



Canadian HIV/AIDS  
Legal Network | Réseau  
juridique canadien  
VIH/sida

## **The Criminalization of HIV Transmission and Exposure**

**Justice Edwin Cameron**  
Constitutional Court of South Africa

**Public Lecture hosted by the Canadian HIV/AIDS Legal Network**  
Osgoode Hall, Toronto  
Friday, June 12, 2009

**1<sup>st</sup> Annual Symposium on HIV, Law and Human Rights**  
June 12–13, 2009

# **The Criminalization of HIV Transmission and Exposure\***

**by Justice Edwin Cameron**  
**Constitutional Court of South Africa**

## **Introduction**

It is a privilege to have such a distinguished and diverse audience, and to be hosted by the Canadian HIV/AIDS Legal Network, whose meticulous professionalism and thoughtful activism have made it a world leader.

And it is a privilege, also, to be speaking to a topic that is simultaneously intellectually intriguing, socially pressing and politically fraught for those concerned to ensure justice and rationality in the AIDS epidemic.

Allow me to address it in the style of a good Presbyterian sermoniser (for my paternal grandparents were Scots): I will first tell you what I'm going to say, then I will say what I want to say, and then conclude by saying what I've said.

## **Summary**

My main theme is that the AIDS-rights movement must pick its way carefully through the political and conceptual complexities of the criminalization debate.

That involves three tasks, one strategic and moral; a second reflective; and a third political and organisational.

The first is that of turf-definition.

We must start by granting that the criminal law has a proper and useful role to play in public health emergencies. This involves accepting not only that persons with HIV who expose others to infection may in some circumstances legitimately face prosecution, but that to prosecute them will on occasion be right.

More important than resisting all prosecutions is to define with care the circumstances in which criminal laws and prosecutions are truly *not* justified.

Then follows the task of understanding and insight.

We must try to comprehend why unjustified and unjustifiable laws are enacted and prosecutions pursued, for our arguments and strategic positions must be based on insight. And last there is the job of consolidating forces.

We must unite to address the causes of such unjust laws and to resist their effects.

In short, the criminalization debate is about picking our turf, cutting loose from it what is indefensibly beyond it, and uniting sensibly to resist encroachments on it.

---

\* I am most grateful for thoughtful assistance and vigorous discussion to my law clerks Nick Ferreira and Chesa Boudin, and for extensive comments to Richard Elliott of the Canadian HIV/AIDS Legal Network.

And if that all sounds rather serenely abstract, let me get practical straight away.

### **Scope of debate**

When we talk of the “criminalization of HIV” we mean both enacting laws specifically directed to punish behaviour that may transmit HIV, and the application of general laws in a way that targets those with HIV who have acted in that way.

### **The surge of criminalization**

The global trend towards criminalization of HIV is accelerating, with significant human and legal consequences.

Canada owns the dark distinction of being a world leader in HIV-related criminal prosecutions. This country has, per capita, prosecuted more persons with HIV for HIV-related sexual offences than any other country.<sup>1</sup> More than 90 people with HIV have been prosecuted, and almost 70 convicted, of criminal HIV exposure or transmission in Canada since the late 1980s.<sup>2</sup> I return to the details of your country’s record soon — but Canada is just one of many jurisdictions that seem increasingly to be invoking the criminal law against people with HIV.

*There is the dismal Texas spitting prosecution:* Since 1997 there have been 16 successful prosecutions in Texas for HIV exposure or transmission, the most recent at the end of May 2009.<sup>3</sup>

In 2008, a homeless man was sent to jail. But he was convicted of committing a serious offence while being arrested for drunk and disorderly conduct — namely, harassing a public servant with a deadly weapon.

Because of his past encounters with the law, the system ratcheted up the gravity of what he did, and he ended up being sentenced to 35 years in jail — of which he must serve at least half before he can apply for parole.<sup>4</sup>

The “deadly weapon” the man used was his saliva. It was alleged to be “deadly” because he had HIV. He was jailed because he spat at the officers who were arresting him.

According to assured scientific knowledge, after nearly three decades, saliva has never been shown to transmit HIV.<sup>5</sup> So the “deadly weapon” was no more than a toy pistol —

---

<sup>1</sup> “Guilty verdict in first ever murder trial for sexual HIV transmission”:

<http://www.aidsmap.com/en/news/779517F3-B26C-473F-B809-58C1548E4A91.asp>.

<sup>2</sup> George House, “Canada — HIV Transmission ‘Murders.’” *George House Trust*. Available at [http://www.gh.org.uk/news/article/38384/08/04/2009/Canada\\_-\\_HIV\\_Transmission](http://www.gh.org.uk/news/article/38384/08/04/2009/Canada_-_HIV_Transmission) Canadian HIV/AIDS Legal Network, “Cases of Criminal HIV Transmissions and Exposures” (last updated June 1, 2009), data on file.

<sup>3</sup> See <http://criminalhivtransmission.blogspot.com/>

<sup>4</sup> G. C. Kovach, “Prison for man with H.I.V. who spit on a police officer”, *New York Times*, 16 May 2008.

and it was not even loaded. Increasing the severity of his offence because he had HIV was thus plain wrong.

Lest you think such a case reflects a particular propensity toward overly harsh reaction in Texas, let me note the earlier case of *Thissen* here in Ontario (1996), in which a sex worker with HIV was sentenced to imprisonment for 2 years less a day for biting an undercover police officer on the hand during a scuffle as he arrested her. She pleaded guilty to the offence of aggravated assault — a charge laid on the far-fetched supposition that the bite endangered the officer's life. Notwithstanding the absence of any significant risk of transmitting HIV via such a route, and the fact that bites have played no role in the spread of the epidemic, the sentencing judge adverted to "the enormity of the consequences [of the epidemic] to individuals and society as a whole," and concluded that "the incidence of HIV/AIDS is so great that it is a known worldwide health menace." The Crown requested imprisonment for three to four years. The judge agreed that such a lengthy sentence was appropriate but refused to impose a sentence whose length (by virtue of exceeding 2 years) would require incarceration in the federal correctional system "because of a lack of facilities in federal institutions in this province for the custody and care of inmates infected with HIV/AIDS." While the concern for the health of the HIV-positive accused in prison was commendable, it is hard to escape the conclusion that the police, prosecution and sentencing judge overreacted dramatically and with no basis in science, largely because of misinformation and stigma related to HIV.

*Then there is the shocking case of the Iowa gay man:* in April 2009 a gay man in Iowa was sentenced to 25 years in prison, required to register as a sex offender and undergo a sex offender treatment program for not disclosing his HIV status prior to a one-off sexual contact he had with a man he met online.<sup>6</sup> There was no transmission of the virus.

*There is the appalling case of the woman from Zimbabwe:* in 2007, a 26-year-old woman living with HIV from a township near Bulawayo was arrested for having unprotected sex with her lover. The crime of which she was convicted was "deliberately infecting another person."

