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## The problem of "significant risk": Exploring the public health impact of criminalizing HIV non-disclosure

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### ABSTRACT

Using criminal law powers to respond to people living with HIV (PHAs) who expose sexual partners to HIV or transmit the virus to them is a prominent global HIV public policy issue. While there are widespread concerns about the public health impact of HIV-related criminalization, the social science literature on the topic is limited. This article responds to that gap in knowledge by reporting on the results of qualitative research conducted with service providers and PHAs in Canada. The article draws on a studies in the social organization of knowledge perspective and insights from critical criminology and work on the “medico-legal borderland.” It investigates the role played by the legal concept of “significant risk” in coordinating criminal law governance and its interface with public health and HIV prevention. In doing so, the article emphasizes that exploring the public health impact of criminalization must move past the criminal law—PHA dyad to address broader social and institutional processes relevant to HIV prevention. Drawing on individual and focus group interviews, this article explores how criminal law governance shapes the activities of providers engaged in HIV prevention counseling, conceptualized as a complex of activities linking clinicians, public health officials, front-line counselors, PHAs, and others. It emphasizes three key findings: (1) the concept of significant risk poses serious problems to risk communication in HIV counseling and contributes to contradictory advice about disclosure obligations; (2) criminalization discourages PHAs’ openness about HIV non-disclosure in counseling relationships; and (3) the recontextualization of public health interpretations of significant risk in criminal proceedings can intensify criminalization.

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### Introduction

Using criminal law powers to govern the risk of HIV transmission is a prominent global HIV public policy issue. Concerns about criminalization have been propelled by an acceleration in the prosecution of HIV-related sexual offenses, particularly in Europe and North America, and by a move in a number of West African states to establish HIV-specific criminal laws (Pearshouse, 2007). The World Health Organization, UNAIDS, civil society organizations, legal scholars and others have responded to these developments by arguing that criminalizing HIV transmission and/or exposure seriously hinders established public health approaches to preventing HIV transmission (Bernard, 2010; Cameron & Rule, 2009; Elliott, 2002; Galletly & Pinkerton, 2006; GNP+, 2010; Open Society Institute, 2008; UNAIDS, 2008; WHO, 2006; Wolf & Vezina, 2004).

Critics frame the criminal law as a blunt instrument that is ineffective at regulating the complex sexual activities that figure in HIV transmission. They emphasize that the vast majority of people with HIV (PHAs) take precautions to prevent HIV transmission and suggest curtailing the use of the criminal law, often citing conduct that intentionally and successfully transmits HIV as the relevant threshold (Burriss & Cameron, 2008). A number of critics claim that criminalization disrupts access to HIV testing, education and support services (Wainberg, 2009) and erodes public health norms that support mutual responsibility for HIV prevention (Cameron, Burriss, & Clayton, 2008). Others emphasize that criminalization heightens HIV-related stigma (GNP+, 2010), while undermining action on the underlying social factors responsible for HIV transmission (Open Society Institute, 2008).

The critique of criminalizing HIV transmission/exposure is limited by the slim base of theoretically-informed social science research that addresses its central claims. Drawing on a studies in the social organization of knowledge perspective (Smith, 2005), this article responds to that knowledge gap by reporting on research on the public health impact of criminalizing HIV non-

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disclosure in Canada. The article differs from the established literature in two central ways. First, its primary empirical focus is not the activities of PHAs or those at risk of HIV infection, but the work of providers engaged in HIV prevention counseling. Second, it draws on insights from critical criminology and work on the “medico-legal borderland” to offer a more relational understanding of how the criminal law affects HIV prevention.

My approach is to explore criminal law/public health relations as the social organization of knowledge. In particular, I emphasize how the legal concept of significant risk, and providers' and PHAs' responses to it, figure prominently in problems that arise at the site of HIV prevention counseling. The article continues with a brief review of the literature, the Canadian legal context, and the study's methods. It then discusses key research findings, emphasizing how: (1) the vagueness of the significant risk concept hinders risk communication in HIV counseling and contributes to contradictory advice about PHAs' disclosure obligations; (2) criminalization discourages open communication about non-disclosure in counseling relationships; and (3) the recontextualization of public health interpretations of significant risk can intensify criminal law liability.

### The research literature

Most empirical research on the public health impact of criminalizing HIV transmission/exposure has been conducted by academic lawyers and applied social scientists in the United States and the U.K. The studies use a range of qualitative and quantitative methods and focus on PHAs as well as “at-risk” populations, including gay men, injection drug users, women, and African-Americans, among others (see, for example, [Dodds & Keogh, 2006](#); [Galletly & Dickson-Gomez, 2009](#)). The central topics explored are PHAs' experiences and understandings of criminal laws related to HIV exposure/transmission and the relationship between such laws and sexual risk behaviors (see, for example, [Burris, Beletsky, Burleson, Case, & Lazzarini, 2007](#); [Dodds et al., 2008](#)).

The literature points to a mix of responses toward criminalization on the part of PHAs. While many support criminalization, they do so in a context of widespread misunderstanding of their criminal law obligations ([Galletly, DiFranceisco, & Pinkerton, 2009](#)), concerns about the effects of criminalization such as secondary disclosure and heightened HIV-related stigmatization ([Dodds & Keogh, 2006](#); [Galletly & Dickson-Gomez, 2009](#)), and a preference for a qualified use of the criminal law ([Klitzman et al., 2004](#)). Criminal laws have also been shown to have varied and contradictory effects on the sexual activities of PHAs. Comparative survey research has found very few differences between the self-reported sexual activities of research participants who reside in jurisdictions with HIV-specific legislation and those who do not ([Burris et al., 2007](#); [Horvath, Weinmeyer, & Roser, 2010](#)). Qualitative research has found that while some PHAs respond to criminalization with increased disclosure of their HIV-positive status before sex, others disclose less often, while almost half report no impact ([Dodds, Bourne & Weait, 2009](#)). On balance, the existing literature concludes that criminal laws do not enhance activities that deter HIV transmission and cautions against their use.

