneva: UNAIDS/IPU, 1999) at 50. See also: Justice Edwin Cameron, "The Criminalization of HIV Transmission and Exposure," (Public Lecture hosted by the Canadian HIV/AIDS Legal Network, Osgoode Hall Toronto, 12 -13 June 2009), at page 10; and UNAIDS/UNDP Policy Brief: "Criminalization of HIV Transmission" (Geneva 2008), at page 3.

[97] *Supra,* note 95 at page 3, citing Brenner BG et al (2007) "High rates of forward transmission events after acute/early HIV-1 infection" *Journal of Infectious Diseases* 195: 951-59, Marks G, Crepaz N and Janssen R (2006) "Estimating sexual transmission of HIV from persons aware and unaware that they are infected with the virus in the USA" AIDS 20:1447-1450.

[98] *Supra*, note 96 at 15, citing S. Burris et al., "Do Criminal Laws Effect HIV Risk Behavior? An Empirical Trial." 1st Annual Conference on Empirical Legal Studies Paper (2007). See also: International Planned Parenthood Federation, "HIV: Verdict on a Virus: Public Health, Human Rights and Criminal Law" (2008) at page 9.

[99] *Ibid*.

[100] *Supra*, note 94 at page 15.

change in risk behavior in jurisdictions where transmission of or exposure to HIV is not criminalized *versus* jurisdiction where it is.[101]

2. Stigma

One of the ethics of public health law described by Singer is to protect communities from undue stigmatization.[102] The possibility of criminal sanctions for the transmission or exposure to HIV stigmatizes people with the infection.[103] Stigma in relation to HIV status is, *"often based upon the association of HIV with already marginalized and stigmatized behaviors, such as sex work, drug use and same sex and transgender sexual practices."*[104] Criminal law, rather than redressing the stigmatizing attitudes against HIV, instead promotes and reproduces the stigma in society at large.

As one policy document, *Verdict on a Virus*, states, criminalization *"combines the attitudes, perceptions and morality associated with HIV with those relating to criminality."* [105] Four consequences of criminalizing HIV transmission and exposure are discussed in this document, each of which contributes to the stigmatization of people with HIV.

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[101] *Supra,* note 95 at page 4.

[102] *Supra*, note 88.

[103] International Planned Parenthood Federation, "HIV: Verdict on a Virus: Public Health, Human Rights and Criminal Law" (2008) at page 20.

[104] *Ibid*. at page 21.

[105] *Ibid*. at page 20.

First, criminalization *"influences the relationship between health professionals and their clients."*[106] HIV positive individuals have a reason to be less than forthcoming about their behaviors with public health officials if they know that such information can be used as evidence in a criminal case. The result is ineffective treatment and counseling. Second, criminalizing HIV impacts the self-esteem of HIV positive individuals by deeming them *"potential criminals."* This can affect the individual's decision to seek treatment, counseling and other support. Next, the policy document notes that criminalizing HIV can affect general perceptions of HIV positive individuals, as it equates HIV with criminality, which, *"fosters prejudice and stigma"* and hampers prevention efforts. Finally, the privacy concerns raised by criminalizing HIV transmission affect not only the potential defendant, but previous sexual partners of both complainant and defendant.[107]

In addition to the four consequences discussed above, criminalization of HIV transmission and exposure increases stigma in two additional and powerful ways. First, criminalization garners significant media attention that influences public perception of HIV and HIV positive individuals. Second, the resulting HIV exceptionalism fuels and perpetuates stigma associated with HIV.

3. Adding to Stigma - Media Sensationalism

Significant media attention is focused on cases where HIV positive individuals are subject to criminal sanctions. However, the number of people who knowingly infect others with

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[106] *Ibid.*

[107] *Ibid.*

HIV is miniscule in comparison to the number of infected individuals. The media frenzy creates a public perception that HIV positive individuals frequently act in a way that jeopardizes public health, adding to the stigmatization of infected people. UNAIDS cautions that inflammatory media coverage *"contributes to the stigma surrounding HIV/AIDS and people living with the disease as 'potential criminals' and as a threat to the 'general public."*[108] As Alison Symington, a senior policy analyst with the Canadian HIV/AIDS Legal Network notes, *"the majority of the coverage about HIV/AIDS and people living with HIV that an average Canadian reads in the local newspaper or hears on the radio is about persons facing criminal charges for non-disclosure."*[109] Symington also notes the sensationalist approach of the media to such cases, which often miss-represent the facts or the charges, painting the accused people as intentional and devious. In addition to purely media sensationalism, police departments across the country have recently begun publishing advisories with the name and photograph of HIV-positive individuals whom it is thought are engaging in unprotected sex in the community. These advisories are picked up by the media, fueling stigmatizing beliefs that people living with HIV are a public health threat and are devious and criminal.[110]

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[108] *Supra*, note 89, at page 7.