The strange thing is, tests on her lover revealed he did not have HIV. The woman was receiving anti-retroviral therapy, so that is not surprising.<sup>7</sup> Before sentencing her, the court tried to get a further HIV test from the lover — even though it was reported that he did not want to proceed with the charges.<sup>8</sup> She was eventually sentenced to a suspended

---

<sup>5</sup> Centers for Disease Control, "Contact with saliva, tears, or sweat has never been shown to result in transmission of HIV," (last reviewed and modified October 20, 2006) online at [www.cdc.gov/hiv/resources/qa/qa37.htm](http://www.cdc.gov/hiv/resources/qa/qa37.htm).

<sup>6</sup> See materials posted by E.J. Bernard at <http://criminalhivtransmission.blogspot.com/2009/05/iowa-gay-man-gets-25-years-for-one-time.html>

<sup>7</sup> See P. Vernazza et al, "Les personnes séropositives ne souffrant d'aucune autre MST et suivant un traitement antirétroviral efficace ne transmettent pas le VIH par voie sexuelle," *Bulletin des médecins suisses* 89(5), 2008.

<sup>8</sup> Reported in the (Zimbabwe) *Herald*, 2 April 2008.

term of five years' imprisonment.<sup>9</sup> The threat of imprisonment, and the shame and ordeal of her conviction, will continue to hang over her.

The statute under which she was convicted, s. 79 of the Zimbabwe Criminal Law (Codification and Reform) Act 23 of 2004, is an extraordinary piece of legislation. It does not make it a crime merely for a person who knows that he or she has HIV to infect another. It makes it a crime for anyone who realizes “that there is a real risk or possibility” that he or she might have HIV, to do “anything” that he or she “realises involves a real risk or possibility of infecting another person with HIV.”

Although the offence is termed “deliberate transmission of HIV,” you can commit it even if you do not transmit HIV. In fact, you can commit it even if you do not have HIV.

What is more, the wording of the Zimbabwe law is wide enough to cover a pregnant woman who knows she has, or fears she may, have HIV. For if she does “anything” that involves a possibility of infecting another person — such as giving birth or breast-feeding her newborn baby — the law could make her guilty of deliberate transmission — even if her baby is not infected and the alternative is to abort or watch the baby starve.<sup>10</sup>

In all cases, the law prescribes punishment of up to twenty years in prison.

*There is the forbidding Sierra Leone statute:* lawmakers there have enacted a statute that requires a person with HIV who is aware of the fact to ‘take all reasonable measures and precautions to prevent the transmission of HIV to others’ — and it expressly covers a pregnant woman.<sup>11</sup> It requires her to take reasonable measures to prevent transmitting HIV to her fetus. This in a context where medicines that can reduce or prevent transmission are not always made available and where many people do not have control over all aspects of their sexual life.

There is a depressing super-abundance of examples that highlight the ways in which these laws stigmatize and criminalize a status rather than serve any useful public policy function:

- *Egypt:* in February 2008, Human Rights Watch reported that men are being arrested merely for having HIV under article 9(c) of Law 10/1961, which criminalizes the “habitual practice of debauchery [fujur]” — a term used to penalize consensual homosexual conduct.<sup>12</sup>
- *Switzerland:* in June 2008, the highest court in Switzerland held a man liable for negligently transmitting HIV to a sexual partner when he knew that a past partner

---

<sup>9</sup> *Herald*, 8 April 2008.

<sup>10</sup> Contrast *Johnson v. State*, 602 So.2d 1288 (Fla. 1992) (holding that a mother may not be convicted of delivering narcotics to children through the umbilical chord), which runs counter to the apparent effect of the Zimbabwean law.

<sup>11</sup> Sierra Leone’s Prevention and Control of HIV and AIDS Act of 2007, s. 21, at [www.sierra-leone.org/Laws/2007-8p.pdf](http://www.sierra-leone.org/Laws/2007-8p.pdf).

<sup>12</sup> For details of these allegations, see the letter of protest at [www.hrw.org/english/docs/2008/04/07/egypt18439\\_txt.htm](http://www.hrw.org/english/docs/2008/04/07/egypt18439_txt.htm).

- had HIV, even though he believed, because he experienced no seroconversion symptoms, that he himself did not have HIV<sup>13</sup> — though, more encouragingly, the Geneva cantonal court in February 2009 acquitted a man in a not dissimilar case on the basis of an undetectable viral load (and other pertinent criteria).<sup>14</sup>
- *Singapore*: in July 2008 a man with HIV was sentenced to a year in prison for exposing a sexual partner to the virus. The sex act in question deserves explicit mention. He fellated his “victim”. The risk to the receiving partner was minimal, if not non-existent.<sup>15</sup>
  - *New Zealand*: in June 2009 a gay man was charged for wilfully causing or producing a sickness or disease after unintentionally transmitting HIV to his consenting partner. He is the first ever to be charged solely under section 201 of the Crimes Act which dates back to 1961. He faces up to 14 years in prison.<sup>16</sup>
  - *Arkansas*: also in June 2009, a 17-year-old high school student was arrested under an HIV disclosure law for failing to inform his consenting partner of his status before unprotected sex. He was charged as an adult and faces up to 30 years in prison if convicted. The charge does not appear to relate to transmission, but only to non-disclosure.<sup>17</sup>
  - *Washington State*: also in June 2009, a man with HIV was arrested under an HIV exposure and transmission law following a complaint from a bisexual married man whom he met on the internet for casual sex. The statute criminalizes only the person with HIV and the man has pled guilty and is currently awaiting sentencing. His case likewise does not rest on transmission, but only on exposure.<sup>18</sup>

### **And Canada?**

Mr Johnson Aziga recently became the first person, apparently anywhere in the world, to be convicted of first-degree murder for sexual transmission of HIV. Mr Aziga reportedly had unprotected sex with 13 women after he knew of his HIV status and seven of those women later tested positive themselves. Two of the women subsequently died from AIDS-related cancers. The women alleged that Mr Aziga had infected them with the virus, that he had not disclosed his status to them before they had unprotected sex and in some cases had actively deceived them, and that, had he disclosed, they would not have had sex with him. A jury found him guilty of two counts of first-degree murder, and several other counts of aggravated sexual assault.<sup>19</sup>

Naturally I express only very tentative views on the actual facts or findings in *Aziga*, particularly since sentence is still pending, as is a possible appeal. But it is appropriate in

---

<sup>13</sup> See materials posted by Edwin J Bernard at <http://criminalhivtransmission.blogspot.com/>

<sup>14</sup> See Edwin J Bernard, “Switzerland: Geneva Court of Justice accepts ‘Swiss statement’, quashes HIV exposure conviction”, available at <http://criminalhivtransmission.blogspot.com/2009/02/switzerland-swiss-courts-accept-swiss.html>; *Procureur Général c. “S”*, Arrêt, Cour de Justice (Chambre pénale), République et canton de Genève, 23 février 2009, online via <http://criminalhivtransmission.blogspot.com>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Canadian HIV/AIDS Legal Network, “Criminal Law and cases of HIV transmission or exposure,” 13 *HIV/AIDS Policy & L.R.* 33, 33-34 (2008).

an AIDS-rights context to say that *Aziga* may offer a good instance of narrowly-tailored circumstances in which criminal liability is warranted: if it is ultimately determined that the prosecution has proved, beyond a reasonable doubt, that the defendant *intended* to cause the women bodily harm (that is, infection with HIV) that he knew was likely to cause death and was reckless as to whether death ensued, then he would fall within the UNAIDS delineation, and mine, of a justified prosecution. Whether that formulation ultimately applies in the *Aziga* case may yet be revisited by an appellate court.

