Finding Equality: A Creative Take on Feminist Judgment Projects and the Criminalization of HIV Non-Disclosure

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ABSTRACT

Feminist judgment projects have proliferated in recent years, with contributors in over twelve countries rewriting judgments to bring the relationship between law, gender, and equality to light. The requirements of feminist judgments vary between projects, but many of them require contributors to replicate the generic conventions of judgments and limit their reference to legal precedents and other materials available at the time of the original decision. This article reflects on the politics of feminist judgments, challenging the premises of the conventional methodology in contexts where the law cannot be redeemed through liberal legal methods. One such area is HIV non-disclosure. Canadian courts have repeatedly found that the criminal law has jurisdiction over a person's failure to disclose their HIV-positive status in sexual relations. The article argues that the law in this area should not be rewritten using the conventional methodology because the law should be abolished. In contexts like this, feminists should have recourse to an expanded referential universe, including creative tools, strategies, and forms of literary and artistic expression to represent gender and sexuality differently. The article concludes by constructing a "found poem" from the words of R. *v Aziga, a 2023 decision of the Ontario Court of Appeal, to suggest a more progressive path forward in HIV non-disclosure cases.*

I. INTRODUCTION

In her introduction to *Frontiers of Gender Equality*, an important new book on gender justice and the inspiration for this special issue, Rebecca Cook explains the power of rewriting judgments from a feminist perspective: efforts to "breathe new life into gender equality to make it more relatable, and to connect

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it to the reality of women's lives, not simply to abstract legal concepts."[1] Building on the innovation of the Women's Court of Canada, the world's first feminist judgment project released in 2008,[2] Cook observes that several chapters in the book "address the 'real-life context' and 'the array of forces that shape it' to articulate gendered harms from the perspective of the discriminatee, to avoid the traps of categorical or stereotypical thinking, and to devise remedies that repair the collective effects of gendered harms."[3]

I was fortunate to contribute a chapter to *Frontiers of Gender Equality* on the constitutive limitations of equality rights rhetoric for queer and trans peoples.[4] One of the most challenging questions raised by my chapter is whether feminists should work outside the boundaries or "frontiers" of the international human rights system to promote substantive equality. Related to this question, Hilary Charlesworth explains that central to the feminist rewriting methodology is "prefigurative politics."[5] By this, Charlesworth means that feminist judgments should model the formal legal structures, analytical frameworks, and political outcomes that feminists are seeking to "be the change we want to see."[6] The form and content of feminist judgments vary between projects, but many of them require contributors to replicate the generic conventions of judgments and limit their reference to legal precedents

[1] Rebecca J Cook, "Introduction: Many Paths to Gender Equality" in Rebecca J Cook, ed, *Frontiers of Gender Equality: Transnational Legal Perspectives* (Philadelphia: University of Pennsylvania Press, 2023) 1 at 13.

[2] See Diana Majury, "Introducing the Women's Court of Canada" (2006) 18:1 CJWL 1; Denise Réaume, "Rewriting Equality II" (2018) 30:2 CJWL 195. Denise Réaume, "Turning Feminist Judgments into Jurisprudence: The Women's Court of Canada on Substantive Equality" (2018) 8:9 Oñati Socio-Legal Series 1307.

[3] Cook, *supra* note 1.

[4] Daniel Del Gobbo, "Queer Rights Talk: The Rhetoric of Equality Rights for LGBTQ+ Peoples" in Cook, *supra* note 1, 68.

[5] Hilary Charlesworth, "Prefiguring Feminist Judgment in International Law" in Loveday Hodson & Troy Lavers, eds, *Feminist Judgments in International Law* (Oxford: Hart Publishing, 2019) 479 at 479. For commentary on prefigurative politics, see Cynthia S Lin et al, "Engendering the Prefigurative: Feminist Praxes That Bridge a Politics of Prefigurement and Survival" (2016) 4 J Social & Political Psychology 302; Hilary Charlesworth, "Talking to Ourselves? Feminist Scholarship in International Law" in Sari Kouvo & Zoe Pearson, eds, *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance* (Oxford: Hart Publishing, 2011) 17; Amy J Cohen & Bronwen Morgan, "Prefigurative Legality" (2023) 48:3 Law & Soc Inquiry 1053.

[6] *Ibid.*

and other materials available at the time of the original decision[7]—a practice that I refer to as the "conventional methodology."

Arguably, the conventional methodology reflects the contradictions inherent in what Janet Halley refers to as "governance feminist" projects that wield state and state-affiliated power to challenge gender hierarchy from within the legal system.[8] Feminist judgments provide a blueprint for courts and lawmakers to apply the formal law differently. This is a constructive form of legal activism and pedagogy. In doing so, however, feminist judgments concede the primary ground of feminist organizing to the liberal legal arena, which has been theorized by critical race feminists, Indigenous feminists, postcolonial feminists, queer theorists, and others as a site of white supremacy, male domination, settler colonialism, transphobia, and other systems of oppression.

In this article, I reflect on the possibilities and limits of feminist judgment projects, challenging the premises of the conventional methodology in contexts where the law cannot be redeemed by liberal legal methods. One such area is the criminalization of HIV non-disclosure. Canadian courts have repeatedly and problematically found that the criminal law has jurisdiction over a person's failure to disclose their HIV-positive status in sexual relations.[9] In my view, the law in this area should not be rewritten using the conventional methodology because the law should be abolished. In contexts like this, I argue that promoting substantive equality requires feminist activists to have recourse to an expanded referential universe, including creative tools, strategies, and forms of literary and artistic expression to represent gender and sexuality differently.

In Part II of this article, I explain the feminist thinking behind the conventional methodology and elaborate my critique of the methodology above. Next, I explain why concerns about the methodology have led some feminist judgment writers to include creative media in their collections, including poetry. I focus my analysis on "found poetry," which is a creative form that is made by taking the words of a text and reassembling them to tell a different story. In Part III, I apply these insights to *R. v Aziga*, a 2023 decision released by the Ontario Court of Appeal, in which the court upheld the convictions and life sentences of the defendant, Johnson Aziga, on criminal

[7] See e.g. Majury, *supra* note 2 at 6–7.

[8] Janet E Halley et al, *Governance Feminism: An Introduction* (Minneapolis: University of Minnesota Press, 2018); Janet E Halley et al, eds, *Governance Feminism: Notes from the Field* (Minneapolis: University of Minnesota Press, 2019).

[9] *R v Cuerrier*, [1998] 2 SCR 371 (SCC) [*Cuerrier*]; *R v Mabior*, 2012 SCC 47 [*Mabior*].

charges relating to his failure to disclose his HIV-positive status to eleven women with whom he had sexual relationships.[10] Applying a critical race feminist and queer theory perspective, I summarize the court's reasons in light of my position that the criminalization of HIV non-disclosure is a form of racist and homophobic exclusion that contributes to poor health outcomes and perpetuates discrimination against historically marginalized groups, including Black immigrants and gay men. I conclude the article by constructing a found poem from the court's words in *Aziga* to suggest a more progressive path forward in HIV non-disclosure cases.

II. THE POLITICS OF FEMINIST JUDGMENT PROJECTS

A. The Conventional Methodology

What are the boundaries of feminist judgment projects? Rosemary Hunter conceives of the conventional methodology as a form of ethical reimagining: "Feminist judgment-writing projects attempt to redefine the wrongs of women and construct an alternative reality within legal discourse."[11] The terms "within legal discourse" are key to Hunter's process because they prescribe the frontiers of the methodology's prefigurative politics. By definition, the methodology reimagines the legal regulation of gender and sexuality from a feminist perspective, but this regulation takes place within the province of formal lawmaking. Put another way, the methodology elevates one modality of political activist formation over others—liberal legalism and, frequently, rights-based constitutionalism—that both enables and constrains the possibilities of change that feminist judgment projects can be.

In a prior article, I explained that judgments, like other generic texts, follow an institutionally imposed consensus about their form and content.[12] Consistent with the structuralist view that a judgment's meaning is prescribed by the organization of its textual elements, the plot of judgments should follow a linear narrative trajectory, proceeding through the statement of facts, the identification of issues, the statement of law, and making the decision.[13]

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[10] *R v Aziga*, 2023 ONCA 12 [*Aziga* 2023].

[11] Rosemary Hunter, "The Power of Feminist Judgments?" (2012) 20:2 Fem Leg Stud 135 at 145.

[12] Daniel Del Gobbo, "Unreliable Narration in Law and Fiction" (2017) 30:2 Can JL & Jur 311 at 328–30.

[13] See George Rose Smith, "A Primer of Opinion Writing, for Four New Judges" (1967–8) 21 Ark L Rev 197 at 204.

Evidence should be considered only to the extent that it is relevant and material. The tone of the writing should be monologic and declarative, telling a single story about the "truth" of what happened in the case and what the administration of justice requires, as if the court was forced to the conclusion by applying the law rationally, objectively, and predictably.[14] The rhetorical appeal should be that judges make decisions collectively and impartially on the basis of so-called "neutral principles" of constitutional and statutory interpretation, consistent with the rules of criminal and civil procedure that reflect the importance of conducting a fair process and ensuring formal equality of treatment between the parties.[15] The role of appellate courts is crucial in this regard because they can reverse judges who deviate from these conventions, rewriting decisions where necessary to ensure that the impression of coherence and the legitimacy of the legal system is maintained. Taken together, these elements convey more than the resolution of individual disputes, but the confirmation of group values—the rule of law— is seen as fundamental to liberal democracy.

In a 1990 article, Supreme Court of Canada Justice Bertha Wilson famously asked: "will women judges really make a difference?" in response to critiques of "gender neutrality" in legal decision-making.[16] The literature on feminist judging has evolved since those early days, with the focus shifting from an essentialist, identity-based inquiry into whether women judges bring unique moral perspectives to the law (the Carol Gilligan-inspired "cultural feminist" approach)[17] to a principled examination of how feminist judges can take a more

[14] See generally Robert Ferguson, "The Judicial Opinion as Literary Genre" (1990) 2:1 Yale JL & Human 201; David Ray Papke & Kathleen McManus, "Narrative and the Appellate Opinion" (1999) 23:4 Legal Studies Forum 450; Erwin Chemerinsky, "The Rhetoric of Constitutional Law" (2002) 100:8 Mich L Rev 2008; Peter Brooks, "Inevitable Discovery: Law, Narrative, Retrospectivity" (2002) 15 Yale JL & Human 71.

[15] See Herbert Wechsler, "Toward Neutral Principles of Constitutional Law" (1959) 73:1 Harv L Rev 1. For critiques of "neutral principles" based in critical race theory, see Charles Black, "The Lawfulness of the Segregation Decisions" (1960) 69:3 Yale LJ 421; Derrick A Bell Jr, "*Brown v. Board of Education* and the Interest-Convergence Dilemma" (1980) 93:3 Harv L Rev 518; Gary Peller, "Neutral Principles in the 1950s" (1988) 21:4 U Mich JL Ref 561.

[16] Bertha Wilson, "Will Women Judges Really Make a Difference?" (1990) 28:3 Osgoode Hall LJ 507.