This article contributes to the literature by exploring for the first time, to my knowledge, the impact of criminalizing HIV non-disclosure not only on PHAs or “at-risk” persons, but those who work in HIV prevention, treatment and support. It is fitting to privilege PHAs in research on criminalization, given the dramatic and punitive consequences it poses for them. However, any effects of the criminal law on HIV prevention occur through a complex set of institutional and social processes that extend beyond the

criminal law—PHA behavior dyad. Those processes link expert and popular representations of sexual risks and of the criminal law, criminal justice and law enforcement activities, the interpretive and sexual practices of PHAs and HIV-negative individuals and the work activities of clinicians, public health providers and front-line AIDS service providers, among others.

Drawing on an understanding of the criminal law as a “socially embedded phenomenon” ([Pue, 2010](#)) and on insights from work on the “medico-legal borderland” ([Timmermans & Gabe, 2003](#)), this article seeks to put in place a more relational understanding of how criminalization shapes HIV prevention. That means recognizing that HIV prevention is accomplished through a complex of activities involving a range of actors. It means understanding that the public health impact of criminalization is about more than PHAs' behavior; it is about how the work of providers is affected, how their counseling relationships with PHAs are influenced, and how flows of information about HIV risk are shaped and with what consequences. This article explores these questions from the primary empirical site of HIV prevention counseling. It emphasizes how counseling and problems arising in it are discursively shaped by a form of criminal law governance coordinated by the concept of “significant risk.”

### The Canadian context

In Canada, PHAs have a criminal law obligation to disclose their HIV-positive status to others before engaging with them in activities that pose a “significant risk of serious bodily harm” (i.e. HIV transmission). This legal obligation was established in 1998 by the Supreme Court of Canada's decision in *R v Cuerrier* (1998). The Supreme Court established that in circumstances of sexual activity where a “significant risk” of HIV transmission is posed, not disclosing one's HIV-positive status can be deemed a fraud that vitiates a person's consent to sexual activity. The decision established that an HIV-positive man who engages in unprotected vaginal intercourse poses a significant risk of serious bodily harm ([Elliott, 1999](#)). The Supreme Court did not further define what constitutes a significant risk, nor establish clear parameters for determining when a significant risk has occurred. Prosecutions for non-disclosure in the context of sexual activities that pose a minimal risk of HIV transmission such as oral sex or protected intercourse have followed. Lower court decisions have not clarified the “significant risk test” and have inconsistently drawn on scientific research, particularly with respect to the impact of HIV viral load on HIV transmission ([Mykhalovskiy, Betteridge, & McLay, 2010](#)). The overall lack of clarity and overreach of significant risk have been central to the concerns raised by legal advocates post-*Cuerrier* ([Elliott, 1999](#); [Symington, 2009](#)).

In Canada, using the criminal law to respond to circumstances of alleged HIV non-disclosure has intensified in recent years, leading some to describe the country as a world leader in HIV-related criminal prosecutions ([Cameron, 2009](#)). From 1989 to 2009 inclusive, there were at least 104 cases in which 98 individuals were charged with criminal offenses related to HIV non-disclosure in sexual circumstances. However, approximately 65% of these cases occurred in the last six years. The majority of individuals (65%) who faced charges are men who allegedly failed to disclose their HIV-positive status to female sexual partners. In Ontario, Canada's largest province, from 2004 to 2009, 50% of these men were from Black Caribbean or African communities, a finding explained by various factors including concerns within Black communities about secondary disclosure of HIV-positive status, the media's overwhelming focus on cases involving Black male defendants, and the history of discrimination faced by Black men in the Ontario criminal justice system ([ACCHO, 2010](#)). Canada does not have an HIV-

specific criminal law but uses established criminal offenses to prosecute PHAs for non-disclosure. Since the *Cuerrier* decision, PHAs have been routinely charged with aggravated sexual assault, which carries a maximum penalty of life imprisonment. As of 2009, 63% of known criminal cases in Canada resulted in convictions and 83% of convictions resulted in prison sentences. In 38% of convictions, HIV transmission did not occur (Mykhalovskiy et al., 2010).

## Methods

This study is part of a criminal law reform project that was conducted in Ontario. The project explored four forms of evidence (the interview data reported here, pattern data on criminal charges, scientific research on HIV transmission risks, and court records) with a view to encouraging a more evidence-informed application of the criminal law. The project's key policy recommendation is to establish prosecutorial guidelines to restrict the application of the criminal law, a response to criminalization that has proven effective in other jurisdictions (Azad, 2008; Mykhalovskiy et al., 2010).

Individual and focus group interviews were conducted from January to September, 2010. A total of 56 individuals participated. Twenty-eight service providers were interviewed individually. Four focus groups were conducted with a total of 26 PHAs; 2 PHAs unable to attend were interviewed individually. The choice of focus groups may seem counterintuitive given the controversial nature of the issue, but criminalization is a popular topic in HIV-positive communities and most of the PHA participants were known to one another as ASO (AIDS service organization) clients. Focus groups were designed to explore PHAs' understandings of significant risk and broader experiences of criminalization, not their sexual practices.

All interviews were conducted in one of three cities in Ontario—Toronto, Ottawa and Hamilton. Individual interviews lasted from 38 to 81 min, while focus groups lasted from 87 to 93 min. All interviews were tape-recorded and transcribed. Ethics approval for the study was received from York University.

