

The **Public Health**
Implications of

Criminalizing HIV Non-disclosure, Exposure and Transmission

**Report of an
International Workshop**

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Introduction

Criminalizing people living with HIV/AIDS who do not disclose their HIV-positive status to sexual partners or who sexually transmit HIV to others is a prominent global HIV/AIDS policy concern. In recent years, national and international non-governmental organizations (NGOs), AIDS service organizations (ASOs), people living with HIV/AIDS, human rights advocates, lawyers and researchers have expressed concerns about a growing reliance on the criminal law to respond to presumed HIV transmission risks.

The critical literature on HIV-related criminalization brings together a range of interconnected concerns.¹⁻²⁰ At the broadest level, authors have posed questions about how HIV-related criminalization is part of a growing use of the criminal law to address complex public health problems.^{19,20,45} They have also situated HIV-related criminalization within a history of failed criminal law efforts to govern complex sexual activities.^{25,57} Much of the critical literature raises specific concerns about the nature, scope and blunt application of criminal laws to circumstances of presumed HIV transmission risk. For example, some critics have argued that criminal laws regulating HIV non-disclosure, exposure and transmission have not been appropriately informed by the current state of scientific research on HIV transmission risk.^{1,8,11,16,18,48} Others have expressed concerns that such laws punish behaviours that are not blameworthy and have the potential to be enforced in discriminatory ways.^{25,26,45,55}

One prominent trajectory of critique in the literature focuses on the negative impact of criminalization on public health and community-based efforts to prevent HIV transmission and to provide treatment, care and support services to people living with HIV/AIDS.^{17-18, 21-31} Here, specific concerns have been raised about the criminal law's potential to: heighten HIV-related stigma and discrimination,^{17,18,19,24} especially in relation to racialized communities;²¹ disempower women living with HIV who are vulnerable to partner violence;^{16,28} discourage HIV testing;³¹ disrupt access to HIV care, treatment and support services;¹⁸ and erode public health norms that promote mutual responsibility for HIV prevention.^{24,26}

In recent years, social scientists, public health researchers and legal scholars have responded to claims about the public health implications of criminalizing HIV non-disclosure, exposure and transmission by conducting original empirical research.³²⁻⁵² Studies have been published demonstrating that the application of the criminal law disproportionately impacts marginalized people living with HIV/AIDS^{32,33,48,49} and that the criminal law itself can exacerbate HIV-related stigma,^{36-39,41} interfere with access to HIV testing,⁵¹ compromise HIV prevention counselling and complicate relations between health care providers and people living with HIV/AIDS.^{40,48,50} For a recent review of some of this research see O'Byrne et al. (2013).⁵³

On April 27th and 28th 2013 an international workshop was held in Toronto, Canada to support, encourage and further develop emerging research on the public health implications of criminalizing HIV non-disclosure, exposure and transmission. It was the first international meeting focused exclusively on sharing, critiquing and strengthening new empirical research on this topic.

This report explores three key themes that arose over the course of workshop discussions. The report also offers suggestions for new directions for future research on the public health implications of criminalizing HIV non-disclosure, exposure and transmission.

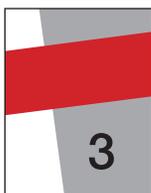
The Workshop

The key goals of the workshop were to enhance the quality of research, document and explore solutions to key methodological, theoretical and knowledge translation challenges facing the field, establish new research priorities and identify opportunities for novel research collaboration. The workshop sought to meet these goals through face-to-face dialogue and the exchange and critique of work-in-progress papers written by leading researchers from the social sciences, law and public health.

Workshop participants came from Canada, the United States (US) and England and included people living with HIV/AIDS, university researchers, public health professionals, doctoral and post-doctoral students, lawyers, advocates, activists, people who work in community-based AIDS and other service organizations and consultants. The list of workshop participants is attached as Appendix A.

Proceedings began on the evening of April 26th with a public keynote lecture given by Joanne Csete entitled “Sex, Drugs and Minimalist Visions: The Legacy of HIV for the Human Rights Enterprise.”⁵⁷ Reflecting on the current state of the HIV epidemic, Csete explored the progress that has been made in using a human rights framework to respond to problematic uses of the criminal law to regulate HIV, sexual activity and drug use. The lecture was attended by people living with HIV/AIDS, community and health care providers, advocates, students and academic researchers. It is available as a video podcast at <http://www.srchiv.ca/en/index.php/knowledge/video>.

The workshop took place on April 27th and 28th. A total of 13 work-in-progress papers were presented over the course of six panels. In each panel, work-in-progress papers were presented by the author(s), commented on by two discussants and then discussed by workshop participants. The work-in-progress papers were made available to participants in advance of the workshop. Two additional sessions took place on the 28th. The first was dedicated to examining public health case management approaches; the second, a closing session, identified new directions for research. The workshop agenda, which includes the titles of work-in progress papers, their authors and discussants, is reproduced as Appendix B.



