

THE CRIMINALIZATION OF

EXPERIENCES OF PEOPLE LIVING WITH

HIV

IN CANADA

NON-DISCLOSURE



+ ALEXANDER MCCLELLAND

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WHAT IS THIS BOOKLET?

THIS IS A REPORT ON THE OUTCOMES of a qualitative research study examining the experiences of people living with HIV who were criminally charged, prosecuted, or threatened with charges because they had been alleged to not tell sex partners of their HIV-positive status.

This report is intended for people living with HIV, people who work in HIV and criminal justice community-based organizations, lawyers, activists and advocates, and other people interested in the criminalization of HIV.

This is the first known qualitative research study examining the phenomena of criminal charges for HIV non-disclosure from the perspectives of those who have lived it. The report is based on my research conducted through Concordia University as part of my PhD in the Interdisciplinary Humanities program. The research received ethical approval from the Concordia Office of Research, and was funded by the Canadian Institutes of Health Research and Concordia University. The project was conducted between January 2016 to January 2019.

This booklet starts by first describing how the project was organized and what methods were used. I then provide detailed stories from nine of the participants, followed by an overview of some of the main findings.

The experiences presented in this booklet are real. Some of the experiences may be difficult to read. Names and some details have been changed or omitted to protect privacy. None of the illustrations are meant to represent the actual likeness of any of the interview participants.

This report is dedicated to J., C., M., J., and M. I know that engaging with this project was a hard, emotional, and healing experience. Thank you for trusting me with your experiences and allowing me into your lives to bear witness. This project is dedicated to all of you in your ongoing efforts to seek peace and justice.

BACKGROUND

Canada is one of the global hot-spots for criminalizing people living with HIV. Leading international human rights and public health experts have deemed Canada's legal approach to be counter to public health objectives and the rights of people living with HIV.

The trend of criminalizing HIV in Canada:

- Since 1989 over 200 people have been criminally prosecuted for alleged HIV non-disclosure.
- HIV is not transmitted in a majority of HIV non-disclosure or exposure cases.
- The situation is highly gendered and racialized with an intensified impact on people of colour and women.
- Charges have occurred when there was no possibility of transmission (i.e. when condoms were used, or when people were rendered untransmissible via the regular use of anti-HIV medications).
- Charges of aggravated sexual assault are most often applied, which is one of the harshest charges in the criminal code with up to a life-time sentence and mandatory sex offender registration.
- Along with criminal law, people have also been targets of various provincial public health laws which can mandate behaviour such as requirements for disclosure of HIV status, condom use, and psychological or medical treatment.
- There is a high conviction rate and those convicted can face long sentences of incarceration in segregation units, and ongoing life-long surveillance via sex offender registration.
- Due to the highly racialized nature of the issue, a high number of people who have been targets of criminalization were newcomers who were deported back to their country of origin after prosecution.

Due to relentless and dedicated activism from legal experts, people living with HIV, and human rights campaigners, there have been recent reforms to Canada's punitive approach. The federal government, with jurisdiction solely over the territories, as well as some provinces, have said that they will no longer pursue charges if the person accused of HIV non-disclosure is virally suppressed. In some instances, the use of condoms will also be taken into account, as will certain other factors.

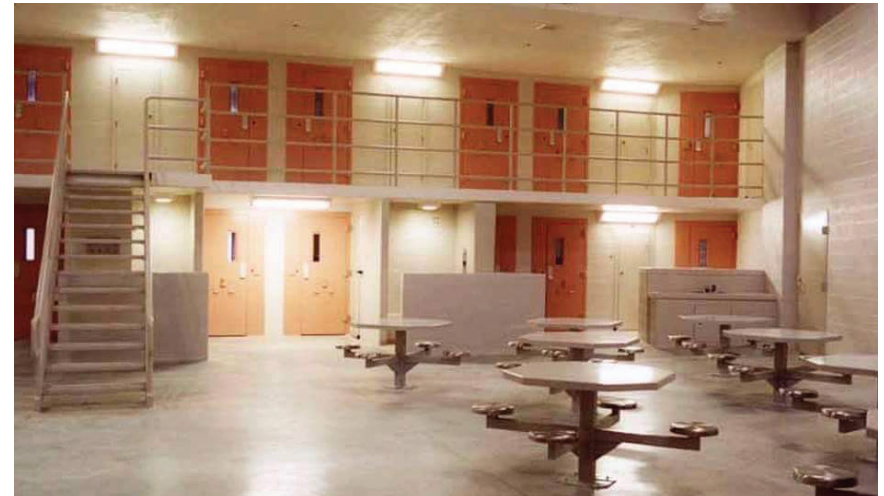
The situation of legal reform across Canada is in flux. Activists continue to call for a moratorium on any new charges, a review of past unjust convictions and prosecutions, and for the criminal code to be reformed so that the laws of sexual assault may no longer be applied to non-disclosure cases, and that the criminal laws only apply in the case of intentional and actual transmission of the virus.

RESEARCH FROM THE PERSPECTIVE OF PEOPLE

When starting this project, I asked myself the question: how do we know what we know about the criminalization of HIV non-disclosure? In answering this question, it became clear that most often what counts as knowledge on this issue is institutional, expert, and official ways of knowing. Ways of knowing that came from the police, media, courts, universities, and community organizations. A majority of the research that existed on HIV criminalization had been organized to demonstrate the negative public health impact of how laws were applied. The result was research highlighting how HIV criminalization negatively impacted public health, or the work of HIV organizations. But the experiences of people who had been criminalized, their voices, their stories, their understandings of their lives, was missing.

This project applied a feminist sociological ethnographic inquiry. This meant that the research was focused on documenting experiences of people's lives who had been historically marginalized from the process of research, in this case, people living with HIV criminalized for alleged HIV non-disclosure. The approach was to examine the impact of being criminalized from the perspective of people who were targets of criminal and public health laws. In this project, the frame of analysis was the daily lives of people who were interviewed. The premise of the project was to ensure that the lived experiences of the people who were directly impacted by the laws were central when examining the issue of HIV criminalization. The outcome was a focus on the daily conditions of violence that result from being labelled a "criminal" and a "risk to the public" by the criminal justice system, police, the media, and public health institutions. When research comes from the perspective of people it is more likely to have a political orientation, with aims to call attention to the violence of criminalization. The outcomes of such research become not just about describing social problems for academic fodder, but are oriented at contributing toward changing the conditions of violence faced by criminalized people.

SHIFTING THE DISCUSSION



A man who I interviewed for this research project gave me this photo from inside a prison. We don't often see inside prisons. Inside this prison is where he lived, it was the space he inhabited daily for over 4 years. Here is where he was housed after being prosecuted for allegedly not telling a former sex partner his HIV-positive status. She never contracted HIV, and their sex was consensual. Inside this prison is where he was witness to multiple violent beatings between other prisoners fighting or guards being abusive to prisoners. This is where his charges of aggravated sexual assault had been leaked by guards to other prisoners. He was then thought to be a rapist with AIDS, and as a result, this is where he often feared violence from others. This is where after months of being gravely ill he was repeatedly denied access to healthcare as a form of punishment by guards. This is where his written request to see a doctor was ripped up in his face. This is also where he was when he missed important life events in his family on the outside, including the birth of his grandson.

Sharing this picture is an effort to help to change the way the issue of HIV criminalization is talked about, moving away from just a focus to the negative impacts it has on public health, to a focus on the negative impacts this issue has on the lives of people.

PROJECT OVERVIEW

- I conducted twenty-eight in-depth qualitative interviews with sixteen people from across five Canadian provinces.
- The interviews consisted of detailed questions about people's experiences from the time they found out they had been criminally charged (or were threatened with charges), as well as, if relevant, their arrest, court proceedings, sentencing, incarceration, release, and their lives outside after serving their sentence.
- Interviews were conducted with five women and eleven men, one of the women identified as a transwoman.
- The people interviewed were a diverse group who comprise a wide range of experiences across the spectrum of who has faced charges in relation to HIV non-disclosure, including those who are socially marginalized, Black and Indigenous people, gay men, women with histories of street-based sex work, and people who live poverty.
- Most often up-to two interviews were conducted with each participant, as well as spending time with them, going to appointments, sharing meals, going for walks, and hanging out with them in their homes. This helped to build trust and connection, as the content of the interviews were difficult for many to share.
- The youngest person I interviewed was in their mid-teens at the time of charges. The oldest was in their mid-fifties at the time of charges. Some people had been charged only a few months after testing HIV-positive, while others had known their HIV-positive status for a number of years.
- The earliest charges were around the year 2000, the most recent charges were from 2015.

STORIES OF CRIMINALIZATION



THE FOLLOWING SECTION DETAILS NINE STORIES of criminalized people who were interviewed for this project. Individual's names and some details have been changed or omitted to protect their privacy. These stories are an outcome of interviews that were conducted, along with archival research to verify certain details. People I interviewed were only able to tell me what they knew about their experience. For many, the experiences they described were traumatizing and their memory was one of shock, shame and depression. Specific details and facts were sometimes a challenge. Some did not know the full name of the charges against them, or have a full understanding of the legal proceedings and procedures that took place in their cases. While my approach was to trust people as experts in their own experience, in some cases, when technical details were required, I also went to other sources to verify accuracy.

