

## Releasing Stigma: Police, Journalists and Crimes of HIV Non-Disclosure

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In 2010, a 29-year-old gay man in Ottawa who had recently learned he was HIV-positive was arrested and charged with several criminal offences, including aggravated sexual assault and later attempted murder. Two days after his arrest, the Ottawa Police Service released his photo to the public, along with his name, details of the sexual encounters and his personal health information. Using this series of events as a case study, this paper examines the complex questions raised when police services issue press releases in alleged HIV non-disclosure cases, and journalists subsequently convey these stories to the public. While recent legal scholarship has focused almost exclusively on whether HIV non-disclosure should be treated as a criminal law issue or as a public health issue, this paper makes an original contribution by turning to the complicated world of police practices and journalistic ethics to advance three central claims. It first argues that situating narratives of HIV/AIDS in their broader social, political and historical context reveals that police and journalists have participated in a project of stigmatizing the condition itself, and those living with it, since the emergence of the epidemic. Second, the paper connects the conceptual dots between how the Ottawa case was conveyed to the public in 2010 and the familiar tropes of promiscuity, deviance and pathology that became synonymous with discourse about gay male sexuality in the early 1980s. Third, the paper shifts to analyze legal reforms, namely expanding the contours of publication bans. Ultimately, the paper concludes that imposing ethical duties on police and journalists may constitute a more useful site in beginning to transform the ways that HIV non-disclosure stories are told.

En 2010, un homosexuel de 29 ans résidant d'Ottawa qui venait d'apprendre qu'il était séropositif, a été arrêté et accusé d'un certain nombre d'infractions criminelles, notamment d'agression sexuelle grave et, par la suite, de tentative de meurtre. Deux jours après son arrestation, le Service de police d'Ottawa publiait sa photo, ainsi que son nom, les détails de ses relations sexuelles et des renseignements personnels concernant sa santé. En se servant de cette série d'événements à titre d'étude de cas, l'auteur de ce texte examine les questions complexes soulevées par le fait que les services de police diffusent des communiqués de presse concernant des causes relatives à la non-divulgence de la séropositivité, causes que des journalistes relatent par la suite au public. Bien que, dernièrement, les recherches juridiques se soient presque exclusivement concentrées sur le fait que la non-divulgence de la séropositivité devrait être traitée comme une question de droit criminel ou de santé publique, ce texte apporte une contribution originale en se servant du monde complexe des pratiques policières et de la déontologie journalistique pour faire valoir trois revendications centrales. En premier lieu, il soutient que le fait de relater des situations impliquant des cas de séropositivité /SIDA dans leur contexte socio-politico-historique élargi démontre que la police et les journalistes ont contribué au projet de stigmatisation de la condition elle-même, et de ceux et celles qui la vivent, depuis l'émergence de l'épidémie. En second lieu, le texte établit un lien conceptuel entre la manière dont la cause d'Ottawa a été communiquée au public en 2010 et les habituels préjugés de promiscuité, de déviance et de pathologie qui sont devenus synonymes du discours entourant la sexualité gaie au début des années 1980. En troisième lieu, le texte se penche sur l'analyse des réformes juridiques, notamment en réclamant que l'on élargisse les conditions d'admissibilité des ordonnances de non-publication. En dernier lieu, le texte conclut en soutenant que le fait d'imposer des obligations éthiques aux policiers et aux journalistes pourrait constituer un outil plus efficace pour faire évoluer les manières de relater les histoires relatives à la non-divulgence de la séropositivité.

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## Releasing Stigma: Police, Journalists and Crimes of HIV Non-Disclosure

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“If [AIDS] is to be a metaphor for anything, it is up to us to make sure that in time it becomes regarded as a glaring example of how the ill may be victimised far beyond their physical symptoms....”

—Simon Watney<sup>1</sup>

### I. INTRODUCTION

In 2010, a 29-year-old gay man<sup>2</sup> in Ottawa, who had recently been diagnosed as HIV-positive, was arrested and initially charged with one count of aggravated sexual assault and one count of breach of probation. As the investigation proceeded, he was charged with additional counts of aggravated sexual assault, along with attempted murder and administering a noxious substance—his semen.<sup>3</sup> The man allegedly failed to disclose his HIV-positive status prior to engaging in sexual activities with partners he met online. Two days after they arrested him, the Ottawa Police Service made the decision to release a photo of the accused to the public with the stated goal of uncovering other potential complainants and encouraging them to seek medical attention. The press release not only ‘outed’ him as being gay and having sex with several men he met online, but also disclosed his personal health information. Given

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1 Simon Watney, *Policing Desire: Pornography, AIDS and the Media*, 3rd ed (Minneapolis: University of Minnesota Press, 1996) at 11 [Watney].

2 Throughout this paper, I will not refer to the name of the accused person. While I recognize that documents cited throughout this article name him and that a simple online search will easily reveal his identity, I want to distance myself from the decision made by the Ottawa Police Service, as well as the journalists who subsequently covered the case, to reveal his identity. Instead, given that he was not convicted during the events at issue in this paper, I will refer to him as “the accused person” or “the accused.” In moments of the paper, I will also refer to the case as “the Ottawa case” or simply as “the case.”

3 Joseph Brean, “Man with HIV to be Tried for Attempted Murder”, *National Post* (3 November 2011), online: <[www.nationalpost.com](http://www.nationalpost.com)>.

the nature and severity of the charges, many people correctly suspected that the accused was HIV-positive, even though the press release did not specify his medical condition.<sup>4</sup>

Using this series of events as a case study, this paper examines the complex issues raised when police departments issue press releases in HIV non-disclosure cases and journalists subsequently cover these stories. While recent legal scholarship in Canada has tended to focus on whether the harms associated with failing to disclose one's HIV-positive status prior to engaging in sexual activities should be targeted by the criminal law or are better suited to public health frameworks,<sup>5</sup> the goal of this paper is to move the discussion in a new, perhaps more fruitful, direction.

With the October 2012 decisions of the Supreme Court of Canada in *R v Mabior*<sup>6</sup> and *R v DC*<sup>7</sup>—fourteen years after the Court's landmark decision in *R v Cuerrier*<sup>8</sup>—the unfortunate reality is that the criminalisation of HIV non-disclosure as a matter of Canadian law is here to stay, at least for the foreseeable future. In *Cuerrier*, the Supreme Court held that failing to advise a sexual partner of one's HIV status constitutes fraud, which vitiates consent in circumstances where there is a "significant risk of serious bodily harm."<sup>9</sup> Given the risk of serious bodily harm associated with the transmission of HIV, the Court reasoned that the operative offence is aggravated sexual assault, an offence that carries with it the maximum sentence of life imprisonment.<sup>10</sup> Recently, the Supreme Court explained that the

4 Ottawa Police Service, Press Release, "Ottawa Police Seeking Further Victims Following an Ottawa Man Being Charged with Aggravated Sexual Assault" (7 May 2010), online: Ottawa Kiosk <blog.ottawakiosk.com> [Ottawa Police Service Press Release].

5 See e.g. Carissima Mathen & Michael Plaxton, "HIV, Consent and Criminal Wrongs" (2011) 57:4 Crim LQ 464; Emily MacKinnon & Constance Crompton, "The Gender of Lying: Feminist Perspectives on the Non-Disclosure of HIV Status" (2012) 45:2 UBC L Rev 407; Isabel Grant, "The Boundaries of the Criminal Law: The Criminalization of the Non-Disclosure of HIV" (2008) 31:1 Dal LJ 123 [Grant, "Boundaries"]; Isabel Grant, "The Prosecution of Non-Disclosure of HIV in Canada: Time to Rethink *Cuerrier*" (2011) 5:1 McGill JL & Health 7; Isabel Grant, "Rethinking Risk: The Relevance of Condoms and Viral Load in HIV Nondisclosure Prosecutions" (2009) 54 McGill LJ 389; Scott Burris et al, "Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial" (2007) 39:2 Ariz St LJ 467; Samantha Ryan, "Reckless Transmission of HIV: Knowledge and Culpability" (2006) Crim L Rev 981; Isabel Grant & Jonathan Glenn Betteridge, "A Tale of Two Cases: Urging Caution in the Prosecution of HIV Non-Disclosure" (2011) 15:3 HIV/AIDS Policy & L Rev 15; Alana Klein, "Criminal Law, Public Health, and Governance of HIV Exposure and Transmission" (2009) 13:2-3 Int'l JHR 251; Matthew Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (New York: Routledge-Cavendish, 2007); Eric Mykhalovskiy, "The Problem of 'Significant Risk': Exploring the Public Health Impact of Criminalizing HIV Non-Disclosure" (2011) 73:5 Social Science & Medicine 668; Richard Elliott, *After Cuerrier: Canadian Criminal Law and the Non-Disclosure of HIV-Positive Status* (Montreal: Canadian HIV/AIDS Legal Network, 1999); Richard Elliott, "Criminal Law, Public Health and HIV Transmission: A Policy Options Paper" *UNAIDS Best Practice Collection* (Geneva: Joint United National Programme on HIV/AIDS, 2002).

6 2012 SCC 47, [2012] 2 SCR 584 [*Mabior*].

7 2012 SCC 48, [2012] 2 SCR 626.

8 [1998] 2 SCR 371, 162 DLR (4th) 513 [*Cuerrier* cited to SCR].

9 *Ibid* at para 48.

10 *Ibid* at para 95; *Criminal Code*, RSC 1985, c C-46, ss 265, 268, 273 [*Criminal Code*].

“significant risk of serious bodily harm” test developed in *Cuerrier* meant a “realistic possibility that HIV will be transmitted.”<sup>11</sup> The Court also noted that a low viral count, as a result of medical treatment, and use of a condom would result in the realistic possibility test not being met.<sup>12</sup> In light of these recent decisions, it may be useful to press pause on the “criminal law versus public health” debate and, instead, begin to consider how to reduce the harms associated with contemporary practices of both police and journalists in HIV non-disclosure cases.

To begin to move the scholarly discussion in this area in a new direction, this paper poses three central questions. First, how did journalists cover the HIV/AIDS epidemic of the 1980s and what connections might we draw from the ways in which they cover contemporary HIV non-disclosure cases? Second, what does the Ottawa case reveal about the complex relationship between the stigmatization of HIV/AIDS, police practices, journalistic ethics and the criminal law? Third, what strategies—both legal and ethical—might we use to better ensure that the ways in which stories of HIV non-disclosure are communicated to the public do not further stigmatize the condition itself, as well as people living with it?

In grappling with these three questions, this paper will first argue that when we situate narratives of HIV/AIDS in their broader social, political and historical context, it becomes apparent that journalists continue to participate in a broader project of stigmatizing the condition itself, as well as those living with it. For the purposes of this paper, I will rely on the definition of “stigma” first developed by Erving Goffman in *Stigma: Notes on the Management of Spoiled Identity*.<sup>13</sup> Goffman defines stigma as “an attribute that is deeply discrediting.”<sup>14</sup> In telling the stories of gay men who became HIV-positive beginning in the 1980s, journalists tended to construct their subjects as overly sexualized, deviant and pathological figures. To use the language giving rise to the title of Goffman’s work, people living with HIV were framed as spoiled identities.<sup>15</sup> Second, I will argue that the Ottawa case study demonstrates that contemporary police practices, paired with stories told by journalists, continue to stigmatize HIV/AIDS itself, as well as those living with it. Third, I will survey legal reforms, such as expanding the contours of publication bans for individuals who are alleged to have failed to disclose their HIV-positive status prior to engaging in sexual activities. Ultimately, however, I conclude that imposing ethical duties on police and journalists may constitute a more useful approach in changing the ways in which HIV non-disclosure stories are told to members of the Canadian public.

