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Opinion / Commentary

Canada's misguided approach to HIV

Canada's use of the criminal law to punish HIV-positive individuals who do not disclose their status to sexual partners is particularly harsh.

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Canada treats not disclosing HIV-positive status as negating consent to sex, equating it to rape under the law. This approach is misguided and produces grave injustices.

By: Robert Leckey Published on Sun Nov 30 2014

World Aids Day, on Dec. 1, gives us cause to rejoice and to lament. In Canada and other countries with robust public health care, HIV is now a manageable chronic condition rather than a death sentence, as it remains for millions elsewhere. But Canada's use of the criminal law to punish HIV-positive individuals who do not disclose their status to sexual partners is particularly expansive and harsh. Its approach undermines basic messages of public health and ignores the diversity of sexual practices.

Canada's punitive approach comes courtesy of aggressive prosecutors and the Supreme Court of Canada. It treats not disclosing HIV-positive status as negating consent to sex, equating it to rape under the law. Even where the accused never transmits the virus or where there was minimal risk of transmission, this approach can lead to imprisonment and lifetime designation as a sex offender.

The current legal approach essentially invites individuals who are HIV-negative to assume that sex is safe. It encourages them to have unprotected sex with people whose HIV status they don't know and don't ask about. After all, the judges and prosecutors tell us, the criminal law obliges your partner to tell you if he or she has HIV.

The problems with this approach are legion. The [Public Health Agency of Canada](#) reports that one in four of those infected don't know that they are. Health researchers tell us that law doesn't effectively overcome those factors that make disclosure less likely. Indeed, potential criminal prosecution adds a reason not to take the test. All told, the few studies on the topic don't support the claim that criminal prosecutions lead to more disclosure.

On the contrary, the public health message for decades has been for everyone to beware

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of risks and take precautions. Instead, the court suggests that broaching the sometimes awkward conversation about risk and precautions isn't the job of everyone who has sex. It's the sole responsibility of those who are HIV-positive, intensifying their burdens and stigma.

An upcoming appeal highlights this approach's flaws. On Dec. 8, the Supreme Court will hear its first criminal appeal involving HIV and gay men. The complainant and the accused met and had sex in a Montreal bathhouse. They had sex on several occasions, sometimes using condoms and sometimes not. The accused didn't initially disclose that he was HIV-positive. The complainant didn't ask.

Here, the court's assumption that everyone is HIV-negative barring contrary indication is grossly misplaced. The court based its approach on a monogamous man and woman. The judges' [latest word on the subject](#), from 2012, makes this plain. The judges tied their punitive approach to historical developments allowing a wife to refuse sex with her husband.

Protecting women's bodily integrity and sexual autonomy is crucial. But an approach crafted to protect the woman who relies on her partner to disclose changes to his health neglects the range of adult relationships. As the upcoming appeal attests, many cases where one partner is HIV-positive involve no women.

The issue isn't what we think makes for an optimal romantic relationship. Some people's ideal centres on the monogamous couple. Others' involves multiple partners, but with frank discussion and full disclosure. Nor is the issue whether there is an ethical duty to disclose. The issue is whether the blunt instrument of the criminal law appropriately punishes failure to disclose, including where no physical harm ensues.

The current approach is misguided and produces grave injustices. Our judges' interpretation of the criminal law will never grasp the variety of human interactions. But they can do better. Next week's case is their opportunity to do so.

Robert Leckey is director of the Paul-André Crépeau Centre for Private and Comparative Law at McGill University.

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