

*The Impact of the Criminalization of HIV Non-Disclosure on
the Health and Human Rights of “Black” Communities*

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Abstract

The criminalization of HIV non-disclosure has become a hot topic for discussion and debate amongst human rights advocates, HIV/AIDS service providers, and people infected and affected by HIV/AIDS. This paper explores the inherent problems with HIV non-disclosure laws. These laws are ambiguous and pose a serious threat to public health policy and programming by obstructing the fundamental human rights of people infected and affected by HIV/AIDS. Using a human rights framework, this paper explores the impact of non-disclosure laws on the health and rights of African, Caribbean, and Black-Canadian communities and proposes ways to address the shortcomings of HIV non-disclosure laws and inadequate social policies.

Key words: HIV/AIDS, criminalization, non-disclosure, law, human rights, health, Black communities, policy

Introduction

The criminalization of HIV non-disclosure has been a hot topic for debate and has caused division in the community of individuals infected and affected by HIV and AIDS (McCaskell, 2010). In Ontario, people living with HIV/AIDS, AIDS service organizations, and human rights advocates have raised concerns about the expanding use of unjust, ambiguous, stigmatizing, and aidsphobic criminal laws in addressing HIV-related sexual offences (Mykhalovskiy et al., 2010; Betteridge, 2010). In this paper, I explore these laws in relation to HIV non-

disclosure cases and the denigrating affect they have on the health and human rights of African, Caribbean, and Black (ACB) - Canadian communities. I begin by outlining existing non-disclosure laws and legal decisions in Canada, while paying specific attention to the intersection of race with criminality and HIV/AIDS vulnerability. I then outline the impacts of non-disclosure laws on public health, the lived realities of ACB communities, and the larger community of people living with HIV and AIDS. This provides a foundation for the third section of the paper which gives a rights-based analysis of non-disclosure laws in support of the incorporation of public health approaches to the issue.

The Application of the Criminal Law

In recent years, the application of criminal law to circumstances of HIV exposure in sexual relations has emerged as a key HIV-related policy issue with important implications for ACB – Canadian communities. Canada has prosecuted, per capita, more persons for HIV-related offences than any other country (Cameron, 2009). The decision to resort to the coercive force of the law through the criminalization of HIV non-disclosure is thought to be a response to concerns about the rapid spread of HIV and the failure of many existing HIV prevention efforts (Open Society Institute, 2008). The Supreme Court’s decision in the *R v. Cuerrier* (1998) case led to the legal obligation of people living with HIV/AIDS to disclose their sero-positive status to their sexual partners before engaging in sexual activities that pose a “significant risk of transmitting HIV or causing

serious bodily harm” (also known as the significant risk test) (Mykhalovskiy et al., 2010; Cameron, 2009; Mykhalovskiy, 2011). Not disclosing one’s HIV-positive status can be deemed a fraud that impairs a person’s consent to sexual activity (Mykhalovskiy, 2011). However, with 104 prosecutions, dating back to 1989, the Canadian courts have not clearly defined the parameters for determining “significant risk,” leaving much uncertainty with respect to when there is a legal obligation to disclose (Mykhalovskiy et al., 2010).

A review of the non-disclosure cases reveals three forms of inconsistency in the application of the significant risk test: (1) in the evidence used to establish whether the sexual relation involved a significant risk of HIV transmission; (2) in how courts have interpreted this legal test; and (3) in actual court decisions ranging from aggravated sexual assault to attempted murder (Mykhalovskiy et al., 2010; McCaskell, 2010). Despite its wide use in non-disclosure cases across the country, the significant risk test is vague, inconsistently applied, and does not provide sufficient guidance for making court decisions. This legal dilemma has resulted in a slew of questionable court decisions regarding non-disclosure. For instance, people living with HIV and AIDS have been charged for exposing their partners to HIV, as transmission is not a requirement for conviction (Peck, 2010). Notably, HIV transmission occurred in 22% of the non-disclosure cases in Canada, yet a significant majority of these cases resulted in convictions (63%) and incarceration (Mykhalovskiy et al., 2010; Mykhalovskiy, 2011). HIV positive

people have also been charged for engaging in sexual activities that pose a minimal risk of HIV transmission such as oral sex and protected intercourse (Mykhalovskiy, 2011; Mykhalovskiy et al., 2010).

In applying criminal law to these cases, and in charging people living with HIV/AIDS with sexual assault, the court considers these sexual acts non-consensual offences to the state, rather than to an individual (which is the jurisdiction of civil law) (Peck, 2010). The severity of these punishments sheds light on the inherent aidsphobia contained in these laws as people living with HIV/AIDS are viewed as walking bio-hazards, their 'deviant, diseased' bodies are deemed a threat to public safety and are worthy of being criminalized. Second, a person who does not know their sero-positive status can still be charged and convicted under these laws. Thus, unlike in other crimes where a guilty mind (*mens rea*), as well as a guilty act (*actus reus*), are required for conviction, in cases of non-disclosure a guilty mind or the intent to harm another is not a requirement (Peck, 2010). The implications of the criminalization of HIV non-disclosure are very problematic for people living with HIV and AIDS, who face the risk of unusually severe punishments for their sexual acts and who are left unable to determine their legal obligations under the Criminal Code (Mykhalovskiy et al., 2010; McCaskell, 2010; Cameron, 2009). The list of charged individuals continues to grow as the lives of people living with HIV and AIDS are turned upside down (McCaskell, 2010).

