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# Who? What? Where? When? And with What Consequences? An Analysis of Criminal Cases of HIV Non-disclosure in Canada<sup>1</sup>

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and Glenn Betteridge

## Introduction

The use of criminal-law powers to govern the risk of HIV transmission has recently emerged as a focal point for AIDS advocacy at global, national, and local levels. People with HIV/AIDS (PHAs), community activists, researchers, legal advocates, and others have created a vibrant critical discourse that decries the blunt nature of criminal-law governance. Their arguments focus on how criminalizing HIV transmission and/or exposure, particularly in the context of sexual relations, hinders HIV prevention and the support of PHAs.<sup>2</sup> They have argued against establishing HIV-specific criminal laws and in favour of restricting the use of general laws to prosecute PHAs.<sup>3</sup> They have also enlisted international organizations in the critique of HIV-related criminalization and engaged in a variety of initiatives aimed at reforming criminal law.<sup>4</sup>

Formal research has begun to play an important role in these activities, particularly as the call for more evidence-informed analysis of HIV-related criminalization gains traction. Social scientists have created a small but important body of empirical research that explores the public-health impact

<sup>1</sup> We thank Cecile Kazatchkine for assistance with the demographic data presented in this article. We also thank the anonymous reviewers for their helpful comments on the manuscript. This research was supported by a grant from the Ontario HIV Treatment Network. Eric Mykhalovskiy is supported by a Canadian Institutes of Health Research New Investigator Award.

<sup>2</sup> L.E. Wolf and R. Vezina, "Crime and Punishment: Is There a Role for Criminal Law in HIV Prevention Policy?" *Whittier Law Review* 25 (2004): 821–86; E. Mykhalovskiy, "The Problem of 'Significant Risk': Exploring the Public Health Impact of Criminalizing HIV Non-disclosure," *Social Science and Medicine* 73 (2011): 670–77; P. O'Byrne, "Criminal Law and Public Health Practice: Are the Canadian HIV Disclosure Laws an Effective HIV Prevention Strategy?" *Sexuality Research and Social Policy* 9, 1 (2012): 70–79.

<sup>3</sup> S. Burris and E. Cameron, "The Case against Criminalization of HIV Transmission," *Journal of the American Medical Association* 300, 5 (2008): 578–80; S. Burris et al., "Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial," *Arizona State Law Journal* 39 (2007): 467–517.

<sup>4</sup> UNAIDS, *Criminalization of HIV Transmission. Policy Brief* (2008); Open Society Institute, *10 Reasons Why Criminalization of HIV Exposure or Transmission Is Bad Public Policy* (2008); Y. Azad, "Developing Guidance for HIV Prosecutions: An Example of Harm Reduction?" *HIV/AIDS Policy and Law Review* 13, 1 (2008): 13–19.

of criminalizing HIV transmission/exposure in multiple jurisdictions.<sup>5</sup> Legal scholars have offered detailed critical analyses of how different criminal laws construct harm, risk, and responsibility in circumstances of sexual HIV transmission risk.<sup>6</sup> Finally, researchers have begun to explore aggregate numerical data on criminal prosecutions in order to represent the scope and contours of criminalization within specific countries, to examine how courts have responded to individuals facing charges for HIV-related sexual offences, and to move toward international comparisons.<sup>7</sup>

This article contributes to the latter genre of research. It explores prosecutions in Canada, where PHAs have a criminal-law obligation to disclose their HIV-positive status before engaging in sex that poses a “significant risk of serious bodily harm.”<sup>8</sup> The article offers the first comprehensive analysis of the temporal trends, demographic patterns, and aggregate outcomes of Canadian criminal cases of alleged HIV exposure/transmission resulting from HIV non-disclosure. At the same time, it explores the role that this information has played in shaping activist efforts in Ontario to intervene in criminal-law governance of HIV.

Our analysis arises out of a research project linking PHAs, community-based AIDS service organizations (ASOs), and the university sector. The project was informed by a response to criminalization that, like other movement-led interventions in the criminal law, is reformist in its politics.<sup>9</sup> Rather than seeking to somehow overturn criminal-law governance of HIV transmission risks, Canadian activists from the legal, research, and community sectors have focused on reducing harms posed by the criminal law. They have critiqued inconsistencies and unfairness in the application of the disclosure obligation and advocated for narrowing and clarifying its parameters through, among other means, establishing prosecutorial guidance (Crown policy and a practice memorandum), working with criminal defence counsel, and intervening in significant cases at provincial courts of appeal and at the Supreme Court of Canada. Canadian activists, on the whole,

<sup>5</sup> For recent examples see Mykhalovskiy, “The Problem with ‘Significant Risk’”; C. Dodds et al., “Responses to Criminal Prosecutions for HIV Transmission among Gay Men with HIV in England and Wales,” *Reproductive Health Matters* 17, 34 (2009): 135–45; B. Adam et al., “Effects of the Criminalization of HIV Transmission in *Cuerrier* on Men Reporting Unprotected Sex with Men,” *Canadian Journal of Law and Society* 23, 1–2 (2008): 143–59, <http://dx.doi.org/10.1353/jls.0.0040>; C.L. Galletly et al., “HIV-Positive Persons’ Awareness and Understanding of Their State’s Criminal HIV Disclosure Law,” *AIDS and Behavior* 13 (2009): 1262–69.

<sup>6</sup> M. Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (Abingdon, UK: Routledge-Cavendish, 2003); I. Grant, “The Boundaries of the Criminal Law: The Criminalization of the Non-disclosure of HIV,” *Dalhousie Law Journal* 31 (2008): 123–80.

<sup>7</sup> E.J. Bernard, *HIV and the Criminal Law* (London: NAM, 2010); Z. Lazzarini, S. Bray, and S. Burris, “Evaluating the Impact of Criminal Laws on HIV Risk Behavior,” *Journal of Law, Medicine and Ethics* 30 (2002): 239–53.

<sup>8</sup> *R v Cuerrier*, [1998] 2 SCR 371.

<sup>9</sup> For a discussion of reformism and feminist interventions in Canadian rape law see M. Los, “The Struggle to Redefine Rape in the Early 1980s,” in *Confronting Sexual Assault: A Decade of Legal and Social Change*, ed. J.V. Roberts and R. M. Mohr, 20–56 (Toronto: University of Toronto Press, 1994).

have not advocated for reform to the Criminal Code as a means of restricting prosecutions, given the “law and order” policy agenda that has dominated federal politics in recent years.<sup>10</sup>

Our project channelled activist politics into an evidenced-based intervention in public discourse about criminalization. We created and explored various forms of evidence, including the trend and pattern data reported here, as part of a policy-options paper supporting the call to establish prosecutorial guidance for criminal cases of HIV non-disclosure in Ontario.<sup>11</sup>

Our decision to create pattern and trend data was influenced by the work of a number of scholars who have emphasized the important role that rendering social phenomena in numerical terms plays in the governance of social life.<sup>12</sup> Like the authorities they have written about, we drew on quantification and visual displays of numerical information to make a phenomenon—in our case, criminalization—visible in ways that might direct action. However, unlike the experts that feature in prior scholarly analyses, we sought to inform activist responses and operated in tension with established sites of power. Our aim in creating data was to encourage community mobilization by substantiating the phenomenon of criminalization and by offering up objects of discourse that invite explanation and that suggest problems in need of exploration and action.

In this article we offer a brief account of our research context and methods. We then explore temporal trends, demographic patterns, and outcomes data for criminal cases of HIV non-disclosure in Ontario or in Canada as a whole. In each instance we describe the pattern or trend we have identified, offer potential explanations for our findings, and explore how the data have informed criminal-law reform efforts. We draw particular attention to the following key findings: a sharp increase in criminal cases that began in 2004; the large proportion of recent criminal cases involving defendants who are heterosexual Black, African, and Caribbean men; and the high proportion of criminal cases resulting in conviction.