Service providers were treated as key informants (Spradley, 1979) and were chosen on the basis of having specialized knowledge of and first-hand experiences related to criminalization. Providers came from a range of sites where work related to HIV prevention occurs: ASOs (8); an HIV clinic (3); public health (7); law (4); and physician care (6). PHAs were chosen from a variety of social and economic locations. One focus group was mixed with respect to gender, race and sexual orientation, one was conducted with gay men, one with economically marginalized PHAs and one with youth. Focus group participants were recruited through provider referral or response to an electronic study announcement circulated by ASOs. They received an honorarium of \$30.

This study was influenced by studies in the social organization of knowledge, an approach to sociological inquiry developed by Canadian sociologist Dorothy Smith. This body of work locates inquiry in the "everyday world" and seeks to explore how people's activities enter into and are coordinated across time and place by professional and managerial discourses and practices. Studies in the social organization of knowledge treat knowledge as an active constituent of the social and try to explicate the large-scale social and institutional relations, including those of the law, through which contemporary societies are governed (Smith, 2005).

Interviews were designed to elicit experiential narratives in which participants reflected on the topic of criminalizing HIV non-disclosure in ways grounded in their actual, day-to-day experiences. Service providers were asked to describe their hands-on experiences related to the criminalization of HIV non-disclosure including how they counseled PHAs about their criminal law

obligations. Focus groups addressed participants' understandings of significant risk and their experiences of criminalization, relationships with providers, and HIV-related stigma.

Analysis of interview data was focused on bringing into view how an abstract criminal law obligation is made meaningful and expresses itself in people's lives through multiple social and institutional channels. Individual transcripts were explored internally and across one another, a process aided by topically tagging the data with data management software. People's accounts were read for their translocal social organization (Devault & McCoy, 2002), that is, for the traces of extended forms of coordination, principally those of discourse, that shaped them and the experiences to which they refer. This approach to analysis encouraged an understanding not only of what people *felt* about criminalization, but how their *activities* were shaped by and entered into the relations criminalization organizes.

## Results

### *PHAs, significant risk and uncertainty*

In Canada, criminal law governance of HIV non-disclosure is conceptually coordinated by the concept of significant risk. As a component of formal legal discourse, the term aims to preserve the credibility of criminal justice by ensuring that criminal liability applies to non-disclosure only in the context of activities that pose a serious risk of HIV transmission. As already noted, the ambiguity of significant risk has prevented it from appropriately restricting prosecutions. This study suggests that the effects of the concept's vagueness are compounded when significant risk circulates beyond the formal limits of criminal law discourse and enters into the registers of PHAs' everyday lives.

HIV-positive participants were widely concerned about the significant risk test. Most experienced the concept in remote terms; it was part of the unfamiliar language of criminal law they had heard about through HIV-positive friends, the media, ASOs, or public health. The concept's remoteness was compounded by their experience of it as something that was, in of itself, vague and uncertain. The question "What is significant risk?" was a common reference point in interviews with PHAs who repeatedly emphasized its indeterminate character. One PHA I individually interviewed noted:

What's significant risk? That's what I never understand. Like it's significant risk, but what necessarily is significant risk? The whole haziness of the law around HIV, I find it kind of makes you a little bit angry, especially being an HIV-positive person.  
(Interview 25)

PHAs emphasized how, in the context of their daily lives, the concept failed to provide meaningful guidance about what forms of sexual activity must be preceded by disclosure. The concept's vagueness coupled with its remove from the registers of daily sexual practice made it particularly troubling for them:

The significant risk test is too ambiguous and it doesn't set up any proper guidelines for people to follow.  
(Focus Group 2)  
It's pretty scary because you don't know what you can do and what you can't do.  
(Focus Group 3)

Unable to determine their disclosure obligations with any certainty, HIV-positive participants were left angry, confused, and frightened. Some responded by withdrawing from sexual activity altogether. Others claimed to disclose in all sexual circumstances, while others suggested becoming less open about their HIV-

positive status. In their efforts to determine “what you can do and...can't do” many became caught in a tension between different forms of risk knowledge. Their encounters with significant risk ran up against a more familiar and established terrain of risk discourse—public health concepts that connect epidemiological risk with particular sexual activities, such as oral sex, distributed along a gradient of no, negligible, low and high levels of transmission risk. While the latter form of risk discourse more easily guided their daily sexual conduct, it did not answer the question of what constitutes a significant risk and left unresolved their confusion about the relationship between and authority of different forms of risk knowledge:

I don't know what is it I have to disclose for if I'm using condoms.  
(Focus Group 1)

#### *Providers, criminalization and HIV prevention counseling*

Providers involved in HIV counseling expressed two central concerns about the impact of criminalization on their work. First, they emphasized how the uncertainty of significant risk challenged their efforts to mediate between different forms of risk knowledge in their counseling relationships. Second, they emphasized how criminalization hampered their ability to establish counseling relationships in which PHAs could be open about their sexual activities and difficulties with disclosure.

#### *Significant risk, knowledge mediation and HIV counseling*

From a public understanding of science perspective (Irwin & Wynne, 1996), HIV prevention counseling can be understood as a form of risk communication that mediates between different forms of knowledge. It involves efforts to bridge the so-called gap between lay risk knowledges and public health ways of knowing about the risks of HIV transmission. Front-line HIV prevention workers are accustomed to negotiating the terms of public health discourse. They are familiar with statistical uncertainty and the challenges of applying population-level risk estimates to individual circumstances. They have devised a range of communicative strategies for translating public health risk concepts into the registers of their clients' daily lives. The same cannot be said of their relationship to legal risk concepts.

