

# *Criminalizing HIV Transmission and Exposure in Canada: A Public Health Evaluation*

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## **Introduction**

In April 2009, the Ontario Superior Court found Johnson Aziga guilty of first-degree murder for knowingly transmitting human immunodeficiency virus ("HIV"). Aziga had unprotected sex with women despite awareness that he had HIV, and did not disclose the illness to his partners. Two of the twelve complainants contracted HIV and later died from related illnesses, leading to the first-degree murder charges. The other complainants either did not contract HIV from Aziga or contracted it but are still alive, which led to charges of, and convictions for, aggravated sexual assault.<sup>1</sup>

Less than a year earlier in October 2008, Clato Lual Mabior was convicted in a Manitoba trial court for aggravated sexual assault, invitation to sexual touching and sexual interference for failing to disclose his HIV status to partners.<sup>2</sup> None of the six complainants contracted HIV. He was sentenced to 14 years in jail.<sup>3</sup> The Court of Appeal heard arguments in February 2010 and has reserved their decision.<sup>4</sup>

These cases have reinvigorated the debate about whether it is appropriate to use the criminal law in cases of HIV exposure and transmission resulting from sexual contact. This paper will evaluate the current legal context in Canada and will then evaluate arguments for and against such criminalization using a public health framework.

## **Legal Context in Canada**

Since 1989, Canadian courts have been willing to impose criminal sanctions on individuals for the transmission of, or exposure to HIV as a result of sexual contact. Charges have ranged from offences like nuisance to sexual assault, aggravated sexual assault and attempted sexual assault.<sup>5</sup> The Supreme Court of Canada first dealt with the issue in *R. v. Cuerrier*.<sup>6</sup> The Court unanimously held that an individual knowing of his or her HIV-positive status must inform sexual partners of that status and failure to do so can lead to criminal culpability in the form of aggravated assault charges. Numerous cases in Canada have since then affirmed this holding.<sup>7</sup> In fact, Canada has, per capita, "prosecuted more persons with HIV for HIV-related sexual offences than any other country."<sup>8</sup>

The Supreme Court in *Cuerrier* unanimously held that the failure of the defendant to disclose his status vitiated the consent of the complainants, resulting in sexual assault. The Court found that the lack of disclosure vitiated the complainants' consent, giving rise to a significant risk of serious bodily harm. The majority decision in *Cuerrier* concluded that sexual assault can be elevated to aggravated sexual assault where, in the commission of sexual assault, the defendant endangers the life of the complainant. The Court found that the risk of contracting HIV significantly endangered the lives of the complainants, justifying the aggravated sexual assault conviction.



The 2005 decision of the Crown in Ontario to charge Aziga with first-degree murder represented a significant divergence from the established principles governing the punishment of individuals who fail to disclose their HIV-positive status to partners. As such, a decade after the decision in *Cuerrier*, the issue of criminalizing HIV transmission is again up for debate in the public domain, this time with even more stunning consequences for individuals accused of transmitting HIV.

In order to obtain a conviction for murder the Crown must first establish that the accused committed homicide. This requires that the accused directly or indirectly caused the death of a human being.<sup>9</sup> Once this first element has been established, the Crown must establish that the homicide is a culpable one, being any of murder, manslaughter or infanticide.<sup>10</sup>

These three types of culpable homicide are each described further, with the requisite elements of murder being described at section 229 of the *Criminal Code*. Murder is established where it can be shown that the accused caused the death of the victim meaningfully or meant to cause bodily harm that the accused knew or was likely to know would cause the death of the victim and was reckless as to whether death ensued. Murder can also be established if a culpable homicide, including manslaughter, occurs during the commission of one of a number of enumerated offences, including sexual assault and aggravated sexual assault.<sup>11</sup> Once the Crown establishes murder in one of these two ways, they may demonstrate that the murder was first-degree rather than second-degree, which affects sentencing. First-degree murder can be demonstrated if it is planned and deliberate, or if the murder occurs at the same time as the commission of another offence, including sexual assault or aggravated sexual assault.<sup>12</sup>

