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## OFFENSES OF SEX OR VIOLENCE? CONSENT, FRAUD, AND HIV TRANSMISSION

Sharon Cowan\*

*Given the current criminalization trend, the motivating question of this article is whether or not sexual transmission of HIV, without specific consent to the risk of such transmission, should be categorized as an assault or a sexual assault, and what difference that (re)categorization might make. In the argument that follows, the criminalization discourses in Canada and England and Wales that underpin and permeate the debates over HIV transmission will be explored. These jurisdictions have been chosen as examples of two regimes, at almost opposite ends of the criminalization spectrum, in which recent changes have set new benchmarks for criminal responsibility. One (England and Wales) has set rather narrow limits on the criminal law, whilst the other (Canada) has set far broader parameters, and lately has begun to include other sorts of cases (such as deception about the absence of birth control) as analogous to the HIV cases, drawing the boundaries of the criminal law even more widely. Beginning with a brief description of the law in each jurisdiction, this article analyzes the gendered and (hetero)normative role of consent in HIV nondisclosure offenses. Through a comparison with the law on sadomasochism, the article questions whether such offenses are rightly categorized as assaults or as sexual assaults. Following a critical engagement with the reasoning in recent Canadian*

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*jurisprudence in the area, the article will conclude by addressing the question of how future HIV transmission cases should be tackled. It is argued that in the absence of a policy that precludes criminalization of nondisclosure, the position in England and Wales is to be preferred.*

**Keywords:** *consent, fraud, HIV transmission, criminalization, sexual assault*

## INTRODUCTION

Even though there may be a moral duty to disclose one's HIV status to a sexual partner, the question of whether or not HIV transmission should ever be criminalized remains open to debate. Many public health officials and medical professionals answer this question in the negative.<sup>1</sup> Nonetheless, the trend toward criminalization seem to be increasing,<sup>2</sup> even though major improvements in antiretroviral drugs have significantly increased the chances of a person with HIV having a normal life expectancy.<sup>3</sup> Notwithstanding the continuing efforts of some criminal lawyers to resist any use of criminal law here,<sup>4</sup> criminalization of the intentional or reckless transmission of (or even exposure to) HIV seems no longer to be controversial for some lawyers.<sup>5</sup> Others argue for minimal criminal intervention even as they reluctantly accepted some criminalization as

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1. See, e.g., A. O'Leary & R.J. Wolitski, *Moral Agency and the Sexual Transmission of HIV*, 135:3 PSYCHOL. BULL. 478–94 (2009); M.D. Phillips & S. Clegg, *Is Punishment and Criminalisation of HIV Transmission Justified?*, 88 SEXUALLY TRANSMITTED INFECTIONS A68–A69 (2012), doi: 10.1136/sextrans-2012-050601c.178.

2. Leslie Pickering Francis & John G. Francis, *Is Criminalizing Health-Related Behaviors Dangerous to Others? Disease Transmission, Transmission-Facilitation, and the Importance of Trust*, 6:1 CRIM. L. & PHIL. 47–63 (2012).

3. Canadian HIV/Legal Network, *HIV Non-Disclosure and the Criminal Law: An analysis of two recent decisions of the Supreme Court of Canada*, at 7 (2012) [hereinafter, CHALN], <http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=1326>; Indraveer Chatterjee, *HIV and Consent: When Yes Means No*, 8:4 HIV AUSTRAL. 20–22, 21 (2009).

4. See, e.g., M. Weait, *Unsafe Law: Health, Rights and the Legal Response to HIV*, INT'L J.L. IN CONTEXT (2013, forthcoming); Francis & Francis, *Criminalizing Health-Related Behaviors*, *supra* note 2.

5. See, e.g., Lisa Cherkassy, *Being Informed: The Complexities of Knowledge, Deception and Consent when Transmitting HIV*, 74:3 J. CRIM. L. 242–58 (2010); John Flaherty, *Clarifying the Duty to Warn in HIV Transference Cases*, 54 CRIM. L.Q. 60–78 (2008).

inevitable.<sup>6</sup> It is fair to say, then, that there is no consensus on the criminalization question.

Different jurisdictions have drawn the boundaries of criminal liability in varying places. As Grant points out in her comparison of the relevant laws in New Zealand, Australia, Canada, and England and Wales, Canada seems to take a relatively punitive approach to the nondisclosure of positive HIV status: exposure as well as transmission is prosecuted, and on occasion even sex with condoms has resulted in conviction; in addition, the offense charged can be either assault or sexual assault, or an aggravated form of either offense, with a maximum penalty of life imprisonment for aggravated sexual assault and fourteen years for aggravated assault.<sup>7</sup> Many U.S. states also impose similar kinds of exposure offenses, although there have been recent moves at the federal level to repeal criminal offenses related to HIV.<sup>8</sup> On the other hand, more narrow parameters of liability have been

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6. Isabel Grant, *The Prosecution of Non-Disclosure of HIV in Canada: Time to Rethink* Cuerrier, 51 MCGILL J.L. & HEALTH 7–59 (2011); JAMES CHALMERS, LEGAL RESPONSES TO HIV AND AIDS (2008); Isabel Grant, *The Boundaries of the Criminal Law: The Criminalisation of the Non-Disclosure of HIV*, 31 DALHOUSIE L.J. 123–80 (2008). Although this author's position is that sexual (or other) nonintentional transmission of HIV ought not to be criminalized, this article does not engage directly with either moral or political arguments on this question. Nor does it grapple with the wealth of critical public health literature on why criminalizing HIV transmission should be avoided. This literature broadly centers on preventive concerns and on the stigmatizing of those living with HIV/AIDS, particularly the impact of criminalization on racialized and immigrant populations, and on trans people (see, e.g., Jaime Grant, Lisa Mottet, & Justin Tanis, *Executive Summary*, in INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY (National Gay and Lesbian Task Force, National Center for Transgender Equality, 2011), who report that trans people in the U.S. have an HIV infection rate of over four times the national average, with trans people of color having an even higher rate). For the purposes of this article, these arguments are bracketed in favor of focusing on legal justifications for criminalizing certain kinds of sexual activity but not others, in order to demonstrate the heteronormative and gendered expectations underpinning the formulation and application of the criminal law.

7. Grant, *Prosecution*, *supra* note 6, at 44.

8. According to the Center for HIV Law and Policy, thirty-two states and two territories explicitly criminalize exposure to HIV, not only through sexual intercourse but also through needle sharing and in some states bodily fluids; see ENDING AND DEFENDING AGAINST HIV CRIMINALIZATION: STATE AND FEDERAL LAWS AND PROSECUTIONS, Vol. 1, 263 (CHLP's Positive Justice Project, 1st ed. 2010), <http://www.hivlawandpolicy.org/resources/view/564>. In 2011, a bill referred to as the "Repeal Existing Policies that Encourage and Allow Legal HIV Discrimination Act," the "REPEAL HIV Discrimination Act," or the "REPEAL Act"

set in England and Wales, for example, where only transmission of, and not simply exposure to, HIV is criminalized, and only those are prosecuted who have actual knowledge of their HIV+ status and have consistently flouted medical advice about protected sex and/or disclosure. The issues that are often still hotly debated across jurisdictions include: the level of knowledge of HIV status required on the part of the accused, the type and seriousness of the offense to be charged, and whether or not liability depends on the actual transmission of the infection.

Given the current criminalization trend, the motivating question of this article is whether or not sexual transmission of HIV, without specific consent to the risk of such transmission, should be categorized as an assault or a sexual assault, and what difference that (re)categorization might make. For the purposes of this article, references to the transmission of HIV should be taken to indicate the *sexual* transmission of HIV and not transmission by other means (e.g., needle sharing), as these are issues that require separate analysis.