[109] Alison Symington, "Criminalization confusion and concerns: the decade since the *Cuerrier* decision" in Volume 14 HIV/AIDS Law & Policy Review, at page 5.

[110] *Ibid*. at page 6.

4. Adding to Stigma - HIV Exceptionalism

HIV is the only medical condition where criminal charges are routinely pursued where an individual transmits or exposes another to the infection, even though other medical conditions that may likewise result in fatality or grievous bodily harm are not criminalized.

For example, the Human Papillomavirus is a sexually transmitted infection that is a necessary precursor to cervical and other types of cancer.[111] Cervical cancer kills over 400 women in Canada every year, and nearly 1,500 women will receive a cervical cancer diagnosis in a given year.[112] Likewise, there were no criminal charges in cases of severe acute respiratory syndrome despite infected individuals acting in ways they knew or ought to have known would infect others.

The criminalization of HIV transmission and exposure, without criminalizing the transmission of other infections, sexually transmitted or not, is not rational and results in *"HIV Exceptionalism,*" whereby HIV is treated differently than other health threats on the basis of its being perceived as "exceptional" and warranting different treatment.[113]

Advances in medicine since the initial discovery of HIV have significantly extended the life expectancy of infected individuals, and also significantly reduced the risk of transmission. Far from the *"death sentence"* that HIV was thought to be only a decade ago, it is now consid-

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[111] Public Health Agency of Canada, "Human Papillomavirus (HPV) Prevention and HPV Vaccine: Questions and Answers" (2007). See also: The Canadian Women's Health Network, "HPV and Cervical Cancer: FAQ" (2008).

[112] Health Canada, "Screening for Cervical Cancer" (2006).

[113] Mary Ann Bobinski, "HIV/AIDS and Public Health Law" in Tracey M. Bailey, Timothy Caulfield, Nola M. Ries, eds, *Public Health Law and Policy in Canada*, 2nd Ed, (Markham: LexisNexis Canada 2008), 179, at page 189.

ered a chronic and manageable health condition.[114] Justification is required to explain the exceptional treatment of HIV transmission as compared to the transmission of other infectious diseases, some of which have far greater medical consequences. Further, the *"exceptional"* treatment of HIV, and of HIV transmission as compared with the transmission of other infections, results in increased stigma associated with the virus.

5. Personal Responsibility

One of the requisite elements to sustaining assault or murder convictions in the context of HIV transmission is the vitiation of consent on the part of the complainant through inadequate information.[115] However, this does little to acknowledge the reality of interpersonal relationships and consensual interactions between adults. HIV has been a known risk for nearly 30 years. In the context of transmission through sexual contact, education campaigns promoting safer sex have existed in Canada for nearly as long.

The finding in Cuerrier that nondisclosure necessarily vitiates consent does not account for the fact that both partners have a responsibility when it comes to engaging in sexual acts with others. There is sufficient information and education in Canada for individuals to know how to practice safe sex, and to target the individual who transmits the virus creates, *"a culture of blame, rather than one of ownership."*[116] As Justice Edwin Cameron points out, *"the risk is part of the environment, and practical responsibility for safer sex habits rest on everyone who is able*

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[114] *Supra*, note 96, at page 7.

[115] *Cuerrier, supra*, note 3.

[116] *Supra*, note 102, at page 25.

to exercise autonomy in deciding to have sex with another."[117] Criminalizing HIV transmission or exposure, and placing the legal responsibility for transmission on the HIV positive individual *"dilutes the public health message of shared responsibility between sexual partners."*[118] Some activists for people living with HIV/AIDS also note that the idea of an *"HIV-negative"* status is erroneous, and individuals can only ever be *"HIV-positive"* or *"unknown"* due to the seroconversion process, which delays the ability to test positive for HIV after infection.[119] This can be a helpful way of demonstrating that it is always important for both partners are responsible for engaging in safe-sex, despite recent tests indicating a negative HIV result.

