



Prosecuting and Propagating Emotional Harm: The Criminalisation of HIV Nondisclosure in Canada

Katarina Bogosavljević^{1b} and Jennifer M. Kilty*

Abstract

This article explores emotional harm in the context of the criminalization of HIV nondisclosure in Canada. With the exception of Matthew Weait in the United Kingdom, few scholars have examined what harm means in cases of HIV nondisclosure. We conceptualize the harm that follows nondisclosure as an affective response to the “HIV positive Other” and argue that law creates a legal norm about what harm is and feels like in cases of HIV nondisclosure when there is no clear consensus about how harm should be defined. Mobilizing the sociology of emotions literature, we contend that criminalizing HIV nondisclosure engages affective, moral, and criminal censure to regulate the behaviours of people living with HIV/AIDS (PLWH), thus reproducing HIV stigma and propagating emotional harm for PLWH. Canada’s response to HIV nondisclosure should instead involve a transformative justice approach that avoids the harm of criminalization and imprisonment while recognizing the emotional harm experienced by complainants.

Keywords: Affect, Law, Feinberg, Victims

Résumé

Cet article a pour objet le préjudice émotionnel dans le contexte de la criminalisation de la non-divulgence du VIH au Canada. À l’exception de Matthew Weait au Royaume-Uni, peu d’universitaires ont étudié les significations attribuées aux préjudices dans les cas de non-divulgence du VIH. Dans cet article, nous conceptualisons le préjudice qui découle de la non-divulgence du VIH comme une réponse affective à « l’Autre séropositif » et nous soutenons que le droit canadien crée une norme juridique qui définit restrictivement les préjudices et les manières de ressentir les préjudices dans les cas de non-divulgence du VIH, alors qu’il n’existe pas de consensus clair sur la façon dont ces préjudices doivent être définis.

* We would like to thank Michael Orsini, Steven Bittle, Jennifer Chandler, Jeff Bradley, Thomas McMorrow, and the anonymous reviewers for their thoughtful comments and suggestions on various versions of this article.

Canadian Journal of Law and Society / Revue Canadienne Droit et Société, 2023, Volume 38, no. 1, pp. 109–128. doi:10.1017/cls.2023.4

En mobilisant la littérature sur la sociologie des émotions, nous soutenons que la criminalisation de la non-divulgence du VIH a un effet de blâme affectif, moral et criminel visant à réguler les comportements des personnes vivant avec le VIH/SIDA (PVV). Nous montrons d'ailleurs que ce blâme reproduit la stigmatisation du VIH et les préjugés émotionnels chez les PVV. À la lumière de ces implications, nous suggérons que la réponse du Canada à la non-divulgence du VIH devrait plutôt impliquer une approche de justice transformatrice qui évite le préjudice de la criminalisation et de l'emprisonnement tout en reconnaissant les préjugés émotionnels subis par les plaignants.

Mots-clés: Émotions, préjudice, affect, droit, non-divulgence du VIH

Introduction

In Canada, people living with HIV (PLWH) may be criminally charged for failing to disclose their HIV status prior to sex regardless of whether the virus was transmitted (Grant 2008). While some countries, including the United Kingdom and certain Australian territories, limit criminalization to cases involving transmission, 36% of Canadian HIV nondisclosure cases involve transmission while 64% involve exposure alone (Hastings et al. 2022), evincing a national trend toward an overly broad use of criminalization and HIV exceptionalism in law. Canada does not have a specific law that criminalizes nondisclosure, meaning Crown prosecutors use general provisions in the Criminal Code (commonly aggravated sexual assault) to hold PLWH criminally responsible for failing to disclose their HIV-positive serostatus prior to sex (HIV/AIDS Legal Network 2019). Since 1989 at least 206 people in Canada have been charged for HIV nondisclosure. The Supreme Court of Canada (SCC) ruling in *R v Cuerrier* (1998) established that failing to disclose one's HIV-positive status constitutes fraud, which vitiates consent since the person did not have the requisite information to give informed consent. The justices in *Cuerrier* determined that the "harm in question must constitute a *significant risk of serious bodily harm*" (Grant, 2008, 135, emphasis added); however, they did not outline parameters for determining what constitutes a significant risk, leading to vastly different interpretations by the lower courts (MacKinnon and Crompton 2012). The SCC revisited the issue of HIV nondisclosure in 2012. The majority ruling in *Mabior* interpreted nondisclosure as continuing to pose a significant risk of bodily harm as set out in *Cuerrier*, unless the accused had a low viral load¹ and used a condom,² which together were said to lower the risk to

¹ For the purposes of the criminal law in Canada, a low viral load is less than 1,500 copies per millilitre of blood. According to a report by UNAIDS (2018), having an undetectable or suppressed viral load is below 200 copies per millilitre of blood, thereby significantly reducing the risk of transmission. In common parlance, advocates and medical experts now use the term U=U, or undetectable=untransmissible. Since viral loads can fluctuate for various reasons, the Justices felt that "antiretroviral therapy, alone, still exposes a sexual partner to a realistic possibility of transmission" (*R v Mabior*, 2012, para 101).

² The *Mabior* decision contributed to Canada's overly broad use of criminalization by instructing the lower courts to prosecute exposure incidents where condoms were used, which ignores that condom use demonstrates an ethic of care for one's partner and thus an intent to protect, rather than to do harm. When condoms are used correctly, scientific experts have confirmed that HIV

such a point that there is no “realistic possibility of transmission” (*R v Mabior*, 2012, para 84).

The *Mabior* decision advances “a generous approach to the issue of consent and when deceit might vitiate it, an approach that respected the right of women involved to choose whether to have intercourse or not” (*R v Mabior*, 2012, para 31). Buchanan (2015, 1262) suggests this decision problematically concentrates on HIV “when other serious diseases, and other material sexual deceptions, are not crimes” and “transforms otherwise-wanted sex into a violation akin to rape.” In *R v Kirkpatrick*, the Supreme Court upheld a woman’s right to choose how intercourse is performed, specifically finding that non-consensual removal of or failure to use a condom is sexual assault. Scholars argue that HIV nondisclosure cases have been problematically subsumed under sexual assault provisions in the *Criminal Code*, resulting in the overcriminalization of PLWH and the “distortion of the law of sexual assault in ways that limit sexual autonomy for complainants” (Grant 2020, 8).

In this article, we contend that the criminalization of HIV nondisclosure is an expression of emotional censure toward PLWH and an attempt to protect complainants from the emotional (rather than solely the physical) consequences of HIV nondisclosure. Criminalizing emotional harm reinforces an optimistic attachment to law as an institution that will bring justice and heal the pain associated with said harms. Such an optimistic attachment, however, fails to consider how law itself can be harmful, especially for vulnerable communities. Law struggles to grapple with the relational nature of harm, where the messiness of interpersonal relationships³ and adversarial process make it even more difficult. By focusing on the emotional harms suffered by the presumed victim in these cases, law negates the emotional and other associated harms felt by PLWH, such as stigma, shame, and ostracization.