[17] In a widely cited 1982 book, Carol Gilligan argued that boys tended to experience themselves as morally guided by law, logic, and individual rights (what she referred to as the "ethic of rights"), while girls tended to experience themselves as relational and connected to other people (what she referred to as the "ethic of care"). Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, MA: Harvard University Press, 1982). Gilligan's concept of the "ethic of

contextual and particularized account of the law's relationship to gender, sexuality, and other systems of oppression.[18] Hunter provides a list of "habits, techniques, concerns, and dispositions" that feminist judges have employed and critics have argued should be employed by judges working in the conventional manner.[19] I provide an abbreviated version of this list below:

- revealing the gender implications of apparently neutral rules and practices;
- writing the experiences of women and other historically marginalized groups into legal discourse and the construction of legal rules;
- challenging gender bias in legal doctrine and judicial reasoning;
- making individualized, rather than categorical or abstract, decisions, paying careful attention to the parties before the court and not judging

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care" found traction in feminist legal theory, with many critics using it to challenge liberalism and reorient the legal system around female-identified values. See Carrie Menkel-Meadow, "Portia in a Different Voice: 'Speculations on a Women's Lawyering Process'" (1985) 1:1 Berkeley Women's LJ 39; Suzanna Sherry, "Civic Virtue and the Feminine Voice in Constitutional Adjudication" (1986) 7:3 Va L Rev 543; Daniel Del Gobbo, "The Feminist Negotiator's Dilemma" (2018) 33:1 Ohio St J Disp Resol 1 at 28–9.

[18] See Rosemary Hunter, Clare McGlynn & Erika Rackley, "Feminist Judgments: An Introduction" in Rosemary Hunter, Clare McGlynn & Erika Rackley, eds, *Feminist Judgments: From Theory to Practice* (Oxford: Hart Publishing, 2010) at 6. For commentary and empirical analysis of whether women judges make a difference, see Mary Jane Mossman, "Feminism and Legal Method: The Difference It Makes" (1986) 3:1 Australian JL & Society 30; Judith Resnik, "On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges" (1988) 61:6 S Cal L Rev 1877; Sonia Sotomayor, "A Latina Judge's Voice" (2002) 13:1 Berkeley La Raza LJ 87; Rosemary Hunter, "Can *Feminist* Judges Make a Difference" (2008) 15:1–2 Intl JL Profession 7; Beverly Baines, "But Was She a Feminist Judge?" in Kim Brooks, ed, *One Woman's Difference: The Contributions of Justice Bertha Wilson* (Vancouver: UBC Press, 2009) 211; Beverly Baines, "Must Feminist Judges Self-Identify as Feminists?" in Ulrike Schultz & Gisela Shaw, eds, *Gender and Judging* (Oxford: Hart Publishing, 2013); Rosemary Hunter, "More Than Just a Different Face? Judicial Diversity and Decision-making" (2015) 68 Current Leg Probs 119; Beverly Baines, "Women Judges on Constitutional Courts: Why Not Nine Women?" in Helen Irving, ed, *Constitutions and Gender* (Cheltenham, UK: Edward Elgar, 2017) 290; Linda L Berger, Bridget J Crawford & Kathryn M Stanchi, "Using Feminist Theory to Advance Equal Justice under Law" (2017) 17 Nev LJ 539.

[19] Rosemary Hunter, "An Account of Feminist Judging" in Hunter, McGlynn & Rackley, *supra* note 18, 30 at 35. See also Katharine T Bartlett, "Feminist Legal Methods" (1990) 103:4 Harv L Rev 829; Kathryn Abrams, "Feminist Lawyering and Legal Method" (1991) 16:2 Law & Soc Inquiry 373; Linda L Berger, Bridget J Crawford & Kathryn M Stanchi, "Feminist Judging Matters: How Feminist Theory and Methods Affect the Process of Judgment" (2017–18) 47 U Balt L Rev 167.

women and members of other historically marginalized groups for making different choices than those the judge would have made;
- seeking to remedy injustices and improve the conditions of women's lives;
- promoting substantive equality; and
- drawing on feminist legal theory and scholarship to inform decisions.[20]

In *Frontiers of Gender Equality*, Cook expands on this framework by taking a consequentialist view of the methodology, underscoring the role of law in transforming the structural aspects of women's oppression: "Inherent in the exercise of feminist rewriting is devising remedies that reform the preexisting conditions that caused discrimination."[21] In her chapter co-authored with Charles Ngwena on the *Mildred Mapingure* case,[22] a 2014 decision of the Zimbabwe Supreme Court that denied the plaintiff's rights to safe abortion and other medical services after she was sexually assaulted, Cook illustrates the power of taking an outcomes-oriented approach by framing her rewritten judgment as a fictitious appeal to the Constitutional Court of Zimbabwe that is focused on restoring the plaintiff's equal citizenship.[23] In her introduction to the book, Cook suggests that feminist judges ask the following questions: "Do the proposed remedies address the gendered harms? Are the remedies designed in ways that change the structural conditions that led to the discrimination? Do they have a collective dimension that is necessary to remedy those practices that deny dignity on the basis of group identity?"[24]

Feminist judgment projects have proliferated in recent years, with projects completed or in progress in Canada,[25] the United States,[26] the United

[20] Hunter, *supra* note 19 at 35.
[21] Cook, *supra* note 1 at 14–15.
[22] *Mildred Mapingure v Minister of Home Affairs, Minister of Health, Minister of Justice, Legal and Parliamentary Affairs*, [2014] ZWSC 22 [*Mapingure*].
[23] Charles G Ngwena & Rebecca J Cook, "Restoring Mai Mapingure's Equal Citizenship" in Cook, *supra* note 1, 406.
[24] Cook, *supra* note 1 at 14.
[25] Majury, *supra* note 2.
[26] Kathryn M Stanchi, Linda L Berger & Bridget J Crawford, eds, *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (Cambridge, UK: Cambridge University Press, 2016).

Kingdom,[27] Scotland,[28] Northern/Ireland,[29] Australia,[30] Aotearoa/New Zealand,[31] Brazil,[32] India,[33] Pakistan,[34] Mexico,[35] and Africa.[36] A corresponding body of literature attests to the growing influence of such projects across multiple fields of law on national, regional, and international levels.[37] Confirming this influence, feminist judgment projects have inspired similar rewriting projects on critical race theory,[38] queer theory,[39] Indigenous legal

[27] Hunter, McGlynn & Rackley, *supra* note 19.
[28] Sharon Cowan, Chloë Kennedy & Vanessa E Munro, eds, *Scottish Feminist Judgments: (Re)creating Law from the Outside In* (Oxford: Hart Publishing, 2019).
[29] Máiréad Enright, Julie McCandless & Aoife O'Donoghue, eds, *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Oxford: Hart Publishing, 2017).
[30] Heather Douglas et al, eds, *Australian Feminist Judgments: Righting and Rewriting Law* (Oxford: Hart Publishing, 2014).
[31] Elisabeth McDonald et al, eds, *Feminist Judgments of Aotearoa New Zealand: Te Rino: A Two-Stranded Rope* (Oxford: Hart Publishing, 2017).
[32] Fabiana Cristina Severi, ed, *Feminist Judgments Projects: The Brazilian Experience* (Ribeirão Preto, Brazil: Law School of Ribeirão Preto, 2023).
[33] Aparna Chandra, Jhuma Sen & Rachna Chaudha, "Introduction: The Indian Feminist Judgements Project" (2021) 5:3 Indian L Rev 261.
[34] Shaikh Ahmad Hassan School of Law, "Workshops by the Pakistani Feminist Judgments Project" (last visited 1 April 2024), online: <sahsol.lums.edu.pk> [perma.cc/M9LP-QJBW].
[35] Geraldina González de la Vega, "Gender and Justice" (15 March 2018), online: <feminismosgeneroyjusticia.blogspot.com> [perma.cc/SZF4-AJT2].
[36] Cardiff Law and Global Justice, "The African Feminist Judgments Project" (last visited 13 September 2019), online: <lawandglobaljustice.com> [perma.cc/W6PR-GGTR].
[37] See Berger, Crawford & Stanchi, *supra* note 18; Jennifer Koshan, "Impact of the Feminist Judgment Writing Projects: The Case of the Women's Court of Canada" (2018) 8:9 Oñati Socio-Legal Series 1325; Rosemary Hunter, "Feminist Judging in the Real World" (2018) 8:9 Oñati Socio-Legal Series 1275.
[38] Bennett Capers et al, eds, *Critical Race Judgments: Rewritten US Court Opinions on Race and the Law* (Cambridge, UK: Cambridge University Press, 2022).
[39] Queer Judgments Project, "The Queer Judgments Project (QJP)" (last visited 1 April 2024), online: <queerjudgments.org> [perma.cc/AMV6-QVUV]. See also Alex Sharpe, "Queering Judgment: The Case of Gender Identity Fraud" (2017) 81:5 J Crim L 417.

perspectives,[40] Earth-centred principles,[41] international law,[42] and children's rights.[43]

As this body of work demonstrates, one of the strengths of the conventional methodology is that it respects the process followed by the original judges. The Women's Court of Canada exemplified this approach by rewriting the decisions in six equality cases under Section 15 of the *Canadian Charter of Rights and Freedoms*, creating a "counter-jurisprudence" that courts and other lawmakers might actually use.[44]By showing that cases could (and should) have been resolved differently by applying legal precedents and other materials available at the time, the project confirmed that judgments that fail to centre the experiences of women and other historically marginalized groups are not natural or necessary but, rather, susceptible to challenge. As Hunter puts it with Clare McGlynn and Erika Rackley, "[w]e want to change the law, not turn our backs on it."[45] The methodology proves that liberal legalism is not closed to a governance feminist approach.

At the same time, the conventional methodology serves an important meaning-making and legitimizing function. The Women's Court of Canada harnessed the power of the *Charter* to transform "outsider" feminist knowledge into "insider" legal knowledge and therefore increase its political influence.[46] It follows that these projects are a valuable teaching tool for feminist activists who understand change as something that happens incrementally through formal lawmaking, who recognize the importance of impact litigation as part

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[40] Gilbert & Tobin Centre of Public Law, "Critical Judgment Projects: Indigenous Legal Judgments" (last updated 6 April 2022), online: <criticaljudgments.com> [perma.cc/5C9B-WPPB].

[41] University of Sussex Law, "The UK Earth Law Judgments Project" (last visited 1 April 2024), online: <sussex.ac.uk> [perma.cc/XJ3B-ECRD]; Gilbert & Tobin Centre of Public Law, "Critical Judgment Projects: The Wild Law Judgment Project" (last updated 6 April 2022), online: <criticaljudgments.com> [perma.cc/MM3S-DJ9H]; Nicole Rogers & Michelle Maloney, "The Anthropocene Judgments project: A Thought Experiment in Futureproofing the Common Law" (2022) 0:0 Alternative LJ 1.

[42] Hodson & Lavers, *supra* note 5.

[43] Helen Stalford, Kathryn Hollingsworth & Stephen Gilmore, *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Oxford: Hart Publishing, 2017).

[44] *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. See Koshan, *supra* note 37 at 1328. For commentary on the thinking behind the Women's Court of Canada's methodology, see Majury, *supra* note 2 at 6; Angela Fernandez, "Denise Réaume and the Women's Court of Canada: Feminist Judgment Writing and *Pierson v Post*" in this issue.

[45] Hunter, McGlynn & Rackley, *supra* note 18 at 8.

[46] See Hunter, *supra* note 11 at 7.

of a reformist strategy, or who might otherwise be resistant to extra-legal and community-based approaches to activism that operate outside the reaches of the state.[47] Accordingly, Hunter, McGlynn, and Rackley concede that "feminist efforts to reform the law almost inevitably accept law's image of itself as a force for good."[48]

B. Feminist Critiques of the Methodology

The conventional methodology is a pragmatic and necessary form of feminist legal activism and pedagogy. Praiseworthy as it might be, however, the methodology is not a radical intervention because liberal law reform is not always a "force for good" for women and other historically marginalized groups in practice, – and, more provocatively, I suggest, liberal law reform may never be a force for good in certain contexts.