The shared responsibility of both partners to engage in safe-sex may be increasingly important in the coming years, as news of an HIV vaccine has recently made headlines. [120] Could an individual who fails to be vaccinated be held partially responsible for contracting HIV? While it may be years before an effective vaccine is introduced for widespread use, issues of personal responsibility are important considerations in the context of criminalizing HIV transmission and exposure.

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[117] Justice Edwin Cameron, "The Criminalization of HIV Transmission and Exposure," (Public Lecture hosted by the Canadian HIV/AIDS Legal Network, Osgoode Hall Toronto, 12 -13 June 2009), at page 12.

[118] *Supra*, note 95, at page 4.

[119] See for example: online comments to Dale Smith, "Canada's record of criminalization creep" at xtra.ca, 20 August 2009.

[120] Tu Thanh Ha, "A huge boost in the battle for HIV vaccine," *The Globe and Mail* (25 September, 2009).

6. Disincentive for Testing, Treatment and Disclosure

Attaching criminal consequences to nondisclosure provides a disincentive for individuals to be tested for HIV, for fear of criminal sanctions being imposed on them.[121] The result is that HIV positive individuals will not know their status, and will not receive appropriate treatment.

HIV testing and counseling is the most effective way to control the spread of the infection as it is the most significant determinant of risk behavior.[122] An individual receiving a positive test result will then receive counseling, including information about treatment and reducing transmission risks through behavioral changes.[123] As numerous commentators have pointed out recently, the use of certain medications like HAART can reduce the viral load in HIV positive individuals to such a point that the risk of transmission, even in a situation of unprotected sex, is zero.[124] This supports the view that testing and treatment are highly effective means of reducing the transmission of HIV.

An HIV positive individual will be dissuaded from disclosing their status to individuals they may have unintentionally exposed to HIV, for fear that criminal prosecution could result. The result is that the individuals to whom the virus may have inadvertently been spread will not be tested or treated, potentially transmitting the virus on to others unknowingly.

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[121] *Supra*, note 89, at page 24.

[122] *Supra*, note 96, at page 15.

[123] *Ibid*.

[124] *Supra*, note 96, at page 11, citing TC Quinn et al. "Viral load and heterosexual transmission of human immunodeficiency virus type 1: Rakai Project Study Group" N Engl J Med 2000; 342; 921-9; GD Sanders et al. "Cost-Effectiveness of screening for HIV in the era of highly active antiretroviral therapy" N Engl J Med 2005; 352: 570-85.

Further, advances in recent years in the use of prophylactics suggest that a person potentially exposed to HIV taking prophylactic drugs within a certain period following the exposure has a significant reduced likelihood of being acquiring HIV.[125] The disincentive to disclose places the entire community at risk by reducing the likelihood that the most effective way to reduce transmission, testing and treatment, will be sought. It further jeopardizes individual's health by denying them the ability to seek prophylactic treatment.

The disincentives to HIV positive individuals created by criminalizing their conduct puts the community at large at risk: more HIV-positive individuals will be unaware of their status, and will not receive treatment. Lack of knowledge of one's status and being highly infectious due to not being treated are the two most common reasons for transmission of HIV. Further, the health of the community is compromised by the greater likelihood that individuals who may benefit from prophylactic drugs will not be informed of their need to do so, for fear on the part of the HIV-positive individual that they will face criminal sanctions for their role in exposing another person to HIV. The goal of health protection and promotion is clearly compromised by the disincentives that result from a policy of criminalization.

B. What is the Narrow and Focused Role of the Criminal Law?

Commentators have made numerous suggestions for a more tailored approach to the use of criminal law in cases of HIV transmission. These will be reviewed, along with concerns expressed regarding the practicality of pursuing criminal charges in these cases.

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[125] *Supra*, note 113, at page 215, citing David K. Henderson & Julie L. Gerberding, "Prophylactic zidovudine after occupational exposure to the human immunodeficiency virus: an interim analysis" (1989) 160 J. Infect. Dis. 321.