In the argument that follows, the criminalization discourses in Canada and England and Wales that underpin and permeate the debates over HIV transmission will be explored. Following the precedents set by the English cases of *R v. Dica*<sup>9</sup> and *R v. Konzani*,<sup>10</sup> in 2008, the Crown Prosecution Service in England and Wales published guidelines indicating which HIV transmission cases should be prosecuted.<sup>11</sup> This legal regime, which focuses on the bodily harm caused by actual transmission in nondisclosure cases, will be compared to that of Canada, in particular the recent HIV transmission cases heard at the Supreme Court of Canada (*R v. Mabior*, and *R v. D.C.*), as

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(H.R. 3053) was introduced (<http://www.govtrack.us/congress/bills/112/hr3053#overview>), following the announcement of a new national HIV/AIDS strategy by the White House; see *National HIV/AIDS Strategy: Federal Implementation Plan*, Step 3.3 at 26 (July 2010), <http://www.whitehouse.gov/files/documents/nhas-implementation.pdf>. The bill allowed for consultation on and review of existing criminal offenses to ascertain whether they discriminate against those living with HIV/AIDS, and are contradictory to public health goals. Although the Bill was not enacted, this approach, and the support and attention of the White House, is promising for those who wish to challenge the inevitability of criminalization.

9. *R v. Dica* [2004] EWCA Crim 1103.

10. *R v. Konzani* [2005] EWCA Crim 706.

11. Crown Prosecution Service, *Intentional or Reckless Sexual Transmission of Infection* (n.d.) [hereinafter, *Crown Prosecution Guidelines*], [http://www.cps.gov.uk/legal/h\\_to\\_k/intentional\\_or\\_reckless\\_sexual\\_transmission\\_of\\_infection\\_guidance/](http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/).

well as the 2012 case of *R v. Hutchinson*,<sup>12</sup> where the accused, who had sabotaged condoms hoping that his partner would get pregnant, was convicted of sexual assault. These jurisdictions have been chosen as examples of two regimes, at almost opposite ends of the criminalization spectrum, in which recent changes have set new benchmarks for criminal responsibility. One (England and Wales) has set rather narrow limits on the criminal law, whilst the other (Canada) has set far broader parameters, and lately has begun to include other sorts of cases (such as nondisclosure of lack of birth control) as analogous to the HIV cases, drawing the boundaries of the criminal law even more widely.

Beginning with a brief description of the law in each jurisdiction, this article will analyze the gendered and heteronormative role that consent plays in HIV nondisclosure offenses, and question whether such offenses are rightly categorized as assaults or as sexual assaults. Having critically engaged with the reasoning in recent Canadian jurisprudence in the area, the article will conclude by addressing the question of how future HIV transmission cases should be tackled. It will be argued that in the absence of a policy that precludes criminalization of nondisclosure, the position in England and Wales is to be preferred.

## I. THE CURRENT LAW ON SEXUAL TRANSMISSION OF HIV IN CANADA AND IN ENGLAND AND WALES

### A. England and Wales

The boundaries of criminal liability are drawn relatively narrowly in England and Wales. The current law is to be found in the cases of *R v. Dica* and *R v. Konzani*,<sup>13</sup> as well as a set of Prosecution Guidelines produced by the

12. *R v. Mabior* 2012 SCC 27; *R v. D.C.* 2012 SCC 48; *R. v. Hutchinson* (2013) NSCA 1, June 4, 2012, Halifax, Nova Scotia, Canada.

13. For comment on these cases, see Vanessa Munro, *On Responsible Relationships and Irresponsible Sex: Criminalising the Reckless Transmission of HIV*, *R v. Dica and R v. Konzani*, 112–15, 19:1 CHILD. & FAM. L.Q. (2007); Matthew Weait, *Criminal Law and the Sexual Transmission of HIV: R v Dica*, 86:1 MOD. L. REV. 121 (2005). The first prosecutions in England or Wales were pursued against racialized and/or immigrant male defendants engaging in heterosexual sex, but the law has since been used also to criminalize white, British, heterosexual and homosexual men and women. See NAM AIDS-Map, *Timeline of Developments in the Criminalisation of HIV and STI Transmission in the*

Crown Prosecution Service. *R v. Dica* departed from the nineteenth-century precedent set by *R v. Clarence*,<sup>14</sup> which held that consent to sexual intercourse necessarily entailed consent to the risk of transmission of sexually transmitted infections. In contrast, the court in *Dica*, as further clarified by the court in *Konzani*, held that notwithstanding valid consent to sexual intercourse, intentional or reckless transmission of HIV will result in a charge under Section 18 (wounding or causing grievous bodily harm with intent) or Section 20 (inflicting grievous bodily harm) of the Offences Against the Person Act 1861. However, explicit and informed consent can provide a defense: parties can consent to sex that involves the risk of HIV transmission if, and only if, the noninfected party knows of and consciously undertakes to run that specific risk.

The Crown Prosecution Guidelines (which cover the sexual transmission of any infections, not only HIV)<sup>15</sup> emphasize that an offense will be “difficult to prove to the requisite high standard” since it requires not only knowledge of infection, but also recklessness in its transmission. This, they say, means that those who take appropriate and reasonable precautions not to transmit the infection are unlikely to be demonstrably reckless. Only cases of transmission will be pursued (unless it can be shown that the defendant intentionally attempted but failed to transmit the infection).<sup>16</sup> The Guidelines stress that only cases with robust factual and scientific/medical evidence of both transmission and the direction of transmission between the parties will be taken forward. They also explicitly state that the charge can only ever be one of assault, not rape, although the transmission of an infection can be an aggravating factor for sentencing purposes following a sexual assault conviction.<sup>17</sup>

Although this allows for fairly limited opportunities to impose the criminal law, some commentators have raised concerns about: the ways in

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UK (n.d.), <http://www.aidsmap.com/Timeline-of-developments-in-the-criminalisation-of-HIV-and-STI-transmission-in-the-UK/page/1504201/>.

14. *R v. Clarence* (1988) 22 QBD 23.

15. The first successful prosecution for sexual transmission of Hepatitis B was in 2008.

16. However, in January 2010, in Scotland, which has a separate criminal jurisdiction to that of England and Wales, Mark Devereaux pled guilty to the UK’s first prosecution for an HIV exposure offense, charged as “culpable and reckless conduct”. For comment see, BBC News, *Alarm over Reckless HIV Sex Case*, Jan. 20, 2010, [http://news.bbc.co.uk/2/hi/uk\\_news/scotland/north\\_east/8469238.stm](http://news.bbc.co.uk/2/hi/uk_news/scotland/north_east/8469238.stm).

17. *Crown Prosecution Guidelines*, *supra* note 11.

which charging and prosecuting decisions, as well as judicial expectations of appropriate behavior, may vary depending on whether or not the sex takes place in the context of a monogamous, long-term, and heterosexual relationship<sup>18</sup>; and whether liability ought to attach notwithstanding a real fear that disclosure, or a request that condoms be used, might be met with a violent or abusive response.<sup>19</sup> These concerns subsist despite the recent Prosecution Guidelines.

