

HOW CRIMINALIZATION IS AFFECTING PEOPLE LIVING WITH HIV IN ONTARIO



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The courts and HIV prevention

In recent years, the judicial system has become an increasingly prominent player in the public policy response to HIV. Eighty-four percent of criminal prosecutions for alleged HIV non-disclosure to sexual partners have occurred in the six years from 2004 to 2010 (Mykhalovskiy et al. 2010:6) though HIV was identified more than thirty years ago. Media attention has shifted accordingly so that criminalization has become a primary theme in HIV coverage. This increasing treatment of HIV (non)disclosure within a criminal law framework also shows a particular gender and racial pattern. Sixty-five percent of the criminal cases in this period have involved men who have been charged with failing to disclose their serostatus to female sex partners, and half of these cases have involved men from Black Caribbean or African communities (Larcher & Symington 2010), a pattern that has also been observed in Britain (Weait 2007). The media have extensively covered the cases with greatest potential for public scandal, turning them into high-profile instances of HIV criminalization, shaping perceptions of HIV transmission for many members of society including institutional actors, people at risk, and people living with HIV.

Much of the increased judicial attention to HIV follows on the 1998 decision of the Supreme Court of Canada in *R. v. Cuerrier* [1998] 2 S.C.R. 371, which established a requirement that HIV-positive people disclose their serostatus in situations of “significant risk of serious bodily harm” (Elliott 1999; Symington 2009). The elevation of disclosure as a primary consideration in criminal cases, and the publicizing of these cases by the media, have made disclosure a leading part of public discourse on HIV and have resulted in the courts becoming major actors in the definition of HIV as a public problem. The general absence of legislative action in this area, and the low visibility of AIDS service organizations and public health in the public sphere, have created a striking case in the governmentality of health and disease. In other words, the accumulation of case law, occurring through the actions of individual complainants, police authorities, prosecutors, judges and juries in a range of lower courts, has created an uneven accretion of decisions that have been constituting public policy in the absence of defined legislative parameters on the subject. In February 2012, HIV non-disclosure returned to the Supreme Court of Canada in the cases of *R. v. Mabior* and *R. v. D.C.* in which the Attorneys General of Manitoba and Alberta (and more ambiguously, the Attorney General of Quebec) argued for obligatory disclosure of HIV status in sexual interaction regardless of the degree of risk of transmission (Canadian HIV/AIDS Legal Network, 2012; Elliott & Symington, 2012a, 2012b). The Ontario Attorney General also sought to advance this position, subsequently withdrew its request for intervener status at the Supreme Court, but reinstated it in affidavits filed before the Ontario Court of Appeal in June of 2012. Striking the “significant risk” qualification from the legal test for conviction and from prosecutorial policy would elevate the question of whether or not there had been disclosure to the status of the single, overriding consideration in the application of the criminal law to HIV.

The courts, then, have become actors in the field of HIV prevention. Indeed, on behalf of the majority of the Supreme Court of Canada in *Cuerrier*, Justice Cory opined:

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.... Yet the Criminal

Code does have a role to play. Through deterrence it will protect and serve to encourage honesty, frankness and safer sexual practices. (paras. 142, 144, 147)

The court-mandated requirement for disclosure of HIV status flows from a particular model of human behaviour that holds that: (a) HIV-positive people can and should assume the responsibility of warning others of the potential for infection, and (b) prospective partners, once informed of that potential, will act appropriately to avoid infection. It is a model of human behaviour that grounds a good deal of law in liberal, democratic societies: people are conceived as autonomous, rational makers of contracts. Indeed, the Supreme Court of Canada's interpretation and application of the criminal law of assault to the circumstance of alleged HIV non-disclosure in *Cuerrier* explicitly rests on adapting established principles from the domain of fraud in the context of commercial contracts. The research record, however, shows just how problematic a reliance on disclosure can be in managing HIV risk (Adam 2006b).

The relationship between disclosure and HIV risk is complex at best. Research on gay and bisexual men shows that the consistent practice of safer sex usually does not require discussion and typically happens without it (Henriksson & Månsson 1995). In fact, those who decide from encounter to encounter whether to disclose or not, and who then disclose inconsistently, have higher rates of unprotected sex than either those who disclose consistently or those who do not disclose (Hart et al. 2005; Mao et al. 2006; Holt et al. 2011). While some studies have found an association between disclosure and condom use, more have found no relationship (Galletly & Pinkerton 2006). Indeed, John de Wit et al (2009:105) conclude, "using a condom with casual sexual partners is more likely if there is no disclosure, suggesting that for many men disclosure signals the possibility of not using condoms." This indicates a tacit norm, shared by gay men of different serostatuses, that presumes that disclosure is unnecessary if safe sex is practised (Heaphy 2001:127).

Disclosure poses a range of challenges in everyday social situations. The demand to disclose essentially requires HIV-positive people to place themselves in a situation to be rejected or stigmatized (Galletly & Dickson-Gomez 2009), a situation exacerbated in a climate of rising prosecution and media attention. Michael Stirratt's (2005:103) interviews with HIV-positive people found that "rejection from partners following disclosure took many forms, including refusal to have sex, unwillingness to engage in particular sex practices, emotional distancing, abrupt or longer term relationship dissolution, and even (although rarely) acts of violence." A publication of the National Association of People Living with HIV/AIDS in Australia explains it this way, "Most people experience several episodes of rejection if they are upfront with every sex partner about their status, and some find it difficult to get the confidence to disclose until they have been HIV-positive for some time. Any kind of sexual rejection can be crushing to the ego and to self esteem, and for quite a few, disclosing every time takes considerable courage and bravery" (Menadue 2009:147).

In practice, disclosure proves to be particularly difficult for people (often women) in a relationship of dependency (Siegel et al. 2005) or those who feel disadvantaged by age, attractiveness, or ethno-cultural background (Adam et al. 2005a). Disclosure occurs more often with partners in an ongoing relationship; less often with new acquaintances (Driskell et al. 2008). Though disclosure may often be presumed to be a communication between two people in private, once disclosure has happened, the confidentiality of that information is dependent on the trustworthiness and thoughtfulness of the recipient who can easily break confidence or disclose to more people in potentially damaging ways. Criminalization may in fact discourage people from disclosing as they may decide that it is better to let "sleeping dogs lie" rather than risk being placed in a position of vulnerability by a potentially vindictive partner (Adam et al. 2008; Galletly & Dickson-Gomez 2009). Criminalization heightens the sense of HIV as a stigmatized status making it more difficult to live openly as HIV-positive (Dodds and Keogh 2006).

This conflict of exigencies can result in protracted or indirect disclosure where HIV-positive people feel out interlocutors or test the waters to gauge the receptiveness of potential audiences (Welch Cline & McKenzie 2000). For example, some refer to receiving disability payments, working in HIV-related organizations, living in an HIV residence, having symptoms that could be construed as HIV disease, or taking medication as methods of incremental disclosure (Stirratt 2005; Adam 2005; Serovich et al. 2005; Adam et al. 2008).

Ultimately reliance on disclosure makes sense as an HIV prevention measure only if both partners are certain of their serostatus, though epidemiologists point out that significant percentages of people who are HIV-positive do not know they are. In Canada, an estimated 26 percent of people infected with HIV are unaware of this fact (Public Health Agency of Canada, 2010). Indeed some researchers contend that transmission by those unaware of their infection accounts for a significant portion of new infections (Brenner et al. 2007). Criminal prosecutions for non-disclosure encourage at-risk persons to rely on prospective sex partners to disclose their HIV status, if positive, and to assume that there is no or minimal risk in the absence of positive serostatus disclosure, evident in complainants' testimony at trial in such cases. Serostatus disclosure laws may thus foster a false sense of security among HIV-negative persons who may default to forgoing safer sex unless notified of their partners' HIV-positive status (Galletly & Pinkerton 2006). Reliance on disclosure, then, is a shaky foundation for HIV avoidance. By absolving people of responsibility for practising safer sex, it may even *increase* vulnerability to infection. Disclosure, then, is often challenging to accomplish in everyday life and the research evidence shows that disclosure is far from reliable as a method of avoiding HIV. The accumulation and consolidation of a body of legal doctrine that rests primarily on an obligation to disclose by those who know they are HIV-positive raises a number of problems in the pursuit of effective public policy in HIV prevention. There is, then, a need to test the presuppositions underlying the legal obligation to disclose as an HIV prevention strategy and to examine the real effects of criminalizing non-disclosure on people living with HIV.

The study

This research project examines how people living with HIV (PHAs) perceive the law and the legal obligation to disclose serostatus to prospective sexual partners, as well as their perceptions of the changing public climate affected by the increasing prominence of criminal discourses applied to HIV. There is a dearth of evidence on the impact of criminal prosecutions for non-disclosure on HIV prevention, even as public policy in the area is evolving through decisions made by police investigators, prosecutors, and courts. This project set out to investigate:

- the sources of legal information available to HIV-positive people, including how they have been informed of legal developments by AIDS service organizations, health providers, and other relevant agencies,
- how criminal prosecutions, and media coverage of these legal proceedings, affect understanding of rights and responsibilities of self and others concerning transmission and vulnerability to prosecution;
- how PHAs perceive that criminal prosecutions are affecting the perceptions, treatment, and possible stigmatization of HIV-positive people by the individuals and institutions in their environment,
- how legal proceedings and associated public discourse affect decisions to test for HIV;
- how they affect disclosure practices of self and sexual partners;
- how they affect safer sex practices of self and others; and
- where PHAs themselves stand on what role the criminal justice system should play in regulating HIV transmission.

A proposal for a study arose from a series of meetings of people from academic, community, government, and PHA organizations, concerned with the impact of criminalization on the lives of people

living with HIV. A research team and advisory committee emerged from these meetings, based primarily on interest, skill, and degree of time commitment that members were able to devote to the project. As well, this study builds on earlier findings arising from a single question related to criminalization in a larger study of HIV risk among gay and bisexual men. That study was published as:

Barry D Adam, Richard Elliott, Winston Husbands, James Murray and John Maxwell. 2008.

“Effects of the criminalization of HIV transmission in Cuerrier on men reporting unprotected sex with men” *Canadian Journal of Law and Society* 23 (1–2):137–153.

Funding for the study was provided by a grant from the Ontario HIV Treatment Network.

Methodology

The findings reported here draw on three major data sources:

- the Ontario HIV Treatment Network Cohort Study (OCS) (<http://www.ohntcohortstudy.ca/>) (N=492),
- the Positive Spaces, Healthy Places cohort study (PSHP) (<http://www.pshp.ca/>) (N=442), and
- in-depth qualitative interviews conducted with 122 PHAs.

A set of questions on AIDS and the law were added to the questionnaires of the two large cohort studies (OCS and PSHP) during one cycle of data collection (2009-2010). This survey on PHA views of the role of the criminal justice system in HIV non-disclosure, exposure, and transmission is the largest conducted in the world (as of 2012).

An objective of all three of these data sources was to attain broad representation of PHAs in accord with the epidemiology of HIV prevalence in Ontario as measured by risk group, age, gender, sexual orientation, and ethno-cultural origin. In general this objective was met. The PSHP has good representation of PHAs from all five regions of Ontario and has somewhat greater representation of Aboriginal people when compared to the other two data sources. The OCS included the AIDS and the law questions in its “extended questionnaire” which was administered at three sites in Toronto and one in Ottawa. These two cities account for 76 percent of the prevalence of HIV in Ontario. The OCS has somewhat better representation of African and Caribbean people in its cohort. Participants in the qualitative interviews were drawn from the OCS sites. Of the 122 interviews, 8 were conducted in French in Ottawa, the rest being in English in Toronto and Ottawa. Ten interviews were with PHAs who had some kind of direct experience with the criminal justice system either as complainants, defendants (including some who were convicted of charges related to non-disclosure or exposure to HIV), or former sex partners contacted by police for testimony in HIV-related trials.