## Research Context

In Canada, HIV-related criminalization has focused on HIV non-disclosure and the *risk* of transmitting HIV infection rather than on actual transmission of the virus. As determined by the Supreme Court of Canada in 1998 in *R v Cuerrier*, PHAs have a criminal-law obligation to disclose their HIV-positive status to sexual partners before engaging in activities with them that pose a

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<sup>10</sup> Ontario Working Group on Criminal Law and HIV Exposure, “We Need Prosecutorial Guidelines for HIV Non-Disclosure,” [www.Ontarioaidsnetwork.on.ca/clhe](http://www.Ontarioaidsnetwork.on.ca/clhe).

<sup>11</sup> E. Mykhalovskiy, G. Betteridge, and D. McLay, *HIV Non-disclosure and the Criminal Law: Establishing Policy Options for Ontario* (Toronto: Ontario HIV Treatment Network, 2010).

<sup>12</sup> T.M. Porter, *Trust in Numbers: The Pursuit of Objectivity in Science and Public Life* (Princeton, NJ: Princeton University Press, 1995); P. Miller and N. Rose, “Governing Economic Life,” *Economy and Society* 19, 2 (1990): 1–31; B. Latour, *Science in Action* (Milton Keynes, UK: Open University Press, 1987).

“significant risk of serious bodily harm.” Henry Cuerrier faced two counts of aggravated assault for not disclosing that he was HIV-positive to two women with whom he had vaginal intercourse without a condom. Neither woman became HIV-positive as a result of having sex with Cuerrier. In its decision, the Supreme Court established that in the context of sex that poses a significant risk of HIV transmission, not disclosing one’s HIV-positive status can be considered a fraud that vitiates a partner’s consent to sex. In doing so, it outlined the legal reasoning that permits otherwise consensual sex to be treated as an “assault” under Canadian criminal law.<sup>13</sup>

Unfortunately, the Supreme Court did not clearly define the significant-risk test, nor did it establish clear parameters for lower courts to use in establishing whether the risks in a given case might be considered significant. The result has been confusion and uncertainty, both within and beyond the legal system, about criminal liability for HIV non-disclosure. Police have laid charges where transmission risk was apparently negligible or non-existent. Lower courts have been inconsistent in interpreting the significant-risk test and in applying current scientific research on HIV transmission risks to that test; not surprisingly, they have issued conflicting decisions.<sup>14</sup> Outside the courts, the vagueness of the significant-risk test has meant that PHAs cannot determine with any clarity their criminal-law disclosure obligation.

In Canada, advocacy against the criminalization of HIV non-disclosure, much of it centring on problems stemming from the vagueness of significant risk, has surged in recent years. Our work grew out of the activities of the Ontario Working Group on Criminal Law and HIV Exposure (CLHE). CLHE was established in Toronto in 2007 by a group of PHAs, advocates, and front-line staff from ASOs, with an aim to curtail the growing use of the criminal law in circumstances of HIV non-disclosure. The centrepiece of CLHE’s advocacy is a provincial campaign calling upon the Ministry of the Attorney General of Ontario (MAG) to establish a policy and practice memorandum for criminal prosecutors for cases involving alleged HIV non-disclosure. CLHE has also conducted public education on the issue, organized a criminal defence strategy for PHAs facing criminal charges, and engaged with the media.<sup>15</sup>

Early on in CLHE’s work we recognized that there was a dearth of informed public policy discourse on HIV criminalization in Ontario and across Canada. Mainstream media sensationalized criminal cases, often vilifying HIV-positive defendants while sidestepping complex systemic issues such as the normative or scientific basis of criminal charges for non-disclosure or

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<sup>13</sup> R. Elliott, *After Cuerrier: Canadian Criminal Law and the Non-disclosure of HIV-Positive Status* (Toronto: Canadian HIV/AIDS Legal Network, 1999).

<sup>14</sup> See Mykhalovskiy et al., *HIV Non-disclosure and the Criminal Law*.

<sup>15</sup> In December 2010, following lobbying efforts by CLHE, MAG committed to producing prosecutorial guidance for criminal cases of HIV non-disclosure and other sexually transmitted infections. On CLHE’s activist work see T. McCaskell, “Disrupting the Criminalization of HIV,” *Our Schools Our Selves* 20, 3 (2011): 133–56.

the public-health impact of criminalization.<sup>16</sup> Physicians and public-health officials were reluctant to comment publicly on the issue, and policy makers had not participated in a public debate on the criminalization of HIV non-disclosure.

To respond to this situation, we created a research-based document to encourage and shape public discourse on the issue. Our project sought to frame community-based responses to the issue while providing MAG with a way to think about and address the problem. The heart of the project was a widely disseminated policy document that problematized the vagueness of the significant-risk test and posed questions about the role of scientific research in judicial decisions; the public-health impact of criminalization; and the temporal trends, demographic distribution, and outcomes of criminal cases.<sup>17</sup> This article deepens and adds new data to our early analysis of trend and pattern data.

## Methods

At the beginning of our project, we realized that we had no way of speaking with confidence about whether cases were becoming more frequent, or about who was being charged and how their cases were decided. We reasoned that a first step in building an informed public dialogue on the issue was to put in place discursive resources for knowing what the criminalization of HIV non-disclosure “looked like” in numerical terms.

We approached that task mindful of the artefactual character of statistics and the pitfalls of naïve realism. Debates about making and using race-based statistics about the criminal justice system were a particular concern. Arguments about the accuracy of such statistics, their tendency to reify race, and their potential to contribute to stereotypical associations between racialized communities and crime are well established in the literature.<sup>18</sup> In a manner that has been reported of the interest in race–crime statistics generally,<sup>19</sup> we decided to collect race-based data because of a demand for such information from communities concerned about potential racial discrimination in the criminal justice system. We adopted a parsimonious approach. Unlike others,<sup>20</sup> we recorded the race of defendants and complainants only

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<sup>16</sup> E. Mykhalovskiy and C. Sanders, “‘There is no excuse for this wanton, reckless, self-indulgent behavior’: A Critical Analysis of Media Representation of the Criminalization of HIV Non-disclosure in Canada” (paper presented at Ontario HIV Treatment Network Annual Conference, Toronto, 2008).

<sup>17</sup> Mykhalovskiy et al., *HIV Non-disclosure and the Criminal Law*.

<sup>18</sup> See, e.g., J.V. Roberts, “Racism and the Collection of Statistics Relating to Race and Ethnicity,” in *Crimes of Colour: Racialization and the Criminal Justice System in Canada*, ed. W. Chan and K. Mirchandani, 101–12 (Peterborough: Broadview Press, 2001); S. Wortley, “Hidden Intersections: Research on Race, Crime, and Criminal Justice in Canada,” *Canadian Ethnic Studies* 35, 3 (2003): 99–117.

<sup>19</sup> A. Owusu-Bempah and P. Millar, “Revisiting the Collection of ‘Justice Statistics by Race’ in Canada,” *Canadian Journal of Law and Society* 25, 1 (2010): 97–104, <http://dx.doi.org/10.1353/ajs.0.0107>.