## B. Canada

In Canada, the apposite case is *R v. Cuerrier*, though the recent cases of *R v. Mabior* and *R v. D.C.* have further developed the *Cuerrier* rules. In 1998, the majority in *Cuerrier* held that the accused person, who had not disclosed their HIV positive status to their sexual partners, was guilty of an aggravated assault even though the virus was not transmitted. Gaining consent to sexual activity *simpliciter* is therefore not sufficient to protect the accused against criminal charge; again, there must be consent to sexual activity that carries the risk of HIV transmission. Drawing on the test for fraud in commercial cases (which requires both deception and deprivation or risk of deprivation), the majority held that failure to disclose positive HIV status prior to sexual activity could amount to a fraud that would vitiate consent to sex, as long as there was a “significant risk of serious bodily harm.”<sup>20</sup> The question of what amounted to a significant risk was not clearly answered by the court, and it was suggested *obiter dicta*, that there may be cases, such as where a condom was used, where the risk of harm was not significant.<sup>21</sup> No prosecutorial guidelines, similar to those produced in England and Wales, exist to support prosecutorial decision-making around such details as, for example, what counts as a “significant risk.”

Many academics and activists have been critical of this approach (both those who wish to widen and those who wish to narrow the net of criminalization here). *Cuerrier*, it has been argued, neglected to engage in a proper discussion of sexual assault,<sup>22</sup> and set a threshold of harm that

18. Munro, *On Responsible Relationships*, *supra* note 13; Grant, *Prosecution*, *supra* note 6.

19. CHALN, *supra* note 3.

20. *R v. Cuerrier* [1998] 2 SCR 371 at ¶ 128.

21. *Id.* at ¶ 129.

22. Carissima Mathen & Michael Plaxton, *HIV, Consent and Criminal Wrongs*, 57:4 CRIM. L.Q. 464–85 (2011).

is unacceptably vague, rendering the law uncertain, such that subsequent courts have been inconsistent in their application of *Cuerrier*, resulting in arbitrary outcomes.<sup>23</sup> Fast-forward ten years, through various interpretations of *Cuerrier*,<sup>24</sup> to *Mabior*, where in 2008, the accused was convicted at first instance of six counts of aggravated sexual assault for not disclosing his positive HIV status to several female partners (and again, the virus was not actually transmitted). On appeal, four of these convictions were quashed either because the accused's viral load was low or because a condom had been used. The Crown appealed to the Supreme Court of Canada (SCC). This appeal was heard alongside that of *R v. D.C.*; a woman had been convicted of one count of aggravated sexual assault because she failed to disclose her positive HIV status prior to the first act of sexual intercourse with her male partner, even though they stayed together for four years after her disclosure, and she did not transmit the virus to him. The charge arose in the wake of a successful prosecution of the male partner for violence against D.C. and her son. On appeal, her conviction was quashed on the basis of her low viral count, and again the Crown appealed to the SCC.

In their 2012 decision, the SCC responded to the concern that the *Cuerrier* test needed clarification, particularly taking into account contemporary social views and scientific and medical advances, but did so by placing a more onerous burden on the HIV+ individual to disclose their status. Although the Crown argued, in both cases, that the HIV+ person should have to disclose their status to a potential partner, regardless of the level of risk of harm, in *all* sexual encounters,<sup>25</sup> the SCC ultimately held that not all non-disclosures were criminal. However, contrary to Justice Cory's suggestion in *Cuerrier*, neither condom use nor a low viral load would, in isolation, be sufficient to decrease the risk of transmission below the "significant" threshold. Confining their remarks mainly to heterosexual penile-vaginal penetration, the Supreme Court held that, only where an accused person had *both* a low viral load *and* had made proper use of contraception would the risk fall below the watermark of "significant." Moreover, "significant risk" was to be understood to mean there was a "realistic possibility" of transmitting the virus. In coming to this conclusion, it has been argued, the court has further

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23. CHALN, *supra* note 3; Grant, *Boundaries*, *supra* note 6; Grant, *Prosecution*, *supra* note 6.

24. Grant, *Prosecution*, *supra* note 6.

25. See also Flaherty, *Clarifying the Duty*, *supra* note 5.

and inappropriately widened the net of criminalization, and has made a “bad law worse,”<sup>26</sup> not least because of the difficulty of establishing at any moment in time an accurate estimation of viral load.<sup>27</sup>

The legal framework for criminalizing nondisclosure of HIV status in Canada is thus starkly different from that in England and Wales. In Canada exposure as well as transmission is criminalized, thus the test for criminal liability relies on the level of risk of harm; and since the nondisclosure is said to amount to a fraud that vitiates consent to sexual intercourse, the accused is (usually) charged with a sexual assault. In contradistinction, prosecutions for nondisclosure of HIV status in England and Wales are aimed only at cases of actual transmission, and criminal liability therefore depends not on the level of risk inherent in the activities in which parties engage, but the presence or absence of informed consent. Importantly, where consent is not informed, or where the defendant has intended to transmit the infection, an assault or attempted assault (rather than sexual assault or rape) charge arises, since consent to the sexual intercourse subsists. The net of criminalization is thus cast more widely in Canada than in England and Wales. Setting aside general arguments against overcriminalization<sup>28</sup> and long-standing critiques of the criminalization of HIV transmission in particular, what more can be said about the different approaches of these two regimes? The next section will consider the normative role that consent plays in each location.

## II. THE NORMATIVE ROLE OF CONSENT

### A. Consent as a Defense?

In England and Wales, the transmission cases are not pursued as sexual offenses, but offenses of bodily harm. The question of whether or not HIV

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26. CHALN, *supra* note 3, at 9.

27. Isabel Grant, *Rethinking Risk: The Relevance of Condoms and Viral Load in HIV*, 54 MCGILL L.J. 389–404 (2009); Grant, *Prosecution*, *supra* note 6. Chalmers has also suggested that the court in *Mabior* pays insufficient attention to the question of whether the accused himself knew about the risk of harm and thus ignores the *mens rea* requirement of fraud (James Chalmers, *Catching Up with the Science, Leaving Culpability Behind: Recent Developments in the Criminalisation of HIV Transmission and Exposure*, 1–15, 10 (2013, on file with author)).

28. See, e.g., DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2009).

transmission offenses are sexual in nature is relevant for, amongst other reasons, the appropriate role that consent should play. In England and Wales, for example, a lack of consent is part of the *actus reus* of sexual offenses. Having consent as part of the offense definition signals, as it does in the law of sexual offenses generally, that because the behavior has, usually, positive social value (or, is deemed sufficiently unharmed to be of neutral value), the criminal law should not discourage it; it is prima facie lawful, unless consent is absent.<sup>29</sup> In the law of assault, consent can offer a defense, if the assault takes place in particular circumstances (such as surgery, tattooing, etc.) or where the harm does not go above a certain level.<sup>30</sup> Where consent acts as a defense, the implication is that the proscribed act is not in itself of value to society, that it is prima facie unlawful and therefore to be discouraged, and criminal sanction is only avoided where consent can be, and has been, secured.

To position HIV transmission as a bodily harm, that is, an assault, rather than a sexual assault or rape, signals that the transmission of disease is not a valued social goal. However, it also results in various peculiarities. Firstly, the rules on consent to injury in England and Wales have been clearly set in *R v. Brown* (the “homosexual sadomasochist” case), and engaging in sexual behavior that carries the risk of HIV transmission seems to be caught under these rules. This is because the Court in *Brown* drew the line of permissible contact at actual bodily harm (ABH); injury causing (or surpassing) ABH cannot be consented to, unless in the context of one of the established exceptions (such as surgery). This seems inconsistent, though, with the later case of *Dica*, which both approved *Brown*, and yet allowed for consent to the risk of serious bodily harm (i.e., the transmission of HIV through sex) where the noninfected party knowingly consents to that risk. This author has previously argued that this is contradictory.<sup>31</sup> This contradiction may not be readily apparent; it might be argued, for instance, that *Brown* deals with circumstances of actual harm, whereas *Dica* allows merely the possibility of consenting to the *risk* of harm, and so the cases are not

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29. Compare with the argument made by Michelle Madden-Dempsey and Jonathan Herring (*Why Sexual Penetration Requires Justification*, 27 OXFORD J. LEGAL STUD. 467–91 (2007)), that sexual penetration per se requires justification.