The trouble is that exceptional cases like that of Mr *Aziga* — and the sensational murder convictions secured there — may be seized as justification for a broader push for criminalization. And indeed in practice, the application of HIV criminalization codes usually has far less warrant.

In this regard, perhaps even more troubling are two very recent cases in Toronto — *Mahmoudi* and *Davis* — in which, as best can be inferred from the evidence currently available on the public record, the police have laid “attempted murder” charges based solely on the allegation of not disclosing HIV positive status before unprotected (and otherwise consensual) sex. This may be the ripple effect of the murder convictions in *Aziga* even though it seems questionable whether merely not disclosing HIV status should suffice to draw the conclusion that there was intent to infect at another person — that seems a leap of considerable proportions, although too often media reporting on such difficult cases have conveyed such an impression. If this is, in fact, an indication of the “new normal” practice by police and prosecutors seeking to expand upon the *Aziga* convictions, the worrisome question of over-charging (surely an abuse of process) may arise — something to which the defendants’ lawyers, and activists — and, one hopes, judges — will no doubt be alert.

Another indication of what Richard Elliott has dubbed the “creep of criminalization” in Canada may arise from the prosecution of people merely for oral sex without disclosure, another potentially emerging trend that should be resisted. There appears to be at least one case currently before a Canadian court in which the accused is being prosecuted for aggravated sexual assault for allegedly not disclosing his HIV-positive status even though only acts of oral sex are alleged. Yet oral sex has generally been characterized as carrying at most a “low risk” of transmission — which could be said to fall well below the “significant risk” threshold established by the Supreme Court of Canada some 11 years ago in the leading judgment, *R. v. Cuerrier* (to which I will return). Indeed, I note that a number of years ago, in the *Edwards* case in 2001, a prosecutor and judge in Halifax quite rightly observed that “unprotected oral sex is conduct at a low risk that would not bring it within [the aggravated assault section] of the Criminal Code and had only unprotected oral sex taken place [in that case], no charges would have been laid.” It is disturbing to contemplate that even this sensible limit on the resort to the criminal law may now be at risk from overzealous police and prosecutors.

*R v Mabior*, a case currently before the Manitoba Court of Appeal, is just as troubling. There, the accused was last year convicted on several charges of aggravated sexual

assault, which carries a maximum penalty of life imprisonment.<sup>20</sup> Despite knowing that he had HIV, despite being advised by health care workers of the danger of infection to his sexual partners and despite being warned that he should disclose his status to them and always practise safer sex, he had unprotected sex with several women.<sup>21</sup>

In all cases the sex was non-coercive.

At the time of conviction, none of the complainants had been diagnosed with HIV. The defendant in other words was convicted for conduct that was patently reckless toward others, but which had no confirmed deleterious results.

The complainants' freedom from HIV infection is surely significant.

It makes it necessary to ask for what he was being punished: was it for his bad attitude, his bad deeds, or their bad consequences?

Convicting a defendant of aggravated sexual assault when the sex acts in question were non-coercive and did not lead to infection seems troublingly excessive, particularly since the *Mabior* approach seems entail that to escape liability for non-disclosure the person with HIV must both have an undetectable viral load and use a condom; but is a criminal even when he uses a condom but has detectable virus in his body, or even when he has an undetectable viral load and fails to use a condom.

The absence of transmission brings to mind broader considerations. Sometimes luck plays a determining factor in the fair application of the law. Two people may engage in the same reckless but unintentional behaviour; one may have the bad luck that accidentally a bad consequence ensues, while the other may have the good fortune to come through without incident. In the first situation a tragedy ensues and criminal charges can be brought but in the other, where no harm occurs, there should ordinarily be no charge — unless we now wish to equate non-disclosure of HIV in sex with crimes like drunk driving, which are punished even when no bad consequence ensues.

I would suggest that is excessive and unwarranted. Mr Mabior and his partners, it seems, were fortunate in that no transmission occurred. The charges on which he was convicted fail to reflect that crucial factor. But the implications of his conviction bring to mind broader considerations.

### **HIV prosecutions and “status crimes”: the continually pivotal role of stigma**

Some of the instances I have mentioned bring to mind the statute that California passed in the 1960s that made it a criminal offence for a person “to be addicted to the use of narcotics”. A person was continuously guilty of this crime, even if he had never used or possessed any narcotics within the State, and even if he had not been guilty of any harmful behavior.

---

<sup>20</sup> *HIV/AIDS Policy & Law Review*, Vol.14 No.1, May 2009 p5.

<sup>21</sup> *R v Mabior*, 2008 MBQB 201at para 42.

The opinion of Justice Stewart for the majority in the Supreme Court of the United States in *Robinson v California* stated that “It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment”.<sup>22</sup>

Yet one wonders how close some of these instances come to what Justice Stewart seems to have thought impossible.

It is no great step from punishing conduct by someone with a “venereal disease” which has no adverse consequence — as many of the statutes and prosecutions I have mentioned do — to punishing the mere status of having the disease.

And indeed some of the sentences I mentioned earlier are shockingly long. It is a matter for dismay that persons who have not actually inflicted physical harm or damaged any property or otherwise caused injury could be locked away for these lengths of time. It must be asked whether sentences as harsh are imposed in other cases of assault, where the complainant consented to the activity, but where serious harm did in fact result? A review of cases in various jurisdictions suggests a disproportionate harshness in sentencing of those convicted of “HIV crimes”.

The inference that undue reaction to the defendants’ HIV status played a significant, probably pivotal, part in convicting and imprisoning these defendants, is unavoidable.

In short: they were punished less for what they did than for the virus they carried. A similarly situated person engaging in the same acts but without HIV would almost certainly not be charged with any crime. HIV status made the difference.

Stigma and lack of knowledge and plain phobia about AIDS play themselves out repeatedly in the epidemic:

- In May 2009 a member of the Swaziland parliament called for people with HIV to be branded on the buttocks after mandatory testing, so that “[b]efore having sex

---

<sup>22</sup> *Robinson v California* 370 U.S. 660; 82 S. Ct. 1417; 8 L. Ed. 2d 758; 1962 U.S. LEXIS 850 (man convicted on basis of a police officer's testimony that he had scar tissue and discoloration on the inside of his arm, as well as needle marks and a scab below the crook of the elbow, which the officer believed was the result of injections by hypodermic needles; the officer also testified that he admitted to occasional use of narcotics – but at the time of his arrest, the defendant was not engaged in any illegal conduct, and there was no proof that he had actually used narcotics within California).

