A Comparative Jurisdictional Analysis of the Criminalisation of the Sexual Transmission/Exposure of HIV: A New Legislative Framework

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Declaration

I confirm that the thesis conforms to the prescribed word length for the degree for which I am submitting it for examination. I confirm that no part of the material offered has previously been submitted by me for a degree in this or in any other University. If material has been generated through joint work, my independent contribution has been clearly indicated. In all other cases material from the work of others has been acknowledged and quotations and paraphrases suitably indicated.

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Abstract

This thesis explores the criminalisation of the sexual transmission/exposure to HIV by drawing upon the legislative and judicial precepts of the criminal justice systems of England, Canada and the United States of America. The criminalisation of the transmission/ exposure is contentious within these jurisdictions and the aim of this work is to address these fundamental issues by investigating the disparate approaches to inculpation.

To be able to achieve this aim the study uses a comparative analysis that sets out the extant position of the law in each country and extrapolates theoretical underpinnings to criminalisation. This denotes that the defendant's awareness as to their sero-status; the effectiveness of a complainant consenting to the risk of contracting the virus; and the type of conduct that is criminalised must be investigated. Further discourse as to alternative defences that may be accessible to the defendant is provided

The work will examine the solutions to these issues from the other jurisdictions, and highlight the similarities and differences within each countries approach. It is argued that the law relating to the criminal transmission/exposure to HIV within all of the jurisdictions is generally deficient. None of the jurisdictions provide criminal laws that accede, in their entirety to philosophical, doctrinal or theoretical solutions to the problem. This study is unique as it draws upon the multiple jurisdictional approaches, as well as philosophy, theory and doctrine to provide the optimal pathway to legislation. Thus, the thesis proposes a legislative framework that is adherent to established liberal understandings of criminalisation. It also contributes to the understanding of the criminalisation of the transmission/exposure to HIV by offering a *de novo* legislative framework.

Chapter One:

Introduction

The Purpose Of The Work

The aim of this work is to review the deficiencies of the current English law in relation to the criminalisation of the sexual transmission of HIV. To achieve this aim it is necessary to contextualise the position in English law against particularised comparator legal systems. An examination of the distinct jurisdictional approaches of England, Canada and United States facilitates the primordial overarching aim of the work: to provide proposals for an appropriately worded *de novo* overarching legislative framework.

The spread of HIV is a global concern as it is not been confined to one jurisdiction, country or continent. Over the last three decades the significant increase in the rate of infections has been a recurrent problem for policy makers: magnitudinal increase in infections has been considerable, and by the end of 2013 over 35 million people had HIV throughout the world.[1] Each of these respective countries that form the basis of the analysis have been confronted by an identical quandary, in that individuals have either been exposed to or have contracted HIV from another when they have been unaware of that sexual partner's sero-status. A comparative

[1] http://www.unaids.org/sites/default/files/en/media/unaids/contentassets/documents/factsheet/2014/20140716_FactSheet_en.pdf accessed 22 April 2015

juxtaposition will be utilised to identify the various criminal approaches, specifically addressing the imperfections of the English position.

An analysis of four core issues will be undertaken to ascertain whether the legislation and judicial precepts of the respective jurisdictions are similar or distinct, and correspond to apposite doctrinal, philosophical and theoretical principles. There are a number of concerns with the extant English position: there is no clarity in relation to the level of awareness of their sero-status that the defendant must possess to be inculpated; nor is there precision as to the parameters of the criminalisation of exposing another to the virus. Two further issues also necessitate examination: the judicial precepts in England do not expound within any clarity or certainty upon the requirement of a fully informed consent by the complainant; and additionally, there is no confirmation of whether condom use, viral load, or the type of sexual activity can be utilised as a defence by the defendant.

This introductory chapter serves a number of functions. Initially, there will be a broader discourse of the concerns with the extant position in England. This will identify the four key concepts that require further elucidation; these can be categorised as specific questions and will, thus, be considered separately. The introductory chapter will also set out the methodology of the comparative analysis and the rationale for the choice of jurisdictions. As the thesis is focused upon the criminalisation of the sexual transmission/exposure of HIV there are a number of preliminary matters that necessitate consideration. These require clarification as

these definitions will be used consistently throughout the thesis. Finally, a brief synopsis of the sequential chapters will be set out.

The Basis For A Comparative Analysis

I studied law as an undergraduate at Sunderland University and established an interest in criminal law. It was such an interesting area of law, and there appeared to be many issues with how the criminal law has and continues to develop within England. My undergraduate study of the criminal law had taken place during 2001 – 2002, and the problems in relation to the criminalisation of the sexual transmission of HIV had not been addressed. There had been no criminal cases concerning the sexual transmission of HIV, and *Clarence*[2] appeared to be the authority on this specific issue. In 2007 I was given the opportunity to study as a postgraduate at Sunderland University, and my interest in the contentious issues within criminal law were reignited. It was only when I embarked upon the masters programme that I became aware of the issues in relation to s20 of the Offence Against the Person Act 1861, and the criminalisation of the sexual transmission of HIV.

The Court of Appeal decisions of *Dica*[3] and *Konzani*[4] confirmed that s20 was the appropriate mechanism for criminalisation of this type of conduct, and it seemed to be that the issue of consent was the primary concern. This prompted my intellectual curiosity as there was no real clarity on the parameters of an informed consent, and the decisions of *Dica* and *Konzani* appeared to contradict the House of Lords

[2] (1888) 22 QBD 23
[3] [2004] EWCA Crim 1103; QB 1257, 3 All ER 593
[4] [2005] EWCA Crim 706; [2005] 2 Cr.App.R. 14

decision in *Brown*.[5] Upon further investigation it became apparent that there were more problems with this specific criminal sanction, and the sexual transmission of HIV. The deficiencies became even more apparent when I began to survey other jurisdictional approaches to the criminalisation of HIV. It was then that I realised that a comparative analysis could form the basis of the sound thesis within this arena, and I submitted a research proposal to this effect.

The Problem(s) In English Law Identified

The current English position on the criminalisation of the sexual transmission/exposure to HIV raises more questions than provides answers.[6] Currently, s. 20 of the Offences Against the Person Act 1861 determines that a defendant can be successfully prosecuted if he[7] has transmitted the virus to an unsuspecting complainant. The dissonant appellate decisions, and contextualisation of inculpation via the utilisation of non-fatal offences, have facilitated a steady stream of academic discontent.[8] It has been stated that, for various reasons, criminalisation of sexual transmission of HIV does not fit comfortably within that legislative provision,[9] and this thesis seeks to remedy this by proposing a bespoke legislative framework.

[5] [1994] 1 A.C. 212
[6] *R v* Dica [2004] QB 1257 ; *R v Konzani* [2005] EWCA Crim 706; [2005] 2 Cr.App.R. 14
[7] He will also mean she throughout the thesis
[8] see Matthew Weait, 'Criminal Law and the Sexual Transmission of HIV: *R v Dica'* (2005) 68 Modern Law Review 121; Samantha Ryan, 'Reckless Transmission of HIV: Knowledge and Culpability' (2006) Criminal Law Review 981
[9] Matthew Weait (n 8)

s20 Offences Against the Person Act 1861 And The Sexual Transmission of HIV

The Offences Against the Person Act 1861 is often criticised for its archaic wording and lack of clarity.[10] There have been considerable case law developments interpreting the elements of the various offences within the statute, and this is the Act that has been utilised to criminalise the sexual transmission of HIV in England. S20 of the Offences Against the Person Act 1861, that forms the basis of the enquiry states:

> "Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor…"

Thus, there are a number of elements to the offence, and the prosecution must establish each of these to assist the fact finder in determining the guilt of a defendant. The defendant must have acted unlawfully and maliciously wound or inflict grievous bodily harm upon the complainant. Therefore, the *actus reus* of the s20 offence can be committed either by wounding or, and the one that relates to the sexual transmission of HIV, through the infliction grievous bodily harm. Grievous bodily harm is not defined within the statute, but it has been held that the term is to be given its 'ordinary and natural meaning' denoting that grievous means 'really serious'.[11] It is common ground that HIV can be considered a serious harm, and the Crown Prosecution Service (CPS) recognise that it is necessary to adduce scientific

[10] Law Commission, *Reform of the Offences Against the Person* (Law Com CP No 217, 2014) para 1.14
[11] *DPP v Smith* [1961] AC 290, 333 per Viscount Kilmuir L.C.

evidence to demonstrate that this type of harm has taken place.[12] Inflcit is the other ingredient for the offence, but this does not signify that an assault or an act of violence has to have taken place.[13] This approach conflicted with *Clarence*[14] as *Clarence* was the authority that stipulated that the sexual transmission of disease was not within the ambit of non-fatal offences. In *Clarence* the defendant had transmitted gonorrhoea to his unsuspecting wife. It was held that there was no offence under s20 as the infliction of the disease did not equate to an assault. This precedent was finally overruled by Judge LJ in *Dica,*[15] and affirms that the infliction of HIV through consensual intercourse is within the ambit of a section 20 offence.

The *mens rea* of the s20 offence stipulates that the defendant must act 'maliciously', and this equates to acting intentionally or recklessly.[16] Reckless within this context is considered to be Cunninghamreckless thereby connoting subjective advertence.[17] Generally, there cannot be liability if the defendant is unaware that his conduct might cause harm, but this does not denote that the defendant has to have foresight that he will wound or inflict grievous bodily harm. In *Savage*[18] Lord Ackner elucidated upon this point, and held that a defendant could be accountable for an offence under s20 if 'he should have foreseen that some physical harm to some person, albeit of a minor character, might result'.[19] Crown Prosecution guidelines in relation to the sexual transmission of HIV endorse the foreseeability of harm by stipulating that:

[12] Crown Prosecution Service 'Intentional or Reckless Sexual Transmission of Infection' <http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/index.html#Safe accessed 21 April 2015
[13] *Wilson* [1984] AC 242 at 260; *Ireland* [1998] A.C. 147
[14] (1888) 22 QBD 23
[15] [2004] EWCA Crim 1103; QB 1257, 3 All ER 593
[16] *Savage*[1991] 3 W.L.R. 914; [1992] 1 A.C. 699 at 752
[17] *Cunningham* [1957] 2 QB 396
[18] *Savage*[1991] 3 W.L.R. 914; [1992] 1 A.C. 699
[19] *Savage* [1991] 3 W.L.R. 914; [1992] 1 A.C. 699

"Recklessness in this context means that a defendant foresaw that the complainant might contract the infection via unprotected sexual activity but still went on to take that risk. Once the prosecutor is satisfied that the suspect had foreseen the risk of infection, the reasonableness of taking such a risk must be considered. Reasonableness is dependant upon the circumstances known to that person at the time he or she decided to take the risk."[20]

The crux of recklessness and the sexual transmission of HIV is that the defendant recognised that there was a risk of transmitting the virus, and that that risk was not reasonable one to take. Finally, if there is a defence that is based upon the issue of whether the act was lawful there must be a direction by the judge to the jury of what can equate to lawfulness, and that the burden lies with the prosecution to negate the defence.[21] If the issue is that the complainant consented to having sexual intercourse with an HIV+ individual then this could render the activity lawful.

The problems with the criminalisation through s20 are evident, as unsuspecting complainants are still being infected with the virus by sexual partners who have not disclosed their HIV status. By the end of September 2014 there had been 25 prosecutions for the sexual transmission of disease in England and Wales.[22] Only three of those three defendants had appealed on points of law (rather than sentence), and this may denote the complexity of the issues, and possibly the lack of scientific understanding by legal practitioners. The Law Commission also recognise

[20] Crown Prosecution Service (n 12)
[21] Stokes {2003] EWCA Crim 2977 per Hernandez J [4]
[22] http://www.nat.org.uk/media/Files/Policy/2015/HIV_criminal_prosecutions_table_July2015.pdf accessed 25th August 2015

that there are issues with the criminalisation of the sexual transmission of HIV, as this has caused 'considerable controversy'.[23] It is of such concern that a chapter of the non-fatal offences Scoping paper is dedicated to the sexual transmission of disease.[24] It is contentious as a number of academicians propose that such matters should be dealt with via public health rather than the criminal law.[25] Opponents propose that the criminal law is a suitable mechanism for individuals who transmit the virus to unsuspecting individuals.[26]

There is a lack of consensus, and ambiguity prevails in relation to essential elements of the offence. The Law Commission has recognised that there must be more clarity as to the level of awareness that the defendant must possess to be considered to have knowledge of their sero-status.[27] Other concerns, with the current position is that there is no confirmation within the leading judgments of an appropriate definition of informed consent.[28] Potential defences such as condom use and viral load have not been explored by the judiciary, and this denotes that a defendant cannot be certain that these defences would exonerate them of any criminal sanction. This thesis also seeks to identify that the law of attempts is inappropriate as it is theoretically possible to prosecute an individual who is not HIV+. [29]

[23] Law Commission (n 10) para 6.4
[24] Law Commission (n 10) Chapter six
[25] Matthew Weait (n 8)
[26] John R Spencer, 'Liability for Reckless Infection--Part 2' (2004) 154 New Law Journal 448
[27] Law Commission (n 10) para 6.36
[28] Below Ch. 4
[29] Crown Prosecution Service (n 12)

An Analysis Of Non-Fatal Offence Through The Harm Principle

The proposed statutory framework that forms the basis of this thesis, sets out an appropriately worded statute that criminalises the sexual transmission and exposure to HIV through an analysis of the harm principle.[30] As the thesis is based upon actual harm or the risk of serious harm through the virus being transmitted it is unnecessary to explore criminalisation through sexual offences legislation, therefore, this investigation is focused upon non-fatal offences. It is accepted that the judiciary are beginning to afford guidance of circumstances whereby HIV non-disclosure can equate to a sexual offence, and that there is considerable judicial development of the doctrine of conditional consent.[31] This is not an attempt to exclude sexual offences from the ambit of HIV transmission/exposure or the developing concept of conditional consent, but these issues are not the concern of this investigation, and are therefore beyond the remit of any extensive elaboration.[32] The position of this work is that the transmission of HIV is considered an actual harm that has the potential to have devastating physical consequences upon an individual who becomes infected with the virus. This is in contrast to the harm that transpires from the criminal act of rape. It is the consent to the risk of harm rather than the consent to intercourse that is the pivotal question that is addressed.[33] Thus, it is a tangible harm or the potential for that harm that this thesis proposes should be criminalised, as there has been consent to sexual intercourse, but not necessarily consent to the risk of the virus being transmitted.