30. *R v. Brown* [1994] 1 AC 212.

31. Sharon Cowan, *The Pain of Pleasure: Consent and the Criminalisation of Sado-Masochistic “Assaults”*, in *ESSAYS IN CRIMINAL LAW IN HONOUR OF SIR GERALD GORDON* 126–40 (James Chalmers, Fiona Leverick, & Lindsay Farmer eds., 2010).

directly comparable. The facts of these two cases may also appear disanalogous. Consider, however, that where there is consent to the risk of HIV transmission, neither the risk of transmission nor transmission itself will result in prosecution for assault. Consensual SM activity on the other hand can be prosecuted whether or not it causes harm, since activity that simply risks the kind of “harm” caused in *Brown* could well be charged as an attempted assault. Therefore the “risk versus actuality of harm” question is not the factor that distinguishes the criminal (SM) from the noncriminal (HIV transmission).

Secondly, the Court in *Dica* unequivocally dissociates itself from the facts of *Brown*; SM cases are about serious violence, inflicted for sexual gratification, and *Dica* is not.<sup>32</sup> In contrast, those who knowingly and consensually risk transmission of HIV (a potentially lethal disease) are depicted in *Dica* as honest, accountable sexual subjects who have made responsible choices; the risk of disease is portrayed as an inherent risk of normal sexual intercourse, just like pregnancy,<sup>33</sup> whereas the risks engaged during SM encounters are unjustifiable and show their participants to be irresponsible and dangerous. Actions such as those performed by Mr. Dica are by any measurement morally and ethically wrong, as they are not founded on concepts such as mutuality of sexual expression, respect for sexual integrity, communication, or a regard for the personal autonomy that grounds the ability to carve out one’s life and goals, as far as that is possible. But this is not to argue that engaging in sexual activity that risks HIV transmission should necessarily be subject to the same levels of criminalization as SM sex (and indeed this author has argued elsewhere<sup>34</sup> against the current regime of criminalization of SM). One possible argument, then, is that neither SM nor transmission of HIV should be criminalized. In (some) SM sex, the risk of bodily harm is inherent—injury is not the intended outcome, but rather a possible secondary by-product of sexual pleasure. Participants can (and the point is, do) explicitly agree to run the risk of injury for the sake of sexual pleasure. Similarly, it could be argued that harm that results from transmission of HIV is a risk, like

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32. *Dica*, [2004] EWCA Crim 1103, at ¶ 47.

33. *Id.*

34. Cowan, *The Pain of Pleasure*, *supra* note 31; Sharon Cowan, *Criminalizing SM: Disavowing the Erotic, Instantiating Violence*, in *THE STRUCTURES OF THE CRIMINAL LAW* 59–84 (R.A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo, & Victor Tadros eds., 2012).

pregnancy, inherent within “normal” sexual intercourse.<sup>35</sup> Disease, and therefore serious bodily harm, is not the intended result, only a secondary by-product of sexual pleasure. Two people can therefore explicitly (through sharing knowledge of disease status) consent to taking such a risk for the purposes of pleasure. In each case, the risk, and even the actualization of harm, is a means to an end rather than an end in itself.<sup>36</sup> There may be policy reasons—for example, sending a message about the importance of mutual agreement in sexual activity, and the protection of public health—that support the criminalization of reckless (nonconsensual) HIV transmission. Combine with this, in the HIV cases, the abuse of trust and lack of respect for sexual autonomy and communication, and we may well have a stronger case for *Dica*-type criminalization (nonconsensual violence) than for *Brown*-type criminalization (consensual sex).<sup>37</sup>

However, the question of whether and how far to criminalize HIV transmission seems to raise something of a dilemma for those who are generally opposed to criminalization; although alternative penalties and public health approaches might well be more suitable than criminal justice responses to the potential spread of infection, there is also, arguably, a strong case to be made for punishing those who fail to respect the sexual autonomy of their partners by engaging in sexual contact without gaining consent to known risks of infection of a particular disease or virus.<sup>38</sup> Is it consistent, then, to call for less criminalization generally, and restricted criminalization of SM, as well as tough criminal penalties for those who fail to disclose their HIV status prior to sexual activity?

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35. Compare the judgment of Justice Farrar in *R v. Hutchinson*: “At its most basic, biological level, pregnancy is a ‘natural’ consequence for women who have sex, in a way that a disease like HIV is not” (¶ 206).

36. There is arguably an important distinction between risk/infliction of injury as a secondary by-product of sexual pleasure, on the one hand, and risk/infliction of injury as a means to the end of sexual pleasure on the other. However for the purposes of this article, the argument is that consensual sexual pleasure is an outcome that can justify at least *some* risk/infliction of injury, whether that risk/injury is a secondary by-product of or a means to an end of sexual pleasure. Thanks to an anonymous reviewer for prompting clarification on this point.

37. For other views on the comparison between SM and the sexual transmission of HIV, see Chatterjee, *HIV and Consent*, *supra* note 3; Cherkassy, *Being Informed*, *supra* note 5; David Gurnham, *Risky Sex and Manly Diversions: Contours of Consent in HIV Transmission and Rough Horseplay Cases*, in *THE CRIMINAL LAW AND BIOETHICAL CONFLICT: WALKING THE TIGHTROPE* 88–101 (2012).

38. Mathen & Plaxton, *HIV, Consent*, *supra* note 22.

It might be consistent to argue for less criminalization of SM alongside restricting HIV-type criminalization to cases where transmission has occurred. In those cases where the HIV virus is not transmitted to the “unknowing” partner, no physical harm has befallen the complainant; arguably, unlike those who are subsequently infected, they suffer no real harm or injury, notwithstanding the lack of consent. However, Gardner and Shute<sup>39</sup> have argued in the context of rape that labeling an activity as *criminal* harm does not necessarily rely solely on whether or not the complainant consciously experiences harm. They point out that if a man rapes an unconscious woman, even if that woman never finds out that he has done so, a moral wrong has still been committed even if she is not “harmed” in the traditional sense. It is wrongful in that there has been a violation of her sexual autonomy<sup>40</sup> and an invasion of her bodily integrity. In the HIV non-disclosure example, there may not be the same sort of nonconsensual invasion of bodily integrity, as the unknowing partner has consented to sex, but there is certainly a breach of sexual autonomy.<sup>41</sup> This might, in itself, warrant a criminal law response. It is not clear, though, whether this is a strong enough reason in the HIV context to counter the objections from those who wish to minimize or eradicate criminalization and promote a nonpunitive approach to the promotion of public health<sup>42</sup>; it is even less clear that it justifies lumping the exposure cases and the actual transmission cases together under one offense heading of aggravated (sexual) assault.

In any case, what a comparison between SM cases and cases of HIV transmission demonstrates is the presence of normative ideals that inform judicial thinking about what constitutes “regular” sex, which is undertaken

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39. John Gardner & Stephen Shute, *The Wrongness of Rape*, in OXFORD ESSAYS IN JURISPRUDENCE 193–227 (Jeremy Horder ed., 2000).

40. *Id.* at 208. For critique of their account and application of the harm principle in this example, see Hamish Stewart, *The Limits of the Harm Principle*, 41 CRIM. L. & PHIL. 17–35, 26–32 (2010).