Because a jury rendered the decision in *Aziga*, there is no record of how the judge instructed the jury as to the law: whether the instruction suggested that Aziga's acts were planned and deliberate, or whether the death of the victims occurred during a sexual assault or an aggravated sexual assault. *Aziga* intends to appeal his conviction and reasons offered by the Ontario Court of Appeal could provide some insight as to the trial judge's direction. The preliminary hearing indicates that the Crown proceeded on the basis of first-degree murder as a result of planning and deliberation but this may have changed.<sup>13</sup>

The Court in *Mabior* criminalized the accused's conduct through the use of aggravated sexual assault charges. In *Mabior*, none of the complainants were infected with HIV so the conviction was based on the reasoning in *Cuerrier*: exposing someone to HIV constitutes the endangerment of his or her life within the meaning of the aggravated assault provision of the *Criminal Code*. The majority of the Supreme Court in *Cuerrier* held that no harm need result for an aggravated sexual assault conviction, it is the risk to which the complainant is exposed that constitutes the harm. On this basis, the trial judge in *Mabior* found the accused guilty because he either had unprotected sexual relations with the complainants when his viral load was undetectable or had protected sexual relations with the complainants when his viral load was detectable. The trial judge exculpated the accused on charges of aggravated assault in the case of the two complainants with whom he had sexual relations with a condom during times when his viral load was undetectable, finding that this did not constitute sufficient risk.<sup>14</sup>

Clearly the *Criminal Code* provides the means of criminalizing HIV transmission through the use of murder and other charges. The question left to answer is whether it is sound and effective policy to pursue murder convictions, or any criminalization at all. The next section of this paper will evaluate the justifications offered for criminalizing HIV transmission and exposure, and the arguments against such criminalization.

## Public Health Framework

A number of authors have come up with frameworks, principles, goals, and analytical tools to evaluate public health efforts and a number of common themes emerge from their work.<sup>15</sup> These common themes will be used to evaluate the arguments for and against criminalization of HIV transmission and exposure. Incorporating the framework by Childress *et al.*,<sup>16</sup> and Singer's analysis of the SARS outbreak,<sup>17</sup> the following factors will be used in the analysis: effectiveness, least infringement, protection of communities from undue stigmatization, proportionality, necessity and protection of the public from harm. There are a number of compelling arguments supporting the view that criminalizing HIV transmission impedes public health goals and is an inappropriate policy position.<sup>18</sup> The focus of most of the literature on this topic is the denunciation of the routine application of criminal laws in an effort to reduce HIV



transmission, reserving a narrow role for the criminal law in exceptional cases.

## Undermining Arguments in Favor of Criminalization

Before turning to the arguments against criminalizing HIV exposure and transmission it is helpful to examine why criminalization was introduced in the first place and critically evaluate the common justifications for this policy approach. Criminal law serves many purposes: deterrence, denunciation, rehabilitation, and retribution.<sup>19</sup> Each of these purposes is reflected in the two typical justifications for criminalizing HIV transmission. The first justification for criminalizing HIV exposure and transmission is that it will reduce transmission rates by providing an incentive to infected individuals to change their behavior. The second is that incarceration will isolate an HIV-positive individual from the rest of society, thereby reducing that individual's ability to further spread the virus, thereby reducing transmission. The first justification, that behavioral change will result, is discussed further below where it is shown that HIV-positive individuals are not deterred by the prospect of criminal sanction.

The second justification is problematic because there is evidence that the incarceration of individuals with HIV actually increases transmission, at odds with the public health goals it seeks to achieve. This is in contravention of the goals of public health to protect the public from harm and to use effective interventions. The rate of HIV in prisons is ten times higher than in the general population,<sup>20</sup> which is the result of a number of factors. The use of incarceration as a means of reducing transmission is not the least restrictive option available, and therefore undermines public health ethics. First, HIV-positive inmates in Canada face difficulties in properly taking highly active antiretroviral treatment ("HAART"), although such medications are available to inmates. The situation is described in an info sheet on HIV/AIDS and hepatitis C in prisons:

Anecdotal evidence, epidemiological studies and coroners' inquests have shown that interruptions in HAART occur in prisons, both federally and provincially. Prisoners report going without their HAART medications for days, not getting their doses at the prescribed time of day, and not getting the correct dose.

