

Impacts of Criminalization on the Everyday Lives of People Living with HIV in Canada

Barry D. Adam & Richard Elliott & Patrice Corriveau & Ken English

Originally published in *Sex Res Soc Policy* (2014) 11:39–49. Published online: 3 August 2013.

Abstract

Over the last decade, there have been a rising number of prosecutions for nondisclosure of HIV status along with heightened media attention to the issue in Canada. One hundred twenty-two people living with HIV were interviewed concerning the effects of criminalization on their sense of personal security and their romantic and sexual relationships. The largest number of respondents believe that criminalization has unfairly shifted the burden of proof so that they: are held to be guilty until proven innocent; are now caught in a difficult he-said/(s)he-said situation of having to justify their actions, disgruntled partners now have a legal weapon to wield against them regardless of the facts and 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 heightened sense of uncertainty, fear or vulnerability, but others feel that the climate of acceptance is still better than in the early days of the epidemic or that the prosecution of the high profile cases is justified. The increasing focus of the court system on penalizing non-disclosure is having counter productive or unanticipated consequences that can run contrary to the ostensible objective of discouraging behaviour likely to transmit HIV.

As part of a study on the social consequences of the criminal justice system on people living with HIV or AIDS (PHAs) in Canada, this article focuses on how heightened public identification of HIV with criminal matters is having wide ranging effects on perceived personal security and in particular on negotiating potential romantic and sexual interactions. As articulated by the Supreme Court of Canada, the courts have been enforcing a requirement that HIV-positive people disclose their serostatus to prospective

partners, relying on the notion that “through deterrence it [the Criminal Code] will protect and serve to encourage honesty, frankness and safer sexual practices.” Nevertheless an accumulating set of evidence in the social and health sciences is pointing toward the difficulties of carrying out this directive in everyday life and toward the ways in which the application of law creates counter-productive or unanticipated consequences that can run contrary to the ostensible objective of discouraging behaviour likely to transmit HIV.

The Socio-Legal Context

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 6 years from 2004 to 2010 in Ontario though HIV was identified more than 30 years ago (Mykhalovskiy and Betteridge 2012). The rising number of prosecutions has been accompanied by media attention bringing criminalization increasingly to the fore in HIV coverage. The treatment of HIV (non)disclosure within a criminal law framework shows a particular gender and racial pattern. Sixty-nine 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 (Mykhalovskiy and Betteridge 2012, 40–41; Larcher and Symington 2010), a pattern that has also been observed in Britain and Australia (Weait 2007; Persson and Newman 2008). The media have extensively covered the cases with greatest potential for public scandal, turning them into high-profile instances of HIV criminalization, potentially 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.*

B. D. Adam

Department of Sociology, Anthropology and Criminology, University of Windsor, 401 Sunset Avenue, Windsor, Ontario, Canada N9B 3P4

e-mail: adam@uwindsor.ca

URL: <http://www.uwindsor.ca/adam>

Ontario HIV Treatment Network, 1300 Yonge Street #600, Toronto, Ontario, Canada M4T 1X3

URL: <http://www.ohtn.on.ca/>

R. Elliott

Canadian HIV/AIDS Legal Network, Toronto, Ontario, Canada

P. Corriveau

Department of Criminology, University of Ottawa, Ottawa, Ontario, Canada

K. English

Ontario Ministry of Health and Long Term Care, Toronto, Ontario, Canada

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 Court ruled that not disclosing in such circumstances could constitute fraud that vitiates consent to the sexual activity, therefore turning it into an assault as a matter of law under the country’s Criminal Code and indeed, the charge most frequently laid in subsequent years has been aggravated sexual assault, the most serious of the three categories of sexual assault, which includes any assault that “endangers the life of the complainant.” 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 significant 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 (apart from a few organizations with a specifically legal mandate), have created a striking case study 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 any sexual encounter regardless of the degree of risk of transmission (Canadian HIV/AIDS Legal Network 2012; Elliott and Symington 2012a, b). The Ontario Attorney General also originally sought to advance this position, subsequently withdrawing its request for intervener status at the Supreme Court, but reinstated it in materials filed in other prosecutions 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 have elevated the question of whether there has been disclosure to the status of the single, overriding consideration in the application of the criminal law to HIV. In its paired rulings in the *Mabior* and *D.C.* cases, released in October 2012, the Supreme Court of Canada did not, strictly speaking, go as far as was urged by the attorneys-general. The Court did not impose a blanket obligation to disclose (known) HIV-positive status, and instead asserted that it was maintaining the “significant risk of serious bodily harm” test from its earlier ruling however, the Court ruled that there is a “significant risk” if there is a “realistic possibility” of HIV transmission declaring that, at least in