Key Themes

The work-in-progress papers, the presentations and the discussions they stimulated were varied. For example, the topics addressed by papers ranged from the unequal application of criminal laws to minority populations, analyzed by Trevor Hoppe in his paper “Interpreting disparate outcomes in Michigan trial court HIV non-disclosure convictions: The modifying effect of the complainants’ gender” to Daniel Grace’s discussion of the implications of using model laws to criminalize HIV transmission in West and Central Africa in his paper “Troubling ‘best practice’ replications: The use of model law to criminalize HIV transmission transnationally.”

In this report we cannot fully capture the breadth and depth of all workshop materials and discussion. Instead we focus on three overarching themes that were raised during the workshop: (1) the relationship between research and advocacy; (2) the implications of HIV-related criminalization for public health practice; and (3) the potential and limits of public health research for criminal law reform. Our treatment of these themes is intended to provide insight into some of the significant issues raised by workshop participants and to set the context for the directions for future research identified in the final section of this report.

The relationship between research and advocacy

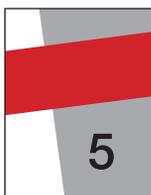
Questions about the relationship between research and advocacy are particularly salient in the context of the criminalization of HIV non-disclosure, exposure and transmission. Advocates in multiple jurisdictions have drawn on various forms of research evidence in their work against HIV-related criminalization and the topic is an area of growing social science research activity. Most work on HIV-related criminalization is applied, engaged research, driven by concerns about the potential negative consequences of criminalization, rather than so-called “high church” scholarship motivated primarily by intellectual curiosity and theory building.

Workshop discussions about the relationship between research and advocacy were framed by two papers that opened the first day of proceedings. In “How can the social sciences support global anti-criminalisation advocacy?”, Edwin Bernard reported on the preliminary results of a survey that examined how advocates from Australia, Denmark, England and Wales and the US have used research. The paper adds to our understanding of the complex relationship between advocacy and research. It highlights how advocates enlist research in law reform and repeal efforts that are shaped by local social, political and epidemiological contexts and the intersection of laws, policies and practices in given jurisdictions. Rather than imagining a “magic-bullet”—the one study that provides a fully convincing evidence-based argument about the public health impact of criminalization—Bernard shows how activists combine social science research with other forms of knowledge. The latter include, for example, evidence about the scope of prosecutions, scientific research on HIV transmission risks, moral arguments

about trust, blame and responsibility for HIV prevention, and human-rights considerations. This combined evidence strategy has been used in a wide range of advocacy efforts, including media work, community education, interventions in court cases, policy reform and direct advocacy with politicians, legislators and decision makers.

In “Advocacy, research, and the criminalization of HIV exposure”, Zita Lazzarini and Carol Galletly reported work-in-progress findings from survey research involving 10 participants (five advocates and five researchers). Their research explored a range of issues arising out of participants’ involvement in HIV-related criminalization research and/or advocacy. Participants were asked about their conceptions of research and advocacy, values, accomplishments, notions of progress and understandings of evidence. The paper highlights substantial common ground between advocates and researchers on key issues as well as differences of perspective that suggest sites of potential tension and areas in need of negotiation. Interestingly, Lazzarini and Galletly’s findings suggest that the boundaries between research and advocacy can be quite porous: a number of their participants stressed that they engage in both research and advocacy, or switch between roles depending on the exigencies of particular circumstances that they confront. Still, researchers tended to view better and more research as an indication of progress, while those who identified primarily as advocates viewed specific changes in policy and law as markers of progress. Somewhat counterintuitively, several researchers viewed narrative evidence and personal stories as a more persuasive form of evidence than advocates, who argued that authoritative research evidence documenting negative public health impacts was the most important form of evidence to bring forward to policy and law makers.

Subsequent workshop discussion about the relationship between research and advocacy was wide-ranging. The tendency in discussions was to problematize and open up areas of reflection rather than to propose definitive answers to specific topics. There was much talk about the need to consider the respective relationships of research and advocacy to social change. The value of rethinking rigid boundaries between those who advocate and those who research resonated strongly among participants, with a number emphasizing the need for greater reflexivity in how researchers formulate the questions they pose, interpret their results, understand their relationships to advocates and view the importance of intersections of race, class, gender and sexual orientation to their own work and to the field more generally.

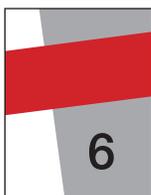


While there was general agreement among participants that researchers and advocates should work in collaboration with one another, how such collaborations might be formed and what they might look like in actual practice was an open question. The extent to which research should be shaped by the knowledge needs of activists was one matter of considerable

debate. Some participants argued strongly for research on HIV-related criminalization to be formulated, from the outset, in relation to advocacy goals. Here, collaboration might involve researchers partnering with advocates throughout the research process or consulting with them during the design phase with the goal of formulating studies that support advocacy goals. By contrast, those preferring a more “neutral” stance to social research argued that researcher distance from advocacy is necessary in order for study findings to be perceived as legitimate by policy and law makers. Still others noted that framing research too closely in terms of prevailing policy considerations runs the risk of creating research that meets the needs of policy makers, but not those of other knowledge communities.

