The Deterrence Rational in the Criminalization of HIV/AIDS

Anne MERMINOD

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Introduction.

In many countries, including Canada, it is a criminal offence to transmit or expose others to the risk of infection with HIV through unprotected sex.[1] There is currently no specific section in Canada's *Criminal Code* making it a crime to knowingly transmit, attempt to transmit, or expose others to the risk of infection with HIV/AIDS. However, in September 1998, the Supreme Court of Canada released its judgment in *R. v. Cuerrier*[2] which dealt with the criminal prosecution of an HIV-positive person for engaging in sexual activity without disclosing his/her seropositive status. Overruling lower-courts decisions, the Supreme Court stated that where sexual activity poses a "significant risk of serious bodily harm", there is a duty on the HIV-positive person to disclose his or her HIV-status.[3]

Where the duty to disclose the HIV status exists, the failure to disclose constitutes "fraud" that renders a sexual partner's consent to that activity legally invalid, thereby transforming consensual sex into an "assault" under Canadian criminal law.[4] Under sec. 265(1)(a) of the *Criminal Code*, a person commits an assault when, "without the consent of another person, he applies force intentionally to that other person."[5] In *Cuerrier*, the Supreme Court held that this requirement of establishing that "he intentionally applied force" is satisfied if the HIV-positive person committed the act of consensual unprotected intercourse. With regard to consent, the Supreme Court asserted that non-disclosure of one's serostatus may constitute fraud.

To determine whether the absence of disclosure of one's HIV status actually constitutes fraud, the Supreme Court in *Cuerrier* developed a new test. First, the actions of the person living with HIV/Aids must be assessed objectively to determine whether a reasonable person would find them to be "dishonest". [6] In *Cuerrier*, the Court held that there is no difference "between lies and a deliberate failure to disclose".[7] Therefore, the non-disclosure of an important fact, such as HIV infection, can be considered "dishonest".[8] Second, the Crown must prove that the dishonest act had the effect of exposing the person consenting to a "significant risk of serious bodily harm".[9] The Court established that the risk of contracting HIV meets that test, since unprotected sexual

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[1] In Canada, the courts do not make the difference between exposing someone to HIV/AIDS and actual transmission of the disease.
[2] *R. v. Cuerrier* [1998] 2 S.C.R. 371 [*Cuerrier*].
[3] *Ibid*, at par. 14.
[4] *Ibid*.
[5] *Criminal Code*. R.S., 1985, c. C-46, s. 718; R.S., 1985, c. 27 (1st Supp.), s. 155; 1995, c. 22, s. 6. S. 265 [*Criminal Code*].
[6] *Currier, supra* note 2 at 116-118.
[7] *Ibid* at 126.
[8] *Ibid*, at 14, 128.
[9] *Ibid*.

intercourse presents a "significant risk" of infection with HIV, a virus causing "serious bodily harm".[10] Third, the Crown must prove beyond a reasonable doubt that the person would not have consented to sex, if the person living with HIV would have disclosed his/her status.[11] In summary, consent to sexual intercourse may be vitiated by fraud under s. 265 of the *Criminal Code* if the failure to disclose the HIV□positive status is dishonest and results in deprivation by putting the partner at a significant risk of suffering serious bodily harm.[12]

Since *Cuerrier*, there have been increasing numbers of prosecutions and convictions of HIV-positive persons for engaging in unprotected sexual behaviour without disclosing their HIV status. In the context of HIV criminal cases, judges formulate and apply criminal law rules on the assumption that they will influence conduct and thus affect deterrence. In fact, a close analysis of HIV criminal law cases shows that the deterrence rationale is used in every HIV case to justify the imposition of criminal responsibility.

Deterrence is defined as a means of crime control aimed at preventing criminal behaviour by fear of punishment. The deterrence theory is to affect behaviour by dissuading the offender from committing crimes in the future, or discouraging other potential criminals from committing the same crime on the basis of the perception that they may be caught and punished.[13] Deterrence may be "specific" or "general".[14] "Specific deterrence" is aimed at regulating only the conduct of the offender who is sentenced. "General deterrence" is aimed at regulating the conduct of potential offenders other than the individual sentenced. This approach is used to dissuade the general public from engaging in high-risk behaviour by instilling fear of punishment. This latter type of deterrence is the one currently promoted by courts in cases of criminalization of transmission and exposure of HIV/Aids.

In the context of HIV criminal law, supporters of the deterrence doctrine assume that an HIV-positive person contemplating consensual unprotected sex without disclosing his/her HIV status will be deterred because of the certainty that he/she will be caught and punished. In other words, the criminal penalty is supposed to have a negative inducement which will discourage people from engaging in behaviour that violates the law. Courts have stated that, rather than punishing after the fact, deterring harmful conduct in the future is, and should be, the primary function of criminal sanctions.[15] The focus on deterrence in encouraging precautionary conduct through criminalization is motivated by

[10] *Ibid*, at 19.
[11] *Ibid*, at 130.
[12] *Ibid*.
[13] H (1980), 3 A. Crime. R. 53, at p. 74.
[14] *Criminal Code*, *supra* note 5, sec. 718,
[15] See *infra* note criminal HIV cases.

public health concerns and reduction of overall HIV transmissions.[16] However, the criminalization of HIV/AIDS transmission and exposure may not ultimately serve to prevent further transmissions.

First, this research paper will analyze the role of the concept of deterrence in the justification for the criminalization of HIV/AIDS. Then, it will argue that scholars and lawmakers are not warranted in using deterrence arguments in new areas of law like the criminalization of HIV/AIDS where the efficacy of legal rules in deterring harmful conduct has never been demonstrated. To this end, the paper will explore three distinct aspects. Section A will analyze the rationale underlying the criminalization of HIV and show that charges and prosecutions of HIV-positive people are more frequent and that their sentences are especially long. Section B will examine the deterrence argument as a principle of sentencing in general and in the context of the criminalization of HIV/AIDS. Section C will examine the social science literature and judicial critique prompting and support our skepticism as to whether the criminal law deters.

Second, this research paper will argue that in addition to not meeting the objective of preventing HIV/AIDS transmissions, the imposition of criminal penalties intended to deter may even have negative impact on control of HIV transmissions. In fact, criminalization of non-disclosure of seropositivity, may amongst other effects, discourage people from getting tested, impede education, undermine counseling efforts to reduce the risk of transmission and stigmatize people living with HIV/AIDS, a group already socially, culturally and/or economically marginalized.

A. The Criminalization of Sexual HIV/AIDS Transmission and Exposure in Canada

There are a number of cases in which HIV-positive individuals have been prosecuted under criminal law for engaging in sexual behaviour without disclosing their HIV status. Canada, as well as many other countries[17], has decided to criminalize the failure to disclose one's HIV-status, motivated by the deterrence rationale.[18] This section

[16] See e.g. Winifred H. Holland. « HIV/AIDS and the criminal law » (1994) Crim L. Q. 279, 288 [Holland]; Stephan Kenney. "Criminalizing HIV transmission : lessons from History and a Modal for the Future", (1992) 8 J *Contemp. Health L. & Policy* 245 [Kenney]; Donald H. J. Hermann. "Criminalizing Conduct Related to HIV Transmission" (1990) 9 *St. Louis U. Pub. L. Rev*. 352 [Hermann].

[17] It is a crime to expose another person to the risks of HIV transmission, whether or not the transmission has occurred in the following countries: New South Wales, China, Vietnam, Denmark, France, Germany, the Netherlands, Norway, Poland, Russia, Sweden, Ukraine South Africa, East Timor, Kenya. According to Lazzarini & al. *infra* note 21, from 1980 to 2001 27 seven states enacted criminal HIV exposure or transmission statutes. In the U.S. Penalties for exposure without disclosure (and without malice) range from a short prison sentence or a fine of $2500, or both, in Virginia, to a maximum of 30 years in prison in Arkansas.

[18] See e.g. *Holland supra* note 16; Kenney *supra* note 16.

explains the rationales for the criminalization of HIV/AIDS and describes the history and recent evolution of prosecution of people living with HIV/AIDS.

1. Rationales for the Criminalization of HIV transmissions and exposures

Advocates of the criminalization of HIV/AIDS argue that criminal law will deter HIV-positive individuals from risk taking behavior, as well as punish individuals who place others at risk of infection.[19] They assume that criminal punishment will help to deter individuals from engaging in future conduct behaviours carrying the risks of HIV transmissions: "Criminal statutes are effective to deter individuals from engaging in HIV transmitting behaviour […] There is a social objective to prevent conduct likely to spread HIV in order to prevent further transmission of HIV to uninfected persons […]."[20] In other words, criminal law attempts to deter transmission or exposure by punishing those responsible, with the belief that the threat of incarceration will operate as deterrent for the general population.[21] Similarly, the Supreme Court of Canada alleges that fear of criminal punishment can deter sero-positive people to engage in risky sexual conduct without disclosing their HIV status. Using inflammatory language, Chief Justice Cory states that the criminal law "provides a needed measure of protection in the form of deterrence and reflects society's abhorrence of the self−centred recklessness and the callous insensitivity of the actions of the respondent and those who have acted in a similar manner."[22]

Next section will examine whether the deterrence criminal theory, which is the sole argument supporting criminalization, is valid.