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11 *Mabior*, *supra* note 6 at para 4.

12 *Ibid.*

13 Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Englewood Cliffs, NJ: Prentice-Hall, 1963) [Goffman].

14 *Ibid* at 3.

15 Goffman, *supra* note 13.

## II. TELLING STORIES OF HIV/AIDS: A BRIEF HISTORY

It is difficult to examine the recent HIV non-disclosure case from Ottawa without first situating the story in its broader social, political and historical context. To set the stage for the analysis that follows, it is useful to explore the ways that journalists covered the emergence of the HIV/AIDS epidemic in the early 1980s. In *AIDS and its Metaphors*, Susan Sontag argues that HIV/AIDS, as well as those living with it, came to be deeply stigmatized by society.<sup>16</sup> Metaphorically, HIV itself, as well as those who acquired the condition, denoted “pollution”—HIV/AIDS represented “polluted” blood, “polluted” persons and “polluted” interactions between those living with HIV and those who were not. In *Illness as Metaphor*, Sontag attempts to remove such meaning from illness and the ill, and in its place generate a more “truthful way of regarding illness,” one that is “purified of, [and] most resistant to, metaphoric thinking.”<sup>17</sup>

Metaphor, according to Aristotle and adopted by Sontag, “consists in giving [a] thing a name that belongs to something else.”<sup>18</sup> The act of inscribing cultural meanings onto a thing—an object, a condition or a body—allows for the production of knowledge. In this way, “all thinking is interpretation” and, for this reason, humans cannot understand the world around them without metaphors.<sup>19</sup> Perhaps the most important aspect of the act of creating metaphors, however, is not the chosen metaphor itself, but rather the underlying regulatory and institutional regime that led to the selection of that particular metaphor in the first place. By and large, metaphors used in the interpretation of illness are punitive, isolating and based in fear. There is no single metaphor of HIV/AIDS. Rather, a series of metaphors are used to vilify suffering and may ultimately undermine a more evidence-based, purposeful approach to the lived realities of those living with HIV/AIDS.<sup>20</sup>

While there is much to appreciate about the work of Sontag, she often fails to identify the precise mechanisms through which metaphors of HIV/AIDS take shape in society. To look more closely at these mechanisms, it is important to assess the ways that journalists covered the emergence of the HIV/AIDS epidemic beginning in the early 1980s. In those early days, journalists tended to describe gay

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16 Susan Sontag, *AIDS and its Metaphors* (New York: Farrar, Straus and Giroux, 1989) [Sontag, *AIDS & Metaphors*]. For further discussion, see also Larry Gross & James D Woods, eds, *The Columbia Reader on Lesbians and Gay Men in Media, Society, & Politics* (New York: Columbia University Press, 1999) [Gross & Woods]; Chris Greer, ed, *Crime and Media: A Reader* (Oxon, UK: Routledge, 2010); Yvonne Jewkes, *Media and Crime*, 2nd ed (Thousand Oakes, Cal: SAGE Publications, 2011); Keith J Hayward & Mike Presdee, *Framing Crime: Cultural Criminology and the Image* (Oxon, UK: Routledge, 2010); Ian Marsh & Gaynor Melville, *Crime, Justice and the Media* (Oxon, UK: Routledge, 2009); Peter Aggleton & Richard Parker, eds, *Routledge Handbook of Sexuality, Health and Rights* (Oxon, UK: Routledge, 2010).

17 Susan Sontag, *Illness as Metaphor* (New York: Farrar, Straus and Giroux, 1978) at 3.

18 Aristotle, *Poetics*, translated by John Warrington (London, UK: JM Dent & Sons, 1963) at 36.

19 Sontag, *AIDS & Metaphors*, *supra* note 16 at 5.

20 *Ibid* at 68.

male sexual practices as entirely at odds with acceptable values in Anglo-American society. To use Sontag's language, these practices and identities were constructed as "polluted." A number of scholars have noted that journalists participated in the project of constructing gay men as overly sexualized, pathological figures who were responsible for their "polluted" states. For example, Simon Watney argues that the presence of HIV/AIDS among gay men is "generally perceived not as accidental but as a symbolic extension of some imagined inner essence of being, manifesting itself as disease."<sup>21</sup> Similarly, Michael A Smyth explains that the "specter of the pathological, predatory, sexually violent deviant played a significant role in shaping discourse about homosexuality,"<sup>22</sup> while Gregory M Herek notes the pervasive construction of gay men as "pathological, predatory, and compulsively promiscuous."<sup>23</sup>

A close reading of stories from the early 1980s demonstrates that journalists covering the emergence of the HIV/AIDS epidemic often conveyed the idea that, at its core, HIV/AIDS was a gay illness. For example, the first story about HIV/AIDS recounted by *NBC News* aired in June 1982. The story opened with Tom Brokaw framing the HIV/AIDS epidemic as one that was limited to a discrete category of individuals: overly sexualized, promiscuous gay men. Brokaw stated: "Scientists at the National Center for Disease Control in Atlanta today released the results of a study, which shows that the lifestyle of some male homosexuals has triggered an epidemic of a rare form of cancer."<sup>24</sup>

While Brokaw deployed somewhat sanitized prose in explaining that the "lifestyle" of some gay men caused them to contract the illness, an article appearing in early 1983 in *Rolling Stone* was far more dramatic in its storytelling. The article proclaimed: "Investigators also believe that AIDS is principally a phenomenon of the raunchy subculture in large cities, where bars and bathhouses are literal hotbeds of sexual promiscuity."<sup>25</sup> Similarly, an article that appeared in *Maclean's* in 1983 again highlighted the correlation between gay male promiscuity and HIV/AIDS. To do so, it relied upon largely unsubstantiated claims about the number of sexual partners of gay men who were HIV-positive, stating: "The vast majority of sufferers—75%—are homosexual males, many of them highly promiscuous, some with sexual histories involving many hundreds, and even thousands of partners."<sup>26</sup>

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21 Watney, *supra* note 1 at 8.

22 Michael A Smyth, "Queers and Provocateurs: Hegemony, Ideology, and the 'Homosexual Advance' Defense" (2006) 40:4 *L & Soc'y Rev* 903 at 904.

23 Gregory M Herek, "The Social Context of Hate Crimes: Notes on Cultural Heterosexism" in Gregory M Herek & Kevin T Berrill, eds, *Hate Crimes: Confronting Violence Against Lesbians and Gay Men* (Newbury Park, Cal: Sage Publications, 1992) 89 at 96.

24 Tom Brokaw (Anchor) & Robert Bazell (Reporter), "Early Studies on AIDS", *NBC Nightly News* (17 June 1982), online: <archives.nbclearn.com/portal/site/k-12/flatview?cuecard=916>.

25 "Is There Death After Sex?", *Rolling Stone* (3 February 1983) 17, cited in Gross & Woods, *supra* note 16 at 387–88.

26 Shona McKay, "The Growing Canadian AIDS Alarm", *Maclean's* 96:28 (11 July 1983) 34, cited in Edward Albert, "Illness and Deviance: The Response of the Press to AIDS" in Gross & Woods, *supra* note 16, 393 at 396–97.

As these articles and accompanying scholarly literature<sup>27</sup> demonstrate, journalists covering the emergence of the HIV/AIDS epidemic constructed their gay male subjects as engaging in non-normative, often promiscuous, sexual activities.

A related theme—one of blame and individual responsibility—emerges throughout the stories told by journalists covering the early HIV/AIDS epidemic. A 1983 *Newsweek* article, for example, portrayed gay men who had contracted HIV as both irresponsible and morally culpable. The piece used vivid descriptions of anonymous sexual encounters and kinky sex.<sup>28</sup> Similarly, 1982 and 1983 *New York Magazine* articles described gay men in urban centres as participating in so-called fast lane lifestyles and, with almost pathological compulsivity, engaging in sexual activities with strangers.<sup>29</sup> Rather than conveying the idea that the emergence of HIV/AIDS was a public health epidemic affecting all members of society, most journalists simply suggested that gay men were responsible for contracting the condition because of their irresponsible, non-normative sexual practices.

As the authors of *Queer (In)Justice* explain, figures such as the overly sexualized, promiscuous HIV-positive gay man have become deeply rooted in society's collective unconscious. They write:

The narratives...are so vivid, compelling, and entrenched that they are more properly characterized as *archetypes*—recurring, culturally ingrained representations that evoke strong, often subterranean emotional associations or responses. In the realm of criminal archetypes, anxiety, fear, and dread prevail—potent emotions that can easily overpower reason.... These archetypes serve to establish compelling, ultimately controlling, narratives or predetermined story lines that shape how a person's appearance and behavior will be interpreted—regardless of individual circumstances or realities.<sup>30</sup>

Having briefly explored the media's treatment of HIV/AIDS during the 1980s, at least two recurring themes emerge. The first theme is the construction of gay men

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27 For further discussion on the early coverage of HIV/AIDS, see e.g. Timothy E Cook & David C Colby, "The Mass-Mediated Epidemic: The Politics of AIDS on the Nightly Network News" in Elizabeth Fee & Daniel M Fox, eds, *AIDS: The Making of a Chronic Disease* (Berkeley: University of California Press, 1992) 84; Sander L Gilman, *Disease and Representation: Images of Illness from Madness to AIDS* (Ithaca, NY: Cornell University Press, 1988); Claudine Herzlich & Janine Pierret, "The Construction of a Social Phenomenon: AIDS in the French Press (1989) 29:11 *Social Science & Medicine* 1235; Deborah Lupton, *Moral Threats and Dangerous Desires: AIDS in the News Media* (London, UK: Taylor & Francis, 1994); Randy Shilts, *And the Band Played On: Politics, People, and the AIDS Epidemic* (New York: St Martin's Press, 1987).

28 "The AIDS Epidemic: The Search for a Cure", *Newsweek* 101 (18 April 1983) 74, cited in Albert, *supra* note 26 at 399.

29 "The Gay Plague", *New York Magazine* 15 (31 May 1982) 52; "AIDS Anxiety", *New York Magazine* 16 (20 June 1983) 24, cited in Albert, *supra* note 26 at 399.

30 Joey L Mogul, Andrea J Ritchie & Kay Whitlock, *Queer (In)Justice: The Criminalization of LGBT People in the United States* (Boston: Beacon Press, 2011) at 23 [emphasis in original].



as overly sexualized and promiscuous. The second theme that emerges is that gay men who contract HIV are morally culpable and, ultimately, responsible for their fates—their non-normative sexual practices have resulted in their illness.