In Part I, we outline our conceptualization of the emotional harm that follows HIV nondisclosure. We examine how Canada’s criminal legal approach to HIV nondisclosure defines harm in these cases as an individual experience while failing to account for how harm, especially emotional harm, is socially constituted and felt differently by people depending on their social locations, relational contexts, and power dynamics. Following Feinberg (1987), we suggest that while nondisclosure may be classified as a harm, that alone is not a reason to criminalize it; using Feinberg’s mediating maxims, we contend that the emotional harms stemming from HIV nondisclosure are transient; they are minor harms that fall below the threshold of the harm principle for the purposes of criminalization, which in effect causes more harm than it aims to prevent. Part II of this article discusses the

cannot be transmitted (Barré-Sinoussi et al. 2018). The Canadian Coalition to Reform HIV Criminalization (2017) argues that condom use should reduce the risk to such a degree that the state should not prosecute nondisclosure when a condom is used.

³ We distinguish the emotional harm that occurs due to HIV nondisclosure from the emotional abuse experienced by victims of intimate partner violence. Whereas the former involves a sense, feeling, or interpretation of emotional harm by the complainant, the latter refers to “nonverbal behaviour or attitudes that are designed to control, subdue, punish, or isolate the other person through the use of humiliation or fear” (Karakurt and Silver 2013, 804).

emotions that underpin the legal discourses surrounding HIV nondisclosure and how these are connected to perceptions of (im)morality. Part III examines how emotional attachments to criminal law produce harmful effects for PLWH. Here we explore the problematic reliance on the criminal justice system, a notoriously flawed institutional structure, to seek justice and redress for the harms experienced by complainants in HIV nondisclosure cases. In Part IV, we propose a transformative response to this social problem that would avoid the harm of criminalization and imprisonment.

I HIV Nondisclosure and the Criminalization of Emotional Harm

Few scholars have explored what the notion of harm entails—either physically or emotionally/psychically—in HIV nondisclosure cases. One notable exception is Matthew Weait, who questions whether HIV should be treated as a harm by the criminal law. Weait (2016, 33) argues that “what makes HIV a harm is not HIV *per se* but the moral context in which the infection occurs.” He defines new HIV infections as nothing more than a naturally occurring phenomenon. Illness and death are the *effects* of living with HIV and while they *can* be harmful, they are not in and of themselves justifications for “treating [HIV infection] as *necessarily* a harm for the purposes of criminal law” (Weait 2016, 34, emphasis in original). We support Weait’s argument that HIV exposure and transmission via nondisclosure are harms that should be addressed, albeit not by the criminal law. Instead, the effects of exposure via nondisclosure are better conceptualized as emotional harm, reflecting Feinberg’s (1987) description of mental pains and forms of offendedness that do not meet the criteria for criminal wrongdoing using the harm principle. As Feinberg (1987, 46) argues, hurts that include physical pains like aches and stabs, mental pains such as “wounded’ feelings, bitterness, keen disappointment, remorse, depression, grief, ‘heartache,’ despair,” other “nonpainful forms of physical unpleasantness [such as] nausea, itches, dizziness, tension,” and nonpainful mental states he classifies as “forms of offendedness,” including, “unpleasant sensations, disgust, shocked sensibilities, irritation, frustration, anxiety, embarrassment, shame, guilt, boredom, and certain kinds of responsive anger and fear” do not constitute harms to be addressed through criminal law. Feinberg’s (1987) limited offence principle positions profound offenses such as revulsion and disgust, hurts such as harmless throbs and pangs, and other feelings such as shame and embarrassment, as potential wrongful setbacks to interests that could justify criminal prohibition if they are sufficiently severe or prolonged.

To determine whether the mental distress is severe or prolonged enough to justify criminalization, we turn to Feinberg’s (1987) discussion of the linked maxims of the gravity and probability of harm, wherein the greater the gravity of the harm, the less probable the harm needs to be to justify prohibition of the harmful activity. Likewise, the more probable the harm is, the less grave it needs to be to justify criminalization. Our understanding of HIV nondisclosure as emotional harm does not fall under the harm principle, nor does it subscribe to the individualized understanding of harm that law propagates and that Feinberg details in his four-volume work on the harm principle. Instead, we propose that emotional

harm be considered as something that is socially constituted and relationally produced and felt.

While we classify HIV exposure via nondisclosure as an emotional harm that falls outside of the harm principle, we cannot deny the disruption to one's life and sense of self that learning and having to manage an illness that lives "in wait" in one's body can represent (Ciambrone 2001). Accepting Feinberg's (1987) maxims, the continued criminalization of HIV exposure via nondisclosure evinces HIV exceptionalism in Canadian law, given that transmission is rendered less probable through condom use and/or a low viral load (UNAIDS 2018). HIV exposure from nondisclosure is a harm in the emotional sense insofar as it causes feelings of anxiety, fear, and shock until the undisclosed-to-person receives a negative HIV test result, at which point those feelings may subside and feelings of betrayal and anger (may) surface. This kind of emotional harm and the feelings attached to it "reflect the victim's *recognition* of the harm that he has suffered [and] if he did not realize that he had [not] been [disclosed to], this would not mean that he did not suffer a harm of this distinctive kind; it would mean that he did not realize that he had been thus harmed." This raises the question "of whether one who does not care [...] about the wrong done has still been harmed by it" (Duff 2001, 23) and could explain why it is that heterosexual women are the predominant group that reports instances of HIV nondisclosure to police (Hastings et al. 2022).

Weait (2007, 112) acknowledges that "incorporeal feelings—of time stolen, of a future damaged, of intimacy soured—which may more adequately reflect the harm experienced, are irrelevant in establishing whether an offence has been committed under the law as it stands." This sentiment was articulated by Justice Beveridge of the Nova Scotia Court of Appeal in *R v CAT*, who held that "worry, stress, anger are natural emotions on learning of unwittingly being exposed to HIV. But absent a significant risk of serious bodily harm, satisfied by actual transmission or a realistic possibility of transmission, consent is not vitiated" (*R v CAT*, 2018 NSCA 13 at para 48). This is a significant departure from the lower court decision in *R v CAT* (2016 NSSC at para 136–144),⁴ where Justice Hood found C.A.T. not guilty of aggravated sexual assault, but guilty of sexual assault causing bodily harm *because* of the psychological harm the complainants endured.

Both H.R.H. and M.A.M. testified about their reaction to the news that [C.A.T.] was HIV-positive. H.R.H. said she was scared and shocked, and underwent testing to determine if HIV had been transmitted to her. Between the time she knew that [C.A.T.] was HIV-positive until the time she had the testing done and received the results, H.R.H. suffered psychological harm in that she did not know if she had contracted HIV. I conclude this is not harm of a trifling nature because of the seriousness of HIV as a disease. Nor was the harm of a transient nature. The psychological worry of whether she had contracted HIV continued until she had the results of the testing. This satisfies the requirement of deprivation. [...] M.A.M. testified she had one year of testing for HIV. She said it was stressful and she had a fear of the

⁴ There was a publication ban on revealing the complainants' identities; we are using initials to protect the defendant's identity, as well.

unknown, that is whether she had contracted HIV. She too suffered psychological harm within the meaning of bodily harm. The psychological harm lasted for one year and I conclude therefore it was not trifling or transient.

