At the end of September 1998, the Canadian Supreme Court ruled in the case R. v Cuerrier that Henry Cuerrier, an HIV-positive British Columbian man, was guilty of two cases of aggravated assault in having unprotected sex with two seronegative women. Defining his actions as aggravated assault requires proof that a) his actions endangered the life of the complainants, and that b) the force must have been intentionally applied. Although both women consented to the sex with Cuerrier, the crown successfully argued that their consent to having sex was nullified because Cuerrier obtained it through fraud – in other words, because he did not disclose his serostatus to them.

This criminalization of non-disclosure may seem logical to many. But criminalization carries with it significant public health consequences: the risk of deterring individuals from seeking HIV testing by inducing fear of incarceration, an adverse effect on patient-provider relationships, a risk of lulling society into a false sense of protection by criminal law, and the infringement of civil liberties. This article will outline the events leading up to the court's decision, and will address the unfortunate consequences resulting from it.

The Case
The details of the case are as follows. Cuerrier first discovered he was HIV-positive in August 1992. Although a public health nurse told him that he should use condoms for sexual intercourse and that he should inform sexual partners of his status, he said he could not do so because of the small size of his community. Shortly thereafter he began a relationship with KM, involving frequent unprotected vaginal intercourse. She discussed sexually transmitted diseases with him within a week of first having sex, though HIV was not specifically mentioned. He told her that he had had recent sexual encounters with
women who themselves had had numerous sexual partners, and that he had tested HIV-negative several months earlier. Later in the relationship, after getting tested for HIV together, both partners were told of Cuerrier's HIV status. KM tested negative but was told she may require further tests. The couple continued having unprotected sex for 15 months thereafter.

Cuerrier began a sexual relationship with another woman, BH, several months later. She told him that she was concerned about diseases, without specifically mentioning HIV. Cuerrier again did not disclose his HIV status, and the couple used no condom for half of their 10 sexual encounters. After learning of his serostatus later on, BH confronted Cuerrier, who apologized and admitted he should have told her earlier.

The initial ruling acquitted Cuerrier on both counts, a decision that was upheld by the BC Court of Appeal. At the time of the initial hearing, both women tested HIV-negative. The Supreme Court overturned these two decisions, however, ruling that whenever non-disclosure when obtaining consent puts another individual at ‘serious risk of bodily harm’, the non-disclosure constitutes an act of fraud which vitiates consent. By nullifying both women’s apparent consent, this interpretation renders Cuerrier’s sexual relations with both partners cases of sexual assault.

Given this situation, few would dispute the claim that the women deserve justice for the risk of contracting HIV infection. Indeed, the goal of preventing HIV transmission has risen to the forefront of public attention over the past two decades, spurring changes in educational curricula, media advertisements and a wide range of other sectors of society. But the complexities of these two values - that of attaining justice and that of HIV prevention - make them interconnect in complex and significant ways. What should society do when these values come into conflict?

Deterring Voluntary Testing
The principal reason that some public health advocates are concerned about the Cuerrier decision is the very real prospect that criminalizing a failure to disclose one’s HIV positive serostatus will deter people from being tested. This argument implies that someone at reasonable risk of being infected with the virus - and who should, therefore, seek an HIV antibody test in the interests of optimizing his or her health and of allowing preventative intervention - may no longer want to get the result at all. Discovering that one is HIV positive can be extremely stressful, given the prognosis, the distress of deciding who to tell, and other psychosocial issues. In the new context of criminalization, the prospect of incarceration will add just another factor into the process of deciding to be tested. In some cases, this obstacle may be enough to prevent people from seeking HIV testing altogether.

Such deterrence from HIV testing would have significant negative impacts on public health. Voluntary HIV testing, along with supportive counseling and education programs, form the foundation of HIV prevention programs. In today’s world, the news reports of miraculous successes with triple therapy, exciting new AIDS vaccine trials, and breakthroughs in medical research may erroneously allow people to view HIV with less urgency and hence to ‘let down their guard’. Anything which erodes society’s emphasis on the importance of HIV testing frustrates efforts to control the epidemic. This in turn limits opportunities for education, treatment, and support services that may have an effect in changing risk behaviour.

A further problem could be the potential of a negative impact on the nature of the patient - provider relationship. It is conceivable that doctors may be subpoenaed to appear in court to publicly testify about what they know about their patient’s HIV serostatus, sexual practices and other information normally held in the strictest confidence. Under normal circumstances, any disclosure of confidential information, no matter how inconsequential it may seem, requires patient consent. This fundamental rule allows patients to develop stronger, trusting relationships with their care providers, which is a cornerstone of high quality health care. The only exception to this rule of maintaining patient confidentiality is that if a test result is positive, physicians are ethically obliged (though specific legal obligations vary between the provinces and territories) to notify sexual and drug-use partners that they may have been exposed to HIV. Patients could, of course, avoid this reporting altogether by seeking anonymous or non-nominal HIV testing, which is offered by an increasing number of agencies in Canada. But the result remains that this risk of breached confidentiality, and more likely the fear of this risk, may become yet another barrier to HIV testing and to people with HIV / AIDS (PWAs) being able to disclose their status at all.