<sup>20</sup> A. Merminod, “The Deterrence Rationale in the Criminalization of HIV/AIDS,” *Lex Electronica* 13, 3 (2009): 2–34.

when it was clearly reported by the media or was known to service providers or criminal defence lawyers within our networks. The race of individuals facing criminal charges for HIV non-disclosure was not uniformly reported in our information sources; particularly for earlier criminal cases, data were often missing, resulting in a high proportion of individuals for whom race is unknown. For this reason, we do not present data on race for Canada as a whole. To report demographic patterns, we use the *individual defendant* as the unit of analysis, while for temporal and outcomes data we use the *criminal case* as the primary unit of analysis.<sup>21</sup>

We created a database containing 18 information fields, which included the following information when available: name, sex, age, and race/ethnicity of the accused person; race/ethnicity of the complainant(s); whether the complainant(s) was (were) a same- or opposite-sex partner; province and city of charge; Criminal Code offence(s) charged; year of charge(s); whether HIV transmission was alleged; level of court seized of the case; outcome of the case; year of outcome; sentence upon conviction; whether a police media release was issued; our data sources; citation for the court's reasons for decision/sentence; and any other relevant information. The primary information source for completing our data fields was news reports. We searched the Canadian HIV/AIDS Legal Network's publications and their paper and electronic files for information about criminal cases related to HIV non-disclosure.<sup>22</sup> We supplemented this information with electronic searches of legal databases (LexisNexis, Quicklaw, and CanLii) and Internet searches. We also communicated with networks of ASO staff and lawyers with expertise in HIV or criminal law and requested that they inform us about cases.

Our discussion draws on data from 1989 through 2010. During this period we identified a total of 122 cases in which 114 individuals were charged with criminal offences related to HIV non-disclosure.<sup>23</sup> Of these, 48% ( $n = 58$ ) occurred in Ontario and involved 55 individuals who faced criminal charges. At the time of writing we identified additional cases for 2011, for a total of 134 cases involving 124 individuals charged. Roughly half of the cases (65/134) occurred in Ontario and involved 61 individuals who were criminally charged. We limit our discussion below to data from 1989 to 2010, since 2010 is the last full year for which we have complete data.

<sup>21</sup> We defined as an HIV non-disclosure *case* any circumstance in which one or more Criminal Code charges were laid by police against a person based on alleged HIV non-disclosure in the context of sexual activity. We excluded situations in which police charged an HIV-positive person with assault—including sexual assault and aggravated sexual assault—when force, violence, or coercion was used to obtain sex. We also excluded criminal cases involving charges for biting or spitting. We treated as separate cases charges that were prosecuted in separate proceedings, either at the trial stage or on appeal. In 66 cases, defendants faced two or more criminal charges related to HIV non-disclosure.

<sup>22</sup> Since at least 1989, the Canadian HIV/AIDS Legal Network has been tracking HIV non-disclosure criminal prosecutions in Canada, drawing on a variety of sources: media clipping services (including FPinfomart.ca); Internet and hand searches of media reporting; electronic searches of legal databases (LexisNexis, Quicklaw, and CanLii); and information passed on by HIV/AIDS organizations, community members, and lawyers.

<sup>23</sup> Eight individuals were each involved in two criminal cases.

We caution that our analysis must be understood within the context of the limitations of our data sources, including, most importantly, the incomplete character of news reports and the inconsistent reporting of demographic information in published court decisions. It is also the case that, like any exercise that uses descriptive or other statistics to suggest patterns and trends, our analysis raises as many questions as it answers, if not more.

### Temporal Trends

The established Canadian policy literature on the criminal law and HIV non-disclosure cautions that the number of criminal cases is increasing year-over-year.<sup>24</sup> Often, metaphors suggesting a gradual progression in the number of cases are used to describe what is happening; for example, many describe the Canadian situation as involving “a criminalization creep.”<sup>25</sup>

Our research points to a different type of temporal trend: a period of relative inactivity followed by a sharp increase in the number of cases that begins in 2004 and is sustained to the end of 2010. Our data show that the change in the number of cases over time is better understood as involving a jump rather than a creep, a temporal trend that holds for both Canada (see Figure 1) and Ontario (see Figure 2).

During the first 15 years for which data are available, with the exception of 1999 (the year following the *Cuerrier* decision) and 2003, the annual number of cases in Canada was four or fewer. In 2004, there was a roughly twofold jump in the number of cases from the previous year, and while the annual

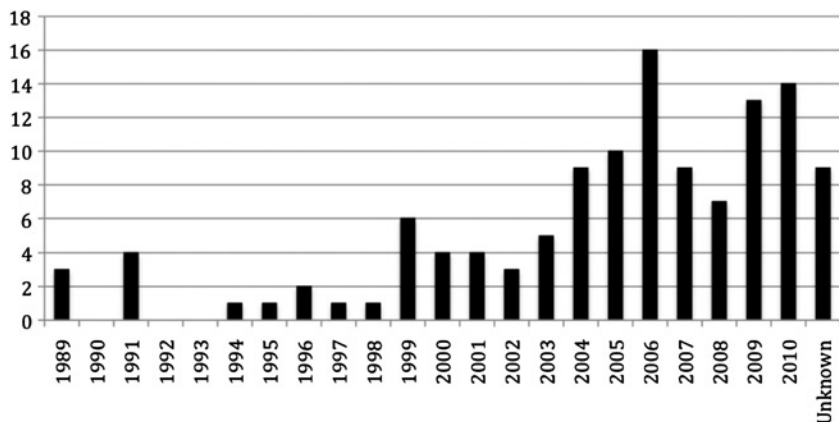


Figure 1 HIV non-disclosure cases, Canada, 1989–2010 ( $n = 122$ )

<sup>24</sup> A. Symington, “Criminalization Confusion and Concern: The Decade since the *Cuerrier* Decision,” *HIV/AIDS Policy and Law Review* 14, 1 (2009): 5–10; Grant, “The Boundaries of the Criminal Law.”

<sup>25</sup> R. Elliott, “Criminalization Creep: Legal Developments and Community Responses to Criminal Prosecutions for HIV Exposure” (paper presented at OHTN Research Conference, Toronto, 2009).



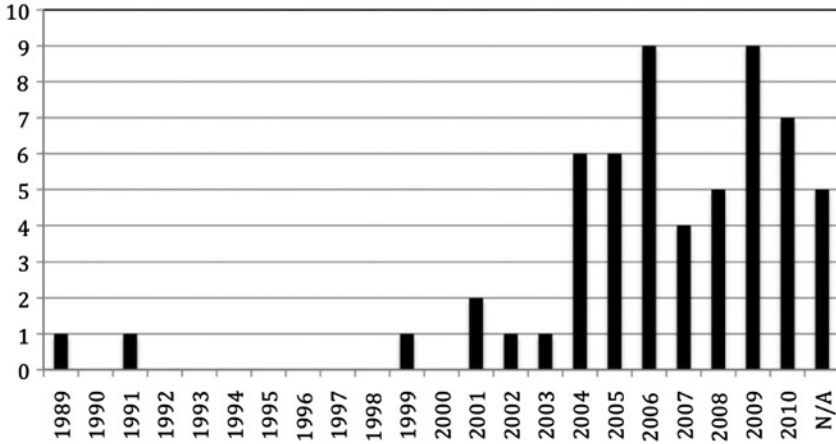


Figure 2 HIV non-disclosure cases, Ontario, 1989–2010 ( $n = 58$ )

number of cases peaks in 2006 at 16, it remains high until 2010 relative to the period prior to 2004. Approximately 69% (78/113) of criminal cases in Canada for which the year of charge is known occurred between 2004 and 2010 inclusive. These temporal trends are even more pronounced for Ontario, where there were only seven cases prior to 2004 and where 87% (46/53) of criminal cases for which the year of charge is known occurred between 2004 and 2010.

### *Reflections on Temporal Trends*

We have used our trend and pattern data in multiple presentations at conferences, workshops, specialized speaking events, and other venues, primarily in Ontario but also in other provinces and internationally. Our primary audiences have been PHAs, community workers, lawyers, researchers, policy makers, and public-health staff and officials.

In presenting findings about temporal trends, we sought to focus community and professional concerns about heightened criminalization, correct misperceptions about the scale of criminalization, and encourage public dialogue about explanations for the increase in cases. We took care to represent the current situation in Canada as unique and urgent. A complex of factors and relations have produced the last few years as an unprecedented period of criminal prosecution of HIV non-disclosure; our present situation is not simply the latest moment of a progressive criminalization creep. While trend data easily establish the past few years as exceptional, it is far more difficult to understand *why* the data take shape as they do. Why the sudden increase in cases beginning in 2004? What explains their sustained number since then?