Table 1: A list of some of the trends in HIV non-disclosure cases (Mykhalovskiy et al., 2010)
Of the 104 cases of HIV non-disclosure brought before Canadian courts between 1989 and 2009, 98 people have been charged with criminal offences. 47% of which were charged in Ontario.
89% of those charged in Ontario are men, the majority of whom identify as being heterosexual.
50% of the heterosexual men charged in Ontario since 2004 were identified as being African, Caribbean, or Black.
68% of criminal cases in Ontario resulted in convictions, 34% of which had no HIV transmission.
68% of the convicted cases in Ontario have resulted in prison terms.
A growing number of women living with HIV/AIDS are being put under house arrest for mother to child or 'vertical' transmission.
The statistics of convictions across Canada based on self-reported ethnicity is as follows: 33% Black, 5% Aboriginal, 38% White, and 5% Asian or South Asian.

Criminalization, HIV, and ACB Communities:

The surge of HIV non-disclosure cases highlights the moral discourses about HIV transmission, which have long linked this disease to 'deviant' sexual behaviors such as promiscuity and sexual irresponsibility. In turn, these assumptions about how one contracts HIV inform the criminality with which sero-positive people are viewed (Robertson, 2007; Williams et al., 2009; Stradler, 2003; Tharao, Massaquoi, and Teclom, 2006). These morally charged arguments about HIV and AIDS also inform and are informed by discussions about race and its intersections with gender, class, and sexual orientation. Over 90% of the national charges for non-disclosure have been against men (See Table 1). Heterosexual men were the single largest demographic category represented in

these cases, accounting for 72% and 71.4% of those charged in Canada and Ontario, respectively. Along the lines of race, Black men account for a higher proportion (50%) of the heterosexual men charged between 2004 and 2009 in Ontario (Mykhalovskiy et al., 2010). These trends in the HIV non-disclosure cases are particularly concerning because of the vagueness of the statutes and the inconsistency in their application, which may lead to the unfair and selective criminalization of already vulnerable groups such as ACB individuals, as has been the pattern in European countries (Cameron, 2009). The inherent aidsphobia in non-disclosure laws is made even more alarming in light of the disproportionate prevalence of HIV and AIDS within ACB communities. ACB communities compose merely 2.5% (783, 795) of the Canadian population and yet accounted for 12.9% of the positive HIV test reports and 11.1% of the reported AIDS cases in 2006 (Interagency Coalition on AIDS and Development, 2008). In 2005, with the exception of Aboriginal communities, the infection rate in the ACB community was 12.6 times higher than in Canadians of other races (Public Health Agency of Canada (PHAC), 2009). On a provincial level, ACB communities are amongst the groups most “at risk” for HIV/AIDS in Ontario. The ACB population accounts for 17% of the people living with HIV/AIDS and 27% of the new HIV infections in Ontario (Ontario Ministry of Health, 2009).

It is important to note that along other lines of identity, HIV/AIDS increasingly affects ACB newcomers, women, and youth. People from HIV

endemic regions such as sub-Saharan Africa and the Caribbean account for almost one quarter of the HIV cases in Ontario (PHAC, 2011). Despite myths and racially charged stereotypes that HIV is brought by newcomers from HIV-endemic countries, epidemiological data suggests that most ACB immigrants who acquired HIV were infected post-migration (Remis et al., 2007; Remis et al., 2009). This may have much to do with the fact that Canadian immigration policy and practice is raced and classed in a way that creates barriers to the permanent residency of people living with HIV/AIDS who lack the resources required to avoid relying on health and social services, i.e. people living with HIV/AIDS from under-resourced, endemic regions (Germaise, 2013). Inherent in these policies is the treatment of migrants living with HIV/AIDS as foreign bio-terrorists and threats to national public health. Another explanation for these trends include the fact that for many newcomers Canada is marketed as a rich Western nation, where health crises such as the spread of HIV go under the radar or are down-played (PHAC, 2011). As a result, newcomers may not readily engage in safe sexual practices because they don't perceive HIV to be a concern in such a 'rich and healthy' context (Tharao, Massaquoi, and Teclom, 2006).