In the next section, I will argue that, while we may be tempted to view this construction of gay men as a historical anomaly resulting from the extreme circumstances of the 1980s HIV/AIDS epidemic, journalists continue to rely upon these well-established tropes when they cover contemporary cases of criminal HIV non-disclosure. To be clear, I will not argue that journalists *always* rely upon these tropes when they tell stories related to gay men. One need only survey recent coverage of issues such as same-sex marriage and adoption to recognize that it is impossible to articulate the approaches of journalists in monolithic terms. Rather, the point I will make is that contemporary HIV non-disclosure cases reveal that these controlling narratives have not dissipated into the ether altogether.

### III. CASE STUDY

#### A. The Law of HIV Non-Disclosure in Canada

Before closely examining the Ottawa case, a brief survey of the law of HIV non-disclosure in Canada is in order. There are no specific HIV non-disclosure or HIV transmission offences set out in the *Criminal Code*.<sup>31</sup> Rather, existing offences—most notably, aggravated sexual assault—have been applied in cases where individuals have failed to disclose their HIV-positive status, or where they have put others at risk of contracting HIV. These offences include common nuisance,<sup>32</sup> administering a noxious substance,<sup>33</sup> criminal negligence causing bodily harm<sup>34</sup> and murder.<sup>35</sup> As we might expect, most individuals who have been charged for not disclosing their status in Canada are men. Given the prevalence of HIV among gay men,<sup>36</sup> it is surprising that most of the individuals charged with failing to disclose their HIV-positive status are men who engage in sexual activities with women. A recent empirical study authored by Eric Mykhalovskiy and Glenn Betteridge suggests that, by the end of 2010, heterosexual men accounted for 65% of all individuals accused of failing

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31 Grant, “Boundaries”, *supra* note 5 at 126.

32 *Criminal Code*, *supra* note 10, s 180(1)(b). See e.g. *R v Thornton* (1989), 8 WCB (2d) 156 (Ont Dist Ct), aff’d (1991), 1 OR (3d) 480 (CA), aff’d [1993] 2 SCR 445, 13 OR (3d) 744; *R v Summer* (1989), 98 AR 191, 8 WCB (2d) 178 (Prov Ct); *R v Williams*, 2001 NFCA 52, 205 Nfld & PEIR 1.

33 *Criminal Code*, *supra* note 10, s 245. In the Ottawa case, the noxious substance was the accused person’s semen.

34 *Criminal Code*, *supra* note 10, s 221. See e.g. *R v Wentzell*, [1989] NSJ No 510 (County Ct) (QL); *R v Ssenyonga* (1993), 81 CCC (3d) 257, 21 CR (4th) 128 (Ont Ct J (Gen Div)).

35 *Criminal Code*, *supra* note 10, s 231.

36 Gay or bisexual men accounted for 57% of HIV-infected people in Ontario as of 2008. See Ontario Ministry of Health and Long-Term Care, Public Information, “Ontario HIV/AIDS Infection Rates”, online <[www.health.gov.on.ca/en/public/programs/hiv aids/charact\\_epidemic.aspx](http://www.health.gov.on.ca/en/public/programs/hiv aids/charact_epidemic.aspx)> [Ontario HIV/AIDS Infection Rates].

to disclose their HIV-positive status in Canada.<sup>37</sup> The authors further suggest that their data points to a “potential centring of criminal charges on Black heterosexual men.”<sup>38</sup> Recently, however, empirical evidence demonstrates that there have been an increasing number of prosecutions against gay men. In Ontario, for example, 13 of 48 men charged by the end of 2010 allegedly failed to disclose their status before engaging in sexual relations with other men.<sup>39</sup>

In light of scientific advancements over the past three decades, HIV is no longer the fatal condition it was when the epidemic emerged in the early 1980s, nor when the Supreme Court decided *Cuerrier* in 1998.<sup>40</sup> As Martha Shaffer, Isabel Grant and Alison Symington note:

There have been significant changes with respect to our knowledge about HIV prevention and transmission since *Cuerrier*, as well as ongoing development of effective treatments, which have transformed HIV from a fatal diagnosis into a chronic, manageable condition for most people with access to treatment. Yet much of the public still believes that HIV is highly infectious, is inevitably fatal, and is associated with immoral activities. As a result, not revealing HIV status to sexual partners is a charged issue.<sup>41</sup>

Despite these advancements, prosecutors have recently tended to move away from less serious charges, such as common nuisance, and toward more serious charges, such as aggravated sexual assault, attempted murder and murder in cases involving heterosexual and gay men alike.<sup>42</sup>

### 1. *Sexual Assault Provisions*

The sexual assault provisions of the *Criminal Code*, which are most often used in cases of alleged HIV non-disclosure, have been applied inconsistently. A person who knows that he or she is HIV-positive has a duty to disclose his or her status before engaging in conduct that poses a “significant risk of serious bodily harm” of transmitting the virus to another person, a standard the Supreme Court of Canada

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37 Eric Mykhalovskiy & Glenn Betteridge, “Who? What? Where? When? And with What Consequences? An Analysis of Criminal Cases of HIV Non-Disclosure in Canada” (2012) 27:1 CJLS 31 at 40 [Mykhalovskiy & Betteridge].

38 *Ibid* at 41. For a discussion about the tropes of race and sexuality at work in HIV non-disclosure cases, see e.g. James Miller, “African Immigrant Damnation Syndrome: The Case of Charles Ssenyonga” (2005) 2:2 Sexuality Research & Social Policy 31.

39 Mykhalovskiy & Betteridge, *supra* note 37 at 41.

40 *Cuerrier*, *supra* note 8.

41 Isabel Grant, Martha Shaffer & Alison Symington, “Focus: *R v Mabior* and *R v DC*: Sex, HIV, and Non-Disclosure, Take Two: Introduction” (2013) 63:3 UTLJ 462 at 463 [Grant, Shaffer & Symington].

42 Grant, “Boundaries”, *supra* note 5 at 124–26. More empirical research examining the underlying causes of this shift in prosecutorial trends in Canada may be useful to fully understand this trend.

first developed in *Cuerrier*.<sup>43</sup> Where this duty exists, not disclosing one's status may constitute fraud within the meaning of paragraph 265(3)(c) of the *Criminal Code*.<sup>44</sup> The fraud renders the sexual partner's consent to that activity legally invalid. To establish fraud on the part of the accused person that renders the sexual partner's consent legally invalid, the Crown bears the burden of proving, beyond a reasonable doubt, that: (1) the accused committed an act that a reasonable person would see as dishonest; (2) a harm, or a risk of harm, to the complainant resulted from that dishonesty; and (3) the complainant would not have consented but for the accused's dishonesty.<sup>45</sup> Within this paradigm of consent, it is irrelevant whether or not the complainant actually contracted HIV.

Since *Cuerrier* was released in 1998, there has been considerable confusion about which sexual acts meet the "significant risk of serious bodily harm" test—the result has been that people living with HIV run the risk of being charged and convicted anytime they fail to disclose their status, regardless of the specific sexual activities in question and the level of risk associated with them. As Shaffer explains, "[r]esearch has shown that the risk of HIV infection is mediated by many factors, including stage of the infection, type of sexual activity, whether the person living with HIV/AIDS (PHA) is the insertive or receptive partner, condom use, viral load, anti-retroviral treatment, circumcision, and whether either partner has an STI."<sup>46</sup> To use a concrete example, the vast majority of scientific evidence suggests that there is a qualitative difference in terms of risk of HIV transmission between condomless anal intercourse and condomless oral sex. The Canadian AIDS Society classifies condomless anal intercourse as carrying a "high risk" of HIV transmission. Conversely, it classifies performing oral sex without a condom as carrying a "low risk" of HIV transmission and classifies receiving oral sex without a condom as carrying a "negligible risk" of HIV transmission.<sup>47</sup> It was unclear whether these sexual activities, which carry vastly different risks, would be treated similarly under the "significant risk of serious bodily harm" analysis developed in *Cuerrier*.

To their credit, the Supreme Court in *Mabior* recently acknowledged and attempted to address the questions left unanswered by *Cuerrier*. McLachlin CJC, writing for a unanimous Court, noted at the outset of the decision: "[w]hile *Cuerrier* laid down the basic requirements for the offence, the precise circumstances when

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43 *Cuerrier*, *supra* note 8 at para 128.

44 *Criminal Code*, *supra* note 10, s 265(3)(c).

45 *Cuerrier*, *supra* note 8 at paras 126, 128, 130.

46 Martha Shaffer, "Sex, Lies, and HIV: *Mabior* and the Concept of Sexual Fraud" (2013) 63:3 UTLJ 466 at 471, DOI: <10.3138/utlj.63.3.0301-1> [Shaffer, "Sex, Lies & HIV"].

47 Canadian AIDS Society, *HIV Transmission: Guidelines for Assessing Risk: A Resource for Educators, Counsellors and Health Care Providers*, 5th ed (Ottawa: Canadian AIDS Society, 2004) at 26, 29, online: <librarypdf.catie.ca/pdf/p25/22303.pdf>. A fulsome discussion of the scientific literature regarding HIV transmission goes beyond the scope of this paper. For further analysis, see Eric Mykhalovskiy, Glenn Betteridge & David McLay, "HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario" (August 2010), online: <www.catie.ca/pdf/Brochures/HIV-non-disclosure-criminal-law.pdf>.

failure to disclose HIV status vitiates consent and converts sexual activity into a criminal act remain unclear. The parties ask this Court for clarification.<sup>48</sup> Purporting to add clarity to the decision in *Cuerrier*, the Court restated the test as follows: “[w]here there is a *realistic possibility of transmission of HIV*, a significant risk of serious bodily harm is established, and the deprivation element of the *Cuerrier* test is met.”<sup>49</sup>

While a full treatment of the limitations of *Mabior* goes beyond the scope of this paper, scholars and activists have lodged considerable criticism at the decision since its release in 2012. In a recent article, Shaffer points to four fundamental weaknesses of the Court’s discussion of the doctrine of fraud in the context of sexual assault law. First, she argues that the “realistic possibility” standard developed in *Mabior* is misleading—rather, the test is now “more akin to holding that disclosure is required if there is more than a negligible risk of transmission.”<sup>50</sup> Second, the requirement that an accused person have a low viral count raises serious evidentiary issues. In particular, the Court fails to specify when a viral count should be treated as “low” and provides no guidance about how frequently people living with HIV need to get tested in order to prove that they were not legally required to disclose their status before engaging in sexual activities.<sup>51</sup> Third, the Court fails to provide guidance about how the “realistic possibility” standard applies in the context of non-vaginal sexual intercourse, including oral and anal sex.<sup>52</sup> Finally, the Court offers virtually no analysis on the disclosure obligations imposed on people living with other serious sexually transmitted infections, including antibiotic resistant strains of gonorrhea and genital herpes.<sup>53</sup> As a result, Shaffer concludes that the decision in *Mabior* “fails to help us consider whether *Cuerrier*’s ‘significant risk’ test sets out a notion of sexual fraud that promotes a full conception of sexual autonomy and sexual consent.”<sup>54</sup>

Writing in a similar vein, Grant argues that there are at least three underlying problems with the Court’s aggravated sexual assault analysis in *Mabior*. First, the Court simply asserts that any possibility of transmitting HIV endangers the complainant’s life, regardless of whether HIV is actually transmitted. Grant explains: “[w]hile sexual assault is not a crime that is measured by the degree of harm caused to the complainant, aggravated sexual assault is . . . [A]ggravated sexual assault applies to situations where that autonomy is negated *and* further serious harm is caused. The judgment in *Mabior* trivializes the significance of such harm when it does occur.”<sup>55</sup> Second, Grant argues that by proceeding on the assumption that the complainant’s life has been endangered unless a condom is used and the

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48 *Mabior*, *supra* note 6 at para 3.