Broad social relations certainly point to some of what is involved. For example, it would be hard to argue that the increase in cases is not related

to the recent popularity in Canada of a “tough on crime” approach to governing complex social problems. That approach is typically identified with increases in sanctions for a broad range of criminal offences and other changes in criminal-law policy that the federal Conservative government began introducing in 2006.<sup>26</sup> While the “tough on crime” agenda technically follows the spike in non-disclosure cases, it arguably creates a climate that encourages the zealous prosecution of such cases.

One might also suggest that criminalization represents one extreme component of a much broader and multi-sited reconfiguration of HIV prevention. That reconfiguration has been spurred by the public-health construction of PHAs’ increased life expectancy (following the advent of successful anti-retroviral therapy) as a heightened opportunity for HIV transmission. It involves a range of biomedical, public-health, and community-based behavioural interventions that seek to govern PHAs’ sexual behaviour, including HIV-prevention education and counselling, public-health surveillance, the use of anti-retroviral therapy as a prevention tool, and positive prevention initiatives.<sup>27</sup> Increasingly, it centres responsibility for preventing HIV transmission in the bodies and conduct of PHAs, in opposition to older traditions that emphasize safer sex as a responsibility of all sexual partners.<sup>28</sup>

Attempts to explain the recent increase in cases in terms of more proximate factors are challenged by the closed nature of the criminal justice system. We know that the spike in cases in 1998 and the sharp increase in cases that began in 2004 followed key Supreme Court of Canada decisions related to HIV non-disclosure.<sup>29</sup> But we do not know what precise role, if any, those decisions may have played in shifting institutional practices within the criminal justice system in ways that have resulted in more criminal cases. Lack of access prevents us from determining what mix of institutional factors may be behind the recent jump in cases—including, for example, shifts in the conduct of police investigations that may have moved a greater proportion of complaints to the criminal charge phase, or changes among Crown prosecutors that may have increased the number of decisions to prosecute individuals.

Criminal cases related to HIV non-disclosure typically begin with complaints made to the police by individuals who allege that they have been sexually exposed to or infected with HIV by a sexual partner in the absence of

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<sup>26</sup> P. Mallea, *The Fear Factor: Stephen Harper’s “Tough on Crime Agenda”* (Ottawa: Canadian Centre for Policy Alternatives, 2010).

<sup>27</sup> On positive prevention see J. Fisher, L. Smith, and E. Lenz, “Secondary Prevention of HIV in the United States: Past, Current and Future Perspectives,” *Journal of Acquired Immune Deficiency Syndrome* 55 (2010): S106–15.

<sup>28</sup> E. Mykhalovskiy, “Integrating HIV Treatment and Prevention: Shifts in Community-Based Organizing and Biopolitics in the Canadian Context,” in *HIV Treatment and Prevention Technologies in International Perspective*, ed. M. Davis and C. Squire, 61–86 (Basingstoke, UK: Palgrave Macmillan, 2010).

<sup>29</sup> In *R v Williams*, [2003] 2 SCC 41 at para 28, the Supreme Court of Canada suggested that once an individual becomes aware that he or she has faced a risk of contracting HIV, and hence that his or her partner’s consent has become an issue, the individual is obliged to disclose that awareness to his or her sexual partner.

disclosure. An important proximate source of increases in cases may be an increase in the number of such complaints. In order to make a police complaint related to HIV non-disclosure, people must, at the very least, understand themselves to have experienced a potential criminal wrong. The discursive structuring of their experiences as such has a number of likely sources. We suggest the particular importance of mainstream media coverage of criminal HIV non-disclosure cases. Extensive media coverage has created high-profile criminal cases in which reporting focuses on the “moral failings” of individual defendants and closely follows key developments in their trials.<sup>30</sup> Media stories are the primary form of public discourse that pairs non-disclosure with criminality. To the extent that complainants are socially located outside of ASOs and communities of high HIV prevalence, in which ideas that counter the criminalization of HIV non-disclosure circulate widely, media may play a primary role in laying the discursive groundwork that makes complaints possible.

### Demographic Patterns

Criminal cases related to HIV non-disclosure in Ontario and Canada are strongly patterned by gender, race, and sexual orientation. Gender is a strong predictor of whether someone will face criminal charges related to HIV non-disclosure: both in Ontario (87%, 48/55) and across Canada (90%, 103/114), the vast majority of individuals who have been criminally charged for failing to disclose their HIV-positive status in a sexual relationship have been men.<sup>31</sup>

A closer look at that population of men offers further insight into the demographic patterns that characterize criminal-law governance of HIV non-disclosure. As Tables 1 and 2 indicate, the majority of male defendants both across Canada (72%, 74/103) and in Ontario (69%, 33/48) are heterosexual.<sup>32</sup> Heterosexual men are the single largest demographic category represented among people who have faced criminal charges for HIV non-disclosure in Canada. They account for 65% (74/114) of all accused in Canada and 60% (33/55) of all accused in Ontario.

While our data clearly show that criminal cases of HIV non-disclosure arise primarily out of heterosexual relations, they also suggest that cases

<sup>30</sup> Mykhalovskiy and Sanders, “There Is No Excuse.”

<sup>31</sup> Our analysis focuses on men because the number of women (11) prosecuted from 1989 to 2010 does not lend itself to the identification of trends and patterns. Of course, the impact of criminalization on HIV-positive women is not a simple function of the number of cases involving female defendants; it is also important to recognize gender differences in the experience of criminalization based on such factors as degrees of social marginalization and power dynamics in interpersonal relationships. For a discussion see P. Allard, C. Kazatchkine, and A. Symington, “Criminal Prosecutions for HIV Non-disclosure: Protecting Women from Infection or Threatening Prevention Efforts?” in *Women and HIV Prevention in Canada: The Past, the Present and the Future—Implications for Research, Policy and Practice*, ed. J. Gahagan (Toronto: Canadian Scholars Press, forthcoming).

<sup>32</sup> For the purposes of our research, we designated the accused’s sexual orientation on the basis of the gender of the complainant.

**Table 1**

HIV Non-disclosure: Sexual Orientation of Men Charged, Canada, 1989–2010 (*n* = 103)

Orientation	No.	%
Heterosexual	74	72
Homosexual	20	19
Hetero/homosexual	2	2
Unknown	7	7
Total	103	100

**Table 2**

HIV Non-disclosure: Sexual Orientation of Men Charged, Ontario, 1989–2010 (*n* = 48)

Orientation	No.	%
Heterosexual	33	69
Homosexual	12	25
Hetero/homosexual	1	2
Unknown	2	4
Total	48	100

may be increasing among men who have sex with men (MSM). In Ontario, for example, 13 of 48 men charged allegedly did not disclose their HIV-positive status in sexual relations with men. However, 12 of these 13 men were charged within the last 5 years for which data are available; they represent 42% (12/28) of men charged in Ontario from 2006 through 2010.

An important dimension of the demographic patterns of criminal charges for HIV non-disclosure is revealed when we take into account the race of defendants. Of the seven women who have been charged in Ontario, two are White, one is Thai, and one is Black; the race/ethnic background of the remaining three is unknown. The race/ethnicity of men charged in Ontario is presented in Figure 3; as the figure indicates, White men account for the majority of defendants (38%, 18/48), followed closely by Black men (31%, 15/48).