Justice Hood uses the term psychological harm, which he situates within law's understanding of bodily harm, to describe the harmful effects of nondisclosure.⁵ Emotional harm is at the heart of Canada's nondisclosure laws precisely because risk (the realistic possibility of transmission) and emotions are intimately tied and configure one another, something Lupton (2013, 641) describes as an "emotion-risk assemblage."

While we support Justice Beveridge's conclusion that emotional distress does not meet the threshold for vitiating consent, it also shows the court's attempt to maintain traditional notions of legal objectivity, which denies that emotions are always-already present in legal judgements about risk. In other words, "judgements about what phenomena should be called 'risks' are influenced by the social and cultural context and by personal experience, including the embodied sensations that are defined as 'emotions'" (Lupton 2013, 638). When individuals make decisions about what they deem risky, they do so by cross-referencing these judgements with their own values and morals about what they perceive to be acceptable and harmless and what they perceive to be dangerous or threatening. These appraisals are tied to emotions because "all thought and reason is inevitably emotional" (Lupton 2013, 641). By reducing judgements about right and wrong to experiences of hurt, pain, or suffering, we sustain forms of violence that go unnoticed, unfelt, and unacknowledged (Ahmed 2004), such as the violence experienced by PLWH who are criminalized for nondisclosure (McClelland 2019). That criminal law is ill-equipped to deal with the nuance and messiness of emotions and feelings, particularly in the context of interpersonal relationships (Eisenberg 2015), suggests it is problematic to define a crime based on how it is imagined to make a person feel.

By criminalizing HIV nondisclosure to address emotional harm and protect the HIV-negative body politic, the courts have created a "truth" or norm about what harm is even though there is no consensus on this (Hillyard and Tombs 2007; Pemberton 2015). Social theorists contend that *harm* is difficult to define as it is subjectively experienced, meaning what one person experiences as harm may not be harmful to another person (Hillyard and Tombs 2007). Similarly, what law defines as a harm does not reflect a universal experience, but rather the paternalist and moralist norms that buttress legal interpretations of harm. For example, in *R v Cuerrier* (1998, para 142) Justice Cory stated that 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

⁵ Justice Hood's term psychological harm positions the emotions experienced from nondisclosure as clinical symptoms of trauma. Such explanations are couched in medico-legal discourses that individualize and pathologize emotions. We contend that the emotional harm that occurs from nondisclosure is relational, an affective force that signals people's responsibilities to each other and the world around them.

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. It may well have the desired effect of ensuring that there is disclosure of the risk and that appropriate precautions are taken.

Although written twenty-five years ago, when PLWH experienced more overt and persistent discrimination and HIV treatment was much less effective, Justice Cory's precedent-setting reasoning in *Cuerrier* situates PLWH who do not disclose as reckless and callous without acknowledging that people routinely consent to activities that involve varying degrees of risk or that decisions to consent to sex are not always completely informed. Pronouncements that the "risks of infection are so devastating" and "the potentially fatal consequences are far more invidious and graver than many other actions prohibited by the *Criminal Code*" amplify perceptions of the exceptional nature of HIV harms.

We might consider HIV transmission following nondisclosure to fall under the harm principle. Feinberg (1987, 215) contends that harm is produced by "morally indefensible conduct that not only sets back the victim's interest, but also violates his right." Certainly, acquiring HIV is a harm in the sense that it sets back a person's interests; however, returning to Feinberg's (1987) mediating maxim on the gravity of harm, we suggest that, with the scientific advancements that have transformed HIV into a chronic but manageable condition (Loutfy et al. 2014), criminalization is unjustified. As Stewart (2010, 32) writes, "conduct should be criminalized only if, on balance, criminalization would do more good than harm, and should not be criminalized if, on balance, criminalization would do more harm than good." HIV nondisclosure that results in transmission where intent to transmit can be proven may be considered a harm for the purposes of the application of the criminal law. Canadian law currently requires no proof of an intent to harm by way of HIV transmission, the highest *mens rea* threshold compared with negligence and recklessness. We recognize that the absence of proof of intent is not exceptional as there are other crimes that do not require intent to harm. In nondisclosure cases, the law is only concerned with whether disclosure happened prior to sex so as to justify the fraud requirement in the legal test set out in *Cuerrier* and confirmed in *Mabior* (Buchanan 2015). By focusing on disclosure only in relation to HIV, the law perpetuates HIV/AIDS exceptionalism and reveals the pervasive stickiness of emotions (Ahmed 2004) like fear and disgust to HIV (Bogosavljević and Kilty 2021). These emotional attachments situate nondisclosure as a moral failure that angers, scares, and disgusts, emotions that underpin state efforts to manage, trace, and criminalize individuals perceived to be threats to the body politic.

The concept of "intent" is complex in HIV nondisclosure cases. Consider the notion of constructive intent in which the defendant does not necessarily set about to harm the complainant, but harm nonetheless occurs and is objectively foreseeable. In the context of constructive intent, can the accused objectively foresee harm

to the complainant (i.e., a realistic possibility of transmission) if they have unprotected sex but are adhering to their antiretroviral medications regimen and have an undetectable viral load? Alternatively, can the accused objectively foresee harm to the complainant if they wear a condom but do not have a low viral load? Both of these instances show an ethic of care and an intent to protect rather than harm a sexual partner. This reasoning illustrates how the threshold for nondisclosure set out in *Mabior* uses a problematic notion of harm that is defined in individualistic terms rather than as something that is socially constituted and relationally produced and felt. While there is not always a clear distinction between emotional and physical harm, particularly if the emotional harm of exposure is so severe that there are lasting effects, it is important not to depend on the criminal justice system to address this harm. Instead, “we need to respond to injustice in a way that shows rather than erases the complexity of the relation between violence, power and emotion” (Ahmed 2004, 196). This might involve turning to the helping professions and those working at AIDS service organizations, who are better equipped to deal with the emotional harm that arises from exposure (a point we develop in Part IV).

Importantly, we do not diminish the emotional harm that is felt by those who have been exposed to HIV. We recognize that this experience could be linked to feelings of trauma—including those borne from other experiences, such as sexual assault. While nondisclosure may be traumatic for some, the emotional harm felt should not be the basis for using criminal law to apportion blame and assign punishment. We contend that emotional harm (e.g., anger, fear, shock, and/or betrayal) should not be inherently understood as a medical issue requiring treatment (by linking trauma to PTSD for example) or as a criminal problem requiring punishment, but rather “as felt experiences that can be mobilized in a range of directions” (Cvetkovich 2003, 47), including alternative legal or non-legal approaches such as restorative justice, transformative justice, or other methods of reconciliation. This allows us to think past law as a mechanism for dealing with the emotional harm that follows HIV nondisclosure to explore how “trauma can be understood as a sign or symptom of a broader systemic problem, a moment in which abstract social systems can actually be felt or sensed” (Cvetkovich 2003, 43). It also forces us to think of harm in a broader sense than what the law or Feinberg’s (1987) definition of harm allows, particularly given critiques that the harm principle has been co-opted by conservative liberalism (Harcourt 1999). Emotional harm is therefore best conceptualized as an aspect of “social harm” that “acts as shorthand to reflect the relations, processes, flows, practices, discourses, actions and inactions that constitute the fabric of our societies which serve to compromise the fulfilment of human needs and in doing so result in identifiable harms” (Pemberton 2015, 24). Indigenous teachings and forms of justice help us to see how emotional harm is social and relational; for example, Tynan (2021, 600) suggests that “relationships between ideas or entities [are] an affective force that compels us to not just understand the world as relational, but feel the world as kin... [and] to enact a relational ethos and the responsibilities and accountabilities that accompany it.” This framework reveals that nondisclosure may cause emotional harm and that the criminalization of HIV nondisclosure fosters state-inflicted

emotional and physical harm, making it a demonstrably poor deterrence policy and public health strategy.