Demographic characteristics of the three data sources

Overall, the participants in the three arms of the study (OCS, PSHP, and qualitative interviews) have the following demographic characteristics:

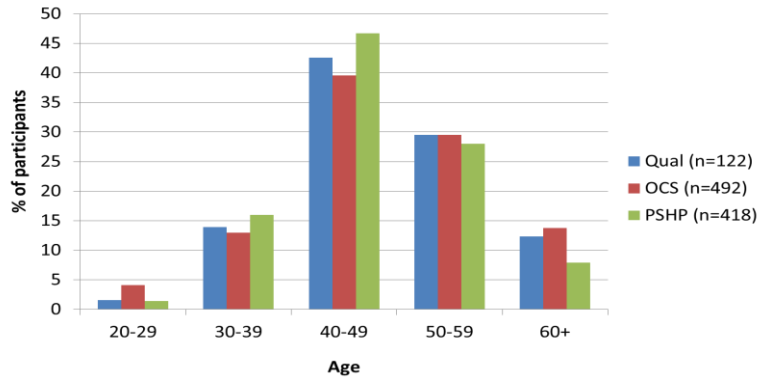
	Gender		
	Qualitative* (n=121)	OCS** (n=489)	PSHP*** (n=436)
Male	102 (74.1%)	386 (78.9%)	323 (74.1%)
Female	19 (25.9%)	103 (21.1%)	113 (25.9%)
*Total:	121 (100%)	489 (100%)	100%

* 1 identified as transwoman (MTF)

** 3 identified as MTF, intersexed or other

*** 6 identified as transwomen (MTF)

Participants by age



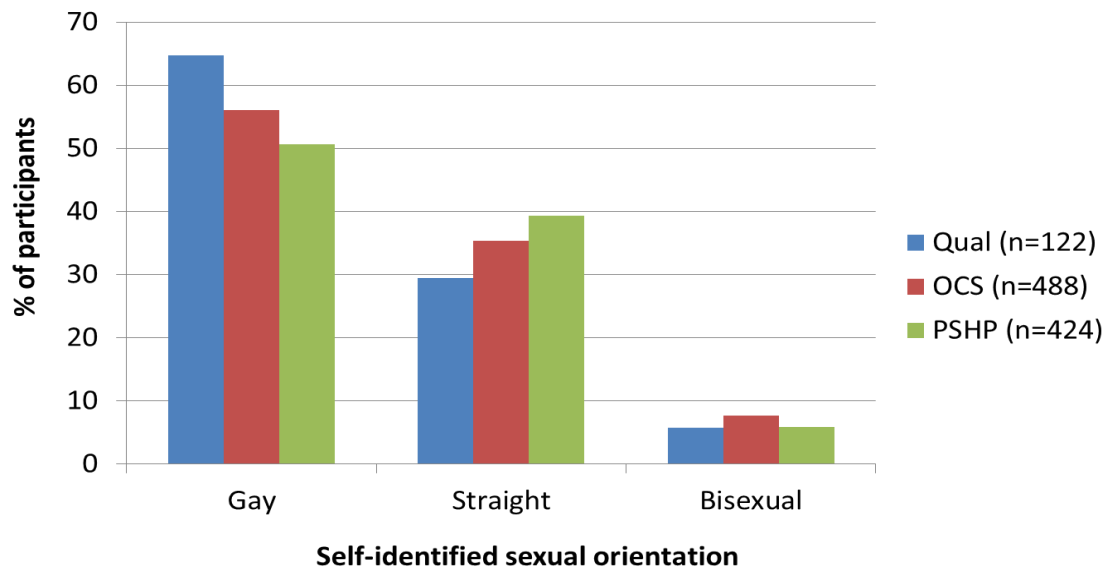
*n=24 PSHP participants did not provide year of birth
 **PSHP participant age is only collected through year-of-birth only – therefore a re-calculation of these values was conducted (current as of 2010)

	Age		
	Qualitative (n=122)	OCS (n=492)	PSHP** (n=418)
20-29	2 (1.6%)	20 (4.1%)	6 (1.4%)
30-39	17 (13.9%)	64 (13.0%)	67 (16.0%)
40-49	52 (42.6%)	195 (39.6%)	195 (46.7%)
50-59	36 (29.5%)	145 (29.5%)	117 (28.0%)
60+	15 (12.3%)	68 (13.8%)	33 (7.9%)
Total:	122 (100%)	492 (100%)	418 (100%)*

*no year of birth recorded N=24

**PSHP only collects year of birth, therefore age was calculated by subtracting the year of birth from 2010 (the year of survey completion)

Reported sexual orientation



*n=4 OCS and n=18 PSHP participants classified as 'others' - includes lesbian, queer, individuals who refused to answer, or those with missing values for this question

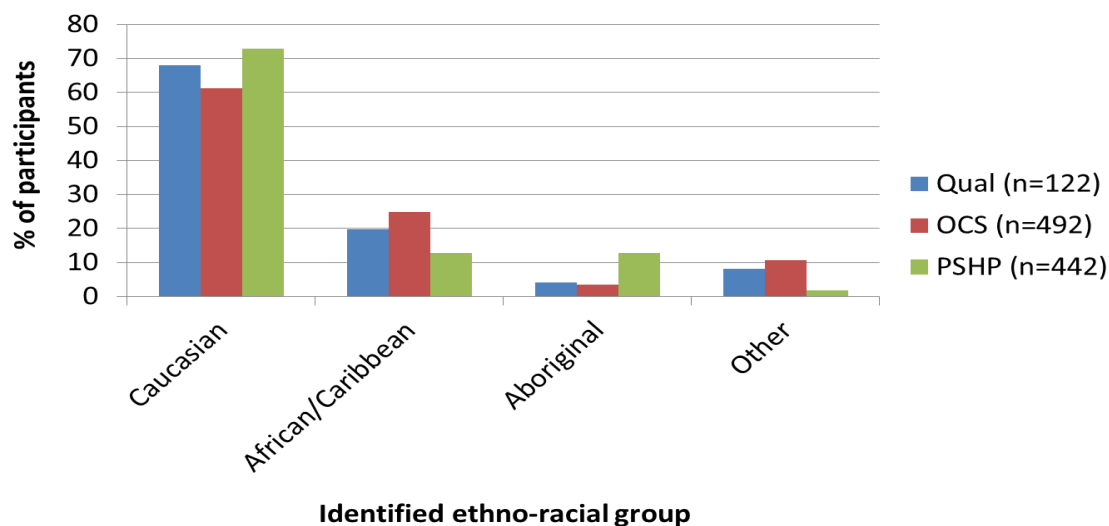
	Sexual orientation		
	Qualitative (n=122)	OCS* (n=488)	PSHP** (n=424)
Gay/Homosexual	79 (64.8%)	276 (56.6%)	222 (52.4%)
Straight/Heterosexual	36(29.5%)	174 (35.7%)	172 (40.6%)
Bisexual	7 (5.7%)	38 (7.8%)	26 (6.1%)
Total:	122 (100%)	488 (100%)	424 (100%)

* 4 listed 'other' as response

** 18 listed 'other' as response

'Other' includes: lesbian, queer, 'don't know' and those with missing values or who refused to answer

Participants by ethno-racial group



*A hierarchical assignment of ethnicity was made based on the following - Aboriginal = most important, followed by African/Caribbean, and then Caucasian
 ***Other "includes: Latino, Middle Eastern, Asian, 'don't know' responses and anyone who refused to answer or did not identify their race

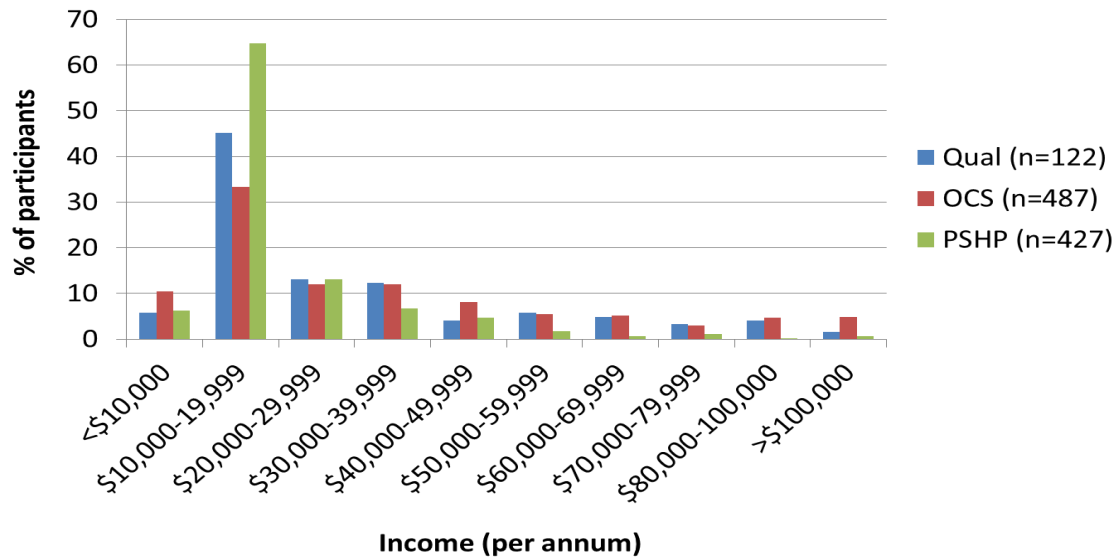
	Ethno-racial group*		
	Qualitative (n=122)	OCS (n=492)	PSHP (n=442)
Caucasian	83 (68.0%)	301 (61.2%)	322 (72.9%)
African/Caribbean	24 (19.7%)	122 (24.8%)	56 (12.7%)
Aboriginal	5 (4.1%)	17 (3.5%)	56 (12.7%)
Other	10 (8.2%)	52 (10.6%)	8 (1.8%)
Total:	122 (100%)	492 (100%)	(100%)

*A hierarchy assignment of ethno-racial identity was created as follows:

Aboriginal=1, African/Caribbean=2, those only listing White/Caucasian (no mix) =3, all other respondents grouped as 'other' =4

'Other' includes Latino/Hispanic/Latin American, Middle Eastern, all Asian ethnocultural identities and anyone with missing values and those who refused to answer or said they did not know

Approximate annual income



*n=5 OCS participants did not know their income or refused to answer / n=15 PSHP participants did not answer this question
 **PSHP income is collected on a per month basis – therefore a re-calculation of this to provide annual income was conducted

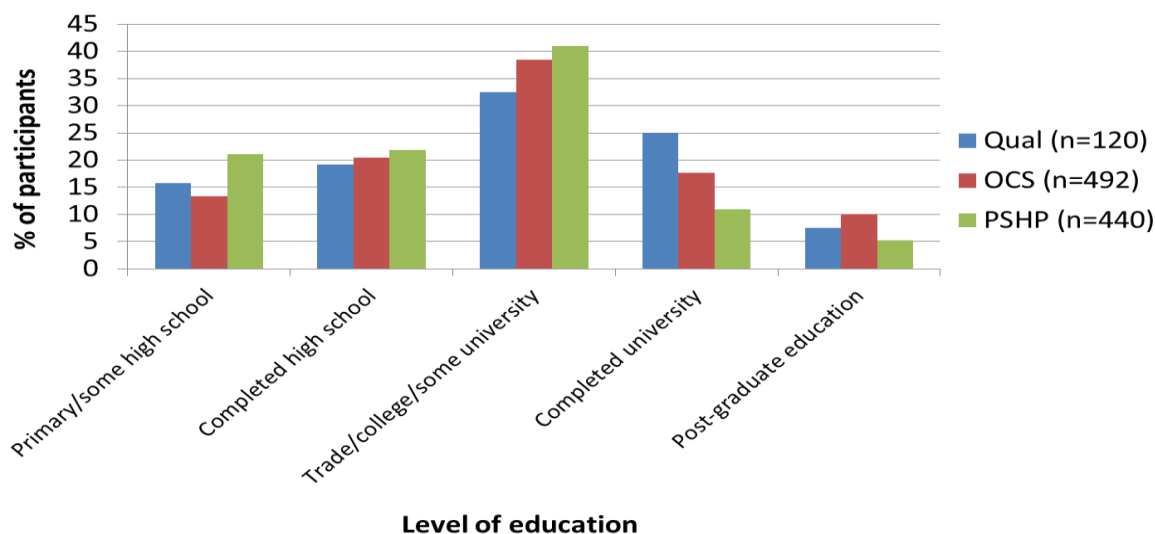
Income			
	Qual (n=122)	OCS (n=487)	PSHP*(n=427)
<\$10,000	7 (5.7%)	51 (10.4%)	27 (6.3%)
\$10,000-19,999	55 (45.1%)	164 (33.3%)	272 (64.8%)
\$20,000-29,999	16 (13.1%)	59 (12.0%)	58 (13.1%)
\$30,000-39,999	15 (12.3%)	59 (12.0%)	29 (6.7%)
\$40,000-49,999	5 (4.1%)	40 (8.1%)	21 (4.7%)
\$50,000-59,999	7 (5.7%)	27 (5.5%)	8 (1.8%)
\$60,000-69,999	6 (4.9%)	25 (5.1%)	3 (0.7%)
\$70,000-79,999	4 (3.3%)	15 (3.0%)	5 (1.1%)
\$80,000-99,999	5 (4.1%)	23 (4.7%)	1 (0.2%)
>\$100,000	2 (1.6%)	24 (4.9%)	3 (0.7%)
Total:	122 (100%)	487 (100%)**	427 (100%)***

*PSHP collects income/month – therefore this value (x12) was used to calculate annual income

** 5 did not know their income or refused to answer

*** 15 did not answer this question

Highest level of education obtained



*n=2 qualitative participants did not answer this question / n=2 PSHP participants refused or had missing values for this question

	Education		
	Qual (n=120)	OCS (n=492)	PSHP (n=440)
Primary/some high school	19 (15.8%)	66 (13.4%)	93 (21.1%)
Completed high school	23 (19.2%)	101 (20.5%)	96 (21.8%)
Trade/college/some university	39 (32.5%)	189 (38.4%)	180 (41.0%)
Completed university	30 (25.0%)	87 (17.7%)	48 (11.0%)
Post-graduate education	9 (7.5%)	49 (10.0%)	23 (5.2%)
Total:	120 (100%)*	492 (100%)	440 (100%)**

Excluded from above N:

* 2 did not answer this question

** 2 refused or had missing values for this question

In reviewing the results of this study, then, it is worth bearing in mind that consistent with the profile of HIV-positive people across the province, participants in this study were more often in their forties and fifties. Demographic data for the OCS also show that 39.5 percent indicate being married or in a common-law or committed relationships.

Information sources and awareness of the law among people living with HIV

Participants in the two cohort studies were asked a basic question about their awareness of the law concerning HIV.

Have you heard that Canadian law requires you to tell your sexual partners that you are HIV-positive, at least in some circumstances?

	PSHP	OCS
Yes	420 (96%)	430 (87%)
No	15 (3%)	56 (11%)
Don't Know	3 (1%)	6 (1%)
Refused	0 (0%)	0 (0%)
Total	438 (100%)	492 (100%)

This was followed by a question on sources of information on HIV and the law:

Have you received any information about disclosure, responsibility, or other legal issues from any of the following sources, whether through websites, public events, printed information, or counselling?

