

Inequity, structural violence, and the criminalization of HIV non-disclosure

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Abstract

This paper was originally written for Dr. Alissa Greer's CRIM 312 course *Criminological Perspectives on Social Problems*. The assignment asked students to apply the concepts of inequity and structural violence to a criminalized social issue. The paper uses APA citation style.

This paper considers how the criminalization of HIV non-disclosure and the media coverage of criminal prosecutions of people living with HIV in Canada have created an environment where HIV-positive people experience a degree of stigmatization, discrimination, rejection, and unequal treatment that arguably amounts to structural violence. An analysis of how the concepts of inequity and structural violence relate to the experiences of people living with HIV in Canada is followed by a reflection on how such concepts are valuable where a critical examination of a criminalized social issue is concerned.

How is living with HIV “criminalized”?

In Canada, people living with HIV are criminalized through the prosecution of HIV non-disclosure. While the Canadian *Criminal Code* contains no specific law prohibiting HIV non-disclosure (Krüsi et al., 2018, p. 2), a series of the decisions made by the Supreme Court of Canada have established that HIV non-disclosure nullifies consent to sexual activity (Adam et al., 2014, p. 40). HIV non-disclosure is thus most often prosecuted as aggravated sexual assault, which includes any assault which “endangers the life of the complainant” and is the most serious category of sexual assault in the *Criminal Code* (Adam et al., 2014, p. 40). However, people living with HIV have also been convicted of a wide range of other crimes as a result of their serostatus, including murder, transmitting a noxious substance, and nuisance (Swiffen & French, 2018, p. 548). GNP+ and the HIV Justice Network have identified Canada as being a “hot spot” for HIV criminalization

(Swiffen & French, 2018, p. 547), and Canada tops global rankings in terms of the number of convictions for HIV non-disclosure (Krüsi et al., 2018, p. 2).

Minorities and immigrants are disproportionately represented among individuals who have been charged for failing to disclose their serostatus – for example, 42% of the women charged in Canada between 1989 and 2016 were Indigenous (Krüsi et al., 2018, p. 2).

Indeed, it was in the 1998 case of *R. v. Cuerrier* that the Supreme Court of Canada established that HIV-positive people were required to disclose their serostatus in situations that posed a “significant risk of bodily harm”, as failing to do so would nullify consent to the sexual activity and therefore constitute sexual assault (Adam et al., 2014, p. 40). In their later rulings in the 2012 cases of *R. v. Mabior* and *R. v. D.C.*, the Supreme Court of Canada clarified that a “significant risk of bodily harm” existed where there was a “realistic possibility” of HIV transmission – here, it was held that a duty to disclose before vaginal sex existed unless both a condom was used and the HIV-positive partner had a low viral load (Adam et al., 2014, p. 40). Lastly, it was held that only individuals who had been tested and were aware of their serostatus could face prosecution (Standing Committee on Justice and Human Rights, 2019, p. 20). In addition to the prosecution of individuals for HIV non-disclosure, the criminal justice system contributes to HIV criminalization in a myriad of other ways, such as through the use of stigmatizing language in courtroom settings that misrepresents HIV as a “biological agent” or weapon (Novak, 2021, p. 58). Furthermore, the media’s sensationalized coverage of cases of HIV non-disclosure (Adam et al., 2014, p. 39) have had the effect of further criminalizing and stigmatizing people living with HIV by depicting them as dangerous, sexual deviants, or “disease-spreaders” (Novak, 2021, p. 60). Overall, the combination of the criminal prosecution of people living with HIV and media coverage of such prosecutions have created an environment where HIV-positive people live in fear of being stigmatized, discriminated against, rejected, or criminalized because of their serostatus.

How do people impacted by HIV experience structural violence?