A False Sense of Security
During the course of the trial, numerous AIDS organizations, including the Canadian AIDS Society (CAS), the Canadian HIV / AIDS Legal Network (Network), and the BC Persons with AIDS Society (BCPWA) argued that public health endeavours are more effective than criminal sanctions in controlling AIDS. However, representing the majority decision, Justice Cory countered that “the criminal law does have a role to play both in deterring those infected with HIV from putting the lives of others at risk and in protecting the public from irresponsible individuals who refuse to comply with public health orders to restrain from high-risk activities . . . there is a real and urgent need to provide a measure of protection for those in the position of the complainants”.

Statements such as this within the Supreme Court’s ruling have given AIDS activists a cause for concern. In a press release dated 3 September 1998, the same day the decision was handed down, both the CAS and the Network expressed their fear that criminalizing non-disclosure of HIV status will null HIV-negative individuals into a false sense of security that the
Another goal is arguably to prevent harm to others through the distant, bureaucratic functions of the state judiciary. Human behaviour is often far too complex to be controlled and various forms of sexual activity already demonstrate that criminalizing going to deter those who are willing to behave as they please. One such goal is to deter harmful behaviour. But is criminalization the right tool for the common cause of reducing HIV transmission? The Wrong Tool for the Right Cause?

Further, the number of people engaging in such alarming behaviour as Cuerrier is insignificant compared to the numbers of new HIV cases attributable to social vulnerability and inadequate prevention. In the words of Stephen Genden, President of New York City’s Community Prescription Services and Vice-President of POZ magazine, “it would be one thing if we had perfect HIV prevention, and still there were people who were ‘acting irresponsibly’. But we’re not in that situation at all . . . I see the criminalization debate as a red herring - it diverts us from addressing the real problems with prevention and care. It allows us to feel like we’re solving the crisis by going after these very specific and very weird situations when we’re avoiding the much bigger problems that lead to most HIV transmissions”. Indeed, a primary flaw in the logic of incarceration is that it completely fails to promote behaviour change in both the person engaging in unacceptable behaviour and the population at large.

The Wrong Tool for the Right Cause?

Given the potential of the Cuerrier case ruling to undermine public health efforts by deterring people from voluntary testing, adversely affecting the patient-care provider relationship, and offering a false sense of ‘protection’, the frustration of AIDS organizations is understandable. To them, criminalization is the wrong tool for the common cause of reducing HIV transmission in Canada. It is instructive, in this regard, to consider what some of the goals of criminalization are in the first place.

One such goal is to deter harmful behaviour. But is criminalization going to deter those who are willing to behave as Cuerrier did anyway? Historical efforts to prohibit drugs, alcohol, and various forms of sexual activity already demonstrate that human behaviour is often far too complex to be controlled through the distant, bureaucratic functions of the state judiciary.

Another goal is arguably to prevent harm to others through incarceration. But because unsafe sex and needle-sharing are common in prisons, where access to condoms, clean needles and needle-cleaning equipment is often scarce, this measure may in fact only serve to accelerate the spread of the epidemic.

Finally, a third goal of criminalization is to punish. But is this the right way to approach the challenge of AIDS? Doing so addresses only the small proportion of people who willfully infect others while exacerbating the stigmatization faced by other groups commonly, and possibly unfairly, associated with HIV - gay and bisexual men, sex trade workers, and injection drug users. In some cases, this effect of ‘stigmatization’ has already started, since many PWA organizations view decisions like R. v. Cuerrier in the same light as other North American laws and rulings aimed at people with HIV / AIDS. These include laws introducing mandatory ‘names reporting’ of HIV positive people, screening programs for pregnant women and prisoners, and in at least 29 states, the criminalization of knowingly exposing others to HIV. Common to all these situations is an increasing demand for HIV-status disclosure - a trend which, some would argue, seriously curtails individual liberty. One of the seven Supreme Court Justices involved in the Cuerrier case, Justice MacLachlin, argued in her dissent that the definition of ‘fraud’ created by the majority restricts PWAs’ civil liberties by essentially rendering disclosure of HIV positivity a prerequisite for consent to sexual intercourse. Elsewhere, it has been asserted that the internationally respected late AIDS activist and humanitarian Jonathan Mann would have been “appalled” at the decision to criminalize non-disclosure of HIV status: during Mann’s career, “He made clear why confidentiality of HIV status was necessary for health and ethical reasons, and why laws that target people with HIV infection result in worse health for the individual targeted and for the community”. In this context, then, the notions of ‘cracking down’ on HIV and the ‘fight against AIDS’ start looking much more like a crackdown on PWAs.