The particular ambiguity of significant risk, the absence of parameters that might clarify its reach, and the difficulty of making it “make sense” in experiential terms posed particular challenges for providers. One participant expressed a common sense of frustration with significant risk, noting how its vagueness complicated communication with her HIV-positive clients:

Working on the front-line there is a lack of clarity [about significant risk] and you can write three-million [agency] policies but they're still not going to be clear because the law's not clear. So it makes my work, sometimes, and the things I can say or can't say unclear.  
(HIV Counselor—Interview 21)

Given their responsibilities for mediating between formal expertise and lay knowledge, and the high stakes involved in communicating about significant risk, providers responded to its ambiguity in various ways. Many sought to extend the reach of their own knowledge by consulting resources on criminalization produced by the Canadian HIV/AIDS Legal Network. Others found comfort in organizational divisions of responsibility for communicating about the law and referred clients who had questions about significant risk to legal agencies. A common strategy was to repeat

the terms of the *Cuerrier* decision to clients or to review the decisions of recent criminal cases with them. Such efforts may have familiarized PHAs with the discursive character of criminal law reason. However, in some instances, they compounded the presence of uncertainty about formal disclosure obligations in HIV counseling and left unanswered the question of what is a significant risk:

They're looking for some kind of certainty. 'Is that significant risk or is it not?' And I don't feel that I have certainty on that... There is, in some ways, an ongoing murkiness...like all you can say is 'This is what is considered significant risk based on what has happened in cases so far.'

EM: How do clients react to that?

Well, it's a murky answer. It's not a certain answer. All I can say is 'it's not the most precise term' and I will explore with them what does that bring up for them... It actually gives direction in some ways, but also can raise a spectrum of uncertainty in the unknown. 'Am I doing enough or am I not?' Some people are able to navigate uncertainty...but there's a whole group of people [for whom] its very destabilizing.  
(Social Worker, HIV Clinic—Interview 3)

This study suggests that despite providers' better efforts to respond to the ambiguity of significant risk, its inherent vagueness has resulted in inconsistent information about the legal obligation to disclose being provided to PHAs. This was evidenced in the range of interpretations of the significant risk test provided by key informants in interviews. Some felt that protected anal or vaginal intercourse did not pose a significant risk of HIV transmission and, therefore, did not require disclosure. Others emphasized that unprotected oral intercourse was not a significant risk. Still others refused to define parameters of any kind. It comes as no surprise that varied interpretations of an unclear legal risk concept have resulted in contradictory advice to PHAs about when they are obliged by the criminal law to disclose. Public health nurses cited concerns about the mixed messages that resulted:

We are so close to Toronto, we have clients coming in and out of the region and crossing jurisdictions all the time and, so, if you have one person interpreting it this way and we're interpreting it this way, it really sends mixed messages and it creates a lot of confusion. People [PHAs] aren't really sure what they need to do and what their responsibility is.

(Public Health Nurse—Interview 20)

There's a lot of anxiety with clients that I deal with, and there's a lot of gray areas that haven't been covered around these [court] decisions. I think it's very important for people to know exactly. They want to know 'Ok when do I need to tell a partner?' So public health says one thing, your doctor says another and there's so many variables...there's just different messages getting out from different people.

(Public Health Nurse—Interview 13)

#### *Criminalization and the discouragement of openness in HIV prevention counseling*

The *Cuerrier* decision presumes that criminalizing HIV non-disclosure promotes “frankness” and “honesty” in sexual communication between PHAs and their sexual partners (Cuerrier, 1998, 72). For many PHAs, HIV counseling can be an important source of support in making decisions about sexual communication. In this study, providers had many concerns about how criminalizing HIV non-disclosure hindered their efforts to work with PHAs in open ways about their sexual activities and disclosure practices. The

extent of their concerns calls into question legal presumptions about the relationship between the threat of criminal sanction and HIV disclosure.

#### *Counseling with an eye to the law*

Key informants from public health expressed their concerns about criminalization by emphasizing the consequences of counseling “with an eye to the law.” They used this phrase to refer to how criminal law governance interfered with public health reasoning and practice in ways that were potentially corrosive of voluntary counseling and client-centered approaches.

Public health counselors viewed criminalization as running contrary to a public health perspective. They oriented to HIV prevention as a “health issue,” not a criminal law concern and understood public health responses to non-disclosure to be a matter of balancing public safety with PHAs’ needs. They also privileged client-centered approaches based on voluntary counseling over more coercive public health measures which were viewed as a last resort, to be used only in cases of unusually recalcitrant PHAs.

Some public health nurses were concerned that the increased use of the criminal law discouraged PHAs from approaching or maintaining relationships with public health. The source of their concern was sensationalist media stories of high profile criminal cases in which police press releases urged sexual contacts of the accused to contact public health authorities or health care providers for HIV testing. Respondents felt such media coverage discouraged PHAs from approaching public health because of an impression of close ties between public health and the police.

So every time this happens where an individual is charged the sensationalism in the newspapers and in the media is exactly the same every time... I think that with respect to public health there’s a lot of misinformation out there about what we actually do. So we’re not the law. There is public health law but we don’t, you know, we don’t go to the police and we don’t report individuals that are having unsafe sex to the police.

(Public Health Nurse—Interview 20)

While public health respondents repeatedly emphasized distinctions between public health and criminal law functions, they were also genuinely concerned about the potential erosion of public health practice and reasoning as their activities increasingly entered into relationship with the criminal law governance of health risks. The notion of carrying out HIV prevention “with an eye to the law” aptly describes the nuanced shifts in public health counseling with which participants were concerned. The phrase suggests how criminal law regulation creeps into the practice and consciousness of public health nurses who engage in public health counseling from a stance of growing preoccupation with legal concerns and consequences.