The issue of scholarly autonomy arose in the context of discussions about research findings that are conflict-inducing and/or contrary or unhelpful to advocacy goals. Workshop discussions emphasized that the criminalization of HIV non-disclosure, exposure and transmission is a controversial, morally-fraught issue and that research findings on the topic can have unintended consequences for people living with HIV/AIDS. Findings that contradict or undermine advocacy claims can be a particular source of tension between advocates and researchers. Efforts on the part of advocates to influence how such research is communicated publicly can be understood by researchers as disrupting scholarly autonomy. To respond to such complexities, some participants emphasized the need to rethink knowledge, translation and exchange (KTE) so that it both preserves the credibility of research and avoids unsophisticated approaches to publicly communicating research results. As part of such rethinking, they argued, researchers would have a responsibility to carefully plan how findings are publicly presented and provide appropriate analysis and interpretation of controversial and potentially harmful research results.

A final area of discussion focused on the potential for researcher-advocate collaborations to give rise to a narrow form of “evidence-based” advocacy. Some participants noted that activist opposition to HIV-related criminalization has, in some instances, relied heavily on enlisting research in efforts to make the criminal justice system function in a more evidence-based fashion. Such an approach arguably marginalizes forms of activism that focus more squarely on deeply rooted-forms of injustice based in relations of class, race and sexual orientation that are largely impervious to evidence-based critique. They and others argued that activism against HIV criminalization should be linked with broader struggles and would benefit from stronger ties with activists working from prison abolition and restorative justice approaches as well as those who oppose criminalization that is not HIV-related.



Research on the public health implications of criminalizing HIV non-disclosure, transmission and exposure

The first published empirical studies of the public health implications of criminalizing HIV non-disclosure, transmission and exposure were conducted by academic lawyers and social scientists from the US and England. These studies drew on qualitative, quantitative and mixed-methods approaches to explore the impact of criminalization on people living with HIV/AIDS and people at risk of HIV infection, including, for example, gay men, HIV-positive women, injection drug users, new immigrants and African Americans. Among the topics explored were research participants' experiences of and perspectives on criminalization, their understandings of relevant criminal laws, the impact of the criminal law on HIV disclosure and sexual practices, and the relationship between criminalization and HIV-related stigma. These studies cautioned strongly against the use of the criminal law as they found the criminal law to have a negligible or negative impact on activities known to protect against HIV transmission.^{35-38, 40-42, 46-47} In Canada, an early study by Adam and colleagues reported similar findings based on qualitative interview research with men who have sex with men.³⁴

Four work-in-progress papers extended the tradition that explores the public health implications of HIV-related criminalization through research focused on people living with HIV/AIDS and those at risk of HIV infection. Each paper brought a new analytic perspective to this research strategy. For example, in "The impact of criminalization of non-disclosure of HIV-positive status on racialized communities", Roberta Timothy made an important intervention in the literature by conceptualizing criminalization in ways that understand identity, racism and intersectional violence as central to its impact on racialized communities. While her paper is based on research with African/Black women and men living with HIV/AIDS as well as service providers, lawyers and others, her presentation focused on an analysis of data from HIV-positive study participants. One important finding emphasized how community ties and identities are important sources of resiliency for African/Black people living with HIV/AIDS who experience a heightened risk of criminalization given racist media coverage and past experiences of racial surveillance and discrimination by the criminal justice system.

Two papers drew on data from HIV-positive participants to pose critical questions about the role of disclosure in HIV prevention. In "Disclosure as HIV prevention", Barry Adam reported findings from a mixed-methods study combining interviews with 122 people living with HIV/AIDS and survey findings from two large cohort studies of people living with HIV/AIDS in Ontario. The paper explores the day-to-day practices through which people living with HIV/AIDS make decisions about HIV disclosure. It highlights a principal tension between the legal construction of non-disclosure and the varied rationalities and approaches to intimacy that

inform actual disclosure dynamics. A paper by Patrick O’Byrne and colleagues, “Counselling about HIV-status disclosure: Nursing practice or law enforcement? A Foucauldian-based public health reflection”, drew on interviews conducted with 12 HIV-positive and 15 HIV-negative gay or bisexual men living in or near Ottawa, Ontario. The paper draws attention to the range of approaches to disclosure that men undertake in their sexual encounters with casual partners. Many reported that the decision not to disclose prior to sex was normative, emphasizing that using a condom negated the need to disclose. Some oriented to discussions about HIV status as a joint accomplishment and responsibility while others, particularly HIV-negative participants, emphasized that discussion of HIV status should be initiated by people living with HIV/AIDS. Both papers pose questions about a growing public health emphasis on disclosure as an HIV prevention strategy, citing the complexity of actual disclosure dynamics, the lack of empirical research support for HIV disclosure as an HIV prevention strategy, the contradictory effects of punitive approaches to non-disclosure, and the potential for an expectation of disclosure to discourage safer sex practices.