[30] Below Ch. 4
[31] *Assange v Swedish Prosecution Authority* [2011] EWHC 2849; *Regina (F) v Director of Public Prosecutions* [2013] EWHC 945; [2014] Q.B. 581; *R v McNally* [2013] EWCA Crim 1051
[32] For a discussion on conditional consent and deceptive consent see Jacqueline Scott, 'The Concept of Consent' (2010) Plymouth Law Review 22; Carole McCartney and Natalie Wortley, 'Raped by the State' (2014) Journal of Crimnal Law 1
[33] Matthew Weait (n 8) 123

A Distinct Approach To Criminalisation

The proposed legislative framework differs from the CPS guidelines and the Law Commission Scoping paper as the conclusion of this thesis is a bespoke piece of legislation that has been resolutely tested against philosophical, theoretical, and doctrinal models from each jurisdiction. This is something that neither the Scoping paper nor the CPS consider as an appropriate mechanism for guidance. This is not to stipulate that the Scoping paper or the CPS have not considered the elements of the offence. In terms of assessing the defendant's awareness of his HIV status the Scoping paper and the CPS guidelines have both endorsed criminalising an individual who knows or suspects that he has the virus.[34] This corresponds to the proposals that are set out within this thesis, but neither the Scoping paper nor the CPS guidelines provide a cogent rationale for the inclusion of a wilfully blind individual. Each propose that criminal sanctions can encompass a defendant who suspects he has the virus, but do not offer any statutory provision to that effect, something this work does provide. Thus, this study sets a legislative framework that specifies the knowledge requirement of the defendant, and this is tested against philosophical, theoretical and doctrinal rationales for the inclusion of an individual who is wilfully blind.

The Scoping paper also proposes that there should be no criminalisation of defendant's who expose another to the virus. It is deemed that it 'would be strange

[34] Law Commission (n 10) para 6.36; Crown Prosecution Service (n12)

and offensive' to criminalise such conduct.[35] The Scoping does not provide a coherent rationale for such assertions, other than it would be 'unfair and over-inclusive'.[36] This is in contrast to the position that is set out within this thesis, whereby it is proposed that the criminalisation of exposure is warranted, as the proposed statutory framework is resolutely tested against Feinberg's interpretation of the harm principle. The CPS provide guidance where there may be cases of exposure, but this in relation to criminalisation of intentional attempts. This does not explore any other circumstances whereby criminalisation of exposure can be justified. There is no exploration of any theoretical underpinnings, but it is accepted that the guidelines that are set out by the CPS to explain the current position of the English law, and there is no attempt at proposing how the law should develop.

The Law Commission and the CPS both fail to consider what would equate to a fully informed consent, other than that an implied consent will suffice. There is no exploration of circumstances whereby a complainant consents to intercourse with an individual who is HIV+. The proposed legislative response to sexual transmission/exposure to HIV sets out the parameters of what should be considered to be a fully informed consent, and this precludes an implied consent. The final proposals within this thesis are also considered by the Law Commission and the CPS, but with differing conclusions. The CPS recognises that condom use and the level of the defendant's viral load may assist in establishing that the defendant was not reckless.[37] Contrastingly, the Law Commission Scoping paper disregards these defences by stipulating that 'it is not possible to lay down any fixed rules about

[35] Law Commission (n 10) para 6.106
[36] Law Commission (n 10) para 6.107
[37] Crown Prosecution Service (n 12)

this'.[38] This is also in contrast to the proposals that are set out in chapter four of this thesis whereby the defences of condom use, viral load and the type of sexual activity are specifically included within the proposed statutory framework.

Article 7, Retrospectivity And The Need For Certainty

The dissatisfaction with s. 20 as an inculpation template is warranted as the two leading appellate cases in this arena have not imparted any clarity as to what will equate to inculpatory behaviour.[39] Each decision has remained opaque as to key definitional-offence concepts. These are fundamental, as an individual must be aware of what will be considered criminal conduct at the time of the sexual act, so that he can tailor his behaviour to avoid criminal sanctions. He must also be conscious of what may exonerate him when he has transmitted or exposed another to the virus. If there is to be criminalisation of transmission or exposure to HIV then the law must be definitive, and this will conform to Article 7[40] of European Convention on Human Rights in terms of certainty and retrospectivity.[41]

Article 7 of the European Convention on Human Rights requires that a criminal law should be certain, and that an individual should not be subject to retrospective punishment. Although Article 7 of the Convention is often neglected in terms of cases heard by the Strasbourg Court it is a fundamental tenet of criminal law. A rationale for the paucity of cases is that 'the interpretation has been so restrictive and

[38] Law Commission (n 10) para 6.30
[39] *R v* Dica [2004] QB 1257 ; *R v Konzani* [2005] EWCA Crim 706; [2005] 2 Cr.App.R. 14
[40] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 7
[41] *Konkkinakis v Greece* (1994) 17 EHRR 397

unimaginative as to render its scope narrow and limited'.[42] The lack of authority emanating from the Strasbourg Court does not denote that Article 7 has not been considered by the judiciary. In *Greece v Konkinakis*[43] the European Court of Human Rights stated that:

> *"the principle of legal certainty requires the acts which entail an individual's criminal liability to be clearly set out in the law. This requirement is satisfied where it is possible to determine from the relevant statutory provision what act or omission entails criminal liability,"*[44]

This indicates that the European court have placed emphasis on certainty, but this is not to stipulate that the Strasburg Court disregards an incremental development of criminal acts through the common law, in fact it is the polar opposite. Murphy suggests that development through the common law is a step too far, and the construction of laws should be limited to the legislature.[45] The contrary position can be surveyed in *SW v United Kingdom*,[46] a case relating to martial rape, where it was stated by the Strasbourg court that:

> *"Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation*

[42] Ralph Beddard, 'The Rights of the Criminal Under Article 7 of ECHR' (1996) European Law Review 3
[43] *Konkkinakis v Greece* (1994) 17 EHRR 397
[44] *Konkkinakis v Greece* (1994) 17 EHRR 397, 409-10
[45] Cian C. Murphy, 'The Principle of Legality in Criminal Law Under the European Convention on Human Rights' (2010) European Human Rights Law Review 192, 194
[46] (1996) 21 E.H.R.R. 363

from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen."[47]

This, however, seems to contradict the language of Article 7, and the context of that particular case as the legal position of marital rape when the defendant committed the offence was that he could not be convicted of raping his wife.[48] An acceptance by the court that it was legitimate to criminalise such conduct appears to run contrary to the retrospectively provision of Article 7. Such a stance, although laudatory for the abolition of the marital rape exemption in English law meant that SW was convicted of a crime that was not an offence at the time of the act. If there is to be law making in these type of circumstance then it should be exclusive to Parliament rather than judiciary. [49] Issues in relation to the retrospective law making by the English Courts, is even more evident in *Dica*, as the decision in *Clarence* was the authority that stipulated that the transmission of sexual disease was not a criminal act. If Dica had sought legal advice prior to partaking in any intimate acts he would have been informed that he would not commit a criminal offence by transmitting HIV to a sexual partner.[50] It is also contrary to European jurisprudence that stipulates that the law must meet the requirement of foreseeability,[51] something that was not achieved in *Dica*, as neither statute nor case law provided a sound basis for ascertaining that Dica's conduct could equate to a criminal act.

[47] *SW v United Kingdom* (1996) 21 E.H.R.R. 363, 399
[48] Sir Matthew Hale *History of the Pleas of the Crown* (1736) vol. 1, ch. 58, p. 629
[49] Ralph Beddard (n 42) 13
[50] See *Kafkaris v Cyprus* (2009) 49 E.H.R.R. 35 where it is stated that foreseeability may still be achieved if an individual has to seek legal advice to ascertain the legal position.
[51] *Achour v France* (2007) 45 E.H.R.R. 2 [42]; *Kafkaris v Cyprus* (2009) 49 E.H.R.R. 35

The European Court of Human Rights has also specified that there will never be statute that is defined with precision.[52] Thus, Article 7 does not require absolute certainty, but there is an expectation that the crime is sufficiently defined and foreseeable, something that the proposed legislative framework achieves. The proposed statute is explicit as to the elements of the criminal offence, by providing a definition of when a defendant knows that he is HIV+, and what equates to the criminal acts of transmission and exposure. The bespoke legislative framework goes further by identifying circumstances whereby a defendant will not be accountable for his actions. This is attained when there has been an informed consent; when he has used protective measures; has partaken in low risk sexual activities or has a non-infectious viral load. Therefore, the proposed legislative framework is more than compatible with Article 7 of the European Convention.

The thesis seeks to address the specific deficiencies of English law by comparing the extant criminal sanctions within the United States and Canada. The work will critique the law in each jurisdiction in order to ascertain what 'ought' to be the legislative response that eradicates the current deficiencies, not just in England, but within all of the countries that are comprised within this analysis.

Is Criminalising The Sexual Transmission Of HIV Discriminatory?

It is difficult to articulate that there is potential for discrimination as the virus is not discriminatory when infecting individuals. Initially, the virus was predominant within the gay community, but it is no longer exclusive to this section of society. There has

[52] *Kafkaris v Cyprus* (2009) 49 E.H.R.R. 35 [141]

been an increase in infections within every sector of society, and this demonstrates the non-discriminatory nature of the virus. It has also suggested that criminalising HIV transmission/exposure would discriminate against already marginalised individuals.[53] Weait proposes that there is potential for discrimination because of the dynamics of those who are infected.[54] It is a sad fact the virus is predominantly found in Sub-Saharan Africans, as these individuals are disproportionately affected with the virus. Criminalisation would not discriminate against such individuals. Any person, who is infected with HIV, whether they are heterosexual, homosexual, white or black could be liable to criminal sanctions.

To further eradicate any assertions in relation to the discriminatory impact of the legislation the proposed statutory model can act as a template for criminalisation of other sexually transmitted diseases. The primary rationale for focusing upon the criminalisation of the sexual transmission/exposure to HIV is that each of the jurisdictions have criminalised this type of infection. Only when antiretroviral medication administration is the norm and equally distributed, and that there is an education programme that places emphasis on the non-infectivity of an individual who has undergone the appropriate treatment will the stigma attributed to the virus begin to erode.

The Aims/Objectives That Are To Be Addressed By This Thesis

To achieve a coherent legislative framework, that may be transplanted into any of the criminal justice systems within this analysis, there must be an examination of four

[53]Matthew Weait (n 8) 134
[54]Matthew Weait (n 8) 134

fundamental questions: these are essential, and each of these matters form the basis of the sequential chapters herein. It is the requisite knowledge requirement of the defendant as to their sero-status that presents the foundation of inculpation, and in tandem whether criminalisation should include exposure to the virus. Two further problematic areas must also be overcome as there is no clarification within English law of the parameters of an informed consent, and there is no elucidation on the potentiality of additional defences to criminal sanctions. The thesis will examine each of these topics to determine whether the extant legal position in Canada or the United States provides a suitable solution to the issues that have been identified within the English jurisdiction. It may be that none of the approaches is appropriate and that a more innovative approach that corresponds to philosophical, theoretical or established doctrinal underpinnings is necessary. The objective, therefore, is to provide a fully operational bespoke piece of legislation: four questions are addressed specifically to provide a chartered pathway for reform proposals.

1. What Must The Defendant Know Of Their Sero-Status To Be Inculpated?

This is a fundamental question that must be addressed as this is the foundation upon which criminal culpability is based in these cases within the designated countries.[55] In order to address this question an examination of the philosophical understanding of knowledge will be examined as well as a discourse on the general criminal laws position of knowledge within each jurisdiction. These will assist in assessing whether the requirement in relation to HIV transmission/exposure, within each criminal justice system corresponds to a philosophical or established doctrinal understanding of

[55] *R v* Dica [2004] QB 1257 ; *R v Konzani* [2005] EWCA Crim 706; [2005] 2 Cr.App.R. 14; *R v Cuerrier,* [1998} 2 S.C.R 371; Ark Code § 5-14-123 (2012); Nev. Rev Stat § 201.205 (2014)

knowledge. The thesis will also identify the current requirement of knowledge of HIV status within each of the jurisdictions, and the rationale for inclusion or exclusion of certain levels of awareness.[56] This requirement will denote that within the legal systems addressed an individual has to have actual knowledge or be wilfully blind as to their sero-status to affirm inculpation.