- with anyone, people will have to check their partners' buttocks before proceeding.” (He has since retracted and apologised.)<sup>23</sup>
- In December 2007, a trial judge in Barrie (Ontario), upon learning that a witness was HIV+ and hepatitis C positive, ordered that he be masked or to testify from another room. (I gather that a complaint to the Ontario Judicial Council has prompted recognition that such orders are unacceptable.)<sup>24</sup>
  - Here in Toronto (and elsewhere in Canada, with apparently distressing frequency), the police release the names and photographs of people suspected of having unprotected sex without disclosing their HIV status. They hold press conferences and issue “public safety alerts”, calling for anyone who has had sexual contact with such persons to contact the police.<sup>25</sup> Media outlets such as the *Toronto Sun* report such cases under headlines like “Were you with this man?”<sup>26</sup>
  - As I was preparing this lecture last Thursday, another news release from the Toronto police came through: “Public Safety Alert, Man faces two charges in Attempt Murder investigation, Carlton Davis, 46, Photograph of accused released, 13 Division”.<sup>27</sup>

The *Toronto Star* and CityTV News, among others, relayed the report, name, photograph and police appeal included.<sup>28</sup>

One wonders whether the ensuing public debate leaves space for asking who the accused's sexual partners were, and what responsibility they take, 28 years after HIV became a known reality on the continent of North America, for having unprotected sex with him.

The mediaeval dynamics of public shaming, of gross but partial community condemnation, and of crudely emotive responses instead of considered reactions, do not seem too far away.

### **The main arguments against criminalization**

There is no doubt that some of the behaviour of those who have been prosecuted is blameworthy. *Some* of these individuals do not evoke much sympathy. *Some* may deserve punishment for what they have done. But policy makers, law enforcement officials,

---

<sup>23</sup> “Brand HIV-positive people on the buttocks”, originally published on page 1 of the Johannesburg *Sunday Independent*, 24 May 2009: The MP has since apologised and withdrawn the remarks. [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=68&art\\_id=vn20090524074908246C297054](http://www.iol.co.za/index.php?set_id=1&click_id=68&art_id=vn20090524074908246C297054)

<sup>24</sup> Add cite – see <http://www.thestar.com/News/Ontario/article/298672>.

<sup>25</sup> “Man accused of not disclosing HIV status to partner”, article on CTV website: [http://toronto.ctv.ca/servlet/an/local/CTVNews/20090507/police\\_accused\\_090507/20090507/?hub=TorontoNewHome](http://toronto.ctv.ca/servlet/an/local/CTVNews/20090507/police_accused_090507/20090507/?hub=TorontoNewHome)

<sup>26</sup> *Toronto Sun* website: <http://www.torontosun.com/news/torontoandgta/2009/05/08/9390346-sun.html>

<sup>27</sup> See <http://www.torontopolice.on.ca/newsreleases/release.php?id=16560>, accessed on Thursday 4 June 2009.

<sup>28</sup> See *Toronto Star*, “HIV Positive man faces attempted murder charge”, <http://www.thestar.com/article/645581>, accessed Thursday 4 June 2009; *CityNews*, “Cops Issue Warning About HIV Positive Man After He's Charged With Attempted Murder”, June 4, 2009, [http://www.citynews.ca/news/news\\_35089.aspx](http://www.citynews.ca/news/news_35089.aspx).

prosecutors and judges must tread carefully. There are profound ethical and legal problems that arise from using the blunt instrument of the criminal law.

And the central part that stigmatised and stigmatising reactions to the disease itself – in contradistinction to anything that those with it have done – continue to play in criminalization should be a profound source of worry.

Hence the central arguments against criminalization:

**FIRST: Criminalization is misconceived — it is ineffective at preventing transmission.**

A motive justification behind many of the laws and prosecutions seems to be the wish to inhibit the spread of HIV.

If this is so, the laws and prosecutions are misdirected.

They do not prevent the spread of HIV. In the majority of cases, the virus spreads when two people have consensual sex, neither of them knowing that one has HIV. That will continue to happen, no matter what criminal laws are enacted, and what criminal remedies are enforced.

It may be that laws of this kind operate to inhibit some risky behaviour on the part of some persons who know that they have HIV. But the inhibition comes (as the arguments that follow suggest) at profound cost to other goals in HIV prevention, because it fuels stigma and inhibits testing.

**SECOND: Criminalization is misdirected — it should not replace harm reduction.**

A second strong motive in enacting the laws and launching prosecutions seems to be to protect persons from exposure to infection with HIV.

If this is so, criminalization is misdirected. It is a misguided substitute for measures that really protect those at risk of contracting HIV — ie, effective prevention, protection against discrimination, reduced stigma, strong leadership and role models, greater access to testing and, most importantly, treatment for those who are unnecessarily dying of AIDS.

AIDS is now a medically manageable condition. It is a virus, not a crime, and we must reject interventions that suggest otherwise.

All public health interventions — including the employment of the criminal law — should be directed to this premise.

For the uninfected, we need greater protection for women, and more secure social and economic status, enhancing their capacity to negotiate safer sex and to protect themselves from predatory sexual partners. Criminal laws and prosecutions will not do that.

What they do, instead, is to distract us from reaching that goal and expend resources better used elsewhere with greater beneficial impact on HIV prevention.

Criminalization assumes the worst about people with HIV and, in doing so, it punishes vulnerability. The human rights or harm reduction approach assumes the best about people with HIV and supports empowerment.

As Justice Michael Kirby, who recently retired from the High Court of Australia, has pointed out, countries with human rights laws that encourage the undiagnosed to test for HIV do much better at containing the epidemic than those that have “adopted punitive, moralistic, denialist strategies, including those relying on the criminal law as a sanction.”<sup>29</sup>

When condoms are available, when women have the power to use them, when those with HIV or at risk of it can get testing and treatment, when they are not afraid of stigma, ostracism and discrimination, they are far more likely to be able to act consistently for their own safety and that of others. Instead of criminalization we must demand treatment, prevention, education, and empowerment.

**THIRD: Criminalization does not protect women — it endangers them.**

A seemingly powerful motivation, one often cited by those enacting these laws, is that women need protection. Far from protecting women, criminalization victimizes, oppresses and endangers them. In Africa, most people who know their HIV status are female because most testing occurs at prenatal healthcare sites. The result, inevitably, is that most of those who will be prosecuted because they know – or ought to know – their HIV status will be women.

Many women cannot disclose their status to their partners because they fear violent assault or exclusion from the home. If a woman in this position continues a sexual relationship (whether consensually or not), she risks prosecution under many of these African laws for exposing her partners to HIV. It is callous to propound a doctrine of equal responsibility in autonomous sexual decision-making in situations where women lack the power to make definitive choices about their sexual practice. Where equal status and bargaining power do exist in the bedroom, then responsibility should fall equally on both partners.

**FOURTH: Criminalization misplaces the moral onus of self-protection — it shifts the burden of preventing transmission to one person instead of recognizing it as shared by two.**

This is a hard but necessary thing to say. HIV has been around for nearly three decades, during which the universal public information message has been that no one is exempt from it. So the risk of getting HIV must now be seen as an inescapable facet of having unprotected sex.