None of the illustrations are intended to represent the actual likeness of any of the interview participants. Instead the illustrations are included to bring each person to life in a context when being criminalized meant they lost all access to autonomy, privacy, humanity and justice. The law is a blunt instrument that forces complex life experiences into boxes: right vs. wrong, innocent vs. guilty, criminal vs. victim. But life is much more nuanced and complex than those simple boxes. Personal stories can help us understand that complexity.

SHAUN

I SPOKE TO SHAUN, a Black man in his late 20s, while he was living in the suburbs of a large Canadian urban centre. A relaxed guy, living in his own apartment, he offered me a coffee as we talked about his new dog. Shaun lived in a low-income high rise and worked in a factory a bit further north of his place. Many years earlier, while dating a woman, he learned he was HIV-positive. Shaun went on medication right away. He soon after told her his status, and together they went to see public health officials. Later the clinic, a doctor told Shaun and his girlfriend that Shaun was undetectable, and posed no risk, but that it was against the law for an HIV-positive person to have sex with someone without first revealing their status.

Shaun's girlfriend accepted that he had HIV and a few months later they moved into an apartment together as a couple. But after finding out his status, Shaun looked towards moving on from drinking and partying: "I started to feel the impact of HIV. I've got to slow down and I was, like, to my partner, 'I can't keep up, you know, so, like, I have to change my ways.'" His girlfriend, however, continued to enjoy going out a lot, and their lives drifted apart. Their relationship took a downward turn and he decided to break it off. When he ended the relationship, "She got mad, then pressed charges, because she found out from when we met with public health that she could, and was like, 'Well, you are going to leave me, leave me here by myself... I ended up getting charged with non-disclosure.'"

Shaun was scared and turned himself in immediately. At the police station, he was asked to enter an interrogation room, at which point Shaun told me the police beat him: "I was in the interview room and I couldn't get up and I'm screaming for help and no one was coming to help me. I kept falling on the ground, because, like, I was so hurt inside, like, I had broken ribs, I couldn't breathe properly." During the assault, Shaun said to me that an officer referred to him as being Black and as a rapist with HIV. After being left on the floor for an hour, beaten and asking what was happening to him, Shaun was then taken to another interrogation room. There, he was told nothing had happened and he must have been mistaken about his assault. Shaun then told me the police, conducted an interrogation.

After his arrest and interrogation, the police released a public safety warning about Shaun. The warning was posted online using the police Twitter account and sent to multiple media outlets. It included Shaun's biometric details; his height, weight, eye and hair colour, any visible identifying marks, a mug shot, and a statement asking for anyone who had sex with him to come forward. Media articles were published,



which were widely dispersed online, and included Shaun's name, picture, and the police profile, along with his charges. He was denied bail and incarcerated immediately on remand, which is pre-trial detention.

At his bail hearing, Shaun's aunt came to testify. She said that Shaun was not a flight risk and had family connections, so that he could be granted bail. He had no previous criminal record. But, due to the perceived seriousness of the charge, Shaun was denied bail. He told me that the Crown Prosecutor said to the court, "Shaun is a menace to society, and if we let him out, he's just going to keep doing this again and again." When he found out his HIV-positive status, public health officials had initially told him he posed no risk. Now the court was labelling him a high-risk.

Shaun told me that he was then placed under lockdown in solitary confinement for two months. During that time, he had a hard time accessing his anti-HIV medications: "They didn't have my pills there for maybe the first week I was there, they just didn't have my pills." He was confused because he had been diligently following his doctor's orders, taking his medications and remaining virally undetectable. Yet, the police and court treated him like he was a threat. Now, the institutions that had treated him like he was as an infectious risk were denying him the very treatment that he needed to remain healthy and to suppress the virus in his body.

Finally, after three years under a combination of pretrial detention and house arrest with his aunt and uncle, he was released because his charges were no longer being pursued by the Crown Prosecutor. Despite how he had been treated by the police, and court, Shaun told me that because he felt as though the fact that his viral load was undetectable and he had used condoms, that his case would not have held up in court.

A few weeks later, at night he was out with his dog. A group of men from his neighbourhood approached Shaun. One said, "You're HIV-positive and you are sharing cigarettes with other people out here. We read about you, you're spreading HIV, that's what the media said." They started telling Shaun that he should leave their neighbourhood and started pushing him around. He yelled, "I'm, like, man, I'm HIV, I'm undetectable, I am no risk, my case was overturned," and they are like, "It doesn't matter, you're still HIV positive." Regardless, the group of men beat him up, standing above and encircling him, kicking him repeatedly. Shaun told me that he now often feels unsafe, surveilled, and scared around his home. ■

DARLENE

I SPOKE WITH DARLENE, an Indigenous woman in her early thirties, one summer afternoon, first on the phone, and later in person. She was warm and funny, and talked about her love of animals and her devotion to her children. Her son had been taken away from her and she was working towards regaining custody. For many years, she had worked as a street-based sex worker in a major city. She was arrested while residing in a recovery house for women fleeing experiences of violence. She had recently fled from an abusive ex-boyfriend and was working to get her life together. Her ex-boyfriend had been extremely abusive, once even trying to run her over with his car. For a time, he had also been her pimp. He knew her HIV status and out of revenge, because she was trying to leave him, he went to the police.

The police knew she was HIV-positive and working the streets, and found her after launching a sting operation against her. She was arrested and charged with aggravated sexual assault. "An undercover [police officer] approached me and tried to get me to say that I would do sex without a condom... Sometimes you've got to say things to get shit done. People, you know, that was just the lifestyle that I was living at that time," she told me, noting she often went along with what men asked for during negotiations prior to sex. She had condoms in her purse and used them as much as possible with her clients. She told me how a few of her friends who worked alongside her on the street had gone missing. Word on the street was they had been murdered, but Darlene told me she thought the police were not interested. As a sex worker, Darlene told me she knew the police did not care about her or her friend's lives. Darlene was upset that instead of looking for her missing friends, the police conducted a sting operation against her. She was shocked that this was what the police were spending time and resources investigating when people in her community were saying that women in the area had gone missing. Her photo and case information had been published widely in the media, with one headline calling her an "HIV-positive hooker." She was now portrayed in the media as if she had been actively transmitting HIV.



The media was intense. Darlene stated, “It was in the papers, you know they were encouraging people that had had sex with me to come forward and, like, testify against me in court. And, now, if you Google my name, it will come up with stuff about the case.” Her lawyer convinced her to plead guilty, even though she was virally undetectable and that her abusive ex-boyfriend knew her HIV-positive status before they had sex. The Crown Prosecutor was asking for a sentence of eight years. Darlene pled guilty and got a sentence of three years in the end, she was scared she would miss her kids.

Following her release, Darlene found life hard. Her relationship with her family became quite strained:

“My mum she knows, but she makes like it’s a secret, like only family should know. It’s embarrassing for the family to have a daughter who’s a sex offender. You can’t be around kids without supervision, which is hard if I want to spend time with my nieces and nephews.”

While out in public in her community, Darlene would regularly face harassment or be denied services. She wanted to get on with her life, but things were an uphill challenge. ■

LENORE

LENORE IS A KIND, and somewhat shy Indigenous woman in her late 20s. We met for lunch at the local Tim Horton's with her boyfriend. She was initially reluctant to talk about her experience, given previous betrayals of her trust and privacy. She had been sexually assaulted in the past, but now she was being considered a sex offender, she was scared and cautious. She told me she felt ashamed and angry about what had happened to her.

I spoke with Lenore and her boyfriend, clearly observing that they were in love and openly affectionate towards one another. His unequivocal support for her was clear. Her boyfriend was HIV-negative. He and Lenore met shortly after she had been charged and he had helped her throughout the experience. After ordering sandwiches, she jumped into telling me about her first engagement with the police in her small town. She explained how she was initially charged: "It was my social worker who called me. It was about a phone call from the RCMP [Royal Canadian Mounted Police]." A nurse from the local public health authority had previously visited Lenore a few times. The nurse stated that they were aware that Lenore was HIV-positive, and demanded that she disclose her status to her sexual partners, but provided no support on how to do so. Lenore found the encounters jarring and disturbing, encounters that left her feeling insecure. She told me that she believes the public health authorities went to the police alleging that she has had sex that risked transmitting HIV without disclosing her status.

Lenore continued, "My social worker said, 'We need to talk to you about something. Can you come to the police station?'" Lenore, scared and confused, went to the police station: "They read me my rights, then they took me upstairs to the interrogation room." She was being charged with aggravated sexual assault. She immediately received duty counsel, a publicly available defence lawyer provided by the government, who she called and who told her not to say anything to the police. Despite what her lawyer said Lenore told the police that she had slept with a man a few times while intoxicated, she was in a deep depression since finding out she had HIV. Lenore told me that she never told him her HIV-positive status, but neither did she keep it a secret. She told me she did not know how to talk about it, but that she was not trying to hide her status. Lenore and the guy had hooked up when they both were quite inebriated. She tried to give him a condom, but he did not use it.