The fourth paper responded to the methodological challenge of conducting research addressing the relationship between HIV criminalization and complex social activities such as seeking HIV testing and medical care. In “The reasonable person standard: HIV-specific criminal laws and the fear of disclosing one’s status to sexual partners and accessing HIV testing and treatment”, Laurel Sprague reported on the findings of a community-based research project that surveyed over 3000 individuals, primarily from the US, 72% of whom were HIV-positive. Rather than positing a simple, direct relationship between the criminal law and HIV testing, the paper suggests that the relationship is mediated by community norms that conflict with assumptions about reasonable conduct presumed by the law. In particular, the paper argues that ideas about responsible behaviour underpinning HIV criminalization laws exacerbate vulnerabilities faced by communities of people living with HIV/AIDS and affected by HIV, making it reasonable for them to avoid testing, disclosure and treatment.

Three additional work-in-progress papers signalled an important new direction in research on the public health implications of HIV-related criminalization. Following the example of earlier Canadian research,⁴⁸⁻⁴⁹ these papers reported on studies involving providers engaged in HIV prevention and support work in Canada, the UK and the US. Among the studies’ participants were health care providers, public health nurses, allied health professionals, counsellors and people who work in community-based organizations. Collectively, these papers represent an important move to conduct research that brings into view how the criminal law operates beyond its stated intentions, in part, by affecting the activities of individuals engaged in HIV prevention who are not explicit targets of criminal law regulation. They contribute to the project of demonstrating how the “impacts” of criminalization are far-reaching and extend to a

complex of activities and forms of knowledge through which the prevention of HIV transmission is negotiated.

The presentation and discussion of these papers highlighted how the delivery of HIV prevention and support services differs across jurisdictions. For example, Martin French's paper "The viropolitics of HIV testing: Counselling and criminalization in Tennessee" underscores the important role played by local churches in delivering HIV testing services in the American South. By contrast, a paper presented by Catherine Dodds, "HIV and the criminal law: Impact in HIV service settings", focuses on registered health, allied and other professionals working in clinical and community-based settings, given their central role in providing HIV-related counselling, monitoring and support in England and Wales. Workshop participants discussed how the diversity in the organization of service delivery presents complex sampling and other challenges for the design of research on the public health implications of HIV-related criminalization and emphasized the need to take such diversity into account when comparing research results across jurisdictions.

Interestingly, workshop participants identified important similarities in research findings across papers that focused on the implications of criminalization for practitioners' work in different jurisdictions. Discussion focused on how criminalization introduces substantial complications to practitioners' HIV prevention and support work and heightens tensions in their different work roles, especially for those who must balance meeting the individual health and support needs of people living with HIV/AIDS with a responsibility to protect population-level public health. Chris Sanders reported on these complications and tensions in his paper "Confidentiality and documentary practices during HIV post-test counselling: Impact of criminalization on public health nurses' work." Reporting on the results of interviews with 30 nurses from four Ontario public health units, the paper points to what Sanders calls the "subtle impact that criminal law has on public health practices." The paper describes how public health nurses' growing consciousness of the criminal law enters into routine aspects of their work with complex results. For example, the possibility of client records being subpoenaed has resulted in significant and varied changes in nurses' note-taking practices. At the same time, nurses report real challenges in establishing and maintaining rapport in the context of criminalization. For example, they struggle with uncertainties about how to inform HIV-positive clients, during counselling sessions, about the limits of confidentiality of public health records. These results, Sanders argues, pose important questions about ethical nursing practice and about the use of public health records in criminal justice proceedings.



The papers presented by French and Dodds also reported significant emerging tensions in practitioners' work linked to HIV-related criminalization. Drawing on the results of 16 interviews with providers of HIV voluntary testing and counselling, French argues that counselling

about legal responsibilities is a site of confusion and uncertainty for practitioners that has a negative impact on the HIV testing and counselling milieu. French theorizes this impact as a form of “anomie” that transforms counselling into a milieu “in which it is increasingly difficult to establish norms for HIV prevention.” Dodds reported findings from a study based on seven focus groups involving 75 professionals from clinical and community-based services for people living with HIV/AIDS. Participants in the study did not report changes in their practice that paralleled the “chilling effect” of criminalization on counselling discussions about sex and HIV prevention found in Canadian research. However, they did report that criminalization heightened uncertainty and lack of clarity in their work environments. A particular site of anxiety was accurately communicating legal information to HIV-positive clients, given the complexity of the information, a lack of training in legal discourse and job descriptions that do not include the provision of legal information. Dodds’ paper emphasizes that practitioners remain confused about legal terminology, tend to rely on their own moral and risk compasses to interpret HIV-positive clients’ legal obligations and remain concerned that an emphasis on criminal liability does not help their clients to be healthier or happier.