Structural violence refers to harms that are endured by individuals as a result of inequities produced by social structures (Taylor, 2013, p. 257). Structural violence occurs when social structures which maintain hierarchical relations between groups of people in society – such as laws – work to prevent certain groups of people from achieving their full potential or fulfilling basic human needs (Taylor, 2013, p. 257). Unlike direct violence – which is committed by a

specific actor – there is typically no single individual to blame for the outcomes of structural violence, and this quality contributes to its “invisible” nature (Taylor, 2013, p. 258). Due to the criminalization of HIV, people living with HIV experience structural violence in an array of forms, ranging from a repressed ability to fulfill the basic human need for intimate relationships, to unequal treatment under the law in the event of sexual victimization.

Maslow’s hierarchy of needs is a motivational theory developed by Abraham Maslow, which proposed that basic human needs are arranged in a hierarchical format, where needs at the bottom of the hierarchy must be met before those higher up on the hierarchy can be attended to (McLeod, 2022). In his five-tier model of needs, Maslow identified sex as being a physiological need at the bottom of the hierarchy – and therefore one that must be fulfilled in order to ensure optimal functioning of the human body (McLeod, 2022). Due to the criminalization and stigmatization of HIV, some people living with HIV have felt inclined to deny themselves the opportunity to fulfill this basic need, out of fear of transmitting HIV or facing legal consequences (Krüsi et al., 2018, p. 5). Indeed, participants of studies examining the influence of HIV non-disclosure criminalization described having “quit having sex” post-diagnosis (Krüsi et al., 2018, p. 5), and lamented that “Since I have it, I can’t sleep with nobody. I’m now totally virgin.” (Adam et al., 2014, p. 43). Here, it can be said that people living with HIV are subjected to constraints on their sexual life that are not experienced by other groups in society because of the criminalization of HIV non-disclosure.

In addition to barring people living with HIV from pursuing sexual relationships, HIV criminalization has also posed barriers to the fulfillment of a healthy social life. For one, women living with HIV have described having been encouraged to stay in abusive relationships due to a fear of HIV disclosure, especially in cases where an abusive partner has used threats of disclosure in order to maintain a power imbalance in the relationship (Krüsi et al., 2018, p. 6). HIV-positive people have also described becoming more “insular” (Adam et al., 2014, p. 43) as a result of their diagnosis, and recounted instances where friends had “quit calling” them after they disclosed their serostatus (Krüsi et al., 2018, p. 5). This social isolation experienced by HIV-positive people can have dire consequences – indeed, one longitudinal study identified a link between social isolation and all-cause mortality amongst people living with HIV (Marziali et al., 2020, p. 386). Here, it can be said that due to the stigma surrounding HIV, people living with HIV risk experiencing rejection or loss of social status if they disclose their serostatus. Indeed, the fear that many people living with HIV have – that of

their status being disclosed to third parties – strongly illustrates the role that HIV stigmatization and criminalization has played in relegating HIV-positive people to a marginalized position in society, where the publicization of their status sparks fears of criminalization, eviction, or loss of child custody (Krüsi et al., 2018, p. 10).

The legal duty to disclose one's status in the event of sexual activity has arguably prevented people living with HIV from seeking legal recourse in the event of sexual violence. Consider the experience of a young Indigenous trans woman named Vanessa, who detailed an incident where she was raped but did not report what happened to the police as she feared facing HIV non-disclosure charges (Krüsi et al., 2018, p. 7). Sadly, evidence exists to suggest that Vanessa's fears were well-founded – a 2019 report of the Standing Committee on Justice and Human Rights recounted instances where HIV-positive women who were violently sexually assaulted were subsequently threatened with charges of – or actually charged with – aggravated sexual assault for having not disclosed their serostatus to their rapists (Standing Committee on Justice and Human Rights, 2019, p. 10). Here, it can be said that the criminalization of HIV places HIV-positive people in an unequal position where they are not afforded the same degree of protection under the law as other groups in society, and are instead disproportionately targeted for punishment - even in instances where they were victimized.

How is the criminalization of HIV non-disclosure linked to structural violence?