2. History of Criminal Prosecution

In fact, history demonstrates the submission that the criminal law is not a suitable vehicle for proscribing and limiting human sexual behaviour. Criminal sanctions are ineffective in limiting risky consensual sexual behaviour. For example, laws relating to prostitution, transmission of syphilis, and sodomy have been unsuccessful to prevent those behaviours.[23]

In 1985, a section of the *Criminal Code*, which made it an offence to knowingly transmit a venereal disease or sexually transmitted infection (STI), was repealed by the Canadian government[24], on the ground that the proscribed behaviour was a public health

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[19] *Ibid*.
[20] Hermann, *supra* note 16 at 352-353.
[21] Zita Lazzarini & Robert Klitzman « HIV and the Law : Integrating Law, Policy, and Social Epidemiology » (2002) 30 J.L. Med. & Ethics, at p. 537 [Lanzzarini 2002].
[22] *Cuerrier*, *supra* note 2 at 142.
[23] D. McGinnis. "Law and Leprosis of Lust: regulating syphilis and AIDS". (1990) 20 49 *Ottawa Law Rev*, at 57 [*McGinnis*].
[24] *Criminal Law Amendment Act* 1985, S.C. 1985, c. 19, s.42 [*Criminal Law Amendment Act*].

issue rather than a criminal law issue.[25] Furthermore, the government concluded that the offense of knowingly transmitting an STI was counterproductive. The government stated that criminalizing the transmission of an STI made it difficult to obtain accurate reports on the disease, since people at risk were inhibited to get tested as they were afraid to be criminally charged if tested positive.[26] This paper approves the government's decision to repeal this specific mentioned and agrees that criminalizing STI transmission is counterproductive.

As opposed to this stand taken by the Canadian government in relation to STI transmission, HIV/AIDS transmission and exposure has been criminalized in Canadian law. Even if there is still no specific section in the *Criminal Code* making it a crime to knowingly transmit, attempt to transmit, or expose others to the risk of infection with HIV, non-disclosure is now subject to criminal charges. Over the last 18 years, a number of cases have indeed been reported in which people living with HIV have been criminally charged for a variety of acts that result in HIV transmission or carry the risk of transmission. Criminal prosecutions in HIV non-disclosure cases have been based on common nuisance[27], assault[28], aggravated assault[29], sexual assault[30], aggravated sexual assault[31], criminal negligence[32] and first-degree murder.[33]

An overview since 1989 demonstrates that out of the 65 charges laid, most of the people charged are Caucasian heterosexual males. However, 21 people charged are non-

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[25] McGinnis, *supra* note 23. See also Special Committee on Pornography and Prostitution. *Pornography and prostitution in Canada*. (1985) (Ottawa: Canadian Government Publishing Centre), 1985 [Canadian report].

[26] *Criminal Law Amendment Act, supra* note 24. Interestingly, McGinnis *supra* note 23, made an allusion that this section might have been revoked because the criminal liability may deter people from seeking counsel or treatment. See also Canadian Report, *supra* note 25.

[27] *Criminal Code, ibid*, at sec. 180. A person who does an unlawful act, or fails to discharge a legal duty, thereby endangering the lives, safety, or health of the public, or causing physical injury to any person, commits a "common nuisance". This offense carries a maximum penalty of two years in prison.

[28] *Ibid,* at sec. 265. It is an assault to « apply force intentionally » to another person without their consent. There is no legally valid consent where a person consents by reasons of "fraud". The offense of assault carries a penalty of up to five years' imprisonment.

[29] *Ibid*, at sec. 268. Where the offender endangers the life of the complainant, the penalty carries a maximum of 14 years' imprisonment.

[30] *Ibid*, at sec. 271. In the context of the criminalization of HIV, the offense of sexual assault is applied even if the intercourse is consensual. This offense carries a penalty of a maximum of ten years.

[31] *Ibid,* at sec. 273. A person is liable of aggravated assault if the assault is of sexual nature and endangers the life of the complainant. The maximum sentence of aggravated assault is life imprisonment.

[32] *Ibid,* at sec, 219 and 221. A person is « criminally negligent » if, in doing anything or omitting to do anything that « shows wanton or reckless disregard for the lives or safety of other persons" Criminal negligence offense carries a maximum penalty of 10 years' imprisonment.

[33] *Ibid,* at sec. 229, 230. First degree murder carries a maximum penalty of life imprisonment. A person is guilty of first degree murder if they do something with the intent of causing bodily harm or with the intent of causing bodily harm. In HIV criminal cases, first degree murder are applied when a HIV-positive person shows reckless disregard as to whether death ensues from consensual sex or not.

Caucasians (see Table 1)[34] and most of those charges were made in the last 7 years (see Table 2).

Table 1

NUMBER OF PEOPLE CHARGED	
Men	**TOTAL: 59** • Caucasians: 45* if the race is not specified, assumptions that man is Caucasian. • Black men: 12 • Latinos: 2
Women	**TOTAL: 06** • Native: 2 • Asian: 1
TOTAL	**65**

Table 2

CHARGES LAID			
LEGEND: • *MEN: I* • *BLACK MEN: B* • *LATINO MEN: L* • *WOMEN: W* • *ASIAN WOMAN: AW* • ** if no precise dates assumed that that the charges where a year before the year of conviction.*			
YEAR	***CHARGES***	***ASSUMPTIONS****	***TOTAL***
1997	*II*	*I*	*3*
1998			*0*
1999	*II*		*2*
2000	*IIIII*	*III*	*8*
2001	*IIII*	*W*	*5*
2002	*IBW*	*I*	*4*
2003	*I*		*I*
2004	*BLIII*		*5*
2005	*WBIBBLBBII*	*I*	*11*
2006	*BBIIWBBI*	*II*	*10*
2007	*WWWII*		*5*

[34] Information in Table 1 to Table 5 is drawn form the work I did this summer at the Canadian HIV/AIDS Legal Network in Toronto.

Since 2005, most of the charges laid are against heterosexual black males and against women (See table 2). In fact, out of the 5 charges brought in 2007, 3 of these charges were made against women.

Ontario is the Canadian province with the highest number of prosecutions. In fact, 28 out of 65 charges were made in Ontario, 10 in British Columbia, 9 in Quebec, 6 in Alberta, 6 in Newfoundland and 5 in Manitoba. In Ontario, prosecutions were laid prevalently in small cities (London, Kitchener, Hamilton, Waterloo, Guelph, Windsor) (see Table 3).

Table 3.

CHARGES IN SMALL CITIES- ONTARIO ****Bold: black men; L: Latino, W: women.	
LONDON	2002, 2004, 2006, 2005
KITCHENER	2001,
GUELPH	
WINDSOR	2004(L), 2002
ST-CATHERINES	2005,
TIMMINS	2001,
HAMILTON	**2005,** 2006(w), **2006, 2006,**
SUDBURY	**2005**
THUNDER BAY	2006
TOTAL	16

Analysis of the cases shows that the length of sentences ranges from 1 year to 18 years, no matter if there was actual transmission of the disease or not. Moreover, sentences since 2000 harsher since the year 2000. Unfortunately, Canadian courts offer no clear explanation for the stiffer sentences they are imposing. However, it can be argued, based on *Cuerrier*[35] and since this decision that courts have adopted strong sentences with a view to deterrence believing that harsh sentences will achieve this goal. The publicity surrounding recent HIV cases[36] may have further strengthened this belief and thus encouraged courts to continue to use sentencing with the aim of deterrence.

[35] *Cuerrier, supra* note 2.

[36] See e.g. the mass media prosecutions of Trevis Smith a Roughriders's Football player in Regina: « CFL's HIV sex scandal to play out in Regina Court » January 28, 2007. CTV. Online : http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20070128/CFL_HIV_070128?s_name=&no_ads; See also, the case Johnson Aziga accused of two first degree murders charges: « Aids back in Spotlight» *Hamilton Spectator*, May 14 2007. Online : http://www.thespec.com/article/198760.

Table 4

LENGTH OF SENTENCES	
18 years	1
15 years	1
11 years	1
10 years	2
8 years	2
7 years	1
6 years	1
4 years and 8 months	1
45 months (3.75 years)	1
40 months	2
36 months	3
32 months	1
24 months	1
18 months	2
1 year	2

A comparison between sentences applied in criminal HIV exposures and comparable crimes illustrates that sentences in criminal HIV exposures are longer compared to crimes of similar severity. The offense of impaired driving can be justifiably compared with criminal HIV exposure.[37] Both types are comparable because each exposes each is punished regardless of whether actual harm occurs.