Doses are missed because medications are not re-ordered, prisoners are too ill to get their medications from health services, lock-downs prevent them from getting to health services, and steps are not taken to ensure access to medications in segregation.<sup>21</sup>

The same info sheet notes that 90 to 95% of doses of HAART must be taken according to specific directions in order to ensure that the medication operates effectively to suppress HIV. The suppression of HIV is critical to ensuring the health of the patient, and in ensuring the

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reduced transmissibility of the infection to others. The proper use of HAART, which ensures both individual health and community protection, must be promoted in order to meet public health goals, both within and outside of jails. Impediments to HAART caused by incarceration raise concerns of distributive justice, as members of an already marginalized group face barriers to treatment that are not present in society at large, threatening their health and well being as well as the safety and health of their community.

Second, health promotion in detention facilities may fall short. While products designed to encourage safe-sex are available in federal penitentiaries, a number of provinces do not offer the same products as widely or discreetly. In Alberta, for example, a request must be made to the prison health service for condoms. In New Brunswick, Nunavut and Prince Edward Island, condoms and dental dams are not made available in prisons.<sup>22</sup> As of 2007, no detention facilities in Canada offer needle and syringe programs, despite international evidence that such programs do not increase drug use and are effective in controlling the spread of HIV and hepatitis.<sup>23</sup> Like the impediments to HAART, a lack of



access to products that promote both individual and community health and safety impedes the satisfaction of public health goals.

Finally, the justification that incarceration will reduce HIV transmission is erroneous, as it relies on an out-dated rationale that HIV will lead to death in a short period of time. As Grant notes, incarceration was once viewed as a *de facto* life sentence due to the short life expectancy of HIV-positive inmates.<sup>24</sup> The reality is that inmates with HIV will be released into the community. Incapacitation will serve no purpose in reducing transmission, but due to impediments to HAART and preventative measures, will likely increase transmission and compromise the health of all inmates. This does not reflect the need for efficacy in public health interventions.

### Arguments Against Criminalization

This section will canvass four arguments that demonstrate how criminalizing the transmission of or exposure to HIV does not advance, and in fact impedes, public health goals.

### Ineffective at Reducing Transmission

Commentators cite empirical evidence to show that the majority of HIV transmissions will not be affected by the deterrent power of the criminal law.<sup>25</sup> This is for two reasons.

First, the majority of new HIV cases are the result of transmission by a person who is unaware that they are HIV-positive.<sup>26</sup> The vast majority of transmission occurs by individuals who have recently acquired the virus, and are therefore both unaware of their infection and have a very high viral load, making them extremely infectious.<sup>27</sup> A recent report suggests that nearly 1 in 3 HIV-positive individuals are unaware of their status.<sup>28</sup>

Second, there is evidence to suggest that the criminal law has little power to affect risk behavior in a sexual setting.<sup>29</sup> This evidence suggests that the deterrent power of criminal sanctions will not influence individuals to change their behavior, and people are instead motivated to change their behavior based on the view that it is wrong to infect others with the virus.<sup>30</sup> As Grant points out, even using criminal sanctions as a last resort will not be effective in reducing HIV transmission, as the few individuals who refuse to comply with public health

orders and instructions will unlikely be swayed to change their behavior with the threat of criminal sanction.<sup>31</sup> Further, there is no data supporting the deterrent effect of criminal sanction, with no change in risk behavior in jurisdictions where transmission of or exposure to HIV is not criminalized versus jurisdictions where it is.<sup>32</sup>

### Stigma

One of the ethics of public health law described by Singer is to protect communities from undue stigmatization. The possibility of criminal sanctions for the transmission or exposure to HIV stigmatizes people with the infection.<sup>33</sup> Stigma in relation to HIV status is “often based upon the association of HIV with already marginalized and stigmatized behaviors, such as sex work, drug use and same sex and transgender sexual practices.”<sup>34</sup> Criminal law, rather than redressing the stigmatizing attitudes against HIV, instead promotes and reproduces the stigma in society at large.