By placing complete legal responsibility on HIV-positive people to both disclose their serostatus and ensure safer sex practices are used, the criminalization of HIV non-disclosure places people living with HIV at risk of violence – especially where gendered power imbalances and other structural factors inhibit the negotiation of condom use. Consider the experiences of women living with HIV, who expressed having experienced difficulty in negotiating the use of a condom, and ultimately felt as though they had limited power in enforcing the use of one, even though they were legally obligated to do so (Krüsi et al., 2018, p. 8). When faced with a male partner refusing to use a condom, women living with HIV find themselves being forced to choose between disclosing their serostatus and risking a violent response from their partner or failing to disclose and risking being criminally prosecuted (Krüsi et al., 2018, p. 9). Furthermore, sex workers may face additional structural barriers to the negotiation of condom use, such as enforced

displacement due to police harassment and client-perpetrated violence (Rhodes et al., 2012, p. 220). By holding HIV-positive women to the same standard as men – in requiring condom usage to establish consent – the criminalization of HIV non-disclosure fails to account for gendered power imbalances and leaves HIV-positive women at a heightened risk of being criminalized.

In Canada, the legal duty to disclose one's serostatus can be circumvented if – in addition to the use of a condom – the HIV-positive partner has a low or undetectable viral load. However, as the antiretroviral therapy that is required to achieve a low viral load requires access to consistent and appropriate medical care, people living with HIV who are socially and/or economically marginalized or live in rural areas may have difficulty achieving this requirement for avoiding prosecution for HIV non-disclosure (Swiffen & French, 2018, p. 550). Given that HIV disproportionately affects groups that are already marginalized in some capacity – such as sex workers, rural populations, immigrants, and Indigenous Peoples (Novak, 2021, p. 57) – it can arguably be said that the existing legislation distributes the risk of being criminalized for non-disclosure in an unequal manner, as more privileged individuals can better meet the requirements for avoiding legal liability. In addition to facing a heightened risk of prosecution, marginalized individuals living with HIV may have more difficulty financing the necessary legal resources for addressing a charge as severe as aggravated sexual assault, which can carry a maximum penalty of life imprisonment and/or registration as a sex offender (Standing Committee on Justice and Human Rights, 2019, p. 5).

Reflection re: the concepts of inequity and structural violence

The concepts of inequity and structural violence are indispensable for the critical evaluation of hierarchical structures in society and how they maintain divisions in society that benefit some groups while harming others. By providing additional context and insight into the structural factors that fuel them, the concept of structural violence allows us to move beyond an understanding of social problems that solely assigns blame to individual choices. For example, in the case of HIV criminalization, my initial perspective prior to examining the issue through the lens of inequity and structural violence was one that supported the criminalization of non-disclosure, as I felt as though people living with HIV should be legally obligated to disclose in order to prevent transmission. However, once I learned about the structural factors that can complicate one's decision to disclose, I realized that the decision to disclose could not be removed from the social context – which, due to the influence of HIV stigmatization and criminalization,

was one where disclosure could result in rejection, loss of social status, prosecution, and other harms. After examining the broader social context, I was able to appreciate that the “problem” of HIV transmission and non-disclosure was not one that could solely be attributed to the individual choices of people living with HIV, as the influence of structures such as the legal system could not be discounted. Indeed, it was through this lens that I was able to recognize how the legal system could even be counter-productive in its effects – by considering, for example, how the criminalization of HIV non-disclosure has actually produced a disincentive to HIV testing, as only those who are aware of their serostatus can face prosecution for non-disclosure (Standing Committee on Justice and Human Rights, 2019, p. 20). All in all, I believe the concepts of inequity and structural violence are very useful for evaluating social issues in a manner that is cognizant of how individual choices are ultimately situated within social, political, and economic contexts.

The concepts of inequity and structural violence align with a perspective that differs from those I have taken in previous classes. Previous classes that I have taken have adopted a biological approach to explaining criminal behavior, where criminality was theorized to be the result of individual abnormalities affecting one’s neurotransmitters or hormones. Similarly, other classes explored psychological factors of criminality, such as personality disorders and low verbal IQ. In these classes, an individual’s decision to commit a crime was viewed as a symptom or expression of their psychopathology and was not considered within a broader social context. Unlike the concepts of inequity and structural violence, these perspectives draw focus to individual abnormalities and shortcomings when attempting to explain the roots of the social issue that is crime.

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