	PSHP	OCS
The media: newspapers, gay press, newsletters, TV, radio	244 (56%)	315 (64%)
An AIDS service organization	236 (54%)	65 (13%)
From another HIV-positive person	137 (31%)	31 (6%)
From an HIV clinic	94 (21%)	68 (14%)
From friends or family	78 (18%)	40 (8%)
A physician or other health providers	75 (17%)	95 (19%)
From a nurse or health care provider	54 (12%)	55 (11%)
From a social service agency	51 (12%)	36 (9%)

(Study participants could check off more than one source so percentages add to more than 100 percent.) The most frequently named source of information about HIV and the criminal law is the media. The gay press (Xtra, Capital Xtra, and Fugues) figures prominently among the sources named. OCS respondents name health-care sources second (physician, clinic, nurse) and then AIDS service organizations (ASOs). PSHP respondents name ASOs second and other PHAs third. These differences may reflect different recruitment strategies as the OCS is a clinic-based cohort while the PSHP relies on ASO networks to identify potential study participants. Statistical analysis of the PSHP responses shows that those who are employed ($p=0.015$), on disability ($p=0.011$), or volunteering ($p=0.003$) are more likely to name an ASO compared to those who are unemployed ($p=0.017$). Websites are named more often as information sources by those who are employed ($p=0.005$) and better educated ($p=0.001$). Hearing from another HIV-positive person is mentioned more often by those on disability ($p=0.003$) and Aboriginal people ($p=0.039$) but less often by people of African or Caribbean origin ($p=0.039$).

The interviews confirm this overall pattern. (Throughout this report more common remarks from interviews are presented first; less common follow.)

[I have] never been to anything, published or nothing. Just what I read in Xtra, occasional articles, that's it. (015, gay, male, 40s)

I read Xtra....I read everything from the Globe to the Toronto Sun to the Post to the Star and also stuff online if I get a lot of news online. I watch the daily news on TV. (020, gay, male, 40s)

Anything that I learn today I get off the news. Nobody has sent any information, none of the doctors or anything, has given me any information whatsoever on the criminalization or the standings on how they're going to deal with this. (040, gay, male, 50s)

Those who are better connected with ASOs do mention them as sources of information on HIV and the law. The ASOs that most frequently come up are: the AIDS Committee of Toronto (ACT), the People With AIDS Foundation (PWA), and the HIV/AIDS Legal Clinic of Ontario (HALCO). Other sources mentioned were the Canadian AIDS Treatment Information Exchange (CATIE), the Canadian HIV/AIDS Legal Network, Opening Doors (regional conferences), and in Ottawa, the Coalition des organismes communautaires québécois de lutte contre le sida (COCQSIDA), the Living Room, and the AIDS Committee of Ottawa.

There's quite a number of people I know that work at ASOs. Over the years, there's been quite a number of discussions about it. (056, gay, male, 40s)

I seem to want to think that it came through ACT or PWA. They both put out a rather extensive and high calibre e-bulletins and newsletters and I think I may have picked up a reference in one of those to either a study done by someone or some activity going on in the legal community that I went further and googled on and found out that, hey, there are some organizations. (002, gay, male, 60s)

And a few mention their physician:

My doctor told me....I must tell. If I don't tell it's a crime. That's what she told me. (009, heterosexual, male, 50s)

My doctor down at St. Michael's hospital, he kind of filled me in on a few of the things....That I have it, to let other people know. Yeah, he let me know that if I infect other people, they could come back on me. (012, bisexual, male, 40s)

Well I went to my doctor. He told me. I think he said to disclose if I'm engaging in significant risk sex and he gave me some pamphlets, one being from ACT. (063, gay, male, 30s)

The interviews reveal some divergence in the nature of the coverage of criminalization issues by language. Anglophones frequently mention the Aziga case from Hamilton and some, the prosecution of Saskatchewan Roughriders linebacker Trevis Smith. Francophones more frequently cite the case of Diane from Longueuil. These cases often created quite different visions of the workings of the criminal justice system. While Aziga had few defenders, Diane provoked a good deal of sympathy.

Ce qui est le cas de Diane à Longueuil, d'une personne qui a été violenté et qui se regardait vraiment mal vers l'accusé, qui était l'homme, qui était le conjoint, et à la dernière minute a sortie de la poche d'en arrière le fait quelle lui avait pas dit qu'elle était séro-positive, et que elle aura pu mettre sa vie en jeux....qui avait casser le bras de la femme et avait brutalisé son fils....c'est lui qui sort gagnant et c'est elle qui s'en va avec une sentence alors qu'elle est très malade etc. Je trouve ça totalement inacceptable comme situation. (F6, gay, male, 40s)

These findings might be compared with Galletly et al. (2009) who surveyed 384 PHAs in “a statewide sample of persons living with HIV (PLWH) in a state that enacted an HIV-specific disclosure law.” Their awareness of the law was less (76%) than this Ontario sample, and the US sample cited ASOs more often than the general media as the source of information in the area.

Overall the sizeable portion of PHAs in this study who report little or no formal instruction in the area may also reflect the fact that most had been diagnosed before criminalization became a more prominent public issue (in the last seven years).

Perceptions of media coverage

Despite this reliance on media, views on mainstream media coverage are ambivalent. (Once again, the most frequently occurring responses are reported first, followed by less frequent comments.) The primary theme emerging from interviews is a sense of media coverage as sensationalized and one-sided, often portraying HIV-positive people as criminals looking to cause harm. In an environment where police and press have at times published the names and pictures of HIV-positive people accused of non-disclosure or other charges related to their HIV status well before going to trial, many individuals feel the media are not supportive of people living with HIV and that their main goal is to sell papers. A secondary typification of media coverage is that the media do a good job of bringing attention to this issue, but often “miss the point” or present incomplete or misleading information. A number of these individuals feel the gay press does a better job supporting PHAs in the current public climate. Less common is the view that media coverage is objective, fair, neutral, or adequate. These respondents state the media are simply stating the facts but also note how they could do a better job explaining the details and complexities of HIV cases.

For example, study participants remarked in interview that:

I think the media coverage is very discriminatory and the people who are HIV-positive, they are not seen as people. The media is always talking negative things about people who are HIV-positive. They don't talk about anything positive about them. I'm so scared because of the way they portray us. It scares me. It looks like we are not human. (091, heterosexual, female, 40s)

I think there's a very, like, racial bias with it as well with people of colour who get it. I mean I do have to wonder if this was a white man would this be happening as well or because he's a man of colour, is it something worse? (020, gay, male, 40s)

They tend to vilify people even before they appear in the court. I think that there's still a lot of ignorance around HIV, and people look for clues in the media as to how HIV individuals should be treated and so on and so forth. When there are a few individuals that perhaps are careless or perhaps don't have proof of disclosure, it sensationalizes the whole issue again. (077, gay, male, 50s)

Participants thought the media could do a better job explaining the details and complexities of the cases and play a role in educating the public about HIV:

If they were real journalists, they would be doing their job and getting the full story, the real version of what's happening out there and innocent people are being accused and charged and lives are being destroyed because of whatever reason that someone is falsely accused. I think a lot more needs to be done. (004, gay, male, 40s)

Others observe that the majority of the cases in the media involve heterosexual conduct and that the gay press does a better job of supporting PHAs. Finally, some remember media coverage this way:

They just stated the facts, which was a good thing. They didn't get into their opinion. They just said this is the fact, this person was caught, admitted it or didn't admit it but through testing and then gave a list of all of the, if you call them, victims. So it went chronologically and it was well described without too much comment from the reporters so that was good I thought. (003, bisexual, male, 60s)

Impacts of criminalization on everyday life

The rising tide of prosecutions for non-disclosure and exposure to HIV has a wide range of effects on people living with HIV. The largest number of respondents believe that criminalization has unfairly shifted the burden of proof so that PHAs are held to be guilty until proven innocent and that: (a) PHAs are now caught in a difficult he-said/(s)he-said situation of having to justify their actions, (b) disgruntled partners now have a legal weapon to wield against them regardless of the facts, and (c) the onus now falls on women whose male partners could ignore their wishes regarding safer sex. In terms of general impact, many respondents report: (a) a heightened sense of uncertainty, fear, or vulnerability, but others feel that (b) the climate of acceptance is still better than in the early days of the epidemic, or that (c) the prosecution of the high profile cases is justified and these PHAs are giving all PHAs a bad name.

Significant numbers of study participants feel unaffected because they: (a) always disclose their serostatus in sexual encounters, (b) openly negotiate serostatus often preferring sero-concordant partners, (c) feel that disclosure of serostatus is the morally right thing to do regardless of the law, or (d) are not having sex anyway. It is worth bearing in mind that the best represented age group, both in the HIV prevalence numbers and in the three data sources in this study, is people in their 40s and 50s. Many are in long-term relationships and a sizeable proportion report not having sex in recent months meaning that disclosure in sexual relationships may not be seen as immediately relevant to their lives.

Other PHAs take a more situational or conditional strategy, believing that disclosure is unnecessary if safe sex is practised, assess how safe they feel before disclosing, or disclose only if a relationship has potential to be more than casual.

These themes echo some of the findings from focus groups with PHAs in Britain and Canada where responses to criminalization ranged from no personal impact to heightened anxiety, and included both increased and decreased disclosure in the face of increased stigma (Dodds et al. 2009; Mykhalovskiy et al. 2010). A focus group of 31 Michigan PHAs showed that many “perceived vulnerability to unwanted secondary disclosure by a prospective partner to whom they disclosed in compliance with the law” (Galletly & Dickson-Gomez 2009:615). Like Ontario PHAs, they worried about “being falsely accused [as] there is likely to be little evidence with which to prove that the HIV-positive person indeed disclosed” and that the criminal justice system “went beyond biased attitudes to include frank discrimination.”

Shifted burden of proof

The largest number believes that criminalization has unfairly shifted the burden of proof so that PHAs are held to be guilty until proven innocent.

The whole premise of the charge that puts all the responsibility on the HIV-positive person to not only disclose but to ensure safer sex practices are used, I think it's a bit unfair. I mean it scares me. (006, gay, male, 40s)

The thing is that if I was put in to that situation myself, I would think I haven't got a hope in hell. I'm guilty before I've even gone to court. (025, gay, male, 60s)

Even before you found guilty, you will be on public consciousness. You're guilty. You haven't anything to prove. Wherever they caught you, you will be on the news, before you go to court. (030, heterosexual, male, 30s)

I guess what I would be anxious about is that even doing stuff which I feel is legally and ethically sound, I still find myself vulnerable. Because I'm positive and because the way these cases are being treated is that I basically have to prove that I'm innocent. The onus of proof is on me.... It [criminalization] makes many people see or think of people with HIV as somehow dangerous to the rest of the community. It puts the onus completely on people with HIV in terms of transmission. (059, gay, male, 50s)

A number of PHAs express a sense of feeling themselves under siege, finding themselves caught in a difficult he-said/(s)he-said situation of having to justify their actions.

The concern is that even if I have protected sex, which is what I practise, then it would be somebody else's word against mine. (045, gay, male, 40s)

What if I don't have sex with somebody and they get pissed off and then they go to the police and say he had sex with me in the baths. I mean here I am you know. It's his word against mine....I could still end up with my picture in the... that everybody who's ever had any contact with should call the police right. That kind of trial by media is not something anybody would look forward to. So yeah, it makes me kind of anxious. (059, gay, male, 50s)

Disgruntled partners now have a legal weapon to wield regardless of the facts. Some had experienced precisely that scenario:

I went out with a guy who was HIV negative. I let him know my status but when we broke up, he started telling me how he's going to go to the police and tell the police. (067, heterosexual, female, 30s)

Ten years ago when I lived in BC, I had a partner and he knew, and things went sour in the friendship and he got angry and he threatened to have me charged for not telling him that I was HIV-positive which was not true. (071, gay, male, 40s)

Someone within my home that I had sex with was trying to rob me. I called the police. He told the police that we'd had sex, which he hadn't, and they arrested me and charged with me aggravated assault.... He disappeared after four months of court appearances. The crown finally withdrew all charges. (022, gay, male, 40s)

I've had an incident myself where someone's tried to go after me... Thank god for MSN and saving chats. The police showed up, I showed them the chat logs and pretty much that was it. (027, gay, male, 30s)

I was seeing a man I met online. I think he liked me a little too much. I was going away. He didn't want me to go away. It seemed like he wanted to get me a job where he was working and living with him and I was like, I don't think so....He got scared I guess without realizing the sex we had is totally insignificant risk or low risk.... This other guy

kept emailing me. He emailed me saying, 'Do you do bareback sex?' 'Do you do bareback sex?' 'Do you do bareback sex?' and we found out that it was the same person who charged me. He was putting fake profiles to try and entrap me....It makes you feel embarrassed. It makes you feel dirty and it makes you feel like you're not human. It makes me feel they should just slap on a pink triangle¹ of the poz and negative on people. It really does. It's really fearful. (063, gay, male, 30s)

Many others worry that just that kind of scenario could happen to them:

We had agreed to have unprotected sex. I went over to his place and I could tell that there was a financial difference in terms of our lives.... What came into my head was, is he going to see this as an opportunity in the future?... You know, he had lost his job, he had to go on welfare, all these kinds of things... Is he going to see this as an opportunity to get some money? I was afraid in that situation because we had agreed to unsafe sex. (006, gay, male, 40s)

Let's say you're out for a night and then somebody says, "You know what? You never told me," and it's my word against their word. It really bothers me. It scares me. (012, bisexual, male, 40s)

Even if you tell people, they could turn around and say you never told them, you know, out of spite. (038, gay, male, 40s)

We could break up, like we could have an argument or we could quarrel and then he could use that as an excuse. He's Canadian and he has everything. I just came to Canada. I just had my refugee claim accepted. (088, heterosexual, female, 40s)

Criminalization reinforces that the onus now falls on women despite the power of male partners to ignore their wishes.

When you're married in our culture, you are supposed to submit. You know, the man is the head of the house. Like he wanted a child and I didn't want to have a child. I wanted him to use a condom and he didn't want to use a condom. So I'm not protected. (044, heterosexual, female, 40s)

So you come here, you are in a marital relationship or somebody is promising to marry you, and he's your legal status and they infect you. Then you fear calling the police because this person is your breadwinner and he's almost like your everything. (067, heterosexual, female, 30s)

He sent me in because he knows he had infected me. That's actually how he threatened me. I mean this guy stabbed me, he beat me up, all sorts of things.... and when I was HIV, that was like the final nail on the coffin. (086, heterosexual, female, 40s)

General impact of criminalization

The rising number of criminal cases results in many respondents reporting a heightened sense of fear and vulnerability.

