



Ontario AIDS Network

ILLEGAL SEX? HIV NON-DISCLOSURE RESOURCE SUMMARIES (Essential Readings)

GENERAL INFORMATION – OVERVIEW OF ISSUES

BETTERIDGE, GLENN, *HIV (Non) Disclosure & the Criminal Law in Canada* -- Presentation at the CATIE Annual General Meeting & Educational Conference. (2008)

PowerPoint presentation that provides important background material on the current status of criminal law in Canada, the relevant legal statutes in HIV non-disclosure cases, leading cases in the evolving jurisprudence on the issue, as well as analyses of leading cases and information on complainants, accused, and charges (and convictions) to date in Canada.

TAGS: actus reus (conduct, acts), mens rea (state of mind), burden of proof, Cuerrier (1998), Williams (2003), Mabior (2008), significant risk, serious bodily harm, assault, aggravated assault, aggravated sexual assault, fraud, consent, PHA.

DODDS, CATHERINE et.al., *Grievous harm? Use of the Offences Against the Person Act 1861 for sexual transmission of HIV*. (2005)

A briefing paper that explores available evidence regarding the use of the judiciary in cases of sexual HIV transmission and considers the likely impact that criminalizing HIV transmission has upon public health, and especially HIV prevention. While the paper focuses primarily upon experiences in the United Kingdom, it provides an excellent overview of both academic and policy debates as well as responses to the topic -- reviewing all cases (in England, Wales, and Northern Ireland) as of August 31st, 2005. The paper provides a well-structured discussion of the criminalization debate in general, evidence relating to the public health impact of criminal law, arguments both for and against criminalization, and puts forth an exhaustive list of

recommendations based on this overview for a variety of target populations and agencies including sexual health organizations, the police, as well as journalists and media editors.

TAGS: incapacitation, rehabilitation, retribution, deterrence (theory), rational calculation (rational choice theory), grievous (serious) bodily harm, public health authorities, HIV stigma (discrimination), recklessness.

WOLF, LESLIE et. al., *Crime and Punishment: Is There a Role for Criminal Law in HIV Prevention Policy?* (2004)

STEIN, ARIANNE, *Should HIV Be Jailed? HIV Criminal Exposure Statutes and Their Effects in The United States and South Africa.* (2004)

EKOS RESEARCH ASSOCIATES INC., *HIV/AIDS Attitudinal Tracking Survey 2006 – Final Report.* (2006)

CANADIAN HIV/AIDS LEGAL NETWORK, *Criminalization of HIV exposure: current Canadian law.* (2008)

CANADIAN HIV/AIDS LEGAL NETWORK, *Public health laws and HIV prevention.* (2008)

NO (LITTLE) SUPPORT FOR APPLICATION OF CRIMINAL LAW:

ADAM, BARRY et. al., *Effects on the Criminalization of HIV Transmission in Cuerrier on Men Reporting Unprotected Sex with Men.* (2008)

The authors examine the (potential) effects of the application of criminal law in **Canada** (R. v. Cuerrier, 1998) focusing primarily on the fact that court cases (to date) implicitly endorse a model of human behavior that reflects human social actors as “calculating, rational, self-interested subjects” as posited in rational choice and thus modern deterrence theory – but that is “an ideal with no easy fit with the day-to-day experiences and practices of sexual and romantic interaction.” Using data on the perceptions and experiences of a (small) set of men who have unprotected sex with men most or all of the time, the authors look at the motivations and decision-making processes that go into encounters of un/protected sex – in order to examine how the courts’ reasoning may be received, adapted, or resisted by a population

potentially vulnerable to its application, and to provide insight into the effects of the judicial construction of HIV on risk management in everyday life. Their findings make an important contribution to the debates over whether criminal law has a deterrent effect on HIV-positive people who might otherwise put sexual partners at risk without the latter's knowledge. More specifically, the authors point to the important distinction or "gap" between the courts' objectives in encouraging disclosure and what they refer to as "disclosure problems in practice." As such, the authors suggest that the social consequences of judicial policy "raises questions about the viability of relying on, and legally enforcing, disclosure as leading method of HIV prevention, especially given that the most practical, day-to-day HIV prevention occurs when safer sex is practiced consistently regardless of disclosure."

TAGS: rational choice theory, deterrence theory (evidence), decision-making, moral reasoning, symbolic interactionism (social psychology), disclosure.

DODDS, CATHERINE et. al., *Sexually charged: The views of gay and bisexual men on criminal prosecutions for sexual HIV transmission.* (2009)

The authors explore the perspectives of gay and bisexual men in the United Kingdom on criminal prosecutions (in addition to media attention, conflation, and misrepresentation) arguing that these perspectives reveal not only views on particular legal principles but also approaches to HIV risk management itself. The findings suggest the following: first, that prosecutions for sexual HIV transmission have little to do with addressing the epidemic on a population level and more about punishing those who pass on HIV; second, that rather than recognizing and proactively reducing risk in circumstances where a sexual partner's HIV status is unknown, the default assumption tends to be that he has the same HIV status (negative) and that risk reduction measures are not necessary; and third, that the predominant theme of the need for responsibility (among these men) is not *caused* by the emergence of criminal prosecutions, but that the law maintains and possibly exacerbates this need by fostering unrealistic expectations and encouraging blame – and that those with unrealistic assumptions and expectations regarding sero-concordancy and positive disclosure will continue to take risks.