II The Emotional and Moral Roots of HIV Nondisclosure Criminalization

Criminalization punishes HIV nondisclosure and tries to protect HIV-negative people from the emotional harm that HIV exposure can manifest as well as the guilt and shame that they may experience in cases where they failed to ask about a partner's status and/or use a condom. The state's effort to protect in this regard essentializes complainants as inherent victims, while obscuring the fact that criminalization propagates emotional harm, stigma, and ostracism for PLWH. We maintain that this use of criminal law is rooted in cultural and emotional reactions to the ongoing HIV epidemic, which has long-been described as a moralized crisis (Watney 1996).

Emotions play an important role in moral thought and behaviour. Cova, Deonna, and Sander (2015) identify five aspects of the relationship between morality and emotions. First, emotions are considered moral when they present their object as having some moral value or disvalue. For example, this occurs when fear constructs its object as dangerous or when guilt presents the person who feels this emotion as responsible for wrongdoing. Second, emotions are integral to moral evaluation, meaning we determine moral actions *with* our emotions rather than without. Third, emotions are moral to the extent that they have motivational power—they move us to action. For instance, we are motivated to help someone in need because we feel compassion for them. Fourth, emotions are moral “insofar as their cultivation within a certain individual or society contribute [sic] to *fostering morality*,” the evaluation of which “requires distancing ourselves from the framework of everyday interactions and ‘reactive attitudes’ to reflect on the value judgements that our affective reactions embody” (Cova, Deonna, and Sander 2015, 398). Lastly, because emotions can be evaluated as moral or immoral, individuals can be praised or blamed for having them.

It is worth noting that this debate is only relevant with respect to HIV nondisclosure prior to sex; Canada does not criminalize HIV nondisclosure in relation to injection drug use, for example. The presumption is that drug users choose to use drugs with the understanding that drug use is inherently risky and therefore that they consent to the risk posed by sharing injection equipment. In contrast, complainants in HIV nondisclosure cases are situated as unwitting, innocent victims whom the law must protect. Embedded within SCC jurisprudence is the assumption that moral individuals will disclose their HIV seropositivity, which problematically implies that it is safe to engage in unprotected sex when there is no such disclosure. Following Cova, Deonna, and Sander (2015), we can see that law positions disclosure as the only moral course of action, which, when coupled with emotions like anger (at nondisclosure), disgust and fear (of HIV), results in legal characterizations of PLWH who fail to disclose as dangerous, immoral people who must be censured by law (Kilty and Bogosavljević 2019; Adam et al. 2015; Bennett, Draper, and Frith 2000; Chalmers 2002; Kirkup

2015). That this application of law undermines decades of public health messaging that encourages us to approach every sexual encounter as a potential risk for infection (of HIV or any other sexually transmitted infection) usefully illustrates the disequilibrium in how we apply moral censure to HIV risk (Kilty 2018)⁶ and raises questions as to whose claims are considered credible (Bogosavljević and Kilty 2021). Harcourt (1999, 131) contends that the harm principle has undergone an ideological shift since the 1960s, where proponents of regulation and prohibition abandoned the rhetoric of legal moralism in favour of the harm principle such that “harm became *the* critical principle used to police the line between law and morality.”

We suggest that, while it may be morally wrong to lie to a sexual partner, through either active deceit or omission, about one’s HIV serostatus, it is a leap of logic to presume that this moral wrong is a criminal act. This logic reveals that emotions structure our evaluations of the morality of certain behaviours and thus of whether they *should* be criminalized (Cova, Deonna, and Sander 2015). For example, T.S. was convicted of aggravated sexual assault for failing to disclose his serostatus to two women, both of whom tested negative for HIV. Despite the fact that T.S. often, although not always, practised safer sex by using condoms and consistently adhered to his anti-retroviral medication regimen to ensure he maintained an undetectable viral load, the Crown prosecutor argued that T.S. should be handed the severest possible sentence because he “chose” to put two women at risk, one of whom is a single mother while the other was to be an organ donor for her father. In his submission, Mr. Burge stated:

His treatment of these women, it was more of a casual relationship with B.G. but he knew who she was, he knew she was a single mother and chose to put her at risk and deliberately put her at risk through his lies. [...] that should result in a denunciatory sentence [in terms of] how he treated B.G. [and] how he treated O.A. [...] the factor of O.A.’s father involves an aspect of moral blameworthiness that is [...] so serious and [...] so egregious that it puts Mr. T.S. among the worst of the worse in the category of moral blameworthiness [...]. Mr. T.S. has chosen to put people at risk. [...] There are other sexual partners that he has admitted that he doesn’t tell his sexual partners [sic] of his status and it’s my submission that Mr. T.S. will continue to put females at risk as long as he has the opportunity. (*R v TS*, 2007, decision, 27–28)

This quote demonstrates the anger and frustration expressed towards T.S. for failing to exercise proper moral judgement with regard to disclosure, even though “for some, silence functions as a technology of self-care” (Kilty, Orsini, and Balogh 2017). Disclosure is never *just* about telling someone your HIV status, it “can expose and depersonalize someone, taking things away from them. It gives them the name of the virus and substitutes that for their own name, their own person,

⁶ There are a small number of cases where the Crown attempted to prosecute the nondisclosure of other sexually transmitted infections, but these have been rare, again exemplifying a degree of HIV exceptionalism in criminal law. For example, in *R v J*, [2002] NBQB 340 the accused was acquitted for not disclosing they had Hepatitis C on the basis that a transmission risk of “less than 1 percent” was not “significant”.

even for themselves: ‘I am HIV’” (Squire 2014, 152). Given T.S.’s former status as a professional football player in Canada and American immigrant, it is perhaps unsurprising that his was one of the most sensational HIV nondisclosure cases in Canada, complete with extensive hyperbolic and racist media coverage that constructed him as a remorseless sexual predator with an insatiable libido (Kilty and Bogosavljević 2019).