¹ A reference to an identifier imposed on gay prisoners in the Nazi concentration camps.

I mean I get nervous. I get scared. I feel like a loner. I'm afraid that if I do anything, am I going to be charged? (012, bisexual, male, 40s)

I was scared. I was scared to make a disclosure. I was scared to have unsafe sex. I was scared if I have sex with a stranger, if the condom broke, I might be going to go to jail. I was scared to disclose my status at work, to my friends, to anybody because what else. They will keep an eye on me. As soon as I do anything I will be jailed. You feel unsafe.... I'm afraid of stigma. I'm afraid of discrimination. I'm afraid of rejection. We all afraid to be rejected, men and women. I'm protecting myself emotionally and morally. I'm saving myself the humiliation but I'm taking all the precautions. Accidents happen. What am I supposed to do? (029, bisexual, male, 40s)

I'm human and I also need a partner or a friend. But then because of this HIV status, I'm so scared and I just keep it to myself. (035, heterosexual, female, 40s)

Since I have it, I can't sleep with nobody. I'm now totally virgin. (036, heterosexual, male, 40s)

It's almost getting to a point where an HIV person like myself is almost feeling that they can't have sex again. They can't be intimate with anybody again or else they're going to risk being in trouble with the law, perhaps even looking at jail time, having your name run through in the paper or whatever. So that's frightening because I mean now you become more insular. (056, gay, male, 40s)

Not all share the same sense of anxiety. Those who had been living with HIV for decades perceived the current social climate as better for PHAs than in the early days of the epidemic.

I don't think there's this huge backlash or you know what I mean. It's just the occasional story here and there that you hear about people doing stupid things but other than that, it's okay to me. (024, gay, male, 40s)

It's a lot easier today to say within our community here in Toronto that I'm HIV and it's no big deal. Somebody might walk away or not want to have a sexual encounter with you but you don't have the same stigma. Years ago that did happen. (056, gay, male, 40s)

It seems to be a lot more accepting. I can remember of course when it first came out, that was terrible. There was paranoia about it and everything. But lately now, it's become such an accepted part of life. (010, gay, male, 50s)

Some contend that the prosecution of the high profile cases is justified and these PHAs are giving all PHAs a bad name.

I think he [Aziga] gives everybody with HIV a bad name because you have someone we think is responsible for carrying on like that. But you'd think it would send a message to other people that they should be a lot more cautious. (008, gay, male, 40s)

There is, then, considerable diversity of opinion among PHAs regarding the general impact of criminal cases on public opinion about HIV and people living with HIV. The increase in prosecution and attendant media attention have heightened anxiety among many and created a sense of vulnerability to criminalization. Others feel unaffected because of their personal circumstances or their perception of the current legal climate compared to the 1980s.

Feeling unaffected by criminalization

Significant numbers of study participants feel unaffected because they are in established relationships and not meeting new people or they are not having sex at all. In the OCS cohort, 26.9% of male respondents report having had a casual male partner in the last three months and 6.8% report having had a casual female partner. (There is some overlap of these two numbers.) Five percent of female respondents report a casual male partner. Others feel unaffected because they always disclose their serostatus in sexual encounters:

I do practice safe sex and I disclose, whether it's beneficial or not. I think one has to take responsibility for one's actions and as a gay man who has sex with other men, I think it is very important to stop the spread of HIV as best one can. (001, gay, male, 60s)

A few are completely public about their serostatus having giving public lectures or appeared on television.

I'm pretty open about what I do so it doesn't affect me whatsoever. (024, gay, male, 40s)

Some openly negotiate the question of serostatus in their relationships, often preferring sero-concordant partners.

For years anyway, I was more comfortable engaging in sexual relations with fellow HIV-positive men just because of a level of comfort to hopefully avoid the whole fear factor. I have met certainly very open minded HIV negative men who know about safe sex and are open minded enough to give me a chance. Yet I have also encountered a lot of fear and phobia which has sort of made me centre my efforts towards HIV-positive men and that's kind of ghettoizing in a way. Since becoming HIV-positive when I was 25, it was an overarching concern of mine to not knowingly or period to not pass on the virus. (042, gay, male, 30s)

We're the bareback club and we keep it that way. We don't play with outside....Our group is only us because we all have the same genotype and this way we can't co-infect each other. (018, gay, male, 40s)

Personally my sex life is an open book, right?, and I don't have sex with somebody who is HIV negative. I only have sex with somebody who is HIV-positive and the buck stops there. I don't even want to take the chance of transmitting it to somebody else. So for me, it's really a non issue. (040, gay, male, 50s)

Others are in monogamous relationships so disclosure to new people does not arise:

I'm living with somebody for 10 years now and that's the only guy I have sex with and we're both positive and that's it. (047, bisexual, male, 50s)

A sizeable portion of respondents report they are not having sex:

To be honest with you, in the last 6 or 7 years, I've been celibate. I have not had sex with anybody in that amount of time. It's because of the HIV status....I don't go out to bars and meet people and get into some sexual activity and say, "Oh by the way, I'm HIV-positive." That's why I chose to stay celibate because it's easier to avoid it. (071, gay, male, 40s)

My partner died in January 2002. (I: And you haven't been with anyone since?). Well I lived with him my whole life. I met him when I was 18. I stayed with him my whole life until he died and that was it. He died in January 2002 and that's it. (I: Since then you haven't been with anyone else?). No, I haven't. (076, gay, male, 40s)

I'm in my 40s now. I've had a lot of sex. I don't really care anymore about it in the same way I used to....I just don't like anal sex. (053, gay, male, 40s)

Personal ethics

Many interviewees voice the view that disclosure of serostatus is the morally right thing to do regardless of the law. For them, criminalization has not made a change in how they conduct themselves.

I had to come up with principles and ethics, a code of ethics for myself and that hasn't changed, given the public climate. (062, gay, male, 40s)

I would hate somebody to say, "Remember we got together the other day? Well I tested positive." That would just kill me. I would just lie down and die. (034, gay, male, 60s)

I'm guided by my morals. I don't want to put someone in danger. (067, heterosexual, female, 30s)

Overall, study participants show a strong commitment to practices that minimize the possibility of HIV transmission and many of the questions regarding HIV and law appear to be read through the lens of the morality of personal conduct rather than legal reasoning per se. For example, in response to the survey question,

Do you feel that you should have to disclose your HIV status to your sexual partners if your viral load is undetectable?

Most express a strong obligation to disclose:

	PSHP	OCS
Yes	344 (79%)	364 (74%)
No	56 (13%)	85 (17%)
Don't Know	36 (8%)	43 (9%)
Refused	1 (0.2%)	0 (0%)
Total	438 (100%)	492 (100%)

It should be noted, this survey question was answered before more recent discussions prompted by research showing much reduced transmission rates from partners with undetectable viral load, at least among heterosexual couples (Cohen et al. 2011). Cohen et al. (2012:4) remark, "The subjects in the early treatment arm had greater than 96% protection from HIV acquisition from their HIV infected partner.... A key question from HPTN 052 is the generalizability to other contexts: heterosexual couples with CD4 counts lower and higher than those studied in HPTN 052, high risk heterosexual subjects (e.g. sex workers and their clients), men who have sex with men (MSM) and intravenous drug users (IDU). There are no data to address this issue directly."

Situational approach

Other PHAs take a more situational or conditional strategy, believing that disclosure is unnecessary if safe sex is practiced, an approach consistent with the emphasis on safer sex as a means of HIV prevention that emerged in the early years after the sexual transmission of HIV was identified.

As long as it's oral sex, it's not necessary. Once it's anal, it's either necessary to disclose or to use condoms. (010, gay, male, 50s)

I'm certainly not going to disclose the fact that I'm HIV-positive to people, regardless if we're having sex or not. As long as I'm protected, there is no need to know. That's my feelings on it. (068, heterosexual, male, 40s)

If they're really not going to put someone at risk and it's all very low risk and depending on the sex that happens, they don't need to tell everyone, especially if you kind of, like, trust the other party. (089, gay, male, 20s)

For many, disclosure raises fundamental safety concerns.

Well I really like the campaign² they have out now, like if you were rejected every time you disclosed, like I think that's very powerful. It says a lot. (008, gay, male, 40s)

I think it depends on the situation and whether or not I feel safe in that situation to disclose. (006, gay, male, 40s)

Disclosure can have wide-ranging consequences extending well beyond a single encounter. Interviewees for this study remark on the difficulty of managing information about one's health status once it has been entrusted to others:

The problem with full disclosure is that if you're meeting someone, you have no control after you're telling them, they could say, "No, I'm not interested," but they could go tell every Tom, Dick and Harry. You can't seal their mouth. It's like once you ring the bell you can't un-ring it... You've got to be very careful. You've got to feel them out ahead of time; what are your feelings towards somebody being positive to start with. If it seems they're really negative, then I wouldn't tell them. (003, bisexual, male, 60s)

I don't think I'm going to tell anyone now. (I: Is it as a direct result of what's been happening in the courts?). Yeah... I would be afraid right now if I had told other people because I'd be afraid that other people would now come and how would they use that against me? It would give me a lot of stress right now if there were people around the city that knew.... If they told me they were positive, I still wouldn't tell them I was. I would just say, "don't know." That would be the answer they would get at this point because even in 6 months from now they could go around and tell 17 other people and then the damage has been done. (053, gay, male, 40s)

Each time you meet somebody, at one point you have to say it and the problem is there are no guarantees if you confide in someone that it will remain between you two. (013, heterosexual, female, 50s)

² On the HIV stigma campaign, see Adam et al. 2011.

Relations with health professionals

Eric Mykhalovskiy's (2011) recent study of service providers from AIDS service organizations, public health, law, and physician care in Ontario found that they "were concerned that the increased use of the criminal law discouraged PHAs from approaching or maintaining relationships with public health.... Respondents felt such media coverage discouraged PHAs from approaching public health because of an impression of close ties between public health and the police."

In interview, participants in this study were asked, *How has the current public climate around HIV and the law affected your willingness to trust, or disclose HIV status to, any of these service providers?* Because the participants in this study were invited to participate through clinic care settings, they had often longstanding relationships with health care professionals. Those who might be discouraged from entering care at all, then, would not be represented in this sample. In general, interviewees show a broad consensus that they are not experiencing a problem with the health care providers whom they already know.

Well the cat's out of the bag anyway. I mean everybody knows so there's not much I can do now. It's not as if I can go get an insurance policy for health insurance and lie about it because it's already done; everything is there. So the aftermath, it's just now regulating it and finding out where you feel comfortable. (011, gay, male, 50s)

I would sooner trust them than I would certain individuals who are friends of friends or who are in the scene who have big mouths and do nothing except talk about everybody else's lives all day long. (013, gay, male, 50s)

I over many years settled on honesty really is the best policy and I try to be as honest as I can with anyone and especially with healthcare providers because they have to know what's going on with your health.... [E]specially with healthcare providers, I've never shied away from identifying I've been positive. (020, gay, male, 40s)

This level of trust and acceptance may be provisional. A few respondents expressed a general concern about disclosure in encountering new health providers.

To service providers, yeah, I'm scared to... Those who know already, they know already. I'm scared to go to new service providers or maybe to better service providers because I don't know how they're going to treat me. So I'm stuck with whoever I have. (044, heterosexual, female, 40s)

What PHAs are hearing from health professionals

Health professionals are one potential source of information about HIV and the law. Mykhalovskiy (2011) found that legal advice provided by service providers tended to convey a message that clients should err on the side of caution, advice that "moved the goal posts" in the evolving case law on the criminalization of non-disclosure by dispensing with the "significant risk" qualification that was a hallmark of the Cuierrier decision and a major source of current litigation. Mykhalovskiy remarks,

In interviews, it became clear that some providers have responded to the vagueness of the significant risk test by counselling their clients to disclose their HIV-positive status to sexual partners prior to all sexual activities, regardless of the transmission risks they pose....[This] suggests a troubling consequence of the use of the criminal law to govern HIV transmission risks, the emergence of counseling strategies that encourage a practice of disclosure that exceeds the criminal law obligation, as defined by the significant risk

threshold. This has the arguable effect of detaching disclosure from risk governance in favor of a blanket moral obligation to disclose in all sexual situations.

Interviews with PHAs in this study confirm the observation that PHAs are indeed frequently hearing the more stringent message and that health professionals (at least as perceived by their sero-positive clients) seem to be increasingly part of a movement toward elevating and consolidating disclosure as the primary criterion in the governmentality of HIV.