The police released her with a promise to appear in court: “I was told that [the incident] was going to remain under investigation and that nothing would happen.” A day later, Lenore heard from her social worker again, “asking me ‘How are you doing? Your name is in the paper, and so is your picture’, she said, ‘Whaaat?’” Lenore then told me how she went into a long period of self-imposed social isolation out of fear, checking into a motel in another town.

Lenore told me that a former teacher from her high school leaked her graduation picture to the media. That picture was now everywhere, with headlines saying she had HIV and was being charged with aggravated sexual assault.

After coffees and sandwiches, I went over to Lenore’s place with her and her boyfriend. She told me about when she was first incarcerated. When she entered the institution, the guards asked her if she wanted to be “by herself” or in the general population. She asked to be by herself—she was shy and wanted privacy. “I would love to be alone, I need to be alone. I didn’t realize that asking to be alone meant what it did.” But, the conditions and consequences of “being by herself” were not fully explained to Lenore beforehand. In that specific institution, this meant administrative segregation and suicide watch. A male guard took her to her room, she continued:

“So, they took away my underwear and didn’t tell me why. And I was, like, why do you need all my clothes? This isn’t safe. I’ve been molested, this isn’t safe. You’ve got male guards here. No... It took about a half hour before they finally got me to calm down. I have never freaked out that way in my life before. I saw a side of myself that I had never seen before.”

Lenore was forced to strip naked, placed in a cell with only a concert floor, with a video camera watching her and a window that a male guard would watch her through at all hours. None of her questions were answered, and the guards ignored her concerns. She did not have access to her anti-anxiety or HIV medications. She hyperventilated and cried. After her panic attack, the male guard gave her a smock to wear, but that did not help.

“They had only male guards on duty. My fear of men... after what I’ve been through already. There was no safe position to lay down in those rooms. There is one way, where they can see everything from the window and there is the other way where they can see everything from the camera, no one was explaining anything to me. Now you’re found guilty, so they don’t listen to you, you’re a criminal, no one listened to my questions. I’m just another drunk Indian girl who got raped, no one cares about me. We were expecting community service, and I got a sentence of two and a half years.”

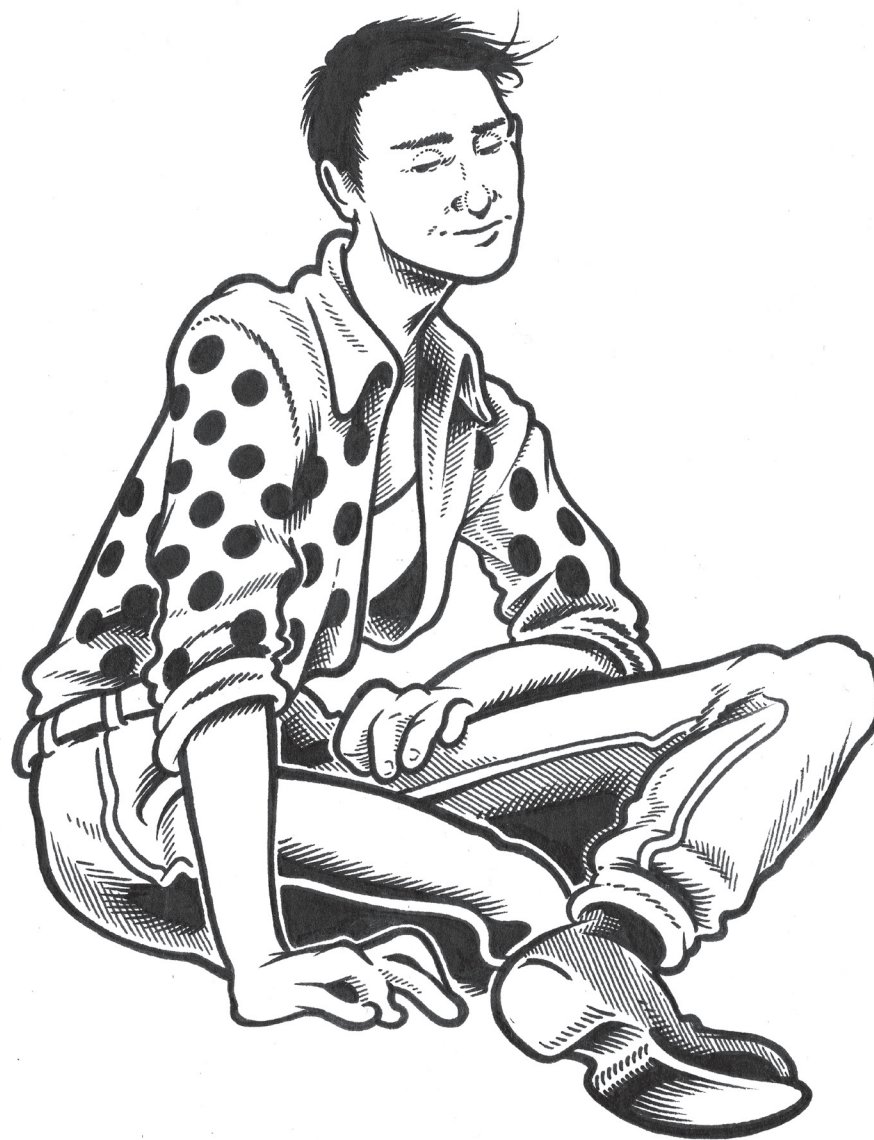
Eventually her lawyer got her released from segregation. In fact, during her appeal, her lawyer got her released back home with her boyfriend. While sitting on the couch at her place with her boyfriend, Lenore told me about her life following her release from the corrections institution: “I’m on the registry that is for rapists and pedophiles. I really don’t feel like I belong there. I am on there because of HIV.” She used to volunteer at her son’s school in the daycare program, but was now no longer able to. “The guidance counsellor that works at my kid’s school would love to have me back as a volunteer, but it’s the school that won’t allow me because of my charge.” She told me how she felt as though she was under constant surveillance: “They need to keep tabs on me, I love working with kids.” She felt frustrated and depressed that her charge was keeping her from doing what she loved: “Because of sexual aggravation, they can’t have someone like that. But I didn’t assault anybody.”

She told me how she was pregnant and how she was excited about having a new child in her life. But, she was also worried because she had another appeal coming up in a few weeks, and if it was not accepted, she was going to have to return to prison to serve the rest of her sentence. She had close to nine months left to serve, and she was deeply stressed out, upset, and worried. “What’s going to happen with the baby?” she feared. ■

MATTEO

WHEN I MET HIM, Matteo was still under curfew as part of the conditions of his release. His parents were his sureties—he was mandated to live with them in the suburbs. A gay white man in his early twenties, Matteo was still in college, and only allowed out of his parents' house to attend school for the day. He only recently found out his HIV-positive status. In fact, we met on the one-year anniversary of his diagnosis. He told me about how he had used hook-up applications like Grindr and Scruff. He met a guy that way, and they had sex. Matteo did not tell the guy his status. He had been told by his doctor that since he was virally undetectable it was impossible for him to transmit HIV. Matteo concluded that he only had to disclose his status if there was a risk of transmission: "I thought if I was taking medication I didn't have to disclose. Apparently, that is not the case." A few weeks later, he was at work and the police came to arrest him. Matteo was arrested in front of his staff, coworkers, and customers: "I felt really shitty, like I, like I had just robbed a liquor store. They [the police] said, 'You know why we are here. You are being charged and arrested.'

They read me my rights and said, "This is what you are being charged with—four counts of aggravated sexual assault." Matteo immediately spoke with duty counsel—a publicly-funded lawyer for people who can not hire their own lawyer—who told him not to speak to the police. They took him to the police station in their cruiser and into an interrogation room. After aggressively pressuring him, the "extremely intimidating" police got him to speak about his experience. "I told them a lot about myself—they didn't know what undetectable meant, they didn't have any knowledge on it." He ended up educating the detectives on the risk factors for transmission. Fundamentally, the police tasked with arresting Matteo did not know the current science behind the actual risks of HIV transmission. The police then released his picture, biometric details including his height, weight, eye and hair colour, any visible identifying marks, the charges filed against him, and his HIV-positive status. They also released a picture of Matteo as part of a public safety warning, asking his past sexual partners to come forward. The warning was widely covered in the media. As a result, it was also shared online, including on Facebook, targeting Matteo's profile. Once such negative post read, "If we still had the lash in Canada for punishment, this would be a case for its proper application..."



While talking at his place, Matteo told me more about what it was like to live under curfew at his parent's house and the other conditions of his release. He felt constantly surveilled, isolated, and depressed. He pulled out a piece of paper and read to me the more than 20 conditions of his release. Among the many conditions, he was barred from socializing in the gay community or going out to participate in social events. The condition that most bothered him was that he was mandated to contact authorities twenty-four hours before any potential sexual conduct, providing them with the name and contact information of the person. The police would then directly verify that the person knew Matteo's HIV-positive status and that they consented to sex with him. "Like, who is going to want to do that? How am I going to meet anyone?" He felt extremely isolated and lonely. ■

CYNTHIA

I MET CYNTHIA in her neighbourhood on the outskirts of a large Canadian urban centre. As her second or third language, she was still learning English. She told me about her move to Canada a few years earlier from a South American country. She felt that living as a transsexual woman in her home country was impossible. She feared that had she remained she would have faced life-threatening violence. Since moving to Canada, she had been working as a sex worker. She told me she generally had clients she liked, and she worked out of her home. She was warm and engaged when talking to me. In her late 30s, Cynthia was well-dressed, and had a gentle demeanour. As we sat together drinking tea, she began telling me about how she was threatened with a charge of aggravated sexual assault. She was on anti-HIV medications, was undetectable, and regularly used condoms with her clients. She knew that she was protecting them and also herself.