When attention is focused on heterosexual men who have been charged since 2004—that is, on the group most represented in criminal cases during the most intensive period of criminal law application—this pattern is reversed. As Table 3 indicates, among heterosexual men charged from 2004 through 2010, Black men account for a higher proportion than do White men. The proportion of Black heterosexual men charged is also higher in recent years than over the entire data-collection period: they account for 52% of cases among heterosexual men from 2004 to 2010. A potential centring of criminal charges on Black heterosexual men is further suggested by data showing that

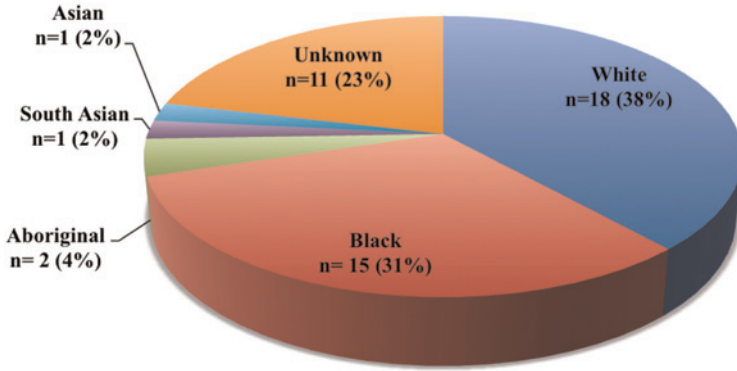


Figure 3 HIV non-disclosure, race/ethnicity of men charged, Ontario, 1989–2010 (n = 48)

**Table 3**

HIV Non-disclosure: Race/Ethnicity of Heterosexual Men Charged, Ontario, 2004–2010 (n = 25)

	2004	2005	2006	2007	2008	2009	2010	2004–2010	% of men
Black		4	4		1	3	1	13	52
White	5	1	2	1	1			10	40
Aboriginal						1		1	4
South Asian									
Asian									
Unknown							1	1	4
Total	5	5	6	1	2	4	2	25	100

since 2005, Black men account for at least half of all cases among heterosexual men per year, with the exception of 2007.

***Reflections on Sexual Orientation and Race***

In large urban centres in Canada, communities of PHAs have been formed along established bases of identity such as sexual orientation, gender, race, and ethnicity. This has followed from the existence of gay male communities where HIV prevalence is high as well as from the establishment of ASOs designed to meet the needs of particular non-European ethnic and racialized groups. In our presentations to PHAs and ASOs, we found that the most animated discussions often focused on our demographic findings and, in particular, on concerns about the over-representation of particular groups among individuals charged.

We responded to these concerns by focusing our analysis on the sexual orientation, gender, race, and ethnicity of individuals facing charges; data on complainants is too incomplete to include in our discussion. Our aim was to promote dialogue about criminalization by providing greater empirical

clarity as to the demographic characteristics of defendants in criminal cases and by prompting informed reflection on what might explain the key patterns we observed.

Those patterns—the overwhelming representation of heterosexual men among defendants; the recent increase of cases, at least in Ontario, involving accused men who are gay or bisexual; and the large proportion of cases involving Black heterosexual men—are challenging to fully understand. We sought a broader reflection on what might explain them by focusing on a complex of factors and relations.

For example, we argue that the under-representation of gay men and over-representation of heterosexual men among defendants, relative to their overall proportion of HIV-positive individuals in Canada, arises out of the interplay of HIV prevalence, HIV prevention targeted at specific populations, and the place of non-disclosure in sexual cultures. HIV prevalence is high in urban gay male communities, and sexual activity between HIV-positive and HIV-negative men is not uncommon. In Canada and other developed countries, gay male communities have also been the focus of decades of HIV-prevention education, which has created an awareness among gay men of HIV infection, safer sex, and the risks of HIV transmission.<sup>33</sup> By contrast, HIV prevalence among heterosexual men is low, except in some micro-communities such as drug users in Vancouver.<sup>34</sup> A growing acceptance of the need to focus HIV-prevention efforts on so-called high-risk communities has hastened a decline in general HIV-prevention education in Canada. Unless women are connected to high-prevalence communities, they may be unlikely to directly encounter HIV prevention education.

These factors likely create differences in understandings of and responses to sexual HIV risk and non-disclosure between the respective sexual cultures of gay men and heterosexual women. We lack empirical studies that explore how women and HIV-negative gay men experience exposure to HIV in circumstances of non-disclosure and what they perceive their options and possible responses to be. Still, we suggest that gay men, especially middle-aged and older gay men, likely accept a much higher level of personal responsibility for HIV-related sexual risks than do the female complainants who have brought charges against their male sexual partners. We recognize a heterogeneity of sexual practices and experiences among heterosexual women and gay and bisexual men. However, in contrast to heterosexual women and, indeed, heterosexual men, gay men may be less likely to pursue criminal charges. This may result from a host of social relations, including an awareness among gay men that their partners may be HIV-positive; the common, if not

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<sup>33</sup> B. Adam et al., “Circuits, Networks, and HIV Risk Management,” *AIDS Education and Prevention* 20 (2008): 420–35.

<sup>34</sup> In a recent paper drawing on a range of drug-using cohorts in the Vancouver area, Marshall and colleagues report an HIV prevalence rate of 21.2% among male heterosexual drug users. B. Marshall et al., “Pathways to HIV Risk and Vulnerability among Lesbian, Gay, Bisexual, and Transgendered Methamphetamine Users: A Multi-cohort Gender-Based Analysis,” *BMC Public Health* 11, 20 (2011).

normative, practice of safer sex within gay communities; and the fact that within gay communities, HIV disclosure is not routinely expected or demanded.

These differences in the organization of sexual cultures coincide with institutional activities in ways that help to explain the large proportion of criminal cases involving heterosexual as opposed to gay men. In Canada, HIV non-disclosure cases are typically treated by the criminal justice system as sexual assaults. They are thus discursively structured in law in ways that carry forward a general expectation of male perpetrators and female victims. Media coverage of HIV non-disclosure typically focuses on criminal cases involving male defendants, particularly Black men, offering narratives of their betrayal of heterosexual relationships and their “predatory” sexual behaviours.<sup>35</sup> There is no available research exploring any differences in how police respond to complainants from different genders, sexual orientations, and race and class backgrounds in HIV non-disclosure cases. However, the established research literature does draw attention to racist and homophobic practices within police work cultures and problematic relationships between police and gay and Black communities that may discourage some individuals from making complaints.<sup>36</sup> These structural and institutional conditions may make some heterosexual women more likely than gay men to recognize themselves as victims, to make complaints, and to have their complaints acted on by police investigators.

The recent increase in cases against gay men was a concern for many to whom we presented our data. They view the gay community as an important source of values that protect against criminalization, particularly a tradition of mutual responsibility for preventing HIV transmission through the practice of safer sex. Gay men are heterogeneous in their views on the legal and moral duty of HIV disclosure.<sup>37</sup> It is difficult to speculate about what might explain the recent increase in cases against gay men and whether this trend will continue. We emphasize the potential fragility of established sexual values within the gay community and note with concern the possibility of dramatic increases in criminal complaints in a community of high HIV prevalence, should those values be eroded.

The large proportion of criminal cases involving Black heterosexual men is an important research finding that has helped provide empirical stability to concerns raised by African, Caribbean, and Black communities about

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<sup>35</sup> J. Miller, “African Immigrant Damnation Syndrome: The Case of Charles Ssenyonga,” *Sexuality Research and Social Policy* 2, 2 (2005): 31–50; African and Caribbean Council on HIV/AIDS in Ontario (ACCHO), *Criminals and Victims? Race, Law and HIV Exposure in Ontario* (Toronto, 2010).

<sup>36</sup> S. Wortley and J. Tanner, “Data, Denials and Confusion: The Racial Profiling Debate in Toronto,” *Canadian Journal of Criminology and Criminal Justice* 45 (2003): 367–89, <http://dx.doi.org/10.3138/cjccj.45.3.367>; D.V. Janoff, *Pink Blood: Homophobic Violence in Canada* (Toronto: University of Toronto Press, 2005).

<sup>37</sup> B. Adam, “What Do HIV-Positive People Think about the Criminalization of HIV Transmission? Results from the Positive Spaces Healthy Places Survey” (paper presented at the OHTN Research Conference, November 2010).