Commentary on feminist judgment projects builds on a long line of critical race feminist, Indigenous feminist, postcolonial feminist, and queer scholarship that explores the promise and perils of elevating the formal law and rights-based formulations of gender and sexuality in feminist activism. As I intimated previously, central to this critique is the state's pretention to liberal notions of colour blindness and gender neutrality under law, which produce an ontological reality in which the maldistribution of life chances between majority and minority populations are coded as "objective" and, therefore, legal because they reinstate the status quo.[49] Carol Smart's ideas have figured prominently in

[47] There is a growing literature that attests to the role of feminist judgments in legal pedagogy. See Koshan, *supra* note 37; Rosemary Auchmuty, "Using Feminist Judgments in the Property Law Classroom" (2012) 46:3 L Teacher 227; Helen Carr & Nick Dearden, "Research-Led Teaching, Vehicular Ideas and the Feminist Judgments Project" (2012) 46:3 L Teacher 268; Anna Grear, "Learning legal Reasoning While Rejecting the Oxymoronic Status of Feminist Judicial Rationalities: A View from the Law Classroom" (2012) 46:3 L Teacher 239; Caroline Hunter & Ben Fitzpatrick, "Feminist Judging and Legal Theory" (2012) 46:3 L Teacher 255; Rosemary Hunter, "Feminist Judgments as Teaching Resources" (2012) 2:5 Oñati Socio-Legal Series 47; Maria Drakopoulou, "Revisiting Feminist Jurisprudence: A Rehabilitation" (2013) 3:2 Feminists@ L 1; Karin van Marle, "Holding Out for Other Ways of Knowing and Being" (2017) 7:2 Feminists @ L 1; Linda L Berger, Kathryn M Stanchi & Bridget J Crawford, "Learning from Feminist Judgments: Lessons in Language and Advocacy" (2019) 98 Texas L Rev Online 40; Bridget J Crawford et al, "Teaching with Feminist Judgments: A Global Conversation" (2020) 38:1 L & Inequality: J Theory & Practice 1; Fernandez, *supra* note 44.

[48] Hunter, McGlynn & Rackley, *supra* note 18 at 9.

[49] For commentary on colourblindness, see Neil Gotanda, "A Critique of 'Our Constitution Is Color-Blind'" (1991) 44:1 Stan L Rev 1; Kimberlé Williams Crenshaw, "Color Blindness, History, and the Law" in Wahneema Lubiano, ed, *The House That Race Built: Original Essays by Toni Morrison,*

this scholarship: "[I]n accepting law's terms in order to challenge law, feminism always concedes too much."[50] Sherene Razack elaborates that formalism is not ideology free but, rather, "a powerful web of symbols, rules, and practices that combine to oppress women and other groups."[51] It follows that harnessing the power of law to transform "outsider" feminist knowledge into "insider" legal knowledge runs the risk that feminist interests become flattened and essentialized to meet the terms of liberal legal discourse, and, in the process, they become co-opted by majority interests and contribute to harmful deployments of state power elsewhere. If the risk of complicity is unavoidable, it raises the question of whether feminist judgments are a racist and settler colonial enterprise, particularly in the Canadian context where conventional forms of legal reasoning reflect the country's settler colonial history and aspirations. This is the internal critique of the conventional methodology from within feminism.

Feminist judgment writers have engaged with this critique in complex and ambivalent ways. Kate Fitz-Gibbon and JaneMaree Maher explain that rearticulating the state's power and "donning the robes" of the institution can challenge male domination by performing and subverting gender norms in some cases, but the practice cannot fundamentally unsettle the institution's operation.[52] Legal and political imperatives require feminists to make uncomfortable compromises, they suggest, in order to maintain credibility and be taken seriously by judges and lawmakers.[53] Notably, contributors to the African project received warnings from judges about the risks of being "too

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Angela Y Davis, Cornel West, and Others on Black Americans and Politics in America Today (New York: Vintage Books, 1998) 280; Lani Guinier & Gerald Torres, *The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy* (Cambridge, MA: Harvard University Press, 2002) at 32–66; Ian F Haney López, *White by Law: The Legal Construction of Race* (New York: New York University Press, 2006). For commentary on gender neutrality, see Catharine A MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence" (1983) 8:4 J Women Culture & Society 635 at 644–5; Ann Scales, "The Emergence of Feminist Jurisprudence: An Essay" (1986) 95:7 Yale LJ 1373 at 1377; Martha Albertson Fineman, "Feminist Legal Theory" (2005) 13:1 J Gender, Social Policy & L 13 at 14; Emily Snyder, "Indigenous Feminist Legal Theory" (2014) 26:2 CJWL 365 at 369.

[50] Carol Smart, *Feminism and the Power of Law* (New York: Routledge, 1989) at 5. For commentary on the influence of Smart's work on feminist judgment projects, see Hunter, *supra* note 11.

[51] Sherene Razack, "Using Law for Social Change: Historical Perspectives" (1992) 17:1 Queen's LJ 31 at 49.

[52] Kate Fitz-Gibbon & JaneMaree Maher, "Feminist Challenges to the Constraints of Law: Donning Uncomfortable Robes?" (2015) 23:3 Fem Leg Stud 253 at 263.

[53] *Ibid* at 268–9.

creative" in formatting their contributions.[54] Hunter, McGlynn, and Rackley elaborate on this dilemma: "Of course, we do not consider efforts to change the law to be an exclusive strategy, nor do we hold out unrealistic hopes for its effectiveness, but so long as women appear before the law, and the law continues to have material effects on women's lives, we must continue to engage with it."[55]

Other critics have pushed back by encouraging feminists to reject the conventional methodology and follow different rules. Illustrating the range of possible approaches, the Aotearoa/New Zealand project includes feminist judgments, commentaries on the cases, and reflective statements by the contributors about their process of rewriting.[56] The Australian project features a 1934 decision rewritten by a 2034 court that references materials created after the original judgment was released.[57] Several chapters in the Australian collection rely on Indigenous traditions and laws, with one judgment taking place in a fictional healing court, the First Nations Court of Australia, to show how white settler institutions that fail to apply these authorities are limited in their capacity to recognize Indigenous women's perspectives.[58] The Northern/Irish project takes an even more confrontational approach, challenging the textual basis of law by including creative, non-legal works in the collection.[59]

One of most innovative examples is the Scottish project, released in 2019.[60] It consists of sixteen rewritten decisions as well as theatre performances, poetry, art, and other creative works that were displayed in a variety of forums, exhibitions, and public spaces, including the Scottish Parliament and law school classrooms in Edinburgh, Glasgow, Dundee, and Aberdeen as part of a six-month traveling bike tour.[61] The co-editors of the project have written extensively about their methodology and the importance

[54] Vanessa E Munro, "Feminist Judgment Projects at the Intersections" (2021) 29:1 Fem Leg Stud 251 at 254.
[55] Hunter, McGlynn & Rackley, *supra* note 18 at 9. See also Munro, *supra* note 54 at 254.
[56] McDonald et al, *supra* note 31.
[57] Thalia Anthony, "Commentary on *In the Matter of Djappari (Re Tuckiar)*" in Douglas et al, *supra* note 30, 441.
[58] See e.g. Anthony, *supra* note 57.
[59] Enright, McCandless & O'Donoghue, *supra* note 29.
[60] Cowan, Kennedy & Munro, *supra* note 28.
[61] Sharon Cowan, Chloë Kennedy & Vanessa E Munro, "Seeing Things Differently: Art, Law and Justice in the Scottish Feminist Judgments Project" (2020) 10:1 Feminists @ L 1.

of bridging legal and creative, non-legal techniques.[62] Citing Linda Mulcahy's work and recalling Robert Cover's argument about the epistemic violences of legal interpretation,[63] the co-editors explain that art can "reveal what the elegantly written legal text does not about the violence of law … the result is that the image has the potential to reveal a 'multiplicity of othernesses and differences' which are for the most part silenced in texts."[64] The reference to multiplicity evokes Mari Matsuda's concept of "multiple consciousness" in critical race feminism and intersectionality theory, which suggests that incorporating creative media in the rewriting process enables feminists to assume the "standpoint of the oppressed" and centre the experiences of women and other historically marginalized groups "on the bottom."[65] Collectively, this body of work reflects the fundamental insight that putting law and art in conversation helps to shed light on realities of gender and sexuality that the law, and, specifically, the conventional methodology, traditionally excludes.

C. Breaking from the Methodology

The conventional versus creative methodology distinction maps onto a long-standing debate in feminist legal theory about the merits of liberal legalism and extra-legal, community-based approaches to social change[66]—what Amna

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[62] See *ibid*; Berger, Crawford & Stanchi, *supra* note 19; Hunter, McGlynn & Rackley, *supra* note 18; Hunter, *supra* note 11; Cowan, Kennedy & Munro, *supra* note 28; Linda L Berger, Bridget J Crawford & Kathryn M Stanchi, "Feminist Judgments: Comparative Socio-legal Perspectives on Judicial Decision Making and Gender Justice" (2018) 8:9 Oñati Socio-Legal Series 1215.

[63] Robert M Cover, "Violence and the Word" (1986) 95:8 Yale LJ 1601.

[64] Cowan, Kennedy & Munro, *supra* note 61 at 11. See also Linda Mulcahy, "Eyes of the Law: A Visual Turn in Socio-Legal Studies?" (2017) 44 JL & Soc'y 111 at 113, citing Oren Ben-Dor, ed, *Law and Art: Justice, Ethics and Aesthetics* (London: Routledge-Cavendish, 2011).

[65] Mari J Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations" (1987) 22 Harv CR-CLL Rev 323; Mari J Matsuda, "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method" (1989) 14:2 Women's Rts L Rep 7. For commentary on critical race feminist and intersectional method, see Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) 1:8 U Chicago Legal F 139; Angela P Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42:3 581 at 584; Patricia J Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge, MA: Harvard University Press, 1991); Debora L Threedy, "The Madness of a Seduced Woman: Gender, Law, and Literature" (1996) 6:1 Tex J Women & L 1.

[66] See generally Patricia A Monture, "Confronting Power: Aboriginal Women and Justice Reform" (2006) 25:3-4 Can Woman Studies 25; Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Durham, NC: Duke University Press, 2011); Beth E Richie, *Arrested Justice: Black Women, Violence, and America's Prison Nation* (New York: New York University Press,

Akbar and others have theorized as "reformist" and "non-reformist" reforms.[67] Arguably, the conventional methodology conflicts with the objectives of feminists in the latter camp for whom "being the change we want to see" means repealing the law, overhauling the courts, bypassing the legal system, or, most radically, transforming the nature of the state in recognition of the fact that these institutions are inextricably shot through with oppression. Ben Golder explains that, at one end of the spectrum, "the project appears to be one of exposing the contingency of adjudication without really putting the legitimacy of the entire exercise into question," while, at the other end of the spectrum, "the very performance of judicial power is itself revealed as empty and groundless, and the line between 'these feminist academics' and the 'judges' they are momentarily imagining themselves to be is called into question."[68]

I cannot explore this debate comprehensively here, but one thread that strikes me as particularly salient is the conventional methodology's concession that the courts have subject matter jurisdiction over the cases being litigated. Implicit in the methodology is an endorsement of the formal law's authority to regulate gender and sexuality in the relevant subject matter area and a corresponding willingness to overlook the potentially harmful, unintended consequences of that regulation. Problems can arise in two categories of cases: contexts where the regulation of an issue is morally justified and, therefore, legally appropriate to pursue but where the political risks of proceeding outweigh the benefits and contexts where the regulation of an issue is morally unjustified and, therefore, legally inappropriate to pursue.