41. The concept of sexual autonomy is the subject of much feminist critique and debate. See, e.g., KATHERINE O'DONOVAN, *SEXUAL DIVISIONS IN THE LAW* (1985); CATHARINE MACKINNON, *TOWARDS A FEMINIST THEORY OF THE STATE* (1989); F. Olsen, *Constitutional Law: Feminist Critique and the Public/Private Distinction*, 10 CONST. COMMENT. 319–27 (1993); NICOLA LACEY, *UNSPEAKABLE SUBJECTS: FEMINIST ESSAYS IN LEGAL AND SOCIAL THEORY* (1998); Sharon Cowan, *Choosing Freely: Theoretically Reframing the Concept of Consent*, in CHOICE AND CONSENT: FEMINIST ENGAGEMENTS WITH LAW AND SUBJECTIVITY 91–105 (Rosemary Hunter ed., 2007).

42. Francis & Francis, *Criminalizing Health-Related Behaviors*, *supra* note 2.

by responsible citizens and therefore worthy of legal protection, as opposed to sex that is properly risky and relished by deviant sexual others. In England and Wales at least, although it is not possible to be a responsible, sexually active SM participant, if activity risks or causes actual bodily harm, it is possible to be a responsible, sexually active HIV+ citizen who risks (and may or may not cause) grievous bodily harm, as long as the risk of transmission is disclosed to consenting sexual partners.

## B. Consent, Risk, and Harm

In Canada, courts dealing with the HIV transmission cases have set out an even more expansive framework of criminalization than England and Wales around “risky” sex, taking a relatively punitive approach to nondisclosing HIV+ persons who engage in sexual intercourse. *R v. Mabior* and *R v. D.C.* have resulted in a hierarchy of responsabilization, whereby only *very* responsible citizens can be assured that they will not be prosecuted for assault or sexual assault: the most responsible *always* disclose their HIV status; the less responsible but noncriminal are those who do not disclose but who engage only in nonrisk activities, use condoms, and undergo antiretroviral treatment. Irresponsible sexual subjects are those who fail to disclose, even where they either use condoms or have a low viral load.

What is notable is the role that consent (or its absence) plays in the Canadian context. In both jurisdictions, consent plays a key role in the attribution of criminal responsibility. In England and Wales, parties to sex can consent to the risk of HIV transmission. Where there is no consent to the risk of transmission (because there has been no disclosure of HIV status), if transmission occurs there has been an offense (of bodily harm). In Canada, parties can also consent to the risk of HIV transmission. Obviously, where the complainant has been exposed to a risk, and there has been no disclosure of that risk, there can be no consent to that risk. At that point, the “significant harm” test comes into play. This means that in Canada, a lack of disclosure and absence of consent does not automatically mean an offense has been committed; although consent has been gained dishonestly (fraudulently), liability only attaches where the fraud gives rise to a significant risk of serious harm (regardless of whether transmission occurs). Unlike the position in England and Wales, consent does not do all the conceptual work of grounding criminal liability. As such, the Canadian courts have not had to address the question of whether or not consent to

the risk of HIV transmission is akin to consent to, for example, the risk of injury through SM sex, and therefore the normative role of consent seems less central here. And this focus on harm rather than consent may seem anomalous, given that the subjective state of mind of the complainant, and the question of sexual autonomy, is so important in the Canadian judicial approach to sexual offenses more generally.<sup>43</sup>

Flaherty<sup>44</sup> has argued that the only way to fully respect the autonomy of the unknowing sexual partner is for Canadian criminal law to introduce a mandatory duty to warn of the risk of HIV transmission, regardless of the probability of infection, thereby both responsabilizing the HIV+ person and valuing the consent and choice of their partner over and above the luck-driven, outcome-based question of whether or not significant harm has occurred. His approach is similar to the one adopted in England and Wales, in that consent (or its absence) is the factor that drives the attribution of criminal responsibility—except for fact that in England and Wales, liability only attaches where there has been actual transmission. In that sense, the question of whether there should be a duty to disclose and gain informed consent is always, in England and Wales, a retrospective one. However, Flaherty calls for a *prospective* mandatory duty to warn in *all* cases, whether or not transmission occurred. Although such a rule would have the benefit of being extremely clear, it draws the parameters of the criminal law very widely indeed. It may also be particularly problematic for those who are already vulnerable—women with violent male partners, for example.<sup>45</sup>

Alternatively, Grant<sup>46</sup> has argued that although *some* criminalization for nondisclosure of HIV status may now be unavoidable, only those nondisclosing HIV+ persons who actually transmit the infection, and thus inflict harm, should be criminally liable in Canada. This is a preferable approach in that it restricts the application of the criminal law to the more serious category of actualized rather than risked harms, and respects the choice and autonomy of the unknowing party without having to focus on assessing the

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43. R v. Ewanchuk (1989) 22 QBD 23, Major J. at 28.

44. Flaherty, *Clarifying the Duty*, *supra* note 5.

45. CHALN, *supra* note 3; Grant, *Rethinking Risk*, *supra* note 27; Munro, *On Responsible Relationships*, *supra* note 13.

46. Grant, *Rethinking Risk*, *supra* note 27.

probability of infection, which is likely to be factually difficult for courts to ascertain on the evidence available to them.<sup>47</sup>

### III. SEXUAL TRANSMISSION OF HIV: SEX OR VIOLENCE?

The “sex or violence?” question has not been widely considered in the context of HIV transmission.<sup>48</sup> So what can we learn from other areas of criminal law where there is a dispute about whether or not conduct amounts to a sexual offense? It has been forcefully argued<sup>49</sup> that sadomasochism (SM) should be treated in law as principally sexual rather than simply violent behavior. The sexual context and motivation of SM activity gives reason to perceive and treat SM as consensual sex rather than unwanted violence.<sup>50</sup> Nonconsensual SM encounters would then amount to sexual assaults rather than assaults. This is not to position sex and violence as mutually exclusive; I have claimed elsewhere that the disavowal of the erotic that takes place when law criminalizes SM as simply violence, is unconvincing and in itself a form of violence.<sup>51</sup> But there is good reason to argue for the reconceptualization of SM as primarily sexual activity, and to step away from the heteronormative construction of SM participants as violent, perverted, and “risky,” as distinct from responsible, safe, and loving non-SM sexual subjects.

What about failure to disclose the risk of HIV transmission—is this an assault or a sexual assault? The argument set out above suggests that one reason to see SM as sex is that categorizing SM that causes bodily harm as *sex* allows for the possibility that consent can be given, whereas categorizing the same behavior as *violence* rules out that possibility. But in the HIV context, informed consent can provide a defense, *regardless of whether HIV*

47. Chalmers, *Catching Up*, *supra* note 27; Mathen & Plaxton, *HIV, Consent*, *supra* note 22; Grant, *Rethinking Risk*, *supra* note 27.

48. Compare Chalmers, *Catching Up*, *supra* note 27; Mathen & Plaxton, *HIV, Consent*, *supra* note 22.

49. Lois Bibbings & Peter Alldridge, *Sexual Expression, Body Alteration and the Defence of Consent*, 20 J.L. & SOC'Y 356 (1993); Nicholas Bamforth, *Sado-Masochism and Consent*, CRIM. L. REV. 661 (1994); Cowan, *The Pain of Pleasure*, *supra* note 31; Cowan, *Criminalising SM*, *supra* note 24.

50. Cowan, *The Pain of Pleasure*, *supra* note 31; Cowan, *Criminalising SM*, *supra* note 24.

51. Cowan, *Criminalising SM*, *supra* note 34.

*transmission is charged as sexual assault or assault.* Other reasons must be provided, then, to justify its categorization one way or the other. One such reason might be that sexual assaults are usually perceived as more serious than other sorts of assaults, and labeling them as *sexual* assaults therefore indicates that we as a society take a more punitive stance toward them. So, should HIV transmission offenses be categorized as sexual assaults?