For some, working with an eye to the law referred to the challenges of maintaining a public health focus in counseling in the context of their own and their clients’ concerns about criminal law disclosure obligations. For others, it involved an uneasiness about whether or how to counsel newly-infected individuals about their option to pursue criminal charges against HIV-positive partners whom they felt may have not disclosed to them. Counseling with an eye to the law also referred to how public health staff had a heightened awareness of and concern for public health’s liabilities, something which had been amplified by recent civil law suits brought against public health for failing in their duty to warn the public and prevent harm in cases involving HIV non-disclosure (Betteridge, 2009).

Overall, participants described counseling with an eye to the law as constraining their work and contributing to counseling

circumstances that discouraged openness and honesty on the part of PHAs. They worried that in response to criminalization public health might prematurely turn to coercive approaches to risk management at the expense of relationship building and more open, client-centered counseling efforts:

I wouldn’t say I’m satisfied with the way things are now. Certainly the [criminal] cases have been really highly publicized and broken down and scrutinized and judged and I don’t particularly like to see this issue where it is now and it just seems that it’s happening more and more. I think our front-line staff is really fearful that this is going to be, it used to be sort of few and far between that things would sort of escalate to that point. But I think it’s happening more and more and more and people are really fearful about how that will impact our relationships with our clients and our ability to work with them... Staff’s really fearful that this is going to become something that they’re more and more drawn into... that this is becoming, that we’re managing this with such a legal focus.

(Public Health Nurse—Interview 17)

#### *Chills in counseling*

Front-line staff from ASOs and family physicians did not generally refer to counseling with an “eye to the law” in their accounts of how criminalization affected their HIV prevention work. Rather, they spoke about how the criminal law created “a chill” in their counseling relationships with HIV-positive clients and patients. The notion of a chill referred to restrictions or limitations on open dialogue in counseling, particularly a disinclination on the part of PHAs to discuss challenges they may be facing disclosing their HIV-positive status to sexual partners. Counseling limits of this sort are an important example of how the criminal law’s impact on HIV prevention is relational and mediated. They arise as part of counselors responses to criminalization, in particular their concerns about the vulnerable legal status of counseling records, expressed to their clients through cautions about the limits of client confidentiality.

Providers’ concerns about confidentiality arose in the context of their awareness of criminal trials in which information shared in HIV prevention counseling sessions had been subpoenaed and entered into court proceedings. Some providers spoke about the struggles they faced trying to balance the duty to inform HIV-positive clients about the limits of client confidentiality with their efforts to create a trusting counseling relationship with them:

Hopefully [I’m] going to balance the message of what my clinical responsibilities may be with regards to the law, with where my positioning is, which is: ‘I operate within the boundaries of the law but, for our conversation here, this is going to be about you and how I can help you make better decisions.’ So, absolutely, it’s key in my head around how is this going to impact our future conversations.

(ASO Worker—Interview 16)

Despite their better efforts to build trust, providers remained concerned about how the criminal law can operate contrary to its formal objectives by dissuading open dialogue about precisely the behavior it seeks to regulate. One case manager reflected on her understanding of how criminalization placed limits on what clients felt able to communicate to her:

They feel like they’re being centered out, that...their whole sexuality is being policed... And we have to, like I’m going to admit here that I think the counseling relationship and the total disclosure, you know, is impeded by the criminalization. I think there are things that might be hidden from me that otherwise

wouldn't be. I think it does impede how open clients are and I have a feeling that they really want to talk about more but they take a step back because of criminalization.  
(ASO Case Manager—Interview 21)

A physician interviewed for the study echoed these remarks. He described situations in which patients had requested that conversations about non-disclosure not be charted and suggested that some of his patients had not been forthcoming about their sexual practices because of legal worries. Placing himself in their shoes he noted, "If I was in the same situation would that have implications on what I would say to my doctor and not say to my doctor? Yes, absolutely it would."

Accounts of this sort highlight the complex relationship between criminal law governance and the circumstances through which non-disclosure is brought into language and discussed. On one hand, criminalization has produced much discussion about HIV non-disclosure in community and mainstream media. It is also a focus of conversation and dialogue among PHAs and among providers for whom questions about how and to whom PHAs disclose have developed a new salience. But at the level of one of the primary communicative forms through which HIV prevention is enacted—individual counseling—criminal law governance contributes to regulating and limiting discussion of HIV non-disclosure in highly problematic ways.

#### *Responding to false allegations of HIV non-disclosure*

While providers emphasized the limitations to HIV prevention posed by criminal law governance, they also spoke about their efforts to respond in positive ways to the problems it posed for PHAs. Drawing attention to those efforts helps prevent an overly deterministic critique of criminalization. While it is clear that their overall experience of criminalization was of its negative consequences, providers' creative responses to those consequences suggested important sites of innovation in HIV prevention.