49 *Ibid* at para 84 [emphasis in original].

50 Shaffer, “Sex, Lies & HIV”, *supra* note 46 at 473.

51 *Ibid*.

52 *Ibid*.

53 *Ibid* at 474.

54 *Ibid*.

55 Isabel Grant, “The Over-Criminalization of Persons with HIV” (2013) 63:3 UTLJ 475 at 479, DOI: <10.3138/utlj.63.3.0301-2> [Grant, “Over-Criminalization”] [emphasis in original].

accused person had a low viral load at the time of the sexual activities, the Court appears to have made it easier for the Crown to prove endangerment.<sup>56</sup> Third, Grant criticizes the Court for conflating the *mens rea* for sexual assault with the *mens rea* for aggravated assault—while aggravated sexual assault usually requires objective foreseeability of harm, the Court remains silent about the application of this standard in the context of HIV non-disclosure.<sup>57</sup> She notes, for example, that an accused person with an undetectable viral load could marshal strong empirical evidence to support the argument that he or she reasonably believed that the complainant's life was not endangered.<sup>58</sup> Beyond criticizing the Court's doctrinal analysis, Grant also rejects the Court's contention that *Mabior* constitutes an attempt to limit the parameters set out in *Cuerrier* and avoid over-criminalizing people living with HIV. She writes: “[i]t is beyond dispute that *Mabior* expands the scope of criminal liability beyond *Cuerrier*. Strangely absent from *Mabior* are the passages from the majority and minority opinions in *Cuerrier* which strongly suggested that condom use would negate a ‘significant risk.’”<sup>59</sup>

Beyond the doctrinal weaknesses Shaffer and Grant identify, the Supreme Court's decision in *Mabior* also warrants criticism for its deep and uncritical heteronormativity. While the test purports to focus on the realistic possibility of transmission of HIV, the Court offers no analysis about sex that goes beyond the paradigm of heterosexual penile-vaginal sex. It is curious that, while the Court purports to reframe the nature of the inquiry around the “realistic possibility of the transmission of HIV,” it remains silent about the application of the test in the context of non-heterosexual sexual encounters.<sup>60</sup> In particular, the decision fails to engage difficult questions surrounding the risks associated with anal sex, oral sex or even sex among members of lesbian, gay, bisexual, transgender and queer (LGBTQ) communities. Indeed, the decision never uses the words “anal sex,” “oral sex,” “gay,” “lesbian,” “bisexual,” “transgender” or “queer” at all. Rather, the sexual encounter imagined by the Court is an opposite-sex one—as a result, clarity about what “realistic possibility of the transmission of HIV” may look like for same-sex partners remains illusive.

The Court released *Mabior* shortly before the completion of the trial in the Ottawa case. Applying this new, more stringent test, the jury convicted the accused person of three counts of aggravated sexual assault, in addition to three counts of attempted murder and two counts of administering a noxious substance, his semen.<sup>61</sup>

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56 *Ibid* at 480.

57 *Ibid*.

58 *Ibid*.

59 *Ibid* at 482 [emphasis in original].

60 See Ontario HIV/AIDS Infection Rates, *supra* note 36. As of 2008, gay or bisexual men accounted for 57% of HIV-infected people in Ontario.

61 “HIV-Positive Ottawa Man Guilty of Attempted Murder” *CBC News* (1 November 2012), online: <[www.cbc.ca](http://www.cbc.ca)>; Carissima Mathen, “The Boundaries of HIV Criminalization” (6 November 2012), online: *The Ottawa Citizen* <[www.ottawacitizen.com](http://www.ottawacitizen.com)>.

## 2. *Murder and Attempted Murder*

Before 1999, homicide charges were rarely laid against individuals who did not disclose their HIV-positive status prior to engaging in sexual activities. While there are different theories about this shift in charging patterns, Grant has suggested that this change may have resulted from the rule repealed in 1999 that prosecutors had to prove that the victim's death occurred within one year and a day from when the acts in question took place.<sup>62</sup> The key mental elements of murder are the intention to cause the requisite degree of bodily harm, coupled with the necessary recklessness as to its effect.<sup>63</sup> A person "who attempts by any means to commit murder" is guilty of attempted murder.<sup>64</sup>

In recent cases, including the one from Ottawa, Crown prosecutors have laid charges of murder or attempted murder where individuals have not disclosed their HIV-positive status prior to engaging in sexual activities. For example, in a 2009 Canadian case tried before judge and jury, Johnson Aziga was convicted of two counts of first-degree murder for failing to disclose his HIV status before having sex without a condom. He was also convicted of ten counts of aggravated sexual assault and one count of attempted aggravated sexual assault following sexual encounters with eleven women. Seven of the complainants later tested positive for HIV following their encounters with the accused, and two subsequently died of cancer that was alleged to have been related to contracting HIV. Aziga was sentenced to life imprisonment with no possibility of parole for 25 years—the mandatory minimum sentence for first-degree murder. To date, however, Aziga is the only person to have ever been convicted in Canada for first-degree murder due to HIV transmission.<sup>65</sup>

### B. The Ottawa Case Study

#### 1. *Release of Name, Photograph, Details About Sexuality and Personal Health Information*

Having briefly sketched the law of HIV non-disclosure in Canada, I will turn to the case at the heart of my analysis. In April 2010, the Ottawa Police Service received

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62 Grant, "Boundaries", *supra* note 5 at 132, citing *Criminal Code*, *supra* note 10, s 227, as repealed by Bill C-51, *An Act to Amend the Criminal Code, the Controlled Drugs and Substances Act and the Corrections and Conditional Release Act*, 1st Sess, 36th Parl, 1998, cl 9 (assented to 11 March 1999), SC 1999, c 5, s 9.

63 Subsection 229(b) of the *Criminal Code* deals with the situations where an unintended victim is killed as a result of the accused acts, while section 229(c) deals with homicides occurring while a person commits another unlawful act. Neither of these subsections relate to prosecutions for HIV transmission and exposure.

64 *Criminal Code*, *supra* note 10, s 239(1)(a).

65 Sandra Ka Hon Chu & Richard Elliott, "Criminal Law and Cases of HIV Transmission or Exposure" in "HIV/AIDS in the Courts — Canada" (2009) 14:2 HIV/AIDS Policy & L Rev 38 at 42–43. See also "HIV-Positive Man Killed with Hatred", *Toronto Star* (6 April 2009), online: <www.thestar.com>. For further discussion, see *R v Aziga*, [2005] OJ No 5983 (QL) (Ont Ct J); and *R v Aziga* (2006), 42 CR (6th) 42, 2006 CanLII 42798 (Ont Sup Ct).

a single complaint that the accused person had failed to disclose his HIV status prior to engaging in sexual activities with a young man he met online. Two days after the witness came forward, the police made the decision to arrest the accused person, noting that there was reason to suspect that he had put other men at risk of contracting HIV. The police obtained a *Feeney* warrant, and officers attended the Ottawa man's residence, but he was not home. Just before midnight on the same evening, the investigating officer called the accused person on his cell phone. The officer requested a meeting, and the two agreed to meet at a local Tim Horton's restaurant. When the accused arrived at the restaurant, he did not immediately see the officer and decided to order a coffee and wait in the parking lot. His friend, who was driving the vehicle, entered the drive-through lane to place their order. At this point, two police vehicles immediately blocked their passage into the drive-through and several officers then conducted a high-risk takedown. Police placed the accused under arrest, and he was initially charged with one count of aggravated sexual assault and one count of breach of probation.<sup>66</sup> As the investigation proceeded, the police increased the number of aggravated sexual assault charges and added new charges for attempted murder and administering a noxious substance.

Two days later, with the accused person already in custody, the Ottawa Police Service issued a press release to the public. Entitled "Ottawa Police seeking further victims following an Ottawa man being charged with Aggravated Sexual Assault," the press release included a large colour photo of the accused person.

The text of the press release stated:

Yesterday, the Ottawa Police Service has charged an Ottawa male with nine counts of Aggravated Sexual Assault as a result of incidents that occurred in late January and early February 2010. An investigation was commenced on April 30, 2010 after a male victim complained to police after contracting an infectious disease from a male. The male knowingly failed to disclose details to the victim regarding his infectious medical condition. [The accused person], age 29, of Ottawa appeared in court on May 6, 2010 and remains in custody. 'The Ottawa Police is releasing the picture of the charged man—an extraordinary measure—to ensure that all sexual partners are informed that medical follow-up is warranted,' noted Acting Chief Gilles Larochelle. It is estimated that [the accused] has had multiple sexual partners over the past months, approaching them using the internet for the most part. The Ottawa Police Service urges all those who have had sexual contact with [the accused] to contact the Ottawa Police Sexual Assault/Child Abuse Unit at 613-236-1222, ext. 5944

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66 These facts are recounted more fulsomely in a related case: *R v Boone*, 2012 ONSC 51, 254 CRR (2d) 192.

or phone Crime Stoppers at 613-233-8477 (TIPS) or toll free at 1-800-222-8477. Individuals who have had sexual contact with this individual are also being urged to seek appropriate medical follow up either through their own health care provider or through Ottawa Public Health at 613-580-6744. 'Ottawa Public Health offers free and anonymous testing for sexually transmitted infections,' said Dr. Isra Levy, Medical Officer of Health, Ottawa Public Health.<sup>67</sup>

The extended press release, which was sent out on an email listserv of the Ottawa Police Service's GLBT Liaison Committee, went one step further. It referred to the accused person as a "sexual predator."<sup>68</sup>

As the press release makes clear, police departments in Canada do not—as a matter of course—release the photographs of accused persons to the public. In Ontario, subsection 41(1.1) of the *Police Services Act*<sup>69</sup> empowers the chief of police, or his or her designate, to "disclose personal information about an individual in accordance with the regulations."<sup>70</sup> Subsection 3(1) of Ontario Regulation 265/98 (Disclosure of Personal Information) provides: "A chief of police or his or her designate may disclose personal information, as described in subsection (2), about an individual to any person if the individual has been charged with, convicted or found guilty of an offence under the *Criminal Code* (Canada), the *Controlled Drugs and Substances Act* (Canada) or any other federal or provincial Act."<sup>71</sup> In cases where subsection 3(1) applies, police services are permitted to disclose the following information:

1. The individual's name, date of birth and address.
2. The offence described in subsection (1) with which he or she has been charged or of which he or she has been convicted or found guilty and the sentence, if any, imposed for that offence.
3. The outcome of all significant judicial proceedings relevant to the offence described in subsection (1).
4. The procedural stage of the criminal justice process to which the prosecution of the offence described in subsection (1) has progressed and the physical status of the individual in that process (for example, whether the individual is in custody, or the terms, if any, upon which he or she has been released from custody).

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67 Ottawa Police Service Press Release, *supra* note 4 [name of the accused person redacted].