One of her regulars came over one night more intoxicated than was typical for him. He pulled a knife on Cynthia and raped her, holding the knife to her neck. He did not use a condom. She was terrified and called the police afterwards. During the police investigation, Cynthia told police about her HIV-positive status. Later when speaking with the man who raped her, the police told him that he could press charges against Cynthia. She had previously not disclosed her status to the man, thinking that the use of a condom and being undetectable was more than sufficient. A few weeks later, she received a letter from a detective, stating that she was under investigation and they were considering pressing criminal charges of aggravated sexual assault. She was scared, she didn't know what to do. The man knew where she lived and had been violent towards her, and now she was potentially facing criminal charges. She told me that because she was a sex worker, her rape and assault were not being further pursued by the police. But, now, she was under threat of a charge of aggravated sexual assault for not disclosing her HIV status to her rapist.



Sitting at her kitchen table in her small apartment, Cynthia continued her story. After receiving the letter about the investigation from the authorities, she felt constantly surveilled, scared, and worried. Moreover, now that he knew she was HIV-positive, the client who assaulted her began stalking and harassing her. She was terrified in her own neighbourhood, isolating herself and rarely venturing out. She deactivated her social media accounts because he also began posting messages, harassing her and her friends online. She was extremely fearful in her own neighbourhood, but also scared to call the police again. The police were the ones who placed her in this situation in the first place. She told me, “If I had not called them, I would not have this charge hanging over my head.” She felt as though she was under constant watch, but with no means to protect herself. She knew the police were not going to help her, and was worried she would face additional violence from her former client. ■

GEORGE

I MET GEORGE in his apartment. He is a warm and gregarious white gay man in his late 50s, with a self-described long history of problematic prescription drug use, gambling, and mental health issues. When George began a specific relationship around 10 years earlier, he initially did not tell his boyfriend about his HIV-positive status. At the time, he told me, he was himself uncertain about how HIV was transmitted. He told me that he was often depressed and in denial about aspects of his life. One day, a few months after his own diagnosis, George told me that his boyfriend came home with an HIV-positive test result from the clinic after a routine sexually transmitted infection screen. George, then, finally told his boyfriend his status in a letter: “There is a possibility that you may have gotten it from me, and I’m very deeply sorry for not disclosing [it to you].” His boyfriend went into a rage and went to police.

A few days later, he received a text message from his boyfriend that he was at the police station giving them his story. George immediately went to the station. “The next thing I knew, they were taking me into custody, and they said, ‘You have the right to call a lawyer’, and they told me that ‘you are being arrested for sexual assault.’” George told me that a constable initially told to him, “You’ve never had a criminal charge before. You will probably just have to stay overnight and tomorrow we’ll get your bail sorted.” But, a few hours later, the same constable came to see him and told him his charges had been elevated to attempted murder: “‘You aren’t going anywhere,’ she says, and she was right.” Due to the seriousness of the charge, George was denied bail even though he had no previous criminal record.

While sitting in his apartment looking out onto the city, George continued telling me about his experiences. Due to the fear, shame, and anxiety he experienced, he decided to plead guilty. He had never been incarcerated. The Crown Prosecutor was asking for ten years. George’s lawyer told George to plea, that he had no case, because he had admitted his crimes. If he pled out, he would be sentenced to a lot less time inside. He listened to his lawyer. While incarcerated, he was placed in the general population with men facing all types of charges. He started facing verbal and physical harassment. Prisoners began calling him a rapist, and asked why he took medication. After days of harassment he was brutally assaulted by other prisoners. Those assaulting him said they knew he was trying to spread HIV. George said the guards watched and did nothing. George told me he was certain that the guards had leaked information about his charge to the prisoners, knowing he would be assaulted.



Under an institutional directive, prisoners' charges and health status should remain confidential, and the only people with access to the information are guards. There was no other way for the information to end up in the hands of prisoners. He told me angrily, "I was getting beaten by all of the inmates, the correctional officers had disclosed my charge to people on the range [cellblock], I got beat up, and they put me in to, I can't remember what they called it, protective custody." While in protective custody, George remained unsafe and was beaten again and again:

"I went into the protective custody wing, and there is all kinds of sex offenders there and murderers and everything else like that. And when I got there, they found out my charge. So, they beat the shit out of me as well. I never fought a day in my life. I have never lifted a hand to anybody... I was on an isolated range for violent murderers and would still get harassed. You know, this rape charge and HIV was worse than being a murderer in their eyes."

He told me that other sex offenders and murderers were left alone. But he was continually attacked for having HIV combined with a "dirty charge"—that is, aggravated sexual assault. One day, George was being harassed by another prisoner when a guard intervened. George told me he felt the guard had it out for him, and he was scared of the guard who had said demeaning things to him in the past. After the altercation with the other prisoner, George started to have a panic attack. While hyperventilating, that same guard forced George to strip naked and made him lay down on the cold concrete floor, holding him down on the floor with his boot. The guard pushed his boot into George's chest hard, and said "I don't touch anyone with AIDS," as a nurse arrived to sedate George, sticking a syringe in his arm.

Ultimately, he served the rest of his sentence in administrative segregation, where he was not allowed any clothes, and only had a concrete floor with no bed until night time. He was given just one sheet of paper and a pencil to occupy his time while locked down alone in a cell. He served approximately one year in those conditions. ■

STEPHANIE

I MET STEPHANIE at the transition house in which she was temporarily living. A few months earlier, she has been released from a women's federal correctional institution because of her prosecution on charges due to alleged HIV non-disclosure. After being incarcerated for multiple years, she was having a rough time reintegrating into society. She showed me around her transitional housing unit, we went to some appointments together, walked around the city, hung out with her boyfriend, and shared a few meals. A white woman in her early forties, Stephanie described her experience upon first learning that she had been charged with aggravated sexual assault: "I went to the police and I told them I had been raped." She lived in a small town and ended up at a hotel party with group of men. Drunk and in a blackout, she told me that multiple men raped her. The next day, she went to the police.

Sitting in a Tim Horton's while drinking coffee, looking across at me, Stephanie continued, "Then they came to me and told me I was going to be arrested for aggravated sexual assault. I had no idea where this was coming from." She had previously been very public about her HIV-positive status, and openly spoke to the media about her life and living with HIV. She was on HIV medication and taking care of her health. Her rape was never officially taken up or recorded institutionally despite her initially going to the police. At the police station when she was interrogated without a lawyer present, "I got tripped into a statement which negated the fact that I got raped." Stephanie was scared, and had no trust that the system would take her seriously. As a working-class woman, she had a long history of doing what she needed to do to get by, including working as a street-based sex worker. She has been assaulted numerous times by men over the years.

After her arrest and interrogation, the police widely send out a safety warning about her, the warning asked that people who had sex with her to come forward since she was a public health risk who has been promiscuous. "Reporters, reporters, and more reporters" immediately picked up the case. Her sex life and sexuality were widely scrutinized in the press, along with her perceived risqué clothing choices and drinking behaviour. She was talked about by the media as knowingly trying to transmit HIV. Because of the severity of the aggravated sexual assault charge, she was denied bail. Following intense media scrutiny and a desire to not miss her family including her son for too long, Stephanie ultimately agreed to a plea bargain. She was terrified and had no support. She told me how she felt as though her lawyer was a bully who was ill informed about HIV. In the end, she pled guilty to one count of aggravated sexual assault. "Guilty for being raped," she said angrily, her eyes fixed on mine, gripping her coffee cup.



Prior to her sentencing, the Crown Prosecutor in charge of her case had an expert sex offender psychologist interview Stephanie to evaluate her level of risk to the public. Stephanie told me it was the first time the psychologist had seen a case involving HIV non-disclosure. They had no official diagnostic tools to calculate her potential level of risk based on the circumstances of the case. She did not fit any of the official criteria of sex offenders that the psychologist used during the interview. Despite this, Stephanie was still designated a sex offender, deemed a risk to the public, and denied bail. Stephanie told me the psychologist said she was a unique threat and a “different kind of sex offender.” She is now registered as a sex offender for life, and was sentenced to multiple years under house arrest and, later, incarceration.

Turning back to Stephanie’s time in a transitional housing unit, she expressed her anger and depression regarding the strict conditions imposed upon her. While walking up the steps to the unit, she continued, impersonating her case worker:

“Where are you going? Who are you going with? Where you gonna be?” Fuck, why don’t you put the cuffs on me? I don’t even have that many probation restrictions. So, like, I walked outta prison with even more restrictions than I had when I was inside. I don’t have a curfew restriction, but the house does now... I feel like I’m not moving forward ‘cause I’m still in that box.”