The first category is exemplified by abortion. Ngwena and Cook's chapter on the *Mapingure* case is premised on the idea that the Constitutional

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2012); Liat Ben-Moshe, "The Tension Between Abolition and Reform" in Mechthild E Nagel & Anthony J Nocella II, eds, *The End of Prisons: Reflections from the Decarceration Movement* (Amsterdam: Rodopdi, 2013) 83 at 83–92; Leanne Betasamosake Simpson, *As We Have Always Done: Indigenous Freedom through Radical Resistance* (Minneapolis, MN: University of Minnesota Press, 2017); Amna A Akbar, "Toward a Radical Imagination of Law" (2018) 93:3 NYU L Rev 405; Mimi E Kim, "From Carceral Feminism to Transformative Justice: Women-of-Color Feminism and Alternatives to Incarceration" (2018) 27:3 J Ethnic & Cultural Diversity Soc Work 219; Debra Parkes, "Starting With Life: Murder Sentencing and Feminist Prison Abolitionist Praxis" in Chloe Taylor & Kelly Struthers Montford, eds, *Building Abolition: Decarceration and Social Justice* (London: Routledge, 2021); India Thusi, "Feminist Scripts for Punishment" (2021) 134:7 Harv L Rev 2449; Angela Y Davis et al, *Abolition. Feminism. Now.* (Chicago: Haymarket Books, 2022).

[67] Amna A Akbar, "Non-Reformist Reforms and Struggles over Life, Death, and Democracy" (2023) 132:8 Yale LJ 2360.

[68] Ben Golder, "The Politics of Judicial Imagination" (2022) 13:2 Jurisprudence 275 at 284.

Court of Zimbabwe has jurisdiction over the plaintiff's right to access abortion and other medical services and, relatedly, that the issues raised in the case are properly governed and regulated by the Constitution of Zimbabwe.[69] It should not be taken to suggest that these assumptions are legally incorrect or politically imprudent in the Zimbabwe context. To the contrary, Ngwena and Cook's chapter explains why their contribution is necessary and overdue.[70] Rather, the example is instructive because it raises questions about the risks and benefits of rewriting abortion law in countries where the consequences of court intervention are different.

Currently, there is no constitutional or statutory framework that enshrines women's right to abortion in Canada. In 1988, the Supreme Court of Canada famously struck down section 251 of the *Criminal Code* in *R. v Morgentaler*, finding that the provision's restrictions on women's health care made access to abortion "practically illusory."[71] Legislatures have been hesitant to regulate the issue in the years since. Challenges to ensuring equal access to abortion remain, but abortion has become a widely accepted practice in Canada despite, or perhaps because of, this lack of regulation.[72] Following the US Supreme Court's decision overturning *Roe v Wade* in 2022,[73] a coalition of feminist organizations, institutions, and academics released a joint statement pushing back on reactionary efforts to introduce abortion legislation in Canada.[74] It expressed concerns that making new law in this area could disrupt the fragile post-*Morgentaler* consensus and open the door to new restrictions. The risks of political blowback are real.[75] It follows from this possibility that feminists should hesitate to rewrite Canadian decisions that touch on abortion law because their efforts, however well meaning, could signal that court intervention is politically advisable when, in fact, courts should leave this issue well alone. There are contexts where rearticulating the state's power and

[69] Ngwena & Cook, *supra* note 23.
[70] *Ibid* at 406–12.
[71] *R v Morgentaler*, [1988] 1 SCR 30 at 33.
[72] Access to abortion in Canada varies from region to region, particularly in remote and rural areas. See Laura Schummers & Wendy V Norman, "Abortion Services in Canada: Access and Safety" (2019) 191:19 Can Medical Association J E517.
[73] *Dobbs v Jackson Women's Health Organization*, 597 US (2022), 142 S Ct 2228 (WL).
[74] Action Canada for Sexual Health and Rights, "Feminist Organizations Support No New Abortion Law in Canada" (8 October 2022), online: <www.actioncanadashr.org> [perma.cc/9SP9-475E].
[75] *Ibid.* See also Lauren Di Felice et al, "Improving Access to Abortion Services in Canada: A What We Heard Report" (Toronto: University of Toronto, Reproductive Rights Working Group, David Asper Centre for Constitutional Rights, 2024).

"donning the robes" of the institution, to use Fitz-Gibbon and Maher's words, is morally justified and legally appropriate in theory but politically unwise in practice because the results are likely to be counterproductive to feminist interests.

The second category is exemplified by HIV non-disclosure. Canadian courts have repeatedly and problematically found that the criminal law has jurisdiction over HIV non-disclosure in sexual relations. The first leading authority is *R. v Cuerrier*, a 1998 case in which the Supreme Court of Canada found that people living with HIV are required to disclose their status where the sexual activity gives rise to a "significant risk of serious bodily harm."[76] A person's failure to disclose their status in these circumstances constitutes fraud that vitiates the other person's consent to sex, meaning that any actions taken could amount to a criminal offence.[77] The second is *R. v Mabior*, a 2012 case in which the Supreme Court of Canada attempted to clarify the *Cuerrier* test by finding that disclosure is only required where the sexual activity gives rise to a "realistic possibility" of HIV transmission.[78] If a person has a low viral load and uses a condom in sex, these two factors are sufficient to mitigate the risk of the activity such that a realistic possibility of transmission will not arise and the requirement to disclose is not triggered.[79] The court held: "*Charter* values of equality, autonomy, liberty, privacy and human dignity require full recognition of the right to consent or to withhold consent to sexual relations."[80]

As critics like Kyle Kirkup and Alexander McClelland explain, there are more effective ways than criminalization to achieve the feminist objectives of promoting sexual autonomy, encouraging safer sex practices, and preventing HIV transmission that operate on the public health level alone.[81] The general

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[76] *Cuerrier*, *supra* note 9 at para 128–33.
[77] *Ibid.*
[78] *Mabior*, *supra* note 9 at para 84–90.
[79] *Ibid* at para 4.
[80] *Ibid* at para 45.
[81] See Kyle Kirkup, "Releasing Stigma: Police, Journalists and Crimes of HIV Non-Disclosure" (2015) 46:1 Ottawa L Rev 127; Kyle Kirkup, "The Gross Indecency of Criminalizing HIV Non-Disclosure" (2020) 70:3 UTLJ 263; Kyle Kirkup, "Law's Sexual Infections" (2023) 46:2 Dal LJ 609 [Kirkup, "Infections"]; Alexander McClelland, "The Criminalization of HIV Non-Disclosure in Canada: Experiences of People Living with HIV" (2019), online: *Alexander McClelland* <toolkit.hivjusticeworldwide.org/wp-content/uploads/2019/12/McClelland-Criminalization-2.pdf>; Alexander McClelland, "Histories of Living in a Negative Relation to the Law: Resistance to HIV Criminalization" in Kelly Fritsch, Jeffrey Monaghan & Emily van der Meulen, eds, *Disability Injustice: Confronting Criminalization in Canada* (Vancouver: UBC Press, 2022) 72 [McClelland,

consensus among public health researchers is that comprehensive efforts to facilitate condom use, harm reduction, and mutual responsibility to reduce transmission risk through targeted public health interventions and progressive sex education should be encouraged instead.[82] Moreover, the evidence is clear that the law in this area contributes to poor health outcomes, reinforces stigma surrounding the condition, and perpetuates discrimination against historically marginalized groups.[83] I elaborate this argument in Part III of this article, but criminalization is only justified if we accept that HIV non-disclosure is sufficiently reprehensible in light of the barriers to disclosure that exist and the costs of proceeding in this manner. I do not accept this.[84]

For these reasons, I would argue that feminists should hesitate to rewrite the *Cuerrier/Mabior* framework using the conventional methodology because the law that governs them should not have jurisdiction over the issues in the first place. The framework should not be rewritten in a way that merely tinkers at the seams and leaves the fundamental structure of the law intact. Its

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"Histories"]; Alexander McClelland, *Criminalized Lives: HIV and Legal Violence* (New Brunswick, NJ: Rutgers University Press, 2024).

[82] See Kim Shayo Buchanan, "When Is HIV a Crime? Sexuality, Gender and Consent" (2015) 99:4 Minn L Rev 1231 at 1241. For commentary on community-based responses to HIV non-disclosure, see India Annamanthadoo, Cécile Kazatchkine & Sandra Ka Hon Chu, "A Gender-Centred Dialogue on Alternative Justice Responses to HIV Non-Disclosure Criminalization" (December 2022), online: *HIV Legal Network* <www.hivlegalnetwork.ca/site/a-gender-centred-dialogue-on-alternative-justice-responses-to-hiv-non-disclosure-criminalization/?lang=en>.

[83] The literature on the harms of criminalizing HIV non-disclosure is vast. See notes 81–2 above and accompanying text. See also Isabel Grant, "The Over-Criminalization of Persons with HIV" (2013) 63:3 UTLJ 475; Alison Symington, "Injustice Amplified by HIV Non-Disclosure Ruling" (2013) 63:3 UTLJ 485; Erin Dej & Jennifer M Kilty, "Criminalization Creep: A Brief Discussion of the Criminalization of HIV/AIDS Non-Disclosure in Canada" (2012) 27:1 CJLS 55; Barry D Adam et al, "HIV Positive People's Perspectives on Canadian Criminal Law and Non-Disclosure" (2016) 31:1 CJLS 1; Tony Ficarrotta, "HIV Disclosure Laws Are Unjustified" (2017) 24:2 Duke J Gender L & Pol'y 143; Erica R Speakman, "Constructing an 'HIV-Killer': HIV Non-Disclosure and the Techniques of Vilification" (2017) 38:4 Deviant Behaviour 392; Françoise Barré-Sinoussi et al, "Expert Consensus Statement on the Science of HIV in the Context of Criminal Law" (2018) 21:7 J Intl AIDS Society; Trevor Hoppe, *Punishing Disease: HIV and the Criminalization of Sickness* (Oakland: University of California Press, 2018); Isabel Grant, "The Complex Legacy of *R v Cuerrier*: HIV Nondisclosure Prosecutions and Their Impact on Sexual Assault Law" (2020) 58:1 Alta L Rev 45; Joshua D Blecher-Cohen, "Disability Law and HIV Criminalization" (2021) 130:6 Yale LJ 1560; Colin Hastings et al, "Criminal Code Reform of HIV Non-Disclosure Is Urgently Needed: Social Science Perspectives on the Harms of HIV Criminalization in Canada" (2024) 115:1 Can J Public Health 8.

[84] See Matthew J Weait, "Limit Cases: How and Why We Should Decriminalize HIV Transmission, Exposure, and Non-Disclosure" (2019) 27:4 Medical L Rev 576 at 595.

embedded assumptions must be fully uprooted. To concede this jurisdictional point is effectively to concede the legitimacy of criminalization as a form of racist and homophobic exclusion that perpetuates discrimination. In contexts like this, I would argue that promoting substantive equality requires feminists to have recourse to an expanded referential universe beyond what the conventional methodology permits, including creative tools, strategies, and forms of literary and artistic expression to represent gender and sexuality differently, challenge the law's hegemony over the issues, and prefigure a new social order.