the case of penile–vaginal sex (the activity that was before the Court on the facts of the two cases), only if there had been both the use of latex condom and the HIV-positive partner had a “low” viral load (under 1,500 copies/mL) at the time of the encounter would there be no “realistic possibility” of transmission. By deciding that there is a duty to disclose before vaginal sex unless both a condom is used and a person’s viral load is low, the Court effectively decided that anything greater than this very strict measure of risk could trigger a duty to disclose. This approach was at odds with the suggestion by a majority of the Court in its earlier *Cuerrier* ruling that protected sex (i.e. using a condom) should or might not attract criminal liability, a proposition that had been explicitly or implicitly adopted in the bulk of the subsequent lower court rulings after *Cuerrier*.

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 the 1998 *Cuerrier* decision, 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 question arises, however, how well this model of human behaviour works in everyday instances of sexual encounter to bring about the objective of HIV prevention as enunciated by the Court.

Disclosure in Practice

The research record, however, shows just how problematic a reliance on disclosure can be in managing HIV risk (Simoni and Pantalone 2004; Adam 2006; Race 2012). 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 and 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; St de Lore et al. 2012). While some studies have found an association between disclosure and condom use, more have found no relationship (Galletly and 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 and 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

2005). Disclosure occurs more often with partners in an ongoing relationship; less often with new acquaintances (Bairan et al. 2007; 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 and 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 heighten the tension between approach and avoidant coping strategies (Chaudoir et al. 2011) resulting 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 and 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 % 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 and 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. This study sets out to examine how the court obligation to disclose plays out in negotiating potential romantic and sexual interactions in everyday life in the contemporary legal climate in Canada.

Methodology

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. The study proposal was reviewed in accord with the Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans by research ethics boards at the University of Windsor and the University of Ottawa. A community advisory committee with representatives from PHA, AIDS service and legal organizations plus the provincial ministry of health assisted the development of the research project. An honorarium of \$30 was provided to study participants in recognition of time and travel expenses.

The findings reported here draw on in-depth qualitative interviews conducted with 122 PHAs drawn from the largest cohort study of PHAs in Ontario, the Ontario HIV Treatment Network Cohort Study (OCS) (<http://www.ohntcohortstudy.ca/>) (N=958). Clinic staff provided information about this study to people coming in for a regular appointment at three clinics participating in the OCS in Toronto and one in Ottawa. Eighty-three percent of PHAs in Ontario live in those two cities. They were provided a toll-free number if they were interested in participating in the study and an interview was subsequently arranged.

An objective of recruitment was to attain a broad array 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. Of the 122 interviews, eight 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.

Semi-structured interviews explored such topics as: awareness of court cases and media coverage of criminal proceedings concerning HIV, the effects of the current public

climate around HIV and the law, views on responsibility in HIV transmission and ways in which the current legal climate may be entering into the conduct of sexual and romantic relationships. Interviews were transcribed, then examined for common themes using constant comparative analysis with NVivo8 software. More frequent occurring themes are reported first in the paper as a whole as well as under each subheading, followed by variations and less frequent themes.