She became increasingly angered and frustrated when explaining it to me. She had served her time and just wanted to reintegrate into society and move on with her life. We had to be buzzed in and a receptionist signed me in and checked my ID. At the transition house, her life was highly regulated and monitored, and guests were limited to daytime and staff supervision while on-site. Staff kept track of every place she went, and she told me it felt suffocating. We went into a small common room, furnished with a TV, microwave, and some unremarkable beige couches and surrounding furniture. She now had her freedom, but felt more constrained than while inside. She could taste leaving her criminal record behind, which made it seem even farther away. “We can’t talk here, hun. It’s not safe for me,” she said in a hush under her breath. She was worried that anything she did or said in front of the housing staff could be used against her in future. She was also worried about seeing her doctor—she no longer trusted healthcare professionals. Pursuant to a court order her doctor handed over all her health files to the Crown Prosecutor, files which were used to prosecute her as a criminal.

She told me how stressed and fearful she was in her community. She had tried to go to local AIDS support organization for support, but each time it seemed like they faced difficulties dealing with her. She was frustrated with the limited services available, services that seemed out of touch with what she needed in order to reintegrate into society. ■

PAUL

PAUL SPOKE WITH ME just after his release from incarceration. He had been sentenced to over ten years. Nearing the end of his sentence, he had been recently granted day parole, which is release from prison for short periods of time during the day. He was spending time off and on with a friend of his when he was allowed out into the community during the day. A white man in his early 40s, from working-class origins, Paul was trying to comprehend everything he had endured. “They treat you like your HIV is a weapon that you used to hurt someone. You’re walking around with a loaded gun. They see us people with HIV as violent, so now I’m on the [sex offender] registry for life because of that.” When his case was first being investigated by authorities, Paul told me, the police worked hard to make him seem like a risky perpetrator: “The police were suggesting that I was deviant and trying to say I was trying to spread HIV purposefully.” He told me what he did was what he understood to be the normal behaviour of a hedonistic young bachelor in his 20s. But, due to HIV, he was being labelled a threat: “I was dating women that I had long-term relationships with, it was normal... they [the police] used my HIV to say I was a horrible person. It scared them; they used it as a way to keep me locked up.”

Because of his sex offender registration, Paul had to be housed in a medium to maximum-security correctional institution. While incarcerated, Paul was mandated to participate in the Moderate Intensity National Sex Offender Program, and also underwent regular psychiatric evaluation. Those evaluations included phallometric testing, a procedure to determine the sexual preferences of people with penises by measuring their erection responses to visual stimuli depicting various sexual behaviours. “They put an apparatus on your private parts and make you watch all sorts of rapes, child sex, torture, violence, and see if you are aroused. ‘Oh when that girl was getting tortured you got excited.’” Paul was angry that he had to undergo such testing. Watching and listening to the videos traumatized him, “I had to go through all that just ‘cause I had HIV.” The results of the phallometric testing showed that he exhibited the average sexual impulses of a heterosexual man.

The psychological test results, contributed to Paul’s assessment rating, which was used by corrections authorities to determine his potential risk level to reoffend, and how he was to be treated while incarcerated. The higher the rating, the more surveillance and restrictions. The rating was also used during his parole hearings to determine if he should be allowed back into the community. His assessment ratings were generally good, since he had no other offences and he was generally assessed as having a high potential for reintegration. But, one aspect of his rating was not



as good. This one was known as the “dynamic factors” rating, which was compiled based on various factors, such as attitude and level of accountability. The results of this rating were based on Paul’s participation in the Sex Offender Program, where his attitude was often noted as needing improvement. In a group of 15 or so other men, many had received sentences for violent sexual assaults, a number of them for assaulting children. Paul told me he had to sit with the others and hear their stories. He needed talk about his own sexual desires as pathological and dangerous, as the others participants did. Paul continued:

“It was traumatizing sitting with those men, hearing them confess what they had done. You have to accept accountability, acknowledge that everything you did was wrong, not try to minimize, not try to rationalize, tell them that you are a horrible, horrible person, and what you did was really, really bad and wrong—if you don’t go along with that there, then you are not going to get a good report.”

It was hard for Paul to understand how to participate in the group. They made him feel like he had to pathologize his desires just because he was HIV-positive. He spoke with the facilitator, later stating to me, “Even the facilitator didn’t know why I was in the program. But they had to make a report and rationalize my participation. It was their job. All the normal things I did, because I have HIV, became a thing. But if I didn’t have HIV, they would be considered normal behaviour.” Paul found it increasingly challenging and traumatizing to participate in the program, and the facilitator, despite also agreeing that the program was not a proper fit for him, had to evaluate him using the same criteria applied to everyone else. Paul was described as not accepting his crime, the criteria for the group led to him being perceived as denying and rationalizing his past actions. One of the activities for the homework component of the program included outlining how to manage deviant sexual urges:

“[W]hen you have this urge to molest someone, how do you then manage that? So, what is my urge? If I ever want to have sex, because I have HIV, what is my urge? I mean, it wouldn’t be an urge for anybody else. It is a normal thing, right?”

Paul had to explain the kinds of sex he was interested in to the other group members, and then use the criteria of the group to make that sex seem deviant and abnormal. In his case, he sometimes liked anal sex and also enjoyed being on top during sexual intercourse with his female partners. In the group, this was understood as “unconventional sex”, which meant, according to the group facilitator, a psychologist, that Paul had issues with power and control. However, he eventually gave in to the logic of the group—he “had to dig deep inside, bite my tongue, and do what was required of me.”

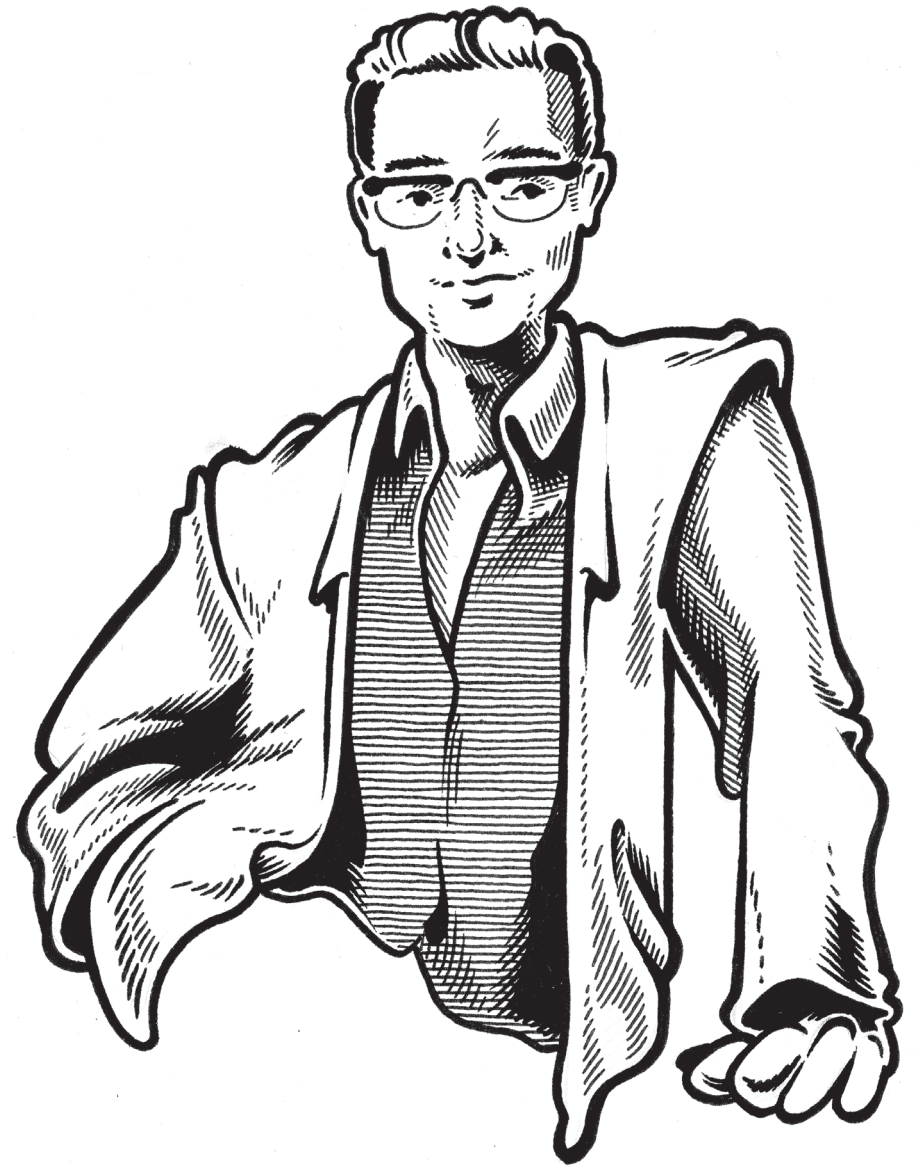
After his day parole was granted, one day during a meeting with his parole officer, her manager joined in on the meeting. The parole officer’s manager used to work at the same correctional institution in which Paul had spent years. She remembered him. She told Paul that when he came to the institution the staff had not had a case like his before, and they were not sure how to process him. He told me, “She said they didn’t think I should be labelled as a sex offender, as I did not fit any of the criteria. But, since I was found guilty, they were institutionally mandated to put me through the program.” He was angry that he had to go through the program. It had been emotional damaging to him, even more so now that he knew even the staff in the institution thought that he did not belong in that program. ■

CHARLES

I MET CHARLES in the small town where he lives. He was on social assistance and barely scraping by. Registered as a sex offender for life, he found it nearly impossible to find a job. When we met, he had been released from prison for a few years, but was still having a rough time. A white man in his mid-forties, he told me he came from a working-class background, had kids, and was very proud of recently becoming a grandfather.