Women account for a growing proportion of positive HIV test reports across Canada. Heterosexual contact is the primary mode of transmission amongst ACB women (PHAC, 2011). Nationally, Black women accounted for 18.8% of the HIV/AIDS cases amongst women between the years of 1998 and 2008

(Beausoleil, 2011). This translates to ACB women being 3 times more likely to be infected with HIV than their white counterparts (Robertson, 2007). Women comprise 50% of the new HIV infections in the ACB community. In turn, this contributes to an 85% increase in the number of Black women infected with HIV (Robertson, 2007; Williams et al., 2009).

Youth aged 15 – 29 accounted for 28% of all the positive HIV test reports in Canada between 1985 and 2005, making youth sexual behaviour a major public health concern (Spigelman et al., 2006; Williams et al., 2009). Along with Aboriginal youth, Black youth are diagnosed with HIV and AIDS at increasingly younger ages than youth of other ethnic groups (PHAC, 2009). This is more worrisome in light of the fact that the ACB population has a very large youth population (Shimeless and Bailey, 2011). Nearly 30% of the ACB community is under 15 and 16.7% of Black Canadians are between the ages of 15 and 24, and this compared to 13.5% for the overall Canadian population (PHAC, 2011).

These statistics represent the growing evidence that HIV and AIDS have increasingly become racialized, feminized, and marginalized diseases, following lines of existing socio-structural inequality (Flicker, 2010; Robertson, 2007; PHAC, 2011). In this, I am referencing a social determinants of health perspective, which refers to the social markers ascribed to an individual (i.e. race, gender, class, ethnicity, etc.) and the social and economic conditions that influence the health of the individual as well as their immediate community

(Raphael, 2004). Importantly, I also take up the point from the book *Race & Wellbeing: The lives, Hopes and Activism of African Canadians* (James et al., 2010) that racism (much like gender and class) is to be considered a social determinant of health, because it functions as a form of marginalization, inequality, and oppression within society and it is further supported and shaped by the broader context of institutional racism (James et al., 2010, p. 116). As a result, racism has direct links to health as it fosters an environment of not only inequality but also powerlessness and stress, which are contributors to health disparities (James et al., 2010).

In being adequately explained through a social determinants of health framework, it should come as no surprise that the HIV/AIDS epidemic revolutionized human rights discourses by making space on the international stage to discuss the intersections of sexuality, gender, race, economics, globalization, capitalism, and their impact on health and human rights. I will use a human rights lens to analyze the issue of the criminalization of HIV non-disclosure because such a framework is an essential, but missing, element in uncovering the problems inherent in these cases (Petchesky, 2003). The paragraphs below will provide the necessary background for my discussion of human rights. I will outline several ways non-disclosure laws are detrimental to the lived experiences and behaviours of people living with HIV/AIDS and to the public health of the larger community

infected and affected by HIV and AIDS (with particular attention to the impacts on ACB communities).

HIV non-disclosure laws challenge public health and the objectives of the Health Protection and Promotion Act (HPPA): legislation created by the Board of Health that mandates the existence and functions of medical officers and more minor boards of health. HPPA is also a statute that prescribes the provision for the organization and delivery of public health programs and services; prevention of the spread of disease and the promotion and protection of the health of the people in Ontario (Association of Local Public Health Agencies, 2004; Mykhalovskiy, 2011). This is very problematic to people infected and affected by HIV/AIDS for the following reasons (which I will take up in the paragraphs below)

(Mykhalovskiy et al., 2010; McCaskell, 2010): *Criminalization is a form of systemic oppression for ACB communities; there is an unfair burden of disclosure; medical-scientific evidence questions the definition of significant risk; criminalization undermines the law; and the duty to disclose undermines public health.*

Criminalization is a form of systemic oppression for ACB communities

Arguments in support of HIV non-disclosure laws focus on individual, moral responsibility for HIV transmission, while overlooking the role of powerful structures and institutions. However, as alluded to, the criminalization of non-disclosure is of urgent concern for ACB communities that are disproportionately

affected by the HIV/AIDS epidemic, a result of structural violence, marginalization and oppression (Robertson, 2007; Williams et al., 2009). ACB communities remain one of the most socially, economically, and politically marginalized groups in Canada. These contemporary forms of systemic discrimination inhibit financial and educational opportunities for upward mobility and access to HIV resources while gender norms, entrenched in diverse and complex histories of colonialism and slavery prescribe female subordination, and homophobia. Along with the intersections of racism, poverty, stigma, aidsphobia, discrimination, and marginalization, criminalization is but another form of oppression experienced by ACB communities (African and Caribbean Council on HIV/AIDS in Ontario (ACCHO), 2010).