### A. Sexual Assault

The obvious initial question is, *what makes an assault sexual?* Sexual offenses in England and Wales have appeared both in common law and statutory form. Historically the offense in question was not sexual assault but “indecent assault” (§§ 14, 15 of the Sexual Offences Act 1956), and indecency was said in *R v. Court*<sup>52</sup> to be that which the right-minded person would understand to be indecent (a somewhat circular explanation). The common law definition of indecent, and its application by courts, was criticized as “vague and unclear,”<sup>53</sup> and some argued for a less moralistic and more straightforward offense of sexual assault.<sup>54</sup> The various common law rules and legislative interventions on sexual offenses were finally reformed and codified by way of the Sexual Offences Act 2003, which replaced indecent assault with the offense of sexual assault (§ 3). Section 78 of the Act states that activity is sexual if “a reasonable person would consider that (a) whatever its circumstances or any person’s purpose in relation to it, it is because of its nature sexual, or (b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.”<sup>55</sup> The Explanatory Notes to the Sexual Offences Bill suggest that this will rule out prosecutions for “obscure fetishes.”<sup>56</sup>

In contrast, the Canadian Criminal Code does not address what is meant by sexual for the purposes of sexual offenses, but under the common

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52. *R v. Court* [1989] AC 28.

53. Jennifer Temkin & Andrew Ashworth, *The Sexual Offences Act 2003: Rape, Sexual Assaults and the Problems of Consent*, CRIM. L. REV. 328–46, 332 (2004).

54. George Sullivan, *The Need for a Crime of Sexual Assault*, CRIM. L. REV. 331–39 (1989).

55. Strangely, this definition does not apply to the offense of sexual activity in a public lavatory (§ 71), which defines an activity as sexual “if a reasonable person would, in all the circumstances but regardless of any person’s purpose, consider it to be sexual.”

56. Explanatory Notes to the Sexual Offences Bill 2003, (House of Lords Bill 26) Clause 80: “Sexual,” ¶ 65, <http://www.publications.parliament.uk/pa/ld200203/ldbills/026/en/03026x-b.htm#end>. *But see* *R v. Price* [2003] EWCA Crim 2405.

law, an offense is of a sexual nature where “the sexual integrity of the victim is violated.”<sup>57</sup> The Crown does not have to prove sexual intent or sexual gratification on the part of the accused,<sup>58</sup> and sexual assault can be committed even where the accused thinks they are playing a joke, as long as the “reasonable person” would see the touching as sexual.<sup>59</sup> Whether an assault is sexual in nature is, therefore, left to the hypothetical rational and objective fact finder to judge.

So, should HIV transmission offenses be treated as sexual assaults? The context is certainly sexual. The HIV+ person does not necessarily intend to harm their partner, but given that this kind of behavior is deemed to be some species of assault, the reasonable person might well say that the assault is sexual in nature (even though, as James Chalmers<sup>60</sup> suggests, most jurisdictions have treated the sexual context as “incidental”). Both Canada and England and Wales rely on the oft-berated concept of the “reasonable person” here. The consequences of doing so are unpredictable, and the test may not offer a neutral assessment of the issues at hand; the question of “reasonable to whom?” and the problem of the normative assumptions at play when juries decide what kind of behavior is reasonable, is one that plagues other sexual offenses, most markedly rape.<sup>61</sup>

In practice, to see HIV nondisclosure offenses as sexual in nature also has a particular consequence in England and Wales: if we conceptualize the sex consented to as “sex without the risk of (a potentially lethal) disease,” then arguably the nondisclosure of positive HIV status undermines any consent to sex per se. Some writers have argued for just such an approach.<sup>62</sup> But courts in England and Wales have been reluctant to take

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57. EDWARD L. GREENSPAN, MARC ROSENBERG, & MARIE HENEIN, MARTIN'S ANNUAL CRIMINAL CODE 578 (2012).

58. R v. Chase [1987] 2 SCR 293.

59. R v. Bernier [1998] 1 SCR 975.

60. Chalmers, *Catching Up*, *supra* note 27.

61. Cowan, *Choosing Freely*, *supra* note 41; L. Ellison & V.E. Munro, *Of “Normal Sex” and “Real Rape”: Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation*, 18:3 SOC. & LEGAL STUD. 1–22 (2009); L. Ellison & V.E. Munro, *A Stranger in the Bushes or an Elephant in the Room?: Critical Reflections on Received Rape Myth Wisdom in the Context of a Mock Jury Study*, 13:4 NEW CRIM. L. REV. 781–801 (2010).

62. Jonathan Herring, *Mistaken Sex*, CRIM. L. REV. 511 (2005). Compare Damian Warburton, *A Critical Review of English Law in Respect of Criminalising Blameworthy Behaviour by HIV+ Individuals*, J. CRIM. L. REV. 55 (2004); see also Rebecca Williams, *Deception, Mistake and Vitiating of the Victim's Consent*, LAW Q. REV. 124, 132 (2008).

such a route,<sup>63</sup> in part because sexual intercourse without consent amounts to rape, and for many it would be incongruous, for labeling reasons, to treat these cases as rape alongside those where there is no consent to any form of sexual activity at all. Indeed, as discussed above, the Crown Office has stated specifically in its Prosecution Guidelines that a nondisclosing HIV+ person who sexually transmits HIV is guilty of assault, but not rape. It seems unlikely then that England and Wales will pursue such a course of action any time soon.

These concerns and disinclinations can be avoided and the issue more fully discussed with respect to Canada, where the offense of rape was replaced in 1992 with sexual assault; therefore the problem of a rape conviction in these circumstances does not arise.<sup>64</sup> So, is the conduct a sexual offense or not? In Canada, HIV transmission cases have at times been dealt with as (aggravated) assaults (*Cuerrier*), but at others as (aggravated) sexual assaults (*Mabior*). Grant argues that it is not clear what motivates charging one offense over the other, and that the court in *Cuerrier* has effectively conflated the two.<sup>65</sup> Should courts prefer sexual assault charges?

Two reasons might be given in favor of categorizing these cases as sexual in Canada. First, a slightly different legal test applies depending on which offense is charged. Sexual assault has its own consent provision (§ 273), over and above the consent rules that apply to assault more generally (§ 265). In the latter (assault) provision, consent can be vitiated by fraud (as well as other factors such as force). If the nondisclosing HIV+ person is charged with assault, s/he may claim an honest though unreasonable belief that the unknowing partner consented to running the risk of transmission, for example, if s/he believed that a sexual partner had knowledge of their HIV status from a third party, or from readily available documentary evidence such as a doctor's letter left on a desk. However, *sexual* consent is said to mean "voluntary agreement of the complainant to engage in the sexual activity in question" (§ 273.1(1)). Section 273.2(b) of the Canadian Criminal Code sets out a higher threshold for mistaken belief of consent in sexual assaults: a mistaken belief must also be *reasonable*, that is, the accused must have taken reasonable steps to ascertain consent. Charging the accused with

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63. R v. EB [2006] EWCA Crim 2945.

64. For discussion of this point, see Chalmers, *Catching Up*, *supra* note 27.

65. Grant, *Prosecution*, *supra* note 6, at 44, 48.

a sexual assault arguably gives the complainant more protection against frivolous or mendacious claims of mistaken belief in consent.