English judicial precepts in cases of the sexual transmission of HIV do not impart any clarity as to this essential fault requirement.[57] A solution to this requirement may emanate from either Canadian cases or the HIV specific statutes of the United States. A juxtaposition of the extant circumstances within each criminal justice system will reveal that there is no uniform approach to the defendant's 'awareness' of their sero-status. This tripartite analysis identifies that the majority of distinct approaches are 'under-inclusive' and do not conform to set doctrines within the jurisdictions. It will be demonstrated that the Canadian approach is the most acceptable account, and that the Supreme Court of Canada deliberation as to this requirement is the optimal pathway to novel legislative reform.[58]

2. Should The Law In England Be Extended To Specifically Criminalise Exposure?

To answer this posited question it will be shown that any criminalisation of exposure must adhere to the harm principle.[59] This denotes that the risk of serious harm should be evaluated when considering whether exposure should be criminalised.[60] The current position in England does not impart clarity on this salient point, and

[56] Below ch 2
[57] *R v* Dica [2004] QB 1257 ; *R v Konzani* [2005] EWCA Crim 706; *R vP* [2006] EWCA Crim 2599
[58] *R v Williams* [2003] 2 S.C.R. 134
[59] Joel Feinberg, *Harm to Others: the Moral Limits of Criminal Law* (Oxford University Press 1984)
[60] ibid 11

criminalisation is predominantly based upon a defendant transmitting the virus to an unsuspecting complainant.[61] There have been no criminal convictions in England in relation to exposure, therefore, the parameters of the risk of serious harm have not been explored by the judiciary.[62] Legislative accountability for exposing another to the virus lacks coherence as criminalisation of this type of conduct is based upon the law of attempts.[63] This does not fully accord to the western liberal approach to harm for criminalisation in this context, and has the potential to be 'over-inclusive'. Under these conditions an individual may be considered to have exposed another to HIV when he does not have the virus.[64]

To be able to address the deficiencies of the existing English position an analysis of the other jurisdictions approaches is necessary. It will be important to analyse and critique the scope of the offences that are available to prosecutors within Canada and the United States. Canada and the U.S. States have criminalised exposure and a discourse of their approaches assists in evaluating the defective position in England. A comparison of the approaches within the three jurisdictions will assist in identifying an optimal solution for cases of exposure/ transmission of the HIV virus for prospective cases.

[61] *R v* Dica [2004] QB 1257 ; *R v Konzani* [2005] EWCA Crim 706; [2005] 2 Cr.App.R. 14
[62] Crown Prosecution Service (n 12)
[63]Crown Prosecution Service (n 12)
[64] See generally Brian Hogan, 'Attempting the Impossible' (1986)10 Trent Law .Journal 1;Glanville Williams, 'Attempting the Impossible-The Last Round' (1985) 135 New Law Journal 337

3. *What Is An Individual Consenting To When Their Sexual Partner Reveals That He Is HIV+?*

The foundational basis of informed consent needs to be fully explored. This will provide a working definition of what a fully informed consent should equate to when a defendant has exposed their prospective partner to the virus. An examination of the English judicial approach to the defence of consent in HIV transmission cases will follow the exposition of the definitional construct of informed consent. It will become apparent that the English position is unclear as a prospective sexual partner may be unaware of what they are consenting to when agreeing to have unprotected sexual intercourse with an HIV+ individual.[65] There is a presumption that a complainant will always be aware of the risks through unprotected sexual intercourse as long as a defendant discloses their status, which is inappropriate and too restricted.[66]

To be able to provide a coherent solution to consent as a definitional element a comparative review of tripartite legal systems will be adduced. This will demonstrate that the deficiencies with the English approach is not unique, but are replicated within Canada, and also within the majority of U.S. States that have enacted HIV specific legislation.[67] This does not denote that the exposition of the Canadian and American approaches is ineffectual: a number of U.S. States have provided a legislative framework that has defined with precision the requirements of a fully informed consent, and provide an alternative comparative standardisation for

[65] *R v* Dica [2004] QB 1257 ; *R v Konzani* [2005] EWCA Crim 706; [2005] 2 Cr.App.R. 14
[66] ibid
[67] *R v Cuerrier*[1998] 2 S.C.R. 371, *R v Mabior* 2012 SCC 47; Ark. Code Ann. § 5-14-123 (b) (2012); Cal. Health & Safety Code § 120291 (a) (2014); Minn. Stat. § 609.2241(2)(1) (2014

review.[68] The answer to this question will, thus, provide a suggested statutory provision that fully considers prospective partners awareness to the risk of having unprotected intercourse with an HIV+ individual, and the true parameters of consent within the inculpation/exculpation dichotomy.

4. Other Than Consent, What May Also Act As A Defence In Cases Of Transmission And Exposure?

This final question has not received any affirmative judicial consideration within the English appellate courts.[69] This has left the issue of what can be considered to be a defence to the sexual transmission of HIV is disjointed. A defendant is, therefore, unable to ascertain whether his conduct may invoke criminal sanctions. A rationale for a broader inclusion of available defences is promulgated herein. In order to overcome these discrepancies within the English jurisdiction a discourse of the extant position in Canada and the United States is necessary, to set out the parameters of exemption from liability.

It will be demonstrated that other jurisdictions have facilitated the possibility of a number of alternative defences. The primary concern is that the availability of exculpation, predicated upon other potential defences generally, remains opaque. There is no real consideration of the risk of transmission in the majority of jurisdictions, and those that allow for certain types of conduct to act as a defence anticipate too much onus upon the defendant at a gradational liability threshold. This

[68] Ohio Rev. Code Ann. § 2903.11 (b) (2014); 720 Ill. Comp. Stat. § 5/12-16.2 N.D. Cent. Code § 12.1-20-17 Nev. Rev. Stat. § 201.205 Mo. Rev. Stat. § 191.677

[69] *R v* Dica [2004] QB 1257 ; *R v Konzani* [2005] EWCA Crim 706; [2005] 2 Cr.App.R. 14

comparison will, however, stipulate that an allowance of these defences is warranted, and that the various jurisdictions that do not make the defences accessible have not given true consideration to the statistical probability of the virus being transmitted, and implication attached to condom use, undetectable viral load, and/ or type of sexual activity.

Originality of the Research

There has been no extensive comparative law study of the criminalisation of this type of behaviour. Nor has there been detailed extrapolation of the philosophical, theoretical and doctrinal underpinnings that ought to be the pre-requisite to criminalising the sexual transmission/exposure to HIV. This study is unique as it does not just provide a juxtaposition of the jurisdictions, but tests the resolution of the judicial precepts and legislative framework by also comparing them to philosophical and theoretical underpinnings, as well as established doctrinal principles.

This is not to suggest that in any sense there has been limited academic discourse on the criminalisation of the sexual transmission/exposure to HIV within all of the countries that comprise this analysis: it is the polar opposite as a multitude of writers have addressed criminalisation. Academicians, however, have not extensively considered alternative jurisdictional approaches, or provided a rationale for the restriction or inclusion of these behaviours within the ambit of penal law *vis-a-vis* philosophical, theoretical and doctrinal underpinnings. The focus of much deliberation by academicians is founded upon confronting these categories of behaviours through public health initiatives, rather than the criminal law. This

analysis will determine the appropriate method to criminalise the sexual transmission and exposure to HIV by assessing the differing jurisdictional legislative and judicial approaches that have been adopted as relational responses to these specific types of act.

Each of the jurisdictions, that form the basis of the comparative analysis have criminalised the sexual transmission/exposure to HIV. This does not denote that the relevant criminal sanctions within each country are appropriate, or have been resolutely tested against justifiable parameters for criminalisation. Thus, the contribution of this work to knowledge is evident. There has been no comprehensive comparative analysis of the criminalisation of the sexual transmission/exposure to HIV that provides a bespoke legislative framework that has been resolutely tested against doctrinal, philosophical and theoretical underpinnings.

The current position within each country as to the defendant's culpability is founded upon an awareness of his sero status, and this has not been fully explored or considered by the legislature or the judiciary within any of the jurisdictions. There has been discourse on the level of awareness, but no convincing justification as to why the culpability of a defendant should be founded upon those who possess actual knowledge or those who are wilfully blind as to their sero status. This is achieved within this thesis as the position of the level of awareness is explored from a philosophical, doctrinal and theoretical foundation. The aim of the chapter that is dedicated to knowledge is to explore the rationale for including those who are wilfully blind, and then provide a statutory footing for the inclusion of such individuals. This approach is replicated within the chapter on the transmission, whereby the

discussion focuses upon the harm principle, and whether there is a cogent rationale for criminalising sexual transmission and exposure to HIV, with the ultimate goal of providing a bespoke legislative framework that is based upon theoretical underpinnings. This process is repeated in the subsequent chapter on consent as a theoretical foundation is set out to assist in defining the parameters of an informed consent. The final chapter also proposes defences that are based upon the risk of the virus being transmitted. Therefore, each chapter sets out a rationale for criminalisation that culminates with a suggested statutory footing. For clarification purposes the suggested statutory framework is set out below:

Criminal Transmission of HIV Bill 2014

An Act to legislate for the criminalisation of the sexual transmission or exposure of the Human Immunodeficiency Virus (HIV)

1. **Transmission of HIV**

A person commits an offence under this statute if he:

(1) Intentionally or recklessly transmits HIV to another through unprotected vaginal or anal intercourse or;

(2) Intentionally exposes another to HIV by having unprotected vaginal or anal intercourse

Unprotected intercourse means that a defendant has not used protective measures to reduce the risk of the virus being transmitted

2. Knowledge of HIV status

A defendant is aware that they have contracted HIV if he:

(1) Actually knows (by testing positive or any other means); or

(2) suspects that he is carrying the virus and that he does have that virus

3. Disclosing HIV status

It is a defence to a criminal charge of transmission or exposure to HIV that the complainant consented to running the risk of acquiring the virus. For that person to consent to running the risk of acquiring the virus:

(1)The defendant must disclose that he has the virus;

(2)That disclosure must take place before any unprotected sexual activity;

(3) The defendant must only partake in that activity if following disclosure he is confident that his prospective partner is aware that there is a risk that the virus may be transmitted

(4) It is for the prosecution to establish that the complainant did not consent

(5) Consent will not form a defence if that person intended to transmit the virus or the complainant desired that they acquire the virus from that person.

4. Defences:

(1) Protective Measures: Condom Use

Only the correct and consistent use of condoms (protective measures) will form the basis of a defence to the criminal acts of intentional exposure and intention or reckless transmission of HIV

(2) Viral Load

(1) An accused will not be considered to have exposed/ transmitted the virus to another if he had an non-infectious viral load at the time of the sexual act

(2) In order to establish that the accused had a non-infectious viral load the sexual act must have transpired after advice from a medical professional that he was non-infectious

Methodological Parameters: HIV And Other Definitional Concerns

This study focuses upon the criminalisation of HIV sexual transmission/exposure, and consequently HIV as a disease, and how it can be transmitted necessitates consideration. There are also other terminological concerns that are exclusively attributed to HIV that must be defined, and these are discussed throughout the inquiry. The following exposition will set out to define HIV; how it is transmitted; what is phylogenetic analysis; viral load; and antiretroviral medication. Before embarking upon a more extensive discussion of the various terms it is appropriate to provide a

brief description of relevant terms. The table below sets out the definition of these terms:

AIDS:	a disease of the human immune system in which there is a severe loss of the body's cellular immunity, greatly lowering the resistance to infection and malignancy[70]
CD 4:	a large glycoprotein that is found especially on the surface of helper T cells, that is the receptor for HIV[71]
Highly Active Antiretroviral Therapy:	Drug regimens, for patients with HIV Infections, that aggressively suppress HIV replication.[72]
HIV:	any of several retroviruses and especially HIV-1 that infect and destroy helper T cells of the immune system causing the marked reduction in their numbers that is diagnostic of AIDS—called also *AIDS virus, human immunodeficiency virus*[73]
Phylogenetic analysis:	study of the evolutionary relationships between genes, populations, species, etc., usually by constructing phylogenetic trees[74]

[70] http://www.oxforddictionaries.com/definition/english/AIDS?q=aids accessed 1st August 2015
[71] http://www.merriam-webster.com/medlineplus/cd4 accessed 21st August 2015
[72] http://www.online-medical-dictionary.org/definitions-a/antiretroviral-therapy-highly-active.html accessed 21st August 2015
[73] http://www.merriam-webster.com/medlineplus/hiv accessed 21st August 2015
[74] http://www.oxfordreference.com/view/10.1093/acref/9780198529170.001.0001/acref-9780198529170-e-15563?rskey=aZCCgq&result=1 accessed 21st August 2015

Sero status:	status with respect to being seropositive or seronegative for a particular antibody <HIV *serostatus*>[75]
T helper cell (T cell): **:**	a T cell that participates in an immune response by recognizing a foreign antigen[76]
Viral load:	The quantity of measurable virus in a body Fluid. (blood in the case of HIV)[77]

What is HIV?