The discrimination of Blacks by Canada's criminal justice system has been well documented and dates back to the racist practices of the slavery era (Mykhalovskiy et al., 2010; ACCHO, 2010). The majority of the HIV non-disclosure charges laid since 2004 have involved Black male defendants. It is important to note that all of the cases that have led to convictions in non-disclosure cases have been the result of victim-driven complaints. This is important because heterosexual Black men are convicted at an increasingly disproportionate rate, in comparison to Black men who have sex with men and men of other races. These different rates of conviction could reflect a host of different factors, including the social conceptions of the power dynamics within

heterosexual sexual cultures which are informed by sensational and ill-informed media coverage that vilify Black men (Betteridge, 2010; Mykhalovskiy et al., 2010). These media portrayals, which include facets of public shaming such as police authorized public advisories and press conferences for people living with HIV/AIDS under investigation, tend to focus on cases involving Black male defendants (e.g., *R v. Aziga*) (Cameron, 2009; Mykhalovskiy, 2011). In turn, this contributes to stigmatizing and dichotomously pathological conceptions of the ‘Black, promiscuous, sexually irresponsible, male predator’ and the ‘innocent, pure, White, female, victim.’ These stereotypical conceptions of race, gender, sexuality, sexual orientation, and criminality colour public understanding of non-disclosure cases and may inform who feels safe enough to disclose their positive status to their partners, as well as who benefits from court decisions in the criminal justice system (Mykhalovskiy et al., 2010; Symington, 2009; ACCHO, 2010; Mykhalovskiy, 2011).

Criminalization of non-disclosure is also of concern for ACB women who are susceptible to HIV due to factors such as inadequate information or misinformation; sexual violence within and outside of marriage; and gender inequality, which may result in dependency on male partners and the inability to negotiate safe sex. In fact, domestic violence may put ACB women at greater risk for HIV than in situations of consensual sex, yet the criminalization of non-disclosure does not prevent or address these issues of gender inequality (Open

Society Institute (OSI), 2008). Instead, the criminal law has been used to control women living with HIV/AIDS who vertically transmit to their children (Betteridge, 2010). In many cases, sero-positive women are judged and criminalized for being pregnant, for being unaware of their sero-positive status, or for having limited access to drugs. Due to the ambiguities of non-disclosure laws, access to HIV resources and testing bring ACB women no protection from criminalization. HIV non-disclosure laws pose a huge threat by criminalizing and institutionalizing ACB individuals and further splintering ACB families and communities.

The unfair burden of disclosure

Non-disclosure laws inadvertently send the message that sero-negative people do not have to take any responsibility for their sexual behaviour except to resort to the law after they have had unsafe sex. In turn, this erodes long-standing public health messages about safer sex being a shared responsibility of both HIV-positive and HIV-negative sexual partners. People who are sero-negative should assume they are taking a chance or risk every time they consent to having unprotected sex (McCaskell, 2010; Mykhalovskiy et al., 2010; Cameron, 2009). The question then remains, why is the onus on people living with HIV/AIDS to disclose? The persistence of aidsphobia makes disclosure no simple matter for people living with HIV/AIDS. Such revelations can cost people living with HIV/AIDS their jobs, social networks, emotional supports, friends, families, and

in extreme cases, their lives due to violent, discriminatory acts (Mykhalovskiy et al., 2010; Betteridge, 2010; Cameron, 2009). The criminal law does not assess the myriad of social obstacles to disclosure which, due to historic and contemporary factors, may be of particular concern for racialized people (ACCHO, 2010). For instance, within Canadian society, culture and religion create moral readings of HIV and AIDS that link the diseases to stigmatizing sexual behaviour such as male homosexuality and female promiscuity (Robertson, 2007; Williams et al., 2009). Due to this stigma and homophobia, many communities, and specifically ACB communities, partake in social distancing, isolating themselves from information and discourse about HIV/AIDS. In turn, this fosters a false sense of security about the disease. Meanwhile, there remains a culture of tolerance for male promiscuity and low rates of condom use, which exacerbate the HIV/AIDS epidemic (Robertson, 2007). In a Canadian study, researchers found that the legal standard for disclosure conflicted with the practical realities of sexual decision-making and activity for both sero-positive and sero-negative people (Mykhalovskiy et al., 2010). This creates further problems because a substantial proportion of HIV transmission is accounted for by people who do not know their status (Mykhalovskiy et al., 2010).

Additionally, disclosure provides no guarantee against criminal charges, prosecution, or legal entanglements (Mykhalovskiy et al., 2010; Mykhalovskiy, 2011). People living with HIV/AIDS have few means by which to prove that they

have disclosed to their sexual partners. Further, disclosure challenges interpersonal relations if a partner can lay a charge on a person living with HIV/AIDS whenever they feel like it. This possession of power by the sero-negative partner can be threatening and isolating for a person living with HIV/AIDS (Mykhalovskiy et al., 2010). One study found that ACB women living with HIV/AIDS who were newcomers to Canada were particularly concerned about the potential for false claims by their partners that they had not disclosed their HIV-positive status (Mykhalovskiy, 2011). These fears of manipulation were further complicated if the women depended on their partners for sponsorship and economic supports (Mykhalovskiy, 2011). Disclosure requires intimacy and trust; it is a process rather than a single event (ACCHO, 2010). Society's use of criminal law in these cases needs to consider the complex realities and social contexts of living with HIV/AIDS; the daily barriers and personal costs of disclosure; and the complex ways criminalization further stigmatizes HIV and AIDS, inhibiting the process of disclosure.