First and foremost, commentators suggest the use of general criminal law rather than HIV-specific statutes to deal with cases of HIV transmission. This lessens the perception that the ailment is being criminalized, and instead focuses on the wrongful conduct of the individual.[126]

Second, the transmission of HIV ought to be subject to criminal sanction in limited situations, but exposure should not. This relates to the idea that actual risk of significant bodily harm ought to be required for criminalizing HIV transmission. Behaviors that are proven to reduce the risk of HIV transmission ought not to be criminalized, specifically practicing safe sex. Indeed, the WHO suggests that engaging in unprotected sex with a very low or undetectable viral load ought not to be considered criminally reckless due to the very low risk of transmission.[127] Likewise, UNAIDS stresses the importance of, *"sound data regarding the risk levels of various activities should guide the determination of what is considered a 'significant' risk of HIV transmission for the purposes of criminal liability."* [128]

Third, intent to transmit the virus ought to be required to pursue criminal charges. This requires that the individual knew of their status as HIV positive, failed to disclose it to sexual partners when asked, and engaged in risky behavior that they knew would be likely to result in harm to the victim. Criminal liability ought to attach only where there is deliberate deceit,[129] operating to vitiate consent. Nondisclosure alone ought not to attract liability as it undermines per-

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[126] *Supra*, note 89, at page 9.

[127] *Supra*, note 96, at page 11.

[128] *Supra*, note 89, at page 9.

[129] *Ibid*. at page 10.

sonal autonomy in decision-making, and does not reflect the personal responsibility of both partners to engage in safe sex.

The way the criminal law should be used in the limited situations described above should be limited to charges other than murder or attempted murder. Aggravated assault, for example, could be effectively used in these situations, as described by the court in Cuerrier, but only where there is a real risk of harm to the complainant as evidenced by actual transmission. The causal link between HIV infection and death is arguably becoming more and more remote. The WHO characterizes HIV as a chronic manageable condition, which, with the appropriate treatment, can lead to a full life.[130] And is may be erroneous in the face of new treatment options, equating HIV with death adds to the stigma associated with HIV.

The practical problems associated with pursuing criminal charges for HIV transmission or exposure must also be considered in determining the appropriate role for criminal law. The most significant of the practical problems is proof of causation beyond a reasonable doubt in prosecuting HIV transmission. Demonstrating that the accused was responsible for the complainant's infection requires evaluating the complainant's sexual history. The Aziga case was unique due to the rare strain of HIV carried by Aziga, and found in the complainants.[131] The use of complainants' sexual history by the defense raises a host of privacy and other concerns, and it is an area in which extreme care ought to be taken. Prosecutors and triers of fact must be vigilant not to *"blame the victim"* by using the complainants sexual past as a means of exculpating the wrongful conduct of a defendant. Likewise, the difficulty of obtaining accurate scientific evi-

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[130] *Supra*, note 96, at page 7.

[131] *R. v .Aziga, (*2008) O.J. No. 5131 (QL), preliminary ruling on admissibility of evidence.

dence indicating the direction of transmission ought not to justify the dilution of evidentiary standards in such cases, and rather, should reflect the fact that criminal charges ought not to be pursued where there is a lack of evidence.

In order to ensure that the narrow focus of the criminal law for HIV transmission is maintained, it is important for law enforcement officials, prosecutors and the judiciary to be well informed of the appropriate legal limits to criminalization. Education about HIV transmission and the risks associated with certain behavior is an important part of this. Two concerning examples of judges with erroneous information about HIV show the significance of the lack of information of some judges.

A Justice of the British Columbia Supreme Court in 2007 made the shocking statement that, *"spitting in recent times has been associated with the very real risk of transmission of serious diseases such as HIV or hepatitis. Courts have taken judicial notice of this."*[132] In fact, spitting has never been shown to transmit HIV. Another incident of judicial ignorance of HIV occurred in Ontario, where a Justice *"mandated the use of face masks and rubber gloves in a trial involving a witness who was HIV-positive."* [133] These examples demonstrate how powerfully incorrect information can affect the procedural or substantive rights of an accused.