The potential and limitations of research on the public health implications of criminalization for law reform

Explicitly or implicitly, the empirical literature on the public health implications of HIV criminalization takes for granted that such research can influence the criminal law, the form it takes, and its interpretation in or application to specific cases. While this presumption is consistent with evidence-based decision making as a foundation of legislative, policy and court decisions, it can underestimate the barriers that limit the application of research in resolving complex criminal law problems. The standards and conventions for producing and considering evidence in research and criminal justice settings are not necessarily the same and criminal justice systems have developed norms for decision making that are not necessarily tightly bound to the use of research evidence.⁵⁴ The criminalization of HIV non-disclosure, exposure and transmission is a complex social phenomenon spanning jurisdictions and cultures, encompassing a wide range of people and practices and drawing on and contributing to contested discourses associated with race, sex, migration, sexual orientation and crime. This complexity carries further implications for empirical research into HIV criminalization and its public health impact and for understanding the role empirical research might play in reforming current laws.

Legal developments across jurisdictions have been differently influenced by positions based on evidence about criminalization’s impact on established approaches to preventing HIV transmission. The workshop provided an opportunity to explore some of the factors behind these differences and to consider both the potential and limitations of using research to inform criminal law reform efforts.

Workshop papers and dialogue identified a number of ways that research can play an important role in changing criminal laws and informing relevant criminal law policy and program development. Below, we identify some of the key points of discussion on this topic made during the workshop. When relevant, the authors of workshop papers are cited. Overall, workshop discussions emphasized that research on the public health implications of HIV-related criminalization:

- ◆ Can identify the impacts of HIV-related criminalization on HIV prevention, care, treatment and support. Research into such impacts is especially important in light of new approaches that respond to the HIV epidemic by increasing the uptake of HIV testing and counselling, linking HIV-positive people to health and social services, initiating HIV antiretroviral therapy as early as possible, and retaining people living with HIV/AIDS in medical care (Sanders; O’Byrne).
- ◆ Can elucidate the influence of criminalizing HIV non-disclosure, exposure and transmission on the attitudes, opinions, beliefs and activities of people living with HIV/AIDS, people and communities at risk, service providers in public health and clinical settings and staff in ASOs and community-based organizations (Adam; Calzavara; Dodds; O’Byrne; Sanders; Sprague; Timothy).
- ◆ Can inform efforts to respond to the potential discriminatory enforcement of criminal laws by identifying the demographic patterns associated with HIV-related criminal prosecutions (Hoppe).
- ◆ Can provide public health authorities with evidence required to become more engaged in the issue, to develop policy and programs, and to comment publicly on an increasingly important facet of the HIV epidemic.
- ◆ Can identify legal, ethical and practice issues faced by public health and clinical staff as a result of HIV criminalization, and provide evidence to support legally and ethically sound policy and practice (Dodds; O’Byrne; Sanders).
- ◆ Can assess the efficacy and costs and benefits of different policy options to address HIV transmission.
- ◆ Has informed decisions by legislators, criminal prosecutors and courts in a number of jurisdictions (Bernard).

Workshop participants also identified and elaborated upon the need to investigate, in greater depth, the processes through which empirical evidence is taken up and used by decision makers in criminal justice and public health. Although research evidence has played an important role in criminal law reform, and influenced public health policy and practice in

some jurisdictions, this has not uniformly been the case as Grace, Bernard and others argued in their papers.

The complexity of HIV criminalization challenges our ability to arrive at associations between criminalization on the one hand, and health behaviours and outcomes (e.g., HIV testing, HIV disclosure, safer sex practices, HIV incidence) on the other. Complexity also imposes limits on the generalizability of findings given diversity, across and even within countries, in the epidemiology of HIV infection, demographic characteristics of people involved in criminal cases, laws and criminal justice and public health institutions and practices. Even assuming it were possible to demonstrate causal links between HIV criminalization and specific health behaviours or outcomes, the extent to which elected or unelected officials and decision makers rely on evidence, as opposed to other considerations, when making decisions is unclear.

For instance, in popular and policy discourses and decision making regarding HIV criminalization, normative arguments regarding socially acceptable sexual behaviour and responsibility have tended to play an influential role. Workshop participants remarked that such moral arguments have, in some contexts, played a larger role than evidence in policy discourse and decision making. Research that explores popular attitudes, opinions and beliefs about criminalization may serve to reinforce these moral positions.

The possibility that the “moral tenacity” of punishment and retribution diminishes the relevance of empirical research findings on public health behaviours and outcomes raises a series of related questions: When people hold a moral position, can evidence from research challenge their taken-for-granted assumptions or change their minds? If so, what types of research findings, arrived at using what type of methods, might be persuasive? And what is the process through which such research findings can be framed to fully engage people? Workshop participants noted that the research evidence that is considered to be compelling may differ among the public, police, prosecutors and legislators.