Demographic Characteristics

Overall, the 122 participants in the qualitative interviews have the following demographic characteristics:

- Gender: male, 102 (74.1 %); female, 19 (25.9 %), (male to-female) transwoman, 1
- Age: 2 (1.6 %) 20–29 years old; 17 (13.9 %) 30–39; 52 (42.6 %) 40–49; 36 (29.5 %) 50–59; 15 (12.3 %) 60 or more.
- Sexual orientation: 79 (64.8 %) gay/homosexual; 36 (29.5 %) heterosexual; 7 (5.7 %) bisexual
- Ethno-racial identification: 83 (68.0 %) white; 24 (19.7 %)
- African/Caribbean; 10 (8.2 %) aboriginal; 10 (8.2 %) other (Asian, Latin American, Middle Eastern or no response)
- Income: 62 (52.8 %) earned less than \$20,000 per year; 31 (25.4 %) \$20,000–39,999; 29 (23.8 %) \$40,000 or more
- Education: 42 (35.0 %) high school; 39 (32.5 %) trade/ college/some university; 39 (32.5 %) university or post graduate degree

Impacts of Criminalization on Everyday Life

Focus groups with PHAs in Britain and Canada concerning criminalization have shown responses ranging from personal impact to heightened anxiety, including 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 and Dickson-Gomez 2009, 615). 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.”

The rising tide of prosecutions for non-disclosure and exposure to HIV in Ontario 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.

A sizeable contingent of study participants feels 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 among participants in this study, is people in their 40s and 50s. Many are in long-term relationships and others 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.

Criminalization and Heightened Vulnerability

The rising number of criminal cases results in many respondents reporting a heightened sense of fear and vulnerability. In response to the question, How do you feel the current public climate around HIV and the law is affecting HIV-positive people? The most common narrative theme centred on anxiety:

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)

For some, criminalization has made the already difficult area of pursuing intimate relationships an even more treacherous undertaking. In the context of discussing media coverage of HIV criminalization, these study participants remark,

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)

Even before the increasing prominence of criminalization of HIV in the public eye, many PHAs felt stigma and challenges in negotiating new relationships; criminalization appears to have amplified a sense of personal insecurity and uncertainty for many.

Shifted Burden of Proof

A predominant theme was 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)

The Court's explicit admonition that the "primary responsibility for making the disclosure must rest upon those who are aware they are infected" is not lost on PHAs. They, nevertheless, wonder about how disclosure is to be proven if worse comes to worst and a defence has to be mounted in court.

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)

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)

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 [paper]...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:

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. 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)

It's more of a moral issue of on the other person and I don't think the media has the right to put that person's name or picture and flash it all over the news. 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)

Like other stigmatized peoples, people living with HIV may come to feel that police and public officials will not provide them the protection accorded to other citizens but will presume that they are automatically suspect.

Someone within my home that I had [intended to have] 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.... I went to court, repeated appearances, this guy disappeared. He had a criminal record already.... He disappeared after 4 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)

This study participant did have charges laid against him in a situation where exposure to HIV was scarcely at issue. Only after many months were the charges dropped by the prosecutor before trial.

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)

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

Criminalization can compound other inequalities that already place an HIV-positive person in a vulnerable position reinforcing, for example, the difficulty that some

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

women experience as their male partners are able to ignore their wishes.

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)

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)

As criminal justice logic tends to start with the notion of autonomous individuals entering into voluntary contracts, in these instances, it pushes aside women's capability to assert the kind of responsibility demanded by legal precepts. In doing so, it reinforces gender inequality by holding women who feel subordinate in domestic relationships to the same standard as men who have greater power to assert themselves in the household.

Feeling Unaffected by Criminalization

Another set 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 larger OCS cohort from which interviewees were drawn, a minority (27 %) of male respondents report having had a casual male partner in the last 3 months and 7 % 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, sometimes in response to the difficulties anticipated in trying to meet new people while positive:

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)

It's more of a connection thing, a little bit of fellatio I suppose on their behalf and then not really a lot of satisfaction on my half for fear of infecting somebody first of all and this as well. So generally sex is not really about me any longer. 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)

Not all share the same sense of anxiety. Those who had been living with HIV for decades perceive 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 [gay] 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 prosecutorial attention. Others have accommodated themselves to the vicissitudes of dating while positive by preferring other HIV-positive partners, or feel unaffected because of their personal circumstances or the perception of the current legal climate compared to the 1980s.

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.

Situational Approaches to Disclosure

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 concerns about personal safety.

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

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)

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?).