Medical-scientific evidence questions the definition of significant risk

Non-disclosure laws are inherently aidsphobic as they are not applied to cases of exposure to other, often more infectious, diseases and sexually transmitted infections (STIs). They are used to censor the sexual autonomy of people living with HIV/AIDS, while treating a chronic, manageable condition such as HIV as if it were a death sentence (Cameron, 2009; Mykhalovskiy et al.,

2010). Legally targeting HIV, which has a relatively low transmissibility compared to other STIs such as syphilis, gonorrhea, or hepatitis, is not only discriminatory, but it paints the picture that sero-positive people are sexually irresponsible. Evidence has demonstrated that during unprotected vaginal intercourse involving an HIV-positive person and an HIV negative person, there is roughly a 1 in 1000 chance of transmission. Comparatively, unprotected anal intercourse has a higher per-act risk ranging from 1 in 50 to 1 in 100 (Mykhalovskiy et al., 2010; Canadian HIV/AIDS Legal Network, 2011). However, condom use and Highly Active Anti-retroviral Therapy (HAART) drugs (which decrease viral load and the progression of HIV) greatly reduce the risk of HIV transmission (Mykhalovskiy et al., 2010). Oral sex is also considered a “low” or “negligible risk activity” (Canadian HIV/AIDS Legal Network, 2011). Thus, these acts may logically not constitute a “significant risk” and should not obligate a person with HIV/AIDS to disclose (Canadian HIV/AIDS Legal Network, 2011). However, Canadian courts have yet to consistently apply this medical-scientific evidence that outlines the biology of HIV transmissibility (Mykhalovskiy et al., 2010; Canadian HIV/AIDS Legal Network, 2011; Cameron, 2009).

Criminalization undermines the law

Cases where a person living with HIV/AIDS lies, deceives, and infects another are rare, thereby, deeming criminal sanctions inappropriate for dealing

with issues of non-disclosure (McCaskell, 2010; Mykhalovskiy et al., 2010; Cameron, 2009). There is no scientific data supporting the claim that criminal prosecution, or the threat thereof, has any appreciable effect on encouraging people living with HIV/AIDS to disclose to their sexual partners or that these laws deter behaviour that poses a risk of transmission (OSI, 2009; Cameron, 2009; Mykhalovskiy, 2011; McCaskell, 2010). Public health researchers, legal scholars, social scientists, and others have cautioned that criminalizing HIV exposure/transmission may undermine established public health policies and local interventions geared at reducing aidsphobia and preventing the spread of HIV infection by discouraging people living with HIV/AIDS from seeking health services (HPPA, 1990; Mykhalovskiy et al., 2010). Criminalizing non-disclosure has been demonstrated to increase the discrimination against people living with HIV/AIDS, while providing little guidance as to what forms of sexual activity must be preceded by disclosure, thereby inciting anger, fear, and confusion on the part of HIV positive people (Mykhalovskiy et al., 2010; OSI, 2009; Petchesky, 2003; Mykhalovskiy, 2011).

Another negative consequence of non-disclosure laws is that equating non-disclosure with serious crimes such as aggravated sexual assault (which carries a maximum penalty of life imprisonment) is an incredibly problematic legal definition. In classifying otherwise consensual sex as a violent, sexual crime, these definitions trivialize real sexual offenses that disproportionately affect

women (Symington, 2010; Mykhalovskiy, 2011). This becomes a more pressing issue in light of the fact that a) in one case of non-disclosure in Canada a woman was charged for not disclosing to a man who sexually assaulted her (Symington, 2010). This case blurs the line between “the guilty” and “the innocent,” the “victim” and the “offender” in discourses regarding criminalization of non-disclosure (Symington, 2010). And b) criminalization often oppresses women because for many social, biological and gendered reasons women, more so than men, are often subjected to health care institutions for things such as gynecological check-ups and prenatal care. Thus, women are often the first partner to discover their HIV status, putting them at increased risk to be prosecuted (Cameron, 2009).

The duty to disclose undermines public health

Inconsistencies with the definition and application of the significant risk test have created confusion amongst public health workers within AIDS service organizations about what sexual activities present a risk of criminal prosecution. This has resulted in mixed messages in HIV prevention counseling regarding the legal obligation of disclosure for sero-positive people (Mykhalovskiy et al., 2010; Cameron, 2009; Mykhalovskiy, 2011). Despite the medical-scientific evidence of risk, research suggests that some public health service providers conflict in their advice for disclosure of protected anal and vaginal intercourse, and unprotected oral intercourse (Mykhalovskiy et al., 2010). These mixed messages on the part of

service providers yield confusing and contradictory advice for their sero-positive clientele who may be encouraged to disclose in ways beyond their legal obligation, irrespective of the actual transmission risk of the sexual activities they engage in (Mykhalovskiy et al., 2010; Mykhalovskiy, 2011).