It is also important to recognize the potential challenge of establishing public health evidence in the juridical setting. Courts may not accord significant weight to evidence on the public health impacts of HIV criminalization, especially social science evidence, if they perceive HIV infection as a threat to the health, well-being and autonomy of individuals who are presumed to be in need of legal protection. When it comes to law reform in the courts, developing morally-informed counter arguments, perhaps based in jurisprudence on constitutional rights, may be a necessary adjunct to evidence of negative public health impacts.



The final limitation of research to date may arise from framing the issue narrowly in terms of the “public health impact” of HIV criminalization.

There is significant evidence that systemic and structural factors place people at risk of HIV infection. Many people experience criminalization of HIV as an additional facet of the dynamic process of social marginalization.

Directions for Future Research

Bringing together researchers, people living with HIV/AIDS, lawyers, advocates, public health professionals, ASO staff and others in an intensive workshop experience created opportunities to explore and reflect on new directions for research on the public health implications of criminalizing HIV non-disclosure, exposure and transmission. These explorations and discussions took place throughout the workshop but were concentrated in the final session, which was dedicated to a discussion of future directions in research. Below, we offer a summary of the key suggestions for new research directions emerging from the workshop. For a recent discussion of research and policy agenda issues related to the criminalization of HIV non-disclosure, exposure and transmission in the US context, see Lazzarini et al. (2013).⁵⁵

We note that participants also identified areas in which further research is not needed, either because sufficient research already exists or because the type of research is no longer worth pursuing in light of past experience and developments in the law. A number of participants identified opinion surveys that do not probe, or are not based on questions that seek out, informed attitudes, opinions and beliefs as one such type of research. Organizations such as Sigma Research (London School of Hygiene and Tropical Medicine), the Centre for AIDS Intervention Research (Medical College of Wisconsin), and The Global Network of People Living with HIV/AIDS-North America, in partnership with The Sero Project, have developed survey questions that provide respondents with information regarding various aspects of HIV criminalization and probe informed attitudes, opinions and beliefs.

A number of the participants from frontline ASOs and other community-based organizations also expressed a desire for “less research, more action” on HIV criminalization. They cited the failure of researchers to regularly partner with ASOs, encouraged researchers to do so, and stated their great willingness to establish such community-academic research partnerships. These same participants also encouraged researchers to pay greater attention (in terms of time and resources) to knowledge translation and implementation at the community level.

Five main suggestions for moving the research field forward were identified:

1. Explore novel analytical and methodological approaches

Given the complexity of HIV criminalization, applied and theoretical research agendas should be structured broadly, inquire into a wide range of possible “implications” and account for the intersectionality of factors



such as race, class, migration, colonization and gender. New research would benefit from a deeper engagement with socio-legal studies and criminology.

Further suggestions:

- ◆ Ground research questions in a health and human rights or an intersectional/anti-oppression framework as alternatives to a public health implications framework.
- ◆ Critically engage with mainstream feminist analysis that supports HIV criminalization.
- ◆ Use qualitative approaches, including narrative analysis, ethnographic methods and participatory action research to:
 - ◆ capture issues of importance to, and respond to the needs of, communities of people living with and at risk of HIV;
 - ◆ document and explore experiences of people who have been criminally charged and/or prosecuted as well as those who have brought forward police complaints;
 - ◆ explore HIV criminalization as a complex, constructed and varied social phenomenon.

2. Conduct intervention research

Research on the public health implications of criminalizing HIV non-disclosure would be enhanced by studies exploring the processes and outcomes of interventions that offer alternatives to criminalization and/or that seek to prevent HIV transmission.

Further suggestions:

- ◆ Conduct research on and explore the implications of using restorative justice approaches for criminal offences related to HIV non-disclosure, exposure and transmission.
- ◆ Evaluate the impact of new or existing case management strategies that focus on sexual activities that risk incarceration and HIV transmission:
 - ◆ explore collaborations with ASOs and other community-based organizations as sites for intervention research. ASOs offer a less coercive and more supportive environment to address challenges of concern to the public health and the criminal justice systems;

- ◆ conduct ethnographic research on the “Calgary Model.” The Calgary Model is a policy-informed public health case management model that has been endorsed by policy makers in Canada, yet has not been empirically studied.

3. Conduct research on factors that underpin and drive HIV criminal prosecutions

Research on the criminalization of HIV non-disclosure, exposure and transmission has yet to rigorously explore the various factors that encourage criminal prosecutions. There has been very little research involving people who initiate criminal complaints, their motivations for doing so, their relationships with people living with HIV/AIDS and their experience of the criminal justice system. Relatedly, we know very little about police and prosecutors, their understandings of laws related to HIV non-disclosure, exposure and transmission, their knowledge of HIV and HIV transmission, and their attitudes towards people living with HIV/AIDS. There is a strong need for research that explores the underlying social, structural, behavioural and cultural factors that drive HIV-related criminalization.