This seems to me to be true both in a country like my own, where HIV is a disease of mass prevalence, and in yours, where largely it remains limited to defined vulnerable groups — although I note the growing proportion of new infections in Canada

---

<sup>29</sup> “Australian judge slams HIV criminalization,” *Poz*, 18 July 2008.

attributable to heterosexual encounters, reflected in the steadily increasing infection rate among women.

We cannot pretend that the risk is introduced into an otherwise safe encounter by the person who knows or should know he has HIV. The risk is part of the environment, and practical responsibility for safer sex habits rests on everyone who is able to exercise autonomy in deciding to have sex with another.

The person who passes on the virus may indeed be “more guilty” than the person who acquires it — but criminalization unfairly places the blame solely on the person with HIV. Unprotected sex always entails risk of transmission of a range of sexually transmitted infections (STIs). Can it be right in these circumstances to expect a person to inform their partner of their status if the partner does not inquire?

Where there are moderately equal levels of sexual autonomy and decision-making, it is surely the responsibility of both partners to ask, to tell, to protect, and to prevent.

It is true (as I have pointed out) that the subordinate position of many women, particularly in my own continent of Africa, makes it difficult if not impossible for them to negotiate safer sex. When a woman has no choice about sex, and her partner despite knowing he has HIV infects her, he unquestionably deserves blame.

But the fact is that criminalization does not help women in this position. It simply places them at greater risk of victimization. Criminalization singles one sexual partner out. All too often, despite her greater vulnerability, it will be the woman. Criminalization compounds the evil, rather than combating it.

**FIFTH: Criminalization tends to be unacceptably vague.**

Many of these laws are extremely poorly drafted. For instance, under a poorly drafted “model law” that many countries in East and West Africa have adopted, a person who is aware of being infected with HIV must inform ‘any sexual contact in advance’ of this fact. But the law does not say what ‘any sexual contact’ is. Is it holding hands? Kissing? Or only more intimate forms of exploratory contact? Or does it apply only to penetrative intercourse? Nor does it say what “in advance” means. No transmission is required and no intent is required making it extremely difficult for the average person to determine precisely what behavior is subject to prosecution.

The ‘model’ law would not — or should not — pass muster in any constitutional state where the rule of law applies. The rule of law requires clarity in advance on the meaning of criminal provisions and the boundaries of criminal liability.<sup>30</sup> (I am proud to be able to report that the HIV/AIDS Legal Network has done a detailed critique of the “model law”, with specific proposals for change; these have been published by UNAIDS for use in engaging law-makers to amend bills or laws to restrain the scope of criminalization.)

---

<sup>30</sup> See for example *Chicago v. Morales*, 527 U.S. 41 (1999) (holding that a law can not be so vague that a person of ordinary intelligence can not figure out what is innocent activity and what is illegal).

Moreover, these laws are difficult and degrading to apply. They intrude on the intimacy and privacy of consensual sex. (We are not talking about non-consensual sex; that is rape, and rape should always be prosecuted.) But where sex is between two consenting adult partners, the apparatus of proof and the necessary methodology of prosecution degrade the parties and debase the law. The Zimbabwean woman again springs to mind: Her lover wanted the prosecution withdrawn, but the law vetoed his wishes. It also countermanded her interests. The result is a tragedy for all, and a severe setback to HIV prevention and treatment efforts.

As I have emphasized, where there is deliberate intention to pass on the virus and the person succeeds in passing it on, there can be no difficulty about prosecuting such a person and no objection to it, but we do not need HIV specific statutes for that. (Naturally I assume that the partner does not wish to acquire HIV.)

But in cases where there is no deliberate intent, the categories and distinctions of the law become unavoidably fuzzy. They become incapable of clear guidance either to those subject to them, or to prosecutors. Those laws that target reckless, or negligent or inadvertent transmission of HIV serve only to introduce uncertainty into an area that is already difficult to police.

The combination of vagueness of the statutes and the difficulty in their application contributes to the unfair and selective enforcement of criminalization. Such laws create at least the risk that prosecutors may single out already vulnerable groups — like sex workers, men who have sex with men and, at least as seen in European countries, black males. The risk of selective enforcement arises precisely because the behaviour the laws target is extremely common: consensual sex.

#### **SIXTH: Criminalization fuels stigma.**

From the first diagnosis of 28 years ago of what eventually came to be called AIDS, HIV has carried a mountainous burden of stigma. Stigma has, in fact, been the predominant feature of the social and political response to AIDS.

No other infectious disease is viewed with as much fear as is HIV. In fact, diseases far more infectious than HIV are treated with less repugnance.

This has been for two over-riding reasons: the fact that it is sexually transmitted; and the fact that it is predominantly found in groups that are already socially disfavoured or marginalized — gay men, the poor, black Africans, women, those who use drugs, sex workers.

It is stigma that makes those at risk of HIV reluctant to be tested; it is stigma that makes it difficult — and often impossible — for them to speak about their infection; and it is stigma that continues to hinder access to the life-saving ARV therapies that are now increasingly available across Africa.

It is also stigma that lies primarily behind the drive to criminalization. Cases like those from Iowa and Singapore, and cases where serious charges laid for conduct that carries

no significant risk – such as the charges recently in Hamilton against an HIV+ gay man for performing fellatio – highlight the persistence and the prominence of HIV/AIDS stigma.

It is stigma, rooted in the moralism that arises from the sexual transmission of HIV, that too often provides the main impulse behind the enactment and enforcement of these laws.

**SEVENTH: Criminalization may discourage testing.**

Criminalization is radically incompatible with a public health strategy that seeks to encourage people to come forward to find out their HIV status. AIDS is now a medically manageable disease — I am living proof of that fact. But why should anyone want to find out their HIV status, when that knowledge can only expose them to risk of prosecution? By reinforcing stigma, by using the weapons of fear and blame and recrimination, criminalization makes it more difficult for those with or at risk of HIV to access testing, to talk about diagnosis with HIV, and to receive treatment and support.

It is regrettable that in *Cuerrier* the majority of the Court rejected the proposition that extending the crime of sexual assault to encompass undisclosed HIV status would discourage testing. It did so without citing any evidence and in fact ordinary human experience suggests the opposite.<sup>31</sup> (It is a fair observation that even as the Court in *Cuerrier* rejected this concern about deterring testing as unevicenced, it accepted, in the absence of evidence, that criminalization would deter risky behaviour.)

We therefore have a dire but unavoidable calculus: inappropriate criminalization is costing lives. The International Community of Women Living with HIV and AIDS (ICW) has rightly described laws like this as part of a “war on women.”<sup>32</sup> They are not just a war on women. They are a war on all people with HIV.

Similar arguments were advanced at last year’s International AIDS Conference in Mexico City and later published by Professor Scott Burris of Temple University’s law school and me in an article in the *Journal of the American Medical Association* that has been widely disseminated and debated; a cognate development of the arguments, largely shepherded by Ralf Jürgens and the Open Society Institute, will shortly be published in the journal *Reproductive Health Matters*.