HIV is the **h**uman **i**mmunodeficiency **v**irus and this 'attacks and harms the immune system' of the individual who has became infected. The virus is classified as two distinct strains: HIV 1 and HIV 2. HIV 2 is predominately located in Africa; whilst HIV 1 is the type that has spread globally.[78] The HIV-1 strain is further classified into three groups: these are named as M, N, and O. These groups are dispersed differently geographically as N and O are ordinarily found in Cameroon, whilst group M is worldwide. The HIV-1 M group is also divided into sub-groups that are set out as letters of the alphabet and recombinants that are a combination of those sub-groups.[79]

[75] http://www.merriam-webster.com/medlineplus/sero%20status accessed 21st August 2015
[76] http://www.merriam-webster.com/medlineplus/helper+t+cell accessed 21st August
[77] http://www.online-medical-dictionary.org/definitions-v/viral-load.html accessed 21st August 2015
[78] Edwin J Bernard and others, 'The Use of Phylogenetic Analysis as Evidence in Criminal Investigation of HIV Transmission' (2007) 1,10 http://www.nat.org.uk/media%20library/files/pdf%20documents/hiv-forensics.pdf accessed 22 April 2015
[79] ibid

Once an individual becomes infected with HIV the virus begins to destroy blood cells within that person's body.[80] These blood cells are known as CD4 and T cells, and they are essential in maintaining the well-being of an individual as they assist the body in fighting diseases. The virus enters into a blood cell, and then uses that cell to duplicate itself, until it eventually destroys that cell.[81] The virus is distinct to other types of virus (e.g. flu) as the immune system cannot dispose of HIV. As the blood cells are unable to combat the virus, this eventually weakens the immune system. If left untreated the virus can cause a number of diseases, and will ultimately lead to AIDS within the infected party.[82] AIDS is the final stages of the virus, and this is when the immune system is so damaged that it can no longer fight diseases. A person will be diagnosed with AIDS if you have a low amount of CD4 cells, cancers or one or more opportunistic infections.[83] These infections are considered opportunistic as they only manifest themselves because the immune system is deficient.[84]

The Methods of Sexual Transmission

The virus is found in blood, semen and vaginal fluids[85] and there are a number of ways the virus can be transmitted. It can be transmitted through unprotected intercourse, sharing needles, blood transfusions, tattooing, piercings and from

[80] http://www.cdc.gov/hiv/basics/whatIshiv.html accessed 22 April 2015
[81] http://aids.gov/hiv-aids-basics/hiv-aids-101/what-is-hiv-aids/ accessed 22 April 2015
[82] http://www.cdc.gov/hiv/basics/whatIshiv.html accessed 22 April 2015
[83] http://aids.gov/hiv-aids-basics/hiv-aids-101/what-is-hiv-aids/ accessed 22 April 2015
[84] Gene Schultz, 'Aids: Public Health And The Criminal Law' (1988) 7 Saint Louis University Public Law Review 65, 66
[85] http://www.avert.org/fact-sheet-hiv-transmission.htm accessed 22 April 2015

mother to baby.[86] The pre-dominant method of transmission is through unprotected intercourse. For the virus to be transmitted through unprotected intercourse the fluids of the infected party must come into contact with damaged tissue or mucous membrane of the uninfected individual.[87]

The ability to provide an accurate account of the risk of the virus being transmitted through sexual acts has been considered to be the 'holy grail' of HIV epidemiology'.[88] Nevertheless, it is common ground that the risk of transmission depends upon a number of factors, including the type of sexual activity and whether a condom has been used. Prominent studies such as the research that was undertaken by Weller and Beaty-Davis,[89] and that the Canadian Supreme Court considered to be 'widely accepted'[90] were consulted, and conclusions were derived from these papers. The following discourse is illustrative of the risks of the virus being transmitted under various conditions, and it must be noted that this is not attempt to state that the figures are definitive, as this is beyond the scope of this thesis. It is, however, evident from the various studies, and the table below that the greatest risk of the virus being transmitted is through unprotected sexual intercourse. Oral intercourse, whether protected or not, is significantly less of a risk than unprotected sexual intercourse.

[86] ibid
[87] http://www.cdc.gov/hiv/basics/transmission.html accessed 22 April 2015
[88] Ronald H. Gray and Maria J. Wawer, 'Probability of Heterosexual HIV-1 Transmission per Coital Act in Sub-Saharan Africa' (2012) 205 Journal of Infectious Diseases 351
[89] Susan C Weller and Karen Davis-Beaty. "Condom Effectiveness in Reducing Heterosexual HIV Transmission" (2002), 1 *Cochrane Database Syst. Rev.* CD003255. http://apps.who.int/rhl/reviews/langs/CD003255.pdf accessed 22 April 2015
[90] *R v Mabior* 2012 SCC 47 [98]

Exposure Route	Estimated infections per 10,000 exposures to an infected Source	Categorisation of Risk (unprotected)	Categorisation of Risk with condom use
Receptive anal intercourse	50	High	Low
Insertive anal intercourse	6.5	High	Low
Receptive penile vaginal intercourse	10	High	Low
Insertive vaginal – penile intercourse	5	High	Low
Receptive oral intercourse	1	Low	Negligible
Insertive oral intercourse	0.5	Low	Negligible

91

[91] Matthew Cornett, 'Criminalization of the Intended Transmission or Knowing Non-disclosure of HIV in Canada' (2011) 5 McGill Journal of Law and Health 61, 95

The Effectiveness Of Condom Use

Protected sexual activity considerably reduces the risk of the virus being transmitted. This is supported by a number of medical studies in relation to female and male protected intercourse. The estimations suggest that the chance of transmission is significantly reduced by the use of protective measures.[92] This is even so when taking into account the various permutations that surround the issue.[93]

One common theme throughout all of the studies is an acceptance that consistent and correct use of condoms will significantly reduce the risk of transmitting HIV to another. It is estimated that utilisation of condoms reduces the risk of transmission by 80% to 95%, albeit this statistical data is by no means certain. For example, it is acknowledged by Pinkerton *et al,* that there can still be a number of factors that can increase or decrease the risk. [94] The factors that can affect the level of risk were stated to be the number of 'sexual contacts, frequency of condom use and the sero-status of the infected person's partner'[95]. It was further specified that for accuracy their study only consisted of material from studies that compared consistent condom use with inconsistent or no use.[96] The study concluded that the use of condoms will reduce the risk by 94% for male to female transmission.

[92]Steven D. Pinkerton and Paul R. Abramson, 'Effectiveness of Condoms in Preventing HIV Transmission'. (1997) 44 Social Science and Medicine 1303; Susan C. Weller and Karen Davis-Beaty (n 89); Norman Hearst and Sanny Chen 'Condom Promotion for AIDS Prevention in the Developing World: Is it Working?' http://www.ip.usp.br/portal/images/stories/Nepaids/condom.pdf accessed 22 April 2015
[93] Pinkerton and Abramson (n 92) 1309
[94] ibid 1304
[95] ibid 1309
[96] ibid 1306

The methodology of that study was deemed to be defective by Weller as it utilised information from three sources. It was suggested that only data from individuals who either used condoms, or did not use the protection, should have been the basis of the study.[97] This, logically, would have provided more accurate information. Contrastingly, Hearst and Chen propose that the Pinkerton study was the most rigorous of the studies that are available, as it used a number of different studies to ascertain the risk.[98] Although the study used a number of sources this still does not remove the questionability of the accuracy of the data. Even though they advocated the approach contained in the Pinkerton study, Hearst and Chen suggest that the risk of infection is decreased by 90%, a slightly lower overall figure. In 1999, Weller estimated the risk would reduce to 87%.[99] This study was based upon couples who used condoms, and couples who do not use such protection. A subsequent study by Weller concluded that protected vaginal intercourse reduced the risk by 80%.[100] Thus, the two studies by Weller show inconsistent results, but ultimately the risk of the virus being transmitted may fluctuate between 80 to 95% in light of empirical data adumbrated.

The Relevance Of An Individual's Viral Load

As well as the type of sexual activity and condom use the viral load can assist in ascertaining the level of risk of the virus being transmitted. The viral load confirms the concentration of the virus within a person's blood. Basically, the higher the viral load the more probable it is that an infected individual can transmit the virus to

[97] Weller and Davis-Beaty (n 89)
[98] Hearst and Chen (n 92)
[99] Susan C Weller and Karen R Davis, 'The Effectiveness of Condoms in Reducing Heterosexual Transmission of HIV'(1999) 31 Family Planning Perspectives 272
[100] Weller and Davis-Beaty (n 89)

another person. The World Health Organisation recognise that the level of an individual's viral load is one of the greatest risk factors in transmitting the virus to another person, and that reducing the level of the load can be one of the most effective ways of diminishing the possibility of HIV transmission.[101] One study has also clarified that the level of a person's viral load is the chief predictor on the risk of transmission:

> *"Our data suggest that peripheral-blood levels of HIV-1 RNA contribute dramatically to the risk of heterosexual transmission. Serum HIV-1 RNA levels below 1500 copies per milliliter were not associated with transmission, whereas the risk of transmission increased substantially with increasing viral loads.."*[102]

The level of an individual's viral load can be a deciding factor as to whether the virus will be transmitted, the lower the load the less likely is the possibility of infecting another person. In those circumstances, it can be contended that the level of the viral load can be as effective as condom use in alleviating transmissions.[103] The viral load is reduced by antiretroviral medication (ART), and there are currently three methods to test the viral load of which the RNA is recognised as the most accurate.[104] If the test shows that the viral load is less than 1500 copies of the virus per millilitre of blood then the risk of transmission is considered 'rare'.[105] Other studies have specified that a level of 1500 copies of the virus per millilitre of blood

[101] World Health Organisation, 'Antiretroviral Treatment as Prevention (TASP) of HIV and TB', Programmatic Update, WHO/HIV/2012.12, June 2012, www.who.int/hiv/pub/mtct/programmatic_update_tasp/en/index.html, accessed 22 April 2015
[102] Thomas C. Quinn and others, 'Viral Load and Heterosexual Transmission of Human Immunodeficiency Virus Type 1' (2000) 342 The New England Journal of Medicine 921, 928
[103] Crown Prosecution Service (n 12)
[104] Adrian Puren and others, 'Laboratory Operations, Specimen Processing, and Handling for Viral Load Testing and Surveillance' (2010) 201 The Journal of Infectious Diseases 527
[105] Quinn and others (n 102)

makes the risk of transmission 'near zero'.[106] Consistent use of the medication can further decrease the load to an amount where the virus in the blood will be undetectable(<40 copies per millilitre of blood).[107]

The relevance of an undetectable viral load should not be underestimated. A recent study has stated that the virus cannot be transmitted when the individual has a viral load that is undetectable. The Swiss Federal Commission for HIV/AIDS issued a statement regarding the use of ART and the transmission of HIV. It was announced that if an individual does not have another sexually transmitted disease, complies with his ART, and has had an undetectable load for at least six months, he will be unable to transmit the virus.[108] If the accuracy of the Swiss statement can be assumed, then an undetectable viral load is even more effective in prevention than condom use.

Highly Active Antiretroviral Therapy (HAART)

From the above exposition it is evident that the level of the viral load is intrinsically linked to the use of antiretroviral medication. This treatment usually consists of a combination of three types of drugs; this works more effectively than one drug and acts against the virus. If the sufferer of the virus continues to take the appropriate medication the amount of copies/ml of the virus in the blood significantly decreases, thereby decreasing the viral load.[109] Although the use of medication does not

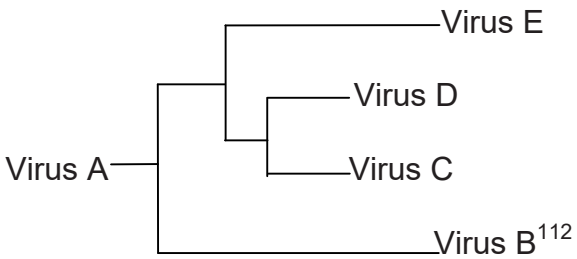
[106] World Health Organisation(n 101)
[107] World Health Organisation(n 101)
[108] Pietro Vernazza and others' 'HIV-positive Individuals Not Suffering From any Other STD and Adhering to an Effective Anti-retroviral Treatment do not Transmit HIV Sexually ' (January 2008) http://www.edwinjbernard.com/pdfs/Swiss%20Commission%20statement_May%202008_translation%20EN.pdf accessed 20 April 2015
[109] ibid

eliminate the virus it will slow down its progress. The taking of the medication has been significant in prolonging the life expectancy of an infected individual, and also reduces the risk of transmission. The combination of anti-retroviral drugs has seen a significant reduction in deaths: 'Huge reductions have been seen in rates of death and suffering when use is made of a potent ARV regimen, particularly in early stages of the disease.'[110]

The Relevance Of Phylogenetic Analysis

Phylogenetic analysis is a scientific method that is utilised to establish whether two HIV strains are related. The test examines the 'differences in the genetic material in these sources',[111] and is capable of identifying whether the strain in an infected individual may match that in another person. This assists in determining whether the infection in the defendant is the equivalent to the infection within the complainant. If the strain of the defendant and the strain of complainant are not related then the virus cannot have emanated from the defendant. If the strains are related then this denotes that the virus may have been transmitted by the defendant. However, HIV is not unique and can mutate inside the host, so phylogenetic analysis can only ever be an estimate of that match. The analysis entails the construction of a phylogenetic tree, and this will set out how the strains are related. An example of phylogenetic tree may assist in demonstrating the potential relationship with strains:

[110] http://www.who.int/hiv/topics/treatment/en/ accessed 21 April 2015
[111] Matthew Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission,* (Routledge-Cavendish, Abingdon 2007) 99



[112]

The phylogenetic tree demonstrates that all of the variants are related to virus A, but C and D are more closely related to A than B and E. There are also other factors that may need to be taken into account. For example, a third party may have transmitted the same strain to the unsuspecting complainant. Therefore, the test, should not be considered as proof of transmission by the defendant.[113] Bernard *et al*, state that the use of 'phylogenetic analysis can, and does, include a certain degree of approximation and error',[114] thereby stipulating that the analysis of the defendant and complainants strains are not conclusive proof that the virus came from the defendant. Scaduto *et al,* also acknowledges that the test is a 'statistical estimate', and cannot have the same robust findings as DNA testing, but forms part of the evidence for the fact-finder to ascertain whether the defendant infected the complainant.[115] Evidence of this type is still highly probative in establishing that the defendant transmitted the virus to the complainant. Indeed, Scaduto *et al* state that, 'phylogenetic methods are ideally suited for determining the HIV pattern of descent in cases of suspected transmission between individuals."[116]

[112] Taken from: Edwin J Bernard and others (n 78)
[113] ibid
[114] Ibid
[115] Diane I. Scaduto and others, 'Source Identification in Two Criminal Cases Using Phylogenetic Analysis of HIV-1 DNA Sequences' (2010) 107 Proceedings of the National Academy of Sciences 21242, 21245
[116] ibid 21242

The above discourse demonstrates that there a number of scientific and statistical factors that must be considered before ascertaining the culpability of the defendant. It is generally accepted that unprotected sexual intercourse is the pre-dominant means of transmitting the virus. The use of condoms, and the type of sexual activity, significantly lowers the risk of the virus being transmitted. An individual's viral load is also relevant to the risk of HIV transmission, and the viral load can be reduced by taking appropriate medication. There is, however, concerns with identifying how the virus is transmitted by the defendant to the complainant as phylogenetic analysis can only be considered as an estimate of the route of transmission, and further evidence will normally be required.

Methodology: Why a Comparative Study?

The extant position in England denotes that there is a pressing need for reform. As the purpose of the thesis is to provide a bespoke piece of legislation that addresses this need, it seems that a comparative analysis would be ideally suited for any reform proposals. The decision to conduct comparative research on this subject is evident, as a comparative analysis affords an opportunity to evaluate external jurisdictional solutions to similar problems. [117] The aim of such as study is 'to expose existing legal systems, cultures and traditions to a thorough review'.[118] An examination of the respective jurisdictions to this extent can present innovative approaches to the criminalisation of the sexual transmission/exposure to HIV.[119] Zweigert and Kötz

[117] Basil Markensinis, 'Comparative Law – A Subject in Search of an Audience' (1990) 53 Modern Law Review 1
[118] Günter Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26 Harvard International Law Journal 411, 413
[119] Konrad Zwigwert and Hein Kötz, *n Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Oxford University Press 1998) 44

stipulate that this type of study can provide more solutions to contemporary challenges than the most inventive legal scholars.[120] A comparative study can, therefore, act as an aid to a legislator.[121] To achieve this facilitation the focus is intentionally straitened, and this remit must now be considered.[122]

Micro-comparison or Macro-comparison?

Zweigert and Kötz suggest that the basis of any comparative law study is either a micro-comparison or a macro-comparison.[123] The difference between the two approaches is apparent, and a micro-comparison has been identified to assess, 'specific legal institutions or problems, that is, with the rules used to solve actual problems or particular conflicts of interests'. A macro-comparison does the opposite, and does not 'concentrate on individual concrete problems and their solutions', but is more concerned with general questions. As the study focuses upon a specific legal problem that does not draw upon an evaluation of larger concerns this study can be safely categorised as a micro-comparison.

Although the distinction between these is sometimes 'flexible',[124] in these circumstances it is helpful to distinguish between the two differing approaches. The narrowness of the focus of the study dictates that a micro-comparison is necessary, as it is judicial precepts and specific legislation that has criminalised the sexual transmission/exposure to HIV that is the basis of this inquiry. It would be superfluous to address other matters that would fall within the ambit of macro-comparison. For

[120] ibid 15
[121] ibid16 -17
[122] Markensinis (n 117) 21
[123] Zwigwert and Kötz (n 119) 4-5
[124] Zwigwert and Kötz (n 119) 5

example, there is no requirement for any macro-comparative discourse on procedural matters or methods of statutory interpretation within each jurisdiction. The task at hand does not, nor should it, afford this as the comparative threshold. Any comparison can be simply put as an analysis of the criminalisation of the sexual transmission/ exposure to HIV. The inquiry also becomes more intricate than is initially suggested as the focus addresses specific sub-issues within that arena of criminalisation, thereby further endorsing a micro-comparison.

The Appropriate Comparative Methodology

The above discourse does not denote that the methodology of all comparative legal studies is polarised as the distinction between micro-comparison and macro-comparison merely signifies the scale of the inquiry. The proponents of micro-comparison and macro-comparison, Zweigert and Kötz, contend that there is no accepted methodological approach to a comparative study.[125] It can be safely asserted that there is too much in law that can be compared for there to be a unique methodological approach to comparative studies. There are, however, numerous methodological approaches, and Frankenberg suggests that there are five 'dominant paradigms' to address the methodology question.[126] Hug has stated that there are five distinct approaches to this field of study.[127] Graziadei also identifies that there is an eclectic approach to the methodology of comparative law by noting that, 'no one could have forseen the plurality of methods which are currently being practiced…'.[128] Thus, it is apparent that there is more than one approach to a comparative analysis,

[125] ibid 33
[126] Frankenberg (n 118) 426 -8
[127] Hug (1922) in Peter De Cruz, *Comparative Law in a Changing World* (Cavendish, 1995) 6
[128] Michele Graziadei, 'The Functional Heritage' in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press2003) 101

and this is not, nor is it intended to be, a treatise of various methodologies that can be adopted.

Despite the numerous approaches one method is considered to be the appropriate route to examine at micro level, and this is the pre-requisite for this study.[129] A functional approach is adopted as functionalism is one of the methods of mirco-comparison,[130] and should, therefore, be the 'basis of case studies'.[131] There is an acknowledgement that functionality is the 'basic methodological principle in all comparative law',[132] and that it is the 'best working tool in comparative legal studies'.[133] Graziadei advocates the adoption of the functional method as, '…a response to a specific set of rather narrow and difficult theoretical questions'.[134] The functional approach is a suitable methodology for the current inquiry as the thesis centres upon one specific issue, and how this has affected all of the comparator jurisdictions.

This is not the end of the matter as a functional approach to comparative law can be further subdivided.[135] Michaels has identified seven approaches to a functional analysis:

> *"(1) the epistemological function of understanding legal rules and institutions, (2) the comparative function of achieving comparability, (3) the*

[129] Esin Örücü, 'Developing Comparative Law' in Esin Örücü and David Nelken (eds) *Comparative Law a Handbook* (Hart Publishing, 2007) 51-52
[130] Ralf Michaels, 'The Functional Method of Comparative Law ' in Mathias Reimann and Reinhard Zimmerman (eds) *The Oxford Handbook of Comparative* (Oxford University Press2008) 341
[131] Gerhard Dannemann, 'Comparative Law: Study of Similarities and Differences?' in Mathias Reimann and Reinhard Zimmerman (eds) *The Oxford Handbook of Comparative Law* (Oxford University Press2008)407
[132] Zwigwert and Kötz (n 119) 34
[133] Michele Graziadei (n 128) 100
[134] ibid 103
[135] Ralf Michaels, (n 130) 363- 364

presumptive function of emphasizing similarity, (4) the formalizing function of system building, (5) the evaluative function of determining the better law, (6) the universalizing function of preparing legal unification, and (7) the critical function of providing tools for the critique of law."[136]

This analysis, for the main, can be considered to fall under heading number five. The essence of a 'better law' analysis is the identification of a law that performs the 'functional equivalence' within all of the jurisdictions. This is essential as, 'incomparable cannot be usefully compared and in law the only thing which are comparable are those which fulfil the same function.'[137] The detection of the appropriate law does not appear to be a simple task, and Zweigert and Kötz state that to unearth the functional equivalent requires 'imagination and discipline'.[138] A tool to assist in this task is to ask an initial question, and this question must be structured in 'purely functional terms'.[139] The conceptualisation herein adopts this perspective, and the question can be constructed in this manner: how do the countries deal with those who transmit or expose unsuspecting individuals to HIV? The question is specific, and it is, therefore, simple to determine the extant legal position in each jurisdiction, as all of the countries that are the basis of this analysis have criminalised activities that expose or transmit the virus to an unsuspecting partner.

[136] ibid 363-364
[137] Zwigwert and Kötz (n 119) 34
[138] ibid 37
[139] ibid 34

The Structure of the Analysis

To complete a coherent comparative analysis an appropriate structure is required. The approach to this work generally adheres to the structural proposals of Zweigert and Kötz,[140] but with added ingredients. Initially, each chapter will provide a discourse of the appropriate philosophical or theoretical underpinnings that 'ought' to form the basis of criminalisation of the type of conduct that is being examined. This will then be followed by a separate exposition of the law within each of the jurisdictions. Zweigert and Kötz suggest that this should be objective and free from critique. This can, for the majority of the discussion, be achieved, but the uniqueness within the current approach denotes that there must be further critique and this is derived from academic opinion, and the theoretical and philosophical teachings. The separate discourse on each jurisdiction is necessary, otherwise the similarities and differences could not be considered in a holistic manner.[141] This can, and does, signify that further analysis is required,[142] and the concluding element of each chapter provides a suggested statutory provision for *de novo* reformulation.

A Quasi-Doctrinal Comparative Analysis

This analysis will compare the similarities and differences of the jurisdictional approaches with the purpose of determining the better law. The thesis is predominantly of 'functional equivalence', to the extent that the majority of the

[140] Zwigwert and Kötz (n 119) 43
[141] Nils Jansen, 'Comparative Law and Comparative Knowledge' in Mathias Reimann and Reinhard Zimmerman (eds) *The Oxford Handbook of Comparative* (Oxford University Press2008) 306
[142] ibid 306

discourse is upon legal doctrine,[143] but it would be naïve to anticipate that an analysis that is exclusive to the jurisdictional approaches would necessarily provide an optimal solution. This may transpire, but another aspect must be considered as the better law within a jurisdiction does not necessarily denote that it is founded upon the general tenets of the criminal law. Therefore, to optimize the solution, the law in the jurisdictions must also be explored by contemplation of philosophical, theoretical and established doctrinal underpinnings. This is not just a comparison of the law of the jurisdictions, this inquiry in unique and goes further by identifying the most suitable legislative or judicial precept that ought to correspond to philosophy, theory and well-established doctrines of the general criminal law.

Methodology: The Choice Of Countries

The choice of country for comparison was not immediately obvious, but it was contemplated that it would be suitable to identify two jurisdictions: one that has specific legislation, and the other that has utilised the general criminal law. This has been achieved by surveying the law of the United States and Canada. To do otherwise, and encompass more jurisdictions, may have broadened the parameters of the thesis, but risked convoluting the purpose of the work. This approach will provide the thesis with the optimal opportunity to identify the most appropriate law for the criminalisation of the sexual transmission/exposure to HIV. There is sufficient scope within the United States to potentially draw upon fifty different jurisdictional approaches. This is not to state that other jurisdictions could not perform the same function, but the accessibility of judicial precepts and legislative framework from the

[143] William Twining, 'Globalisation and Comparative Law' in Esin Örücü and David Nelken (eds) *Comparative Law a Handbook* (Hart Publishing, 2007) 80

U.S. and Canada denote that these countries are most suited to a better law analysis.