D. The Role of Poetry

There is a rich tradition in literary and cultural studies and, to a lesser extent, legal studies that centres the role of poetry in radical social movements for change.[85] Literature can promote recognition and empowerment among women and other historically marginalized groups, particularly when individuals use literature to reflect on the law's impacts, raise political consciousness, and build community and solidarity in the face of harmful conditions. In an essay called "Poetry Is Not a Luxury," Audre Lorde explains the power of poetry in the context of Black women's resistance: "The quality of light by which we scrutinize our lives has direct bearing upon the product which we live, and upon the changes which we hope to bring about through those lives. … This is poetry as illumination, for it is through poetry that we give name to those ideas which are—until the poem—nameless and formless, about to be birthed, but already felt."[86]

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[85] See generally Barbara Harlow, *Resistance Literature* (New York: Methuen, 1987); Barbara Harlow, *After Lives: Legacies of Revolutionary Writing* (London: Verso, 1996); Monica Prendergast, "'Poem Is What?' Poetic Research in Qualitative Social Science Research" (2009) 1:4 Intl Rev Qualitative Research 541; Cornelia Gräbner & David Wood, "Poetics of Resistance: An Introduction" (2010) 6:2 Cosmos & History 2; Birte Christ & Stefanie Mueller, "Towards a Legal Poetics" (2017) 62:2 Amerikastudien 149; Charilaos Nikolaidis, "The Poetry of Rights" (2022) 16:2 L & Human 289; Camea Davis, "Poetic Inquiry as a Research Process" (4 May 2023), online: <creative-generation.org/blogs/poetic-inquiry> [perma.cc/G5PK-EQVK].

[86] Audre Lorde, *Sister Outsider: Essays and Speeches* (Trumansburg, NY: Crossing Press, 1984) at 17. For complementary takes on the power of Indigenous art to challenge settler colonialism, see Jeffery G Hewitt, "How Indigenous Art is Challenging Colonial Law" (27 September 2017), online: <cigionline.org> [perma.cc/YBB7-677Z]; Tasha Henry, "Art as Intervention in a Time of Reconciliation" (17 July 2017), online: *reconciliationsyllabus* <reconciliationsyllabus.wordpress.com/2017/07/17/art-as-intervention-in-a-time-of-reconciliation-by-tasha-henry/>.

Poetry can thus serve descriptive and normative functions in feminist activism. Most immediately, poetry can give voice to the author's experiences and the constituencies they represent, and through its expression of these effects, poetry can reflect the author's reality. It can bring a more human perspective to the law by rendering legally abstract forms material and concrete.[87] The force of poetry's expression is frequently linked to its ability to convey meanings in accessible, evocative, and often intensely personal ways, an ability that relates to its use of language, style, tone, and symbolism. Poetry is capable of eliciting powerful emotional reactions in readers, including compassion, anger, empathy, and other pro-social emotions that can heighten the reader's awareness of legal issues and ratchet up their significance, inspiring them to take moral action in response.[88] In this way, poetry has the potential to "illuminate" the law's relationship to gender, sexuality, and other systems of oppression; to imagine revolutionary communities in which these systems have been transformed; and to galvanize feminist movements to bring these communities into being.

These functions of poetry are not fixed or predictable because the range of meanings that readers interpret is partially determined by the text's formal qualities, means of production and dissemination, and the reader's positionality within shifting cultural, political, and legal traditions.[89] In this way, Oren Ben-Dor explains that poetry can help readers to reconnect with the precarity and

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[87] Claims like this are typical of the "humanist" strand of law-and-literature scholarship, which reflects the idea that reading literature can be a moral uplift project. See Jane B Baron, "Law, Literature, and the Problems of Interdisciplinarity" (1999) 108:5 Yale LJ 1059 at 1064. For more works in this vein, see Martha Nussbaum, "Poetic Justice: The Literary Imagination and Public Life" (Boston: Beacon Press, 1995); Edward J Eberle & Bernhard Grossfeld, "Law and Poetry" (2006) 11:2 Roger Williams UL Rev 353 at 367; Munro, *supra* note 54 at 253. For more on literature's ability to uplift, see Angus Fletcher, *Wonderworks: Literary Invention and the Science of Stories* (New York: Simon & Schuster, 2021).

[88] See Nikolaidis, *supra* note 85 at 290–3; Daniel Del Gobbo, "Lighting a Spark, Playing with Fire: Feminism, Emotions, and the Legal Imagination of Campus Sexual Violence" (2022) 45:1 Dal LJ 1 at 18–19.

[89] This is a basic tenet of post-structuralism and, specifically, "reader-response" theory. See Roland Barthes, "The Death of the Author" in Sallie Sears & Georgianna W Lord, eds, *The Discontinuous Universe: Selected Writings in Contemporary Consciousness*, translated by Richard Howard (New York: Basic Books, 1972); Jacques Derrida, "The Exorbitant Question of Method" in *Of Grammatology*, translated by Gayatri Chakravorty Spivak (Baltimore, MD: Johns Hopkins University Press, 1976); Stanley Fish, "Interpreting the Variorum" in *Is There a Text in This Class?: The Authority of Interpretive Communities* (Cambridge, MA: Harvard University Press, 1980).

messiness of social life.[90] Poetry's openness to multiple, subjective interpretations makes it challenging to contain but potentially responsive and adaptable to feminist purposes beyond what the author intended for readers to pursue. Linda Hirshman claims that literature can train people in the "reflection, consciousness, choice, and responsibility that make up the ability to engage in moral decisionmaking."[91] It follows that poetry can help lawyers and judges to understand the roles of morality and politics in professional identity formation and embolden them to interpret the law and conduct their practices in a feminist manner.[92] Angus Fletcher traces the invention and purposes of poetry: "It was a narrative-emotional technology that helped our ancestors cope with the psychological challenges posed by human biology. It was an invention for overcoming the doubt and the pain of *just being us*."[93]

I am particularly interested in "found poetry," which is a creative medium that is made by taking the words of a pre-existing text, like a judgment, and refashioning them to tell a different story. There are four main categories of found poetry: "cut up," which involves the physical rearrangement of words in the source material to form a new text; "cento," which involves the combination of lines from the source material to form a new text; "free form," which involves the mixing of multiple source materials; and "erasure," which involves the redaction, striking through, or blacking out of words in the source material.[94] The popularity of found poetry has grown in recent years, including among contributors to the Scottish project who experimented with using judgments as source material.[95]

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[90] Oren Ben-Dor, "Introduction: Standing before the Gates of Law?" in Oren Ben-Dor, ed, *Law and Art: Justice, Ethics and Aesthetics* (London: Routledge, 2011) 1.

[91] Linda R Hirshman, "Brontë, Bloom, and Bork: An Essay on the Moral Education of Judges" (1988) 137:1 U Pa L Rev 177 at 179. See also Richard Weisberg, "Coming of Age Some More: 'Law and Literature' Beyond the Cradle" (1988) 13:1 Nova L Rev 107 at 123–4.

[92] For legal ethics scholarship that calls on lawyers to raise their professional consciousness and foster a higher moral purpose, see Allan C Hutchinson, *Legal Ethics and Professional Responsibility* (Toronto: Irwin Law, 2006); Daniel Del Gobbo, "Legal Ethics and the Promotion of Substantive Equality" (2022) 100:3 Can Bar Rev 440.

[93] Fletcher, *supra* note 87 at 9 [emphasis added].

[94] Sarah-Jane Coyle, "Redact to React: Deconstructing Justice with Erasure Poetry" (2023) 44 Liverpool L Rev 359 at 366. See also Prendergast, *supra* note 85 at 547; Lisa D Patrick, "Found Poetry: Creating Space for Imaginative Arts-Based Literacy Research Writing" (2016) 65:1 Literacy Research: Theory, Method, and Practice 384.

[95] Cowan, Kennedy & Munro, *supra* note 61. For commentary on found poetry and legal pedagogy, see Gillian Calder, "Teaching with Love: Inside and Outside the Law School Classroom" (17 December 2019), online: *reconciliationsyllabus*

Consistent with post-structuralist theories of language, found poetry has the potential to engender a feminist poetics that challenges the law's claims to authority. By rearranging the text of judgments, found poetry reveals that law, not unlike gender, is constantly in a process of resignification and performance, and therefore, as Judith Butler explains, it is "continually haunted by [its] own inefficacy."[96] The reader's engagement with found poetry cannot be hermeneutically enforced in the same "biblical" and "unjustifiably authoritarian" manner, to use Peter Goodrich's terms, as judgments that take a conventional approach and pressure readers to comply with their dictates.[97] Yet it is precisely this openness, lack of fixity, and sense of interpretive play that makes found poetry such a powerful and potentially subversive—even queer—technique. The methodology invites feminists to make a radical departure: reclaim the law's language to represent gender and sexuality without law; imagine a world that is governed not by the state's top-down exercise of power and control but, rather, by the interpretive authority that readers possess over their own lives.

As I explained above, the conventional methodology has important uses, but its requirements prevent feminists from considering issues and interests and voices that cannot be expressed using traditional forms. Rackley contrasts the methodology with creative writing in explaining the UK project's scope: "[T]he project was not an exercise in wishful thinking. It was not a work of academic fiction, in the sense of being located entirely in the realm of the imaginary."[98] Sarah-Jane Coyle explains that, against a legal backdrop in which governments, colonizers, historians, and judges have erased the experiences of women and other historically marginalized groups from official records, the creative process can imagine and sustain more emancipatory ways of being in the world.[99] Found poetry shows how the law can centre these experiences and

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<reconciliationsyllabus.wordpress.com/2019/12/17/teaching-with-love-inside-and-outside-the-law-school-classroom/#_ftn8>.

[96] Judith Butler, "Critically Queer" (1993) 1:1 GLQ: Journal of Lesbian and Queer Studies 17 at 26.

[97] Peter Goodrich, "Historical Aspects of Legal Interpretation" (1986) 61:3 Ind LJ 331 at 333. Claims like this are typical of the "hermeneutical" strand of law-and-literature scholarship, which focuses on the theory and methodology of interpretation. See Baron, *supra* note 87 at 1064–5; Del Gobbo, *supra* note 12 at 312–20.

[98] Erika Rackley, "Why Feminist Legal Scholars Should Write Judgments: Reflections on the Feminist Judgments Project in England and Wales" (2012) 24:2 CJWL 389 at 392.

[99] Coyle, *supra* note 94 at 372, citing Jennifer S Cheng, "Erasure Poetry: A Revealing (ii)," *Jacket* (8 September 2016). online: <jacket2.org> [perma.cc/7CAG-XG5Q].

take counter-hegemonic narratives into account, revealing the hidden presence of lives in a case that otherwise renders them invisible, freeing them from what Joshua Hall refers to as a kind of "prose prison, vulnerable nevertheless to a new poetic liberation."[100] The technique suggests a new path forward for women that is real or fictional, plausible or fantastical. It might even engage in "wishful thinking" about the future of substantive equality in Canada. Feminism is liberatory because of its wishfulness, not despite it.

More radically, found poetry challenges the conventional methodology's assumptions that judgments can be rewritten to incorporate feminist "knowledge," "truth," and "meaning" as if these were pre-existing and generalizable concepts and that, so long as courts identify them, the law will progressively improve and "work itself pure," to use Lon Fuller's famous phrase.[101] Feminists should contest the methodology's claims to "know better" when its faith in liberal legalism is contingent and frequently misplaced. In contexts like HIV non-disclosure, the law cannot be "worked pure" because the law should not exist in the first place. Even more radically, the law cannot be "worked pure" because feminists cannot "know" with certainty what substantive equality requires in this context or otherwise because there is no privileged place of knowledge outside power on which feminists and other commentators can stand.[102] There is creative license, nothing more. Law is always already as imaginative as poetry.