For impaired driving offense, maximum sentences are short and inexpensive. Typically, for the first offence of impaired driving, the fixed maximum fine for the first offense is $600; the minimum mandatory imprisonment term for the second offence is from 90 to 120 days.[38] Statistics from the Canadian Safety Council demonstrate that the average length of imprisonment for cases of impaired driving is 73 days.[39] Offenders are sentenced to prison in only 14 per cent of cases. On the contrary, the range of sentences in HIV exposures range from 1 year to 18 years regardless of whether the victim has been infected or not. Notwithstanding the fact that impaired driving sentences should maybe be longer than they currently are[40], comparing HIV criminal sentences with impaired driving sentences demonstrates that sentences applied in the context of the criminalization of HIV are considerably longer than other similar sentences.[41] This difference in sentencing term is not explained by the courts, nor is it based in any

[37] *Criminal Code*, *supra* note 5, at sec. 251(2)(3).
[38] *Ibid*, at sec S. 253(a).
[39] Satistics. Canada Safety Council. http://www.safetycouncil.org/info/traffic/impaired/progress.html [Statistics]
[40] See e.g. Douglas N. Husak "Is Drunk Driving a Serious Offense?" (1994) 23 1 *Philosophy and Public Affairs*, at 52-57.
[41] Satistics, *supra* note 39.

principled rationale. The most probable explanation for this difference is that Canadian courts believe that the more severe the punishment, the less likely it is for the offender to re-engage in the proscribed behaviour, and the more likely the deterrence for potential offenders.

In fact, the sentencing in HIV exposure cases is often justified by the principle of deterrence.

B. The Deterrence Argument: Growing Reasons to be Skeptical

Even though deterrence as a principle of sentencing has been applied since the eighteenth-century, this paper contends that the deterrence rationale underlying the criminalization of HIV/AIDS is solely based on assumptions, which can be proven to be false. The assumption is that deterrence, as a goal of sentencing, discourages crime by threat or example of punishment.[42] The following sections intends to summarize the historical background and the theoretical approach of deterrence as a principle of sentencing; then to argue that the deterrence rationale is applied in all criminal HIV/AIDS cases without any proof that it will really discourage other people living with HIV/AIDS from engaging in unprotected sexual intercourse without disclosing their HIV status; and finally to rely on the social literature and judicial critique to demonstrate that deterrence is not likely to work in criminal HIV/AIDS cases.

1. Deterrence as a Principle of Sentencing

This section examines the historical background and the theoretical approaches of deterrence as a principle of sentencing, its rational as a Common Law principle, and its codified objective under s. 718 of the *Criminal Code*.

The word "deterrence" has been used at least since the eighteenth-century and is derived from the Latin verb "deterrere", meaning to frighten away from.[43] Initial attempts to formalize the idea of deterrence were made by two reformers, Ceasare Beccaria (1738-1794) and Jeremy Bentham (1748-1832), who proposed significant reforms to the criminal justice system. Both argued that the major goal of the criminal justice system should be to prevent future crimes by punishing individuals who have already been caught and to threaten members of the broader society who might contemplate committing a crime.[44] For Braccaria and Bentham, deterrence occurs when the punishment attached to the criminal act is applied to offenders. Then, others will rationally weigh the disadvantage of criminal behaviour and choose the act resulting in the least pain and hence will not commit a crime.

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[42] *R. v. Dixon* (1975), 22 A.C.T.R. 13, at 20. [*Dixon*]
[43] Jack Gibbs. *Crime, Punishment, and Deterrence.* (New York : Elsevier. 1975) [Gibbs].
[44] Bentham, Jeremy. *The Rationale of Punishment*. (Edinburg: John Bowring Tait, 1843) [*Bentham*].

The core argument of Braccaria in *On Crimes and Punishment* (1764)[45] and Jeremy *Bentham in The Rationales of Punishment* (1830)[46] is that the criminal justice system should operate in a manner that deters potential offenders. Both stress three key points. First, the deterrence doctrine believes that suspects should know that they will be arrested with certainty. The deterrence rationale places greater emphasis on the certainty of conviction rather than on the severity of sentence.[47] This means that a potential offender is more likely to be deterred if he knows for certain that he will be caught, rather than if he knows that the chance of being caught is low but the punishment severe. Second, the deterrence doctrine believes that the process of criminal cases should be made in a speedy yet efficient manner. It places great emphasis on the efficient operation of the criminal justice system, specifically on the reduction in court delays and in the time between arrest and trial.[48] Third, the deterrence theory believes that those convicted of a crime should receive a sentence with an appropriate, but not excessive, amount of punishment. In other words, severe sentences do not necessarily proportionally increase the deterrence effect.

Canadian Common law courts applied the deterrence rationale prior to being enacted in the *Criminal Law Code*.[49] On September 3, 1996, the Parliament of Canada enacted Bill C-41, which was the first legislative statement in Canada of what is described as the "Purpose and Principles of Sentencing". The "Purpose and Principles of Sentencing' are set out in section 718, which states:

> 718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
> (*a*) to denounce unlawful conduct;
> (*b*) to deter the offender and other persons from committing offences;
> (*c*) to separate offenders from society, where necessary;
> (*d*) to assist in rehabilitating offenders;
> (*e*) to provide reparations for harm done to victims or to the community; and
> (*f*) to promote a sense of responsibility in offenders, and

[45] Richard Bellamy, ed, *On crimes and punishments, and other writings / Cesare Beccaria.* (1995) New York : Cambridge University Press [Beccaria]
[46] Bentham, *supra* note 44, at ch. VI.
[47] *Ibid*.
[48] Malcom Feeley and J. Simon & al. "The New Penology: Notes on the Emerging Strategy of Corrections and Its implications". (1992) 30 *Criminology* 449-75 [Feeley].
[49] See for example: *R. v. Iwanitw; Overton* (1959), 127 C.C.C. 40 (Man. C.A.); *R. v. Mulvahill* (1935), 21 B.C.A.C. 296; *Reg. v. Wilmott* (1969), 70 W.W.R. 365; *R. v. Dixon* (1975), 22 A.C.T.R. 13; *R. v. Morrissette* (1970), 1 C.C.C. (2d) 307, 75 W.W.R. 644 (Sask. C.A.); *R. v. Kissick* (1969), 70 W.W.R. 365; *R. v. Lyons*, [1987] 2 S.C.R. 309 at p. 329, 37 C.C.C. (3d) 1, 44 D.L.R. (4th) 193.

> acknowledgment of the harm done to victims and to the community.[50]

Importantly, section 718 says that one objective of sentencing is "to deter the offender and other persons from committing offences".[51] Nonetheless, it should be noted that the *Criminal Code* does not say that the sole purpose of sentencing is to deter. The *Criminal Code* rather says that the purpose is to impose "just sanctions", "proportionate to the gravity of the offence and the degree of responsibility of the offender".[52] However, we will see in the subsequent section that deterrence as a principle of sentencing is applied relentlessly and without any proof of its efficacy in every case of HIV/AIDS non-disclosure, as if section 718 was in fact saying that the purpose of sentencing is only to deter. The next section will explain how judges formulate and apply general deterrence in the context of the criminalization of HIV/AIDS.

2. The Deterrence Argument in Criminal HIV/AIDS Cases

Advocates of the criminalization of HIV/AIDS, motivated by public health concerns, assume that punishment will deter people from conduct that transmits, or risks transmitting, HIV/AIDS and will prevent future conduct that risks resulting in HIV transmission by dissuading others who might be inclined to imitate the offender's conduct. Furthermore, deterrence as a principle of sentencing seems also to establish and promulgate expected norms of behavior through fear that the illegal act could lead to imprisonment. In *Cuerrier* it was argued that the "[…] *Criminal Code* does have a role to play. Through deterrence it will protect and serve to encourage honesty, frankness and safer sexual practices."[53]

While each case and its correlative sentencing period are different, the principle of deterrence remains present in all HIV criminal cases. Although this principle is solely based on unproven assumptions, it continues to be the principal rationale for criminalizing the transmission and exposure of HIV/AIDS. Furthermore, the deterrence argument remains invariable in every criminal HIV-case even though no research has been conducted to evaluate its effectiveness.

This section aims to stress the regularity of deterrence rationale without proving its efficacy in criminal HIV cases in order to imprison the accused living with HIV/AIDS who engaged in unprotected sexual intercourse. In fact, deterrence reasoning has been used in a number of cases across Canada before and especially after the Supreme Court decision in *Cuerrier*. All of the cases repeat the same assertion that deterrence is a

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[50] *Criminal Code, supra* note 5, at sec. 718.
[51] *Ibid*.
[52] *Ibid, at* ss 718.1 and 718.2. See also T.W. Ferris, T.W. *Sentencing: Practical Approaches* (Toronto: Butterworths, 2005) [Ferris].
[53] *Cuerrier*, *supra* note 2, at 147.

paramount goal of sentencing in HIV cases. It is crucial to summarize relevant cases to demonstrate that deterrence is used persistently without any proof that imprisonment has indeed a deterrent effect.