HIV-related criminalization and prompt action on the issue by ASOs that represent them.<sup>38</sup> At the time when we produced our data, community discourse framed Black men's involvement in non-disclosure cases in terms of a language of disproportion, drawing on a consciousness of police racial profiling and the over-representation of Black people in arrest and prison statistics.<sup>39</sup> Black heterosexual men are clearly over-represented as defendants if their involvement in criminal cases is compared to the proportion of overall instances of HIV non-disclosure prior to sex that they likely account for. But claims about over-representation are otherwise difficult to establish, given widely discrepant estimates about the proportion of HIV-positive heterosexual men in Canada who are Black.<sup>40</sup>

While claims about disproportionate representation structure consciousness of HIV non-disclosure cases in terms that emphasize institutional racism in the criminal justice system, they are not a requirement of explanations that take such racism or other relevant factors into account. We suggest that understanding the large number of recent cases involving Black male heterosexual defendants requires careful consideration of the communities in which they participate and the shaping of HIV non-disclosure therein. For example, existing research suggests that patriarchal values, HIV-related stigma, immigration status, and concerns about secondary disclosure of HIV are among the factors that may account for high rates of non-disclosure among HIV-positive men in African, Caribbean, and Black communities.<sup>41</sup> We also suggest that race-based patterns in HIV non-disclosure cases need to be understood in terms that recognize the documented discrimination that Black African and Caribbean men face in police investigations, prison admissions, court proceedings, sentencing, and other areas of the criminal justice system.<sup>42</sup> Since HIV non-disclosure cases are triggered by complainants, Black men cannot be said to be targeted by police in a manner fully analogous with police street-based search and seizure practices. However, while little is known about how police and Crown prosecutors respond to Black male defendants in HIV non-disclosure cases, something approaching racial profiling may be at work. Media coverage overwhelmingly focuses on criminal cases involving Black male defendants, contributing to stereotypical conceptions of the relationship between Black male

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<sup>38</sup> ACCHO, *Criminals and Victims*.

<sup>39</sup> See, e.g., J. Roberts and A. Doob, "Race, Ethnicity, and Criminal Justice in Canada," in *Ethnicity, Crime and Immigration: Comparative and Cross-National Perspectives*, vol. 21, ed. M. Tonry, 469–522 (Chicago: University of Chicago Press, 1997).

<sup>40</sup> We received two widely different estimates of the proportion of HIV-positive men in Ontario who are Black. The Ontario HIV Epidemiological Monitoring Unit's estimate of 57.8% was based on modelled HIV prevalence using 2007 surveillance data; a second estimate of 22.6% from the OHTN was based on data from the Ontario Cohort Study.

<sup>41</sup> ACCHO, *Criminals and Victims*.

<sup>42</sup> Commission on Systemic Racism, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995).



heterosexuality and violent sexual crime.<sup>43</sup> General criminological research on racial profiling by police suggests that actors within the criminal justice system can be influenced in their decision making by the circulation of such race-based stereotypes.<sup>44</sup>

### Outcomes of Cases

Our data show, for both Canada and Ontario, that a significant majority of cases—excluding ongoing cases and the small number for which we had no information about the outcome—ended in convictions.<sup>45</sup> In Canada (Figure 4), 78% of cases (67/86) ended in a conviction on at least one charge related to HIV non-disclosure, while 16% (14/86) ended with an acquittal. In Ontario (Figure 5), the conviction rate was 76% (34/45), while the acquittal rate was 20% (9/45). We have also documented that a large proportion of convictions were the result of a guilty plea, as distinct from a finding of guilt after a trial. Across Canada, 51% of cases with a conviction (34/67) ended with a guilty plea, while in Ontario, 59% of convictions (20/34) were the result of a guilty plea.

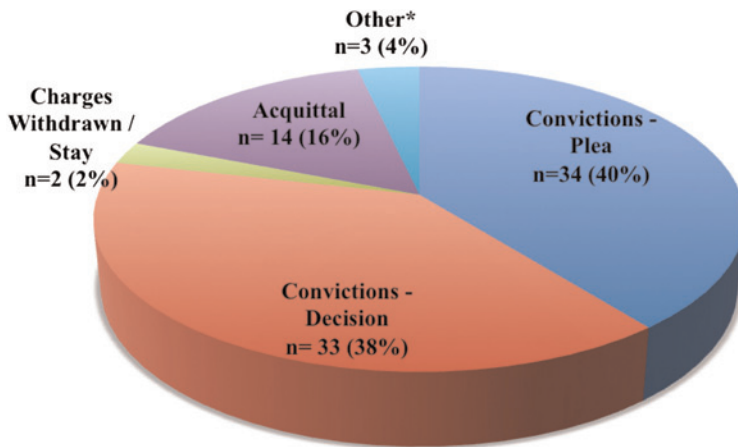


Figure 4 Disposition of HIV non-disclosure cases, Canada, 1989–2010 ( $n = 86$ )\*

\* Includes one case in which the accused was deported prior to trial; one case in which the Crown decided not to proceed with a re-trial; and one case in which the accused died before a verdict was handed down

<sup>43</sup> An examination of *Toronto Star* coverage (March 1990–July 2010) found that 64% (134/208) of news stories on criminal HIV non-disclosure cases focused on cases involving Black male defendants. E. Mykhalovskiy, unpublished data.

<sup>44</sup> Wortley, “Hidden Intersections.”

<sup>45</sup> The outcome data from 1989 to the end of 2010 represent the information we had at the time of writing, which may not reflect the final outcome of a case. We treated cases as “unknown” when we were aware of charges’ being laid but were unable to obtain any information about the outcome(s) as of the time of writing.

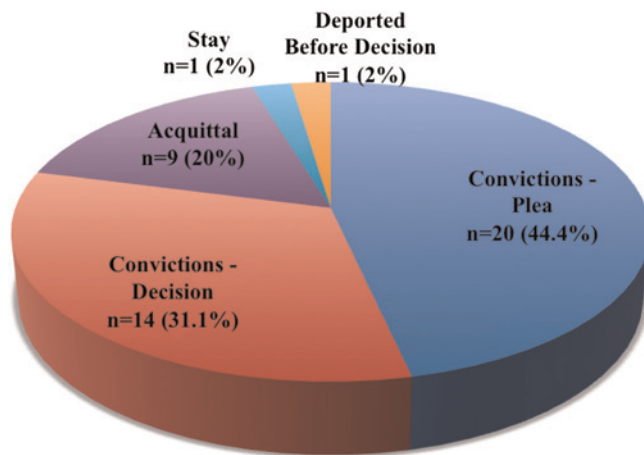


Figure 5 Disposition of HIV non-disclosure cases, Ontario, 1989–2010 ( $n = 45$ )

We further disaggregated our data on convictions on the basis of whether the accused person in the case was alleged to have transmitted HIV to one or more of the complainants. Across Canada, there was no allegation of HIV transmission in 39% of cases that resulted in convictions (26/67); in Ontario, there was no such allegation in 32% of convictions (11/34).

We also explored the sentences handed down by courts in cases that ended with a conviction. We examined two types of sentencing data: whether the sentence involved incarceration or another form of punishment; and, in the case of incarceration, the length of the sentence. Across Canada (Figure 6), in 89% of the cases in which the sentence was known (56/63), the convicted person was incarcerated; in Ontario (Figure 7), the incarceration rate was slightly lower, at 84% (26/31).

As we explained when presenting our research, our sentencing data suffer from limitations if one is seeking to compare sentences across cases, given the wide variety of circumstances in the cases (e.g., number of complainants, whether HIV was transmitted to one or more complainants, the past criminal record of the accused). However, the data do adequately demonstrate the range in sentences of incarceration and the significant periods of incarceration handed down to people convicted in HIV non-disclosure cases. The clear majority of cases resulting in prison terms both across Canada (31/56, Figure 8) and in Ontario (18/26, Figure 9) involved sentences of incarceration in the 0–48 months range. A total of four people across Canada have been sentenced to more than 10 years, while in Ontario one person was so sentenced.