III. REWRITING THE CRIMINAL LAW OF HIV NON-DISCLOSURE

A. Introducing *R. v Aziga*

[100] Joshua M Hall, "On Law as Poetry: Shelley and Tocqueville" (2021) 40:3 South African J Philosophy 304 at 305. For commentary on counter-hegemonic storytelling in critical legal theory, see Williams, *supra* note 65; Richard Delgado, "Storytelling for Oppositionists and Others: A Plea for Narrative" (1989) 87:8 Mich L Rev 2241; Angela P Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42:3 Stan L Rev 581; Kathryn Abrams, "Hearing the Call of Stories" (1991) 79:4 Cal L Rev 971; William N Eskridge Jr, "Gaylegal Narratives" (1994) 46 Stan L Rev 607; Peter Brooks & Paul Gewirtz, eds, *Law's Stories: Narrative and Rhetoric in Law* (New Haven, CT: Yale University Press, 1996); Richard Delgado & Jean Stefancic, *Critical Race Theory: The Cutting Edge*, 3rd ed (Philadelphia: Temple University Press, 2013).

[101] Lon L Fuller, *The Law in Quest of Itself* (Boston: Beacon Press, 1966). See also Chrisopher Bezemek, ""The Law Works Itself Pure': Reflections on a Cherished Trope" (2021) Graz Law Working Paper No 08-2021, online <deliverypdf.ssrn.com> [perma.cc/VS3N-B36R].

[102] See Michel Foucault, *The History of Sexuality*, vol 1: *An Introduction*, translated by Robert Hurley (New York: Random House, 1978) at 95.

Canada has the shameful distinction of being a global leader in the criminalization of HIV non-disclosure, with over 220 cases since the country's first prosecution in 1989.[103] One of the most notorious chapters in this history is the 2009 prosecution and 2011 sentencing of Johnson Aziga, who is believed to be the first person convicted of first-degree murder and sentenced to life in prison on charges related to HIV non-disclosure in the world.[104] In 2023, the Ontario Court of Appeal upheld Aziga's convictions and life sentences in *R. v Aziga*, one of the most recent statements by a Canadian appellate court on the law in this area.[105] As I explain below, the case might seem like an unlikely choice for feminist reconsideration because Aziga's conduct was reprehensible and the complainants suffered harms that are extremely serious. It is a "hard" or "limit case" that gives rise to complex moral and political concerns. However, the case is worth revisiting because the court had an opportunity to engage meaningfully with critiques of the *Cuerrier/Mabior* framework, including the law's role in perpetuating racism, homophobia, and other forms of oppression, but it failed to do so.

Aziga is a Black man who immigrated to Canada from his native Uganda in the 1980s, eventually settling in Hamilton, Ontario.[106] In December 1996, Aziga was diagnosed with HIV.[107] Beginning in 1997, Aziga was repeatedly advised by medical professionals about the possibility of HIV transmission through unprotected sex, the health risks associated with HIV/AIDS, and his legal obligation to disclose his HIV-positive status to his sexual partners.[108] After his diagnosis, Aziga took therapeutic medication to maintain his health, but he declined antiretroviral therapy to prevent his viral load from increasing.[109] Over the years, Aziga's viral load was recorded as falling between twenty thousand and forty thousand copies per millilitres, which the court

[103] Colin Hastings et al, "HIV Criminalization in Canada: Key Trends and Patterns (1989–2020)" (2022) at 5, online: *HIV Legal Network* <www.hivlegalnetwork.ca/site/hiv-criminalization-in-canada-key-trends-and-patterns-1989-2020/?lang=en>.
[104] See Dej & Kilty, *supra* note 83 at 63.
[105] *Aziga* 2023, *supra* note 10. For the sentencing decision in the case, see *R v Aziga*, 2011 ONSC 4592 [*Aziga* 2011].
[106] See Speakman, *supra* note 83 at 392.
[107] *Aziga* 2023, *supra* note 10 at para 7.
[108] *Ibid.*
[109] *Ibid* at para 8.

found to be "moderately infectious" when the sexual activity giving rise to the criminal charges occurred.[110]

Between June 2000 and October 2002, Aziga had unprotected sex with nine complainants without disclosing his HIV-positive status.[111] In June 2002, one of the complainants contracted HIV and subsequently listed Aziga as one of her sexual partners.[112] Public health authorities in Hamilton became concerned about Aziga's lack of response to the warnings he received.[113] In October 2002, they issued an order under Section 22 of Ontario's *Health Protection and Promotion Act* requiring Aziga to attend counselling and education sessions, refrain from having unprotected sex without disclosing his status, and provide a full list of his sexual partners since his diagnosis to public health authorities.[114] The legislation establishes a regulatory framework that can be enforced with a five thousand dollar per day fine and lead to criminal charges in the event of non-compliance.[115]

After the order was issued, Aziga attended the counselling and education sessions as required but continued to engage in unprotected sex with two of the complainants and failed to provide a list of his sexual partners.[116] He claimed that the counselling he received was ineffective because it lacked cultural nuance, a factor that contributed to his failure to comply.[117] Around this time, Aziga engaged in unprotected sex with two more women, bringing the total number of complainants to eleven.[118] In February 2003, another of the complainants contracted HIV and listed Aziga as one of her sexual partners.[119] Public health authorities reminded Aziga about his legal obligations under the order.[120] Aziga responded by stating that he understood the order, but he did not agree with it.[121] In August 2003, Aziga was arrested on charges

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[110] *Ibid* at para 9.
[111] *Ibid* at para 10.
[112] *Ibid* at para 11.
[113] *Ibid.*
[114] *Ibid*; *Health Protection and Promotion Act*, RSO 1990, c H7.
[115] *Health Protection and Promotion Act*, *supra* note 114, ss 22, 101(1). For commentary on the regime, see McClelland, "Histories," *supra* note 81 at 78.
[116] *Aziga* 2023, *supra* note 10 at para 12.
[117] *Aziga* 2011, *supra* note 105 at para 101.
[118] *Aziga* 2023, *supra* note 10 at para 12.
[119] *Ibid* at para 13.
[120] *Ibid.*
[121] *Ibid.*

of aggravated sexual assault and attempted aggravated sexual assault.[122] After two of the complainants died from AIDS-related malignancies, charges of first-degree murder were subsequently added.[123]

Aziga's trial took place in 2008 and 2009. By that time, seven of the eleven complainants had tested positive for HIV.[124] In the case of two complainants, the women consented to move from protected to unprotected sex only after Aziga represented that he was HIV negative.[125] At trial, the issues turned on whether Aziga caused the complainants' infections and possessed the requisite intent to murder. The court heard expert evidence that Aziga and the complainants shared a genetically related and statistically rare subtype of HIV known as "Clade A," which represented between 1.7 and 2 percent of HIV infections in Canada.[126] The evidence could not prove that Aziga infected the complainants, but it showed that they belonged to the same "transmission cluster."[127] In response, Aziga claimed that he was prevented from disclosing his HIV-positive status. Among other factors, he testified to experiencing stress, loneliness, and depression stemming from the breakdown of his marriage, employment, and family issues in addition to the stigma surrounding the disease.[128] He said that his culture as a Black immigrant from Africa made it difficult to discuss sexual matters.[129] One of the experts testified that Aziga was "extremely apologetic to the families and everyone that has been affected by this saga."[130] He suggested that Aziga suffered from a personality disorder, the symptoms of which were exacerbated by alcohol abuse and life stressors.[131]

Ultimately, Aziga was convicted of two counts of first-degree murder, ten counts of aggravated sexual assault, and one count of attempted aggravated sexual assault.[132] On the murder convictions, Aziga received the statutory minimum sentence of life in prison without eligibility for parole for twenty-five years.[133] On the sexual assault-related convictions, Aziga met the statutory

[122] *Ibid* at para 14.
[123] *Aziga* 2011, *supra* note 105, Appendix A.
[124] *Aziga* 2023, *supra* note 10 at para 15.
[125] *Ibid* at para 19.
[126] *Ibid* at para 15–16.
[127] *Ibid* at para 16.
[128] *Aziga* 2011, *supra* note 105 at para 53.
[129] *Ibid* at para 50.
[130] *Aziga* 2011, *supra* note 105 at para 106.
[131] *Ibid* at para 105.
[132] *Aziga* 2023, *supra* note 10 at para 1.
[133] *Ibid* at para 2.

requirements for a dangerous offender designation, and the court sentenced him to an indefinite period of incarceration.[134] The court remarked that Aziga showed little remorse for his actions and continued to pose a risk to the community.[135] It cited expert testimony that, "despite a likely decline in libido as individuals age, highly sexualized people like [Aziga] are likely to be sexual when they are older."[136]

According to victim impact statements, the complainants suffered lasting physical, emotional, and mental health impacts as a result of Aziga's conduct. The power and control that Aziga wielded over them underscored the gendered nature of their injuries. One of the complainants who died, S.B., released a video describing the pain she felt "[k]nowing that her lymphoma was terminal" and "knowing that her life would end soon and she would not see her grandson grow up."[137] In connection with their physical symptoms, several of the complainants experienced depression, sleeping problems, marital issues, feelings of isolation, lack of confidence, and a general mistrust of men. Another complainant, Victim K, testified to the stigma surrounding HIV:

> She kept her HIV infection a secret from her family for over five years. As a result of the stress, she suffered a nervous breakdown and knew she would have to tell her family. It was the hardest thing she ever had to do in her life. As a result of her HIV infection, this victim has doubts that she will ever find a partner. She fears being "unloved." She feels shame, anger, regret, pain, and has very limited social interaction.[138]

Following the trial, Aziga appealed his conviction and sentencing to the Ontario Court of Appeal. The court released its final decision in 2023, granting Aziga's appeal in part. The court set aside the murder convictions and substituted them with manslaughter because the trial judge misdirected the jury on the *mens rea* element.[139] Additionally, the court set aside two of the aggravated sexual assault convictions because the trial judge misdirected the

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[134] *Ibid.*
[135] *Ibid* at para 94.
[136] *Ibid* at para 96.
[137] *Aziga* 2011, *supra* note 105 at para 16.
[138] *Ibid* at para 23.
[139] *Aziga* 2023, *supra* note 10 at para 3.

jury on these offences as well.[140] However, the court refused to set aside the other sexual assault-related convictions. Notably, Aziga submitted that his convictions were informed by "systemic racism" and the "stigma that HIV infection carried" in 2009.[141] Among other claims, he submitted that his lawyer's assistance was ineffective because it played on racist stereotypes about HIV and criminality, including his lawyer's statement in his closing argument about the "glove" not fitting, a reference to O.J. Simpson.[142] Aziga claimed that referring to a criminal trial in which a Black man was infamously acquitted for murdering a white woman "inflame[d] racist passion against him."[143] All of the complainants in Aziga's case were white women.[144] The court rejected these arguments summarily: "Suffice it to say that there is no evidence to support these claims. The evidence against [Aziga] was overwhelming."[145]

Aziga was denied his first chance at parole in late 2023.[146] The panel heard that, while Aziga had successfully completed programs on sexual boundaries, victim impact, and empathy, his "sexual energy" remained high and might not be controllable.[147] The panel deliberated for only ten minutes.[148]

B. The Harms of Criminalizing HIV Non-Disclosure

Critiques of the *Cuerrier/Mabior* framework are now well trodden in the legal and public health literatures, with a chorus of researchers explaining that the law bears little relationship to public health and well-being.[149] Most immediately, people with low viral loads, who use condoms, or who perform or receive oral sex pose an extremely low risk of transmitting HIV to their sexual partners, which raises the question of whether the law is punishing

[140] *Ibid* at para 4.
[141] *Ibid* at para 66.
[142] *Ibid* at para 88.
[143] *Ibid.*
[144] *Ibid.*
[145] *Ibid* at para 66.
[146] See Rosie DiManno, "'You Were a Weapon. People Suffered, People Died': Parole Board Denies HIV-Positive Dangerous Offender Johnson Aziga's Bid for Freedom," *Toronto Star* (12 December 2023), online: <www.thestar.com/opinion/star-columnists/you-were-a-weapon-people-suffered-people-died-parole-board-denies-hiv-positive-dangerous-offender/article_65ec5a0a-993d-11ee-91d4-0b4a25414446.html>.
[147] *Ibid.*
[148] *Ibid.*
[149] See notes 81–3 above and accompanying text.

conduct where no "realistic possibility" of transmission exists.[150] The failure of courts to assess the risk level of these activities properly contributes to a lack of public education and stigma surrounding the disease, creating barriers to disclosure and preventing individuals from getting tested. People who experience stigma tend to have higher viral loads, worse mental health, increased likelihood of substance abuse, and lower quality of life.[151] Kim Shayo Buchanan explains that these barriers are exacerbated by legal mandates on people to reveal their status because, in doing so, individuals are exposing their private lives to regulation and surveillance.[152] The problem is compounded further by power imbalances in relationships, including racial, gender, and economic hierarchies that can prevent individuals from communicating effectively. Many people continue to have unprotected sex after learning their partners are HIV positive, a fact that confirms the law's role in behaviour modification is contingent.[153] The reasons that a person fails to disclose their status are idiosyncratic, culturally specific, and should not be considered always or only morally wrong, even in situations where transmission occurs. Collectively, these factors call the legitimacy of the law into question.