The WHO stresses that accurate information is required in criminal cases involving HIV transmission. Information in relation to the fallibility of phylogenetic testing, for example, pre-

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[132] R. v. Fiergiotis, 2007 BSCS 1837, 77 W.C.B. (2d) 460, making reference to cases where such judicial notice is taken being: R v Jackson, 2003 YKTC 32 and R v Solomon, [2001] O.J. No. 5733 (QL). At para. 51.

[133] Ontario judge scolded for ignorance of HIV, Volume 14 HIV/AIDS Policy & Law Review, at page 23.

sented to prosecutors and the judiciary, can assist in both prosecutorial discretion and reducing the likelihood of convictions based on fallible scientific proof of transmission.[134]

C. Alternatives to Criminalization

The above discussion on the limits of criminalizing HIV transmission and exposure has revealed the public health strategies that are most effective at reducing HIV transmission. Voluntary and confidential testing are required to promote testing by individuals who may have reason to suspect their infection. Ensuring the results of these tests remain confidential is an important factor in inducing individuals to participate in testing. An important aspect of the confidentiality is the inability of prosecutors to use statements made to public health authorities in criminal proceedings, which has been established in Ontario.[135]

Coupling voluntary and confidential testing with adequate pre and post-testing counseling has been shown to be an effective way to reduce risk behavior by HIV positive individuals.[136] Counseling and education targeted at HIV positive individuals about the state of the law in their jurisdiction has been recommended by the WHO as a means to ensure individuals are aware of the possible criminal sanctions they face, but also aware of how to avoid being criminalized, for

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[134] *Supra*, note 96, at page 16.

[135] *R. v. Aziga (*2006), 72 W.C.B. (2d) 364 (QL), preliminary hearing regarding the exclusion of statements made to public health authorities as required by statute. The statements were excluded because they were incriminating and not made voluntarily.

[136] *Supra*, note 89, at page 38.

example, engaging in safe-sex, obtaining treatment, and disclosing their status to partners where required.[137]

Access to HAART and other forms of medication to control HIV is necessary. Proper medical intervention will lower viral loads, sometimes to undetectable levels, greatly reducing the risk of transmission. Access to medical intervention is premised on the wide availability of testing and counseling. The goal of distributive justice requires that inmates have equal access to medication, in order to reduce the transmission levels in jails.

Education for the population at large to dismantle stigma in relation to HIV is important, especially if limited prosecutions of HIV transmission continue in a highly tailored fashion. Ensuring that media reports do not draw erroneous conclusions about people living with HIV as criminals will reduce the stigma associated with HIV, which can facilitate testing and treatment as a means to reduce HIV transmission.

Adopting rigid prosecutorial guidelines for appropriate criminal intervention in cases of HIV transmission is essential. Prosecutors must be educated in the means and likelihood of transmission, and must make decisions about prosecution carefully to avoid stigmatizing results. Educating the judiciary about HIV transmission is equally important. Information about transmission, treatment, consequences of low viral load, and the risk of harm presented by individuals with HIV is essential.

In Ontario, the *Health Protection and Promotion Act* (the "HPPA")[138] gives the Chief Medical Officer of Health and subordinate officers of health broad powers in relation to public

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[137] *Supra*, note 96, at page 21.

[138] R.S.O. 1990, c. H-7.

health matters. The HPPA defines acquired immune deficiency syndrome, but not HIV which would be more appropriate, as both a reportable and communicable disease. Section 22 of the HPPA permits written orders to be given to individuals who pose a significant public health threat, mandating that they do or not do certain activities. Failure to comply with such orders constitutes an offense, and fines can be up to $1,000 per day of the violation. Orders can also include directions to take certain treatment, or to refrain from engaging in certain behavior. These public health measures must, like criminal laws, be used sparingly and only when absolutely required for the health and safety of individuals and the community at large. Effective oversight and transparency of the use of coercive measures is required to ensure that public health law's coercive powers are not used to further marginalize or stigmatize individuals.