In September 1998 the Supreme Court of Canada released in *R. v. Cuerrier*[54] its first judgment dealing with a criminal prosecution of an HIV-positive person for engaging in sexual activity without disclosing his HIV-status. Mr. Cuerrier was charged with aggravated assault after he had unprotected consensual sex with two different women knowing that he had tested positive for HIV. In *Cuerrier,* Chief justice Cory's reasoning, underlining the importance of the deterrence rational in sentencing non-disclosure of HIV offenders, has influenced the subsequent jurisprudence dealing with the criminalization of HIV/AIDS:

> " […] [criminal] law provides a needed measure of protection in the form of deterrence and reflects society's abhorrence of the self-centered recklessness and the callous insensitivity of the actions of the respondent and those who have acted in a similar manner. The risk of infection and death of partners of HIV-positive individuals is a cruel and ever present reality. Indeed the potentially fatal consequences are far more invidious and graver than many other actions prohibited by the *Criminal Code*. The risks of infection are so devastating that there is a real and urgent need to provide a measure of protection for those in the position of the complainants. If ever there was a place for the deterrence provided by criminal sanctions it is present in these circumstances"[55]" "The *Criminal Code* does have a role to play. Through deterrence it will protect and serve to encourage honesty, frankness and safer sexual practices."[56]

Chief Justice Cory's reasoning is repeated in *R. v. Mercer*[57]. In *Mercer*, the accused was convicted of two counts of criminal negligence causing bodily harm.[58] Mercer was tested for HIV. His doctor advised him that until the tests results were known, he should assume to be a risk to others and use a condom. However, Mercer engaged in unprotected sexual intercourse for a short time before receiving the result of his test, and he continued after being advised of being HIV-positive without informing the complainant of his HIV-status. He was sentenced to consecutive terms of six and five years imprisonment. At the trial, Marshall J. described Mercer's crime as one of "monumental proportions" and determined that the dominant considerations in sentencing were deterrence and protection of the public:

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[54] *Ibid.* See also Richard Elliott, *After Cuerrier: Canadian Criminal Law and the Non-Disclosure of HIV-Positive Status* (Montreal: Canadian HIV/AIDS Legal Network, 1999).
[55] *Ibid*, at 72.
[56] *Ibid, at* 147.
[57] *R. v. Mercer* (1993), 84 C.C.C. (3d) 41 (N & L C.A.), [1994] S.C.C.A. No. 449 [*Mercer*]. See also, *R. v. Summer*, [1989] A.J. No. 784 (Prov. Ct.) *[Summer]* for the same reasoning.
[58] *Ibid, Mercer,* at 52.

> " […] it is difficult to see how a court could fail to exercise its powers of dissuasion through a penalty set with general deterrence in mind. In my view this is neither counter productive to, nor operating at cross-purposes with, efforts to stem the spread of the virus. To the contrary it is necessarily complementary to the extensive preventative efforts being undertaken by every arm of society involved in this pre-occupying problem. Therefore, in my view, a weighing of arguments for and against results in the conclusion that general deterrence must be a significant factor in setting sentencing […]"[59].

Like Justice Cory in *Cuerrier*, Marshal J. in *Mercer* offers an explanation as to why the deterrence argument has an important bearing in formulation of these sentences, but does not offer convincing arguments. Marshal J. claims criminal law is complementary to public health effort to dissuade others who may be otherwise inclined to imitate the offender's conduct, but he does not demonstrate that deterrence in HIV-criminal cases is in fact successful.

In 2001, Chief justice O'Regan in *R. v. Williams* also assumed that deterrence is a primary goal of sentencing where the offender failed to inform his partner of his HIV-positive status prior to engaging in unprotected sexual intercourse. [60] Akin to previously discussed cases, O'Regan does not explain how deterrence rationale is successful.

In 2007, the deterrence argument is used again without any explanation as to how criminalization is effective in terms of deterrence. In *R. v. Smith*[61], the Provincial Court sentenced Mr. Smith to three-and-a-half years to a charge of sexual assault. Mr. Smith had consensual unprotected sex with the complainant many times over several months while knowing he was HIV-positive and without disclosing his status to the complainant. The woman had not contracted the virus. He apologized for his conduct during the proceedings and admitted he did not disclose his HIV-status to his girl friend because he feared she would reject him.[62] In this case, Bellrose J. admits that, "[i]n an ideal society, health departments, through their notification process, through their calling in of individuals whom they suspect to have HIV, informing them as to what they should do or should not do, challenging them to be responsible for their [HIV status]"[63] would be sufficient to prevent the spread of HIV/AIDS. Regardless of the specific facts of the case, Bellrose J. applies the theory of deterrence without any explanation: "Deterrence, general

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[59] *Ibid*, at 79.
[60] *R. v. William* [2000] N.J. No. 138, at 17. [*Williams*].
[61] *R. v. Smith* [2004] B.C.J. No. 2736 [*Smith*].
[62] *Ibid*, at 51.
[63] *Ibid*, at 271.

deterrence and specific deterrence plays a crucial role when it comes to sentencing for aggravated assault by way of non-disclosure of HIV status."[64]

In *R. v. Booth*[65], the deterrence argument is applied again without clarifications. In this case, the victim requested that the accused receive a custody sentence of one day despite the case law that establishes a sentencing range of one year to twenty months for an offence under Section 180 of the *Criminal Code*. As the victim explained to the court, she wanted him to receive a lighter sentence because she knew that the accused did not intend to transmit his HIV. Notwithstanding the victim's request, Fraser J. disagreed with the complainant's submission: "It would be undesirable and wrong for this Court to [impose] a substantially lighter sentence than appropriate thereby reducing the deterrent value and the court's and public's denunciation of this crime".[66] Unfortunately, Fraser J. rather than offering clarity as to what are the deterrence effects on Mr Booth himself, or on individuals who are likely to commit the same act, Fraser J.'s solely says "deterrence […] is so important in this type of offence" without giving any explanation as to how such deterrence is achieved.[67]

Yet again, in *R. v. J.M.*[68], the accused, a woman who twice engaged in sexual intercourse with two men was sentenced to a one-year conditional sentence with house arrest and a lengthy probation order. At trial, it was demonstrated that J.M. was suffering from a mood disorder with hypomania features at the time of the offense.[69] Notwithstanding J.M.'s documented psychiatric problems accepted by both the crown and defense experts, Fuerts J. repeats the statement that deterrence as a principle of sentencing is crucial in this type of offense, without offering proof that deterrence has an important bearing in dissuading people.[70]

In the two most recent decisions regarding the criminalization of HIV, Bellrose J. in *R. v. Smith*[71] and Grans J. in *R v. Walkem*[72] reiterate that general deterrence and specific deterrence plays a very crucial role in situations where a person had unprotected sexual intercourse without disclosing ones HIV status.[73] Yet again, no proof is offered as to the efficacy of deterrence in this type of offense.

A review of the decisions discussed above leads inexorably to the conclusion that, in the context of HIV, deterrence is a dominant consideration applied in all cases. In none

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[64] *Ibid*, at par. 271.
[65] *R. v. Booth*, [2005] A.J. No. 792 (Prov. Ct.). [*Booth*]
[66] *Ibid*, at 4.
[67] *Ibid*, at 9.
[68] *R. v. J.M.*, [2005] O.J. No. 5649 [*J.M.*].
[69] *Ibid*, at 11-16.
[70] *Ibid*, at 28.
[71] *Smith*, *supra* note 61.
[72] *R v. Walkem* [2007] O.J. No. 186 (A.M. Gans J). [*Walkem*]
[73] *Ibid*, at 21; see also *Smith, supra* note 61, at 127.

of the cases discussed above, is it explained how deterrence operates, especially in new areas of law such as the criminalization of HIV where the efficacy of legal rules in deterring harmful conduct has never been verified.

As demonstrated above, although deterrence as a goal of sentencing may seem a compelling strategy to dissuade people likely to engage in unprotected sex without disclosing their HIV-status through the fear of imprisonment, its effectiveness rests solely on assumptions. Canadian courts may place too much reliance on the use of the deterrence theory, while nothing proves that deterrence is effective. In fact, the next section will show that although the principle of deterrence is used consistently in all of the cases cited above, there are a number of reasons why the criminalization of HIV/AIDS transmissions and exposures may not ultimately serve as a deterrent.

3. Social Science and Judicial Critique

There is little or no evidence to sustain an empirically justified belief in the deterrent efficacy of legal sanction. As this section contends, there is, on the contrary, strong evidence to question the criminal law's deterrent effect and the ability to deter via criminal law rules and penalties. Many Canadian courts and social science research studies on sentencing have cautioned against over-reliance on deterrence as a principle of sentencing and have recognized that the deterrence value of sentencing is speculative.[74] This paper goes further and suggests that the deterrence strategy is a poor one for three reasons: potential offenders do not know the legal rules; they do not make rational choices; and/or they do not perceive the exact cost for a violation as greater than perceived gain.[75] This section outlines each of these hurdles and suggests that any one of these blocks the apparent deterrent effect.