2 On the HIV stigma campaign, see Adam et al. 2011. The tagline of the campaign posed the question: "If you were rejected every time you disclosed, would you?"

Yeah... 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. (O53, 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. (O13, heterosexual, female, 50s)

Universal disclosure may be more common among those who feel confident of the social support around them (Arnold et al., 2008) but for many, a more tentative approach is in order. Some articulate a standard that has been propounded by AIDS service organizations for quite some time: as long as safe sex is practised, disclosure is not obligatory. Disclosure may then be a process of assessment taking into account personal safety and the ability to manage information once it is disclosed.

Discussion

HIV litigation in Canada has become increasingly centred on the question of nondisclosure of HIV status to prospective sexual partners regardless of whether HIV transmission occurs or not. The increasing number of criminal prosecutions over the last decade and accompanying media attention have created a social climate perceived by many PHAs as one where they face preemptory judgment by the courts and public opinion. The result is widespread apprehensiveness, a heightened sense of vulnerability and considerable uncertainty about how to conduct oneself in a way that avoids unnecessary risk and balances multiple risks of prosecution, of adverse reactions to disclosure or of further loss of confidentiality through onward secondary disclosure.

This accretion of case law has created de facto public policy, ostensibly with a view to HIV prevention, but it is policy premised on a rational, contractual model of human interaction that does not necessarily or clearly advance that objective. The public enforcement of a norm of disclosure, through the penalty of possible criminal prosecution and imprisonment, generates potential double binds and disincentives to successful HIV avoidance in everyday life. By amplifying a sense of stigma and vulnerability, disclosure comes to feel even more difficult in a public climate of legal retribution. The expectation that disclosure

will happen consistently is undermined by a heightened sense of insecurity increased by the legal climate.

Strong reliance on, and enforcement of, a norm of disclosure proves to be a shaky foundation for HIV prevention in day-to-day practice. Increasing emphasis on disclosure undermines the message promoted by HIV prevention agencies that everyone must take responsibility to practise protected sex in order to avoid HIV, as it replaces a safe sex ethic with the presumption that unprotected sex is an acceptable default approach unless there is disclosure of sero-positive status by a partner, upon whom the obligation to disclose is placed despite the shadow of criminal prosecution creating a climate more hostile to disclosure. This normative shift creates a self-negating prophecy where vulnerability is heightened through the encouragement of unsafe sex.

Conclusion

The dominance of a legal discourse of full disclosure and rational contract-making in sexual interaction, then, proves to be difficult to carry out and is experienced as rife with ambiguities and tensions by those charged with realizing it in their everyday lives. While conceived as a regulation to improve HIV prevention, it is a judicial policy that may undermine a long history of messaging by AIDS service organizations and public health that encourages consistent safer sex practice as the most reliable way to avoid HIV transmission. More than a decade of experience with legal regulation in this area raises the question of whether people living with HIV are being held to an exceptional and unnecessarily strict standard of conduct when compared to people with other kinds of transmissible diseases. The current legal situation permits charges to be laid for failure to disclose even when risk of transmission is slight or negligible.

The experiences of people living with HIV in the current legal climate point to a need for prosecutorial guidelines to curb excessive and arbitrary laying of charges and for a better articulation of public health, community-based organizations, and the criminal justice system to divert genuine cases of problematic conduct toward more supportive models of case management. Fewer charges and diversion could, in turn, significantly decrease the tendency of police and media to construct images of demon infectors for public consumption, even before people facing charges have had a chance to be heard in court. Moves in this direction would be consistent with an emerging international consensus that "law enforcement authorities must not prosecute people in cases of HIV nondisclosure or exposure where no intentional or malicious HIV transmission has been proven to take place" (Global Commission on HIV and the Law 2012, 97) and likely place public policy on firmer footing regarding the exigencies of everyday life.

Acknowledgments

This study was made possible with the assistance of Robb Travers, Sean Rourke and Jason Globerman; advisory committee members Murray Jose, Rick Kennedy, Frank McGee, Eric Mykhalovskiy, Fanta Ongoiba, Ryan Peck, John Plater, Michael Sobota and James Watson and support by a grant from the Ontario HIV Treatment Network.