For many, the goals of deterrence, harm prevention and punishment thus provide an inadequate justification for criminalization. According to an earlier ruling on the Cuerrier case by the BC Court of Appeal, “There is no recognized duty, enforceable through the criminal law power of the state, which requires a person to provide full disclosure of all known risks associated with sexual intercourse to his or her sexual partners as a condition precedent to the partner giving an effective consent to sexual intercourse. The criminal law of assault is, indeed, an unusual instrument for attempting to ensure safer sex”. Public Health Alternatives

If safer sex is the goal, but judicial criminalization is an unsatisfactory means, what other alternatives might be of use?

2a The definition of fraud set out in the Criminal Code limits the types of fraud able to vitiate consent in sexual assault to cases which are dishonest about the nature and quality of the act. The definition used in the Cuerrier decision expands the types of fraud able to vitiate consent to include cases where there is a) a dishonest representation, b) a risk of serious bodily harm, and c) evidence that consent was based upon this misrepresentation. MacLachlin’s argument is that this effectively equates non-disclosure of the seropositive partner with an automatic lack of consent, thereby limiting the PWA’s civil liberties.
Wayne Campbell, Chair of the BC Persons with AIDS Society states that “The vast majority of public health experts who are knowledgeable about AIDS agree that HIV transmission is best dealt with through a variety of public health initiatives - not through making HIV transmission a crime”. More specifically, AIDS organizations have advocated increased emphasis on public health laws, as outlined in an extensive policy document released in June 1997. The report explains that public health laws, while differing somewhat between Canada's different jurisdictions, have three principal functions:

1. to classify transmissible diseases and specify what rules apply to each;
2. to impose obligations on infected persons to seek medical treatment, and obligations on others to report suspected cases of infection;
3. to bestow health authorities with powers for the protection of public health which at their most coercive can be quasi-criminal.

In the case of HIV transmission, health officials may require individuals to undergo medical examinations and treatment, and may order infected persons to conduct themselves so as to avoid transmitting the infection to others. In extreme cases, every province has the right to detain or ‘incapacitate’ people (in health-care settings such as hospitals) to prevent the spread of disease. Personalized counselling forms an integral part of all these measures.

The advantages such measures have over criminalization are numerous. Most importantly, since the ultimate goal of laws and rulings such as R. v. Cuerrier is to protect public health, the issue clearly falls under the express mandate of public health law rather than criminal law. By following this basic premise, society will avoid the negative consequences of criminalization discussed already. In addition, public health measures further the ultimate goal of health promotion by tailoring health interventions to fit an individual's specific circumstances and by keeping individuals in contact with health service providers. Criminalizing non-disclosure ignores the multiple factors which often make people unwilling or unable to disclose their HIV status. Such complex human behaviours are best addressed through personalized, supportive public health programs.

Finally, public health laws also carry the advantage of being less restrictive of individuals' civil liberties; public health orders (or at worst, detention in a hospital) are less restrictive than criminal.

Conclusion

Based on this discussion of the adverse public health implications of the Cuerrier decision, the major problems with the goals of criminalization, and the strengths of public health law alternatives, it is evident that while “criminal law is certainly better suited to punish and denounce . . . public health powers are preferable for achieving rehabilitation and incapacitation”.

Returning to the specifics of the Cuerrier case, the only outstanding issue is how best to attain justice for the two women adversely affected by Cuerrier's behaviour. One avenue worth considering might be the opportunities provided through tort law or civil suits. Though not applicable in the Cuerrier case itself since neither of the women contracted HIV, civil suits would provide justice for the complainants while achieving many of the worthwhile goals of criminalization. Ultimately, however, perhaps the best institution for addressing this concern - and indeed for addressing the entire issue of criminalization to begin with - is Parliament. This idea is in fact mentioned in the Cuerrier ruling by dissenting Justice MacLachlin, who contends that by setting a new legal definition of fraud in this case, the court has overstepped its judicial boundaries.

In closing, it should be noted that despite the daunting forecasts, the ultimate result of criminalization on public health outcomes remains to be seen. Because the ultimate goal of those arguing either side of this debate is to reduce the spread of HIV transmission, however, we must not allow the criminalization of non-disclosure of HIV status to divert attention away from initiatives which can make a true difference. Society must continue to work together to emphasize education about the syndrome and its modes of transmission, undertake efforts to address root causes of HIV vulnerability, and promote basic public health practices of voluntary testing, safer sex and shared responsibility for controlling the epidemic.

References