First, to be deterred, the offender needs to know the law. Available studies suggest however that most people do not know legal rules.[76] In fact, the deterrence doctrine in its assumption that it is possible to widely disseminate information about sentences imposed in particular cases, is proven to be wrong.[77] For Paul H. Robinson, Professor at the University of Pennsylvania Law School and David P. Farrington, Professor of Psychology and Public Affairs at the Princeton University, who have conducted empirical studies, potential offenders do not have a good grasp of the severity of penalties to

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[74] See for example *Research Reports on the Canadian Sentencing Commission* (The Archambault Report). "Legal Sanctions and deterrence". (Ottawa: Research and Development Directorate. Department of Justice, 1988). [*The Archambault Report*]

[75] Paul H. Robinson. "Does Criminal Law Deter? A Behavioural Science investigation" (2004) 24 2 Oxford J. Legal Stud. 173 [Robinson (2004)]

[76] A. von Hirsh " Criminal Deterrence and Sentence Severity: An Analysis of Recent Research" (2001) 39 Alta. L. Rev. 597-605. [von Hirsh]

[77] Robinson Paul H; John M Darley. "The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst..." (2003) 91 5 Geo. L. J. 949, at p. 954 [Robinson 2003].

various crimes.[78] Even people who think they know the law, are frequently wrong.[79] Indeed, repeat offenders who would have a greater incentive to know the law, do not know it.[80] Put another way, individuals are generally completely ignorant of what the law is:

> "Potential offenders typically do not read law books and their ability to learn the law, even indirectly through hearing or reading of particular cases, is limited by the fact that the legal rule is just one of hundreds of variables that influence a case disposition. To divine the operative liability rule, hidden as it is under the effects of all the other variables, would require both higher numbers of reported cases than those to which potential offenders are exposed and a mind for complex calculation beyond that which is reasonable to expect".[81]

Furthermore, since individuals have minimal knowledge of the penalties for various crimes, they cannot be deterred. In other words, if individuals are ignorant about criminal law rules, it seems unrealistic to think that those rules will effectively deter individuals from committing a prohibited act. Punitive measures alone, without being known by potential offenders, cannot have a deterrent effect. For instance, in a recent report on impaired driving published by the Department of Justice, Donelson asserts that "law-based, punitive measures alone cannot produce large, sustained reductions in the magnitude of [crimes]".[82] In the context of consensual sex, it is extremely doubtful that an exemplary sentence imposed in a particular case will have an effect in deterring potential offenders.[83] Where the prohibited conduct is the expression of sufficiently compulsive drives or motivations, deterrence is often not possible at all.[84]

Second, to be deterred, individuals need to make a rational choice at the time of the offense. In other words, even if the individual understands the law and its implication, the offender needs to bring this knowledge to bear on his conduct at the time of the offense. Available data suggest that the possibility to make a rational choice will depend on several factors: the context in which the need for the decision arises[85], the particular personality of the offender[86]. and mental abnormalities.[87] In the particular context of this

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[78] Robinson (2004), *supra* note 77 at 176; David P. Farrington, "Human Development and Criminal Carrers" (1997) *Oxford Handbook of Criminology,* at p. 361 [Farrington].
[79] *Ibid*, supra note 75 at 173.
[80] Robinson (2204) *supra* note 75; O. Dahlbeck "Criminality and Risk-taking" (1990) 11 Personality and Individual Differences, at 265.
[81] *Ibid*, at 954.
[82] A.C Donelson, D.J Beirness & al. "Alcohol and Fatal Road Accidents in Canada: A Statistical Look at its Magnitude and Persistence" (1985) Impaired Driving report No. 3. (Ottawa, Ontario: The Department of Justice, Canada), at 221-222.
[83] *The Archambault Report*, *supra* note 74.
[84] H. L. Packer. *The Limits of the Criminal Sanction*. (Stanford : Standford University Press, 1968), at 45 [Packer].
[85] Robinson (2004), *supra* note 75 at 179.
[86] Micheal R. Gottfredson and Travis Hirsh. *A General Theory of Crime*, 1990.
[87] Robinson (2004), *supra* note 74 at 180.

paper, to bear such an understanding on his conduct at the time of a consensual sexual intercourse is especially difficult. Indeed, when it comes to sex, few people seem to be rational actors.[88] Furthermore, situations factors working against disclosure include engaging in sex in environments that implicitly discourage verbal communication between partners, engaging in sex as a means to procure money or drugs, or engaging in sex in situations of coercion. All of these factors are not taken in account by Canadian courts and reduce the reliability of deterrence as a mean of encouraging disclosure to the prospective partner.

In fact, contrary to common belief, prosecutions laid against HIV-positive people are drawn from an array of different circumstances and not exclusively from reckless disregard for the lives and safety of others. This argument is better illustrated by real life examples. The following cases studies are inspired by people I met during my internship at the *Canadian HIV/AIDS Legal Network* in Toronto.[89] They demonstrate that non disclosure may occur in particular circumstances; related to sex work or as a result of fear of violence, fear of rejection, mental illness or intoxication through alcohol or drug.

Lyne is 23 years old. She was 18 years old when she contracted HIV from a former partner who was not aware of his HIV status. The news of her seropositivity had a devastating effect on her. Since then, she became depressed, lonely, and regularly refused dating because of fear of being rejected after disclosing her illness. One day, however, she met Carl. Initially, she tried resisting his flirtatious behaviour but after few weeks accepted to have dinner with him. Their romance began that night. She refused to have sex because Carl insisted to have unprotected sex with her. Lyne told him several times that she wanted to use a condom. Carl categorically refused by telling her that "it didn't feel the same" with a condom. First, it was easy for her to say "no". Carl continued to forcefully ask for unprotected sexual intercourse. She resisted for another few months, afraid to be rejected if she disclosed her HIV-status. After Carl told her that his patience was reaching its limit, she felt that he would leave her. She accepted to have unprotected sex with him.

Carmen is a sex worker and a single mother of three. She has been HIV positive since 2003. One night, a client insisted on having unprotected sex even though she had made it clear that she would not. He told her he would pay three times extra if they did not use a condom. She accepted, because she needed the money.

Nathalie has been married to John since the summer of 2006. John was already an abusive boyfriend, but following their marriage the violence escalated, particularly when

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[88] Dalton Harlton. Criminal law. *Aids and the Law : A Guide for the Public*, at 242 [Dalton].
[89] Canadian HIV/AIDS Legal Network. Online : http://www.aidslaw.ca/. For their anonymity, their real names are kept anonymous.

he was drunk. After a few months of feeling sick, she went to see her doctor. The doctor suggested an HIV test which turned out to be positive. Nathalie knew that if she disclosed her serostatus to her husband he would beat her. On her return from her doctors office, she was too afraid to disclose her HIV status to him. That night, they had unprotected sex.

In theory, people in such situations are all subject to criminal prosecution because all of them had unprotected sex without disclosing their HIV status. Importantly, criminal law operates blindly: no matter whether the accused actually had criminal intent (*mens rea*) to expose his/her partner to the risk of HIV/AIDS at the time of the act; no matter if the accused knew that his/her act was criminal; and no matter that his/her partner contracted HIV. As it was noted in the case studies, instances where persons know that they are HIV-positive but do not disclose may be less a matter of a conscious effort to deceive, as the application of the criminal law suggests, and more a matter of denial, concerns over potentials repercussions of disclosure, or fear of rejection.

Moreover, recent studies of human judgment suggest that human beings place less weight on events in the future as compared to events in the present.[90] Drugs or alcohol, even taken in moderate quantity, exacerbate the perception that future events are less important.[91] It seems fair to say that if the decision in question is whether to disclose the HIV status and probably abstain from sex, or not to disclose and engage in sexual intercourse, the distant possibility of being punished by the judicial system might receive less weight, especially if alcohol or drug was consumed.[92] As behavioural studies demonstrate, people are prone to take immediate gains even if the costs in the future involve consequences.[93] Rules do not deter, even those expressively made to influence conduct.[94]

Third, supporters of the deterrence doctrine assume that punishment can act as a negative inducement by discouraging people from engaging in behaviour that violates the law.[95] To be discouraged, offenders need to perceive the cost of violation and expect punishment as greater than the perceived benefit. The perceived cost is the threatened punishment and the weight the potential offender gives to it. The perceived benefit is what the offender expects to gain from committing the offence.