TAGS: HIV prevention (goals), sero-concordancy, sero-sorting, public health initiatives, risk management, risk reduction.

BURRIS, SCOTT et. al., *Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial.* (2007)

In an empirical study (using stepwise logistical regression) the authors examine independent predictors of unprotected sex, and find that the data support neither the proposition that passing a law prohibiting unsafe sex or requiring disclosure of infection influences people's normative behaviors about risky sex – nor the claim that such laws necessarily drive people

with or at risk of HIV away from health services or interventions. As such, the authors conclude that the criminal law is not a useful intervention for promoting disclosure by HIV positive people to their sexual partners, and indicate that the normative structures supporting disclosure and safer sex practices appear to exist independently of criminal laws. By contrast, testing, counseling and a variety of supportive public health interventions have been successful in doing this for quite some time -- and while criminal law does provide a tool for incapacitating people whose behavior is dangerous or socially unacceptable, that purpose can also be achieved through the use of less punitive control mechanisms often found in public health law. Importantly, the authors do indicate that the question of whether criminalization “makes things worse for public health” is more complicated – and that they see no sign of “moral hazard” such that the uninfected are taking more chances in the belief that the infected are following legal rules or condom use or disclosure.

TAGS: empirical research, null hypothesis, stepwise logistic regression, rational choice theory, deterrence theory (evidence), norms (normative regulation of behavior), HIV stigma.

ONTARIO ADVISORY COMMITTEE ON HIV AND AIDS (OACHA), *Reducing HIV Transmission by People With HIV Who Are Unwilling or Unable to Take Appropriate Precautions.* (2002)

OACHA position paper on reduction of HIV transmission (by people with HIV who are unwilling or unable to take appropriate precautions) that outlines the variety of existing approaches to reduce HIV transmission in the Province of Ontario – from the least intrusive through the most coercive. The central conclusion is that “HIV is primarily a health issue, not a criminal justice issue, [that] is best managed within the health system” and that “[a]lthough people with HIV will continue to be charged in the criminal justice system, the goal should be to reinforce public health interventions and legislation as the least intrusive, most appropriate and most effective way to respond to people who are unwilling or unable.” It is within the public health context that the committee recommends a range of approaches which can be more effectively tailored to the needs of the individual – and that focus more upon risk than retribution – and that such efforts be complemented by more aggressive efforts to communicate to the general public that the majority of people with HIV are responsible, and that those who knowingly put others at risk remain a very small minority.

TAGS: public health, Section 22 -- Health Protection and Promotion Act (HPPA), intrusive measures, retribution.

PICARD, ANDRE, *Prevent and treat HIV, don't criminalize it* – Globe and Mail, August 18. (2008)

AIDS2008, *Human rights and HIV/AIDS: where are we? And what next?* (2008)

LIMITED (QUALIFIED) SUPPORT FOR APPLICATION OF CRIMINAL LAW:

UNAIDS (The Joint United Nations Programme on HIV/AIDS), *Criminalization of HIV Transmission: Policy Brief*. (2008)

United Nations policy brief suggesting that the broad application of criminal law to HIV transmission will achieve neither criminal justice nor prevent HIV transmission -- and that urges governments to limit criminalization to cases of intentional transmission. In elaborating this position, the brief also suggests that the application of criminal law also risks undermining both public health and human rights. In developing the argument, the policy brief carefully outlines the following issues: the relevance of knowledge in relation to both status and the science of HIV transmission, the relevance of *implicit* forms of disclosure, the importance of non-disclosure in cases of fear of violence or other negative (and serious) consequences, as well as those situations in which partners either individually or mutually take precautions and practice *safer sex*. Much like the OACHA report, the policy brief also puts forth recommendations for both *states* and *prosecutors* regarding the development and application of criminal laws in cases where intention and transmission both exist. In addition, identifies concerns about the disproportionate application of such laws to particular populations including those from ethnic minorities, migrants, or men who have sex with men – as well as the greater risk of increasing stigma and discrimination against those living with HIV, thus driving them further away from HIV prevention, treatment, care and support services.

SCHUKLENK, UDO, *Should We Use the Criminal Law to Punish HIV Transmission?* (2009)

The author considers the appropriateness and (potential) impact of using criminal law to punish HIV transmission – primarily through a **review** and evaluation of the arguments of **Matthew Weait** in *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (2007). Interesting (and thoughtful) examination of Weait's work that largely criticizes both the involvement and effectiveness of criminal law and, on some key points, remains in agreement with some of Weait's claims. However, Schuklenk ultimately advocates for the existence and application of criminal law for two key reasons: first, that the criminal law's deterrence effect has been demonstrated historically (within the context of modern, liberal societies -- although not specifically in relation to HIV transmission); and second, that while comparatively small in number, there do exist cases in which HIV transmission (and exposure) involves either reckless if not unethical behavior on the part of those charged. Again, like the OACHA report, the policy brief puts for a list of recommendations for governments, for civil society, and for international partners that more fully elaborate these positions.