One prominent example focused on the problem of false accusations about PHAs' non-disclosure. A number of focus group participants, particularly Black African women newly arrived to Canada, were concerned about false claims that their partners might make about them not having disclosed their HIV-positive status. A service provider described her understanding of the problem:

People who are at risk of prosecution are terrified. I mean really scared... They get scared when there's been a messy break up...I've had a lot of people just afraid that they're going to be manipulated. That this break up isn't going well and so what's the best tool someone can use to make their life miserable is to pick up the phone and lay a charge against them. And...even if nothing comes of that charge, well, they're going to be raked through the courts... It can really get ugly. It can be somebody sponsored by a same-sex partner or an opposite sex partner and their sponsorship depends on this person, things aren't going well and then we see these individuals threatening, you know, various things.  
(ASO Case Manager—Interview 15)

Concerns about false allegations of non-disclosure help to situate the act of disclosure in the real world of interpersonal relationships as against the idealized representation of formal legal responsibilities expressed by criminal law discourse. They suggest how, in the context of unequal relationships, the legal requirement to disclose can be subject to manipulation in the sense that partners can use false claims of non-disclosure to control and threaten PHAs. They further suggest a certain erosion of confidence in the law as

both providers and PHAs come to understand that disclosure provides no guarantee against potentially damaging legal entanglements for PHAs, especially those who are socially or economically marginalized.

Providers described an interesting effort to respond to these circumstances by transforming what their clients experienced as a private, intimate act into a witnessed event. Mindful of the difficulty of proving that one has disclosed, particularly when court proceedings take the form of adjudicating "he said/she said" claims, some providers reported taking steps to producing a formal organizational presence for their clients' disclosure. According to one provider, PHAs and their partners are invited to the agency for HIV prevention counseling. At that time, documents are signed by both individuals or counseling records are made that indicate that disclosure took place and HIV counseling was provided. In this way a textual record attesting to disclosure having occurred is created that can be used to counter subsequent claims that it did not.

#### *Recontextualizing public health knowledge*

This study emphasizes how the criminal law affects HIV prevention counseling. But it also suggests how providers' responses to criminalization feed back into the criminal justice system in problematic ways. This circularity of public health/criminal law relations becomes visible when one considers the emergence of counseling advice that ostensibly detaches risk from the disclosure obligation.

In interviews, it became clear that some providers have responded to the vagueness of the significant risk test by counseling their clients to disclose their HIV-positive status to sexual partners prior to all sexual activities, regardless of the transmission risks they pose.

The quotes that follow suggest the range of this practice:

If the [public] health officers call you...what they tell you is, 'make sure that you disclose your status to whomever.' They don't tell you if it's significant risk or whatever. They're just like 'you have to disclose it.'

(Focus Group 4)

We counsel people to always inform prior to any penetrative sex.

EM: What do you mean by penetrative sex?

Any oral sex, any anal sex, any vaginal sex with or without a condom.

(Public Health Nurse—Interview 13)

We don't know what significant risk is, right? Because it means different things to different people or different judges, right? So I cannot interpret what it means for somebody else. So what we usually say, what I usually say, is that in Canada if you have sex, protected or otherwise, without disclosing, I used to say unprotected but now I say protected, once you have sex without disclosing your HIV status to somebody, you could go to jail. You could be charged.

(ASO Worker—Interview 22)

Providers explained this broad approach to counseling about disclosure obligations as a response to the uncertainty of the significant risk test, as a way to protect clients from criminal prosecution and as a response to concerns about their own legal liability. While it is an understandable move, it suggests a troubling consequence of the use of the criminal law to govern HIV transmission risks—the emergence of counseling strategies that encourage a practice of disclosure that exceeds the criminal law obligation, as defined by the significant risk threshold. This has the arguable effect of detaching disclosure from risk governance in favor of a blanket moral obligation to disclose in all sexual

situations. At least one provider suggested how the complexities of counseling around significant risk can give way to a type of moral entrepreneurship in which counselors emphasize an obligation on the part of PHAs to ensure that all sexual partners, in all circumstances, “always know.”

A further troubling consequence of this approach to counseling about disclosure obligations is its potential to influence judicial decision making. An important feature of the intersection of public health and criminal law regulation is the movement of public health knowledge into court proceedings where it is recontextualized and comes to coordinate relations of criminal law decision making and punishment. When entered into evidence in court proceedings, public health or physician advice to the accused to disclose in all circumstances can influence judicial interpretation of the significant risk test in ways that, contrary to the aims of well-meaning providers, do not protect PHAs from prosecution but, in fact, increase their criminal law liability:

There's a tendency to sort of transmogrify, almost, public health formulations of what people should be doing into criminal law obligations. And so you'll see prosecutors and you'll see judges for example citing to the fact that this person was counseled by public health nurse X on these three occasions to disclose and use a condom and then that becomes used to sort of bootstrap the criminal law obligation into you have an obligation to disclose and to use condoms, which in fact is not what the Supreme Court said in *Cuerrier*. (Lawyer—Interview 5)

## Discussion

Critical criminologists and socio-legal scholars have encouraged ways of thinking about criminal law governance as a thoroughly social process with complex and multiple effects (Garland, 2001; Rose & Valverde, 1998). In contrast to formalist analyses that explore the impact of criminal law immanently, such as through studies of whether it truly deters a given prohibited set of behaviors, they recommend analyses of how the criminal law shapes a broad range of “extralegal” social relations. The many insightful studies that show how, through multiple social and institutional sites, criminalization processes extend their reach beyond the formal governance of the criminal law subject provide but one example (Mosher & Brockman, 2010).

The study of the public health impact of criminalizing HIV transmission/exposure can gain much from such a perspective on the nature of criminal law governance. At times, the critique of criminalization has suffered from a too simple explanatory calculus. Too often, criminal law is approached in abstract form and linked with PHAs or HIV-negative individuals *in vacuo* in bold claims that, for example, criminalization will deter people from seeking HIV testing. Normative critique of criminalization need not be reduced to such equations.