As one policy document states, criminalization “combines the attitudes, perceptions and morality associated with HIV with those relating to criminality.”<sup>35</sup> Four consequences of criminalizing HIV transmission and exposure are discussed in this document, each of which contributes to the stigmatization of people with HIV.

First, criminalization “influences the relationship between health professionals and their clients.”<sup>36</sup> HIV-positive individuals have a reason to be less than forthcoming about their behaviors with public health officials if they know that such information can be used as evidence in a criminal case. The result is ineffective treatment and counselling. Second, criminalizing HIV impacts the self-esteem of HIV-positive individuals by deeming them “potential criminals.” This can affect the individual’s decision to seek treatment, counselling and other support. Next, the policy document notes that criminalizing HIV can affect general perceptions of HIV-positive individuals, as it equates HIV with criminality, which, “fosters prejudice and stigma” and hampers prevention efforts. Finally, the privacy concerns raised by criminalizing HIV transmission and exposure affect not only the potential accused, but also previous sexual partners of both complainant and accused.<sup>37</sup>

In addition to the four consequences discussed above, criminalization of HIV transmission and exposure



increases stigma in two additional and powerful ways. First, criminalization garners significant media attention that influences public perception of HIV and HIV-positive individuals. Second, the resulting HIV exceptionalism fuels and perpetuates stigma associated with HIV.

Significant media attention is focused on cases where HIV-positive individuals are subject to criminal sanctions. However, the number of people who knowingly infect others with HIV is miniscule in comparison to the number of infected individuals. The media frenzy creates a public perception that HIV-positive individuals frequently act in ways that jeopardize public health,

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adding to the stigmatization of infected people. The Joint United Nations Programme on HIV/AIDS (“UNAIDS”) cautions that inflammatory media coverage “contributes to the stigma surrounding HIV/AIDS and people living with the disease as ‘potential criminals’ and as a threat to the ‘general public.’”<sup>38</sup> As Alison Symington, a senior policy analyst with the Canadian HIV/AIDS Legal Network, notes, “the majority of the coverage about HIV/AIDS and people living with HIV that an average Canadian reads in the local newspaper or hears on the radio is about persons facing criminal charges for non-disclosure.”<sup>39</sup> Symington also remarks on the sensationalist approach of the media to such cases, which often misrepresents the facts or the charges, painting the accused people as intentional and devious. In addition to purely media sensationalism, police departments across the country are now publishing advisories with the name and photograph of HIV-positive individuals whom it is thought are engaging

in unprotected sex in the community. These advisories are picked up by the media, fuelling stigmatizing beliefs that people living with HIV are a public health threat and are devious and criminal.<sup>40</sup> HIV is the only medical condition where criminal charges are routinely pursued when an individual transmits or exposes another to the infection, even though other medical conditions that may likewise result in fatality or grievous bodily harm are not criminalized.

The criminalization of HIV transmission and exposure, without criminalizing the transmission of other infections, sexually transmitted or not, is not rational, and results in “HIV Exceptionalism,” whereby HIV is treated differently than other health threats on the basis of its being perceived as “exceptional” and warranting different treatment.<sup>41</sup> Advances in medicine since the initial discovery of HIV have significantly extended the life expectancy of infected individuals, and have significantly reduced the risk of transmission. Far from the “death sentence” that HIV was thought to be only a decade ago, it is now considered a chronic and manageable health condition.<sup>42</sup> Justification is required to explain the exceptional treatment of HIV transmission as compared to the transmission of other infectious diseases, some of which have far greater medical consequences. Further, the “exceptional” treatment of HIV, and of HIV transmission as compared with the transmission of other infections, results in increased stigma associated with the virus.

### **Personal Responsibility**

One of the requisite elements to sustaining assault or murder convictions in the context of HIV transmission is the vitiation of consent on the part of the complainant through inadequate information.<sup>43</sup> However, this does little to acknowledge the reality of interpersonal relationships and consensual interactions between adults. HIV has been a known risk for nearly 30 years. In the context of transmission through sexual contact, education campaigns promoting safer sex have existed in Canada for nearly as long.