The decision to transform the morally wrong act of lying to a sexual partner about one’s serostatus into a criminal wrong reconstructs lying (by act or omission) into reckless indifference by PLWH towards the sexual health of their partners. This discursive move fails to consider the harmful consequences PLWH may face when disclosing their status, including violence, cultural ostracization, and loss of income (Adam et al. 2015). The perception that all PLWH who do not disclose are indifferent to the health and safety of their sexual partners positions them as immoral, callous, manipulative liars whose liberty should be restricted following the exhibition of society’s collective moral censure via a criminal trial. In contrast, the complainant’s feelings of fear and betrayal (what we classify as emotional harm) reflect moral judgements that motivate *some* complainants to go to the police. As both Chalmers (2002, 162) and Bennett, Draper, and Frith (2000) contend, failing to recognize the distinction between moral and legal obligations around disclosure, exemplified by Canada’s criminalization of both protected and unprotected sex, has the harmful unintended consequence of reducing one’s “incentive to refrain from high-risk activities and to use condoms.” Perhaps more to the point, “the existence of a moral duty is a necessary but not a sufficient condition for invoking the criminal sanction” (Chalmers 2002, 162).

III Emotional Attachments to and the Harmful Effects of Law

Although the SCC determined that HIV nondisclosure constitutes fraud, we heed Young’s (2015) position that this legal reasoning fails to account for the fact that people often engage in sex without disclosing personal, sensitive information about themselves. For example, a criminal record, history of addiction or past sexual behaviour in which they were unfaithful or failed to engage in safer sex practices might dissuade a sexual partner from consenting to sex. Constituting HIV nondisclosure as an act of fraud that vitiates consent while not criminalizing other forms of deceit before sex again exemplifies HIV exceptionalism and the affective attachments that construct PLWH as dangerous threats to the body politic. Criminalization also fails to consider the different materializations of power relations involved in sex and in negotiations of safer sex practices. For this reason, we contend that nondisclosure laws in Canada propagate emotional harm to PLWH, who already experience marginalization in our communities. Young (2015, 122) uses the example of a street-based sex worker living with HIV who does not disclose to their client and who may be charged with sexual assault, and asks, “but who should really bear the responsibility for ensuring the avoidance of HIV transmission in the context of this particular relationship”? Disclosure might bring about harm to the sex worker who may not be able to negotiate safer sex practices with her client. Indeed, research documents that PLWH who have been criminalized for

HIV nondisclosure experience violence, verbal abuse, and other forms of emotional violence, ostracization from their families and communities, loss of employment and/or the inability to gain employment because of a criminal record, emotional distress in the form of fear and anxiety about their future and of being “outed” as HIV-positive by police press releases and media coverage of their case (McClelland 2019).

Underscoring Carol Smart’s (1989) argument that there is a juridogenic effect to law, meaning that while law purports to remedy harm it also perpetuates it, it is wiser to promote alternative responses to the emotional harm wrought from nondisclosure that do not rely upon the optimism that a criminal trial will provide justice and help one heal. Importantly, optimism in the criminal justice system is predominantly felt by those who are most privileged (i.e., those who are white, cisgendered, and who have a high socioeconomic status). Dilts (2022, 215) contends that our optimism about the criminal justice system is reinforced precisely because “prison may seem to soothe now [...] because of the carceral enjoyments of the social death of the criminalized other, the suffering of the marginalized other, and the bad faith of parasitic social life.”

To recognize emotional harms as justification for criminalization “is to hold all our activities hostage to those who are most sensitive to them, reasonably or not” (Stewart 2010, 30). In other words, “the feelings we have are unreliable measures of justice and fairness” (Berlant 2000, 45), given that the emotional meanings we assign to events typically reflect what each party believes they are reasonably owed in terms of how one should act and react after or at the time of the event (Hochschild 1979). This is particularly evident in the context of HIV nondisclosure, wherein the law is overly sensitive to the emotional harm experienced by complainants, while remaining indifferent to the emotional harm experienced by defendants. Ironically, some heterosexual women (the largest group of complainants in nondisclosure cases) view the state with optimism, as an “agent of justice” (Ahmed 2004, 197) that can deliver a sense of closure (Bandes 1996), despite the long and persistent history of rape culture in which women are routinely disbelieved by agents of the criminal justice system (Ehrlich 2012). Thus a relation of “cruel optimism” exists precisely because the desired justice after a painful experience “is actually an obstacle to [one’s] flourishing” (Berlant 2011, 1). For example, sexual assault victims report that criminal justice processes feel unfair and the personnel insensitive, which can amplify the experience of PTSD symptoms for complainants (Wemmers 2013).

Indeed, the legal arena limits victims’ emotional expression in relation to the harms they have experienced (Bandes 2016; Miller 2013), and victim impact statements have been shown to “offend human dignity—the victim’s as well as the defendant’s” (Bandes 1996, 366). The harm claims of victims that *are* allowed in court are often manipulated by legal actors for strategic purposes (Miller 2013), and a victim’s emotions and beliefs about forgiveness and justice often change throughout the legal process, especially if they are pressured to support punitive sentences or the death penalty (Bandes 1996; 2016). Victims experience what McGlynn and Westmarland (2019, 186) term kaleidoscopic justice: “justice is complex, nuanced and a difficult to (pre)determine feeling. Justice is a lived, ongoing and ever evolving

experience and process, rather than an ending or result.” The criminal legal system’s ability to repair harm is hindered by the emotion culture of the courtroom, where legal actors work adversarially and where empathetic judicial displays of emotions are discouraged in the name of “objectivity” (Bandes 2016).

Lastly, we must consider the harm that comes from criminalizing HIV nondisclosure—both to individuals and to communities. Previous SCC decisions in *Canada (Attorney General) v Bedford* and *Canada (Attorney General) v PHS Community Services Society* considered the harms of criminalization to vulnerable groups such as sex workers and people who use drugs, yet no such consideration has been given to PLWH. These recent judicial shifts away from justifying criminal law prohibitions based on moralism or ideas of offensiveness sit uneasily beside the *Cuerrier* and *Mabior* decisions. At present, law perpetuates the suffering of PLWH by creating additional emotional and physical harms that flow from stigmatization, criminalization, and incarceration. Criminalization promotes harm by discouraging HIV testing (Bennett, Draper, and Frith 2000; Lee 2014) and causes harm to the accused, and to PLWH more broadly, as they are routinely identified in sensational media coverage and thus outed to their friends, family, and community as always-already sexual predators (Kilty and Bogosavljević 2019; McClelland 2019), yet there is no evidence that criminalization actually encourages disclosure. Using criminal law is the most, rather than least, restrictive response possible, where, upon incarceration, PLWH experience limited or lack of access to harm reduction measures, which elevates HIV risk in this environment (Kilty 2018). We contend that judgements about what is just or unjust cannot be reduced to how one might feel, for doing so would sustain and conceal certain kinds of violence (Ahmed 2004), such as that experienced by PLWH at the hands of the state.