The perception of the cost of violation can be further altered by drug or alcohol

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[90] George Loewenstein. "Out of Control: Visceral Influences on Behaviour"(1996) 65 Org Behav & Human Dec Proc 272-79.
[91] Robinson (2004), supra note 75 at 174.
[92] Ibid, at 178.
[93] Lee Ross & Richard Nisbett, The Person and the Situation: Perspectives of Social Psychology (1991).
[94] Robinson (2004), *supra* note 75, at 174.
[95] See for example, H. Grasmick & R. Bursik. "Conscience, Significant Others, and Rational Choice : Extending the Reference Model" (1990) 24 Law & Soc'y Rev, at 841; Grasmick, H. , & Green, D. E. "Legal punishment, social disapproval, and internalization as inhibitors of illegal behavior" (1990) 71 J. Crim. L. & Criminology 325.

consumption or by mental health problems. Mental health problems can affect anybody, but science reports have shown that people with HIV are more likely to experience a range of neurological and mental health issues over the course of their lives.[96] For instance, the Laboratory of Neuro-Imaging in the Department of Neurology at the University of California School of Medicine reports that 40% of people living with HIV/AIDS suffer from one or more neurological symptoms, which can be associated with mental illness.[97] The high prevalence of neurological symptoms and mental illness among people living with HIV/AIDS is explained by the fact that the acquired immunodeficiency syndrome (AIDS) produces proteins that cause brain cells to die.[98] The more common neurological impairments are feelings of acute emotional distress, confusion, depression, anxiety, behavioural change, dementia and cognitive disorders.[99] Other severe neurological problems include seizures, and coordination, and walking deficit, which will get progressively worse as the disease develops.[100]

A person suffering from a neurological problem associated with a mental illness does not have the same perception of the costs and benefits of an offense, and these symptoms can definitely be factors working against disclosure of the person's HIV status. This paper, on the basis of this, argues that if it can be proven that a person suffers from a mental illness associated with the acquired immune deficiency syndrome (AIDS), the "specific" deterrence rationale is inefficient in dissuading this individual in the future, and should not be used at sentencing. Similarly, the "general" deterrence rationale is also unlikely to be effective in incapacitating 40% of HIV-positive people who experience neurological and/or mental illness.

With respect to the severity of punishment, there is no conclusive evidence that supports the conclusion that harsh sentences would reduce crime through the mechanism

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[96] See for example Marie-Josée Brouillette, Kenneth Citron, editors. *HIV & psychiatry : a training and resource manual*, (1997) Ottawa : Canadian Psychiatric Association [*Brouillette*]; E. Zweben, Patt Denning. *The alcohol and drug wildcard : substance use and psychiatric problems in people with HIV.* San Francisco, CA : Aids Health Project, University of California San Francisco, c1998; Dawn McGuire, MD. "Neurologic manifestation of HIV". (2003) San Francisco: University of California San. Online: http://hivinsite.ucsf.edu/InSite?page=kb-04-01-02.; National Institute of Neurological Disorders and Stroke. "Neurological Complications of Aids" (2007) Bethesda (MD). Online: http://www.ninds.nih.gov/disorders/aids/aids.htm#What_is .

[97] Paul M. Thompson, Rebecca A. Dutton, Kiralee M. Hayashi & all. "Thinning of the cerebral cortex visualized in HIV reflects CD4 T lymphocyte decline", (2005) 102 43 *Neuroscience*. PNAS, 15647.

[98] Dawn McGuire, MD. "Neurologic manifestation of HIV". (2003) San Francisco: University of California San. Online: http://hivinsite.ucsf.edu/InSite?page=kb-04-01-02; « HIV link to demandtia explained ». BBC, Tuesday, 20 April, 2004. Online: http://news.bbc.co.uk/2/hi/health/3638809.stm

[99] Brouillette, *supra* note 96, at p. 30, 88, 110, 128.

[100] M. Kaul & J. MZheng « HIV-1 infection and AIDS: consequences for the central nervous system" (2005) 12 *Cell Death and Differentiation* (2005), at 878–892. Online: http://www.nature.com/cdd/journal/v12/n1s/pdf/4401623a.pdf.

of "general" deterrence.[101] Although this is a difficult subject upon which to conduct research, it appears that a harsh punishment (imprisonment) is not a more effective deterrent than a milder punishment (probation).[102] In fact, it is shown that "recorded offence rates do not vary inversely with the severity of penalties (usually measured by the length of imprisonment)" and "inverse relations between crime and severity (when found) are usually smaller than inverse crime-certainty relations".[103] In other terms, "long prison terms are more likely to be more impressive "to lawmakers than lawbreakers."[104] A study conducted in the United States compared the recurrence rates of people sentenced to probation and others sentenced to prison.[105] The two groups were comparable in terms of background variables that might be related to recurrence (such as criminal history, seriousness of the crime committed). The results showed that the probationers had lower, not higher recidivism rates than individuals who had been sent to prison.[106]

Canadian judicial decisions outside of HIV cases have also shown skepticism as to the harsh sentence as deterrent. For instance, Cory and Iacobucci JJ. held in *R. v. Proulx*[107]:

> "[…] although imprisonment is intended to serve the traditional sentencing goals of separation, deterrence, denunciation, and rehabilitation, there is widespread consensus[108] that imprisonment has not been successful in achieving some of these goals. Over-incarceration is a long-standing problem that has been many times publicly acknowledged but never addressed in a systematic manner by Parliament. In recent years, compared to other countries, sentences of imprisonment in Canada have increased at an alarming rate."[109]

Similarly, Lamer J. stated:

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[101] See for example : Isaac Ehrlich. "Participation in Illegitimate Activities: An Economic Analysis," Journal of Political Economy 81, 1973, at 521-64; Morgan O. Reynolds. "Does Punishment Deter?". (1998) 148 *National Center for Policy Analyst. Policy Backgrounder*, at 3-14.

[102] Julian V. Roberts, David Cole, eds. *Making Sense of Sentencing* (1998, U. of T. Press) [Roberts]

[103] D Beyleveld. *A Bibliography on General Deterrence Research.* (1980). (Farmborough: Saxon House), at 306.

[104] Michael K. Block and Vernon E. Garety, "Some Experimental Evidence on Differences between Student and Prisoner Reactions to Monetary Penalties and Risk" *Journal of Legal Studies* 24, January 1995, at 123-38.

[105] Roberts, *supra* note 102 at 59.

[106] Joyce Peterson & al. *Prison Versus Probation in California: Implications for Crime and Offender Recidivism*.

[107] *R. v. Proulx* (2000), 140 C.C.C. (3.d) 449, per Lamer C.J.C. (S.C.C.) [*Proulx*].

[108] In their reasons, Cory and Iacobucci JJ. reviewed numerous studies that uniformly concluded that incarceration is costly, frequently unduly harsh and "ineffective, not only in relation to its purported rehabilitative goals, but also in relation to its broader public goals" (para. 54). See also Report of the Canadian Committee on Corrections, Toward Unity: Criminal Justice and Corrections (1969); Archambault Report, *supra* note 74.

[109] *Proulx*, *supra* note 107, at 57.

> Incarceration, which is ordinarily a harsher sanction, may provide more deterrence than a conditional sentence. Judges should be wary, however, of placing too much weight on deterrence when choosing between a conditional sentence and incarceration ... The empirical evidence suggests that the deterrent effect of incarceration is uncertain ... Moreover, a conditional sentence can provide significant deterrence if sufficiently punitive conditions are imposed and the public is made aware of the severity of these sentences.[110]

In addition, in *R.v. Gladue*, Cory and Iacobucci JJ. held that although imprisonment is intended to serve the goals of separation, deterrence, denunciation and rehabilitation, "there is widespread consensus that imprisonment has not been successful in achieving some of these goals."[111]

Finally, in *R. v. Hamilton*[112] the criminologist Dr A. Doob gave expert evidence at the sentencing hearing on the impact of variation in the severity of sentences on crime. Lamer J. maintained that Dr Doob's demonstrated that there was no conclusive evidence that supported the conclusion that harsh sentences would reduce crime through the mechanism of general deterrence. At the question "Can we conclude that variation in the severity of sentences would have differential (general) deterrent effects?" Dr. A Doob answered: "No. There is no conclusive evidence that supports the conclusion that harsh sentences would reduce crime through the mechanism of general deterrence."[113]

After demonstrating that social research and judicial decisions agree that harsh sentences do not reduce crimes, hence do not deter; There remains one question to be conclusively answered: Why is it that sentences for HIV-positive people having engaged in unprotected sex without disclosing their HIV-status always include imprisonment and are harsher than similar offences?

In conclusion, scientific research shows that the effect of deterrence on potential offenders is minimal or even non-existent, because offenders do not know the law, do not make rational choices at the time of the offense, and because offenders do not perceive the cost of violation. Hence, the deterrence rationale is not likely a vehicle for dissuading sero-positive people from having unprotected sexual intercourse without disclosing their HIV status. Furthermore, it was shown that factors such as the environment, mental illness or neurological problems, situations of coercion can affect the efficacy of the deterrent rationale. As the case studies underscored, not disclosing

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[110] *Ibid*, at 489-493.
[111] *R. v. Gladue* (1999), 133 C.C.C. (3d) 385, at p. 409 (S.C.C.) [*Gladue*].
[112] *R. v. Hamilton* (2003), 172 C.C.C. (3d) 114 (Ont. S.C.J.) [*Hamilton*].
[113] *Ibid,* at 120.

one's HIV status is not deceit per se and is not planned or deliberate like other criminal offense are.