The finding in *Cuerrier* that non-disclosure necessarily vitiates consent does not account for the fact that both partners have a responsibility when it comes to engaging in sexual acts with others. There is sufficient information and education in Canada for individuals to know how to practice safe sex, and to target the individual who



transmits the virus creates “a culture of blame, rather than one of ownership.”<sup>44</sup> As Justice Edwin Cameron points out, “the risk is part of the environment, and practical responsibility for safer sex habits rest on everyone who is able to exercise autonomy in deciding to have sex with another.”<sup>45</sup> Criminalizing HIV transmission or exposure, and placing the legal responsibility for transmission on the HIV-positive individual, “dilutes the public health message of shared responsibility between sexual partners.”<sup>46</sup> Indeed, it may also be misleading to confirm one’s status as “HIV-negative” as the seroconversion process delays the ability to test positive for HIV after infection. Both partners are responsible for engaging in safe sex, despite recent tests indicating a negative HIV result.

The shared responsibility of both partners to engage in safe sex may be increasingly important in the coming years as news of an HIV vaccine has recently made headlines.<sup>47</sup> Could an individual who fails to be vaccinated be held partially responsible for contracting HIV? While it may be years before an effective vaccine is introduced for widespread use, issues of personal responsibility are important considerations in the context of criminalizing HIV transmission and exposure.

### **Disincentive for Testing and Treatment**

Attaching criminal consequences to non-disclosure provides a disincentive for individuals to be tested for HIV for fear of criminal sanctions being imposed on them.<sup>48</sup> The result is that an HIV-positive individual will not know his or her status and will not receive appropriate treatment.

HIV testing and counselling is the most effective way to control the spread of the infection, as it is the most significant determinant of risk behavior.<sup>49</sup> An individual receiving a positive test result will then receive counselling, including information about treatment and reducing transmission risks through behavioral changes.<sup>50</sup> As numerous commentators have pointed out recently, the use of certain medications like HAART can reduce the viral load in HIV-positive individuals to such a point that the risk of transmission, even in a situation of unprotected sex, is zero.<sup>51</sup> This supports the view that testing and treatment are highly effective means of reducing the transmission of HIV. An HIV-positive individual will be dissuaded from disclosing his or her status to individuals he or she may have unintentionally exposed to HIV, for fear that criminal prosecution could

result. The result is that the individuals to whom the virus may have inadvertently been spread will not be tested or treated, potentially transmitting the virus on to others unknowingly.

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Further, advances in recent years in the use of prophylactics suggest that a person potentially exposed to HIV taking prophylactic drugs within a certain period following the exposure has a significantly reduced likelihood of acquiring HIV.<sup>52</sup> The disincentive to disclose places the entire community at risk by reducing the likelihood that the most effective way to reduce transmission, testing and treatment, will be sought. It further jeopardizes an individual’s health by denying him or her the ability to seek prophylactic treatment.

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

### **What Role Should Criminal Law Play?**

Commentators have made numerous suggestions for a more tailored approach to the use of criminal law in cases of HIV transmission. These will be reviewed, along



with concerns expressed regarding the practicality of pursuing criminal charges in these cases.

First and foremost, commentators suggest the use of general criminal law rather than HIV-specific statutes to deal with cases of HIV transmission. This lessens the perception that the ailment is being criminalized, and instead focuses on the wrongful conduct of the individual.<sup>53</sup> Canada's approach to criminalization adopts this strategy.