The facts in the Supreme Court of Canada’s 2012 decision *R v DC* exemplify this point well (*R v DC*, 2012 SCC 48, [2012] 2 SCR 626). DC is a woman who had charges brought against her by a long-term male partner, who, apart from their first sexual encounter, knew she was HIV-positive throughout their four-year relationship. When DC reported to the authorities that the complainant was violently abusing her and her son, he retaliated by reporting to the police that she did not disclose her HIV status prior to their first sexual encounter four years earlier. This case is but one example of the unintended harms that are born from criminalizing HIV nondisclosure, demonstrating that law’s protective intention, as stated above by Justice Cory in *Cuerrier*, is inherently flawed. If we classify the emotional harm flowing from nondisclosure as a social or relational harm, we can begin to address the ways in which “the harms individuals experience arise from wider relationships in which they are embedded [and capture] the consequential or secondary harms that result beyond the original individual harmed to have an impact on other connected individuals and communities” (Pemberton 2015, 3), such as the wider HIV positive community. Thinking of nondisclosure as an emotional harm allows us to go beyond transforming the immediate circumstances of the harm in question to imagine and work towards social transformation.

IV Alternative Justice Possibilities for the Emotional Harm of HIV Nondisclosure

Transformative justice (TJ) initiatives offer an alternative approach that counters the hostile environment created by our optimistic attachment to the criminal law as the primary mechanism for pursuing justice for the harms caused by HIV nondisclosure. A transformative justice approach that is grounded in the politics of penal abolition, the Black Liberation movement, Indigenous justice, and queer/trans resistance can be conceptualized as a framework for responding to harm without creating additional harm. Indeed, TJ is distinct from restorative justice (RJ) approaches precisely because restoration entails returning to the same conditions that maintain structural violence, while transformation requires challenging and changing the systems that led to the harm in question (Kim 2018; Smith 2010).

By reframing the harm experienced from HIV exposure as social and emotional, we can consider alternative forms of accountability and healing to address the root causes of the problem to “generate solutions and healing there, such that the conditions that create injustice are transformed” (Brown 2020, 107). Transformative justice requires consensual voluntary participation and may therefore not be a viable option for all cases. It promotes healing between the offended and offending parties within the community and civil society, which enables us to consider the “complex effects of injustice on social life as well as individuals” (Ahmed 2004, 197). The first step in this approach, is to listen to the “why” when trying to determine the causes of harm, “even—especially—when we are scared of the answer” (Brown 2020, 107). Doing so creates possibilities for understanding and for developing and expressing empathy with the person committing the wrongdoing. If we ask why someone fails to disclose their serostatus to their sexual partners, we realize that people may do so for fear of rejection or violent reprisal, as a coping mechanism, to protect loved ones from emotional distress and so on (Rouleau, Côté, and Cara 2012; Squire 2014). Therefore, *not* disclosing can be the “right” thing to do in that moment for that person. Asking “why” questions also allows us to resist law’s power to determine the truth, as Smart (1989) so convincingly urges us to do, thereby creating the conditions to better understand the different truths about nondisclosure as they are materially experienced by PLWH. For example, in a recent interview calling for an end to HIV criminalization in Canada, J.M., a woman convicted of aggravated sexual assault for nondisclosure, stated that “it was never my intent to infect anyone, and I haven’t, and I make it a point to take my medication, so I do not infect anyone” (Wilson 2022).

The second step involves asking, “what can this teach me/us about how to improve our humanity?” (Brown 2020, 108). Asking this question allows us to take harmful events as learning opportunities and to recognize and transform the root causes of violence in our communities (i.e., poverty, lack of access to education, stigma, racism, patriarchy, and other forms of structural violence) rather than merely responding to injustices as they happen, in ways that do not offer opportunities for accountability and healing for those directly impacted by the violence. If we understand that PLWH choose not to disclose their serostatus because of ingrained HIV-related stigma and fear of a variety of possible harmful

consequences associated with disclosure, we are better able to see the importance of creating the kind of socio-political and cultural conditions where PLWH feel safe and supported to disclose their status to their sexual partners. By criminalizing HIV nondisclosure, we are creating an ever more hostile environment for PLWH that increases, rather than limits, HIV-related stigma. Indeed, initiatives move us away from focusing on the individual causes of violence to examine the structural causes (Kim 2018). As such, these justice practices empower communities to address harm without relying on a punitive criminal justice system that promotes further harm to individuals and communities, thus urging a different affective relation to the harm of HIV nondisclosure.

For example, WomenatthecentrE is a survivor-led non-profit organization in Canada working to end gender-based violence (GBV). Their Transformative Accountability and Justice Initiative (TAJI) is a voluntary program that “wraps the survivor and aggressor in compassion and kindness, leaving shame behind” while promoting transformation, healing, and accountability (WomenatthecentrE, 2021). TAJI connects survivors and aggressors with individual support teams made up of community advocates, other survivors, and people working in the GBV sector and offers a series of workshops and a counselling program.⁷ During the workshops, survivors examine the societal conditions that lead to GBV and have access to trauma counselling, while aggressors learn about consent, toxic masculinity, patriarchy, empathy, and why “hurt people hurt people.” Aggressors also develop a “personal accountability and transformation statement” that contextualizes the harm they caused and outlines how they will demonstrate accountability (e.g., strategies for maintaining healthy relationships with women) (WomenatthecentrE, 2021). If both parties agree, staff will facilitate communication or meetings between them. For nondisclosure cases, peer and professional staff members working with AIDS Service Organizations could be involved in this kind of support and mediation work, which they have long provided in relation to safer sex practices, HIV, and what it means to live with the illness (Kinsman 1996). This article contends that if there is no intentional transmission of HIV, there should be no crime. Instead, alternative transformative justice responses to HIV nondisclosure in which people can work through the emotional harms they have experienced and/or committed by better understanding the social conditions that contribute to them would be distinctly community-based rather than components of a diversionary sentencing process.

By transforming the socio-political and cultural conditions that enabled the harm in the first place, transformative justice efforts cultivate accountability, healing, resilience, and safety. These alternative forms of justice can involve difficult emotional processes that require time, patience, and a willingness to engage in tough conversations. In other words, it is “not about pack hunting an external enemy, it’s about deep shifts in our own ways of being” (Brown 2020, 108). While we might be inclined to devise mechanisms of accountability *for* those doing the

⁷ WomenatthecentrE’s C6 counselling program considers the following 6 ‘C’s: context, consequence, communication, care, culture, and control.

harming (as we have done with criminal law), a transformative justice approach emphasizes that mechanisms of accountability should be jointly decided by the person who was harmed, the person who committed the harm, and, where relevant, various community representatives. In this way, “communities are also sites for prevention, intervention, and transformation, spaces where interventions can be imagined, initiated, and implemented” (Kim 2018, 227). As such, there is no one-size-fits-all method of responding to violence, harm, and injustice in our communities. Complex problems demand multi-faceted responses.

Conclusion

Speaking to the intimate connection between emotions and justice, Ahmed (2004, 202) writes that “justice is not simply a feeling. And feelings are not always just. But justice involves feelings.” This article has shown that certain emotions reflect and reinforce (and are in turn reinforced by) law’s moralist underpinnings and offers a context-sensitive moral case for changing the law. While the imprecision of the harm principle has led some scholars to question its utility (Duff 2001; Feinberg 1987), we suggest that it can be useful as a general principle, but only if we unpack how morality operates under the guise of harm to justify the regulation and criminalization of conduct deemed “immoral” (Harcourt 1999). This led us to consider the criminalization of HIV nondisclosure as a problematic state response to a kind of emotional harm that would be better addressed by transformative justice approaches. The emotional harm that follows nondisclosure is an affective response that results in an emotional reading of the “HIV-positive Other.” This reading draws the boundaries between self and Other, such that the presumed victim holds no responsibility for sexual decision-making and is thus always-already innocent while the HIV-positive person is presented as an ever-present threat to the body politic whose freedom should be limited.