I can do it with condom or without condom if she agrees. But she told me I must tell. If I don't tell, it's a crime. That's what she told me. (009, heterosexual, male, 50s)

(I: What did they say to you?) Just I have to acknowledge that I have HIV, that if anything does happen I can't say, "Well I didn't know I have it," from a legal point. You know, if somebody lays charges, before that I could have said, "Well I didn't know I had it." (012, bisexual, male, 40s)

I went in to a nurse to have a sexual health check-up and she told me that I could be charged for having safe sex without disclosing and I didn't know that. I got pretty upset at her because she was on a soap box. This woman was like outraged that anyone could have sex with anyone and not disclose, even safe sex....She was just so adamant and preachy. As far as I know, she's actually wrong. (033, gay, male, 40s)

I was told that we have to disclose our HIV status if we have a partner and if you don't disclose your HIV status to your partner and you infect somebody, you will face legal charges. (035, heterosexual, female, 40s)

He [doctor] said that I'm responsible to inform people about my status and we went over that again about a year ago. (045, gay, male, 40s)

I had to agree with Sudbury health that I would disclose or else they were going to hound me forever. It was brutal. So I mean how do you feel about that, right? I was really upset. They had no idea how gay men behaved at all....I used to think that...I didn't really have to disclose if I was having protected sex. I thought that ...if I'm having safe sex, I'm exercising safe sex practices personally and the other individual, whether they're HIV-positive or not, I didn't really think that I had to disclose. In today's world with the way that it is now, I have to disclose. (056, gay, male, 40s)

Whether concerned about their own potential legal liabilities as service providers or about advising PHAs to be “on the safe side,” the message being received by many PHAs shows movement towards an increasingly absolute and universal demand for disclosure regardless of significance of risk. Case law, then, potentially becomes a stimulant for a normative creep toward a strategy that would place many more PHAs at risk of criminal prosecution and imprisonment. As the courts act in a larger social context, and may attend to the practices of service providers in arriving at decisions, this moving standard could, in turn, enter into a feedback loop that influences the courts to consolidate and institutionalize this even more stringent legal requirement. The approach of the prosecution and judge at trial in *Mabior* illustrates this conflation of official public health advice with a criminal law standard for liability.³

³ *R. v. Mabior*, 2008 MBQB 201, paras. 61, 63, 70, 95 and 161. See also the testimony elicited at trial about public health practice: *R. v. Mabior*, Testimony of K.D. McDonald, Public Health Nurse, Brandon Regional Health Authority, in Transcript of Proceedings (23 May 2008), Vol. 8, p. 11 (ll. 19-31), p. 13 (ll. 23-24), p. 15 (l. 26) – p. 16 (l. 9), p. 16 (ll. 24-33), p. 23 (l. 16) – p. 25 (l. 2), p. 36 (l. 12) – p. 37 (l. 8), p. 45 (l. 1) – p. 46 (l. 19), p. 46 (l. 30) – p. 48 (l. 34), p. 49 (l. 12) – p. 50 (l. 26), p. 53 (ll. 10-13); Testimony of J.L. Burgoyne, Public Health Nurse, Brandon Regional

HIV testing and criminalization

The large majority of PHAs in Ontario and in this study tested positive before the rising prominence of criminal prosecutions (over the last seven years), and this study of HIV-positive people does not capture the experiences of those who may be deterred altogether from testing and so would not know if they are HIV-positive. With these caveats in mind, it is perhaps not surprising, then, that in response to the question, “Did legal proceedings and the public climate around legal proceedings affect your decision to test for HIV in any way?” none stated that criminalization had influenced their decision to test. The typical answer to this question was, “no,” or “It was the furthest thing from my mind” (064, heterosexual, female, 40s). This finding is also consistent with research into HIV testing decision-making that shows that people test for a wide range of reasons perceived as more compelling than the eventual risk of criminalization (Godin et al. 1997; Myers et al 2010:87).

PHA views on criminalization

The few studies on views of criminalization have been conducted in the United Kingdom and the United States and have surveyed the opinions of either gay and bisexual men of mixed serostatus or people living with HIV from different risk groups. The largest study has been done in the United Kingdom by Catherine Dodds et al (2009b:6, 9) who asked 8,252 men who have sex with men, *Do you think it is a good idea to imprison people who know they have HIV if they pass it to sexual partners who do not know they have it?* “More than half (57%, n=4676) of all respondents said yes, they think it is a good idea to imprison people who know they have HIV if they pass it to sexual partners who do not know they have it. About a quarter (26%, n=2120) were unsure and the remainder (18%, n=1456) thought it was not a good idea....Men with diagnosed HIV were much less likely to support prosecutions [19.6%].” Overall, Dodds and colleagues (2009b:10) found some variation in attitudes toward criminalization: those who were “younger, had never had an HIV test, had lower levels of education, lived outside of London, reported sex with both men and women in the previous year, were not in a relationship with a man, and had lower numbers of male sexual partners, [were] more punitive but the majority agree [with criminalization] in all instances.”

The question posed by Dodds et al (2009b) focused on the criminalization of the transmission of HIV, rather than the criminalization of non-disclosure of HIV-positive status, in accord with the state of the criminal law in England and Wales under which criminal liability only arises for transmission, not for exposure. A study by Keith Horvath et al (2010) of 1,725 men who have sex with men in the United States shifts attention to disclosure in line with the case law in much of North America. Horvath and colleagues (2010:1224) found that “sixty-five percent of respondents believed that it should be illegal for an HIV-positive person who knows his or her status to have unprotected sex without telling the other person of their HIV-status, 23% believed that it should not be illegal, and 12% did not know.” They also found some variation in opinion which in several respects is similar to the variation found in this study. Horvath et al (2010) found that support for criminalization of unprotected sex without disclosure “was associated with younger age, HIV-negative or unknown status, less education, non-gay sexual identification, being less comfortable with their sexual orientation, residing in a state in which they perceived residents were somewhat or very hostile, engaging in two or more acts of UAI [unprotected anal intercourse] in the past three months, and feeling more responsible for protecting online sexual partners from HIV and other STDs.”

Health Authority, in Transcript of Proceedings (23 May 2008), Vol. 8, p. 63 (ll. 6-18), p. 64 (l. 26) – p. 65 (l. 9), p. 67 (l. 31) – p. 71 (l. 33).

Two studies, again one in the United Kingdom and one in the United States, have investigated PHA views on criminalization in particular. Catherine Dodds and Peter Keogh (2006:316-317) conducted 20 focus groups with 125 PHAs in Britain and found they expressed considerable “concern that criminalization had weakened the message that sexual health should be the responsibility of both consenting partners during sex” but “a minority of respondents did hold that criminalization may be justified if it operates to change the behaviour of people with diagnosed HIV who participate in unprotected sex without disclosing to their partners.” Robert Klitzman et al (2004:49) interviewed 76 PHAs in four US cities and report that “most participants supported the criminalization of non-disclosure of one’s HIV positive status to sexual partners. In fact, many felt this policy could be effective in decreasing HIV transmission by enforcing disclosure and changing sexual behavior.”

Finally, a national public opinion poll conducted in Canada in 2011 found that 82 percent of Canadians agreed with the statement, “People living with HIV/AIDS have the same right to be sexually active as long as they inform their sexual partners about their HIV/AIDS status” and at the same time, 71 percent agreed, “People living with HIV/AIDS have the right to be sexually active as long as they practice safe sex” (Calzavara et al 2012:16). Furthermore, 74 percent agreed it is “appropriate to imprison someone who knowingly did not divulge their status to a sexual partner” even though “fewer than half agree that criminal prosecution is an effective way to stop or deter people from transmitting HIV to their sexual partners” (Calzavara et al 2012:17).

In this study, we posed a series of questions exploring several different scenarios to participants in the OCS and PSHP cohort studies. The results show that the largest proportion of Ontario PHAs participating in the OCS and PSHP cohort studies believe that criminal law should *not* be applied when there is no disclosure and protected sex occurs. Respondents do believe that “someone with HIV should be charged with a crime and perhaps sent to prison” in cases where there is no disclosure before unprotected sex, and for not disclosing if “it’s clear that the person wanted to pass HIV to their partner.” The question, “Do you think someone with HIV should be charged with a crime, and perhaps sent to prison, for having unprotected vaginal or anal sex without telling sexual partners he or she has HIV before having sex?” proves to be the critical breaking point for PHAs in drawing the line in the criminalization debates. The largest proportion holds that disclosure of serostatus should not be a legal requirement if protected sex is practised. In the OCS cohort, 47 percent disagree with the proposition that people should be prosecuted for non-disclosure in cases of protected sex (as opposed to 42 percent who agree with prosecution). In the PSHP cohort, the majority of respondents (54%) disagree with prosecution in cases of protected sex (and only 28 percent agree with criminalization).

The results are as follows:

*Do you think that someone with HIV who has **unprotected vaginal or anal sex and does not tell** their partners that they are HIV-positive should, in some circumstances, be charged with a crime?*

	PSHP	OCS
Yes	312 (71%)	354 (72%)
No	71 (16%)	87 (18%)
Don’t Know	49 (11%)	49 (10%)
Refused	5 (1%)	2 (0.4%)
Total	438 (100%)	492 (100%)

*If it’s clear that a person did not tell their sexual partners that he or she has HIV, and it’s clear that the person **wanted to pass HIV to their partner**, should the person be charged with a crime?*

	PSHP	OCS
Yes	392 (90%)	459 (93%)
No	14% (3%)	18 (4%)
Don't Know	27 (6%)	14 (3%)
Refused	5 (1%)	1 (0.2%)
Total	438 (100%)	492 (100%)

If a sexual partner asked a person about his or her HIV status and the person lied should they be charged with a crime?

	PSHP	OCS
Yes	294(67%)	366 (74%)
No	72 (16%)	76 (15%)
Don't Know	65 (15%)	49 (10%)
Refused	7 (2%)	1 (0.2%)
Total	438 (100%)	492 (100%)

*If **oral sex** is being given to a person with HIV, without a condom, do you think the HIV-positive person should be charged with a crime, and perhaps sent to prison, for not telling sexual partners that they have HIV?*

	PSHP	OCS
Yes	152 (35%)	224 (46%)
No	197 (45%)	185 (38%)
Don't Know	81 (18%)	81 (17%)
Refused	8 (2%)	2 (0.4%)
Total	438 (100%)	492 (100%)

*Do you think someone with HIV should be charged with a crime, and perhaps sent to prison, for having unprotected vaginal or anal sex without telling sexual partners he or she has HIV **before** having sex?*

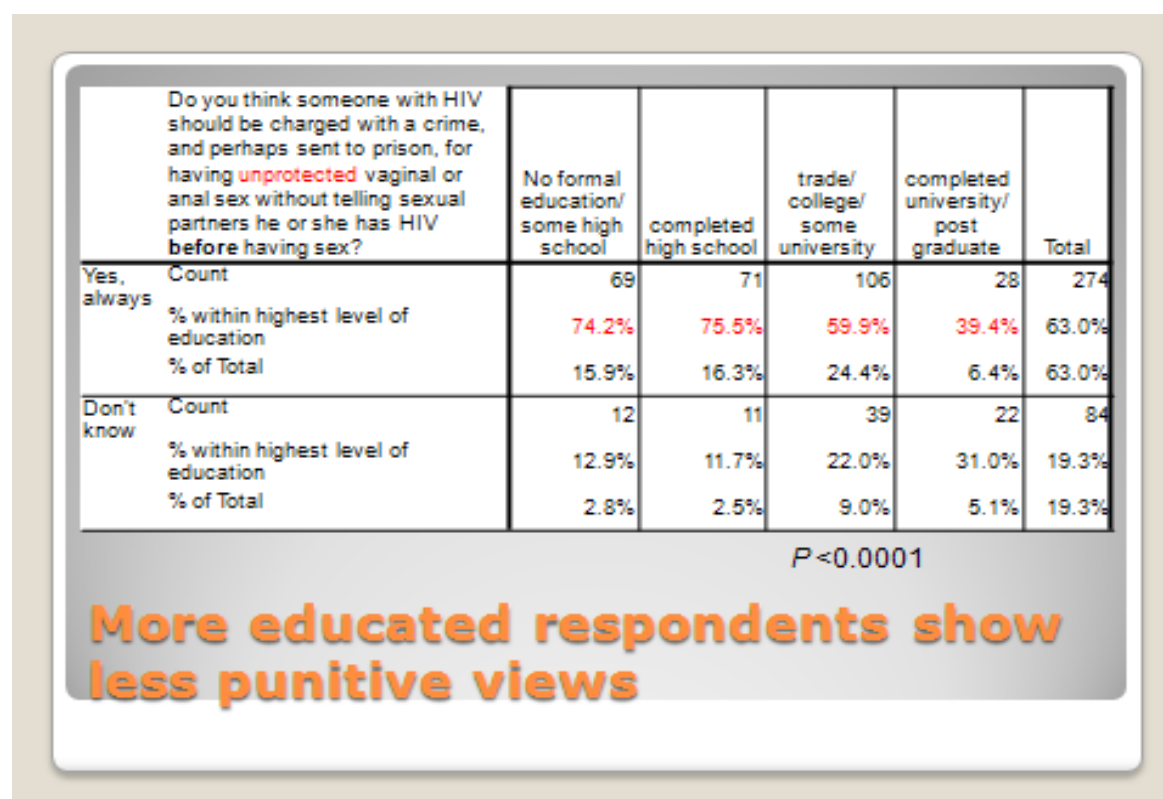
	PSHP	OCS
Yes	275 (63%)	351 (71%)
No	67 (15%)	101 (21%)
Don't Know	84 (19%)	39 (8%)
Refused	11 (3%)	1 (0.2%)
Total	438 (100%)	492 (100%)

*If a condom is used for vaginal or anal sex, do you think that someone with HIV should be charged with a crime, and perhaps sent to prison, for not telling their sexual partners that he or she has HIV **before** having sex?*

	PSHP	OCS
Yes	123 (28%)	206 (42%)
No	238 (54%)	233 (47%)
Don't Know	73 (17%)	52 (11%)
Refused	4 (1%)	1 (0.2%)

Total	438 (100%)	492 (100%)
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Statistical analyses of these results show that there are no significant differences by gender, sexual orientation, or ethno-cultural background on these questions except for Aboriginal PHAs in the PSHP study who are somewhat more punitive in their views regarding non-disclosure. This finding is not replicated in the OCS where the number of Aboriginal respondents is significantly lower. There are, however, significant differences according to the educational attainment of respondents. More educated respondents show less punitive views. In the PSHP cohort, 74 percent of respondents with less than high school support criminalization for nondisclosure and unprotected sex, but this declines to 39 percent among those with a 4-year university degree or more education ($p<.0001$). Regarding viral load, 84 percent of respondents with less than a high school education believe that PHAs with an undetectable viral load should disclose; this figure falls to 70 percent among those with a 4-year degree or more education ($p=.029$). The declining support for criminalization of non-disclosure among the better educated tends to be replaced by a rising rate of “don’t know” answers rather than clear opposition to criminalization. A similar pattern is evident in the OCS cohort.