Further suggestions:

- ◆ Prioritize police, prosecutors and complainants in new research.
- ◆ Conduct research on the moral and other discourses that underpin criminalization and that inform the perspectives of the general population, those living with and at risk of HIV, legislators and policy makers and those who work in the criminal justice and public health systems. Potential research foci include:
 - ◆ norms of sexual practice in communities as contrasted with principles of “good behaviour” applied by courts;
 - ◆ lessons from harm reduction and drug policy reformists who have had some success in working with police in opposing drug prohibition and the “war on drugs”;
 - ◆ critical analysis of how the “good versus bad” person living with HIV/AIDS is discursively constructed in media and elsewhere;
 - ◆ how issues of “personal responsibility” and “wrong” conduct get constructed, expressed and enacted, and to what end;
 - ◆ redesigning existing quantitative surveys to more robustly inquire into the attitudes, opinions and beliefs of respondents;
 - ◆ a moral mapping and deconstruction of pro-criminalization arguments.

4. Continue to research the implications of criminalization for those who work in HIV prevention and in clinical and support services for people living with HIV/AIDS

Additional research on how criminalization affects the work of various practitioners engaged in HIV prevention and the treatment, care and support of people living with HIV/AIDS can further our understanding of the broad implications of criminalizing processes. Comparative studies across national jurisdictions would yield important results.

Further suggestions:

- ◆ Build on existing studies by incorporating mixed methodologies into research designs:
 - ◆ investigate innovative and more rigorous approaches to sampling than has been the case in existing studies.
- ◆ Explore how changes in front-line practice related to criminalization may be connected with broader policy and program changes.
- ◆ Investigate the discursive and other bases of public health response (e.g. explore the origins and impact of “unwilling and unable” terminology in Canadian public health policy).

5. Conduct media research

The mass media are an important source of public information about the criminalization of HIV non-disclosure, exposure and transmission. While we have many accounts of how the media coverage of HIV criminal cases contributes to HIV-related stigma, we have little published research that draws on rigorous sampling methods to explore this question.

Further suggestions:

- ◆ Conduct research to understand the impact of media coverage on communities and people living with and affected by HIV, the general public and legal and policy decision makers.
- ◆ Inquire into the association between media coverage and stigma especially in relation to African, Caribbean and Black communities.
- ◆ Systematically analyze the narrative and rhetorical conventions used by mainstream media when reporting on and editorializing about HIV criminal cases.
- ◆ Investigate the use of media by police as an investigative tool.

Educational and Advocacy Video

By bringing together this diverse group of international scholars, the workshop provided a unique opportunity to produce an educational and advocacy video about the public health implications of criminalizing HIV non-disclosure, exposure and transmission. In the video, Edwin Bernard sits down one-on-one with participants for candid interviews about their ongoing research on this issue. The short feature, *More Harm than Good: How Overly Broad HIV Criminalisation is Hurting Public Health*, is written and presented by Edwin Bernard and filmed, directed and produced by Nicholas Feustel. The video is available at <http://vimeo.com/73954954>.⁵⁶

Appendix A Workshop Participants

NAME	ORGANIZATION
Barry Adam	University of Windsor
Edwin Bernard	HIV Justice Network
Jonathan Glenn Betteridge	HIV & AIDS Legal Clinic Ontario
Laura Bisailon	University of Toronto
Scott Burris	Temple University
Liviana Calzavara	University of Toronto, and the CIHR Social Research Centre in HIV Prevention
Bruce Clarke	City of Toronto
Joanne Csete	Open Society Foundation
Catherine Dodds	London School of Hygiene and Tropical Medicine, and Sigma Research
Richard Elliott	Canadian HIV/AIDS Legal Network
Vera Etches	Ottawa Public Health
Martin French	New York University
Carol Galletly	Medical College of Wisconsin
Caroline Godbout	CIHR Social Research Centre in HIV Prevention
Daniel Grace	University of British Columbia
Nicole Greenspan	University of Toronto
Trevor Hoppe	University of Michigan
Marcella Jones	University of Toronto
Cecile Kazatchkine	Canadian HIV/AIDS Legal Network
Zita Lazzarini	University of Connecticut School of Medicine
Mona Loutfy	Women's College Research Institute, Women's College Hospital
Notisha Massaquoi	Women's Health in Women's Hands Community Health Centre
Alex McClelland	Concordia University
Robin Montgomery	CIHR Social Research Centre in HIV Prevention
Eric Mykhalovskiy	York University
Stephanie Nixon	University of Toronto
Patrick O'Byrne	University of Ottawa
San Patten	San Patten and Associates
Ryan Peck	HIV & AIDS Legal Clinic Ontario
Valérie Pierre-Pierre	African and Caribbean Council on HIV/AIDS in Ontario (ACCHO)
Cristian Rangel	University of Toronto
Barbara Ross	Alberta Health Service
Shannon Thomas Ryan	Black Coalition for AIDS Prevention (Black CAP)
Chris Sanders	York University
Laurel Sprague	Global Network of People Living with HIV/AIDS, North America
Alison Symington	Canadian HIV/AIDS Legal Network
Roberta K. Timothy	University of Toronto
Mercedes Umana	University of Toronto
Jocelyn Watchorn	AIDS Committee of Toronto

Appendix B Agenda

Public Lecture and Workshop Schedule

Friday April 26

Location:

The Debates Room, Hart House, 7 Hart House Circle, University of Toronto

5:30-7:30 p.m.