To this end, we argue for a more transformative agenda that moves away from carceral punishment towards an abolitionist ethos that can facilitate social justice. While law is often presumed to reflect the triumph of reason over emotion, this misapprehension denies the fact that human beings reason with and through their emotions (Cova, Deonna, and Sander 2015). Canada’s criminal legal approach to HIV nondisclosure reflects longstanding cultural fears of the virus and of the populations historically associated with it. The result is a problematic use of criminal law, which subsequently generates the very real unintended effects of discouraging HIV testing (Lee 2014), increasing the number of PLWH in prison settings where there is limited access to harm reduction technologies (Kilty 2018), perpetuating HIV stigma and shame (Kirkup 2015), and criminalizing emotional harm while failing to consider the emotional impact of criminalization on PLWH. Living with HIV does not reflect moral failure or a kind of inherent immorality, yet the moralist discourses that shore up Canada’s criminal legal approach to HIV nondisclosure uphold HIV exceptionalism and perpetuate further emotional harm to PLWH, without any evidence that criminalization increases the likelihood of disclosure or curbs onward transmission. In this way, the criminalization of HIV nondisclosure is a failed public health strategy that reifies the problematic

emotional attachments we make to both law and HIV and that, in the end, does more harm than good.

References

- Adam, Barry D., Patrice Corriveau, Richard Elliott, Jason Globerman, Ken English, and Sean Rourke. 2015. HIV disclosure as practice and public policy. *Critical Public Health* 25 (4): 386–397.
- Ahmed, Sarah. 2004. *The Cultural Politics of Emotion*. Edinburgh: Edinburgh University Press.
- Bandes, Susan A. 1996. Empathy, narrative, and victim impact statements. *University of Chicago Law Review* 63 (2): 361–412.
- . 2016. Share your grief but not your anger: Victims and the expression of emotion in criminal justice. In *the Expression of Emotion: Philosophical, Psychological and Legal Perspectives*, ed. Catherine Abell and Joel Smith, 263–286. Cambridge, UK: Cambridge University Press.
- Barré-Sinoussi, Françoise, Salim S. Abdool Karim, Jan Albert, Linda-Gail Bekker, Chris Beyrer, Pedro Cahn, Alexandra Calmy, et al. 2018. Expert consensus statement on the science of HIV in the context of criminal law. *Journal of the International AIDS Society* 21 (7). <https://doi.org/10.1002/jia2.25161>
- Bennett, Rebecca, Heather Draper, and Lucy Frith. 2000. Ignorance is bliss? HIV and moral duties and legal duties to forewarn. *Journal of Medical Ethics* 26:9–15.
- Berlant, Lauren. 2011. *Cruel Optimism*. Durham: Duke University Press.
- . 2000. The subject of true feeling: Pain, privacy, and politics. In *Transformations: Thinking Through Feminism*, ed. Sarah Ahmed, Jane Kilby, Celia Lury, Maureen McNeil, and Beverley Skeggs, 33–47. London: Routledge.
- Bogosavljević, Katarina, and Jennifer M. Kilty. 2021. “Now, the question here is who to believe”: Criminalizing HIV nondisclosure, emotions, and determinations of credibility in *R. v. T.S. Emotions and Society* 3 (2): 209–225. <https://doi.org/10.1332/263169020X16014084980811>
- Brown, Adrienne Maree. 2020. What is/isn’t transformative justice? In *Beyond Survival: Strategies and Stories from the Transformative Justice Movement*, ed. Ejeris Dixon and Leah Lakshmi Piepzna-Samarasinha, 107–108. Chico, CA: AK Press.
- Buchanan, Kim Shayo. 2015. When is HIV a crime? Sexuality, gender and consent. *Minnesota Law Review* 99 (4): 1231–1342.
- Canadian Coalition to Reform HIV Criminalization. 2017. *End Unjust HIV Criminalization: Community Consensus Statement*. Retrieved from: http://www.aidslaw.ca/site/wp-content/uploads/2017/07/CCRHC_Backgrounder-and-Draft-Community-Consensus-Statement_final_EN_25July2017.pdf
- Chalmers, James. 2002. The criminalisation of HIV transmission: Ethics, law and medicine. *Journal of Medical Ethics* 28 (3): 160–163.
- Ciambrone, Desire’e. 2001. Illness and other assaults on self: The relative impact of HIV/AIDS on women’s lives. *Sociology of Health & Illness* 23 (4): 517–540.
- Cova, Florian, Julien Deonna, and David Sander. 2015. Introduction: Moral emotions. *Topoi*, 34 (2): 397–400.
- Cvetkovich, Ann. 2003. *An Archive of Feeling: Trauma, Sexuality and Lesbian Public Cultures*. Durham: Duke University Press.

- Dilts, Andrew. 2022. Carceral enjoyments and killjoying the social life of social death. In *Building Abolition: Decarceration and Social Justice*, ed. Kelly Struthers-Montford and Chloë Taylor, 196–223. Abingdon: Routledge.
- Duff, Robin Antony. 2001. Harms and Wrongs. *Buffalo Criminal Law Review* 5 (1): 13–45.
- Ehrlich, Susan. 2012. Perpetuating—and resisting—rape myths in trial discourse. In *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism*, ed. Sheehy A. Elizabeth, 389–408. Ottawa: University of Ottawa Press.
- Eisenberg, Avlana K. 2015. Criminal infliction of emotional distress. *Michigan Law Review*, 113 (5): 607–662.
- Feinberg, Joel. 1987. *The Moral Limits of the Criminal Law Volume 1: Harm to Others*. New York: Oxford University Press.
- Grant, Isabel. 2008. The boundaries of the criminal law: The criminalisation of the non-disclosure of HIV. *The Dalhousie Law Journal*, 31:123–180.
- . 2020. The complex legacy of *R. v. Cuerrier*: HIV nondisclosure prosecutions and their impact on sexual assault law. *Alberta Law Review*, 58 (1): 45–82.
- Harcourt, Bernard. 1999. The collapse of the harm principle. *The Journal of Criminal Law and Criminology*, 90:109–194.
- Hastings, Colin, Notisha Massaquoi, Richard Elliott, and Eric Mykhalovskiy. 2022. *HIV Criminalization in Canada: Key Trends and Patterns (1989–2020)*. Report: Canadian HIV/AIDS Legal Network. Retrieved from <https://www.hivlegalnetwork.ca/site/hiv-criminalization-in-canada-key-trends-and-patterns-1989-2020/?lang=en>
- Hillyard, Paddy, and Steve Tombs. 2007. From “crime” to social harm?. *Crime, Law, and Social Change* 48:9–25.
- HIV/AIDS Legal Network. 2019. *The Criminalization of HIV Non-Disclosure in Canada*. Retrieved from: <http://www.aidslaw.ca/site/the-criminalization-of-hiv-non-disclosure-in-canada-report/?lang=en>
- Hochschild, Arlie. 1979. Emotion work, feeling rules, and social structure. *American Journal of Sociology* 85 (3): 551–575.
- Karakurt, Günnur, and Kristin E. Silver. 2013. Emotional abuse in intimate relationships: The role of gender and age. *Violence and Victims* 28 (5): 804–821.
- Kilty, Jennifer M. 2018. Institutionalizing risk in the “daddy state”: Carceral spaces as HIV risk environments. In *Seeing Red: HIV/AIDS and Public Policy in Canada*, ed. Suzanne Hundmarch, Michael Orsini, and Marilou Gagnon, 79–101. Toronto: University of Toronto Press.
- Kilty, Jennifer M., and Katarina Bogosavljević. 2019. Emotional storytelling: Sensational media and the creation of the HIV sexual predator. *Crime, Media, Culture*, 15 (2): 279–299.
- Kilty, Jennifer M., Michael Orsini, and Peter Balogh. 2017. Critical bioethics in the time of epidemic: The case of the criminalization of HIV/AIDS nondisclosure in Canada. *Aporia: The Nursing Journal*, 49 (1): 9–18.
- Kim, Mimi E. 2018. From carceral feminism to transformative justice: Women-of-colour feminism and alternatives to incarceration. *Journal of Ethnic & Cultural Diversity in Social Work* 27 (3): 219–233.
- Kinsman, Gary. 1996. “Responsibility” as a strategy of governance: Regulating people living with AIDS and lesbians and gay men in Ontario. *Economy and Society* 25 (3): 393–409.
- Kirkup, Kyle. 2015. Releasing stigma: Police, journalists and crimes of HIV non-disclosure. *Ottawa Law Review* 46 (1): 127–160.
- Lee, Sun Goo. 2014. Criminal law and HIV testing: Empirical analysis of how at-risk individuals respond to the law. *Yale Journal of Health Policy, Law, and Ethics* 14 (1): 194–238.