Skepticism over the role of deterrence in our sentencing regime is also evident in the case law.[114] In fact, several judges openly skeptical of deterrence as a goal of sentencing have recognized that deterrence is speculative and have cautioned against over-reliance on deterrence as a principle of sentencing: [115] *R. v. Wismayer* is a case in point: "[…] general deterrent effect of incarceration has been and continues to be speculative and […] there are other ways to give effect to the objective of general deterrence." [116] In *R. v. Biancofiore* "The general deterrent effect of incarceration is somewhat speculative […] incarceration should be used with great restraint where the justification is general deterrence."[117] In *R v. Parker*. "General deterrence and denunciation should be weighed in conjunction with sentencing objectives once preconditions for conditional sentence are met rather than in relation to danger to community."[118]

If social science and several judicial decisions are openly skeptical of the efficacy of deterrence, it is justified to ask again: Why is deterrence always applied as the rationale to the criminalization of behaviours that risk transmission of HIV/AIDS? Neither criminal prosecution nor imprisonment are an appropriate means to protect society from HIV-infected persons who did not disclose their HIV status before engaging in consensual unprotected sex.

C. Concerns Regarding the Criminalization of HIV/AIDS

After the review of the judicial and non-judicial literature, it seems fair to conclude that deterrence is solely a theoretical justification for criminalizing exposure or transmission to HIV/AIDS, but that it is unlikely to be matched by any significant deterrent effect in practice. In most cases where the criminal law has been used against people living with HIV, there was no motive or advance planning of HIV exposure. Spontaneous behaviours driven by human anguish, despair, fear of rejection or passion are difficult to prevent and the criminal law is not the adequate vehicle to do it. In other words, there is no reason to believe either that criminalizing transmission or exposures to HIV will have any significant general deterrent effect.

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[114] See for example *United States v. Burns*. (2001), 151 C.C.C. (3d) 97, at 129-30 and 150 (S.C.C.); *R. v. Proulx*, *supra* note 106 (2000); *R. v. Harrison and Garrison*, [1978] 1.W.W.R. 162, at p. 164 (B.C.C.A.); *R. v. W. (L.F.)* (1998), 119 C.C.C. (3d) 97 (Nfdl. C.A.); *R. v. Ursel* (1998), 117 C.C.C. (3d) 289 (B.C.C.A.); *R. v. Parker* (1997), 116 C.C.C. (3d) 418 (N.S.C.A) [*Parker*]; *R. v. Biancofiore* (1997), 119 C.C.C. (3d) 344 (Ont. C.A) [*Biancofiore*]; *Gladue, supra* note 107; *R. v. H.* (C.N.) (2000), 170 C.C.C. (3.d.) 253, at. 265 (Ont. C.A).; *R. v. Hamilton* (2003), 172 C.C.C. (3d) 114 (Ont. S.C.J.).

[115] *Proulx*, *supra* note 107; *R. v. Wismayer* (1997) 115 C.C.C. (3d) 18, at p. 40 (Ont. CA.) [*Wismayer*] *R. v. Hamilton* (2003), 172 C.C.C. (3d) A. Crim. R. 53

[116] *Wismayer* (1997), *supra* note 115.

[117] *Biancofiore*, *supra* note 114, at 23.

[118] *Parker*, *supra* note 114.

This paper not only argues that the criminalization of HIV is ineffective in achieving the goal of deterrence, it further contends that such criminalization is counterproductive as it creates a disincentive for HIV testing, as well as undermining public health services and prevention efforts. Several ways have been identified where criminal HIV disclosure laws impede rather than complement public health efforts to stem the spread of HIV/AIDS. As Professor Carol Galletly and Professor Steven Pinkerton from the Center for AIDS Intervention Research at the Medical College of Wisconsin's (Department of Psychiatry and Behavioral Medicine) state: "[…] criminalization of HIV not only fails to complement public health prevention efforts to promote condom use, they appear to undermine them."[119] In fact, HIV-related criminal laws not only undermine public health efforts, they may even contribute to multiplying HIV transmissions for three reasons. First, criminalization of HIV may dissuade people from getting tested as well as discourage education and undermine counseling efforts targeted at changing behaviour to reduce the risk of transmission. Second, criminalizing HIV stigmatizes people living with HIV/AIDS, a group already socially, culturally and/or economically marginalized, which may lead to further human rights abuses. Third, imprisoning a person living with HIV does not prevent them from spreading the virus, either through conjugal visits or through high-risk behaviours with other prisoners.

1. Disincentive to Testing and Counseling Efforts

In Canadian law, if the person does not know that he/she is HIV positive, he/she cannot be criminally charged for having engaged in consensual unprotected sexual intercourse. Because the law applies only to people knowing their status, criminal law may be a powerful disincentive for voluntary testing. In fact, the limited evidence available suggests that the criminal law will inhibit people from seeking testing.[120] Even when confronted with this evidence, the Supreme Court of Canada preferred the traditional position suggesting that it is unlikely that individuals will forego testing due to the possibility of facing criminal charges because "people want to know whether they are infected or not and whether any treatment is available."[121]

Contrary to the Supreme Court, many have expressed their concern about the negative consequence of the threat of criminal prosecution as a disincentive to getting tested. Doctor Doug Sider, an associate medical officer of Health for the Niagara region, has expressed concerns that criminalization may lead some people to "stick their heads in

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[119] Galletly, CL. & SD Pinkerton. "*Conflicting messages: how criminal HIV disclosure laws undermine public health efforts to control the spread of HIV*". (2006) 10 *AIDS Behav*. 451−461 [Galletly].

[120] See for example David W. Webber. Aids and the Law. Fourth ed. (Aspen: Waltons Klewers) at p. 263 and Lazzarini, *supra* note 20 at 23; Lawrence O. Gostin & James Hodge. "Piercing the Veil of Secrecy in HIV/AIDS and Other Sexually Transmitted Diseases. Theories of Privacy and Disclosure in Partners Notification". (1998) 5 9 *Duke J. Gender L & Pol'y.*, at p. 6.

[121] *Cuerrier, supra* note 2 at 143, see also *Marshall* J. in *Mercer* at par. 76; Holland, *supra* note 16 at 288.

the sand and avoid getting tested: They may think, if I don't get tested, I can't be charged".[122] This idea is repeated in *R. v. Napora*, where the Court acknowledged that criminalizing informed and consensual but unprotected high-risk sexual activity may have the negative effect of discouraging people from getting tested for HIV antibodies: "if a person knew that they might be charged criminally with having consensual, unprotected, high risk sex, they may decide not to get tested, not to get tested under their real names, or not to go back to the clinic to receive their test results".[123] In fact, a recent study by the Los Angeles County Department of Health Services observed that more than half of the people tested positive for HIV infection did not return to receive their test results.[124] As GH Herek has noted "people will not seek HIV-related counseling, testing, treatment and support if this would mean facing discrimination, lack of confidentiality, feeling stigmatized […] Coercive public health measures drive away the people most in need of such services and fail to achieve their public health goals of prevention through behavioural change, care and support".[125] Moreover, people unaware of their HIV-positive status may be more likely to engage in high-risk behaviours and, therefore, may increase the spread of HIV transmission.[126]

In fact, US Centres for Disease Control (CDC) estimate that 25% of those HIV-infected in the US do not know their status since they did not get tested and note that "if asked, a substantial proportion of persons with HIV would report that they are HIV-negative or do not know their HIV status." The CDC have recently calculated that these 25% are responsible for up to 70% of sexually transmitted HIV infections.[127]

If people do not get tested because of fear of being criminally charged, they also do not seek counseling. The counseling is primordial to reduce the risky behaviours and to help the person disclose their HIV status to their partners. As was shown in this section, the criminal law may undermines access to such support and thus goes contrary to the public health policy intent on protecting the society.

2. Reinforcing the Stigmas Attached to HIV/AIDS

HIV/AIDS has always been accompanied by fear, denial, stigma and discrimination. People living with HIV are discriminated in many spheres of their lives such as employment, housing, health care, immigration or entry to foreign countries.[128] The disease often results in stigmatization, repression and discrimination, and individuals

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[122] "Worried potential victims come forward in HIV case" *Hamilton Spectator* (December 2005). (Napora was charged in 2005. He did not receive a sentence yet.
[123] *R. v. Napora.*(1995) 36 Alta. L. R. (3d) 22 [Napora]
[124] Los Angeles County Department of Health Services. Kaiser Network. HIV-positive People Not Obtaining Test Results. July 30, 2003. The Body. Online: http://www.thebody.com/content/art11712.html.
[125] GM Herek et al. "Related Stigmas and Knowledge in the United States : prevalence and Trends, 1991-1999". *American Journal of Public Health*. (2002), 92, at p. 371-377.
[126] Lazzarini, *supra* note 20, at 250.
[127] US centres for Disease Control. « Untested HIV-positive individuals more than twice as likely to engage in high-risk sex than those aware of their HIV-positive status" *Aidsmap*. Online : http://www.cdc.gov/hiv/;
[128] For example, a HIV-positive Canadian citizen cannot visit the U.S.

affected by HIV/AIDS are often rejected by their families, their loved ones and their communities. In many societies, people living with HIV/AIDS are often seen as shameful and associated with minority groups or minority behaviours (homosexuality for example). HIV/AIDS may also be linked to 'perversion' or personal irresponsibility.[129] Sometimes, HIV/AIDS is believed to bring shame upon the family or the community.