Public Lecture

Chair: Eric Mykhalovskiy

Welcome: Liviana Calzavara

Joanne Csete, Sex, Drugs and Minimalist Visions:
The Legacy of HIV for the Human Rights Enterprise

7:30-9 p.m.

Reception

Saturday April 27

Location:

Room 208, Health Sciences Building, University of Toronto, 155 College St.

8:30-9:00 a.m.

Welcome

9:00-10:20 a.m.

Panel 1: Research, Evidence, and Advocacy

Chair: Cecile Kazatchkine

Discussants: Eric Mykhalovskiy, Nicole Greenspan

Carol Galletly and **Zita Lazzarini**, Advocacy,
Research and the Criminalization of HIV Exposure

Edwin Bernard, Building Persuasive Evidence, How
can the Social Sciences Support Global Anti-
Criminalisation Advocacy?

10:20-10:30 a.m.

Break

10:30 a.m-12:30 p.m.

Panel 2: The Public Health Impact of Criminalizing HIV Exposure/Transmission: Canada, the United States, and England

Chair: San Patten

Discussants: Scott Burris, Vera Etches

Martin French, The Viropolitics of HIV Testing,
Counseling and Criminalization in Tennessee

Catherine Dodds, Keeping Confidence: HIV and the
Criminal Law from Service Provider Perspectives

Chris Sanders, Confidentiality and Public Health HIV
Post-Test Counseling: Criminalization and Ethical
Practice

12:30-1:30 p.m.

Lunch



1:30-2:50 p.m.

**Panel 3: HIV, Criminal Law and Public Health:
Canadian Research Perspectives**

Chair: Valérie Pierre-Pierre

Discussants: Richard Elliott, Alex McClelland

Liviana Calzavara, Moving Away from the Public Health Rhetoric: Canadian Voices and Perspective on Criminalization of HIV Non-disclosure to sexual partners

Barry Adam, Disclosure as HIV prevention

2:50-3:10 p.m.

Break

3:10-4:30 p.m.

Panel 4: Racialization, HIV and the Criminal Law

Chair: Mona Loutfy

Discussants: San Patten, Notisha Massaquoi

Trevor Hoppe, Interpreting Disparate Outcomes in of Michigan Nondisclosure Convictions: The Modifying Effect of the Complainant's Gender

Roberta Timothy, The Impact of Criminalization of Non-disclosure of HIV Positive Status on Racialized Communities

Sunday April 28

Location:

Room 208, Health Sciences Building, University of Toronto, 155 College St.

9:00-10:20 a.m.

Panel 5: Criminalization and Public Health

Practice: HIV Counseling and Beyond

Chair: Alison Symington

Discussants: Laura Bisailon, Martin French

Zita Lazzarini and **Carol Galletly**, A Critical Barrier to the Advancement of Research on the Criminalization of HIV Exposure in the United States: The Problem of Sampling with US Public Health Departments

Patrick O'Byrne, Counseling about HIV-Status Disclosure: Nursing Practice or Law Enforcement? A Foucauldian-Based Public Health Reflection

10:20-10:40 a.m.

Break

10:40 a.m.-12:00 p.m.

Panel 6: Legal Practices and their Effects: Local and Global Contexts

Chair: Stephanie Nixon

Discussants: Jonathan Glenn Betteridge, Catherine Dodds

Laurel Sprague, Sean Strub and **Robert Suttle**, The Reasonable Person Standard: HIV-specific



Criminal Laws and the Fear of Disclosing One's Status to Sexual Partners and Accessing HIV Testing and Treatment

Daniel Grace, Legislative Epidemics: The Role of Model Law in the Transnational Trend Criminalize HIV Transmission

12:00-1:00 p.m.

Lunch

1:00-2:20 p.m.

Discussion: Public Health Case Management and HIV Non-disclosure

Chair: Robin Montgomery

Barbara Ross, Public Health Management of U2 Clients – “the Calgary Model”

Jonathan Glenn Betteridge, Responding to Elevated HIV Transmission Risk Behaviours: Key Components and Approaches of Public Health Guidelines and Interventions

2:20-2:30 p.m.

Break

2:30-4:00 p.m.

New Possibilities

Chair: Eric Mykhalovskiy

A discussion to synthesize, ideas, research findings, and key themes and to explore possibilities for new research collaboration and publication venues.



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