68 For further discussion of the email describing the accused person as a "sexual predator," see Noreen Fagan & Neil McKinnon, "Update: Nine More Aggravated Sexual Assault Charges Laid Against Accused", *Daily Xtra* (17 May 2010), online: <[www.dailyxtra.com](http://www.dailyxtra.com)>.

69 *Police Services Act*, RSO 1990, c P.15.

70 *Ibid*, s 41(1.1).

71 O Reg 265/98, s 3(1).



5. The date of the release or impending release of the individual from custody for the offence described in subsection (1), including any release on parole or temporary absence.<sup>72</sup>

Despite the relatively expansive wording of the *Police Services Act* and Ontario Regulation 265/98, the practice of issuing a press release is still relatively rare in Ontario and other jurisdictions throughout Canada. To use the language of the Ottawa Police Service, issuing a press release constitutes an “extraordinary measure.”<sup>73</sup>

Given that the accused person had cooperated with the police and was already in custody when the police issued the press release, there was no ongoing threat to the public. Admittedly, it can take up to three months from the moment of transmission of HIV until an individual will test positive for the condition. There was, however, no ongoing risk. Thus, the Ottawa Police Service issued a press release for a man they already had in custody, one who had cooperated with their investigation —this scenario is not comparable to one where an alleged rapist remains at large and the police issue a warning to the public that includes a sketch or picture of the suspect.<sup>74</sup> Instead, in the Ottawa case, the police argued that they had taken the extraordinary measure of releasing the photo “to ensure that all sexual partners are informed that medical follow-up is warranted.”<sup>75</sup>

The police’s stated goal of reaching out to men who may have engaged in sexual activities with the accused may seem understandable at first blush. Indeed, in fall 2012, the accused person was convicted of three counts of aggravated sexual assault, three counts of attempted murder and two counts of administering a noxious substance, his semen. There was more than one complainant.<sup>76</sup> One might argue that, had the Ottawa Police Service not issued the press release and members of the community later discovered this omission, the police would have been criticized for failing to disclose that the accused person was potentially spreading HIV to others. Indeed, in 2005, four women filed a multi-million dollar civil suit against the Windsor Police Service and the Windsor-Essex County Health Unit for failing to warn them about an individual both organizations allegedly knew was failing to disclose his HIV-positive status to others prior to engaging in sexual activities. The individual was later convicted of 15 counts of aggravated sexual assault and sentenced to 18 years in prison.<sup>77</sup> In early 2013, the four women settled their lawsuit

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72 *Ibid*, s 3(2).

73 Ottawa Police Service Press Release, *supra* note 4.

74 For further discussion on the police practice of issuing warnings to the public, see in particular *Jane Doe v Toronto (Metropolitan) Commissioners of Police* (1998), 39 OR (3d) 487, 160 DLR (4th) 697 (Sup Ct) [*Jane Doe* cited to DLR]. For commentary on the important issues raised by the case, see e.g. *Jane Doe, The Story of Jane Doe: A Book About Rape* (Toronto: Vintage Canada, 2004).

75 Ottawa Police Service Press Release, *supra* note 4.

76 *Supra* note 61.

77 “Suit Against Windsor Police, Health Unit Reserved”, *CBC News* (16 October 2012), online: <[www.cbc.ca](http://www.cbc.ca)>.

against the Windsor Police Service and the Windsor-Essex County Health Unit.<sup>78</sup> To be certain, this type of claim and the risk of civil liability further complicates the decision of the Ottawa Police Service to issue the press release.

In explaining the underlying reasons for issuing the press release, Staff Sergeant John McGetrick of the Ottawa Police Service stated:

A lot of thought went into this decision, and ultimately the release of the photo was a necessity for public safety.... We have reason to believe [the accused person] has knowingly failed to disclose details to multiple persons in the community, and we felt it was paramount to notify the public to seek proper medical attention.<sup>79</sup>

The Ottawa Police Service did later admit, however, that they could have done a better job of reaching out to members of Ottawa's LGBTQ communities and service organizations before issuing the press release. Two months following the press release—and after receiving considerable backlash in both Canada and abroad—Inspector Joan McKenna, co-chair of the Ottawa Police Service's GLBT Liaison Committee, stated: “[w]e would still have put out his picture, but there would have been more consultation with the community. Because again, our role is public safety, so we felt there was a concern to the community at large, to be aware of, that this person was engaged in unsafe sex.”<sup>80</sup> In 2012, Staff Sergeant McGetrick refused to elaborate on the underlying rationale for issuing the press release, noting that the case was currently before the courts.<sup>81</sup> In fairness to the police, then, they seem to have been guided by the good faith belief that issuing the press release would encourage men who had engaged in sexual activities with the accused person to seek out appropriate medical care, including being tested for HIV and other sexually transmitted infections.

The stronger claim, however, is that the accused person's privacy interest in his own medical information, along with a broader goal of not further stigmatizing members of HIV-positive and LGBTQ communities, should have restrained the police from taking the “extraordinary measure” of distributing the press release. When the police issued the press release, the accused person had not been convicted of any crimes. As a matter of constitutional law, he was entitled to the presumption

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78 “4 HIV Victims’ Lawsuit Settled with Police, Health Unit”, *CBC News* (1 February 2013), online: <[www.cbc.ca](http://www.cbc.ca)>.

79 Aedan Helmer, “Courting HIV confusion”, *Ottawa Sun* (15 May 2010), online: <[www.ottawasun.com](http://www.ottawasun.com)> [Helmer].

80 Marcus McCann, “Unacceptable”, *Daily Xtra* (22 July 2010), online: <[www.dailyxtra.com](http://www.dailyxtra.com)>.

81 In an email to the author dated April 25, 2012, Staff Sergeant McGetrick responded to a request for an interview as follows: “Thank you for your correspondence. The file in question is currently before the courts and I am unable to provide any further comments at this time. I would be more than willing to discuss the issues upon the conclusion of court proceedings. However, the trial is not scheduled until the Fall of 2012.” This correspondence is on file with the author.

of innocence as set out in subsection 11(d) of the *Canadian Charter of Rights and Freedoms*.<sup>82</sup> Additionally, at the time the police issued the press release, it was unclear whether the accused person's case would even meet the "significant risk of serious bodily harm" test developed by the Supreme Court of Canada in *Cuerrier*,<sup>83</sup> a test that the Court reframed just before the completion of his trial.<sup>84</sup> For example, what types of sexual activities did the accused engage in with the men he met online? As discussed above, there is a qualitative difference in the risk of HIV transmission between, for example, condomless anal sex and condomless oral sex. What, precisely, did the accused person say or fail to say to the men he met online prior to engaging in sexual activities? What was his viral load—a measure of the amount of HIV in his body and one of the strongest factors in determining whether or not he is likely to transmit the virus to others—during the relevant period?<sup>85</sup> Was there a dispute about whether or not a condom was used when the men engaged in sexual activities? It would be impossible to answer these questions, with any degree of certainty, when the Ottawa Police Service issued their press release two days after the arrest.

At a minimum, before making the "extraordinary" decision to release his name, his sexuality, the details of his sexual encounters and his private health information, one would expect that the Ottawa Police Service engaged these complex questions. Of course, the police describe having put "[a] lot of thought" into the decision.<sup>86</sup> In issuing the press release, one wonders whether the police may have been unconsciously relying upon the well-established, deep-seated trope of the overly sexualized, promiscuous gay man, a figure who came to be synonymous with discourse surrounding HIV/AIDS in the early 1980s.

## 2. Coverage of the Story

Immediately following the Ottawa Police Service's distribution of the press release, the *Ottawa Sun* published a story recounting the details of the case in salacious terms.

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82 *Canadian Charter of Rights and Freedoms*, s 11(d), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, provides: "Any person charged with an offence has the right...to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

83 *Cuerrier*, *supra* note 8 at para 128.

84 See *Mabior*, *supra* note 6.

85 See Grant, Shaffer & Symington, *supra* note 41 at 462–63, n 4: "Viral load is the term used to describe the amount of HIV circulating in the body, usually measured in the blood (as the number of copies per milliliter). The tests currently used in Canada can measure viral load levels as low as 20 to 50 copies/ml. Below this level, viral load is said to be 'undetectable.' The goal of HIV treatment is to render viral load undetectable, thereby allowing the immune system to maintain or recover its strength and keep people healthy. There is also a strong correlation between a person's viral load and the risk of transmission to another person—a lower viral load means there is less possibility of transmission. If the viral load is undetectable, the possibility of transmission is almost eliminated."

86 Helmer, *supra* note 79.

The story appeared on the front page of the tabloid-style newspaper and included a colour photo of the accused. The online version of the story included the title “Have You Had Sex with This Man? If so, Police Say You Need to See Your Doctor.”<sup>87</sup> Both versions opened using the following language:

They met on a gay dating website, chatted and agreed on a place. The first rendezvous went so well in late January they agreed to meet up again and did so every day—sometimes twice—eight more times. Several weeks later one of the men tested positive for HIV. What he didn’t know was the man he met and had unprotected sex with, was infected with the deadly disease the whole time. Angered and seeking justice, he contacted police on April 30. “I had to come forward. I couldn’t let this happen to anyone else,” the 18-year-old said Friday. “It had to stop.”<sup>88</sup>

After including a series of quotations from a single complainant, the article delves into the precise circumstances of the sexual encounters, repeatedly using the accused person’s name. The article states: “Police allege [the accused] found partners on websites such as squirt.ca, gay411.com and plentyoffish.com and then had sex with them. [The accused] allegedly told police there were at least several more men in Ottawa he had slept with.”<sup>89</sup> The article then goes further by noting that, during one of the sexual encounters, “[the accused] and another man met up with two others for a foursome.”<sup>90</sup>

Similarly, coverage of the case by *CTV Ottawa*—a local television station that also publishes short news stories online—relied on many of the same well-established tropes of the overly sexualized, promiscuous HIV-positive gay man. The online version of the story is entitled “Ottawa man’s sex partners urged to come forward.”<sup>91</sup> Again, the coverage highlights the existence of “multiple sexual partners” who the accused “made contact with...on the Internet.”<sup>92</sup> Beyond the one photo contained in the Ottawa Police Service’s initial press release, the article includes an addition photo of the accused, which had originally been posted on his personal Facebook account.<sup>93</sup> While the article acknowledges that “[p]olice will not say what disease the man may have passed on,” it then goes on to discuss the *Aziga* case.<sup>94</sup> As

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87 Kenneth Jackson, “Have You Had Sex with This Man? If so, Police Say You Need to See Your Doctor”, *Ottawa Sun* (7 May 2010), online: <[www.ottawasun.com](http://www.ottawasun.com)>.

88 *Ibid.*

89 *Ibid.*

90 *Ibid.*

91 Melissa Juergensen, “Ottawa Man’s Sex Partners Urged to Come Forward” *CTV News Ottawa* (7 May 2010), online: <[www.ottawa.ctvnews.ca](http://www.ottawa.ctvnews.ca)>.

92 *Ibid.*

93 *Ibid.*

94 *Ibid.*

noted above, in the *Aziga* case, the accused person was found guilty of first-degree murder after two women died as a result of cancer allegedly related to contracting HIV. By referencing this case, the article strongly implies that the accused is HIV-positive.