### *Reflections on the Outcomes of Cases*

The various people to whom we presented our data were struck by the overall severity of the outcomes in HIV non-disclosure cases. This perception is not surprising among PHAs and ASO staff, for whom a health and human-rights discourse, rather than an approach based in case analysis and legal realism,

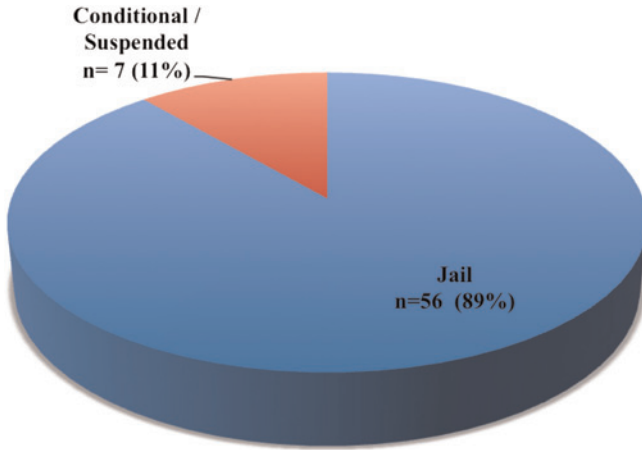


Figure 6 Sentence upon conviction in HIV non-disclosure cases, Canada, 1989–2010 ( $n = 63$ )\*  
\* We have excluded convictions for which the sentence is pending or was unknown.

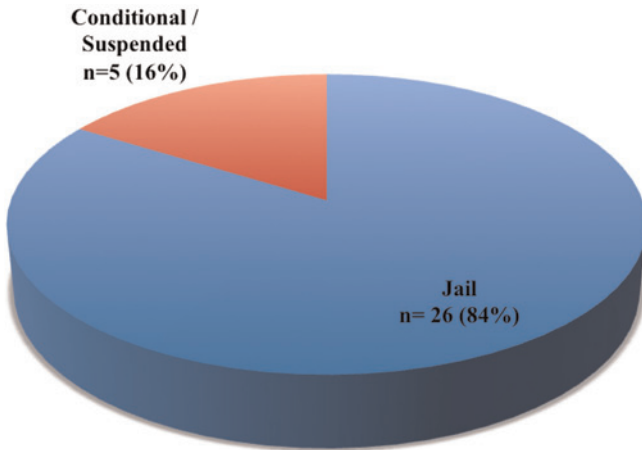


Figure 7 Sentence upon conviction in HIV non-disclosure cases, Ontario, 1989–2010 ( $n = 31$ )\*  
\* We have excluded convictions for which the sentence is pending or was unknown.

structures, to a great extent, discussions of HIV and the law. However, people with legal training and people familiar with the criminal justice system also remarked upon the overall severity of outcomes.

For CLHE members and the criminal defence lawyers we consulted for our project, the high degree of certainty in the outcome of cases (i.e., convictions and convictions by guilty plea) stood in stark contrast to the uncertainty of the “significant risk” test. Numerous courts have incorrectly applied a more

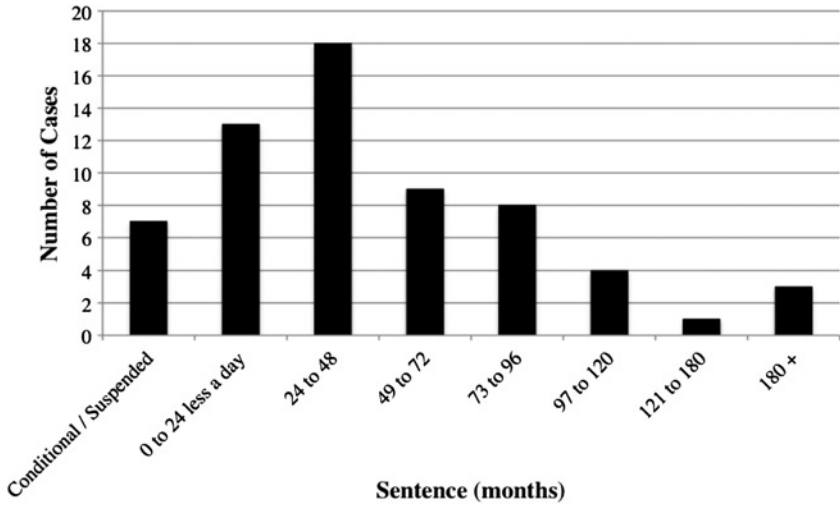


Figure 8 Length of sentence, HIV non-disclosure cases, Canada, 1989–2010 ( $n = 63$ )

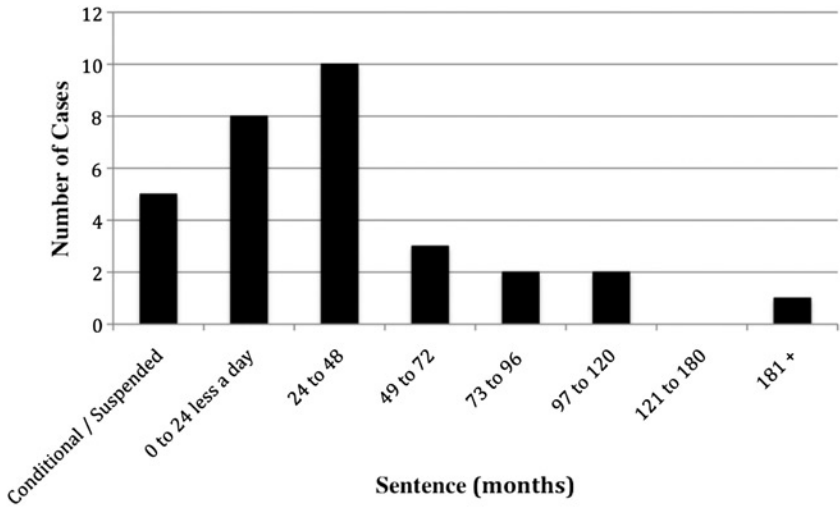


Figure 9 Length of sentence, HIV non-disclosure cases, Ontario, 1989–2010 ( $n = 31$ )

onerous legal standard than that established by the Supreme Court or have proceeded without consideration of expert evidence on the risk of HIV transmission, the central element in most HIV non-disclosure prosecutions.<sup>46</sup> Our data highlight a paradox: the uncertainty in the law appears to have opened the door to guilty pleas and convictions after trial, rather than providing a

<sup>46</sup> Mykhalovskiy et al., *HIV Non-disclosure and the Criminal Law*.

basis for the withdrawal of charges or acquittals. For CLHE members and criminal defence lawyers, the significant proportion of convictions by way of a guilty plea indicated that accused people might not have been receiving adequate legal advice and representation. CLHE's response was twofold. First, it organized a group of veteran criminal defence lawyers who were willing to take on these cases or to work with other lawyers retained in such cases. Second, whenever CLHE became aware of HIV non-disclosure criminal charges, it contacted the accused person or his or her lawyer to offer the assistance of the group of veteran lawyers.