NOTE: Schuklenk's stance was (also) published (with far less elaboration) in the Feb. 26, 2009 edition of *Xtra!* (Toronto) – in a letter responding to Sky Gilbert's editorial entitled *HIV Stigma Radiates from Behind the Bench*, January 29, 2009.

TAGS: rational choice theory, deterrence theory (evidence), reckless (unethical) behavior, postmodernism, volenti non fit iniuria (maxim) “to a willing person, no injury is done,” salus populi suprema lex esto (maxim) “let the good of the people be the supreme law.”

FULLER (GREATER) SUPPORT FOR APPLICATION OF CRIMINAL LAW:

DELAVANDE, ADELINÉ et. al., *Criminal Prosecution and HIV-related Risky Behavior*. (2008)

The authors examine the consequences of prosecuting HIV positive people who expose others to the infection – and show that prosecutions do deter unsafe sex – while also creating incentives for having sex with more promiscuous partners, consequently increasing the spread of HIV. As such, they estimate that doubling the prosecution rate could decrease the total cumulated number of HIV infections by one-third over a ten-year period. The authors do so by developing an economic model of risky sex with law enforcement, and empirically evaluate the effects of stringent law enforcement on the sexual behavior of HIV positive individuals – thus extending previous work on the economics of the HIV epidemic to the study of criminal penalization. The authors thus claim that sexual activity and the propensity for unsafe sex of the HIV positive is quite responsive to more aggressive prosecution – but that these laws also have some unintended but rational behavioral responses, creating unique incentives for having sex with more promiscuous partners (such as prostitutes) for whom it is more difficult to trace the source of infection. The authors also show that fear of prosecution reduces disclosure of HIV positive status to potential partners – and thus potentially increasing the spread of HIV. Importantly, the increase in sexual activity with prostitutes offsets partially, but not fully, the impact of laws on HIV incidence – such that more stringent law enforcement could therefore decrease new infections by 34% over a ten-year period. Admittedly, the authors also indicate that strict(er) enforcement could also have an effect on the behavior of HIV negative individuals or on AIDS treatment which also affects transmission rates – and a fuller exposition of these links is left for further research.

NOTE: readers of this particular study are cautioned that they will need to have the requisite (quantitative and statistical) skills to fully and effectively examine the authors’ development of their economic model as well as their interpretation of the results. While the basic claims are clear, the authors do rely on (projections of HIV transmission rates using) an economic model to make their argument, and it seems reasonable to suggest that there may be some central limits to their arguments such that human sexual (romantic) activity may not be as fully calculated as the authors suggests. See other discussions that question (and challenge) the view of human social (and sexual) actors as engaged in purely rational and unambiguous decision-making process – such as rational choice or deterrence theory.

TAGS: rational choice (deterrence) theory, empirical model (evidence), unintended consequences, quantitative v. qualitative research.

WENTE, MARGARET, *Do the right thing: disclose* – Globe and Mail, November 28. (2008)

Globe and Mail columnist Margaret Wente discusses the increases in HIV transmission rates among gay men in North America, and claims that – despite the range of explanations offered to date (condom fatigue, bareback sex, etc.) – one of the key reasons for increased rates is the resentment of many HIV positive people to disclosing their status. Further, she argues that HIV positive individuals have “mounted a crusade” against criminal law and are positioning themselves as victims. Relying primarily upon anecdotal evidence, Wente levels her more general criticism at “much of Canada’s activist establishment” for its betrayal of the legacy of those pioneers who fought so hard for gay rights and who are now “condemning another generation of young gay men to a cruel and unnecessary fate.” As such, from Wente’s perspective, the moral obligation to disclose must be revisited, reiterated, and reclaimed.

TAGS: condom fatigue, bareback sex, historical amnesia, Johnson Aziga, stigma, victimology.

DIMANNO, ROSIE, *Deterring the reckless* – Globe and Mail, January 17. (2009)

Globe and Mail columnist Rosie DiManno responds to Dr. Mark Wainberg’s claims that the criminalization of HIV transmission does more harm than good – particularly in terms of its potential to discourage HIV testing as a means of avoiding criminal prosecution. DiManno counters Wainberg by arguing that “it is pure supposition that people would turn a blind eye to their own health to protect themselves from the legal consequences of any sexual contact.” Beyond this, she argues that even if the law were to discourage testing that this would in no way justify denying an individual woman or man the law’s protection from a sexual assault. Relying, once again, on primarily anecdotal evidence DiManno claims that the burden for sexual responsibility lies almost entirely with the HIV positive individual and failing to understand this essentially blames those who fall victim to HIV because of non-disclosure for their infection.

TAGS: Mark Wainberg, sexual assault, deterrence theory, Supreme Court of Canada.