The wealth of primary and secondary sources emanating from Canada and USA provide a cogent rationale for the inclusion of these countries. This assists in achieving the overall objective of this work, to provide an optimal bespoke legislative framework. No other countries have as many convictions or appeals within this segment of the criminal law. It would seem obvious that South Africa would be an appropriate choice for a comparative analysis of the criminalisation of the sexual transmission of HIV. South Africa has an estimated 6.4 million people who are infected with HIV, and this equates to 12.2% of the general population.[144] Despite this level of infections there has been no true criminalisation of the sexual transmission/exposure to HIV. The scarcity of criminal sanctions, convictions or appeals within South Africa infers that it would be problematic to construct an effective comparative analysis that included that jurisdiction. This is at its most apparent when you consider that the first conviction for sexual transmission of HIV in South Africa was in 2013.[145] The jurisdiction is, therefore, underdeveloped to assist in providing a thorough analysis of the criminalisation of the sexual transmission/exposure to HIV. Other African jurisdictions, in terms of criminalisation are slightly more developed, but are predominantly at an embryonic stage. For example, Cameroon currently has a draft piece of HIV legislation, and there has only been one conviction for transmission/exposure to HIV within that country.[146]

[144] http://mg.co.za/article/2014-04-01-sa-holds-highest-number-of-new-hiv-infections-worldwide-survey last accessed 8 December 2015
[145] http://sbeta.iol.co.za/news/crime-courts/hiv-man-loses-appeal-over-unprotected-sex-1561786 last accessed 12 October 2015
[146] http://criminalisation.gnpplus.net/country/cameroon last accessed 12 October 2015

Countries from other continents also provide little assistance as there is a scarcity of cases or criminal sanctions to enable an effective comparative analysis. For example, Japan has no specific law or a general criminal law that has been utilised for the sexual transmission/exposure to HIV, and incidences of HIV infection are relatively low.[147] It may have been plausible to survey a country from the European continent, for example, the French jurisdiction has seen 20 prosecutions for exposure or transmission of HIV.[148] This still does not provide as rich a vein of material as Canada or U.S.A. South American countries are also deficient in terms of cases and statutory provisions to be able to enable a thorough examination. The lack of primary sources is evident in Colombia where only one individual has been prosecuted for sexual transmission/exposure.[149] The access to the materials is also a significant factor that is worthy of consideration, and this has further validated an inclination to the jurisdictions of U.S.A. and Canada. No other countries have seen as much activity in relation to the criminalisation of the sexual transmission/exposure to HIV.[150]

England The 'Parent' System

Any comparatist must firstly study their own law.[151] As the 'parent system'[152] is England, and the potential deficiencies of s20 of the Offences Against the Person Act 1861 legislative framework form the basis of this thesis, it seems obvious that the English jurisdiction is included within this analysis: to proceed without an

[147] http://criminalisation.gnpplus.net/country/japan last accessed 12 October 2015
[148] http://criminalisation.gnpplus.net/country/france last accessed 12 October 2015
[149] http://criminalisation.gnpplus.net/country/colombia last accessed 12 October 2015
[150] Alison Symington,'Criminalisation Confusion and Concerns: The Decade Since the Cuerrier Decision' (2009) 14 HIV/AIDS Policy and Law Review 1, 9 http://www.aidslaw.ca/site/wp-content/uploads/2013/04/141-EN.pdf accessed 22 April 2015
[151] Max Rheinstein, 'Comparative Law-Its Functions, Methods and Usages'(1968) 22 Arkansas Law Review 414, 416
[152] Zwigwert and Kötz (n 119) 41

examination of this jurisdiction would be defective. Therefore, the English criminal justice system's approach to the criminalisation of the sexual transmission/ exposure to HIV is fundamental to this research as an overarching template.

The Criminalisation of HIV Transmission in England

There is nothing contemporary about criminal prosecutions through non-fatal offences for the transmission of disease in England. In the 19th Century the common law of England established that a person could be prosecuted for the transmitting a venereal disease.[153] The decisions in *Bennett*[154] and *Sinclair*[155] received heavy criticism,[156] and in the later stages of the 19th Century the law changed to exclude the transmission of disease.[157] In *Clarence,* it was held that a husband could not be guilty of an offence if he transmitted a venereal disease to his wife without her knowledge of the risk of infection, but where the act of sexual intercourse itself was consensual. The often-criticised decision of *Clarence* remained the law in England for over 100 years.

Despite the first cases of infection appearing in the early 1980's, the criminalisation of the sexual transmission of HIV was not immediate.[158] The initial Government response to the spread of the virus was the formation of numerous support groups and to raise public awareness.[159] Public awareness was not the only response, and

[153] *R. v. Bennett* (1866), 4 F. & F. 1105; *R. v. Sinclair* (1867), 13 Cox C.C. 28
[154] *R. v. Bennett* (1866), 4 F. & F. 1105;
[155] *R. v. Sinclair* (1867), 13 Cox C.C. 28
[156] *Hegarty v. Shine* (1878), 14 Cox C.C. 145.
[157] *R. v Clarence* (1888) 22 Q.B.D. 23
[158] http://www.tht.org.uk/our-charity/Our-work/Our-history/1980s accessed 22 April 2015
[159] http://www.avert.org/uk-aids-history.htm accessed 22 April 2015

against expert advice more punitive laws were enacted that would mean that individuals with AIDS could be detained in hospitals. [160]

Other than the draconian detention through hospitalisation, it was the public health drive, rather than criminalisation of the sexual transmission/exposure of HIV, that emerged as the policy of successive governments. The notion of criminalising transmission of the virus was explored in 1993 when the Law Commission proposed that the 'deliberate or reckless transmission' of disease should be criminalised.[161] The proposal was not acted upon, and in 1998 the Government stated that, as a matter of policy, they did not wish to legislate to secure convictions for the reckless transmission of disease. It was felt that the only conduct that should be within the ambit of the criminal law should be the intentional transmission of disease.[162] It seemed that the focus would remain on preventative measures, and the sexual transmission of the virus would not be criminalised. Ten years after the Law Commission Report the position was altered as the English courts convicted a number of individual defendants for reckless transmission of HIV.[163] It has been suggested that the first criminal transmission case 'caught everyone napping',[164] even though there had been discontent with *Clarence,* as it was based upon Victorian morality and an antiquated perception of marriage.[165] The utilisation of s20 of the Offences Against the Person Act 1861 to encompass the sexual transmission of HIV is unique to England, and neither Canada or the United States have

[160] http://www.avert.org/uk-aids-history.htm accessed on 25/07/2012
[161] Law Commission, *Legislating the Criminal Code Offences Against the Person and General Principles* (Law Com. 218 1993) para. 15.17
[162] Home Office, *Violence: Reforming the Offences Against the Person Act 1861* (1998) para 3.18
[163] *R v* Dica [2004] QB 1257 ; *R v Konzani* [2005] EWCA Crim 706; [2005] 2 Cr.App.R. 14
[164] http://www.aidsmap.com/page/1423501/ accessed 22 April 2015
[165] Kate Gleeson, 'The Problem of Clarence Brutal at his Best James Fitzjames Stephen and the Doctrine of Sexual Inequality' (2005) 14 Nottingham Law Journal 1,2

prosecuted an individual under identical provisions, or within the parameters of a similar offence-definitional construct.

The American Jurisdiction: A Unique Common Law System With HIV Specific Legislation.

Zweigert And Kötz propose that to conduct a comparative analysis that includes England with the exclusion of the United States would be 'flawed'.[166] It seems that the American jurisdiction is an obvious choice, but this is not the only rationale for the inclusion of the United States. Undoubtedly, the United States is identified as a member of the common law family,[167] and for the first hundred years subsequent to independence the former colony predominantly followed English precedent.[168] The justice system then began to evolve so that each state court could seek guidance from federal law, other state's precedents, and English judicial precepts. This 'comparative law making' by the various states was still considered to be a common law approach. The approach towards criminal law has further evolved so that the fifty states that form the union have their own unique codified approach to criminal law. There is no uniform approach, but courts can use, and still use, other States and federal appellate decisions. The distinct codification of the criminal law, within the U.S. States, has meant there has been a divergent approach to the criminalisation of the sexual transmission/exposure to HIV. All States have criminalised this conduct, and this has been achieved through the general criminal law or as a specific piece of legislation. Providing a bespoke legislative framework is something that has not

[166] Zwigwert and Kötz (n 119) 41
[167] ibid
[168] Markus Dirk Dubber, 'Comparative Criminal Law' in Mathias Reimann and Reinhard Zimmerman (eds) *The Oxford Handbook of Comparative* (Oxford University Press2008) 1299

transpired in England or Canada and this is the primary rationale for the inclusion of the United States. As there is specific laws it is obvious that this is fertile ground for a comparative analysis, and the analysis of the American position will focus upon the states that have enacted specific legalisation.

This is not an analysis that surveys the institutions of the jurisdictions, but focuses upon one specific issue. This connotes that it was unnecessary to look at a civil law jurisdiction that criminalised sexual transmission/exposure to HIV. The American jurisdiction also provides a wealth of material and this must assist in providing a comprehensive study of the potential options. The United States stands as the predominant jurisdiction in establishing a collection of individuated laws that are specific to HIV transmission/exposure. An alternative could have been Australia,[169] where Victoria has specifically criminalised HIV, but this would have been more restrictive than an analysis of the United States. Moreover, Canada and U.S. legal systems lead the way in prosecutions for this bespoke offence, consequently providing fertile ground for distillation of substantive law.[170]

The Criminalisation Of HIV In The USA

In the United States, criminalisation of the sexual transmission/exposure of HIV was not immediate within the majority of states. Wolfe and Vinzena propose that there was three stages to the criminalisation of the sexual transmission/exposure to HIV

[169] Crimes Act 1958 - Sect 19A
[170] http://www.hivandthelaw.com/basic-information/fast-facts accessed 3 April2015

within the United States.[171] The first stage of criminalisation was when the HIV virus was initially discovered. At that time, a number of states amended sexual transmitted infection laws to incorporate HIV into the list of sexually transmitted infections.[172] By the middle of the 1980's, prosecutions for transmission/exposure to HIV began to emerge.[173] The prosecutors in these cases were consistent, as on each occasion they had utilised the traditional criminal laws as a route towards inculpation.[174] The utilisation of the general criminal law did not deter States from enacting HIV specific legislation, and by 1986 a number of jurisdictions had enacted HIV specific statutes with particularised offence elements.[175] Other state legislators were beginning to introduce Bills to prosecute individuals for knowingly transmitting/ exposing others to the virus.[176]

President Reagan, aware of the global HIV epidemic requested that an advisory commission be formed to investigate, *inter alia,* the legal issues pertaining to the virus. In 1988, the Presidential Commission on the Human Immunodeficiency Virus Epidemic[177] published a fundamental report (Watkins Report). It identified that States' traditional criminal laws may be inadequate to prosecute individuals who transmit or expose the virus to unsuspecting complainants. The Watkins Report recommended that all States enact HIV specific legislation, as 'carefully drafted' laws would send out an unequivocal message that certain types of conduct was 'socially

[171] Leslie E. Wolf and Richard Vezina, 'Crime And Punishment: Is There a Role for Criminal Law in HIV Prevention Policy?' (2004) 25 Whittier Law Review 821, 844
[172] ibid 844
[173] Schultz (n 84) 69
[174] Jaclyn Schmitt Hermes, ' The Criminal Transmission of HIV: A Proposal to Eliminate Iowa's Statute' (2002) The Journal of Gender, Race & Justice 473, 477
[175] Jodi Mosiello, 'Why The Intentional Sexual Transmission Of Human Immunodeficiency Virus (HIV) Should Be Criminalized Through The Use Of Specific HIV Criminal Statutes' (1999) 15 New York Law School Journal of Human Rights 595, 610
[176] Schultz (n 84) 69 -70
[177] The Presidential Commission on the Human Immunodeficiency Virus Epidemic Report (1988)

unacceptable'.[178] The Watkins Report recommended that any penal legislation should be concentrated upon those who 'knew' that they had the virus, and should only criminalise conduct that was 'a scientifically established mode of transmission'.[179] Further recommendations suggested that disclosure of one's HIV status to prospective sexual partners should be a requirement, and that precautions should be utilised.[180]

The consequence of the Watkins Report meant that criminalisation of HIV exposure/transmission was inevitable, and by 1990 twenty one states had HIV exposure laws.[181] In that same year the Ryan White Comprehensive AIDS Resources Emergency (CARE) Act was passed. Wolf and Vinzena propose that the CARE Act was the primary reason for the second stage of criminalisation.[182] The purpose of the CARE Act was to provide AIDS relief grants to States; this funding would only be accessible if States certified that they had adequate laws to prosecute the intentional transmission of HIV.[183] This infers that States were coerced into enacting legislation, or modifying their existing laws. It has also been suggested that the Act was the 'catalyst' for HIV specific statutes,[184] and that by implication the 'forcing' of law has been futile in preventing the spread of HIV.[185] Contrastingly, it has been suggested that the rationale for HIV specific legislation was that States recognised that there was difficulties in attempting to prosecute individuals under the

[178]The Presidential Commission (n 177) 130
[179] ibid 130-131
[180] ibid 131
[181] Wolf and Vezina (n 171) 840
[182] ibid 840
[183]*Ryan White Comprehensive AIDS Resources Emergency (CARE) Act of 1990*, 42 U.S.C. (2000)
[184] Mosiello (n 175) 599
[185] Karen E Lahey, 'The New Line of Defense: Criminal HIV Transmission Laws' (1995) 1 Syracuse Journal of Legislation and Policy 85, 88

traditional criminal law. [186] Whatever the motive for enacting HIV specific laws, by 1993 over half of the States had enacted HIV specific legislation;[187] many of these were considered to be 'vague' and drafted 'too hastily'.[188] Other states fulfilled the obligation by amending public health laws or using traditional criminal laws.[189] By the time that the certification requirement within the CARE Act was repealed all States had confirmed that they had sufficient laws to prosecute HIV infected individuals.[190]

The final stage of criminalisation was understood to have emanated from the much-publicised case of Nushawn Williams, [191] who exposed over fifty unsuspecting women to the virus.[192] This case, and other well-documented trials,[193] enraged the public, and prompted states to enact new legislation, or re-consider their laws and enact more punitive laws.[194] The extant position within the U.S. is that all of the states have laws in position to prosecute individuals who expose or transmit the virus to unsuspecting individuals and the majority of those states have a specific legislative frame work for external review.

Canada: The Same As England But Different.