There are a number of troubling aspects associated with the coverage by both the *Ottawa Sun* and *CTV Ottawa*. In the *Ottawa Sun* article, the decision to include a large photo paired with the headline “Have You Had Sex with This Man?” is stigmatizing not only to the accused, but also to members of HIV-positive and LGBTQ communities. To use the language offered by Goffman, the hyperbolic headline paired with the photo deeply discredits the accused.<sup>95</sup> The story may also impede an evidence-based, purposeful approach to the reality of HIV/AIDS as a public health issue that affects society as a whole. Given the historical conflation between HIV/AIDS and LGBTQ communities, particularly gay men, it is impossible to limit the stigma to the accused. Rather, members of HIV-positive and LGBTQ communities more broadly become associated with the “spoiled identity” of stigma that was invoked and reinscribed as part of the *Ottawa Sun*’s coverage of the press release.<sup>96</sup>

Both articles tap into the deep-seated trope of the overly sexualized, promiscuous HIV-positive gay man that came to be synonymous with HIV/AIDS coverage in the early 1980s. The *Ottawa Sun* article includes a series of quotations from a single complainant, the precise details of the websites the accused allegedly used to meet gay men and salacious details about the alleged sexual encounters. Both stories, however, fail to reach out to members of Ottawa’s LGBTQ communities and service organizations, other than a single complainant, for comments and reactions. They also fail to include a discussion of safer sex practices, such as the careful and consistent use of condoms and regular testing for sexually transmitted infections. Ultimately, while both articles purport to participate in a larger project of public health by encouraging gay men who engaged in sexual activities with the accused to get tested, the articles are counterintuitive to this stated goal. One could argue that the journalists who authored the articles simply got carried away in portraying the sensational elements of the story from the perspective of the young complainant. But there appears to be something deeper going on: both articles suggest that the accused—and the broader HIV-positive and LGBTQ communities he represents—are overly sexualized, promiscuous and perhaps even “polluted.”

Given that the police’s initial decision to issue the press release and the subsequent media coverage surrounding the Ottawa story focused primarily on why covering the story was important for gay men in the region, it is important to examine how the small LGBTQ press treated the story. The story was framed in vastly different terms by these outlets. For example, in an editorial entitled “Epic Privacy Fail,” Marcus McCann, then managing editor of *Daily Xtra*’s Ottawa and

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95 Goffman, *supra* note 13 at 3.

96 Goffman, *supra* note 13.

Toronto editions, states: “There are days when I am embarrassed to be a journalist. Usually, it’s because of pack journalism, personality assaults or lowest common denominator fear-mongering. All three converged on May 8, when the face of a gay man appeared on the cover of the *Ottawa Sun*.”<sup>97</sup> He explains that, unlike mainstream media outlets in Ottawa, *Daily Xtra* made the editorial decision to decline reporting any details that would identify the accused. As he puts it, “[t]he name of the accused ought not to be released in cases like this—and certainly not photos.”<sup>98</sup> To support this claim, McCann draws an analogy to other cases of a “highly personal” nature, such as those involving intimate partner violence and sex work. He explains:

Police and media tend to tread lightly on cases of a highly personal nature. Ottawa Police respond to more than 3,000 cases of domestic abuse a year and don’t announce what’s going on. In most solicitation cases, police don’t release the names of hookers or johns. And the media plays along, a tacit acknowledgement that splashing those kinds of personal and sexual details around can lead to ostracism and depression—in short, it can ruin lives.

If police and the mainstream press can muster that kind of sensitivity elsewhere, why not here?<sup>99</sup>

In comparison with mainstream news outlets, *Daily Xtra* sets out the facts of the case using measured, careful prose. It also avoids dwelling upon the dramatic elements of the case, particularly the sexual activities in question. Rather, *Daily Xtra* notes, albeit somewhat imprecisely, that an Ottawa man is “accused of having consensual sex with someone he met online but failing to disclose his HIV status.”<sup>100</sup> It also highlights the steps that *both parties* may consider taking to avoid contracting HIV. Unlike the mainstream press, *Daily Xtra* declined to rely on well-established, deep-seated tropes of gay men as overly sexualized and promiscuous.

### 3. Harms Flowing From the Police Press Release and Media Coverage

There are a number of harms—both to the accused, as well as broader HIV-positive and LGBTQ communities—that flowed from the police’s initial press release and the subsequent mainstream media coverage. I will begin by examining the specific harms experienced by the accused. In an interview that appeared in *Daily Xtra*,<sup>101</sup>

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97 Marcus McCann, “Epic Privacy Fail”, Editorial, *Daily Xtra* (12 May 2010), online: <www.dailyxtra.com> [McCann, “Epic Privacy Fail”].

98 *Ibid.*

99 *Ibid.*

100 *Ibid.*

101 Michael Burtch, “On[e] on One with Steven Boone”, *Daily Xtra* (9 August 2011), online: <www.dailyxtra.com> [Burtch].

the accused draws clear causal connections between the initial press release, subsequent media coverage and his lived experiences in custody as he awaited trial. The interviewer asks: “You’ve had your name, picture, sexuality and your HIV status released by the Ottawa police to the media. How has that impacted your experience behind bars while you await trial?”<sup>102</sup> The accused responds:

It has seriously impacted my experience behind bars because I have experienced homophobia and discrimination in relation to my HIV status by both fellow inmates as well as jail staff as a result. I also spent several months in segregation as a result of the publicity in my case. I’ve also suffered from verbal death threats, physical assaults and sexual abuse, all unprovoked, by other inmates and even corrections staff. Despite being in ‘protective custody,’ I haven’t felt very protected. By releasing my name, picture, sexuality and HIV status, the Ottawa police put my life in unnecessary danger and caused many dangerous events to take place. Because of this, I’ve had to be moved to Maplehurst, a jail six hours from Ottawa, in Milton, Ontario, where I can maintain a low profile and remain safe. This was something I had to request.<sup>103</sup>

In light of the accused’s description of his lived experiences in prison, it is apparent that the decision of the Ottawa Police Service to release his name, picture, sexuality and health information, as well as the media’s subsequent coverage, may have compromised his safety while he awaited trial. For example, there is a well-developed body of scholarly literature pointing to the negative effects, particularly in terms of mental health, on inmates who are placed in solitary confinement—or to use the Canadian term, administrative segregation—for long periods of time.<sup>104</sup> In order to protect him from other inmates who may have learned about his sexuality, his medical condition and his alleged crimes through the mainstream press, officials in Ottawa placed the accused in administrative segregation. Ultimately, at his request, officials even agreed to move him to another facility in an effort to protect him from further instances of violence, harassment and discrimination. Admittedly, many inmates who are members of LGBTQ communities describe experiencing

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102 *Ibid.*

103 *Ibid.*

104 A fulsome analysis of solitary confinement and its mental health implications for inmates goes beyond the scope of this paper. For further discussion, see e.g. Michael Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* (Vancouver: Douglas & McIntyre, 2002); Craig Haney, “Mental Health Issues in Long-Term Solitary and ‘Supermax’ Confinement” (2003) 49:1 *Crime & Delinquency* 124; Jennifer R Wynn & Alisa Szatrowski, “Hidden Prisons: Twenty-Three-Hour Lock-down Units in New York State Correctional Facilities” (2003) 24:1 *Pace L Rev* 497; Stuart Grassian, “Psychiatric Effects of Solitary Confinement” (2006) 22 *Wash UJL & Pol’y* 325; Peter Scharff Smith, “The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature” (2006) 34 *Crime & Justice* 441.

violence while in custody at higher rates than their heterosexual counterparts.<sup>105</sup> In this case, however, there appears to be a causal connection between the initial decision to issue the press release, subsequent widespread media attention and the accused person's lived experiences of violence in custody. These experiences cannot be read solely as flowing from his self-identification as a gay man.

Beyond the individual harms experienced by the accused, there may also be harms to broader HIV-positive and LGBTQ communities in Ottawa. If we take the Ottawa Police Service's claim seriously that they were attempting to ensure public health and safety, then it seems logical to examine how public health experts in Ottawa viewed the decision to issue the press release and the subsequent media coverage. In a recent article entitled "The Potential Public Health Effects of a Police Announcement About HIV Nondisclosure: A Case Scenario Analysis,"<sup>106</sup> Dr. Patrick O'Byrne uses the Ottawa story to assess whether or not the press release and subsequent media coverage was actually beneficial from a public health perspective. As discussed above, police and journalists alike defended their decision to release the accused person's name, photograph, sexuality and details of his medical condition by arguing that it would encourage gay men to seek out medical attention. Dr. O'Byrne, a public health expert who works in Ottawa, could have served as a useful resource to the Ottawa Police Service.

While Dr. O'Byrne admits that more research is required, he contends that the act of publicizing an HIV-related criminal investigation *inhibits* rather than *encourages* men who have sex with men to seek out appropriate medical care. He compares the number of men in Ottawa who sought out anonymous testing for sexually transmitted infections and HIV before and after the press release and subsequent media coverage of the Ottawa case, finding a statistically significant decrease. While he concedes that he cannot prove that this drop was caused by the press release and the significant media attention it received, he argues that HIV non-disclosure laws do little to modify individual sexual practices. This leads him to conclude:

[t]he police's strategy is likely to have produced more harm than good. As a warning to HIV-prevention authorities who work with

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105 For further discussion on this point, see e.g. David M Heilpern, *Fear or Favour: Sexual Assault of Young Prisoners* (Lismore, Australia: Southern Cross University Press, 1998); Neer Korn, *Life Behind Bars: Conversations with Australian Male Inmates* (Sydney, Australia: New Holland, 2004); Lee H Bowker, *Prison Victimization* (New York: Elsevier North Holland, 1980); Dennis Cooley, "Criminal Victimization in Male Federal Prisons" (1993) 35:1 Can J Crim 479.

106 Patrick O'Byrne, "The Potential Public Health Effects of a Police Announcement About HIV Nondisclosure: A Case Scenario Analysis" (2011) Policy, Politics, & Nursing Practice, DOI: <10.1177/1527154411411484> [O'Byrne]. For further discussion, see e.g. Carol L Galletly & Steven D Pinkerton, "Preventing HIV Transmission via HIV Exposure Laws: Applying Logic and Mathematical Modeling to Compare Statutory Approaches to Penalizing Undisclosed Exposure to HIV" (2008) 36:3 JL Med & Ethics 577; Leslie E Wolf & Richard Vezina, "Crime and Punishment: Is There a Role for Criminal Law in HIV Prevention Policy?" (2004) 25:4 Whittier L Rev 821.



criminal and public health laws that resemble those in Canada, therefore, it is advisable to proceed with caution when making decisions about the use of mass media publications during HIV criminal investigations. The chances that beneficial HIV prevention outcomes might occur are slim, and this suggests that alternative strategies might be preferable.<sup>107</sup>

Dr. O’Byrne’s recent article demonstrates that there appears to be a deep disconnect between the arguments relied on by the police and journalists in releasing details of the Ottawa case and public health professionals’ understandings of strategies that best combat the spread of HIV/AIDS. At a minimum, this deep disconnect demonstrates the need for further discussion across professional disciplines. One would think that, if the police were going to issue the press release in the name of public health, then they should have actually reached out to experts such as Dr. O’Byrne. It is unfortunate that these conversations either never occurred or that the police simply decided to substitute their own judgment for that of public health experts.