The alternative explored here takes a more relational approach that disrupts criminal law's presumption of an individuated, rationally-bound legal subject by orienting to criminal law governance and HIV prevention as socially embedded phenomena (Adam, Elliot, Husbands, Murray, & Maxwell, 2008; Weait 2003). The intent has been to explore features of the social organization of a form of criminal law governance that regulates HIV non-disclosure through the concept of significant risk. A particular concern has been to examine how it shapes HIV prevention, conceptualized as a complex of activities and forms of reasoning linking clinicians, public health officials, front-line HIV counselors, PHAs and others.

This approach locates inquiry in an analytical and empirical space that Timmermans and Gabe refer to as “the medico-legal borderland” (2003:6). They use the term to decry the absence of dialogue between criminology and medical sociology and to encourage critical analyses of sites in which health care and criminal-legal practices intersect. The medico-legal borderland suggests multiple possibilities for analysis including investigation of new forms of social control, the intersection of criminal law and health care governance and the emergence of hybrid health/crime subjects.

This article contributes to the study of the medico-legal borderland by exploring the intersection of public health and the growing use of criminal law powers to regulate HIV transmission risks. The analysis privileges a dynamic of criminal law impact on HIV prevention counseling, while avoiding the pitfalls of determinism by acknowledging that HIV prevention also shapes the domain of criminal law. Indeed, in a manner similar to findings about knowledge flows from other research (Solin, 2004), at this study site, public health knowledge, in the form of counseling records, enters into and is recontextualized within criminal law proceedings with contradictory effects. At the same time, the circularity of public health/criminal law relations is demonstrated by how public health counseling and record keeping are carried out with an “eye to the law,” that is, in anticipation of their potential documentary entry into criminal justice processes.

The findings reported here suggest a host of tensions and problems that arise when the relatively distinct rationalities and forms of risk governance represented by public health and criminal law intersect. In the Canadian context, criminal law governance targets practices of disclosure, relies on an unspecified legal concept of significant risk and aims to punish and contain. Public health governance is nominally averse to punishment, focuses on safer sex practices and relies, in the first instance, on strategies of collaboration and professional client interaction to reduce risk. The growing reach of the criminal law in the context of a history of public health intervention creates tensions at the level of competing forms of risk knowledge and ways of framing responsibility for HIV transmission and the place of the bodies and conduct of PHAs therein.

This study shows how the lack of clarity of the significant risk test and the growing reach of criminal prosecutions, particularly in circumstances when, from a public health perspective, a negligible or low risk of HIV transmission has been posed, has led to anxiety, confusion and contradictory HIV counseling advice. PHAs are unable to determine what their criminal law obligations are and remain confused about the relationship between established public health risk knowledge and safer sex messaging and the parameters of the significant risk test. Their burdens are shared by clinicians, public health nurses and HIV counselors who report serious problems in their HIV prevention work. In a perverse fashion, rather than promoting openness, criminalization has made it more difficult to provide meaningful HIV prevention counseling and support about HIV non-disclosure. While the use of the criminal law may be warranted in some circumstances, the expansive use of a vague legal concept of significant risk does little good either for preventing HIV transmission or for the credibility of the criminal justice system.