There has, of course, been some opposition. One academic called the argument that criminalization will not prevent transmission “silly”,<sup>33</sup> pointing out that traffic regulations do not prevent speeding but nonetheless serve valuable social purposes including the reduction of accidental deaths.

Of course. But traffic regulations do not stigmatise any socially vulnerable group. Nor do they have dire consequences for the lives of those subject to them.

---

<sup>31</sup> Isabel Grant, *The Boundaries of the Criminal Law: The Criminalization of the Non-disclosure of HIV*, 31 Dalhousie L.J. 123, 140 (2008).

<sup>32</sup> Email communication from Beri Hull of ICW.

<sup>33</sup> Udo Schuklenk, “Why Some HIV Transmissions Should be Punished,” *Bioethics and the Law*, 31/10/2008, available at <http://www.thehastingscenter.org/Bioethicsforum/Post.aspx?id=2684>.

And traffic regulations are generally narrowly tailored to road conditions and based on vast accumulations of data. HIV criminalization statutes by contrast are overly broad and ignore a wealth of medical science.

And they have grave consequences for our effective management of the epidemic as a whole.

### **Why the surge in criminalization?**

To tailor our arguments effectively we need insight. And I have to admit — it is hard to find.

The surge in prosecutions and new enactments is in some ways surprising. This is for two reasons.

First, the global population living with HIV has levelled off.<sup>34</sup> While there are places where the epidemic is still expanding (in Eastern Europe and North America's inner cities), and while some communities at special risk (such as gay men) are showing increased prevalence, in global terms the epidemic seems to have reached its apogee. It is no longer thought of as a potentially Malthusian blight. One would have hoped for a corresponding abatement in alarmist reactions.

Second, HIV is recognised more and more widely as a fully medically manageable disease. It is no longer the dreaded fatal "scourge" it once was.

This, too, one would have expected to enter public and official consciousness and thus to lead to less pressure for criminal laws and enforcement.

So it seems odd that laws and prosecutions targeting people with HIV should be spreading.

In other ways it is not. I have puzzled about why this rash of criminalization is happening right now. And I have concluded that the reasons may not be profound. Some lie in circumstance — the model law for Africa, which has been enacted in more than a dozen countries in West and Central Africa, was intended as a beneficial intervention to protect people with HIV: its provisions on criminalization, which as I later show are truly frightening, were added almost as an afterthought.

And in Western Europe and North America the seeming upward burst of prosecutions may stem from either the fact that more heterosexuals are affected by the epidemic, or from the welcome fact that, despite the persistence of stigma, being infected with HIV

---

<sup>34</sup> "The 2008 Report on the Global AIDS epidemic," UNAIDS, 30. According to the report, "The global percentage of adults living with HIV has leveled off since 2000." Available at [http://data.unaids.org/pub/GlobalReport/2008/jc1510\\_2008\\_global\\_report\\_pp29\\_62\\_en.pdf](http://data.unaids.org/pub/GlobalReport/2008/jc1510_2008_global_report_pp29_62_en.pdf).

may no longer be so unspeakable that those who consider themselves to have been victimised by heartless predators are no longer too scared or ashamed to speak out.<sup>35</sup>

If the reasons for increased criminalization are local, contingent and perhaps even haphazard, that is important information that should inform our tactical and strategic responses.

For it would help us underscore our arguments that misplaced criminalization is counterproductive and ill-advised.

### ***Defining the turf* — The core debate: aiming at “normal” responses to AIDS**

This brings us to the core debate: what is it that AIDS activists seek to achieve?

For quite some time, the AIDS-rights community has enjoyed a supportive relationship with liberal and civil rights commentators. The drive to criminalization has introduced complication into the relationship. The honeymoon is over.

Reasonable people ask, quite reasonably, why risky conduct by those who know they have HIV should not be punished.

Their concern is understandable — and our responses must match it.

From the start of the epidemic, the social and political response to AIDS has been deeply marked by stigma. In many societies, stigma has, perhaps, been the preponderant determinant of social and legal responses.

The struggle has accordingly been to secure rational and just responses to HIV.

And in saying this we must bear in mind, always, both for tactics and strategy, and at a level of deep principle, what we wish to achieve.

Our objectives are two-fold: on the one hand, it is to achieve a world in which all disease and all vulnerable populations are treated justly and fairly and rationally. On the other, it is to achieve a world in which HIV is dealt with no differently — no better and no worse — than other diseases, and in which those at risk of HIV are dealt with no better and no worse than other vulnerable groups.

In the end we want a world in which AIDS is a merely normal condition – frightening and life-threatening and requiring just and sane interventions; but demanding these in the same way that any comparable condition would.

---

<sup>35</sup> Indeed, Grant, *supra*, at 179 points out that “a large majority of Canadian prosecutions involve heterosexual couples, and not gay men, IV drug users, or women involved in prostitution.... [c]ases in which complainants represent middle-class Canada are more likely to be prosecuted and more likely to result in a conviction. In some ways HIV / AIDS may be more frightening now precisely because the ‘us’ and ‘them’ dichotomy has broken down.”

These objectives should determine policy.

As I have emphasised, there are cases in which risky conduct by a person with HIV that leads to transmission should be criminally charged, provided only that the generally applicable tests for criminal liability apply. And criminalization should be limited to the actual transmission of an incurable, life threatening disease.<sup>36</sup>

Advances in HIV treatment and prevention make it questionable whether criminal codes can ever be justified in treating HIV differently from other transmissible infections, such as hepatitis.

The counterpart consideration for AIDS-rights activists is that this accords with the struggle that has lain at the centre of the social contest about the epidemic — that AIDS should be treated no worse than other diseases (“normalization”).

The AIDS community must be clear about distinguishing behaviour that ought not to be criminalized from conduct that deserves prosecution and punishment.

We must carefully define the “turf” and be clear why we are defending it. Here I mark the fact that many AIDS activists have in fact taken a nuanced position, even though this has seemingly been ignored on occasion in representing their stand.

The fact is that prosecutions like Mr Aziga’s and Mr Mabior’s with their dismaying facts are a setback for everyone with HIV.

That does not lessen the duty to support the consistent application of rational and fair-minded principles of criminal law.

Denouncing improvident prosecutions and unjust sentences should not prevent us from recognizing the legitimacy of some applications of the criminal law. And a position of principle and nuance — such as that which the Canadian HIV/AIDS Legal Network has sought to adopt — will enable us to call with authority for appropriate education on HIV and AIDS to be provided to judges, prosecutors and all those dealing with (and writing about) the epidemic.

### **Applying the principle of “normalization” to the criminal law debate**

From a firm basis of principle, we can proceed confidently to challenge many forms of HIV criminalization.

#### *Consent*

The principle I have mentioned also colours our response to the debate about disclosure and consent.

---

<sup>36</sup> Scott Burris and Edwin Cameron, “The case against criminalization of HIV transmission”, *JAMA, Journal of the American Medical Association*, 09/2008; 300(5):578-81.