References

- Adam, B. (2005). Constructing the neoliberal sexual actor. *Culture, Health & Sexuality*, 7(4), 333–346.
- Adam, B. (2006). Infectious behaviour. *Social Theory and Health*, 4, 168–179.
- Adam, B., Elliott, R., Husbands, W., Murray, J., & Maxwell, J. (2008). Effects of the criminalization of HIV transmission in Cuenca on men reporting unprotected sex with men. *Canadian Journal of Law and Society*, 23(1–2), 137–153.
- Adam, B. D., Murray, J., Ross, S., Oliver, J., Lincoln, S., & Rynard, V. (2011). HIVstigma.com. *Health Education Research*, 26(5), 795–807.
- Arnold, E. M., Rice, E., Flannery, D., & Rotheram-Borus, J. (2008). HIV disclosure among adults living with HIV. *AIDS Care*, 20(1), 80–92.
- Bairan, A., Taylor, G., Blake, B., Akers, T., Sowell, R., & Mendiola, R. (2007). A model of HIV disclosure. *Journal of the American Academy of Nurse Practitioners*, 19, 242–250.
- Brenner, B., Roger, M., Routy, J.-P., Moisi, D., Ntemgwa, M., Matte, C., et al. (2007). High rates of forward transmission events after acute/ early HIV-1 infection. *Journal of Infectious Diseases*, 195, 951–959.
- Canadian HIV/AIDS Legal Network. (2012). Criminal prosecutions for HIV non-disclosure: Two cases before the supreme court of Canada. Toronto: Canadian HIV/AIDS Legal Network.
- Chaudoir, S., Fisher, J., & Simoni, J. (2011). Understanding HIV disclosure. *Social Science & Medicine*, 72, 1618–1629.
- De Wit, J., Ellard, J., Murphy, D., Zablotska, I., & Kippax, S. (2009). Sexual practices, serostatus disclosure and relationships. In S. Cameron & J. Rule (Eds.), *The criminalisation of HIV transmission in Australia* (pp. 100–107). Newtown: National Association of People Living with HIV/AIDS.
- Dodds, C., & Keogh, P. (2006). Criminal prosecutions for HIV transmission. *International Journal of STD & AIDS*, 17, 315–318.
- Dodds, C., Bourne, A., & Weait, M. (2009). Responses to criminal prosecutions for HIV transmission among gay men with HIV in England and Wales. *Reproductive Health Matters*, 17(34), 135–145.
- Driskell, J., Salomon, E., Mayer, K., Capistrant, B., & Safren, S. (2008). Barriers and facilitators of HIV disclosure. *Journal of HIV/AIDS & Social Services*, 7(2), 135–156.
- Elliott, R. (1999). *After Cuenca: Canadian criminal law and the non disclosure of HIV-positive status*. Montreal: Canadian HIV/AIDS Legal Network.
- Elliott, R., & Symington, A. (2012a). Mabiior and D.C.: does HIV non disclosure equal rape? (part 1). TheCourt.ca, February 7, 2012, online: <http://www.thecourt.ca/2012/02/07/mabiior-and-d-c-is-criminal-law-the-answer-to-non-disclosure-part-2/>.
- Elliott, R., & Symington, A. (2012b). Is criminal law the answer to HIV non-disclosure? (part 2). TheCourt.ca, February 7, 2012, online: <http://www.thecourt.ca/2012/02/07/mabiior-and-d-c-does-hiv-non-disclosure-equal-rape-part-1/>.
- Galletly, C., & Dickson-Gomez, J. (2009). HIV seropositive status disclosure to prospective sex partners and criminal laws that require it. *International Journal of STD & AIDS*, 20, 613–618.
- Galletly, C., & Pinkerton, S. (2006). Conflicting messages. *AIDS and Behavior*, 10, 451–461.
- Global Commission on HIV and the Law. (2012). *Risks, rights & health*. New York: UNDP, HIV/AIDS Group, Bureau for Development Policy.
- Hart, T., Wolitski, R., Purcell, D., Parsons, J., Gómez, C., & Seropositive Urban Men's Study Team. (2005). Partner awareness of the serostatus of HIV-seropositive men who have sex with men. *AIDS and Behavior*, 9(2), 155–166.
- Heaphy, B. (2001). The (im)possibilities of living as people with AIDS. In S. Cunningham-Burley & K. Backett-Milburn (Eds.), *Exploring the body* (pp. 117–136). New York: Palgrave Macmillan.
- Henriksson, B., & Månsson, S. (1995). Sexual negotiations. In H. ten Brummelhuis & G. Herdt (Eds.), *Culture and sexual risk*. Luxembourg: Gordon and Breach.