Secondly, on a slightly different tack, Mathen and Plaxton<sup>66</sup> have argued that treating a case of HIV nondisclosure as a sexual assault more appropriately labels the behavior, since it exemplifies the core wrong of a sexual assault: the infringement upon personal autonomy, and the objectification of a person through use of their body as means rather than an end in itself. Although this may be a convincing picture of what constitutes the wrong of sexual assault, their argument that this is a better approach than the assault route rests on the view that a prosecution for assault must always rely on an assessment of the level of *physical* harm (or risk of such harm) caused by the faulty behavior, whereas a prosecution for sexual assault need not. The harm of a sexual assault is not merely physical, they argue, but arises in Gardner and Shute's hypothetical unconscious rape example.<sup>67</sup> Thus, deeming the assault sexual more fully and aptly protects complainants in HIV nondisclosure cases, since the work of grounding criminal liability is done by (the lack of) consent rather than an evaluation of the level of harm imposed. This would bring Canadian law into line with that in England and Wales, if only in the sense that consent becomes the operative mechanism for establishing liability.

Are these two arguments persuasive enough to define HIV nondisclosure cases as sexual assaults? It is not clear how many "honest belief in consent" defenses are run in HIV nondisclosure cases, though there is anecdotal evidence to suggest that this defense is rarely run in sexual assault cases, so the first reason may not in itself be sufficient to mark the assaults as sexual. What about the sexual autonomy argument, then? Although focused on consent, arguably the Mathen and Plaxton line encourages us to draw the parameters of the criminal law too widely, in that it allows for exposure cases, where HIV has not been transmitted and the harm is emotional/ rather than physical, to be charged and prosecuted alongside those cases where HIV has been transmitted, and the complainant must live with the harm caused by the virus for the rest of their life. Although there may be good reasons to describe the core wrongs of sexual assault as Mathen and Plaxton have done, and good reason to take psychological harm seriously, application of their argument to HIV nondisclosure cases

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66. Mathen & Plaxton, *HIV, Consent*, *supra* note 22.

67. Gardner & Shute, *The Wrongness of Rape*, *supra* note 39.

may well overcriminalize. We must pay careful attention to the broader consequences of labeling nondisclosure cases in this way. It is also important to consider whether or not the over-individualistic tendencies of the concept of autonomy dovetail too neatly with what Francis and Francis<sup>68</sup> have described as an inappropriately individualistic approach to disease transmission, one that neglects social responsibility for creating conditions under which disease and stigma thrive, and undermines population rather than one-to-one models of disease control.

## B. Assault and Fraud

However, we must also pause to consider the appropriateness of labeling such cases as assaults. For one thing, in Canada, for an assault charge to be sustained, the prosecution must show that the complainant's consent results from the accused's fraudulent behavior, that is, failure to disclose positive HIV status renders suspect an apparent consent to sex. Traditionally, jurisdictions such as Canada, and England and Wales, have drawn the parameters of fraudulent sexual consent very narrowly.<sup>69</sup> The worry about proper labeling and censure of an accused who gains sexual consent by fraudulent means is particularly acute in jurisdictions in which rape is still an offense; a rape conviction for "trivial" fraud could dilute a relevant and important distinction between, on the one hand, a lack of consent to sex per se, and on the other, a disagreement about the conditions under which consent was given. Arguably, only deception in those circumstances that go to the heart of the agreement should be frauds that vitiate consent to sex.<sup>70</sup> The problem is, of course, deciding which circumstances go to the heart of

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68. Francis & Francis, *Criminalizing Health-Related Behaviors*, *supra* note 2.

69. *See, e.g.*, the dissenting judgment of Justice Farrar in *R v. Hutchinson*. One notable exception to the general trend is that of Justice L'Heureux-Dubé in her minority judgment in *Cuerrier*, where she reasoned that in the context of sexual activity, if the nondisclosure is beyond the *de minimis* level, and relates to a material fact that goes to general life plans and priorities, this would amount to fraud; therefore nondisclosure of HIV status to a sexual partner could amount fraud that would vitiate consent, rendering the offense one of sexual assault. Although the autonomy of the "unknowing" partner is more fully protected under such a scheme, this is the widest possible interpretation of the impact that fraud should have on apparent consent, and significantly extends the boundaries of the criminal law.

70. Some have also argued that nondeceitful mistakes should also vitiate consent (*e.g.* Herring, *Mistaken Sex*, *supra* note 62).

the agreement and which do not. Alternatively, under Canadian law, a sexual assault conviction need not rest on fraud, since it can always be argued that there was no “voluntary agreement to the sexual activity in question” in the first place. Arguably, this broadens the possible bases on which consent can be undermined; the in-built, common law-based, historically narrow grounds for fraud would be displaced by Section 273.1(1) of the Code. So, in HIV nondisclosure cases, is the consent of the complainant non-voluntary and therefore void *ab initio* (i.e., a sexual assault), or is it prima facie valid but vitiated through fraud (i.e., an assault)? That is, should assault/fraud be the preferred route to demonstrating a lack of consent, and what might be the consequences of taking that route?

The question of the appropriateness of the assault/fraud route was addressed in the recent Nova Scotia Court of Appeal case, *R v. Hutchinson*, where the accused deliberately sabotaged condoms in the hope that his partner would get pregnant, notwithstanding her explicit wish to avoid pregnancy. He was subsequently convicted of aggravated sexual assault. The courts in England and Wales, in both *Dica* and *Konzani*, have been very clear that consent to sexual intercourse does not entail consent to the risk of sexually transmitted infections. Although dealing with a different set of facts, the majority in *Hutchinson* agreed with this principle: in consenting to sex, the complainant had consented only to *protected* sexual intercourse, not *unprotected* sexual intercourse. In assessing whether or not there had been consent to the “sexual activity in question,” as set out in § 273.1(1) of the Canadian Criminal Code, the majority reasoned that the sexual activity in question was sex with a condom. The fact that the complainant had clearly expressed a specific wish and intent to have protected sex, in order to avoid pregnancy, meant that the use of a properly operating condom was an “inseparable component of her consent” (¶ 31). In line with *R v. Ewanchuk* the question of consent was a subjective one, to be determined on the basis of the complainant’s state of mind. Therefore the accused had committed a sexual assault. However, the minority in *Hutchinson* took the opposite view (though coming to the same conclusion that the sex was “nonconsensual”); the complainant had voluntarily agreed to sexual intercourse, but her seemingly valid consent was vitiated by the accused’s fraud, and he was therefore guilty of an assault. The majority decision in *Hutchinson* offers support for the argument that sexual intercourse under such circumstances is void *ab initio*, but Justice Farrar, in dissent, argued strongly for the assault/fraud approach. In other words, the

court argued over whether it mattered that consent be deemed nonexistent or vitiated, since they both lead to the same outcome—lack of consent.

### C. What difference does the distinction make?

In many ways it seems to make no difference whether an apparent consent is discounted by way of vitiation (fraud) or invalidity (not a voluntary agreement). Both lead to criminal sanctions for the accused. However, Justice Farrar resisted the invalidity argument—that is, that there had been no voluntary agreement to sex—on the basis that the definition of voluntary could be over-inclusive in its reach, thereby opening up more widely than the traditional fraud approach, the kinds of circumstances that could undermine consent (¶ 153 et seq.). Moreover, Justice Farrar also expressed concern that, in taking the sexual assault route and defining the “sexual activity in question” as sex with a condom, the majority decision in *Hutchinson* could lead to sexual assault prosecutions of women who lie to their male partners about the use of contraception, such as the pill or an IUD. In contrast, he argued, substantiating an assault charge requires the Crown to prove that there had been a significant risk of serious bodily harm, and the complainant could be shown to have suffered such harm through unwanted pregnancy and abortion in a way that a male partner who had been deceived about contraception could not.