In addition, having had a casual partner in the last 6 months makes a difference; those who have recently had a casual partner are less punitive in their views. Not disclosing HIV-positive serostatus before having unprotected sex should be criminalized according to 71.2 percent of those who have not had a casual partner while 53.2 percent of those who have had a casual partner agree ($p=0.001$). As well, lying about one’s HIV-positive status is viewed more punitively by those who have not had a casual partner (70.9%) than by those who have (62.7%) ($p=0.020$).

The greatest variation in opinion occurs around the question of non-disclosure in the case of oral sex with support for criminalization in the PSHP cohort ranging from:

- 51% among heterosexual men, 50% among heterosexual women, 31% among bisexual men, and 21% among gay men ($p<.0001$),
- 50% among Aboriginal people, 44% among African and Caribbean people, and 30% among white people ($p=.019$), and
- 50% with less than high school education to 20% with a 4 year degree or more ($p=.014$).

The strong gradient by sexual orientation may be related to the twenty-five year history of safer sex training provided by AIDS service organizations that has instructed gay and bisexual men that oral sex is “low risk” for HIV transmission. Heterosexual respondents appear to assimilate oral sex to attitudes about sex in general. Ethno-cultural differences are confounded by the higher numbers of heterosexual PHAs in Aboriginal, African, and Caribbean communities compared to others.

Views on criminalization

In the OCS cohort, it is possible to discern a relationship between amount of time living with HIV and views on criminalization. The interviews show that HIV-positive people can respond to questions on criminalization either in terms of the actions of another person that resulted in their infection, or in terms of potentially infecting someone else. For example,

I know someone that should be [charged] because the person who gave me HIV knew he had it and didn't tell me he had it and when I asked him, he turned around and goes “No, I don't have it,” and gave it to me. (018, gay, male, 40s)

In the OCS cohort, punitive views decline with time being sero-positive: 83 percent of those diagnosed less than six years agree with the criminalization of non-disclosure in cases of unprotected sex, but this falls to 69 percent of those diagnosed more than six years ago. While majorities agree with criminalization in this instance regardless of time living with HIV, this finding suggests that with time, PHA views may moderate, perhaps because, in the early period, their relationship to the question of criminal prosecutions is more influenced by a focus on having been infected, whereas in the latter period, the possibility of being vulnerable to criminal prosecution is accorded greater weight. There may as well be a historical factor at play. Those who were infected within the last six years were infected during a time when the intensity of criminalization for HIV non-disclosure, and consequent media coverage, have been higher than in the earlier period.

In any case, there is a contingent of opinion that criminalization is justifiable in some cases. In several instances, the Aziga case appears to be the touchstone for the opinion expressed, suggesting that much of the framing of questions of HIV and the law for people living with HIV, not to mention the larger public, shows the influence of media attention to a few high-profile cases. In a number of these examples, interviewees clearly wish to distance themselves from behaviour deemed to be extreme or egregious and reaffirm a commitment to HIV prevention.

If they knowingly are putting the other person at risk, then they should have the full weight of the law hit them because they are ruining lives. That's how I feel. I have no sympathy for them because they are knowingly doing it. (003, bisexual, male, 60s)

That man, how many people did he infect and now he's in jail? I don't like the thought of jail for anybody but if that's the only discipline that people will listen to, I guess it has to be. (034, gay, male, 60s)

Would I want there to be some sort of a legal recourse available for victims? I think I would and I have to allow that. I have to admit that I do think that. (042, gay, male, 30s)

Well I don't think it's right. I find it disgusting. And he [Trevis Smith] deserves everything he gets. (07, heterosexual, male, 30s)

Some argue for the potential deterrent effect of prosecution.

If they're HIV-positive and they're going around having sex unprotected, when they see these sort of court cases coming up, it should ring a bell in their head. (025, gay, male, 60s)

The fear of possible repercussions of not disclosing or not using protection should hopefully encourage the people that were doing that, not to. (014, heterosexual, female, 40s)

Here in this country, I can say I like the law because it's very nice to tell your partner, because where I come from they keep it to themselves... Maybe this is why HIV is all over because they don't tell anyone and some just go doing unprotected sex and infecting anyone... I like that law because that law can reduce HIV/AIDS. (064, heterosexual, female, 40s)

I think it [criminal law] makes people to be disciplined, yeah. This is how I feel. (081, heterosexual, female, 40s)

The greater representation of female voices in this section is consistent with the overall pattern of prosecutions where the complainants are disproportionately women in heterosexual relationships with men, though they account for only about a quarter of HIV-positive people in Ontario according to epidemiological research. Legal proceedings rest on a deeper politics of blame and innocence that index a longstanding social distinction assigning some HIV-positive people to the status of “innocent victim” and others, often tacitly, to the status of the always, already guilty. In the early days of the epidemic, these distinctions were often overt in public depictions with women, children, and haemophiliacs assigned to the “innocent” category and gay men, people who use drugs, sex workers, men of colour, and foreigners or immigrants relegated to the latter category seen as “deserving” of, or vectors of, infection. Though less overt today in Canada, these distinctions have not entirely gone away. In interview, gay men and people who use drugs often typify HIV as a silent tragedy that has befallen their communities; “both groups are offered ready-made moral recipes assigning them personal responsibility for their illness” (Adam and Sears 1996:71). Members of groups that are not accorded the “benefit of the doubt” by the politics of blame are perhaps more hesitant to appeal to the courts to judge them “innocent” in the face a historical legacy that has closely identified them as morally suspect and a blameworthy source, rather than a “victim,” of HIV.

Diversion not punishment

A significant set of study participants believe that imprisonment is simply not the solution to problematic behaviour.

I don't think that the legal system is the proper place for handling the containment of communicable diseases. (002, gay, male, 60s)

I don't think prison is. I don't think that even locking them up is really addressing any sort of problem or the affects of it. You're putting someone away. Does it make us any safer in the long run? I'm not entirely convinced that that's the best way. (032, gay, male, 40s)

If people are again being reckless, well then they have the consequences unfortunately....I don't think incarceration for that is going to solve anything. (061, gay, male, 50s)

I think there's always been kind of an unspoken code within the gay community that we don't take these kinds of issues to the larger community because of the Pandora's box it would open... Any stories like these with a kind of a narrative mark of victim and the bogey man, are always going to be portrayed in this manner. It's the same kind of thing as collapsing child molestation with homosexuality. ... I don't think that HIV should be criminalized in any manner whatsoever. (062, gay, male, 40s)

I was given this when I was in a relationship with someone. I never felt animosity toward my partner for giving it to me. He was ignorant of the situation. It was the eighties, it was early on. So you know, there's no blame attached. I don't understand this prosecution thing at all. (016, gay, male, 50s)

I think there should always be some kind of educational or remedial type of program for that, but I don't believe in any imprisonment for that kind of thing. (018, bisexual, male, 50s)

Moi je croirais qu'il devrait avoir comme une certaine (pause) un certain cours comme le John course. (I: John School?) Y devrait avoir une école. (F15, heterosexual, male, 50s)

This survey of PHAs regarding HIV and the law shows considerable diversity of opinion. Variability in opinion is most closely associated with sexual orientation, level of education, time since diagnosis with HIV, and with “grey area” issues such as the risk associated with oral sex or with protected sex.

Disclosure to sexual partners in a context of criminalization

Two studies have attempted to test the deterrent effect of criminal law on HIV disclosure and transmission by comparing attitudes and practices among risk populations in states that have and do not have such laws. Scott Burris et al (2007) enrolled 490 men who have sex with men and injection drug users in Chicago and New York in their study and found no differences between the states. “Most people in our study believed that it was wrong to expose others to the virus and right to disclose infection to their sexual partners. These convictions were not influenced by the respondents' beliefs about the law or whether they lived in a state with such a law or not” (Burris et al. 2007:468). When it came to actual conduct, similarly, “neither anal nor vaginal sex without a condom was significantly associated with beliefs about whether law requires condom use.” (Burris et al. 2007: 497). Turning specifically to the 162 HIV-positive people in their study, they found no differences in the rates of unprotected anal sex in the two states, but a lower rate of unprotected vaginal sex in Illinois, the state with a specific statute regulating sex by people living with HIV. Horvath et al (2010) also found no differences in unprotected anal sex among men who have sex with men in states with and without criminal statutes.

In this study of PHAs, we asked a series of questions concerning practices and expectations regarding disclosure and un/protected sex. The results are as follows:

I expect a casual sexual partner to tell me if he or she

	PSHP (n=438)	OCS (n=492)
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Is HIV negative	112 (26%)	99 (20%)
Is HIV positive	215 (49%)	206 (42%)
Is unaware of their HIV status	85 (19%)	92 (19%)
I do not expect my casual sex partner to tell me about their HIV status	79 (18%)	146 (30%)
I do not have a casual sex partner	237 (54%)	190 (39%)

Concerning **HIV-negative partners** and partners whose HIV status I did not know, with whom I had anal or vaginal sex in the last six months (please check all that apply):

	PSHP	OCS
I told of all my partners that I am HIV-positive	196 (45%)	136 (36%)
I did not tell any of my partners that I am HIV-positive	24 (5%)	20 (5%)
I told some of my partners that I am HIV-positive and did not tell others	38 (9%)	28 (7%)
I dropped hints that I could be HIV-positive	20 (5%)	20 (5%)
I didn't feel it was necessary to tell my partner(s) because we had protected sex	41 (9%)	24 (6%)
I didn't feel it was necessary to tell my partner(s) because they should presume everyone is positive	20 (5%)	11 (3%)
I didn't feel it was necessary to tell my partner(s) because they were willing to have unprotected sex	14 (3%)	6 (2%)
I didn't feel it was necessary to tell my partner(s) because it is their responsibility to use a condom if they want to	17 (4%)	5 (1%)
I was afraid to tell my partner(s) I was HIV-positive	26 (6%)	19 (5%)
I did not have an HIV-negative partner or partner(s) whose HIV status I did not know	141 (32%)	172 (45%)

Concerning **HIV-positive partners** with whom I had anal or vaginal sex in the last six months (please check all that apply):

	PSHP	OCS
I told all my partners that I am HIV-positive	202 (45%)	128 (31%)
I did not tell any of my partners that I am HIV-positive	13 (3%)	14 (3%)
I told some partner(s) that I am HIV-positive and did not tell others	31 (7%)	23 (6%)
I did not have a partner that I knew was HIV-positive	59 (13%)	32 (8%)
Not Applicable	164 (37%)	215 (52%)

Statistical analysis of the PSHP data reveals some variation in attitudes and practices in different populations. Overall 18.3 percent do not expect a sexual partner to tell their HIV status but this varies by sexual orientation with gay men having less expectation (26.7%), followed by bisexual men (23.1%), heterosexual men (10.0%), and finally heterosexual women having the greatest expectation that sexual partners will disclose (5.1%) ($p=0.015$). The OCS data show a similar pattern but with even higher numbers of gay men not expecting disclosure: gay men (42.2%), bisexual men (23.7%), heterosexual men (11.3%), and heterosexual women (10.8%). This same variation is evident by ethnicity where a greater proportion of African, Caribbean, and Aboriginal populations are female or heterosexual when compared to white study participants. The expectation that sexual partners will not disclose is 20.3 percent among white people, 11.1 percent among African and Caribbean people, and 8.9 percent among Aboriginal people

($p=0.048$). For the OCS, the comparable numbers are 35.9% among white people, 16.4% among African and Caribbean people, and 29.4% among Aboriginal people.

With HIV-negative partners and partners of unknown HIV status, 44.7 percent of PSHP respondents told all partners that they are HIV-positive while 32.4% had no partners of this type. (Forty-five percent of OCS respondents report no partners who were HIV-negative or of unknown status.) Between 1 and 9 percent report alternative strategies to disclosure, including: not telling any partners, telling some partners, and dropping hints about HIV status. Others feel it is unnecessary to tell because they had protected sex, because partners should presume everyone is positive, because a partner was willing to have unprotected sex, or because it is a partner's responsibility to use a condom if s/he wants to. Between 4 and 6 percent report being afraid to disclose they have HIV. Unemployed respondents in the PSHP cohort are more likely not to disclose (10.3%, $p=0.008$), to drop hints (8.5%, $p=0.016$), to feel disclosure is unnecessary with protected sex (15.4%, $p=0.009$), and to be afraid to disclose (21.4%, $p=0.003$). Gay and bisexual men are a little more likely to disclose to only some partners (bisexual 19.2%, gay 11.3%, $p=0.020$), to drop hints (gay 7.2%, $p=0.047$), and to feel disclosure is unnecessary with protected sex (12.0%, $p=0.031$). Compared to those without casual partners, respondents with casual partners are more likely to tell only some partners (13.9%, $p<0.0001$), feel it is unnecessary to disclose with protected sex (16.4%, $p<0.0001$), feel it is unnecessary to disclose because partner should presume everyone is positive (8.0%, $p=0.002$), because a partner is willing to have unprotected sex (5.5%, $p=0.013$), or because it is a partner's responsibility to use a condom (7.5%, $p<0.0001$).

This survey of PHAs regarding HIV and the law shows that most either disclose to, or do not have, partners who are HIV-negative or of unknown status. Non-disclosure strategies and assumptions are reported by relatively small sets of PHAs with some variation according to employment status, sexual orientation, gender, ethnicity, and having had a casual partner.