He told me about the difficulties of being incarcerated and how he was often verbally abused by the guards. While serving a four-year sentence in protective custody, he developed a very serious bacterial infection in his genital area. The infection persisted for more than a month, during which time he repeatedly submitted requests to see a doctor. The guards delayed or denied the requests again and again. At one point, a guard who knew that Charles was HIV-positive took his written request to see a doctor. That guard then looked Charles in the eyes, and ripped up the request, and then threw it in the rubbish bin. The same guard, a few months earlier, had told a roomful of prisoners that Charles was HIV-positive while they were all getting flu shots. It was not until the bacterial infection became life-threatening to Charles that he was seen by a doctor, when it became an emergency. By this point, Charles could no longer walk and his friends on the same range, or cellblock, where Charles was housed started banging on their cells, one even lit a fire, in protest so that the guards would take him to see a doctor. Finally, months after the initial request, he was seen by a physician, who was upset with the guards that it had taken them so long to bring Charles to come to see her. She later complained to the guards, telling them that Charles could have died from the infection.

Charles continued experiencing difficulties accessing his doctor. Guards would delay taking his requests, waiting months longer than recommended to go back to see her. During one visit, after months of asking for his routine blood tests, his appointment was finally granted. He went to the hospital, accompanied by guards, this time to a place different from where he normally received care. His doctor was not there, and he was seen by a nurse he did not know. Charles was brought in wearing his usual orange jumpsuit, a suit that made him feel ashamed, and shackled at his hands and feet. The nurse began his regular blood draw, and then one of the guards came up to Charles, saying, "See this baton and this taser? I will fucking taser you'... and they [the guard accompanied by a nurse] were, like, 'Oh we will do one more for good measure,'" taking another vial of Charles's blood. Charles had been incarcerated for two years by this point and had never been violent. He was confused as to



why the guard escalated the situation, and did not understand what was happening. The guard then said, “If you are not willing to give your DNA, we will take it from your neck.” Charles was not resisting, and was already strapped down, still shackled. But he did not consent to the extra blood draw. The nurse took an extra vial of blood, which Charles later learned was mandated as part of his registration as a sex offender.

Following his incarceration, Charles found reintegrating difficult. His post-traumatic stress disorder meant that he often isolated himself. He lived off of the social support provided from his provincial government, which limited what he could do. He tried finding work, but it was hard with his criminal history and being registered as a sex offender. When he did try and participate in society, things did not always work out. For a while, he volunteered at the same local AIDS support organization that he went to for services. Volunteering at that organization provided him with much needed social interaction and helped him feel like he was integrating back into society. Later, he started having problems with his landlord and went to the organization for help, asking them to advocate for him. Charles worried that he would lose his apartment and was upset. During that interaction with staff at the support organization while asking for help, Charles became angry. After his many years of incarceration, he had developed anger management issues. The staff claimed that he was acting aggressively, which made him more upset. That outburst caused the staff to accuse Charles of being threatening, which ran counter to the organizational code of conduct. Charles thought the staff were also scared of him due to his conviction. For two months, Charles was banned from accessing services as well as from his volunteer position. “Since I started there, they were freaked out by me, my history and charge, they were just waiting for the right moment to get me out,” he told me, still obviously upset, angry, and disappointed. He understood that he could come off as threatening, and was working on his anger. He wished others, including those tasked with supporting him, would better understand his needs. Consequently, he no longer participated in that organization, the only one operating in his rural community. ■

SUMMARY OF FINDINGS

IN SPEAKING DIRECTLY WITH PEOPLE who have been criminally charged, my research puts into question dominant understandings of courts and the media, that people living with HIV are violent perpetrators who are actively trying to transmit to others. Rather, what comes to be understood as wrongdoing by police, courts and the media, is much less obviously so. Because of criminalization, complex and nuanced situations, including people’s silence, fear, actual disclosure, or in some cases the inability to address their own HIV status, is forced by the criminal justice system into the dichotomous narrative of victim and perpetrator.

Of the sixteen people interviewed, three had been threatened with criminal charges by police, while thirteen had been formally criminally charged, all with aggravated sexual assault. Some faced multiple other charges, including attempted murder, all related to alleged HIV non-disclosure. In only one of the cases was HIV transmission alleged to have taken place.

The charge of aggravated sexual assault was extremely confusing for people, as they understood the sex they had as consensual.* A majority of the people in the study understood that they acted in a manner so as to protect their partners from potential transmission, such taking their medications regularly, rendering them uninfected, or using condoms, or both. One woman handed her partner a condom prior to sex, which he did not use. She is now a registered sex offender. In some cases, people had disclosed to their partners, who later went to the police and lied that disclosure had not taken place.

All but two of the thirteen people who had been charged told me that this was their first-ever criminal charge. Despite this, all but 1 of them were denied bail due to the perceived severity of the case and were either held in remand (pre-trial detention) or under house arrest for long periods of time.

* Outside of multiple instances where women living with HIV had been sexually assaulted, who then later became the target of criminalization. Discussed further in the section Impact on Women.

Eight people I spoke with were prosecuted, with five of them pleading guilty. The reasons indicated for taking a plea were because they felt coerced by their lawyer (despite having undetectable viral loads, or having used condoms), they were fearful of missing their families, or they were ashamed of the charge and of their HIV-positive status being exposed widely to the public. None felt they were actually guilty of a crime deserving of such a harsh response. The longest sentence served was close to fifteen years, while the shortest sentence served was approximately two and a half years.

All but two indicated that they were virally undetectable when the incident that led to the charges took place. Most of the participants understood that being undetectable meant they could not transmit HIV sexually, and many had been told by medical professionals that being undetectable meant they could not transmit HIV.

The racialized people I spoke with experienced more intense violence than the others. People of colour who I interviewed faced direct physical violence at the hands of police and corrections officers, such as Shaun who was beaten by police when he tried to turn himself in to them after finding out he was being charged (discussed further in his story on page 10).

Many of the people I spoke with also had been subjects of public health orders under various provincial public health acts. The orders put constraints on people's behaviour in ways similar to criminal justice sanctions, such as with bail or parole conditions. The orders often mandated counselling which for many felt pathologizing and disconnected from people's realities. Under the orders there were legal requirements to take medications regularly (when people were already virally suppressed and taking meds for their own health), and other odd conditions, such as a requirement to put on condoms prior to having an erection – even when people were virally suppressed. People told me they felt the actions of public health authorities were often out of sync with their actual behaviours, and were driven by out-dated and stigmatizing fear-based ideas about AIDS which had not caught up to current scientific realities.

All of the people interviewed noted that they had lost trust in healthcare providers. Many had their health records subpoenaed, and some had their own doctors testify against them in court. People now no longer felt safe being honest with any healthcare worker for fear of information being used against them in the future.

Eight of the people interviewed are registered sex offenders (three women/five men). A number of these people, prior to incarceration, used to work in professions that require criminal background checks. And as a result of being on the registry they cannot get the jobs they have experience in doing. Instead they must live off of social assistance support even though they want to work.

All of the people who were incarcerated (either as their sentence or on remand pre-trial) had numerous difficulties in accessing their anti-HIV medications, despite being incarcerated for having HIV. Sometimes people waited months for their medications, and often they had a very difficult time accessing other routine medical supports, such as getting bloodwork.

Due to being charged with a criminal sanction usually reserved for the most violent non-consensual actual sexual assaults, combined public health law sanctions, and with being HIV-positive, the people I spoke with were confronted with intensified forms of punishment, violence and discrimination. This included:

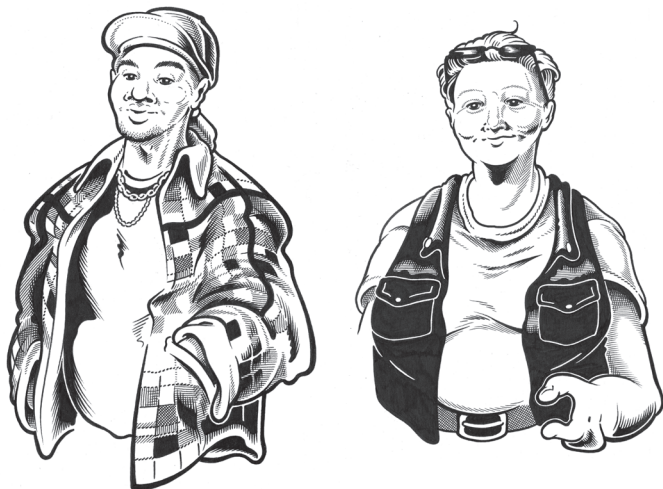
- Denial of bail and ultimately incarceration for long periods of time on remand prior to trial, or before charges were dropped or stayed.
- Extraordinary release conditions as part of bail or conditional release – including being mandated to present oneself to police twenty-four hours in advance of proposed sex with their sexual partner, and having the partner consent to the sex in front of police. The people I interviewed who had these conditions imposed had undetectable viral loads.
- Incarceration in administrative segregation for long periods of time.
- Breaches of privacy by disclosing HIV status and charges by corrections in front of others, knowing that physical violence would or could result.
- Assaults by police and corrections officers, accompanied by stigmatizing comments and discriminatory behaviour.