To achieve the maximum potential that a cross-jurisdictional analysis can offer it was perceived that the inquiry should also focus upon a country that has criminalised

[186] Amy Decker, 'Criminalising the Intentional or Reckless Exposure to HIV a Wake Up Call to Kansas' (1998) 46 University of Kansas Law Review 333, 335
[187] James B. McArthur, 'As the Tide Turns: The Changing HIV/AIDS Epidemic and the Criminalization of HIV Exposure' (2009) 94 Cornell Law Review 707, 715
[188] Thomas W. Tierney, 'Criminalizing the Sexual Transmission of HIV: An International Analysis' (1992) 15 Hastings International and Contemporary Law Review 475 , 511
[189] Mosiello (n 175) 599
[190] Wolf and Vezina (n 171) 840
[191] ibid 844
[192] Arianne Stein, 'Should HIV be jailed? HIV Criminal Exposure Statutes and their Effects in the United States and South Africa' (2004) 3 Washington University Global Studies Law Review 177, 180
[193] ibid 180
[194] Wolf and Vezina (n 171) 844

this type of conduct through the general criminal law. Gutteridge goes further and stipulates that when determining what country to compare, the comparator must search for similarity in, 'the stage of legal, political and economic development', and to do otherwise may create an 'illusory comparison'.[195] Initially then it may be asserted that the Canadian jurisdiction is similar in that it has criminalised conduct via the general criminal law, and that the country is a westernised jurisdiction. This infers that the approach may be the same as England, but this is simply not the case, and Canada is thought to 'lead' the way with prosecutions.

Canada is a former colony of the British Empire, but was initially occupied by French immigrants. The dynamics of the country changed after the American war of independence when subjects loyal to the Crown left the U.S and emigrated to Canada. The Canadian jurisdiction was tied to English law, and until recently the Courts followed decisions from the most senior courts in England. This approach has been replaced, and the current position is that Canada follows its own form of precedent, and has codified the criminal law. It can be said that, 'there is an increasing independence in Canadian legal thought.'[196] Thus, the Canadian jurisdiction follows the same common law tradition as England, but is distinct. One final consideration that further justifies Canadian inclusion within this analysis is that Canada, as stated, is considered to be one of the countries that leads the way in relation to criminalisation of the sexual transmission/exposure to HIV,[197] consequently facilitating identification of a more straitened ideological perspective.

[195] Harold C Gutteridge, *Comparative Law* (Cambridge University Press, Cambridge 1946) 8-9
[196] Zwigwert and Kötz (n 119) 224
[197] http://www.hivandthelaw.com/basic-information/fast-facts accessed 22 April 2015

The Road To Criminalisation In Canada

The first officially reported case of an AIDS related death in Canada was in 1982. An account of the event was discussed in the March edition of *Canada Diseases Weekly Report.* It was reported that a gay man died of an unusual disease in the February of that year.[198] Infections from the virus then began to spread, but this was predominantly within the gay community.[199] Despite the increase in the rate of infections, the criminalisation of exposure and transmission were not initially considered as an option. The Government, and provinces of Canada, were more inclined to respond to the epidemic through public health initiatives. Criminalisation of the sexual HIV exposure/transmission of HIV appeared to be legally redundant. There were calls for criminalisation and eventually prosecutions began to emerge.[200] The prosecutors and police began to use the traditional criminal laws. It has been suggested that this development only transpired because of the indiscriminate nature of the virus; it was no longer exclusively attributed to gay men or a particular community.[201]

In 1989, the Court of Appeal of Alberta heard the first sexual exposure appeal case, but this was in relation to sentencing. In *R v Summer,*[202] the defendant was charged with common nuisance,[203] as he had had unprotected intercourse with five people knowing that he was HIV+. There were no allegations of transmission, and the defendant had pleaded guilty to the charge. This was the foundational basis for

[198] Ann Silversides, *The Canadian Association for HIV Research: The First 15 Years* (Toronto 2006) 5
[199] http://www.phac-aspc.gc.ca/aids-sida/info/1-eng.php accessed 22 April 2015
[200] Todd Ducharme, ' Preparing for a Legal Epidemic: An Aids Primer for Lawyers and Policy Makers'(1988) 26 Alberta Law Review 471, 498
[201] Erin Dej and Jennifer M. Kilty '"Criminalization Creep": A Brief Discussion of the Criminalization of HIV/AIDS Nondisclosure in Canada' (2012) 27 Canadian Journal of Law and Society 55, 58
[202] 1989 ABCA 232
[203] *Criminal Code,* RSC 1985, c C-46 s180

subsequent prosecutions, and generally defendants pleaded guilty.[204] This recognition of their culpable conduct initially precluded further appellate cases that were able to afford any legal analysis of the core overriding issues. This changed in 1991, in *R v Lee,*[205] where the allegation was aggravated assault as the defendant had transmitted the virus to the complainant through consensual unprotected intercourse. The Court of Appeal in Ontario held that Lee could not be convicted of the offence if the unsuspecting complainant had consented to sexual intercourse. The focus appeared to be re-directed to community based and public health approaches. It was stated that by the mid-90's, a 'more balanced response' developed whereby mutual responsibility seemed to be the norm rather than criminal prosecutions.[206]

The decision by the Supreme Court of Canada in *R v Cuerrier*[207] signified a change in policy as defendants could subsequently be prosecuted under the assault provisions of the Criminal Code. It was irrelevant whether a complainant had consented to unprotected sexual intercourse, they must have consented to unprotected intercourse with an HIV+ individual. The ramifications of *Cuerrier* were evident as the Canadian criminal justice system observed an increased number of prosecutions for transmission/ exposure to HIV. The increase has been significant, and by 2010 there had been 122 cases involving HIV non-disclosure.[208] It has been stated that approximately 69% of all HIV exposure cases have taken place since the

[204] R. v. *Mercer* 1993 CanLII 7755 (NL CA), R. v. *Kreider* (1993), 140 A.R. 81
[205] (1991) 3 OR (3d) 726
[206] Barry D Adam and Others, ' Effects of the Criminalisation of HIV Transmission in *Cuerrier* on Men Reporting Unprotected Sex with Men' (2008) 123 Canadian Journal of Law and Society 143 -159
[207] *R. v. Cuerrier*, [1998] 2 SCR 371
[208] Eric Mykhalovskiy, and Glenn Betteridge, 'Who? What? Where? When? And with What Consequences? An Analysis of Criminal Cases of HIV Non-disclosure in Canada' (2012) 27 Canadian Journal of Law and Society 31, 36

decision in *Cuerrier*.[209] There are also suggestions that Canada now, whether rightly or wrongly, leads the way in criminalising the sexual transmission/exposure of HIV: 'Canada currently has the unsettling (dis)honour of being a world leader in criminalizing HIV exposure'.[210]

Summary

To test the appropriateness of s20 of the Offences Against the Person Act 1861 in sexual transmission of HIV cases, and to achieve the aim of this work, the thesis will espouse the following approach. Chapter two will address the first research question by discussing the philosophical definition of knowledge and the extant position of knowledge within the general criminal law. There will also be discourse on the laws that has criminalised the sexual transmission/ exposure to HIV within all of the jurisdictions. This will identify through a comparison of the jurisdictions that the current English approach is deficient as no clarity is imparted in relation to this fundamental requirement. The analysis of the similarities and differences with the jurisdictions will provide the opportunity to propose a bespoke legislative framework to overcome this discrepancy. The next chapter will provide an analysis of the *actus reus* of the offence within the jurisdictions. This will address the second research question and determine the validity of the various approaches to transmission and exposure by assessing the similarities and differences. It will provide an analysis that is also tested against Feinberg's harm principle.[211] It will be determined that

[209] ibid 38
[210] Symington (n 150)
[211] Feinberg (n 59)

criminalisation must encompass sexual transmission and exposure to the HIV virus, and these will be the basis of the proposed statutory provision.

Chapter four is concentrated upon the competency of a complainant to consent to having intercourse with an HIV+ individual. This will consider the differing approaches within the jurisdictions, and examine these against the concepts of factual and normative consent. The similarities and differences of the various criminal justice systems approaches will also be analysed before providing a suggested legislative framework that will adhere to normative consent. Chapter five will examine alternative defences to any criminal sanction for sexually transmitting or exposing an unsuspecting complainant to the virus. Empirical research has identified that condom use, an undetectable viral load, and certain types of sexual activity significantly reduce the risk of the virus being transmitted. It will be shown that none of these defences has been fully explored within the judicial precepts of England. The critique of the extant position within the Canada and the United States recognises that in some situations the defences of condom use, viral load and type of sexual activity may be accessible to defendants. It will be determined that the analysis of the comparator jurisdiction precepts adduces and optimal solution to facilitate these defences.

The final chapter revisits the objectives of the thesis, and presents the recommendations that confirm that there are defects in utilising s20 in cases of sexual transmission of HIV. This details the findings of the inquiry and provides the optimal pathway to the criminalisation of this type of conduct. As the overarching aim of this thesis is to provide a bespoke statute it is consequently set out in its entirety

within this chapter. These recommendations will provide certainty, and act as an appropriate deterrent whilst, still retaining appropriate culpability thresholds.

Chapter Two

Knowledge And The HIV Positive Defendant

Introduction

The purpose of this chapter is to identify the primordial conditions that are needed for a defendant to be deemed to 'know' that they are infected with HIV. The chapter is not pre-eminently concerned with the culpability thresholds attached to a defendant's liability, but is based upon how it can be established that the defendant possessed knowledge of their sero-status. Thus, determining that the defendant knows that he has the virus does not automatically infer guilt; it merely signifies that the defendant knows that he has the virus *per se*. Identifying what should be the appropriate level of awareness will provide a definition of knowledge that can be incorporated into a specific piece of *de novo* legislation that focuses upon the criminalisation of the sexual transmission/exposure of HIV. It will be determined that the knowledge requirement of the defendant in sexual transmission/exposure of HIV cases should be based upon a wider definition than actual knowledge so as to include a conceptualisation of wilful blindness.[1]

In order to achieve the overarching aim of this thesis, the provision of new statutory footing in this substantive arena, the construct of knowledge is deconstructed within five parts in the chapter. Each of the first four parts of the chapter are utilised to

[1] Glanville Williams, *Criminal Law: The General Part* (2nd ed. 1961), 159 "*To the requirement of actual knowledge there is one strictly limited exception. Men readily regard their suspicions as unworthy of them when it is to their advantage to do so. To meet this, the rule is that if a party has his suspicion aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance, he is deemed to have knowledge*."

propose a rationale for including wilful blindness as an appropriate knowledge requirement, and sets out the position of knowledge within each of the comparator jurisdictions. The first section of the chapter will consider the traditional philosophical assumption of propositional knowledge.[2] A discussion of propositional knowledge provides an understanding of what should be considered to be knowledge. It will be demonstrated that actual knowledge in relation to HIV can be compartmentalised into a philosophical understanding of knowledge, whilst wilful blindness would be precluded within this extirpation. To address the exclusion of wilful blindness from the definition of propositional knowledge the second section of the chapter will provide a rationale for allowing wilful blindness to be a substitute for actual knowledge. This will be achieved by identifying other substantive grounds that permit wilful blindness to be considered as a substitute for actual knowledge.

The third part of the chapter will set out the general position of knowledge in substantive criminal law precepts for all of the respective jurisdictions. Each country will be dealt with separately, and a sequential discussion provides a general overview of knowledge in the legal systems addressed, consequentially enhancing our understanding of how a defendant's awareness is considered within the broader criminal law of that country. This will be followed by a tripartite analysis of the approach within each legal system to a defendant's knowledge of their sero-status in HIV specific cases. The section will, thus, commence by initially addressing how knowledge has been defined in the general criminal law of England. It will be established that the doctrine of wilful blindness is fully operational within this

[2] Proposition knowledge is traditionally considered to be a justified true belief in the existence of a fact: Jonathan Jenkins Ichikawa, and Matthias Steup , 'The Analysis of Knowledge' *Stanford Encyclopaedia of Philosophy* (Spring 2014 Edition) Edward N. Zalta (ed.), 1 http://plato.stanford.edu/archives/spr2014/entries/knowledge-analysis/ accessed 16th January 2015

jurisdiction. An exposition of the position of knowledge in relation to HIV transmission cases within England will then be highlighted. The discourse will identify that there is a lack of clarity as to the knowledge requirement within English senior courts, and the extant position is derived from a Court of First Instance determination and limited Crown Prosecution Service (CPS) guidelines.

The same approach will be replicated in relation to Canada, where it will be identified that the general criminal law facilitates the doctrine of wilful blindness. Following this holistic identification of wilful blindness as sufficient to establish knowledge in Canadian criminal law, the focus of the discussion will then centre upon the current knowledge requirement in sexual transmission/exposure of HIV cases. It will be ascertained that the Canadian judiciary have confirmed a defendant will be considered to have knowledge of their HIV status if they have been wilfully blind to the existence of that fact. The final section of this part of the chapter will provide a discussion of the American approach to knowledge. It will be recognized that the general doctrinal approach to criminal law enables knowledge to be established if the defendant is wilfully ignorant, and this is synonymous to wilful blindness.[3] This is followed by discourse of divergent state law approaches to HIV transmission/exposure in the United States. It will be demonstrated that there are two distinct approaches by the States: a number of States' legislative provisions expressly stipulate that actual knowledge is the requirement; and more opaquely a number of State statutes have not considered the parameters of the knowledge requirement in any real sense and the condition remains ill-defined.