- Holt, M., Rawstorne, P., Worth, H., Bittman, M., Wilkinson, J., & Kippax, S. (2011). Predictors of HIV disclosure among untested, HIV-negative and HIV-positive Australian men who had anal inter course with their most recent casual male sex partner. *AIDS and Behavior*, 15, 1128–1139.
- Larcher, A., & Symington, A. (2010). *Criminal and victims? Toronto: African and Caribbean Council on HIV/AIDS in Ontario.*
- Mao, L., Crawford, J., Hoppers, H., Prestage, G., Grulich, A., Kaldor, J., et al. (2006). 'Serosorting' in casual anal sex of HIV-negative gay men is noteworthy and is increasing in Sydney, Australia. *AIDS*, 20(8), 1204–1206.
- Menadue, D. (2009). The impact of the criminalisation issue on HIV-positive people. In S. Cameron & J. Rule (Eds.), *The criminalisation of HIV transmission in Australia* (pp. 146–153). Newtown: National Association of People Living with HIV/AIDS.
- Mykhalovskiy, E., & Betteridge, G. (2012). Who? What? Where? When? And with what consequences? An analysis of criminal cases of HIV non-disclosure in Canada. *Canadian Journal of Law and Society*, 27(1), 31–53.
- Mykhalovskiy, E., Betteridge, G., Mclay, D. (2010). *HIV non-disclosure and the criminal law. Toronto: A report funded by a grant from the Ontario HIV Treatment Network.*
- Persson, A., & Newman, C. (2008). Making monsters. *Sociology of Health & Illness*, 30(4), 632–646.
- Public Health Agency of Canada. (2010). *Undiagnosed HIVinfections in Canada. HIV/AIDS Epi updates—July 2010. Ottawa: Public Health Agency of Canada.*
- Race, K. (2012). Framing responsibility. *Bioethical Inquiry*, 9, 327–338.
- Serovich, J., Oliver, D., Smith, S., & Mason, T. (2005). Methods of HIV disclosure by men who have sex with men to casual sexual partners. *AIDS Patient Care and STDs*, 19(12), 823–832.
- Siegel, K., Lekas, H., & Schrimshaw, E. (2005). Serostatus disclosure to sexual partners by HIV-infected women before and after the advent of HAART. *Women & Health*, 41(4), 63–85.
- Simoni, J., & Pantalone, D. (2004). Secrets and safety in the age of AIDS. *Topics in HIV Medicine*, 12(4), 109–118.
- St de Lore, J., Thiede, H., Cheadle, A., Goldbaum, G., Carey, J., Hutcheson, R., et al. (2012). HIV disclosure and subsequent sexual behaviors among men who have sex with men who meet online. *Journal of Homosexuality*, 59(4), 592–609.
- Stirratt, M. (2005). I have something to tell you. In P. Halkitis, C. Gómez, & R. Wolitski (Eds.), *HIV+ sex* (pp. 101–119). Washington: American Psychological Association.
- Symington, A. (2009). Criminalization confusion and concerns: the de cade since the Cuerrier decision. *HIV/AIDS Policy & Law Review*, 14(1), 5–10.
- Weait, M. (2007). *Intimacy and responsibility. New York: Routledge- Cavendish.*
- Welch Cline, R., & McKenzie, N. (2000). Dilemmas of disclosure in the age of HIV/AIDS. In S. Petronio (Ed.), *Balancing the secrets of private disclosures* (pp. 71–96). Mahwah: Lawrence Erlbaum.