In addition to public health experts, the decision to issue the press release also undermined the relationship between the Ottawa Police Service and a number of LGBTQ community organizations. For example, in the aftermath of the decision, Bruce House refused to accept donations from the Ottawa Police Service because of how the police handled the case.<sup>108</sup> Founded in 1988, the organization describes its mandate as follows: “Bruce House is a community-based organization providing housing, compassionate care and support in Ottawa for people living with HIV and AIDS, based on the belief that everyone has the right to live and die with dignity.”<sup>109</sup> Having served members of LGBTQ communities living with HIV/AIDS in Ottawa for over twenty years, it is telling that Bruce House would refuse to accept the Ottawa Police Service’s donation. Like public health experts, Bruce House’s position is that members of Ottawa’s LGBTQ communities will be less likely to seek out testing and treatment for HIV/AIDS in the aftermath of the press release and coverage by mainstream media outlets. Jay Koornstra, Executive Director of Bruce House, explains: “Until such time that Police Services adopts a more conciliatory and consultative atmosphere [in handling cases of alleged HIV non-disclosure]...our position remains unchanged. We will not accept donations from Ottawa Police Service this year.”<sup>110</sup> Thus, public health experts as well as community organizations viewed the case from a markedly different perspective than the Ottawa Police Service. In their view, the harms to HIV-positive and

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107 O’Byrne, *supra* note 106 at 8.

108 “Steven Paul Boone’s HIV Assault Case Has Activists in Pancake Fight with Ottawa Police” *Queerty* (23 August 2010), online: <[www.queerty.com](http://www.queerty.com)> [Queerty].

109 Bruce House, “Our Mission”, online: <[www.brucehouse.ca](http://www.brucehouse.ca)>.

110 *Queerty*, *supra* note 108.

LGBTQ communities far outweighed the possibility that the press release and media attention might encourage gay men in Ottawa who engaged in sexual activities with the accused to seek medical attention.

#### IV. STRATEGIES FOR REFORM

##### A. Legal Strategies

Having identified the harms associated with the police press release and the ways in which many journalists covered the Ottawa case, I will now consider legal reform strategies. To remedy the harms created by the press release and media coverage in the Ottawa case, one might consider expanding the contours of publication bans. Even if the accused person were able to convince the court that a publication ban should be issued, his picture and his name, as well as details about his sexuality and medical condition, would already have been conveyed to the public by virtue of the press release. Accordingly, a publication ban would come far too late in the process to address the harms at issue in this case.

In Canada, like most liberal western democracies, courts adhere to the open court principle.<sup>111</sup> The courtroom is conceptualized as a space where the public should be free to watch, discuss and report on the happenings in court. In *Edmonton Journal v Alberta (AG)*,<sup>112</sup> the Supreme Court of Canada emphasized the importance of our system of open courts. Justice Cory states:

There can be no doubt that the courts play an important role in any democratic society. They are the forum not only for the resolution of disputes between citizens, but for the resolution of disputes between the citizens and the state in all its manifestations. The more complex society becomes, the more important becomes the function of the courts. As a result of their significance, the courts must be open to public scrutiny and to public criticism of their operation by the public.<sup>113</sup>

As a general rule, proceedings against an accused person are to be held in an open court, but Canada does not adhere to the open court principle in absolute terms. In certain circumstances, a judge may elect to prevent an open discussion in court from occurring. In particular, section 486 of the *Criminal Code* provides that a judge is required to issue a publication ban if requested in order “to protect the identity of all victims of sexual offences and witnesses of sexual offences who are less than 18 years old.” In addition, subsection 486.5(7) provides judges with the

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111 Robert Martin, *Media Law*, 2nd ed (Toronto: Irwin Law, 2003) ch 3 at 86ff.

112 [1989] 2 SCR 1326, 64 DLR (4th) 577 [*Edmonton Journal* cited to SCR].

113 *Ibid* at 1337.

discretion to order a publication ban in order to protect the identity of victims and witnesses who are over the age of 18. It sets out a number of non-exhaustive factors that a judge is required to consider when deciding whether the publication ban should be ordered, stating:

- In determining whether to make an order, the judge or justice shall consider
- (a) the right to a fair and public hearing;
  - (b) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer significant harm if their identity were disclosed;
  - (c) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;
  - (d) society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;
  - (e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;
  - (f) the salutary and deleterious effects of the proposed order;
  - (g) the impact of the proposed order on the freedom of expression of those affected by it; and
  - (h) any other factor that the judge or justice considers relevant.<sup>114</sup>

However, subsection 486.5(7) only protects the identities of *victims* and *witnesses* within the criminal justice system. It does not apply to accused persons. While the accused in the Ottawa case may have experienced “real and substantial risk” of “significant harm” while awaiting trial, his status as an accused means that he falls outside the scope of the provision.<sup>115</sup>

A closer analogy, it seems, could be drawn between a publication ban in the Ottawa case and publication bans for young offenders. In particular, publication bans for young offenders are designed to reduce stigma for accused persons. As my foregoing analysis of the harms flowing from the police's decision to issue the press release and subsequent media coverage suggests, stigma is front and centre in cases involving alleged HIV non-disclosure. Pursuant to section 110 of the *Youth Criminal Justice Act*, journalists cannot publish information that includes the name of a young person accused of committing a crime.<sup>116</sup> The publication ban applies automatically to any young person charged with an offence under the Act. Moreover, failing to

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114 *Criminal Code*, *supra* note 10, s 486.5(7).

115 Burtch, *supra* note 101.

116 *Youth Criminal Justice Act*, SC 2002, c 1, s 110.

adhere to the publication ban constitutes a criminal offence. The *Youth Criminal Justice Act*, however, only applies to young people accused of committing crimes and, as such, is not designed to protect individuals such as the accused in the Ottawa case.

While we might be able to draw an analogy between the harms experienced by young offenders and the harms experienced by the accused, it seems difficult to imagine a scenario where the Canadian government would expend political time and energy pushing to expand the contours of publication bans to include those who are alleged to have committed serious crimes, including failing to disclose their HIV-positive status prior to engaging in sexual activities. There is also the practical issue of timing. Relying on subsection 41(1.1) of the *Police Services Act*<sup>117</sup> and Ontario Regulation 265/98,<sup>118</sup> the Ottawa Police Service issued the press release in the name of public health and safety before the accused had even made his first court appearance. Even if the accused were to convince the court that a publication ban should be issued, his picture and his name, as well as details about his sexuality and medical condition, would already have been conveyed to the public. As such, it seems virtually impossible to attempt to remedy the harms experienced by the accused by expanding the contours of publication bans.

## B. Ethical Strategies

Having expressed skepticism about the viability of legal reform strategies in the form of expanding the contours of publication bans, this leads me to consider the viability of changing ethical norms about the practices of police and journalists in cases involving allegations of HIV non-disclosure in Canada. Attempting to change norms for both the police and journalists may constitute a more useful strategy to respond to the harms experienced by the accused, along with members of HIV-positive and LGBTQ communities, in this case.

### 1. *The Police*

From healthcare professionals<sup>119</sup> to employers,<sup>120</sup> ethical and legal duties to not disclose personal information about an individual's HIV-positive status are imposed on a wide range of actors in Canada. Given the deep-seated stigma that continues to be directed at HIV itself, along with those living with it, maintaining confidentiality is particularly important in this context. As one nurse explained, the consequences of disclosing HIV status can be enormous: "HIV, the disclosure of that kind of diagnosis, could result in someone losing their home, their job, their insurance,

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117 *Supra* note 69.

118 *Supra* note 71.

119 "Know Your Rights 6: Privacy and Health Records" (2014) Canadian HIV/AIDS Legal Network, online: <[www.aidslaw.ca/publications/publicationsdocEN.php?ref=1427](http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=1427)>.

120 "Know Your Rights 1: Disclosure at Work" (2013) Canadian HIV/AIDS Legal Network, online: <[www.aidslaw.ca/publications/publicationsdocEN.php?ref=1356](http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=1356)>.

their health insurance, their life insurance. A whole number of losses can result from disclosure. Confidentiality is key to the relationship that we have with people that we are caring for.”<sup>121</sup> In light of the consequences that flow from the disclosure of HIV status, my argument is that there should be an ethical duty imposed on the police to treat an accused person’s HIV status as confidential and to decline issuing a press release in cases of alleged HIV non-disclosure.

There are at least two arguments that support imposing this ethical duty on the police. First, beyond being entitled to the presumption of innocence set out in subsection 11(d) of the *Charter*, there would have been considerable uncertainty about whether the accused person’s actions even met the “significant risk of serious bodily harm” test developed by the Supreme Court of Canada in *Cuerrier*<sup>122</sup> when the police issued the press release. As noted above, the test is driven by a complex constellation of contextual factors, including the risk associated with the precise sexual activities in question, the information communicated by the accused person before and during the sexual activities, the accused person’s viral count at the time of the encounters and the presence or absence of condoms. Ultimately, the Ottawa Police Service issued a press release when they already had the accused person in custody, at the point in the investigation where it would have been impossible to conclude—with any degree of certainty—whether the accused person even had a legal duty to disclose his HIV status. In light of the complex, factually laden nature of the legal inquiry developed by the Supreme Court in *Cuerrier*<sup>123</sup> and clarified in *Mabior*,<sup>124</sup> cases involving allegations of HIV non-disclosure are particularly ill-suited to the police’s practice of issuing press releases.

Second, my argument in favour of restraining the use of police press releases in cases involving allegations of HIV non-disclosure accords with recent efforts made by human rights advocates in other contexts. Perhaps most notably, in 2014, Ontario’s former Information and Privacy Commissioner, Dr. Ann Cavoukian, filed a notice of application for judicial review in order to stop the Toronto Police Service’s practice of disclosing the mental health records it logs into the Canadian Police Information Centre (CPIC) database.<sup>125</sup> Dr. Cavoukian alleged that the Toronto Police Service’s practice of reporting information relating to suicide attempts or threats of suicide to CPIC resulted in impermissible disclosures of private information within the meaning of the *Municipal Freedom of Information and Privacy Protection Act*,<sup>126</sup> along with the *Freedom of Information and*

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211 Transcript of Coroner’s *Inquest re: “Unknown Female”* (1 June 1994, Case 91-240-0838) at 33–35, cited in Ted Palys & John Lowman, “Ethical and Legal Strategies for Protecting Confidential Research Information” (2000) 15:1 CJLS 39 at 58.

212 *Cuerrier*, *supra* note 8.

213 *Ibid.*

214 *Mabior*, *supra* note 6.

215 Robert Cribb, “Privacy Commissioner Attacks Police Regarding Disclosure of Mental Health Records”, *Toronto Star* (6 June 2014), online: <www.thestar.com>.

216 *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56.

*Protection of Privacy Act*.<sup>127</sup> In her report, Dr. Cavoukian draws clear connections between stigma, mental health and the police practice of disclosing confidential personal information. She notes:

Although efforts have been made by the mental health community to increase the awareness of mental health issues and reduce the stigma associated with it, we are [a] long way from seeing it eliminated.