Equally concerning is the fact that HIV non-disclosure is treated differently at law from other sexually transmitted infections that pose serious risks, a phenomenon that Kirkup theorizes as "HIV exceptionalism."[154] Since *Cuerrier* was decided, the vast majority of prosecutions have focused on HIV non-disclosure, with only a handful of cases involving people living with Hepatitis C and genital herpes.[155] One explanation for this trend is suggested by the Supreme Court of Canada in *Mabior*, where it found that HIV/AIDS is a "life-endangering" and potentially deadly disease.[156] However, this reasoning fails to account for recent advancements in biomedical science, including combination therapy medicine that has transformed HIV into a chronic but manageable condition.[157] Kirkup concludes: "One reply is that HIV is singled

[150] See Barré-Sinoussi et al, *supra* note 83.
[151] See Jasom M Lo Hog Tian et al, "Impact of Experienced HIV Stigma on Health Is Mediated by Internalized Stigma and Depression: Results from the People Living with HIV Stigma Index in Ontario" (2021) 21 BMC Public 1595.
[152] Buchanan, *supra* note 82 at 1257.
[153] *Ibid* at 1246, n 54.
[154] Kirkup, "Infections," *supra* note 81 at 618–26.
[155] *Ibid* at 628–9.
[156] *Mabior*, *supra* note 9 at para 92.
[157] See Barré-Sinoussi et al, *supra* note 83.

out by the criminal legal system not because it is uniquely deadly, but because it is uniquely stigmatized."[158]

I would argue that a compelling explanation for this trend theorizes it as a racialized and homosexualized phenomenon. Specifically, the criminalization of HIV non-disclosure is evidence of the law's role in policing the intersection of Black immigrant masculinity and gay men's sexuality as threatening to white heteronormative sensibilities. In Canadian cases where the race of the defendant is known, Black men have been charged with HIV non-disclosure-related offences at disproportionately high rates, constituting 35 percent of prosecutions from 1989 to 2020.[159] Charges against Black defendants resulted in convictions in 86 percent of cases compared with charges against white defendants resulting in convictions in 73 percent of cases.[160] Media reporting on the issue has similarly focused on Black defendants at disproportionately high rates, specifically Black immigrants from Africa.[161] In cases involving male defendants where the gender of complainants is known, 70 percent of cases involved female complainants only, 28 percent of cases involved male complainants only, and 2 percent of cases involved both male and female complainants.[162]

These findings are not surprising in light of the centrality of the myth of the Black male sexual predator in carceral feminist activism around sexual violence. In Canada and elsewhere, Black, Indigenous, and other racialized men are targeted by accusations, charged with sexual offences, and consequently subjected to carceral and neoliberal systems of policing, surveillance, control, and imprisonment at disproportionately high rates, a result of what Aya Gruber criticizes as the "feminist war on crime."[163] According to Jennifer Kilty and

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[158] Kirkup, "Infections," *supra* note 81 at 624.

[159] Hastings et al, *supra* note 103 at 8. By contrast, Black men represent 18 percent of the reported new HIV infections in 2019 among men for whom their race/ethnicity is known. *Ibid* at 8.

[160] *Ibid* at 10.

[161] Eric Mykhalovskiy et al, "'Callous, Cold, and Deliberately Duplicitous': Racialization, Immigration, and the Representation of HIV Criminalization in Canadian Mainstream Newspapers" (November 2016) at 23–4, online: *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2874409>. See also Asha Persson & Christy Newman, "Making Monsters: Heterosexuality, Crime and Race in Western Media Coverage of HIV" (2008) 30:4 Sociology of Health & Illness 632.

[162] Hastings et al, *supra* note 103 at 6.

[163] Aya Gruber, *The Feminist War on Crime: The Unexpected Role of Women's Liberation in Mass Incarceration* (Oakland: University of California Press, 2020). For complementary takes, see Sherene Razack, "Domestic Violence as Gender Persecution: Policing the Borders of Nation, Race, and Gender"

Katarina Bogosavljevic, Black immigrant men are more likely to be portrayed as "HIV/AIDS predators" in the media because of the stereotypical ways in which their gender and sexuality have been framed discursively, with their sexual prowess and relationships being characterized as "excessive," "animalistic," and "violent" because they are seen as carrying foreign and patriarchal forms of masculinity.[164] The result is a politico-affective narrative that combines threats of corruption with feelings of moral righteousness and anger that Black immigrant men are unable to assimilate into society and abide by "Canadian values."[165]

Complicating the picture further, the criminalization of HIV non-disclosure is linked to the rise of the HIV/AIDS epidemic in the 1980s. The consequent moral panic and fears of social contagion laid the foundation for the police and public health authorities, working in tandem, to identify, contain, and legally incapacitate people living with HIV, beginning with Canada's first HIV non-disclosure prosecution in 1989. Given the early incidence of the disease among men who have sex with men (MSM), HIV was commonly referred to as the "gay cancer," "gay plague," or "gay-related immune disorder" in this period.[166] Biomedical science has evolved to render these terms obsolete. However, the risk of transmission continues to be associated with the homophobic stereotypes that gay men and other queer and trans individuals engage in promiscuous sex acts, recreational drug use, and generally make hedonistic and pathological choices that result in sickness and death.[167] Among other harmful policies, these stereotypes informed the construction of Canadian blood donation rules that categorically excluded MSM because of their perceived transmission risk until 2022 when the rules changed to exclude people who recently had anal sex, a practice commonly associated with MSM,

(1995) 8:1 CJWL 72; Angela Y Davis, *Are Prisons Obsolete?* (New York: Seven Stories Press, 2003); Elizabeth Bernstein, "The Sexual Politics of the 'New Abolitionism'" (2007) 18:3 differences 128; Kristin Bumiller, *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement against Sexual Violence* (Durham, NC: Duke University Press, 2008); Judith Levine & Erica R Meiners, *The Feminist and the Sex Offender: Confronting Sexual Harm, Ending State Violence* (London: Verso, 2020).

[164] See Jennifer M Kilty & Katarina Bogosavljevic, "Emotional Storytelling: Sensational Media and the Creation of the HIV Sexual Predator" (2019) 15:2 Crime, Media, Culture 279 at 282.

[165] For a complementary take on the relationship between emotions and carcerality, see Del Gobbo, *supra* note 88.

[166] See Buchanan, *supra* note 82 at 1294–5.

[167] Problems of homophobic and HIV-related discrimination remain in the health, employment, and social services sectors. See Lo Hog Tian et al, *supra* note 151.

and people who recently used pre- or post-exposure prophylaxis, two highly effective medications similarly associated with MSM.[168]

The pervasiveness of these stereotypes constructs people living with HIV as irrepressible sexual deviants who are unlikely to change their behaviour without the law's intervention. The myth of the promiscuous gay man operates similarly to the myth of the Black male sexual predator in this regard. The construction of these figures contributes to a false sense of invincibility among white heterosexual people, a factor that undermines public health efforts to promote mutual responsibility to reduce transmission.[169] Correspondingly, police and prosecutors have tended to bring charges that protect the respectability of so-called "perfect victims" of HIV non-disclosure, frequently white women, because they can be readily portrayed as innocent, vulnerable, and morally "straight" for having conducted themselves responsibly.[170] Buchanan observes that there is a significant difference between the law's framing of HIV as a normalized condition when it is contained within already stigmatized populations and the law's framing of HIV when it penetrates more privileged groups.[171] Accordingly, the criminalization of HIV non-disclosure should be understood as part of the government's long history of policing Black, Indigenous, and other racialized people, queer and trans individuals, immigrants and newcomers to Canada, and other populations that lead "risky" and non-normative lifestyles.

Reading the *Aziga* case in this broader socio-legal context, it becomes challenging to separate the criminalization of Aziga's actions from racist and homophobic myths about HIV transmission. Recall the trial court's findings that Aziga was a "highly sexualized" individual and carried a rare subtype of "Clade A" infection potentially originating from Africa. In his sentencing hearing, Crown prosecutors expanded on these findings, claiming that Aziga's sex drive was "head and shoulders above" the average man and "knowing his need for sex is not going to be satisfied" would likely prevent him from

[168] See Canadian Blood Services, "Sexual Behaviour-Based Screening" (2014), online: <www.blood.ca/en/blood/am-i-eligible-donate-blood/sexual-behaviour-based-screening>. For commentary on blood donation and pre-exposure prophylaxis, see Doron Dorfman, "The PrEP Penalty" (2022) 63 BC L Rev 813.
[169] See Buchanan, *supra* note 82 at 1245.
[170] See Kilty & Bogosavljevic, *supra* note 164 at 280.
[171] Buchanan, *supra* note 82 at 1240.

disclosing his status in the future.[172] At his 2023 parole board hearing, the panel heard that Aziga had twice been cited for prison violations relating to the possession of pornography and what a *Toronto Star* columnist called "sexual urges he's been unable to control."[173] In rejecting his bid for parole, one panel member said: "There are many forms of weapons. There are guns and knives, people suffer, people die. You were a weapon. People suffered, people died."[174]

In 2016, Eric Mykhalovskiy and his co-authors published a comprehensive study exploring how racism and anti-immigration discourses figure into Canadian media coverage of HIV non-disclosure.[175] The co-authors conclude that the sensational treatment of Aziga's identity, not unlike the treatment of Clato Mabior[176] and Charles Ssenyonga[177] before him—both Black immigrants also—emphasized the racial "otherness" of Aziga's gender and sexuality that infected not only the complainants but also Canadian society as a whole.[178] Rinaldo Walcott suggests that "Black boys live queer lives regardless of sexuality. … Black masculinity cannot be divorced from the social and political institutions that govern belonging to the nation and citizenry."[179] Heterosexual as he might be, Aziga figures as both a Black immigrant and promiscuous gay man on my interpretation, with the court's representations of his sexual prowess and the rarity and intensity of his condition marking him as a perversely queered individual whose identity threatens the white "straight" body politic and must be contained.