A personal experience helps to illustrate the rejection which seropositive people may experience. When I was working at Maison Plein Coeur, a day center in Montreal for people living with HIV/AIDS, someone told me that he would rather have cancer or diabetes than HIV/AIDS, because if he would suffer from those illnesses rather than HIV/AIDS he would receive some support by his friends and family. Rejection is a common experience in the life of people living with HIV.

Laws, rules and policies can increase the stigmatization of people living with HIV/AIDS; this is the case with the criminalization of HIV/AIDS in Canada[130]. The criminalization of HIV/AIDS reinforces stigmas in three ways. First, the criminal charges and prosecution are often accompanied by inflammatory and ill-informed media coverage including the release of personal data including pictures of the persons charged. As a matter of fact, in the 65 charges made against people living with HIV, 21 of the cases where the subject of such media coverage.

Table 5.

CASES WHERE THE PERSON'S PICTURE WAS RELEASED	
Men	
Caucasians	6 / 43
Blacks	9 / 12
Latinos	1 / 02
Women	
Caucasians	1 / 07
Natives	2 / 07
Asian	1/ 07
	TOTAL : 21

Second, as Table 5 demonstrates, when the media releases the picture of the person charged, the person is often a member of a visible minority although most prosecutions involve Caucasians (see Table 1, p.10). The fact that the media are more prone to release the picture of a person from a visible minority contributes to the existing stigmas that HIV/AIDS is propagated by certain minority groups.

[129] Gilmore, Norbert and Margaret Somerville "Stigmatization, scapegoating and discrimination in sexually transmitted diseases: Overcoming 'them' and 'us'." (1994) 39 9 *Social Science and Medicine,* at 1349-1350 [Somerville]
[130] *Ibid,* at 1342.

Third, media coverage contributes to the portrayal of people living with HIV/AIDS as potential criminals and a threat to the general public. In the Canadian media, sero-positive people who have been charged (but not yet pronounced guilty) are often subject to the release of confidential data, including the person's picture, name, age, city and work place, as well as detailed information regarding to their sexual practices. Such public disclosures highlight the distinction between people living with HIV/AIDS and those uninfected people for whom consensual sexual activities are private and not subject to public scrutiny. Moreover, the release of personal information clearly infringes upon their right to privacy- particularly if the person has not yet been convicted.[131] The police justify this infringement by explaining that their procedure is aimed at alerting the population that the person might be dangerous.[132] It is important to note here that the picture is often released even though the person has only engaged in consensual sex with one or two partners over a period of many years, and hence is not dangerous to the public at large.[133] This overly broad use of media coverage tends to send a misinformed message to the public reinforcing the false-impression that people living with HIV/AIDS are dangerous. As Carol L. Galletly has put it, HIV/AIDS criminal laws perpetuate the "us versus them" dichotomy that is central to prevailing theories of stigma.[134] . Furthermore, criminalizing HIV/AIDS sends a message that the responsibility to prevent the spread of HIV/AIDS falls on people living with HIV/AIDS and not on everyone.

Fourth, there may be discrimination in prosecution and sentencing. Fear and prejudice can also taint sentencing for criminal HIV exposure. For example, prosecution can be fuelled by the fact that the individual is from a minority group in a predominantly white community.

Discriminating and stigmatizing attitudes towards persons with HIV/AIDS are identified as a barrier both to prevention efforts and to achievement of a fair and compassionate response to persons affected.[135] Fear of stigmatizing reactions may discourage people living with HIV/AIDS from seeking testing or treatment or from admitting their HIV status publicly or to their partners.[136] Consequently, stigmatization is detrimental to efforts to prevent further HIV transmissions. The laws may reinforce HIV-related stigma and potentially alienate people upon whom prevention efforts depend. In summary, to the extent that HIV disclosure laws reinforce stigma among people living

[131] See e.g., *Aubry v. Éditions Vice-Versa inc.*, [1998] 1 S.C.R. 591
[132] The Spectator. 13 March 2000.
[133] See for e.g. *Booth*, *supra* note 107; *R. v. DeBlois*, [2005] O.J. No. 2267 (Ct. of J.); *R v Edwards* [2001] NSSC 80. 24; *R. v. Nduwayo* [2006] B.C.J. No. 3418; *R. v. William* [2006] O.J. No. 5037.
[134] Galletly, *supra* note 119, at 457.
[135] Lazzarini, *supra* note 65; UNAIDS. "Revised guidelines for HIV counseling, testing, and referral". International Guidelines. Online: http://data.unaids.org/publications/irc-pub02/jc520-humanrights_en.pdf. Year [*UNAIDS*]
[136] Somerville, *supra* note 129 at 1343.

with HIV/AIDS, the HIV-related criminal laws not only fail to complement public health prevention efforts, they appear to undermine them.

3. HIV Transmissions Continue in Prison

Finally, one of the goals of imprisoning HIV-positive people having engaged in unprotected sex is to prevent them from reproducing their conduct. However, the result of criminally prosecuting HIV-positive people may do further harm.

One of the results of criminally prosecuting people living with HIV/AIDS is to increase the sero-positive populations in prisons and penitentiaries. Prisons constitute high-risk environments, particularly because of the high prevalence of intravenous drug-use among inmates. Studies conducted in Canadian penitentiaries have shown that the high prevalence of HIV infections are an important public health problem linked to injections.[137] Injection drug use and the sharing of injection equipment has been closely linked to the high prevalence of HIV infections among inmates, many of whom report sharing injection equipment in prison. In fact, reports have shown that 30%-50% of Canadian inmates have a history of injection drug use,[138] that there is a high prevalence of HIV infection among inmates, and that inmates transit yearly in and out of different prisons where the population turnover is high.[139] Furthermore, care and counseling in prisons for people living with HIV/AIDS is scarce.[140]

Though it is difficult to establish a direct link between the criminalization of HIV/AIDS and the high prevalence of HIV/AIDS in prisons, it is not a far-fetched assumption to infer that the criminalization of HIV results in imprisoning HIV-positive persons in an environment where drug use is highly prevalent, where risk behaviours are particularly high and where the turnover of infected inmates in and out of prisons is strong. Therefore, incarcerating HIV-positive people who has engaged in unprotected sex may not have the desired effect of blocking the transmission of HIV/AIDS, as the transmission of HIV/AIDS in prison is clearly higher than in society.[141]

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[137] See for example Céline Poulin et all. "Prevalence of Hiv and hepatitis C virus infections among inmates of Quebec provincial Prisons" (2007) 77 CMAJ. 3 [*Poulin*]; Richard Eliott. « Bloodborne infections in Inmates » (2007) 77 3 CMAJ 3, at p. 252 [Eliott]; Elizabeth Kantor. "HIV Transmission and Prevention in Prisons. Online: http://hivinsite.ucsf.edu/InSite?page=kb-07-04-13#S4X.

[138] A. Durfour & al. "Prevalence and risk behaviours for HIV infection among inmates of a provincial prison in Quebec City" (1996) 10 *AIDS*, at p. 1007.

[139] Poulin, *supra* note 137, at 253.

[140] Richard Elliott, *supra* note 137, at 262.

[141] Poulin, *supra* note 137, at 253.

Conclusion.

This paper analyzes the role of deterrence in the criminalization of HIV/AIDS. Even though the deterrence rational is used in every HIV case, the fact is that deterrence, as a goal of sentencing, is only speculative. Non-legal literature, as well as expressed opinions by Canadian judges, are openly skeptical of the deterrence objective. This skepticism, as discussed in this paper, is based on the conclusions of a number of studies showing that potential offenders do not know the legal rules, do not make rational choices, or do not perceive the exact cost for a violation that outweighs the expected gain.[142] According to the research conclusions outlined in this paper, the need to set sentences appears to be outweighed by significant potential negative impacts arising from the criminal procedures in Canada.

In fact, as demonstrated that criminal laws in Canada are not likely to stop HIV/AIDS transmissions. Instead, they create a hostile environment enhancing stigmas of HIV/AIDS and thus prevent people from seeking testing and advice for fear of being identified as HIV-positive. Criminalization creates the belief that only HIV-positive people should carry the burden of protected sex. Finally, by imprisoning persons having engaged in unprotected sexual intercourse, criminal laws contribute to HIV/AIDS exposures and transmissions in prisons and the high prevalence of the disease among inmates as a result of their high use of intravenous drugs. It is then possible to ask ourselves: "if […] criminalization serves to undermine our overall public health response to the HIV epidemic, then we must seriously question whether the gains from criminalization are worth it".[143]

This paper strongly supports the idea that criminal law is not needed to reduce the spread of HIV/AIDS. The United Nations HIV/AIDS and Human Rights International Guidelines recommend that "criminal prohibitions on sexual acts between consenting adults in private setting be reviewed, with the aim to repeal criminal laws applicable to those activities and should not be allowed to impede the provision of HIV/AIDS prevention and care services".[144] Rather than criminalizing HIV, a combination of education, persuasion, social support, and increased informed media coverage represents the best hope for decreasing the incidence of risk taking in sexual conduct.

[142] Robinson (2004), *supra* note 75, at 178.
[143] Dalton, *supra* note 88, at 255.
[144] UNAIDS, *supra* note 135, at paras 29(b) (c) (d).

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