Disclosure dynamics

As noted in the opening pages, a number of research studies point toward the challenges posed by the legal expectation to disclose. The most evident is the double bind created by the obligation to disclose and fear of rejection:

Whenever I tell somebody the person run away so this creates a very huge problem for me. (023, heterosexual, male, 50s)

I was raised a certain way and I got infected at the age of 18. I'm 33. 15 years I've had to deal with this, 15 years of being dumped because I disclosed or guys don't want to be with me or... you know, it hurts, it damn well hurts and I know it does. (055, gay, male, 30s)

Some find it easier to go along with a tacit norm of silence around HIV questions:

A few times I have disclosed or they've asked me flat out, "Are you positive or negative?" and I will tell them but often it's not discussed. Guys don't want to talk about it, whether they're positive or negative. It kind of kills the romance or the sort of kind of hotness of the potential for getting together. (013, gay, male, 50s)

As far as I can see, from people I've talked to, I'd say 99.9% of the people never tell anyone they're positive, unless they're asked. (011, gay, male, 50s)

The result is a tendency to engage in a tacit dance of assumptions and intuitions.

The last time was in a bathhouse situation. It was a guy that I recognized from online. At least his profile says that he's positive. He recognized me as well. So there was already a bit of a connection. Although we didn't exchange words in the situation, we both kind of knew where we were coming from. We ended up having unprotected sex. (006, gay, male, 40s)

The whole night I talked about Fashion Cares, HIV, ACT, me doing outreach. (I: Like you did as much as possible without saying it to infer that you were?) It might sound like beating around the bush but I really did kind of like... I mean do I have to fucking write it on my forehead for real? (054, gay, male, 50s)

From a gay's perspective, we know generally, you know, when I don't ask or they don't ask, it's a given we're both HIV and we're going to have probably unprotected sex....If he says, I'll only play wrapped, then I will respect that and play wrapped. (069, gay, male, 40s)

I don't always tell. I probably told more before but now, I'm very wary because I don't know....Sometimes when I'm chatting to somebody I'll kind of drop some hints and if they don't seem to pick it up, then I'll just walk away because I'll say, well I don't think this person is positive, so you know what, I'm just going to leave it.... People who are HIV that I've had discussions with, also feel under siege and maybe less likely to bring up some things or just to look for totally anonymous sex where not even your name is asked. (078, gay, male, 40s)

If someone wants to do something unprotected, that's a big signal, it's someone's telling you (pause) by action, not verbally, that they are HIV. (022, gay, male, 40s)

In several instances, study participants report instances of outright deception that led to their own exposure to HIV:

I asked him if he had ever been tested and... like the phrasing I would have used was, "Are you clean?" And then I went and got all my tests done and then he was like, "Yeah, I did that too." What the fuck, you didn't do it, do you know what I mean? and he didn't. (I: So you were using condoms and then you had this discussion. You went and got tested, not with him though?) Yeah. (I: So then you just come back and you say, I'm good?) Yeah, I'm good, now you want to... because I was trying to go through all the like motions of like now we're going to be in this monogamous relationship. (073, queer, female, 20s)

I went in for standard blood work because it's required by our insurance company and they said, "Well you're HIV-positive," and I said that's impossible because I've only been playing around with two people and one is my partner of four years and the other one is a friend of ours. The friend of ours had it and he knew. I found out he knew he had it and he's telling everybody he doesn't. (018, gay, male, 40s)

In this instance, one interviewee relates his own history of being prosecuted for nondisclosure.

I went through a depression because now I was totally alone. I stopped eating, wasn't taking no medication. I felt that I failed. I came to Canada and failed and now I'm dying too. I don't remember how many women, but a number of women for many years and I didn't tell them.

I: So you met them after you knew you were positive?

Well I met from before and after.

I: Right. So you were sleeping with them before you knew you were positive?

Yeah.

I: And you kept sleeping with them after you knew?

Yeah.

I: And you didn't tell them?

I didn't.

I: Why didn't you tell them?

Well after I found out I was positive, it was hard for me to disclose. I felt if I told anybody that I would be judged and nobody would want to be close to me again. It might have been selfish. In fact it was. It took me a long time to realize it was. It took me a couple years of program to realize that was a very selfish move.... I told her I was scared. I didn't want to lose her. I was afraid I was going to lose her and I didn't want to tell her. I didn't know how to answer. I wasn't trying to lie to her. I didn't know what to tell her and I didn't want to because I was afraid if I told her, you'll walk away, you'll never see me again and I would lose and I wasn't trying to get you sick like me or trying to get you infected or anything. (041, heterosexual, male, 40s)

These findings are largely in line with studies that have been conducted in the United Kingdom and the United States. A study of 29 British HIV-positive gay men (Dodds et al. 2009:141-2) found that “a few said they disclosed their HIV status more regularly since hearing about criminal cases, to minimise the likelihood of having unprotected anal intercourse with an uninfected man, thereby also reducing the risk of prosecution” while others responded “by maximizing their anonymity, and being less open about their HIV status.” Also like British PHAs, the Canadian respondents tended to rely on indirect disclosure or “subtle cues or inferences,” make presumptions about sexualized settings like bathhouses, or read consent to unprotected sex as evidence of sero-positivity (Adam et al. 2008; Bourne et al. 2009).

Poz on poz sex

At the same time, a good many PHAs express reluctance to have unprotected sex even with other HIV-positive people (Adam et al. 2005b).

My strain might be totally different than your strain and while I may pick up your strain and it may not cause me any further ill effects, it may produce a rather nasty new strain that I'm capable of passing on or visa versa. Or it may have a hell of an impact on my drug regimen. (002, gay, male, 60s)

Like I've slept with a couple of people and we've both been positive. I think every time it was safe sex. But then we still worry about like co-infection and maybe his strain is stronger than the one I have and I could get sicker faster. It's always on the back of your mind. (005, gay, male, 30s)

I won't infect him with my HIV and I certainly don't want to get infected with his HIV....If I have to go on his medication at some point, I don't want to be immune to it.... It pisses me off when they know they're HIV-positive and they're out there infecting person after person after person and they know it. Well that's just yes, that should be stopped. (015, gay, male, 40s)

Even if I go with a guy that's HIV and he doesn't want to use a condom, listen honey, you're HIV, you're one type and I'm a completely different type than you and if I go through with that, you're probably going to make me sicker than I am now or I'm going to make you sicker than you are now. (019, gay, male, 50s)

If I have sex with somebody who is positive, I don't want she's kind of virus, strain, to have it. That's what the doctor told me always. So I believe in that. (030, heterosexual, male, 30s)

Others believe that when having sex with a partner who is also HIV-positive, safer sex is less of a concern.

I went on to ODSP. I lost my job. It was the end of a long term relationship and it was just a strange point in my life. I had just turned 40. Maybe it was middle age crazy, I don't know. But I kind of had too much time on my hands ... I got mixed up and had a bit of a crystal meth problem and through that, I met... there's a whole community of guys who....were just on disability, never worked, didn't seem to want to work again. Some guys did have jobs. They were positive. They knew we were positive. They were all into partying and doing drugs and having unprotected sex. I think part of it for me was just for so many years I had drummed into my head, "You've got to have safe sex," and then suddenly to me the whole group of people who... you don't feel like you're a pariah or everybody was just fine with it [unprotected sex]. (020, gay, male, 40s)

I will admit to being fairly flexible or accommodating of the other person's wishes to go barrier free. It's probably reflective of the fact that condoms aren't a terrible amount of fun and I'm guilty I guess of being all too happy to go along with it. (042, gay, male, 30s)

If the [HIV-positive] person is open to not using condoms, that's their choice and I'm not going to fight them on them that. (089, gay, male, 20s)

Constructions of responsibility

Many study participants reflect on the meaning of responsibility in HIV exposure or transmission. For many, their sense of responsibility is embedded in a larger societal "rhetoric of individualism, personal responsibility, consenting adults, and contractual interaction," a "the moral reasoning widely propagated by government and business today that constructs everyone as a self-interested individual who must take responsibility for himself in a marketplace of risks" (Adam 2005a).

I'm an adult, they're an adult. You take responsibility for yourself and if you give me something, it's my own fault for having sex with you and not finding out. (011, gay, male, 50s)

When people have sex, they should always protect themselves. You're responsible for yourself and that's why I don't understand why they're being charged. It's your fault too. That's how I feel. (017, gay, male, 40s)

You have to take some responsibility for your life some place. We can't have a nanny state where everything is just perfect. ...You're not mentally incapable and you're not being raped and you're not being forced in to this; nobody is bending your arm. You're having sex because you want to have sex so why are you not taking care of yourself? (021, gay, male, 50s)

It's a personal choice that you choose. We're all adults. You have to live by the consequences of our decisions right. That's the way I look at it. (024, gay, male, 40s)

If you have random acts of 20 or 30 people in a bathhouse during the evening, if you're stupid enough not to wear a condom, you get what you deserve.... Did I ever feel anger

towards [name]? No. It was my choice, not his. Did it make a difference whether he told me or not? In my view no. I'm responsible for my own actions. (048, gay, male, 50s)

I don't think the onus should be on the person who's positive necessarily or the person who knows that they're positive. It should be everybody's responsibility to protect themselves. We've all heard about HIV. Grow up and take some responsibility. (054, gay, male, 50s)

Tu sais quelle décision tu prends... Faut que tu sois toi-même responsable de tes propres décisions. Pis j'pas là pour imposer mes pensées non-plus sur personne... Il devrait pas aller en prison pour ça. C'est à l'autre personne à forcer, c'est à l'autre personne à l'dire «met un condom». (F14, gay, male, 30s)

It is noteworthy that gay male voices are strongly represented in these constructions of the self as an autonomous male actor responsible for protecting himself against HIV.

Collective or interpersonal responsibility

Others express a sense of responsibility embedded in collective or interpersonal loyalties rather than individualism.

I have no shame whatsoever. I am very open about it and it's the first thing I tell anybody. If they ask me, fine, or I'll mention it. I mention the fact I'm gay, I mention the fact I'm HIV-positive. The positive person is the responsible one 100% and the other person maybe 50% or 70% for the negative person for their responsibility too. (016, gay, male, 60s)

What shocked me was the fact that somebody would have sex with another person without letting him or her know that they're HIV and that there's a possibility of transmission. I just find that very disturbing....I have a lover that I've been with for 46 years and we still have sex. He is not HIV and he does not have Hep C. We do it in such a way that there is no transmission or whatever of fluids, even though my counts in HIV has been undetectable for the last 8 or 10 years and now the Hep C is down to supposedly zero. The fear of passing something on unknowingly or knowingly has become part of my life. (001, gay, male, 60s)

In one instance, a study respondent spoke to drug use undermining responsibility:

I'm like a fucked up drug addict who was screwed up and what's the point? Like what's the point of going to the cops about that and I don't even know if they would do anything.... I've had many times when I haven't disclosed, particularly using drugs. When I was using crystal meth and cocaine, I was having unsafe sex like crazy. We were having sex parties and there were people there that were positive. I knew they were positive. They told me. I told people and still people [who were] negative [were] having unsafe sex with you. (033, gay, male, 40s)

These two major themes of individualized and collective responsibility reflect similar themes evident in a recent study of participant narratives in the blog space of hivstigma.com, a recent project of the Ontario Gay Men's Sexual Health Alliance (Rangel and Adam, forthcoming).

Responsibility and prosecution

Several interviewees had mulled over the question of responsibility and its relationship to prosecution.

Becoming positive, it is your responsibility too so you being mad at the person that made you positive, is also being mad at yourself. Unless you want to live that drama for an extended period of time in your life, there's really no point in charging someone, especially after the fact. (089, gay, male, 20s)

Why put all the onus on the person that's positive? Is it entirely my responsibility because you decide to jump in in bed with me and not ask any questions? That's a tough question, it really is. People don't have any morals and values and just don't care what happens to anyone else and they're just there for themselves. I'd like to think that I've been disclosing and doing it because I believe that in my heart it's the right thing to do. But definitely having been charged myself in the past, it definitely drove that home that I never want to go through that again and that I entirely put the onus on myself to do that....I was charged 6 years ago and I went through the proceedings. The case was dropped because the complainant didn't show up for any of the court dates. (004, gay, male, 40s)

When I found out I was positive, my first result, my first reaction was not to go to the police to charge that guy. My first reaction was to go to that guy and say, "Maybe you didn't know this was possible, but I'm proof positive as is our friend. So now you must be really careful and you must protect yourself." That was my first reaction.... Right away I told the guy and he was in complete denial. I said, "You can't be in denial. This is just so freaky that two women got infected and the only thing we have in common is you and you must get tested or whatever else." It turns out I think he probably knew he was positive and in total denial.... But he certainly knew he was positive when he had sex with all those other women who did infect them and I think they had every right to sue him. (049, heterosexual, female, 50s)

Conclusion

Debates about the application of criminal law to HIV exposure and nondisclosure have evolved over time from the simple yes/no question of whether non-disclosure should be prosecuted, to a spectrum of opinion ranging from argumentation for the most restrictive application of law possible to a trend toward increasingly expansive application.

Minimizing criminalization

At one end of the spectrum of opinion are views that envision little or no role for the criminal justice system in regulating HIV transmission. Matthew Weait (2001:452) makes the case as follows:

Certainly I believe that those who know they are HIV-positive have a responsibility towards others; but I believe just as strongly that those who have no such knowledge bear the same responsibility, both to others and to themselves. To put it bluntly, I have a choice. I can assume that I and my partner or partners may be HIV-positive (whatever they say) and only engage in safer sex. Here, actual knowledge of HIV status is irrelevant, but the consequence is an elimination or minimization of the risk of transmission. Or I can assume that I am HIV-, and that everyone I have sex with (and with whom they have had sex) is or was at the relevant time HIV-.... But how dare I, if this is my approach and am infected, blame my partner – how dare I argue that simply because he knew his HIV-positive status, he is the one who was at fault in any socially meaningful sense? I dare, because the law allows me to, because the law ignores my risk-taking, my irresponsibility and legitimates my gullibility.