Is a feminist rewriting of *Aziga* possible? If my interpretation is correct, then it strikes me that *Aziga* is a hard case for feminists to reclaim because it

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[172] See "HIV Killer Has High Libido and Could Reoffend, Crown Says," *Globe and Mail* (27 June 2011), online: <www.theglobeandmail.com/news/national/hiv-killer-has-high-libido-and-could-reoffend-crown-says/article589067/>.

[173] See DiManno, *supra* note 146.

[174] *Ibid.*

[175] Mykhalovskiy et al, *supra* note 161.

[176] *Ibid* at 50–51.

[177] *Ibid* at 39–44. See also Jennifer M Kilty, "The Emotional Storying of Charles Ssenyonga as an HIV Sexual Predator in June Callwood's *Trial Without End: A Shocking Story of Women and AIDS*" in Susan A Bandes et al, eds, *Research Handbook on Law and Emotion* (Northampton, MA: Edward Elgar, 2021) 342.

[178] Mykhalovskiy et al, *supra* note 161 at 54.

[179] Rinaldo Walcott, "Blackness, Masculinity, and the Work of Queer" in Scott Rayter & Laine Halpern Zisman, eds, *Queerly Canadian: An Introductory Reader in Sexuality Studies*, 2nd ed (Toronto: Women's Press, 2022) 29 at 39. See also E Patrick Johnson & Mae G Henderson, *Black Queer Studies: A Critical Anthology* (Durham, NC: Duke University Press, 2005); C Riley Snorton, *Black on Both Sides: A Racial History of Trans Identity* (Minneapolis: University of Minnesota, 2017).

forces us to consider simultaneously the gendered nature and gravity of the injuries that the complainants experienced and the harms of redressing those injuries through carceral means. I cannot condone Aziga's actions with respect to the complainants. However, my position remains that the court's failure to recognize and respond meaningfully to Aziga's claims that his convictions were informed by racism and stigma was a fundamental error. If one takes the feminist objectives of promoting sexual autonomy, encouraging safer sex practices, and preventing HIV transmission seriously, then it should lead us to challenge the *Aziga* decision because the *Cuerrier/Mabior* framework that governs it plainly contradicts these objectives—a position that is supported by public health researchers overwhelmingly—while perpetuating discrimination against Black immigrants, gay men, and other historically marginalized groups.

Efforts to rewrite the *Cuerrier/Mabior* framework are currently underway. In response to the "problem of overcriminalization," the Attorney General of Canada issued a binding directive in 2018 that interpreted the "realistic possibility" test to limit the prosecution of people with suppressed viral loads, who use condoms, and who perform or receive oral sex.[180] The directive applies to prosecutions in the Yukon, Northwest Territories, and Nunavut only, so it remains to be seen whether it will influence policy in the provinces or reduce the number of prosecutions overall. Building on this initiative, the House of Commons Standing Committee on Justice and Human Rights published a report in 2019 that recommended replacing the framework with a new standalone criminal offence relating to the non-disclosure of infectious diseases where transmission occurs.[181] At first blush, the proposed offence looks like a positive development because it purports to remove HIV non-disclosure from the ambit of sexual assault and criminalize the transmission of infectious diseases equally. However, the proposed offence seems likely to evolve to focus on HIV given the law's historical focus on the disease. Kirkup makes a similar point, criticizing the new offence because it reflects the same

[180] Attorney General of Canada, *Directive of the Attorney General Issued under Section 10(2) of the Director of Public Prosecutions Act: Prosecutions Involving Non-Disclosure of HIV Status* (Ottawa: Public Prosecution Service of Canada, 2018), online: <gazette.gc.ca/rp-pr/p1/2018/2018-12-08/html/notice-avis-eng.html#nl4>.

[181] Canada, House of Commons, Standing Committee on Justice and Human Rights, *The Criminalization of HIV Non-Disclosure in Canada*, 42-1, No 28 (June 2019) (Anthony Housefather), online: <www.ourcommons.ca/Content/Committee/421/JUST/Reports/RP10568820/justrp28/justrp28-e.pdf>. For commentary, see Kirkup, "Infections," *supra* note 81.

carceral logics of criminalizing infection but in a more insidious and "seemingly benign register."[182]

In my view, the *Cuerrier/Mabior* framework should not be rewritten in a manner that leaves the criminalization of HIV non-disclosure intact. Instead, feminists should have recourse to creative strategies that imagine more emancipatory visions of public health and sexual autonomy beyond what can be expressed in the law's terms. In the next and final subsection, I have constructed a "cut up" found poem from the words in two decisions in the *Aziga* case to try and achieve this.[183] The poem is an offering—one might think of it as an exercise in "wishful thinking" about the future of substantive equality in Canada—that I hope will resonate with someone and hopefully inspire them to consider the issues in the case anew.

C. "Finding Equality": A Poem

Can you see the requirements of a more progressive sexual culture?

I'm thinking of a world that promotes new ways of talking
about freedom, opportunity, and intentionality;
one that transforms social context to create right relations between people,[184]
fostering conditions of shared responsibility and meaningful choices in sex,
relationships of trust, recognition, and collaborative decision-making,
with the foundations of this possibility being connection, not separation;
one that creates a more respectful and other-regarding sensibility toward
partners, family members, and strangers met along the way
to increase life chances for women and other groups that face
higher rates of violence, discrimination, and barriers to well-being.

I'm thinking of a world that accepts the tension and indeterminacy that persists
between pleasure and danger, compliance and recalcitrance, safety and risk,

[182] Kirkup, "Infections," *supra* note 81 at 634.

[183] I have taken words from two published decisions in the case: *Aziga* 2011, *supra* note 105; *Aziga* 2023, *supra* note 10. In crafting the poem, I took the liberty of changing the tenses of verbs and prefixes and suffixes of words, as necessary, making sure to preserve the integrity of the root words that can be found in these decisions.

[184] The concept of "right relations" is inspired by the work of restorative justice scholars, building on the work of relational feminists and Indigenous justice scholars who aspire to create relations of equal care, concern, and respect between people. See Jennifer J Llewellyn & Robert Howse, "Restorative Justice: A Conceptual Framework" (1999), online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2114291>; Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford: Oxford University Press, 2012); Jeffery G Hewitt, "Indigenous Restorative Justice: Approaches, Meaning and Possibility" (2016) 67 UNBLJ 313.

and knowledge and hope for a future that cannot be "known" in advance;[185]
one that embraces feelings that are invariably present and cannot be resolved
lest we bind our conversations about HIV in social conservatism—
problems of "moral fault" and "risk reduction" first, pleasure last—
with blameworthiness being linked to race, sexual identity, and other factors,
constructed notions of "good sex" and "bad sex" that justify the treatment
of HIV non-disclosure as legally wrong,[186] producing shame and stigma,
a false distinction that makes a difference: the trouble with "normal."[187]

I'm thinking of a world that prevails over the long hands and devastating crush of
systemic racism and trauma and stereotyping and other prejudices that inform
the "common-sense" logic of criminalization; one that survives despite the
slow-motion heartbreak of the criminal legal system's response to
HIV non-disclosure that bears down on Black men overwhelmingly,
causing pain and mistrust and extending the legal history of state-sanctioned
violence against Black communities by reducing the issues in these cases to
something courts can understand—individual culpability—a concept so flat
and lacking in nuance that it fails to recognize the nature and gravity of the harm,
the true meaning of responsibility, the importance of systemic change.[188]

I'm thinking of a world that fosters a comprehensive public health response
to HIV non-disclosure, centering the experience of individuals most affected,
combatting widespread misconceptions about the disease, preventing transmission
and increasing well-being by facilitating treatment, not punishment;
one that integrates principles of justice with principles of care
in a more therapeutic legal system,[189] providing social services and

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[185] The terms "pleasure and danger" are inspired by Carole Vance's text of the same name, one of the founding texts of feminist sex radicalism and queer theory in the 1980s. Carole S Vance, ed, *Pleasure and Danger: Exploring Female Sexuality* (Boston: Routledge, 1984).

[186] The terms "good sex" and "bad sex" are inspired by Gayle Rubin's call for a political reappraisal of "bad sex" practices falling outside what Rubin calls the "charmed circle" of conservative sexual morality. Gayle S Rubin, "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality" in Vance, *supra* note 185.

[187] The phrase "trouble with 'normal'" is inspired by Michael Warner's book of the same name. Warner focuses his critique on the ethics of sexual shame and identity, challenging the force of homo-normative and neoliberal pressures on queer and trans people to conform. Michael Warner, *The Trouble with Normal: Sex, Politics and the Ethics of Queer Life* (Cambridge, MA: Harvard University Press, 1999).

[188] My language here is inspired by the work of critical race feminist, Indigenous justice, prison abolitionist, and transformative justice organizers who understand the harms of interpersonal and carceral state violence to be connected. See note 66 above and accompanying text.

[189] The concept of a "therapeutic legal system" is inspired by the innovation of therapeutic jurisprudence in critical legal scholarship, which is a body of work that explores how legal rules and processes can be designed to promote health and well-being. See Dennis P Stolle, David B Wexler & Bruce J Winick, eds, *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (Durham, NC:

community-based supports that enable people to communicate effectively
and share information that is necessary to help themselves and others
to live more freely, more deliberately, and with greater passion,
in a way that is uniquely and exquisitely their own.

Can you see the requirements of a more progressive sexual culture?
Focus your efforts on the future and move things around in your mind;
turning the law, abandoning it, creating something new in its place to
be the change you want to see. The force of history concedes nothing until you
find a path forward. Can you see it now? Can you see the potential?

IV. CONCLUSION

In this article, I have reflected on the possibilities and limits of feminist judgment projects in the context of HIV non-disclosure, challenging the premises of the conventional methodology in cases where the law is shot through with oppression. In her conclusion to *Frontiers of Gender Equality*, Francisca Pou Giménez explains that "change begins by changing the focus and what we choose to see, underscore, and build upon."[190] In keeping with the work of my feminist colleagues in this issue and elsewhere, I hope that my found poem and this article as a whole will be interpreted as a form of ethical reimagining: an incitement to critique the forms of law that have been; an invitation to create new forms of law that might be; and a reason to conceive of gender and sexuality in a more progressive manner.

In 2022, the federal Department of Justice launched a public consultation on reforming the *Cuerrier/Mabior* framework, explaining that consultation is key to "creating a path forward that follows science and protects victims while reducing the stigma of those living with HIV."[191] The results of the consultation were overwhelming. Over 80 percent of individual respondents and 90 percent of organizational respondents confirmed that the current

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Carolina Academic Press, 2000); Edna Erez, Michael Kilchling & Jo-Anne Wemmers, eds, *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives* (Durham, NC: Carolina Academic Press, 2011); Estelle Zinsstag & Marie Keenan, eds, *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Dimensions* (New York: Routledge, 2017).

[190] Francisca Pou Giménez, "Conclusion: Taking Stock of Gender Equality" in Cook, *supra* note 1, 430 at 452.

[191] "Reforming the Criminal Law Regarding HIV Non-Disclosure: Government of Canada Launches Public Consultation" (20 October 2022), online: *Department of Justice Canada* <www.canada.ca/en/department-justice/news/2022/10/reforming-the-criminal-law-regarding-hiv-non-disclosure-government-of-canada-launches-public-consultation.html>.

approach to HIV non-disclosure must change.[192] I can see the potential of equality there; it simply needs writing.

[192] "What We Heard Report: NIV Non-Disclosure Public Consultation" (2023) at 4, online: *Department of Justice Canada* <www.justice.gc.ca/eng/cons/hiv-vih/rep-rap/pdf/What_We_Heard_Report-HIV_Non-Disclosure_Consultation_EN.pdf>.