The use of public health interventions rather than criminal law offers a more flexible and less blunt means of dealing with HIV transmission, and adopting public health interventions rather than using criminal law sanction accords with the recommendation of UNAIDS.[139]

In this Chapter I examined the arguments for and against criminalization, from a public health policy perspective, and showed that the use of the criminal law undermines ethics and goals of public health, rather than enhancing them. I also discussed public health initiatives that can be used to reduce the transmission of HIV as alternatives to the routine criminalization of HIV transmission, coming to the conclusion that use of the criminal law ought to be reserved for exceptional cases of HIV transmission, where the evidentiary burdens on the Crown can adequately be met.

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[139] *Supra*, note 89, at page 8.

IX. Conclusion

In Chapter II of this Thesis I provided a thorough legal analyses of the case of R. v. Cuerrier.

In Chapter III, I argued that Courts should only consider *"high risk"* activities, as defined in current risk-assessment guidelines, as posing a legally *"significant"* risk of HIV transmission for the purposes of the criminal law. Those activities that carry only a *"low"* or *"negligible"* risk should not be considered *"significantly"* risky in a legal sense and should therefore not sustain a criminal prosecution for nondisclosure of HIV-positive status. To this end, I also explained why legal assessment of risk should follow epidemiological conclusions, by providing evidence that combined antiretroviral therapy can reduce HIV RNA in both the plasma and genital fluids of infected people, and that effective viral suppression has been associated with a significant reduction of infectivity.

In Chapter IV, I argued that in interpreting Cuerrier as applying only to nondisclosure before engaging in *"high risk"* activity, Courts should expressly recognize a *"safer sex"* defense in subsequent cases, so as to provide a more manageable alternative to disclosure that still significantly reduces the risk of HIV transmission and protects the HIV-positive person from criminal prosecution. To this end, I also demonstrated that the probability of transmission of HIV per sexual contact varies according to type of sexual practice, presence of sexually transmitted infections, stage of HIV disease, and plasma HIV RNA concentration in the infected partner - elements that can only be small pieces of a much larger puzzle.

In Chapter V, I presented the current trends to risk analyses in comparative jurisdictions, to show that concerns remain and to attempt to propose a solution.

In Chapter VI, I argued that the justice system should take a contextual approach to assessing the *"dishonesty"* of not disclosing HIV-positive status, so as to acknowledge that disclosure is not always easily made, and in some circumstances may carry serious risk of physical or other kinds of violence. I concluded at this point that Courts should consider Cuerrier as requiring disclosure of HIV-positive status before engaging in activity posing a *"significant"* risk of transmission, if that status is known to the accused as a result of scientifically accepted confirmatory testing procedures, thus the decision should not be taken as extending a duty of disclosure beyond disclosure of a known HIV-positive status.

In Chapter VII, I argued that transforming sexual intercourse into aggravated assault, risks "*to stretch the bonds of the law of assault beyond reasonable limits in order to achieve an end it was never designed to met.*" To this point, I concluded that credible evidence would be required establishing that the complainant indicated their consent to high-risk sex with a person they knew was HIV-positive (and not just might be).

In Chapter VIII, I examined the arguments for and against criminalization, from a public health policy perspective, and showed that the use of the criminal law undermines ethics and goals of public health, rather than enhancing them. I also discussed public health initiatives that can be used to reduce the transmission of HIV as alternatives to the routine criminalization of HIV transmission, coming to the conclusion that use of the criminal law ought to be reserved for exceptional cases of HIV transmission, where the evidentiary burdens on the Crown can adequately be met.

Overall, I conclude in this Thesis that while there may be a role for limited criminalization of HIV transmission and exposure, criminal law is too blunt and rigid tool for dealing effectively with public health initiatives to control the spread of HIV and deterring harm-risking conduct. Rather, these controversial behaviors will be forced underground, where their control and regulation will be much more difficult, if not impossible. Because scientific change in this area is so rapid, a public health law and policy framework is preferable to outright criminal prohibition, since it is more flexible, and thus better suited to keep up with and reflect quick pace of change in scientific views and understandings. Because scientific evidence is in an almost constant state of flux, the legislation that Canada has in place for regulating HIV transmission and exposure must indeed be able to recognize and accommodate the emerging scientific evidence and scientific developments that unfold.

At the same time, such an approach will not necessarily preclude the application of the criminal law in the domain of HIV transmission and exposure, but will rather inject flexibility into Canadian criminal justice system, and allow the severity of the criminal law to be adjusted to reflect the specific factual circumstances at hand.

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