- Loutfy, Mona, Mark Tyndall, Jean-Guy Baril, Julio S. G. Montaner, Rupert Kaul, and Catherine Hankins. 2014. Canadian consensus statement on HIV and its transmission in the context of criminal law. *The Canadian Journal of Infectious Diseases and Medical Microbiology* 25 (3): 135–140.
- Lupton, Deborah. 2013. Risk and emotion: Towards an alternative theoretical perspective. *Health, Risk, & Society* 15 (8): 634–647.
- MacKinnon, Emily, and Constance Crompton. 2012. The gender of lying: Feminist perspectives on the non-disclosure of HIV status. *University of British Columbia Law Review* 45 (2): 407–447.
- McClelland, Alexander. 2019. “Lock this whore up”: Legal violence and flows of information precipitating personal violence against people criminalized for HIV-related crimes in Canada. *European Journal of Risk Regulation* 10 (1): 132–147.
- McGlynn, Clare, and Nicole Westmarland. 2019. Kaleidoscopic justice: Sexual violence and victim-survivors’ perceptions of justice. *Social & Legal Studies* 28 (2): 179–201.
- Miller, Karen-Lee. 2013. Purposing and repurposing harms: The victim impact statement and sexual assault. *Qualitative Health Research* 23 (11): 1445–1458.
- Pemberton, Simon. 2015. *Harmful Societies: Understanding Social Harm*. Bristol: Policy Press.
- Rouleau, Geneviève, José Côté, and Chantal Cara. 2012. Disclosure experience in a convenience sample of Quebec-born women living with HIV: A phenomenological study. *BMC Women’s Health*, 12(37): 37–47.
- Smart, Carol. 1989. *Feminism and the Power of Law*. London: Routledge.
- Smith, Andrea. 2010. Beyond restorative justice: Radical organizing against violence. In *Restorative Justice and Violence Against Women*, ed. James Ptacek, 255–278. New York, NY: Oxford University Press.
- Squire, Corinne. 2014. HIV disclosure: Practices, knowledges and ethics. In *Disclosure in Health and Illness*, ed. Mark Davis and Lenore Manderson, 138–152. Abingdon: Routledge.
- Stewart, Hamish. 2010. The limits of the harm principle. *Criminal Law and Philosophy* 4 (1): 17–35.
- Tynan, Lauren. 2021. What is relationality? Indigenous knowledges, practices and responsibilities with kin. *Cultural Geographies*, 28 (4): 597–610.
- UNAIDS. 2018. *Undetectable = Untransmittable: Public Health and HIV Viral Load Suppression*. https://www.unaids.org/sites/default/files/media_asset/undetectable-untransmittable_en.pdf
- Watney, Simon. 1996. *Policing Desire: Pornography, AIDS and the Media* (3rd ed.). Minneapolis: University of Minnesota Press.
- Weait, Mathew. 2016. HIV and the meaning of harm. In *Criminalising Contagion: Legal and Ethical Challenges of Disease Transmission and the Criminal Law*, ed. Catherine Stanton and Hannah Quirk, 18–34. Cambridge: Cambridge University Press.
- . 2007. *Intimacy and responsibility: The criminalisation of HIV transmission*. Abingdon: Routledge-Cavendish.
- Wemmers, Joanne. 2013. Victims’ experiences in the criminal justice system and their recovery from crime. *International Review of Victimology* 19 (3): 221–233.
- Wilson, Katelyn. 2022. “I do not infect anyone,” Fighting for change to end HIV non-disclosure prosecution. *CTV News Barrie*: February 2. <https://barrie.ctvnews.ca/i-do-not-infect-anyone-fighting-for-change-to-end-hiv-non-disclosure-prosecution-1.5765502>

128 Katarina Bogosavljević and Jennifer M. Kilty

WomenatthecentreE. 2021. WomenatthecentreE's Transformative Accountability & Justice Initiative (TAJI): Information Package. <https://womenatthecentre.com/wp-content/uploads/Transformative%20Accountability%20%20Justice%20Initiative%20-%20INFO%20PACKAGE%20%20June%202021.pdf>

Young, Diane. 2015. Individual rights and the negotiation of governmental power: The risk of HIV transmission and Canadian criminal law. *Social & Legal Studies* 24 (1): 113–134.

Cases cited

Canada (Attorney General) v Bedford, 2013 SCC 72.

Canada (Attorney General) v PHS Community Services Society, 2011 SCC 44.

R v Cuerrier, [1998] 2 SCR 371.

R v CAT, 2016 NSSC 134.

R v CAT, 2018 NSCA 13.

R v DC, 2012 SCC 48, [2012] 2 SCR 626.

R v J, [2002] NBQB 340.

R v Mabior, 2012 SCC 47, [2012] 2 SCR 584.

R v Kirkpatrick, 2022 SCC 33.

Court transcript cited

R v TS, [2007] SJ No 150 [Smith, 2007], Decision.

Katarina Bogosavljević

PhD Candidate, Department of Criminology, University of Ottawa, Canada.

katarina.bogosavljevic@uottawa.ca

Jennifer M. Kilty

Full Professor, Department of Criminology, University of Ottawa, Canada.

jkilty@uottawa.ca