LACK OF KNOWLEDGE, STIGMA, FEAR, AND IGNORANCE

From the point of arrest, through trial (if one took place), incarceration and release, people who were charged described a series of events that were marked by HIV-related stigma, panic, discrimination and fear. They described a wide-spread lack of knowledge on the current science of HIV by the police, lawyers and courts. This meant that the people charged were placed in a position where they had to educate those tasked with arresting and punishing them about HIV transmission risks, or just be faced with decisions being made based on fear and ignorance. Often out-dated information, or blatant misinformation was communicated by people making decisions about people's lives – including a judge fearing that the defendant and a potential witness would infect the courtroom just by their presence in the space. People also felt the police's stigma, discrimination and violence was enabled by the legal context of criminalization.

"...[T]he cops, they didn't really understand the viral load. If you're going to charge someone you guys should kind of dig in a little deeper, you know, make sure there is a risk. But it's like automatically they are looking at it, like, there is a risk; there wasn't a risk. But, 'because he's HIV, automatically, ok, we should use the HIV law and we should charge him.' Even when the cops were dealing with me, they were, it was just, like, 'just be careful; he's HIV positive.'

- Shaun, Black man, late twenties



PHYSICAL VIOLENCE AND ABUSE

People described a range of forms of violence at the hands of government employees, namely police officers and prison staff, including being beaten, harassed, called names, having their privacy violated, and being treated in a derogatory way. People also described regular denials of healthcare and medication access from corrections employees.

"I was getting beaten by all the inmates, 'cause the correctional officers had disclosed my charge to people on the range. I was on an isolated range for violent murderers and would still get harassed, you know this rape charge and HIV was worse than being a murderer in their eyes. One officer pushed me to the ground naked, holding me with his boot on my chest, saying he would never touch someone with AIDS."

- George, white gay man, fifties

"...they treated me like dirt. They only touched me with gloves and they used that really heavy alcohol rub after. They talked down to me, like not talking to me like I was not a person, an AIDS person"

- Darlene, Indigenous woman, thirties

IMPACT ON WOMEN

All of the women interviewed indicated having long histories of sexual abuse by men and discussed a context where disclosure was highly complex due to their lack of power in the relationships. One woman I spoke with, Stephanie, was charged with aggravated sexual assault, she had been raped by multiple men and did not disclose during the assault. Her assault was not pursued officially. She was ultimately prosecuted. Another woman, Cynthia, was raped at knife point, yet she was the one threatened with charges of aggravated sexual assault. These women had histories of sex work, and they told me that because of that history, authorities did not treat their accounts of their sexual assaults seriously. Stephanie told me, “if I’m guilty of anything, I’m guilty of being raped.”

Another woman, Darlene, spoke to me, about her ex-boyfriend, the man who went to the police claiming she did not disclose her HIV-positive status.

“I had a rough life growing up. I got into prostitution really young. My family, you know, we grew up very poor and my uncle raped me when I was eight. It’s just, yeah, it’s been an uphill battle for me.”

- Darlene, Indigenous woman, thirties

The man who called the police on Darlene was her boyfriend and also her pimp. When she tried to leave him after years of abuse, he went to police out of retribution. He would regularly rape and abuse her. Sexual assault laws applied to HIV non-disclosure was just another means to exert power over her.



INTERSECTIONS OF RACE, GENDER AND COLONIZATION

Four of the five women I spoke with were women of colour, three were Indigenous. Their experiences reveal the ways in which the criminalization of people with HIV continues to be racialized and gendered. The legacy of settler colonialism, including the ongoing generational effects of the residential school system, means that Indigenous women are disproportionately impacted by the forms of violence that resulted from being criminalized.

For example, Lenore’s experience as an Indigenous woman is indicative of how suffering can be amplified when multiple characteristics, such as race and gender are compounded. She had endured past sexual assaults, lived in poverty, and ended up being charged with aggravated sexual assault. Lenore further linked that discrimination to both sexism and racism in her community and within the criminal justice system itself:

“Something that I have learned living in the city is people are extraordinarily racist against Aboriginal women. My prosecutor was racist, she had everything against me... the jury was staring at me the entire trial. Part of me was thinking if they were paying attention about what was being said about me, my HIV, or if they were already judging me because of my skin colour. It’s really opened my eyes to the extent that, ‘cause of my skin colour, I get treated different. There were no Indigenous people on my jury...”

- Lenore, Indigenous woman, late twenties



SEXUAL ORIENTATION

Five of the men I interviewed identified as gay. During interviews they told me how they felt that their charges were brought about my homophobic stigma and discrimination. A few of these men had release conditions banning them from using gay social media and hookup apps such as Grindr, along with conditions banning them from going to gay communities in their cities or towns.

Also, men were mandated either through public health orders, or as part of bail or parole conditions to attend mandatory counselling to promote disclosure. The public health counselling, however, promoted unnecessary practices, such as using condoms for oral sex, a practice unnecessary when an individual is virally undetectable. These men had already learned about HIV and sexual health from a local AIDS organization, information they used with their partners. The mandated public health counselling was often out of sync with what they learned from AIDS organizations, and made them feel pathologized and bad. They felt the mandated public health counselling approach was driven by homophobic fears of gay sex. Furthermore, as a result they no longer trusted many healthcare workers and felt scared to talk to them truthfully about their sex lives. They now equated public health workers as just another part of the criminal justice system.



MEDIA PANIC

Many of the people interviewed faced sensationalistic media coverage labeling them as violent predators who were a threat to the public. Often media articles published false information, such as stating that people had been intentionally trying to infect others with HIV. In the age of the Internet, negative media articles are now available forever. This fact had multiple negative impacts on people's lives, including people socially isolating themselves due to stigma, shame and discrimination. As a result of the media, and due to the stigma surrounding the perceptions on their cases, criminalized people had a limited access to privacy and safety in their communities. They were also often denied access to the means to secure health and well-being, such as housing and employment.

"I come from a small town, so everybody knows everything. The quiet girl is all of a sudden a big media star, everybody knows who I am ... my name in the news, my graduation picture was up in the media. I felt very violated, I was told by my doctors and by the police that I'm innocent until proven guilty. It's my right to disclose; those rights were taken away."

- Lenore, Indigenous woman, late twenties

One Black man, Shaun, in his late twenties, whose charges were no longer being pursued by the Crown Prosecutor, told me that while hearing in court his charges were being withdrawn and he was finally going to be free:

"I was, like, trying to hold back tears. There was, like, fucking journalists behind me and shit. But you know what's fucking funny? I wasn't even in the newspaper for being let off. They were there to see if I was going to be convicted. That's why they were there. This attitude, I wasn't in the newspaper for being acquitted. But, I guarantee if I was convicted, I would have been in the newspaper. So that's messed up."

Despite his charges being withdrawn, past negative media coverage continued to haunt him and meant he faced physical violence in his community.

"Some guys knew my status and they ganged up and robbed me. They were like we read about you... you're spreading HIV that's what the media said. I'm like man I'm HIV I'm undetectable, I am no risk, my case was, and they are like it doesn't matter..."

Experiences of violence left him feeling constantly surveilled and unable to protect himself in his own community.

ACCESS TO JUSTICE

Many of the people with whom I spoke had a difficult time accessing legal counsel who had an adequate understanding of HIV criminalization. In some cases, people paid for lawyers, in other cases people had access to legal aid. A majority of the interviewed came from working-class backgrounds, and therefore the high cost of hiring lawyers was an issue. In many instances, people noted that they felt as though their legal counsel was ill-informed on the science of HIV transmission. Some thought that their lawyer accepted the idea that their clients were dangerous perpetrators, and as a result people felt that they had been pressured to accept guilty pleas. It was noted however, that duty counsel, and legal aid lawyers, were better informed than lawyers that people paid for, however, people felt that the publicly-funded practitioners had limited time to support their cases in the ways people wanted.

Many of those charged had no prior criminal history, yet were denied bail and immediately incarcerated, and for long periods of time before their trials, if a trial occurred at all. Shaun, a Black man in his twenties, had just such an experience. His initial lawyer was ill-informed and did not challenge his charges. After a change in legal counsel to a better informed lawyer, his case changed for the better. Telling me about the first lawyer, Shaun said:

“The lawyer was like a dump truck. He didn’t know anything about the case, like he didn’t know anything about HIV. He never even brought up anything about my viral load that was undetectable up in my case for my defence and that was the one reason why I was initially prosecuted.”

MENTAL HEALTH IMPACTS OF CRIMINALIZATION

All of the people I spoke with had a very hard time psychologically coping with being understood as a violent rapist. Today, due to the various forms of violence they experienced as a result of being criminalized, a majority of the people I spoke with indicated that they live with Post-Traumatic Stress Disorder, which has a wide range of impacts on their daily lives. As a result of the experiences of criminalization, all sixteen people had tried to commit suicide, or had long periods of suicidal ideation.