These laws have challenged the ability of front-line workers to support and build trusting, open relationships with people living with HIV/AIDS because, out of the need to protect their clients, as well as themselves, service providers feel obligated to constantly counsel sero-positive people to disclose (Mykhalovskiy et al., 2010). Further, frontline service providers have to balance their efforts to make clear to people living with HIV/AIDS the limits of their client confidentiality with their efforts to create trusting client-provider relationships.¹³ In challenging the trust of their clients, ASOs run the risk of destroying otherwise successful support programs for preventing HIV transmission because people living with HIV/AIDS may feel isolated in censoring what they say to frontline service providers and may avoid accessing HIV education and support services altogether. Some people living with HIV/AIDS may avoid getting tested for HIV, inaccurately thinking that if they do not know their status, they cannot be charged (McCaskell, 2010; Mykhalovskiy, 2011).

¹³ Notably, under the HPPA, there is no legal obligation to disclose or to comply with the professional advice to disclose (1990). Further, under section 25 and 77 of the HPPA, to maintain public health, physicians and health practitioners and providers have a legal duty to report the personal information of clients with diseases such as HIV to their public health unit or board (1990).

This is deleterious for ACB communities because these communities have, and still continue to face, multi-layered experiences of colonization and racism by Western institutions that leave them at risk for poor health care utilization (Robertson, 2007; Williams et al., 2009). Due to systemic racism, there exists race-based geographic allocation of sexual health clinics and resources to the increasingly gentrified downtown core of cities like Toronto. In turn, this leaves Black communities (which are primarily located at the margins of the city) severely under-serviced (Robertson, 2007; Flicker et al., 2010; Toronto Teen Survey, 2010). Further, ACB communities are more likely to receive a lower quality of care by health practitioners who are predominantly white and may hold racist views. As a result of the vast extent of the institutional oppression and structural violence faced by ACB communities, these groups have developed immense distrust of and dissatisfaction with government, research, and health care institutions (Robertson, 2007; Williams et al., 2009). In this, the law operates to further marginalize ACB communities from accessing services, treatment, supports, and information, all of which help to mitigate the impacts of HIV/AIDS (OSI, 2008). This challenges section 5 of the HPPA, which outlines the requirement that every board of health ensure the provision of health programs and services to control the spread of diseases such as HIV and promote health protection (1990). As a result of these various factors, the duty to disclose one's HIV status imposed on people living with HIV/AIDS under the criminal law

cannot be reconciled with the duty to prevent the spread of HIV imposed by public health authorities under the HPPA (Mykhalovskiy et al., 2010; HPPA, 1990).

It is apparent that non-disclosure laws have far-reaching, negative impacts on public health and these laws are particularly deleterious to people living with HIV/AIDS, as they affect the behaviors and decisions of sero-positive people; the work of providers; counselor-client relationships; and the flow of HIV resources and information (Mykhalovskiy, 2011). As such, the absence of dialogue between the relatively distinct domains of public health and criminal law is very problematic and this has grave consequences for the effective management of the HIV/AIDS epidemic and the health and human rights of people infected and affected by HIV/AIDS (Mykhalovskiy, 2011; Cameron, 2009). In the paragraphs below, I will demonstrate the serious threat posed to human rights by non-disclosure laws.

Theorizing the Role of Rights

Interconnections

HIV/AIDS thrives in environments prone to human rights violations and inequality, locating the body at the crossroads of race, class, gender, sexual orientation, geography, and other social constructs. Thus, HIV sheds light on the fact that rights cannot and do not exist in isolation; they are as indivisible and interdependent as the multiple and complex identities people assume. Sexual,

human, legal, social, personal and macro-economic rights are all interconnected. For instance, the right of ACB communities to access health services is interconnected with, and is as important as, the legal right to be free from discrimination and violence (e.g., structural violence of the law), both of which inhibit access to health services (Petchesky, 2003). Hence, the obstruction of one right leads to the obstruction of the others. The obstruction of legal rights obstructs sexual rights as non-disclosure laws challenge: 1. The bodily integrity of people living with HIV/AIDS by inhibiting their right to have their bodies respected by others and to be free from abuses and discrimination. These laws reaffirm the stigmatization of people living with HIV/AIDS as bioterrorists, devoid of dignity and humanity (Petchesky, 2003; OSI, 2009). 2. These laws challenge the right to personhood and the sexual autonomy of people living with HIV/AIDS as they send the message that people living with HIV/AIDS are sexually irresponsible people whose deviant sexual appetites must be monitored and controlled (Petchesky, 2003; OSI, 2009). In this, non-disclosure laws operate to regulate and impede the sexualities of people living with HIV/AIDS, deeming their sexualities and sexual relationships unacceptable. 3. In deterring people infected and affected by HIV/AIDS from accessing health resources, these laws challenge the right of all individuals (irrespective of gender, race, physical ability, etc.) to the conditions under which they can make healthy, responsible, and safe choices about their lives. These conditions include access to information,

counseling, and other health services that are needed for comprehensive sexual and reproductive health education and HIV prevention (Petchesky, 2003; OSI, 2009). 4. In disproportionately criminalizing members of the ACB community, these laws challenge the right of every person to be respected, irrespective of group affinities, traditions, and culture (Petchesky, 2003; OSI, 2009).