Second, the transmission of HIV ought to be subject to criminal sanction in limited situations, but exposure should not. This relates to the idea that actual risk of significant bodily harm ought to be required for criminalizing HIV transmission. Behaviors that are proven to reduce the risk of HIV transmission ought not to be criminalized, specifically practicing safe sex. Indeed, the World Health Organization ("WHO") suggests that engaging in unprotected sex with a very low or undetectable viral load ought not to be considered criminally reckless due to the very low risk of transmission.<sup>54</sup> Likewise, UNAIDS stresses: "sound data regarding the risk levels of various activities should guide the determination of what is considered a 'significant' risk of HIV transmission for the purposes of criminal liability."<sup>55</sup>

Third, intent to transmit the virus ought to be required to pursue criminal charges. This requires that the individual knew of his or her status as HIV-positive, failed to disclose it to sexual partners when asked, and engaged in risky behavior that he or she knew would be likely to result in harm to the victim. Criminal liability ought to attach only where there is deliberate deceit<sup>56</sup> operating to vitiate consent. Non-disclosure alone ought not to attract liability, as it undermines personal autonomy in decision-making, and does not reflect the personal responsibility of both partners to engage in safe sex.

The way the criminal law should be used in the limited situations described above should be limited to charges other than murder or attempted murder. Aggravated assault, for example, could be effectively used in these situations, as described by the court in *Cuerrier*, but only where there is a real risk of harm to the complainant, as evidenced by actual transmission. The causal link between HIV infection and death is arguably becoming more and more remote. The WHO characterizes HIV as a chronic manageable condition, which, with the appropriate

treatment, can lead to a full life.<sup>57</sup> Equating HIV with death adds to the stigma associated with HIV, and may be erroneous in the face of new treatment options.

The practical problems associated with pursuing criminal charges for HIV transmission or exposure must also be considered in determining the appropriate role for criminal law. The most significant of the practical problems is proof of causation beyond a reasonable doubt in prosecuting HIV transmission. Demonstrating that the accused was responsible for the complainant's infection requires evaluating the complainant's sexual

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history. The *Aziga* case was unique due to the rare strain of HIV carried by Aziga, and found in the complainants.<sup>58</sup> The use of complainants' sexual history by the defense raises a host of privacy and other concerns, and it is an area in which extreme care ought to be taken. Defense counsel and triers of fact must be vigilant not to "blame the victim" by using the complainants' sexual past as a means of exculpating the wrongful conduct of an accused. Likewise, the difficulty of obtaining accurate scientific evidence indicating the direction of transmission ought not to justify the dilution of evidentiary standards in such cases; rather, it should reflect the fact that criminal charges ought not to be pursued where there is a lack of evidence.

In order to ensure that the narrow focus of the criminal law for HIV transmission is maintained, it is important for law enforcement officials, prosecutors and the judiciary to be well informed of the appropriate legal limits to criminalization. Education about HIV transmission and



the risks associated with certain behavior is an important part of this. Two disturbing examples of judges with erroneous information about HIV show the significance of the lack of information on the part of some judges.

In 2007 a Justice of the British Columbia Supreme Court made the shocking statement that, “spitting in recent times has been associated with the very real risk of transmission of serious diseases such as HIV or hepatitis. Courts have taken judicial notice of this.”<sup>59</sup> In fact, spitting has never been shown to transmit HIV.<sup>60</sup> Another incident of judicial ignorance of HIV occurred in Ontario, where a Justice “mandated the use of face masks and rubber gloves in a trial involving a witness who was HIV-positive.”<sup>61</sup> These examples demonstrate how powerfully incorrect information can affect the procedural or substantive rights of an accused.

The WHO stresses that accurate information is required in criminal cases involving HIV transmission. Information in relation to the fallibility of phylogenetic testing, for example, presented to prosecutors and the judiciary, can assist in both prosecutorial discretion and in reducing the likelihood of convictions based on fallible scientific proof of transmission.<sup>62</sup>

### **Alternatives to the Criminal Law**

The above discussion on the limits of criminalizing HIV transmission and exposure reveals the public health strategies that are most effective at reducing HIV transmission. Voluntary and confidential testing is required to promote testing by individuals who may have reason to suspect their infection. Ensuring the results of these tests remain confidential is an important factor in inducing individuals to participate in testing. An important aspect of the confidentiality is the inability of prosecutors to use statements made to public health authorities in criminal proceedings, which has been established in Ontario.<sup>63</sup>