Despite being labeled as a violent rapist, all of the participants who were prosecuted told me that they failed or did not meet the criteria of the various psychological tests used to classify their so-called sex offences. Some of these tests require that people watch videos of child pornography and violent sexual assaults. In sex offender counselling, while incarcerated, people were also coerced into defining their normal adult sexual desires as deviant and wrong just due to the fact that they had HIV. As a result, people noted that the tests and counselling themselves had caused ongoing psychological trauma.

COMMUNITY SUPPORTS?

A majority of the participants discussed the important role that community-based organizations played in helping them through the difficult process of being criminalized. Some people got connected to groups providing support to incarcerated people while they were inside prison, support they often named as life-saving.

For those who served time and were released, or those who later had their charges withdrawn, working to go back to living their lives and integrate into society after being criminalized was a challenge. Upon release from prison, people talked about how hard life was, and how limited supports there were available. Often the supports people felt that they needed to get back on their feet, such employment support, assistance with gaining financial security, and finding stable housing, were not available.

Some also felt that the label “sex offender” was intimidating and threatening to people in their local HIV organizations. The frustration of lack of supports coupled with people’s post-traumatic stress led to instances of conflict within organizations. In some cases, such conflicts resulted in people being barred from accessing supports. The experience of being barred from support organizations post-release from incarceration happened to three of the individuals who were interviewed.

“Since I started [volunteering] there, they were freaked out by me, my history and charge, they were just waiting for the right moment to get me out,”

– Charles, White man, forties

These individuals lost trust in community organizations, and made them feel shunned and shamed. They also felt that if they went back and “slipped up” again, the organizations might call the police. They feared that might mean they could go back to prison, as these three people were out on various conditions of parole.

The people I interviewed hoped for more holistic supports and workers who understood the complexities they faced. Instead, they were met with punitive reactions that banned and shamed them.

ONGOING PUNISHMENT AND SURVEILLANCE

For people who had been prosecuted, their criminal record and sex offender registration continued to extend into their daily lives even after they served their sentence. Because they had been charged with aggravated sexual assault and registered as a sex offender, they were under surveillance by the community. As a result, they had a hard time securing employment and housing. People were no longer eligible for jobs they had former experience and skills doing. As a result, many were on social assistance even though they wanted to work.

“To label someone a sex offender, you know, that’s for life, the sentence is over, the three years, but this is until you die. I have to carry this for the rest of my life. I think it’s really unfair you know, like it’s hard to travel. For jobs, you know, they can find out, and people in your community they know. It’s really hard that someone has to carry that for the rest of their life.”

– Darlene, Indigenous woman, thirties

When applying for housing, one man I spoke with told me the landlord said to him: “we don’t rent to rapists” and then pushed him down the stairs. The Crown Prosecutor was no longer pursuing the man’s charges but information about his case was still widely available online.

CONCLUSION

THROUGH SPEAKING DIRECTLY WITH PEOPLE criminalized due to alleged HIV non-disclosure, it becomes apparent that applying the criminal law, specifically the laws of sexual assault, results in causing greater harm, often exacerbating situations that were already marked by trauma, shame and discrimination.

All people marked as criminal in Canada are vulnerable to violence. But in these cases, when HIV and the laws of sexual assault are combined, the violence that people face can be compounded and amplified. The people I interviewed faced intense forms of physical and psychological violence, stigma, discrimination, and surveillance. The intersection of sexual assault law in relation to HIV non-disclosure makes possible a range of formal punishments from the criminal justice system, along with a wide range of other kinds of punishment through discrimination and stigma. Within the criminal justice system, formal punishments included the most severe and harsh sanctions, such as no access to bail, intense release conditions, and incarceration in administrative segregation.

These findings also reveal how the violence of criminalization is not solely a result of punishment under the criminal justice system, but comes in the form of surveillance, control, discrimination and from a range of other institutions such as public health authorities, community-based organizations, and the media. Criminal laws and public health laws also intersect and reinforce one another. Information from healthcare workers can be used within the criminal justice system for the purposes of criminalization.

Examining this issue from the perspective of people helps to explore the complex and intersecting system of oppression that people end up being caught in when criminalized. In some cases, being criminalized was a result of the initial actions and laws of public health authorities. The outcomes challenge the idea that public health authorities act distinctly from the criminal justice authorities, because it is much more complex.

Media representations can lead to direct personal forms of violence in the lives of those criminalized. People lose access to privacy as information such as press releases and sensationalized media reports that include private photographs are spread widely. Details about people become public, and those individuals become recognizable in their own communities. Social media and online posts disclose information

and charges. Such information can be dispersed and mobilized to discriminate, to enhance surveillance. Those criminalized can be shunned and banished from public spaces and services, denied housing and employment, and face a wide range of physically and emotionally violent consequences such as beatings and verbal abuse.

Through revealing the forms of violence that people face due to being criminalized in relation to HIV I hope we will be better positioned to deem this situation unacceptable and to contribute towards critiques challenging the administration of justice and punishment in our society. To bear witness so that we must contend with these experiences and call for action. This project represents an act of refusal—a refusal to accept this current situation of criminalization, and a refusal to allow these lives to be rendered disposable.

Despite this, all of the people with whom I spoke for my project remain passionate, kind, funny, charming, and dynamic. They are people with visions for the future, and individuals who wanted to share their stories for this project as an act of healing in order to seek justice, and as a way to turn what happened to them into a positive force for change. All of the participants were working to move away from the past in their own ways. Shaun told me, “[I]n the future I want to go to school, to college, I think I want to be a mechanical engineer because I have always liked mechanical machines, vehicles and stuff.” Similarly, Darlene was working to support herself. She has been trying to save money so she could go to hair stylist school. She wants to move on with her life, and hopes a job will help her stop relying on social assistance to survive. It was a challenge to get an interview for anything while being registered as a sex offender. Through a training and re-entry program, she did finally get a job. It took her a long time, but she was persistent. She called me to let me know her good news:

I just got a new job today or yesterday, I started my new job I working at [a fast food restaurant]. I'm trying to get off income assistance, and I'm really trying hard to get into a hairdressing course, that's my passion. I don't want to be on income assistance. Maybe once I get into that, I can eventually have a car and maybe rent or own a condo down the line or something.

Further she said:

Despite everything, overall my family was really supportive and I am really resourceful. I did beat myself up a bit, and I went back to using, I was on a destructive path right. But then I got to thinking, you know, I could let this disease and these charges kill me or I can rise above it and live the best life if I can, and that's the path I chose.

George told me something similar. He had had a long period of being depressed, was regularly denied employment, and was turned down by men while trying to date. But things had recently started to change. He told me:

I served my time, things have been hard. I'm just getting my life started again, relationship wise, work wise, I'm just starting to get a network of work out there. I have always enjoyed bartending so I do a lot of banquets and weddings and private functions that I do, and do this all freelancing – working for myself now, it's been finally going well.

In all of the experiences of violence, discrimination and suffering, people enact ongoing resistance. They live dynamic and rich lives, despite how they have been socially discarded, and denied the rights of personhood. These everyday acts of looking for employment, gaining self-confidence, and conceiving of a future, slowly chip away at the confines of being denied aspects of personhood.

A NOTE ON LIMITATIONS

Speaking directly with people about their own experiences brings about a number of limitations.

The individuals involved in those cases consisted of a complex group of people within which to conduct a qualitative inquiry. People living with HIV do not form a discreet community, but rather comprise people geographically dispersed across the county and representing a range of different populations, including gay and bisexual men, or other men who have sex with men, people who inject drugs, Black people from Africa and the Caribbean, and Indigenous people, amongst others (and of course intersecting these categories). Some people who were charged and/or prosecuted were nearly impossible to reach, since they were deported back to their country of immigration origin, had died, or been killed.

I conducted twenty-eight interviews with sixteen different people. However, over the course of recruitment, I was in touch with twenty-four different people. Quite a few people dropped out of the study for a range of reasons, including: people being actively incarcerated, my social location as a white gay man, some deciding last minute they no longer wanted to talk about what happened to them, or some being told by their lawyers not to participate.

TESTIMONY

THIS PROJECT AIMED TO HELP INFORM and shape discussions on HIV criminalization reform in Canada. As a result, I participated and presented outcomes of the project in a number of policy-making processes with both the federal and Ontario governments, including:

Consultation with Canadian Coalition to Reform HIV Criminalization on legal reform with Senior Policy Advisors Department of Justice Canada and Public Health Agency of Canada, Toronto, 2017.

Policy roundtable on HIV criminalization with Ontario Ministry of Justice and Attorney General, the Minister on the Status of Women, and policy advisors from the Ministry of Public Safety and the Ministry of Health and Long-Term Care. Toronto, 2018.

HIV criminalization study invited expert witness, House of Commons Standing Committee on Justice and Human Rights, Study on the criminalization of HIV non-disclosure, Ottawa, Ontario. Ottawa, 2019.

As a result, outcomes of the research were including in the following government policy documents:

Criminal justice system's response to non-disclosure of HIV, Department of Justice Canada, 2017.

The criminalization of HIV non-disclosure in Canada: Report on the Standing Committee on Justice and Human Rights, House of Commons, 2019.

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