Categorizing the behavior as assault keeps the category of frauds that undermine consent narrow, thus meeting overcriminalization concerns, and appears to take gender into account in acknowledging the differential impact of unprotected sex that leads to pregnancy. However Justice Farrar’s reasoning that the complainant’s consent was vitiated was grounded in his portrayal of her as having “changed her mind” about consent after the fact, when she realized that the condoms were damaged (¶ 165). This is a troubling attitude, and one that invokes gendered assumptions about how, when, and why women engage in sexual activity. As discussed above, there seems to be no particular worry amongst the Canadian judiciary as to the overcriminalization or potentially incorrect criminal labelling of those who expose others to HIV. This stands in stark contrast to the efforts taken to restrict the category of rape, to avoid overcriminalizing or wrongly labelling men who deceive women into having sex with them, and to keep the category of fraud that vitiates consent as narrow as possible. Moreover, Justice Farrar’s concerns about the possible prosecution of women who lie

about contraception, and the overbroadening of sexual assault to include more “trivial” circumstances as undermining consent, were addressed by the majority: the prosecution of women who deceive men about contraception was said to be unlikely—whether or not the sex is protected is less likely to be germane to a man’s decision to engage in sex, due to the absence of a pregnancy risk (¶¶ 58–59); and the over-inclusiveness argument was said to be illusory, since voluntary agreement must be to the “sexual activity in question,” and circumstances such as age or promises of marriage are arguably more easily separable from the sexual activity itself than the question of whether or not the sex is protected (¶ 81).

As with the SM example discussed above, narrowly criminalizing fraudulent sexual consent while widely criminalizing deception about HIV status speaks to the particular histories attached to each context, and the underlying (gendered) normative assumptions about how men and women engage in sexual activity with one another<sup>71</sup>: for example, that on the one hand, in the HIV context there is a level playing field of knowledge, power, and the ability to be completely honest; and on the other, that women are likely to “change their minds” about whether or not they consented to sex, and “cry rape” retrospectively when some “trivial” aspect of the situation turns out to be not as they expected. This is not to suggest that the assault/fraud approach to criminalizing HIV transmission is preferable to charging sexual assault, only that the kind of justification given by Justice Farrar for preferring it relies on unquestioned gendered assumptions about “normal” versus “problematic” sexual encounters.

In any case, it is debatable how comparable the HIV transmission cases are to the “sabotaged condom” case; both appear to be about “safe” sex, and could cover faulty or improper use of condoms. Both are also about the validity of consent and the importance of mutual agreement and communication in sexual activity. However, the criminalization of HIV cases in

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71. “Men and women” are intentionally focused on here, not because heterosexual relationships are the only or most important kinds of sexual relationships, but because the law in this area appears gendered and heteronormative in its approach: discussion of the appropriate response to nondisclosure of HIV mainly happens in a heterosexual context, prosecutions seem to be overwhelmingly brought against heterosexual men (Grant, *Prosecution*, *supra* note 6, at 30 n.103), and the recent Canadian cases do not seem to give clear guidance on what might be a “significant risk of serious harm” out with vaginal-penile penetrative sex (CHALN, *supra* note 3); and because the fraud cases are overwhelmingly focused on men deceiving women into consenting to sexual intercourse.

Canada has included exposure cases, and it is not clear that *Hutchinson* would be expanded to cover cases where no pregnancy results (and arguably the law should *not* be widened in this way). And although the “fraudulent consent leading to an assault” approach prompts criminal liability only in those cases (such as *Hutchinson*) where there is a *significant* risk of *serious* bodily harm, thus in principle keeping the ambit of criminalization narrow, the “significant risk of serious harm” test has been used to criminalize exposure to, as well as transmission of, HIV, ultimately over-broadening Canadian criminal law. Such an approach wrongly encompasses, for example, the accused in *R v D.C.*; prosecutorial discretion *could* be applied to preclude criminalization in her specific circumstances, where there was a one-time incident of nondisclosure, no harm resulted, she and her partner remained together for many years post-disclosure, and there was a history of domestic violence against her. In this case the accused should not have been charged with the same offense as those who recklessly transmit the virus to unknowing partners, often repeatedly, and in explicit contravention of medical advice.<sup>72</sup> Prosecuting her also arguably “trivializes sexual assault and diverts the law from protecting women’s physical and sexual autonomy.”<sup>73</sup> The focus of the criminal law should be sharpened here, not extended.

## CONCLUSION

If criminalization is intended to deter those engaging in sex from withholding their HIV status, or to put it another way, to foster mutual and open communication in sexual relations, it is not clear that this aim can be met solely by legal means. Although, as Vanessa Munro has suggested, few would reject any legal policy that would encourage communication: “[A]s the Court of Appeal itself hinted at, there is a danger in assuming that criminalising nonconformance will in itself bring this about. Indeed, parallels can be drawn with contexts of unwanted intercourse and rape, where the need to decentre law and seek broader social and educational change

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72. It might also be possible to argue that retrospective consent—if it is genuine and free—*could* in limited circumstances circumvent an assault charge, but a full discussion of the dangers of this (especially where retrospective consent takes place in the context of domestic abuse) is beyond the scope of this article.

73. CHALN, *supra* note 3, at 8; *see also* Grant, *Prosecution*, *supra* note 6, at 50.

has been acknowledged as being essential to the meaningful protection of personal autonomy. . . .”<sup>74</sup>

Notwithstanding significant concerns from activists, academics, and policymakers over the criminalization of HIV nondisclosure, it is unlikely that Canada or England and Wales will buck the current trend to criminalize at least some HIV nondisclosure cases. Yet, as the Canadian HIV/AIDS Legal Network have reminded us: “Whether or not the Supreme Court wants to admit it, people do have sex without full and complete information about their sexual partners all the time—including in circumstances which can give rise to some risk of serious harm. Yet the law does not step in to all such circumstances to override consent and criminally prosecute the lack of disclosure of information.”<sup>75</sup> If we need criminal law at all in the HIV transmission context, then, we need a more nuanced and limited criminal law.

In comparing the HIV cases with both SM sex and the case of *R v. Hutchinson*, I have argued that heteronormative and gendered expectations underlie the ways in which the legal rules that govern each arena are delineated and applied, particularly around who has what kind of sex, what counts as risky, and what we can expect men and women to tell each other both before and after sex. What is more, the (over)criminalization of HIV nondisclosure stands in stark contrast to the worry that we must not broaden criminal liability in sexual offenses to include those cases where consent is undermined by a more “trivial” fraud than that pertaining to the nature/purpose of the act, or the identity of the victim.

I have suggested, as have others before me, that we ought to be cautious and mindful of the consequences of resorting to the criminal law, when deciding not only what behavior to criminalize, but also the seriousness with which we view that behavior, and the appropriate label that should attach. If we must have criminal law in this area, only those HIV nondisclosure cases that result in transmission should be prosecuted. Where a jurisdiction does choose to criminalize exposure as well as transmission, some cases should not be pursued, such as *R v D.C.*, where in the context of an on-going (and in that case, abusive) relationship there has been a single act of nondisclosure followed by years of explicit consent to the risk of transmission. Criminal liability in HIV nondisclosure cases *could* take the

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74. Munro, *On Responsible Relationships*, *supra* note 13, at 119.

75. CHALN, *supra* note 3, at 8.

form of sexual offenses, but only where harm (transmission) has occurred. However, to distinguish those cases where the unknowing party has not consented to sex with the risk of HIV transmission from those where there is no consent to sex *per se*, it might be better to approach these as assaults rather than sexual assaults, notwithstanding the fact that they occur within a sexual context. As assaults, the test for criminal liability should rest on informed consent rather than “significant risk of serious harm,” but only those cases resulting in the significant harm of actual transmission should be prosecuted.