The disclosure of police records that include information about an individual's mental health may create barriers to accessing employment opportunities, educational placements, volunteer positions, and to securing professional qualifications.<sup>128</sup>

As a result, Dr. Cavoukian recommends that police cease the troubling practice of routinely sharing suicide-related information on CPIC.<sup>129</sup> While HIV status and mental health issues are qualitatively different, the police practice of disclosing confidential information—either in the form of a press release or a database used by officials in Canada and abroad—raises serious concerns about the perpetuation of stigma not only for individuals, but for the broader communities they represent.

In developing the claim that there should be an ethical norm imposed on police to not disclose HIV status in alleged non-disclosure cases, there are at least two arguments put against me. The first argument relates to the important concerns raised by feminist legal scholars and activists about the police's discriminatory treatment of women in sexual assault cases. Over the past 40 years, a number of feminist legal scholars and activists have repeatedly demanded that police services develop more equitable policies and procedures about how they investigate sexual assault cases. The criticism often lodged at police services has been that, when investigating sexual assault complaints, police officers systemically re-victimize women who have experienced male violence. Police have been rightly criticized for a wide range of discriminatory behaviours, including not taking allegations of sexual assault seriously and relying upon deep-seated tropes about women's sexuality, often referred to as "rape myths."<sup>130</sup> Perhaps more than any other, the case

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127 *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31.

128 Information and Privacy Commissioner Ontario, "Crossing the Line: The Indiscriminate Disclosure of Attempted Suicide Information to U.S. Border Officials via CPIC", Special Investigative Report by Ann Cavoukian (14 April 2014) at 12, online: <[www.ipc.on.ca/images/resources/indiscriminate\\_disclosure.pdf](http://www.ipc.on.ca/images/resources/indiscriminate_disclosure.pdf)>.

129 *Ibid* at 3.

130 A fulsome discussion of feminist advocacy surrounding changing police norms in the context of sexual assault complaints goes beyond the scope of this paper. For further analysis, see e.g. Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012); Julian V Roberts & Renate M Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994). For a discussion about changing norms within police services about the treatment of transgender people, see Kyle Kirkup, "Indocile Bodies: Gender Identity and Strip Searches in Canadian Criminal Law" (2009) 24:1 CJLS 107.

of *Jane Doe* exemplifies the range of important concerns raised by feminist scholars and activists.<sup>131</sup> In 1986, Jane Doe was raped and sexually assaulted at knifepoint by a man after he broke into her second-story apartment through the balcony while she was asleep. In the seven months leading up to the attack, four other women in Toronto's Church and Wellesley neighbourhood reported almost identical attacks to the police—in each case, the man broke into the apartments of single white women who lived alone in second- or third-story apartment buildings with balconies. Despite the repeated pattern of attacks, the women never received a warning. At trial, Jane Doe successfully argued that the Metro Toronto Police owed a duty of care to warn a specific group of women living in her small neighbourhood about the threat posed by the so-called “balcony rapist.”<sup>132</sup>

At first glance, one might argue that the Ottawa case and the *Jane Doe* case should be understood as raising virtually identical concerns. This might lead to the suggestion that the Ottawa Police Service had no option but to issue the press release. There are at least two problems associated with drawing simple comparisons between the police's decision to issue the press release in the Ottawa case and the important feminist victory in *Jane Doe*. In the Ottawa case, the accused person was already in custody and was cooperating with the investigation when the police issued the press release. In addition, public health experts such as Dr. O'Byrne have argued that harms caused by issuing press releases in alleged HIV non-disclosure cases outweigh any marginal benefits.<sup>133</sup> Thus, the *Jane Doe* precedent is distinguishable. In that case, the accused person remained at large over a seven-month period and posed a considerable threat to a relatively small, identifiable group of women in Toronto's Church and Wellesley neighbourhood. The Court found that issuing the warning would have allowed women to take steps to protect themselves.

In addition, the failure to warn analysis in *Jane Doe* relies heavily on a single fact that renders it distinguishable from the Ottawa case: Jane Doe was part of a clearly identifiable group. As Justice MacFarland explained, the police owed a duty of care to “single white women living alone in second and third floor apartments with balconies in the Church/Wellesley area of the City of Toronto.”<sup>134</sup> At first glance, one might argue that there was also a clearly identifiable group in the Ottawa case: men in the City of Ottawa and the surrounding area who used a number of different websites and mobile apps in order to have casual sex with other men, including the accused person. The problem with this argument, however, is that there is widespread use of dating sites and mobile apps among men who have sex with men, far too many individuals to constitute a clearly identifiable group in Ottawa and the surrounding region. For example, a study published in 2014 surveyed 7,184 gay and bi-curious men in the United States who had been tested for sexually transmitted

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131 *Jane Doe*, *supra* note 74.

132 *Ibid.*

133 O'Byrne, *supra* note 106 at 8.

134 *Jane Doe*, *supra* note 74 at 737.

infections between 2011 and 2013. The study found that 22% of respondents had met sexual partners using online dating websites. 17% had met sexual partners using mobile apps such as *Grindr* and *SCRUFF* that rely on global positioning system (GPS) technologies.<sup>135</sup> Given the widespread use of online dating websites and apps among men who have sex with men, there was not a clearly identifiable group of individuals for the police to warn in the Ottawa case. Thus, the important feminist victory in *Jane Doe* and the harmful decision to issue the press release in the Ottawa case are distinguishable.

The second argument put against me is that imposing an ethical duty on the police to not issue a press release is unrealistic. In Ontario, for example, one might argue that, absent legislative amendments, subsection 41(1.1) of the *Police Services Act*<sup>136</sup> and Ontario Regulation 265/98<sup>137</sup> will continue to be used to allow police services to issue press releases in cases involving alleged HIV non-disclosure. Attempting to change ethical norms within police services, one might argue, is an exercise in futility. From a comparative perspective, however, the development of guidelines for police tasked with investigating HIV non-disclosure cases is no longer unprecedented. In 2008, the World Health Organization urged governments around the world to “issue guidelines to limit police and prosecutorial discretion in application of criminal law.”<sup>138</sup> Among other things, guidelines for police and prosecutors should include clear instructions about the use of press releases in cases involving allegations of HIV non-disclosure. Recently, England, Wales and Scotland have developed guidelines for police in HIV non-disclosure cases.<sup>139</sup> In England and Wales, for example, the guidelines note the importance of protecting the anonymity of the complainant, though they remain silent about similar concerns about the accused person. They state:

We recognise that in cases involving the sexual transmission of infection, the complainant may be particularly vulnerable and will not wish to be identified by the media. We will carefully consider the option of applying for an order preventing the reporting of certain details of the complainant in the media that may lead to their identification.<sup>140</sup>

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135 Matthew Beymer et al, “Sex on Demand: Geosocial Networking Phone Apps and Risk of Sexually Transmitted Infections Among a Cross-sectional Sample of Men Who Have Sex with Men in Los Angeles County”, online: (2014) *Sexually Transmitted Infections* 1 at 3, DOI: <10.1136/sex-trans-2013-051494>.

136 *Supra* note 69.

137 *Supra* note 71.

138 UNAIDS, *Criminalization of HIV Transmission: Policy Brief* (Geneva: Joint United National Programme on HIV/AIDS, 2008) at 1.

139 The Crown Prosecution Service, “Policy for Prosecuting Cases Involving the Intentional or Reckless Sexual Transmission of Infection” (15 July 2008), online: <www.cps.gov.uk> [Crown England and Wales]; The Center for HIV Law and Policy, “Sexual Transmission or Exposure to Infection – Prosecution Policy, Crown Office and Procurator Fiscal Service of Scotland” (1 May 2012), online: <www.hivlawandpolicy.org> [Crown Scotland].

140 Crown England and Wales, *supra* note 139.



The guidelines developed in Scotland also recognize and attempt to address the harms caused by media attention in alleged HIV non-disclosure cases. For example, the report notes that one recent high-profile case “attracted media attention and considerable concern from the media and HIV sector.”<sup>141</sup> While one might argue that imposing an ethical duty on the police is unrealistic in the current landscape, the recent development of guidelines in the United Kingdom constitute examples of what the difficult process of transforming ethical norms within Canadian police services might look like.

## 2. Journalists

If the police were to change their ethical norms and not issue press releases in cases of HIV non-disclosure in the first place, then journalists would simply not have the raw materials to publish stories in the way they did in the Ottawa case. Given that norms within police services are unlikely to transform overnight, however, another reform strategy may be to develop an ethical norm enforced within the community of journalists that they will not publish the names and pictures of individuals charged with offences related to failing to disclose their HIV-positive status. As McCann rightly notes, there is an ethical norm amongst journalists that they will not publish stories of intimate partner violence and sex work.<sup>142</sup> Until the emergence of a norm that the police will not issue press releases in HIV non-disclosure cases, it may be useful for interested community members to reach out to journalists to develop strategies to better ensure that HIV non-disclosure cases are not told in ways that further stigmatize their identities. At a minimum, journalists may consider incorporating not only the complainant’s perspective in HIV non-disclosure cases, but also voices from public health experts such as Dr. O’Byrne and community groups such as Bruce House. This may encourage journalists to move beyond the largely sensationalist accounts they offered in the Ottawa case and toward telling stories that better capture the complex issues at stake in cases of alleged HIV non-disclosure.

## V. CONCLUSION

In this paper, I have explored the difficult issues raised when police departments issue press releases in cases involving alleged HIV non-disclosure and journalists subsequently convey these stories to the public. Using the Ottawa story as a case study, I developed three central claims. I first argued that, when we situate narratives of HIV/AIDS in their broader social, political and historical context, it becomes apparent that journalists have participated in a project of stigmatizing

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141 Crown Scotland, *supra* note 139 at 12.

142 McCann, “Epic Privacy Fail”, *supra* note 97.

the condition itself, as well as those living with it, since the 1980s. In telling the stories of gay men who were HIV-positive, journalists tended to construct their subjects as overly sexualized, deviant and pathological figures. To use the language of Goffman, they became spoiled identities.<sup>143</sup> Second, I argued that the Ottawa case demonstrates that contemporary police practices and stories told by journalists continue to stigmatize HIV/AIDS itself, as well as those living with it. With this analysis in place, I then considered a series of reform strategies to better address the harms experienced by the accused and broader HIV-positive and LGBTQ communities. To do so, I began by surveying the viability of expanding the contours of publication bans. I concluded, however, that imposing ethical duties on the police and journalists may constitute a more useful method of changing the ways that HIV non-disclosure stories are told in Canada.

Ultimately, this paper attempts to move the now well-established narratives about the criminalisation of HIV non-disclosure beyond yet again restaging the “criminal law versus public health” debate. As a matter of Canadian law, the unfortunate reality is that the criminalisation of HIV non-disclosure is here to stay, at least for the foreseeable future.<sup>144</sup> Given the current legal landscape created by the Supreme Court, it may be time to open up spaces for new conversations among scholars and activists alike. Changing how police and journalists communicate stories of HIV non-disclosure to the public constitutes one strategy, albeit a modest one, in a much larger project of reducing the harms associated with this pressing criminal law issue. Once and for all, it is time to put an end to the stigmatizing figure of the overly sexualized, promiscuous HIV-positive gay man that haunts criminal non-disclosure cases and, in the process, begin to reimagine police practices and journalistic ethics in Canadian law and society.

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143 Goffman, *supra* note 13.

144 Mabior, *supra* note 6.