Our outcomes data also helped bring two strategic refinements to CLHE's conceptualization of HIV non-disclosure as a criminal offence, which informed its advocacy. First, our data demonstrating high conviction rates and high rates of incarceration upon conviction served to distinguish HIV non-disclosure from other (aggravated) sexual-assault offences. The vast majority of recent cases of alleged HIV non-disclosure have been prosecuted as sexual assaults or aggravated sexual assaults. When women's criminal justice and anti-violence advocates and researchers were presented with this finding, they resoundingly expressed the opinion that HIV non-disclosure cases had a higher conviction rate, and that those convicted received more onerous sentences, relative to sexual-assault cases involving force, coercion, or violence. This opinion helped inform CLHE's stance that HIV non-disclosure cases should not be prosecuted according to the same Crown prosecutorial policy that applies to serious sexual assaults, since the sex involved is consensual but for the HIV non-disclosure. Second, our data demonstrating that HIV was not transmitted in a significant minority of the cases that resulted in convictions called into question the prosecution of HIV non-disclosure as an *aggravated* sexual assault. Aggravated sexual assault carries a maximum penalty of life imprisonment, and the potential of life imprisonment for HIV non-disclosure was perceived as unduly harsh and unjust in the almost 40% of cases across Canada in which no HIV transmission occurred. More broadly, the lack of physical harm in such a significant proportion of cases has prompted CLHE to advocate for an approach tying the criminal law to the actual harm caused—or, at least, to a pattern of behaviour resulting in a significant risk of serious bodily harm—rather than to an isolated incident of HIV non-disclosure.<sup>47</sup>

## Conclusion

This article is informed by a critique of the criminalization of HIV transmission/exposure. At its most expansive, that critique regards the criminal law as a blunt and ineffective mechanism for regulating complex human activities such as HIV non-disclosure. It views HIV prevention as fundamentally a public-health issue and argues for restricting the use of the criminal law

<sup>47</sup> I. Grant, "The Prosecution of HIV Non-disclosure in Canada: Time to Rethink *Cuerrier*," *McGill Journal of Law and Health* 5, 1 (2011): 7–59.

to circumstances involving deliberate and successful transmission of HIV to another person.<sup>48</sup>

The critique of criminalization as bad public policy is the crux of global HIV/AIDS policy discourse on the issue. As important as it has been, it offers little help in responding to jurisdictions, such as Canada, where criminal-law governance of HIV transmission/exposure is well established. It also offers little insight into how to practically oppose HIV-related criminalization in particular local settings, particularly those in which criminal laws are being rigorously applied. The *realpolitik* of criminalization in Canada and elsewhere calls for less lofty, more strategic, responses. At the same time, there is a need to move beyond the critique of criminalization based in abstract universals to explore context-specific, practical efforts to oppose criminalization.

This article reports on aggregate numerical data produced as part of one such effort—a community-based action research project committed to reducing the harms that the criminalization of HIV non-disclosure poses to PHAs in Ontario and Canada. The article highlights important features of the social organization of knowledge of criminal law reform by emphasizing how scholarly insights about governance and the numericalization of social phenomena were paired with expectations for evidence-based policy decision making to shape the research we undertook and the advocacy it helped inform.

Making criminalization “visible” through pattern and trend data created objects of discourse that contributed to new ways of thinking about and acting in relation to the issue. Representing criminal cases temporally enabled us to distinguish the present as a period of intense criminalization; it also allowed us and the advocates we worked with to create a sense of urgency around the issue and establish it as a pressing problem requiring action. Assembling demographic data about defendants in criminal cases helped us to situate the criminalization of HIV non-disclosure within a history of the criminal justice system’s mistreatment of marginalized communities. It provided a way to channel community concerns about criminal cases involving Black heterosexual men but also, more recently, gay men, and helped raise vexing and ongoing questions about the reasons behind such patterns and their implications for community-based responses and sexual politics. Finally, our demographic and outcomes data crystallized for many people—PHAs, ASO staff, members of CLHE, and criminal defence lawyers—the belief that HIV non-disclosure cases were unfolding in an unjust and unfair manner. Our data on convictions and sentencing further contributed to strategic re-conceptualizations of HIV non-disclosure as a criminal offence. In this manner, our data have informed CLHE’s ongoing advocacy for prosecutorial guidance. In concert with future research, our data may yet help inform advocacy efforts to fundamentally reform the Criminal Code via legislative amendment, should this strategic opportunity arise.

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<sup>48</sup> Burris and Cameron, “The Case against Criminalization.”

Our research suggests a number of directions for future inquiry. There is a need to continue to collect and refine data on criminal cases involving HIV non-disclosure to determine whether the temporal trend we identified continues to hold over time. An important research priority is to study the social processes (e.g., stigma, practices of disclosure and non-disclosure, media coverage, policing, and criminal justice practices) that result in the large proportion of criminal cases involving Black heterosexual men. Research on differences in perceptions of sexual responsibility and responses to circumstances of HIV exposure between younger and older HIV-negative gay men would shed light on our concerns about the potential erosion of traditions of mutual responsibility for safer sex in gay urban male communities. Such research might be undertaken as part of a broader turn to investigate the experiences of people who have been exposed to HIV or who have become HIV-positive in the context of non-disclosure, in order to better understand how discourses of victimhood, forms of moral reasoning, media coverage, post-test counselling, and other factors play into decisions to approach the police. Finally, comparative data on the disposition of non-HIV-related sexual assaults would deepen the analysis of the outcomes of cases that we have presented here.

### **Abstract**

The use of criminal-law powers to respond to people with HIV who place others at risk of HIV infection has emerged as a focal point of AIDS advocacy at global, national, and local levels. In the Canadian context, reform efforts that address the criminalization of HIV non-disclosure have been hampered by the absence of data on the contours, scale, and outcomes of criminalization. This article responds to that gap in knowledge with the first comprehensive analysis of the temporal trends, demographic patterns, and aggregate outcomes of Canadian criminal cases of HIV non-disclosure. The authors draw on insights into the role that rendering social phenomena in numerical terms plays for the governance of social life in order to make criminalization “visible” in ways that might contribute to activist responses. The article examines temporal trends, demographic patterns, and outcomes separately. In each instance, the pattern or trend identified is described, potential explanations for findings are offered, and an account is given of how the data have informed efforts to reform criminal law. Particular attention is paid to the following key findings: a sharp increase in criminal cases that began in 2004; the large proportion of recent criminal cases involving defendants who are heterosexual Black, African, and Caribbean men; and the high proportion of criminal cases resulting in conviction. The article closes with suggestions for future research.

**Keywords:** HIV non-disclosure, criminal law, Canada, trends, patterns

### **Résumé**

Le recours aux pouvoirs du droit pénal en vue de prendre des mesures à l'égard des personnes qui ont contracté le VIH et qui présentent un risque de transmission de ce

virus à d'autres est devenu un élément central de l'activisme en ce qui a trait au sida, tant aux niveaux international, national que local. Dans le contexte canadien, les efforts de réforme visant à traiter la criminalisation de la non-divulgence de la séropositivité au VIH ont été ralentis par l'absence de données sur les profils, l'échelle et les effets de la criminalisation. Cet article vise à corriger une telle lacune en matière de connaissances grâce à la toute première analyse exhaustive des tendances temporelles, des modèles démographiques et de l'ensemble des résultats d'affaires criminelles canadiennes en matière de non-divulgence de la séropositivité au VIH. Cet article s'inspire de points de vue à propos du rôle que joue la représentation d'un phénomène social en termes numériques pour la gouvernance de la vie sociale, afin de rendre « visible » la criminalisation par des moyens qui pourraient contribuer aux mesures activistes. Cet article examine les tendances temporelles, les modèles démographiques et les résultats séparément. Pour chaque cas, nous décrivons la tendance ou le modèle que nous avons identifié, nous proposons d'éventuelles explications par rapport aux conclusions, et donnons un compte rendu de la façon dont les données ont servi de base aux efforts de réforme en matière de droit pénal. Une attention toute particulière est accordée aux principales conclusions suivantes : augmentation considérable des affaires criminelles depuis 2004; grande proportion d'affaires criminelles récentes incluant des défendeurs qui sont des hétérosexuels de race noire, des Africains et des hommes des Caraïbes; et importante proportion d'affaires criminelles aboutissant à une condamnation. L'article se termine par des suggestions en vue de recherches à venir.

**Mots clés :** non-divulgence du VIH, affaires criminelles, Canada, tendances, modèles

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