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## References

- ACCHO (African and Caribbean Council on HIV/AIDS in Ontario). (2010). *Criminals and victims. The impact of the criminalization of HIV non-disclosure on African, Caribbean and Black communities in Ontario*. Available. [http://www.accho.ca/pdf/ACCHO\\_Criminals\\_and\\_Victims\\_Nov2010.pdf](http://www.accho.ca/pdf/ACCHO_Criminals_and_Victims_Nov2010.pdf).
- Adam, B., Elliott, R., Husbands, W., Murray, J., & Maxwell, J. (2008). Effects of the criminalization of HIV transmission in Cuernier on men reporting unprotected sex with men. *Canadian Journal of Law and Society*, 23(1–2), 143–159.
- Azad, Y. (2008). Developing guidance for HIV prosecutions: an example of harm reduction? *HIV/AIDS Policy & Law Review*, 13(1), 13–19.
- Bernard, E. J. (2010). *HIV and the criminal law*. London: NAM.
- Betteridge, G. (2006). Criminalization of HIV: Beyond Canada and back. Canadian conference on the public's health and the law. 5–7 November. Toronto.
- Burris, S., Beletsky, L., Burleson, J., Case, P., & Lazzarini, Z. (2007). Do criminal laws influence HIV risk behavior? An empirical trial. *Arizona State Law Journal*, 39, 467–517.
- Burris, S., & Cameron, E. (2008). The case against criminalization of HIV transmission. *Journal of the American Medical Association*, 300(5), 578–580.
- Cameron, E. (2009). Key note lecture, 1st Annual Symposium on HIV, Law and Human rights. 12–13 June *The criminalization of HIV transmission and exposure*. Canadian HIV/AIDS Legal network, Toronto.
- Cameron, E., Burris, S., & Clayton, M. (2008). HIV is a virus, not a crime: ten reasons against criminal statutes and criminal prosecutions. *Journal of the International AIDS Society*, 11(7), 1–7.
- Cameron, S., & Rule, J. (2009). In *The criminalisation of HIV transmission in Australia: Legality, morality and reality*. Newtown, Australia: National Association of People Living with HIV/AIDS.
- Devault, M., & McCoy, L. (2002). Institutional ethnography: using interviews to investigate ruling relations. In J. Gubrium, & J. Holstein (Eds.), *Handbook of interviewing research: Context and method* (pp. 751–775). Thousand Oaks: Sage.
- Dodds, C., Bourne, A., & Wait, M. (2009). Responses to criminal prosecutions for HIV transmission among gay men with HIV in England and Wales. *Reproductive Health Matters*, 17(34), 135–145.
- Dodds, C., & Keogh, P. (2006). Criminal prosecutions for HIV transmission: people living with HIV respond. *International Journal of STD & AIDS*, 17, 315–318.
- Dodds, C., Hammond, G., Weatherburn, P., Hickson, F., Keogh, P., Reid, D., et al. (2008). Homosexually active men's views on criminal prosecutions for HIV transmission are related to HIV prevention need. *AIDS Care*, 20(5), 509–514.
- Elliott, R. (2002). *Criminal law, public health and HIV transmission: a policy options paper*. Geneva: UNAIDS.
- Elliott, R. (1999). *After Cuernier: Canadian criminal law and the non-disclosure of HIV-positive status*. Toronto, Canada: Canadian HIV/AIDS Legal Network.
- Galletly, C. L., DiFranceisco, W., & Pinkerton, S. (2009). HIV-positive person's awareness and understanding of their state's criminal HIV disclosure law. *AIDS and Behavior*, 13, 1262–1269.
- Galletly, C. L., & Dickson-Gomez, J. (2009). HIV seropositive status disclosure to prospective sex partners and criminal laws that require it: perspectives of persons living with HIV. *International Journal of STD & AIDS*, 20, 613–618.
- Galletly, C. L., & Pinkerton, S. D. (2006). Conflicting messages: How criminal HIV disclosure laws undermine public health efforts to control the spread of HIV. *AIDS & Behavior*, 10, 451–461.
- Garland, D. (2001). *The culture of control. Crime and social order in contemporary society*. Chicago: University of Chicago Press.
- GNP+. (2010). *Global criminalisation scan report*. Available. [http://www.gnpplus.net/images/stories/Rights\\_and\\_stigma/2010\\_Global\\_Criminalisation\\_Scan.pdf](http://www.gnpplus.net/images/stories/Rights_and_stigma/2010_Global_Criminalisation_Scan.pdf) Accessed 29.12.10.
- Horvath, K. J., Weinmeyer, R., & Rosser, S. (2010). Should it be illegal for HIV-positive persons to have unprotected sex without disclosure? An examination of attitudes among US men who have sex with men and the impact of state law. *AIDS Care*, 22(10), 1221–1228.
- Irwin, A., & Wynne, B. (Eds.). (1996). *Misunderstanding science? The public reconstruction of science and technology*. Cambridge: Cambridge University Press.
- Klitzman, R., Kirshenbaum, S., Kittel, L., Morin, S., Daya, S., Mastrogiacomo, M., et al. (2004). Naming names: perceptions of name-based HIV reporting, partner notification, and criminalization of non-disclosure among persons living with HIV. *Sexuality Research & Social Policy*, 1(3), 38–57.
- Mosher, J., & Brockman, J. (Eds.). (2010). *Constructing crime: Contemporary processes of criminalization*. Vancouver: University of British Columbia Press.
- Mykhalovskiy, E., Betteridge, G., & McLay, D. (2010). *HIV Non-disclosure and the criminal law: Establishing policy options for Ontario*. Toronto. A report funded by a grant from the Ontario HIV Treatment Network. Available. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1747844](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1747844).
- Open Society Institute. (2008). *10 reasons why criminalization of HIV exposure or transmission is bad public policy*. Available. [http://www.soros.org/initiatives/health/focus/law/articles\\_publications/publications/10reasons\\_20080918](http://www.soros.org/initiatives/health/focus/law/articles_publications/publications/10reasons_20080918) Accessed 20.12.10.
- Pearshouse, R. (2007). Legislation contagion: the spread of problematic new HIV laws in Western Africa. *HIV/AIDS Policy & Law Review*, 12(2/3), 1–11.
- Pue, W. (2010). Front matter. In J. Mosher, & J. Brockman (Eds.), *Constructing crime: Contemporary processes of criminalization* (pp. ii). Vancouver: University of British Columbia Press.
- Rose, N., & Valverde, M. (1998). Governed by law? *Social and Legal Studies*, 7(4), 541–551.
- R v Cuernier*, (1998) 2 SCR 371.
- Smith, D. (2005). *Institutional ethnography: A sociology for people*. London: AltaMira Press.
- Solin, A. (2004). Intertextuality as mediation: on the analysis of intertextual relations in public discourse. *Text – Interdisciplinary Journal for the Study of Discourse*, 24(2), 267–296.
- Spradley, J. (1979). *The ethnographic interview*. New York and Montreal: Holt, Rinehart and Winston.
- Symington, A. (2009). Criminalization confusion and concern: the decade since the Cuernier decision. *HIV/AIDS Policy & Law Review*, 14(1), 5–10.
- Timmermans, S., & Gabe, J. (2003). In *Partners in health, partners in crime*. Oxford: Blackwell.
- UNAIDS. (2008). *Criminalization of HIV transmission. Policy brief*. Available. [http://data.unaids.org/pub/BaseDocument/2008/20080731\\_jc1513\\_policy\\_criminalization\\_en.pdf](http://data.unaids.org/pub/BaseDocument/2008/20080731_jc1513_policy_criminalization_en.pdf) Accessed 17.12.10.
- Wainberg, M. (2009). Criminalizing HIV transmission may be a mistake. *Canadian Medical Association Journal*, 180(6), 688.
- Wait, M. (2003). *Intimacy and responsibility: The criminalization of HIV transmission*. New York: Routledge-Cavendish.
- WHO. (2006). *WHO technical consultation in collaboration with the European AIDS treatment group and AIDS action Europe on the criminalization of HIV and other sexually transmitted infections*. Copenhagen: WHO.
- Wolf, L. E., & Vezina, R. (2004). Crime and punishment: is there a role for criminal law in HIV prevention policy? *Whittier Law Review*, 25, 821–886.