Scott Burris and Edwin Cameron (2008:578) argue, “The use of criminal law to address HIV infection is inappropriate except in rare cases in which a person acts with conscious intent to transmit HIV and does so.” This is also the position adopted by the Joint United Nations Program on HIV/AIDS (UNAIDS) and the UN Development Program (UNDP):

There are no data indicating that the broad application of criminal law to HIV transmission will achieve either criminal justice or prevent HIV transmission. Rather, such application risks undermining public health and human rights. Because of these concerns, UNAIDS urges governments to limit criminalization to cases of intentional transmission i.e. where a person knows his or her HIV positive status, acts with the intention to transmit HIV, and does in fact transmit it” (UNAIDS & UNDP, 2008).

Leading Canadian organizations responding to the complex issue have similarly agreed that criminal prosecution in such circumstances is justifiable (Canadian HIV/AIDS Legal Network, 2011). On this principle, there is perhaps least disagreement. Certainly according to this study, 90 to 93 percent of HIV-positive people in Ontario agree that punitive measures are appropriate in this circumstance. This view seeks to hold the line on the contemporary expansiveness of the legal sphere into the arena of HIV prevention and to limit the role of the judicial arm of the state in the everyday lives of citizens. The issue that remains is to determine the appropriate course of regulation in cases of intentional transmission, either the judicial system or diversion away from the criminal justice system toward some other agency or monitoring system.

Significant risk

The second position, mostly widely endorsed by PHAs in Ontario, holds that the risk of transmission must be significantly reduced through protected sex **or** through disclosure in which case criminal prosecution is unwarranted. The question, “Do you think someone with HIV should be charged with a crime, and perhaps sent to prison, for having unprotected vaginal or anal sex without telling sexual partners he or she has HIV before having sex?” proves to be the critical breaking point for PHAs in drawing the line in the criminalization debates as most hold that disclosure of HIV-positive serostatus should not be a legal requirement if protected sex is practised. This comes closest to current Canadian legal doctrine although a good deal of litigation continues to contest the notion of “significant risk.” Richard Elliott (2002:35) typifies this view with an appeal to both fairness and public health promotion: “allowing the HIV-positive

person to avoid criminal liability by taking precautions is good public policy, because to criminalize the HIV-positive person who, although she/he does not disclose, actually practises safer sex or otherwise seeks to reduce the risk of transmission, would be directly counter-productive to the very goal of preventing further transmission.” This position moves the notion of responsibility beyond the strictly individualized presumption of the lone actor in a marketplace of risk toward a notion of responsibility for the other as well as for the self.

Currently, a new front has opened in the “significant risk” debate concerning the (non)infectiousness of people whose viremia falls below 50 copies per millilitre of blood. It remains to be seen whether the courts will accept “undetectable viral load” as qualifying as *insignificant* risk of transmission, whether popular opinion among PHAs and at-risk populations will perceive it as insignificant, and perhaps more fundamentally whether epidemiological research can demonstrate insignificant transmission in situations of repeated exposure, for example, in ongoing serodiscordant relationships and among men who have sex with men (Adam 2011). Fifteen years after the introduction of the protease inhibitors with greatly improved longevity and quality of life among PHAs, widespread treatment has still not resulted in lower transmission rates among men who have sex with men in advanced industrial societies.

Obligatory disclosure

An emergent third position holds that disclosure is required in all sexual interactions of HIV-positive people. Failure to disclose *per se* warrants criminalization. This position essentially places the legal burden of responsibility overwhelmingly on people living with HIV, regardless of circumstances or degree of risk of transmission, and absolves people, who know or believe themselves to be HIV-negative of responsibility to practise safe sex unless forewarned to do so by prospective partners. It casts the widest criminalizing net and potentially catches even more PHAs than the current fuzzy legal standard in Canada. As one of the participants in this study remarks, “It gives different messages: first of all, that people don’t need to protect themselves. The only [responsible] person is the one who has HIV and it sort of absolves people of responsibility to protect themselves, even if they don’t know that they’re having sex with someone who’s HIV” (046, gay, male, 50s). This view appears to be an emergent position arising partly in reaction to the ambiguity of court rulings on “significant risk” and is disseminated less often as an official position than through the everyday practices of (some) ASOs (see for example, the Shared Health Exchange directed toward women, <http://shexchange.net/wp/disclosure/the-law>) and public health. It is also a position that has recently been advanced by the Attorneys General of Manitoba and Alberta, and with somewhat more ambiguity, the Attorney General of Quebec, before the Supreme Court of Canada (in the appeal before the Supreme Court of Canada in the cases of *R. v. Mabior* and *R. v. D.C.* noted above), and by the Attorney General of Ontario before trial and appellate courts in that province (in several matters under appeal at this writing). This elevation of disclosure to the primary and exclusive preoccupation of the judicial system threatens to submerge the safe sex message altogether.

Social dynamics

Over the last decade, the criminalization of HIV has had something of a cascading effect in public policy. As court cases have acquired extensive media attention, that coverage in turn has influenced the general public, risk populations, and HIV-positive people. In this study, PHAs report the media as a leading source of information on criminalization and they are likely no different from HIV negative people in experiencing the pervasiveness of media coverage. The cascading effect impacts the practices of public health, police, and prosecutors as well. The question for current public policy is: to what degree has the rise in prosecutions, and attendant rise in media coverage in turn, elevated criminal prosecution as a first, rather than, last response to HIV transmission? To what degree has the extensive media coverage stimulated more prosecutions in an accelerating feedback loop? One participant in this study testifies that “my ex was charged and he was found guilty....(I: Charged by you?) No.... it was really like the police that put it in

my head to charge which was kind of like weird and fucked up. They're like... I would have never really thought that" (073, queer, female, 20s). When official agencies like the police and public health "put it in my mind" to prosecute, then criminalization has risen to the status of a primary response to HIV transmission rather than a recourse of last resort.

The result, not surprisingly, is heightened anxiety among PHAs and uncertainty about how to act legally in everyday encounters. This sense of heightened vulnerability is especially compounded in women, immigrants, and black men, but also in everyone experiencing or anticipating the possibility of relationship break-up who worries that there is now no "level playing field" when disgruntled ex-partners can use criminalization as an instrument of harassment.

Galletly and Pinkerton (2006:453) summarize the pitfalls of legal regulation of HIV disclosure and transmission this way:

First, criminal HIV disclosure laws pay scant attention to universal precautions and safer sex, ultimately disregarding or discounting central features of the public health response to HIV. Second, many of the laws fail to distinguish between higher and lower-risk sexual activities, thus minimizing distinctions that are central to the public health objective of risk reduction. Third, the laws implicitly endorse a flawed, disclosure-based norm for promoting safety in sexual interactions that undermines the traditional public health emphasis on each person taking responsibility for protecting his or her own health. Finally, the laws may reinforce HIV-related stigma, potentially alienating those persons upon whom prevention efforts depend.

The larger context of HIV prevention

In Canada in recent years, the state has been shifting resources from social services to law enforcement. At the same time as there are trends toward the responsabilization of citizens to provide for themselves when it comes to healthcare, housing, and pensions among other areas, the state is moving toward harsher criminal law, limiting protections for workers and the environment, and expanding its role in incarceration. In HIV, the prosecutorial arm of the state has expanded while support for ASOs and for HIV prevention has become increasingly tenuous. The move on the part of some attorneys general to press for more punitive solutions to HIV prevention has many pitfalls and unintended consequences that amount, in the long run, to a public policy with poor prospects for meaningful reduction in HIV transmission combined with real damage to the lives and well-being of PHAs. Indeed obsessive focus on disclosure may create the conditions of accelerated transmission if people abandon safe sex in favour of disclosure as the preferred method of HIV avoidance. Simply curbing the punitive trend, however, cannot be enough if at-risk populations are then left to a marketplace of risk where some HIV-negative people make themselves vulnerable to infection by presuming they need not practise safe sex because HIV-positive people will disclose, and some HIV-positive people act on the market-derived "buyer beware" principle that safer sex is necessary only when their partners insist on practising it. Both trends in state and civil society are unlikely to result in any slowing in the advance of the HIV epidemic.

Criminalization, whether minimal or expansive in punitive scope, has little potential to slow the advance of the HIV epidemic and has considerable potential to undermine prevention efforts currently under way. Simply removing the state from the field of HIV prevention tends to leave HIV transmission, apart from the overtly intentional, to the principle of *caveat emptor* (buyer beware) and individuals are held responsible for themselves in a marketplace of risk. This construction of HIV criminalization shows the hallmarks of, what social theorists would see as, an instance of the responsabilization of citizens in neoliberal governmentality. The governmentality school of sociology (Rose & Miller 1992; Rose 1996) observes that over the last thirty years in advanced, industrial societies of the west, governments have

been withdrawing from a number of areas of social regulation. While it is possible to hail this trend as a gain for individual freedom, closer examination shows that regulation has in fact been changing its form from overt policing by the state to lower-cost disciplinary measures exerted by the marketplace. The reduction in state responsibilities and social services has not so much produced greater freedom as greater poverty and insecurity along with an accompanying ideology that holds ordinary citizens “responsible” for their own (mis)fortune. In HIV terms, the withdrawal of the state could be read as relegating the newly diagnosed, then, like the new poor, to the category of “irresponsible” or “gullible,” in other words, undeserving and responsible for their own misfortune.

Certainly the proposition that everyone is responsible for him- or herself in a marketplace of risks, and cannot expect rescue or protection by the state or other social institutions, is a principle that has been widely propagated by business and the state in recent decades in western societies. It cannot be surprising, then, that it finds its way into everyday moral reasoning. One interviewee (cited above) states the links quite starkly, “You have to take some responsibility for your life some place. We can’t have a nanny state where everything is just perfect. ...You’re not mentally incapable and you’re not being raped and you’re not being forced in to this; nobody is bending your arm. You’re having sex because you want to have sex so why are you not taking care of yourself?” For neoliberal sexual actors who hold that sexual interactions are contracts between rational actors who must take responsibility for themselves, then, the sero-negative actor who allows him- or herself unprotected sex “gets what you deserve” (Adam 2005a). The unspoken underpinning to this reasoning is the same as the silences that apply to many other instances of neoliberal responsabilization: no recognition that people are much more (or less) than rational actors. A now voluminous research literature on HIV transmission points toward a lengthy list of factors that predict lapses in safer sex such as: status inequalities, erectile difficulties experienced with condoms, momentary lapses and trade-offs, personal turmoil and depression, heat of the moment, or unreliable strategies of disclosure and intuiting safety (Adam et al. 2005a; Mustanski et al. 2011). Responsibilization rhetoric makes no allowance for these forms of human fallibility.

At the same time, increasing reliance on the criminal justice system to enforce a principle of universal disclosure of HIV-positive status, regardless of the likelihood of transmission, presses PHAs into an untenable double bind: they must place themselves into the risky position of heightening the possibility of rejection, stigmatization, and prosecution. Double binds can scarcely be the foundation for realistic public policy or consistent practice among PHAs. Only decriminalization and destigmatization would begin to create the conditions to make disclosure of sero-status safe. But perhaps more importantly, disclosure has been shown to be an unreliable method of reducing HIV transmission. Obscured by the criminalization debates is the fact that protected sex, especially in a situation where treatment has succeeded in attaining an undetectable viral load in the HIV-positive partner, continues to be a much more reliable method of avoiding HIV (as well as several other sexually transmitted infections).

Policy implications

Currently in Canada and specifically in Ontario, increasing numbers of PHAs have become enmeshed in the legal machinery of the criminal justice system. Perhaps the most pressing policy question is how this self-reinforcing cycle of increasing reliance on criminal remedies for nondisclosure or HIV transmission (or just the possibility of transmission) can be decelerated.

- The current nexus between police and the press has created a mechanism that fuels the criminal framing of HIV. The ability of the police to publicize the identities of PHAs, simply on suspicion of non-disclosure, well in advance of any court proceeding has generated a presumption of guilt and amplified the public image of the PHA as demon infector. The power of the press to frame the meaning of HIV and to occupy the public sphere increasingly elevates criminalization to an appeal of “first resort,” rather than a last resort remedy. The policy question here is: How can this media

iconography be deconstructed? How can HIV transmission be re-framed to demonstrate alternative and complex experiences? And how might more favourable and destigmatizing imagery of PHAs be placed in the public sphere?

- Once in contact with the criminal justice system, there is still some way to go to clarify the “rules of the game” for people of all sero-statuses. The initiative to formulate, and have the criminal justice system adopt, prosecutorial guidelines is an important step toward reducing arbitrariness, panic, and ignorance in laying charges and in reducing the number of vexatious and unnecessary prosecutions (Mykhalovskiy, Betteridge & Mclay 2010).
- The lack of clear policies in public health and AIDS service organizations means day-to-day practice tends to default to the personal views or defensiveness of individual staff people in the face of criminalization. It is clear the general lack of policy in these agencies produces considerable variation, arbitrariness, and even punitive practices through simple inadvertence as staff rely on reflex or moralistic criteria to advise clients. The move toward advice to assure being “on the safe side” creates practice in the absence of policy that has the potential to feed back into the criminal justice system and thereby institutionalize an even wider arena of prosecutorial action.
- The development of a more concerted policy in this area does raise the question of what alternative ways there may be to address the “unwilling and unable” in HIV transmission.

While there are no guarantees concerning the ways in which individuals may come into contact with HIV-related institutions, the lack of coordination among organizations tends to result in a default agenda which is largely set by media coverage of the most scandalous instances of HIV exposure and (non)disclosure.

These findings suggest a need for further policy development:

- *Among police and prosecutors* to employ consistent evidence-informed principles in the laying of charges (Mykhalovskiy et al. 2010),
- *Among journalists* to employ a rigorous decision-making matrix that strictly minimizes the publication of the identity of PHAs, and
- *In public health and AIDS service organizations* to develop a consistent counseling policy that does not mistake universal disclosure for prevention but rather focuses on how best to engage the sexual cultures of at risk populations to advance safer sex practice.

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