The interdependence of different kinds of rights makes sense in light of the fact that the “self” extends beyond bodily integrity to include family, culture, and social and economic relations, which encompass broader rights such as social and macro-economic rights. Likewise, health has been extended to holistically encompass physical, mental, and social wellbeing (OSI, 2009). Thus, true empowerment through the guarantee of rights can only be achieved by transforming the overall social, economic, and cultural systems in which subordination is entrenched (Petchesky, 2003). This is exemplified by the fact that non-disclosure laws were partly enacted to protect women from the alarming rates of male-to-female HIV transmission (OSI, 2009). However, these laws endanger and further oppress women, and specifically ACB women, by way of not acknowledging the deep imbalances of power and practices of subordination that characterize relations between men and women, leaving many females subject to forced and coerced sexual intercourse. Non-disclosure laws do not address the epidemic of gender-based violence or the deep economic, social, and political inequality at the root of women’s and girls’ disproportionate vulnerability to HIV.

Instead, these laws pose a threat to women who are more likely than their male counterparts to be subjected to health systems that discover their sero-positive status. These revelations put women at risk for abuse, isolation and exploitation by their partners and communities (OSI, 2008). These revelations also put women at risk for prosecution under the very criminal law “intended” to protect them because it is often the partner who discovers their own sero-positive status first who is subject to the law (OSI, 2009; Petchesky, 2003; Symington, 2010). This demonstrates that non-disclosure laws are often directed at socially and economically marginalized groups. Hence, these laws insufficiently protect the interests of women and/or the ACB community because they are one-dimensional. They overlook the fact that rights are dense, dynamic, immutable, fluid, and contextualized by political discourse and the intersections of power relations along the lines of race, class, gender, geography, etc. Frustratingly, in the twenty-first century, the legal system has yet to amass the tools to critically and consciously understand and address this complexity (Petchesky, 2003; OSI, 2009).

Policy and Rights

Macroeconomic rights and policies, which are imbued with social values and power relations, can yield enabling or inhibiting environments for the realization of health and human rights. As such, macroeconomic regimes cannot be left out of the picture of human rights. The HIV/AIDS movement has shed

light on the fact that state responsibility and policy decisions are key to securing the rights of adequate health care (Petchesky, 2003). Health care is a public issue of social justice, rather than a private/individual matter - as neoliberal idealism supports. Contrary to the ideologies perpetuated by the media, the roots of diseases like HIV/AIDS are embedded in structural violence and social inequalities, rather than individual pathologies (Petchesky, 2003).

Governments are reluctant, however, to implement and scale-up HIV-related services because they are controversial and resource intensive. This is illustrative of the fact that governments are notorious for prioritizing civic and political rights over economic, social, and human rights because the former are cost free and require only that the government abstain from activities that violate citizens (do no harm). Meanwhile, the latter are affirmative rights that require that governments take action (which often equates to spending money) to ensure citizens the enjoyment of these rights (OSI, 2009; Petchesky, 2003). Notably, this cost analysis of guaranteeing some rights over others confirms that the current capitalistic climate of free-market priorities has permeated political decisions and has led to neoliberal approaches that fail to address macroeconomic and social inequalities (Petchesky, 2003). This makes sense as despite the fact that the Canadian government signed the *2001 Declaration of Commitment on HIV/AIDS* and the *Political Declaration on HIV/AIDS* agreements that declared the intent to take action on HIV and human rights, but few programs have yet been

implemented that secure the rights of people infected and affected by HIV/AIDS. Further, political figures are reluctant to commit to addressing the issues surrounding the HIV/AIDS epidemic because HIV is perceived to be a disease related to “deviant,” “immoral” behaviours and groups. There has been a low response on the public agenda to provide women, Aboriginals, ACB communities, and other marginalized groups access to HIV/AIDS information and resources because these groups lack the political power (and money) needed to keep these issues a high priority on the political agenda (OSI, 2008).

Instead, the Canadian government has opted to shift the burden of HIV onto the individual (i.e. people living with HIV/AIDS) through the enactment of non-disclosure laws that fail to empower. In this, HIV non-disclosure laws are poor substitutes for the enactment and enforcement of laws and policies that address social ills such as gender-based violence and social and economic inequality (OSI, 2009). Internationally, only 66% of countries have laws in place to protect the right of people living with HIV/AIDS to be free from discrimination. Thus, 30 years into the HIV/AIDS epidemic, human rights remain an important but missing element from the political fight against AIDS. The lack of political support for the human rights of people living with HIV/AIDS greatly reduces their access to HIV information, resources, and supports, all of which further exacerbate the epidemic. UNAIDS regards this as a “serious

mismanagement of resources and a failure to respect fundamental human rights” (OSI, 2008).