Coupling voluntary and confidential testing with adequate pre- and post-testing counselling has been shown to be an effective way to reduce risk behavior by HIV-positive individuals.<sup>64</sup> Counselling and education targeted at HIV-positive individuals about the state of the law in their jurisdiction have been recommended by the WHO as a means to ensure individuals are aware of the possible criminal sanctions they face, and of how to avoid being criminalized, for example, by engaging in

safe sex, obtaining treatment, and disclosing their status to partners where required.<sup>65</sup>

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

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

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

In Ontario, the *Health Protection and Promotion Act* (the “HPPA”)<sup>66</sup> gives the Chief Medical Officer of Health and subordinate officers of health broad powers in relation to public health matters. Similar legislation is in place across the country. The HPPA defines acquired immune deficiency syndrome, but not HIV, which would be more appropriate, as both a reportable and communicable disease. Section 22 of the HPPA permits written orders to be given to individuals who pose a significant public health threat, mandating that they do or not do certain activities. Failure to comply with such orders constitutes an offence, and fines can be up to \$1,000 per day of the violation. Orders can also include directions to take certain treatment, or to refrain from engaging in certain behavior. These public health measures must, like criminal laws, be used sparingly and only when absolutely required for the health and safety of individuals and the community at large. Effective oversight and transparency of the use of coercive



measures are required to ensure that public health law's powers are not used to further marginalize or stigmatize individuals.

The use of public health interventions rather than criminal law offers a more flexible and less blunt means of dealing with HIV transmission, and adopting public health interventions rather than using criminal law sanction accords with the recommendation of UNAIDS.<sup>67</sup>

## Conclusion

This paper reviewed Canada's current policy on the criminalization of HIV transmission and exposure. The arguments for and against criminalization from a public health perspective were examined, coming to the conclusion that use of the criminal law ought to be reserved for exceptional cases of HIV transmission, where the evidentiary burdens on the Crown can adequately be met. This analysis also shows that the use of the criminal law undermines ethics and goals of public health, rather than enhancing them. Finally, a review of public health initiatives that can be used to reduce the transmission of HIV were presented as alternatives to the routine criminalization of HIV transmission.

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## Endnotes

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- 3 The duration of Mabior's sentence is likely heavily influenced by the other convictions, including his sexual relationship with a 12-year old.
- 4 "Final arguments in appeal of HIV man convicted of sex assault," online: cbcnews <<http://www.cbc.ca/canada/manitoba/story/2010/02/10/man-mabior-appeal-hiv-disclosure.html>>.

- 5 For an exhaustive discussion of the progression of criminalization of HIV transmission and exposure resulting from non-disclosure in sexual contact, see: Isabel Grant, "The Boundaries of the Criminal Law: the Criminalization of the Non-disclosure of HIV" (2008) 31 Dal. L.J. 123.
- 6 (1998) 2 S.C.R. 371, [1998] S.C.J. No. 64 [Cuerrier].
- 7 See: *R. v. Williams*, 2001 NFCA 52, 205 Nfld. & P.E.I.R. 1, aff'd 2003 SCC 41, [2003] 2 S.C.R. 134; *R. v. Walkem*, (2007) O.J. No. 186, 73 W.C.B. (2d) 145; *R. v. Iamkhong*, 2009 ONCA 478, [2009] O.J. No. 2446; *R. v. Miron* (2000), 174 Man. R. (2d) 52, [2000] M.J. No. 500; *R. v. McGregor*, 2008 ONCA 831, 94 O.R. (3d) 500.
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- 10 *Ibid.*, s. 222(4).
- 11 *Ibid.*, s. 230.
- 12 *Ibid.*, ss. 231(2), 231(5).
- 13 *R. v. Aziga*, [2005] O.J. No. 5983.
- 14 *Supra* note 2 at paras. 143, 151.
- 15 See e.g. Stephanie Nixon *et al.*, "Public Health Ethics" in Tracey M. Bailey, Timothy Caulfield & Nola M. Ries, eds., *Public Health Law and Policy in Canada*, 2<sup>d</sup> ed, (Markham: LexisNexis Canada, 2008) 37.
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