We can broadly accept, for example, that consent is vitiated “if someone has deliberately deceived a person about the nature and the quality of the act and by doing so, has put that person at a risk of harm.”<sup>37</sup> “A consent that is not based upon knowledge of the significant relevant factors is not a valid consent.”<sup>38</sup>

According to this line of reasoning, consent is “invalid” if it can be proved that the complainant would have refused to have unprotected sex with the accused if he or she knew that the accused had HIV,<sup>39</sup> and if there is a “significant risk of serious bodily harm” arising from the deception.

This is essentially the law established by section 265(3)(c) of the Canadian Criminal Code, as interpreted by the majority of the Supreme Court of Canada in *Cuerrier* in 1998, which held that in such circumstances what appeared to have been consensual intercourse becomes sexual assault.

The judgment makes “clear that failure to disclose that one is HIV-positive constitutes fraud negating consent” where there exists a significant risk of transmission. None of the three justices who wrote opinions in the case “explicitly drew a distinction between non-disclosure and deliberately lying about one’s HIV status.”<sup>40</sup>

Despite the statute-specific context of the Canadian decision, I endorsed the outcome in *Cuerrier* as part of a successful strategy in the South African Law Reform Commission to resist the enactment of a criminal enactment specially targeting HIV. When pressed as to why the ordinary criminal law was sufficient, I would answer that undisclosed exposure to deadly peril would void consent, leaving the person with HIV liable to prosecution for rape. No special law was therefore required.

As the years have passed, the question whether this was right has troubled me more and more.

Failing to tell a sexual partner that you’re infected with a potentially deadly disease, and then exposing him or her to it, is a grave ethical lapse.

But is it conceptually accurate, and helpful, to categorise ensuing intercourse as *sexual assault*?

This seems questionable.

For long, the law has recognised that what constitutes a significant relevant factor in evaluating the reality of sexual consent is very narrow.<sup>41</sup>

---

<sup>37</sup> *R v Mabior*, 2008 MBQB 201 at para 12.

<sup>38</sup> *R v Cuerrier* (1998), 127 C.C.C. (3d) 1, [1998] S.C.J. No.64 (S.C.C.) (QL) at para 127.

<sup>39</sup> *R v Cuerrier* (1998), 127 C.C.C. (3d) 1, [1998] S.C.J. No.64 (S.C.C.) (QL) at para 130.

<sup>40</sup> Grant, *supra*, at 136-137.

<sup>41</sup> *People v. Evans*, 85 Misc. 2d 1088, 379 N.Y.S.2d 912 (N.Y. Sup. Ct. 1975).

For example, we accept that most of the frauds, tricks and stratagems employed in bars, clubs and on first dates the world over do not vitiate consent to sex.

Provided there is consent to sexual congress, there is no rape, no matter how despicable the fraud.

I appreciate the force of the contention that where the fraud or the suppression of information creates a material risk of serious harm it should be held to vitiate consent. But to hold that the non-disclosure turns consensual intercourse into rape seems a misconstruction of criminal categories and an abuse of terminology.

To find the non-disclosure unethical is correct. But to hold that it makes consent to intercourse disappear seems like a clever lawyer's stratagem to reconstruct the real world.

And if it were so, then the exception should not be limited to HIV — it should rather be expanded to include contagious diseases such as hepatitis C. While the holding in *Cuerrier* specifically expanded the exception to include other STIs that cause “serious bodily harm”, in practice the case has been used in virtually no prosecutions for STIs other than HIV.<sup>42</sup>

It should perhaps include even a case where a man pretends to a woman for whom pregnancy is a high risk to health that he has had a vasectomy. And what of withholding the fact that one is under-age in sex that may make the partner liable to statutory rape charges?

For these reasons I have, as a non-Canadian person with HIV, for whom *Cuerrier* was previously an article of faith, come to have severe misgivings about it.

Non-disclosure of HIV status should be criminal only if intentional behaviour actually led to a HIV transmission.

#### *Risk/Endangerment — another look at Mabior*

Mr Mabior's case in Winnipeg, currently before the Manitoba Court of Appeal, also warrants further analysis, given its troubling approach to applying the *Cuerrier* test.

Among other charges, Mr Mabior was accused of 10 counts of aggravated sexual assault. Consider the offence of aggravated sexual assault in Canadian law. The elements of the crime are: (a) that the accused intentionally applied force to the complainant; (b) that the force intentionally endangered the life of the complainant; (c) that the force was applied in sexual circumstances; (d) that the complainant did not consent to the force that the accused intentionally applied; and (e) that the accused knew that the complainant did not consent.<sup>43</sup>

---

<sup>42</sup> Grant, *supra*, at 140.

<sup>43</sup> *R v Mabior*, 2008 MBQB 201 at para 9.

In several cases, people with HIV have been charged with this crime for engaging in anal or vaginal sex without disclosing their HIV status. In some cases, this may be an unobjectionable application of the ordinary criminal law, provided it involves the actual transmission of HIV. As Isabel Grant points out, there is a curious anomaly under *Cuerrier*: prosecution is easier where the complainant never tests positive and thus there is definitively no transmission because of the difficulty of ascribing a seroconversion to the defendant at trial.<sup>44</sup>

But the *Mabior* court's approach to the question of endangerment leaves me, as someone living with HIV, filled with misgiving.

As a foreign judge I am respectful of a colleague's decision. As someone who is living with HIV, I must be frank in describing the grave concern the decision causes me.

The willing exposure of a sexual partner to HIV is viewed by the Canadian courts as tantamount to endangering life.<sup>45</sup> It is not necessary to establish that the partner was in fact infected.<sup>46</sup> The risk of harm cannot be trivial; it must have the effect of exposing the person supposedly consenting "to a significant risk of serious bodily harm".<sup>47</sup>

The burning question today, under current Canadian law, is, what constitutes a significant risk of serious bodily harm in HIV?

According to a 2008 statement on behalf of the Swiss Federal Commission for HIV/AIDS authored by four of Switzerland's foremost HIV medical experts, individuals with HIV on effective antiretroviral therapy and without sexually transmitted infections (STIs) are sexually non-infectious. The statement says that "after review of the medical literature and extensive discussion," the Swiss Federal Commission for HIV/AIDS resolves that, "An HIV-infected person on antiretroviral therapy with completely suppressed viraemia ("effective ART") is not sexually infectious, i.e. cannot transmit HIV through sexual contact."<sup>48</sup>

Some consider that this goes too far.

A recent statement by the French AIDS Council nuances the Swiss position, and eludes its pitfalls: it offers an up to date medical framework for normalising the ethical debate about AIDS.<sup>49</sup>

---

<sup>44</sup> Grant, *supra*, at 137.

<sup>45</sup> *R v Cuerrier* (1998), 127 C.C.C. (3d) 1, [1998] S.C.J. No.64 (S.C.C.) (QL) at para 8.

<sup>46</sup> *R v Cuerrier* (1998), 127 C.C.C. (3d) 1, [1998] S.C.J. No.64 (S.C.C.) (QL) at para 95.