The HIV/AIDS movement has been primarily driven by AIDS service organizations, volunteer groups, and activist groups, which tend to be service and project oriented and operate within, as well as challenge, existing systems of inequality. However, some of these organizations and groups are often under-resourced and face censorship and legal force, which restrict their independent voice for effective AIDS policies (OSI, 2009). For instance, despite the resource-intensive work AIDS service organizations engage in, such as counseling seropositive people on disclosure, implementing support programs, offering health services, etc., these organizations (especially those catered to marginalized communities) have seen a steady decline in funding opportunities, resources and public support. This has greatly limited their ability to serve people infected and affected by HIV/AIDS (ACCHO, 2010). Thus, HIV/AIDS activism calls for the political will of responsible and accountable governments to implement HIV-related strategies.

Conclusion

The World Health Organization and articles 1 and 3 of the Universal Declaration of Human Rights all state, to varying degrees, that all human persons have equal and inalienable rights to the highest attainable standard of health, including that of life, liberty, and security of person. These fundamental human

rights also include sexual and reproductive rights and the access to care thereof (Petchesky, 2003). However, these documents have not been used to make any real progress in transforming the sexual health and rights agenda from noble rhetoric to actual policies and services. In deterring people from accessing HIV/AIDS services, perpetuating aidsphobia and ignoring the structural factors that cause HIV/AIDS vulnerability, non-disclosure laws inhibit access to health services that are considered provisions under the fundamental human right to health (OSI, 2009; Petchesky, 2003). Ironically, as long as people are afraid to get tested for HIV, as long as women lack the power to negotiate condom use, and as long as people infected and affected by HIV/AIDS are afraid of discrimination and criminalization, they are unlikely to consistently act in ways that ensure their own safety and that of others (Cameron, 2009). In this, the far-reaching impacts of criminalization cannot be ignored. This suggests the need for coordination between the silos of public health and the criminal justice system to 1) allot public health (which pays greater attention to the intersection of rights and the social context of disclosure) a more central role in managing cases of non-disclosure because under the HPPA, public health has the jurisdiction to prevent the spread of diseases such as HIV (Mykhalovskiy et al., 2010; Betteridge, 2010; Cameron, 2009; Mykhalovskiy, 2011). As such, it is reasonable to suggest that public health be the first of the two institutions to intervene in non-disclosure cases. And 2) to encourage the criminal justice system to enact critical laws that prohibit

aidsphobia and create the empowerment of people infected and affected by HIV/AIDS so they are subject to clearly defined and just laws, know their rights, and can mobilize around them.

Importantly, in 1978, the Alma-Ata declaration (Section 1) embedded the need for community participation and the valuation of local knowledge systems in improving public health. In Canada, the Alma-Ata was succeeded by the 1986 Ottawa Charter of Health Promotion as well as by the growing belief in the 1980s and 1990s that education directly impacted health outcomes. These historical milestones mark the foundational supports for the integral role of public education, empowerment, and discussion in reducing HIV/AIDS-related discrimination in all levels of society (individual, community, and organizational) (Salehi, 2010). Despite this, in Canada, there has been no public participation of policy developers (e.g., MPPs, MPs, Attorney Generals, Ministers of Health and Justice) in debates critically analyzing the criminalization of HIV non-disclosure. This is a contrast to comparable jurisdictions such as Switzerland, Australia, England, and Wales. Further, there has been no public discussion about the utility of scientific evidence to prove the risks of HIV transmission and thus, the appropriate scope of the application of the criminal law (Mykhalovskiy et al., 2010). There is a need for such debates to not only heighten the critical consciousness of the public, but also to engage community experts, people infected and affected by HIV/AIDS, the criminal justice system, public health

ministries, researchers, and policymakers in a dialogue and social-marketing campaign to help de-mystify HIV/AIDS. This is of particular relevance to ACB communities, given the prescriptive forces of rumours, gossip, and blame regarding HIV/AIDS. Further, there is a lack of visibility of spokespersons from the ACB community in decision-making and policy processes. As a result, policymakers need to engage with ACB communities to revise and enact policies that will better meet the HIV treatment, care, and support needs of these communities (Interagency Coalition on AIDS and Development, 2008; OSI 2008; OSI, 2009). Steps should also be taken to create a national network of organizations working on HIV/AIDS initiatives and research in ACB communities.

In closing, HIV non-disclosure laws have had a denigrating effect on the health and human rights of ACB communities, as well as on the broader community of individuals infected and affected by HIV/AIDS. Few efforts have been made to incorporate a human rights framework as support for the wider use of public health, and not only criminal law, in cases of HIV non-disclosure. However, it is precisely such a practical transformation of human rights from noble rhetoric to effective policy efforts, empowering programs, and public discourse that is required.

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