<sup>47</sup> *R v Cuerrier* (1998), 127 C.C.C. (3d) 1, [1998] S.C.J. No.64 (S.C.C.) (QL) at para 128.

<sup>48</sup> See P. Vernazza et al., "Les personnes séropositives ne souffrant d'aucune autre MST et suivant un traitement antirétroviral efficace ne transmettent pas le VIH par voie sexuelle," *Bulletin des médecins suisses* 89(5), 2008.

<sup>49</sup> François Bourdillon, et al., "Statement Followed by recommendations on the appropriateness of treatment as an innovative tool for fighting the epidemic of HIV infections," *Conseil National Du Sida* 9/4/2009. Available at <http://www.cns.sante.fr/spip.php?article296&lang=en>.

While there may always be some residual risk of transmission, no matter how low the viral load, the central point is that a major shift has taken place: HIV treatment is now a proven means of effective prevention.

This fact may also help reduce stigma.

Higher rates of testing and diagnosis, earlier treatment initiation, and higher treatment success rates can all make significant contributions to prevention. Putting more people on antiretrovirals could considerably reduce HIV transmission.<sup>50</sup>

Indeed scientific evidence about the impact of antiretrovirals on viral load and hence on the possibility of transmission was presented in the *Mabior* case.

Yet it seems open to question whether it was accorded its just force and significance. For the accused there was convicted for instances of sex in which he had worn a condom and at times at which his viral load was reduced due to his medication but still detectable, despite the fact that none of his partners became infected. It is to the judge's credit that where there was both condom usage and an undetectable viral load, the defendant was acquitted.<sup>51</sup> Yet the force of logic elsewhere seemed weaker, including the court's refusal to accept that condoms alone would suffice to reduce the risk of transmission such that it is no longer "significant" as required by the *Cuerrier* decision.

The court accepted evidence that condoms only have an 80 percent success rate<sup>52</sup> — and concluded that endangerment of life was proven even where condoms were used. This finding seems at odds with scientific authority, and seems to misstate the risk factors.

The court seems to take the statistic that condoms have a 20 percent failure rate to mean that there is a 20 percent risk of transmission. This is wrong. Depending on the particulars of the sexual encounter, transmission rates are often already significantly lower than 1 percent *without* using a condom. Thus, even if true, the fact that condoms "only" have an 80 percent success rate would make the risk of transmission with a condom virtually zero.

The extremely low viral load of the accused during many of the encounters may in fact have made the chance of transmission zero. But the court did not accept that evidence of a low viral load sufficiently reduced the risk of endangerment of the lives of the complainants.<sup>53</sup> It held that "the potentially lethal consequences of unprotected sexual

---

<sup>50</sup> This is a contentious area – include De Cock proposal; UNAIDS human rights reference group response; Johannesburg statement of 10 June 2009; Dr Julio Montaner, leading Canadian HIV researcher at British Columbia Centre for Excellence in HIV/AIDS and the president of the IAS, is a major proponent of the prevention benefits of dramatically scaling up ARV treatment – add citation.

<sup>51</sup> *R v Mabior*, 2008 MBQB 201 at para 143.

<sup>52</sup> *R v Mabior*, 2008 MBQB 201 at para 104.

<sup>53</sup> *R v Mabior*, 2008 MBQB 201 at para 105.

contact leave room for no other conclusion than that endangerment of life has been substantiated.”<sup>54</sup>

So despite evidence that the accused’s viral load was extremely low during treatment — indeed, the medical expert testified that in at least some of the instances there was a “very high probability that the accused was not infectious and could not have transmitted HIV” — AND the fact that condoms were used in some instances AND the fact that the virus was not transmitted, he was sentenced to 14 years in jail on several charges of aggravated sexual assault.

How should we, who hold ourselves concerned to secure justice and rationality in the epidemic, engage with a case like this?

We should grant that prosecution should occur when there is intent [which in my legal system includes reckless conduct heedless of the prospect of harm] to transmit the virus, coupled with actual transmission. On this point I am in disagreement with some of my distinguished colleagues and allies, including Dr. Mark Wainberg, a former President of the International AIDS Society, who is a clinician and activist with a deep record of commitment in the field and who has passionately raised the broader concern, I share, that the harm of criminalization may outweigh its benefits.<sup>55</sup>

But *Mabior* and some of the other recent cases are deeply disturbing. They embody vaguenesses and an absence of scientific rigour that invite a downwards slide to making HIV a status crime.

With a principled grounding in mind, the AIDS-rights movement should differentiate between just application of criminal laws as opposed to targeted prosecution based on stigma.

For if our resistance to criminalization is too broad, it runs the risk of dissipation. If AIDS activists use all their political credibility denying that criminal prosecution is ever appropriate, they

- (a) lose public support for more significant battles against injustice, because all cases of criminalization are cast in the same light, and the public rightly believes at least some prosecutions are justified;
- (b) feed into AIDS exceptionalism, which is part of what perpetuates stigma; and
- (c) undermine the ability of people living with HIV to be autonomous, responsible adults and perpetuate the mentality of victimhood and powerlessness.

In short, if we expend all our energy defending the indefensible, we will be unable to sustain the nuance and moral authority we need to resist the spitting cases from Texas

---

<sup>54</sup> *R v Mabior*, 2008 MBQB 201 at para 100.

<sup>55</sup> Mark A. Wainberg, “The Johnson Aziga Case: HIV transmission should not be a crime,” *McGill Reporter*, 01/12/2008. Available online at <http://reporter.mcgill.ca/2008/12/the-johnson-aziga-case-hiv-transmission-should-not-be-a-crime/>.

and from Canada, the internet sex cases from Iowa, the no-transmission case from Zimbabwe, and the terrifyingly vague African “model” legislation.

## **Conclusion**

The global trend towards criminalization of HIV manifests itself in differing ways but there seems to be a common thread.

In Africa the “model” legislation is crudely over-inclusive and in my view radically averse to enhanced access to testing; in North America and Western Europe, it is mainly prosecutorial and judicial discretion that invites questions whether HIV could be turned into a status crime.

In both contexts, from Cape Town to Calgary, the common theme seems to be still overly averse, and insufficiently informed, reactions to AIDS.

That common theme the Canadian trend towards broader and inappropriate prosecutions is regrettably spurring. Your domestic national practice will surely encourage other countries, which have looked up to Canada’s human rights record, to broaden their own laws and prosecution policies. Canada will in effect export heightened stigma and discrimination.

Amidst this, we must keep in mind that the struggle for rationality in the epidemic has always been to secure equivalent treatment for those with and at risk of HIV. If we do so, our task becomes clearer.

In this context “normalization” of HIV embraces on the one hand the application of ordinary rules of criminal law to conduct that by any reckoning deserves prosecution; but on the other, equally, resistance to exceptional prosecutions and enactments targeting HIV status alone.

For a world without HIV seems, for now, just as far distant and unattainable as a world without irrational prejudice against HIV.

The strength in our position as proponents of rational and just action in the epidemic is that our fight against the latter continues to provides us with the surest guide to achieving the former.