[3] The term wilful blindness will be used throughout the chapter

The penultimate section of the chapter provides a comparison of the law of the three countries within this tripartite analysis. It is clear that all of the jurisdictions have accepted actual knowledge to demonstrate that a defendant knew of his sero-status. It will be revealed that the law has developed differently in each jurisdiction in relation to wilful blindness. The direct utilisation of wilful blindness to establish knowledge in HIV transmission/exposure cases can only be conclusively attributed to Canada because of a Supreme Court decision therein that endorsed this approach. In England, it is the lower courts and CPS guidelines that allow for the utilisation of the doctrine. The discordant U.S. State statutory provisions, and dissonant judicial precepts, do not confirm whether a defendant will be considered to know if he is wilfully blind.

The final part of the chapter provides a new pathway in adoption of a generic knowledge criterion, by proposing a statutory provision that encompasses individuals who possess actual knowledge of their status, and individuals who are wilfully blind as to their condition. It is accepted that the proposed legislative definition of wilful blindness may be outwith the prevailing philosophical considerations of knowledge. The rationale for the inclusion of wilful blindness is primarily founded upon the doctrine being utilised in the general criminal law, and such an individual being demarcated as equally aware as an individual who possesses actual knowledge. It is now expedient to assess the philosophical understanding of knowledge in this designated context.

The Philosophical Approach to Knowledge

The issue with knowledge and HIV in a legal sense, is the level of 'awareness' that a defendant must have of their sero-status to be considered accountable for transmission or exposure of another to the virus. The current position in each of the jurisdictions emphasises the importance of knowledge, but there has been no true consideration of the parameters of knowledge, and if the requirement should correspond to a philosophical definition of the term. Therefore, a proposal that may be aligned to any legal definition of knowledge, within HIV cases, may emanate from an assessment of that term from a philosophical perspective. This may assist in identifying the most applicable means of clarifying what should be the requisite knowledge requirement in HIV transmission/exposure criminal cases.

In epistemology there are three types of knowledge that can be examined.[4] The appropriate analysis for the current conceptualisation of knowledge is known as propositional knowledge.[5] A philosophical analysis of propositional knowledge proposes the conditions that are necessary for an individual to have the knowledge of the existence of a fact.[6] This is the type of understanding that a HIV+ defendant ought to have of their sero-status. From the outset it must be stated that this is not a thorough analysis of the various components that are contentious in relation to propositional knowledge.[7] The following exposition will focus, albeit briefly, upon elements that are germane to the criminal transmission/exposure of HIV.

[4] Jeremy Fantl, ' Knowledge How' *Stanford Encyclopaedia of Philosophy* (Fall 2014 Edition) Edward N. Zalta (ed.), http://plato.stanford.edu/archives/fall2014/entries/knowledge-how/ accessed 16th January 2015
[5] ibid
[6] Ichikawa and Steup (n 2) 1
[7] ibid

The Traditional Approach to Propositional Knowledge

The traditional assumption of propositional knowledge stipulates that knowledge must consist of a justified true belief. The terms 'justified', 'true' and 'belief' are separate conditions, but each is necessary to fulfil that knowledge requirement. This definition is no longer considered to be an accurate account of knowledge,[8] as it has been suggested that more is necessary for propositional knowledge to exist. For present purposes, the primary focus will be upon the traditional assumption of what will equate to knowledge, as knowledge within the context of HIV may be acquired if the defendant has a justified true belief. In order to ascertain whether the actual knowledge and wilful blindness can equate to propositional knowledge the three conditions of 'justified', 'true' and 'belief' necessitate further examination.

Truth As A Necessary Condition For Propositional Knowledge

There seems to be no overarching concern with the truth condition, as a fact cannot be false and true.[9] The truth condition may be identified as an individual having the virus. If an individual receives a test that confirms that he is HIV+ then this denotes that the truth condition is fulfilled, as what is true cannot be false. Anything devoid of an actual test may not attain the echelons of truth, as it is plausible to state that an individual who has not received a confirmation of their status cannot satisfy the truth condition. There is uncertainty as to whether they will have the virus. This may be the case even if that individual is suffering symptoms, as the truth will only be ratified once an individual has taken the test. Contrastingly, an individual who is suffering

[8] Ichikawa and Steup (n 2) 1
[9] ibid 4

symptoms may also be understood to have satisfied the truth condition if he did have the virus as the fact is true. Therefore, there must be existence of the fact for the truth condition to be fulfilled. This would be relevant to actual knowledge, wilful blindness and constructive knowledge. The accentuation of the law in all of the jurisdictions is that wilful blindness connotes a deliberate avoidance of the truth, but that does not denote that the truth does not exist.[10]

Belief As An Essential Ingredient Of Propositional Knowledge

It is generally acknowledged that the truth condition itself is not controversial, but an acceptance of belief is more contentious. [11] For example, It has been proposed that an individual can acquire knowledge without belief, as he can acknowledge that a fact is correct, but be unsure of its actual existence.[12] If this proposed interpretation of knowledge is precise then this may signify that the knowledge requirement, in HIV cases, could be fulfilled without an individual believing their sero-status. Under these conditions it may be promulgated that the defendant has 'knowledge', whether he desires to believe the existence of the fact or not.[13] This type of situation can be surveyed in the Canadian case of *R v Iamkhong,*[14] where the defendant chose to disbelieve a test that had confirmed that she was HIV+. There the defendant was convicted of criminal negligence. It was deemed that she still had the requisite knowledge requirement. Knowledge without belief may also include a wilfully blind individual. An individual who displays symptoms may be aware that he has the virus

[10] below p57-58, 74-74, 91-93
[11] Ichikawa and Steup (n 2) 6
[12] See generally Colin Radford, 'Knowledge-By Examples' (1966) Analysis 27.1 1-11
[13] Ichikawa and Steup (n 2) 6
[14] *R v Iamkhong* 2009 ONCA 478

as he suspects the existence of that fact. In this circumstance it may indicate that he is finding it difficult to resolve what has transpired.[15]

So how then can the defendant still attain knowledge without forming the belief that they are HIV +? Could an individual still know that he has the virus without believing? To acquire actual knowledge of ones' sero-status a belief can be considered an essential element of the knowledge requirement. Belief in these situations does not necessarily denote that you have to believe. It is the origin of the belief that assists in confirming actual knowledge of ones' HIV status. This may emanate from a positive test, as a test confirming the status leaves an individual with no option but to believe. The condition is fulfilled whether the recipient wishes to believe or not. He will still have attained that belief. The same cannot be stated in relation to wilful blindness. As will be seen, wilful blindness in a legal context is attained by suspicion.[16] If the traditional assumption of knowledge is the pre-requisite for the appropriate awareness then a suspicion would not equate to propositional knowledge. If there is to be an alignment of philosophical and legal definitions of knowledge, then a wilfully blind individual may be excluded as someone who knows the existence of a fact. Although belief is a higher form of advertence than suspicion,[17] suspicion ought to suffice in these circumstances. Therefore, consideration of alternatives for the rationalisation of the requisite awareness that is based upon wilful blindness, rather than a philosophical understanding, is necessary. The final component for propositional knowledge will now be explored.

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[15] Ichikawa and Steup (n 2)

[16] See: *Westminster City Council v Croyalgrange Ltd and Another* [1986] 2 All ER 353 at 359" *it is always open to the tribunal of fact, when knowledge on the part of a defendant is required to be proved, to base a finding of knowledge on evidence that the defendant had deliberately shut his eyes to the obvious or refrained from inquiry because he suspected the truth but did not want to have his suspicion confirmed*" ; *Sansregret v. The Queen*, [1985] 1 S.C.R. 570; United States v Jewell 532 F.2d 697, 702 (9th Cir. 1976)

[17] Oxford English Dictionary belief: a firm opinion

Justification As A Qualifying Condition For Propositional Knowledge

In the tripartite analysis of knowledge, a true belief must also be justified. The justification condition is a necessary component, and eliminates such terms as luck.[18] It is possibly the justification condition that is the most contentious in reconciling propositional knowledge. One of the disparate perspectives as to the justification condition is whether the proposition is internally or externally verified. Internalism has been attributed to a number of definitions, and it can be stated that it, '… requires only really proper thought on the part of the subject…'.[19] The crux of internalism, under this definition, is that attention is upon the individuals' own cognitive abilities, and how he processes that information. This is termed 'mentalism' by Conee and Feldman, who also acknowledge that there are alternative definitions of internalism.[20] It is mentalism that is preferred by Conee and Feldman, as it connotes 'simplicity and clarity'.[21] Mentalism can be demonstrated by the individual who is able to attain actual knowledge of their HIV status. There must be some cognitive process whereby the individual assesses the information in order to attain the justification to believe that he has the virus. This would almost certainly be achieved by an individual who has received a positive test. A further example may be an individual who has been exposed to the virus, but has not yet been tested, and is suffering the symptoms akin to having the virus. Internal mechanisms would afford the individual with the opportunity to evaluate whether he has acquired

[18]Ichikawa and Steup (n 2)
[19] Ernest Sosa, 'Skepticism and the Internal/External Divide' in John Greco and Ernest Sosa (eds), *The Blackwell Guide to Epistemology* , (Blackwell 1999)147.
[20] Richard Feldman and Earl Conee, 'Internalism Defended' (2001) 38 American Philosophical Quarterly 1, 2
[21] ibid

the virus, and it would be their cognitive process that enabled them to come to that conclusion.

The equivalent rationale can be promulgated for externalism, which may also emanate from a positive test, and also an individual's lifestyle, as both may be described as external factors that influence the individual's evaluation of whether a proposition is justified. It is apparent that whether a justification invokes internal or external mechanisms, each may be aligned to an individual, and knowledge of their HIV status. In either circumstance a justification would correlate to actual knowledge or wilful blindness, even if the legal definition of knowledge does not expressly require a justification.

Beyond A Justified True Belief?

If knowledge is assessed under the above definition,[22] it is evident that actual knowledge is within the ambit of propositional knowledge. This corresponds to the judicial precepts of England, Canada and the United States.[23] A philosophical definition of knowledge also has the potential to encompass those who were wilfully blind if a belief supersedes suspicion as to the existence of a fact. The current definitional construct of wilful blindness, within a legal context, does not accommodate belief. To convolute matters further, Gettier[24] proposes that a person can acquire a justified true belief but not possess knowledge. In other words an individual could have justified true belief of something that is not a fact. The defects

[22] Ichikawa and Steup (n 2)
[23] As will be discussed below
[24] Edmund Gettier, 'Is justified True Belief Knowledge?' (1963) 24 Analysis 121,123

that are identified by Gettier denote that an internal justification, as discussed above, ought to be discarded as an individual may be mistaken, and that propositional knowledge is exclusively attributed to being externally verified.[25]

The identification of the problem, with the traditional assumption of what is considered propositional knowledge by Gettier, promulgates that there can be further qualifications to be attributed to a justified true belief and this continues to be deliberated amongst epistemologists. Proposals suggest that the justification condition must be reinforced, or that a fourth condition be attached to a justified true belief. There is no consensus as to the fourth condition, but it has been proposed that knowledge can only be identified if, and only if, that further condition is incorporated. Definitions of what ought to be the fourth condition have included 'sensitivity' and 'lack of falsehood'. The utilization of a fourth condition, or further qualification, to the traditional assumption may be superfluous to actual knowledge within the context of a legal awareness of ones' sero-status. It seems that an individual would attain actual knowledge if he possessed a justified true belief via testing and no qualification to this assumption would be necessary. The suggested enhancements may also not assist in facilitating wilful blindness for inculpation purposes as the concern appears to be in relation to just the justification condition, and not a belief.

The most persuasive means to circumvent the problem that was identified by Gettier, within the context of HIV and the actual knowledge requirement, is reliabilism but this also precludes wilful blindness. Reliablists suggest that knowledge is only attained if

[25] Douglas N. Husak, D and Craig A. Callender, 'Wilful Ignorance, Knowledge and the Equal Culpability Thesis: A Study of the Deeper Significance of the Principle of Legality (1994) Wisconsin Law Review 29 , 44 - 46.

the justification emanates from a reliable source.[26] One of the simpler reliabilism theories purports that reliablism displaces the justification condition.[27] Dretske also proposes that there is no benefit to including justification, providing the information is reliable, therefore, knowledge can be attained without a justification.[28] Actual knowledge of sero-status would always emanate from a reliable source, denoting that utilizing either reliability or the justification condition would suffice, and either would achieve the same outcome. In contrast to these suggestions, Zagzebski submits that a reliable source does not resolve the distinction between knowledge and a true belief, and, therefore, adds no value to the epistemologist understanding of knowledge.[29] However, Sosa purports that beliefs only become knowledge if the source is 'reliable enough'.[30] In the current context, knowledge, encompassing reliability would be achieved by a positive test.

Reliability, may be equated to HIV transmission/exposure cases, and can be considered as equally effective as a justification in ascertaining that the defendant had actual knowledge of their sero-status. This approach denotes that it is undemanding to incorporate testing, in general, but is problematic when attempting to reconcile individuals who have symptoms that are synonymous to being infected. Thus, the alternative to the traditional assumption does not enhance the prospects of the utilization of wilful blindness, within the philosophical framework. What is definitive, from the above exposition, is that wilful blindness may not suffice to fulfil the philosophical knowledge requirement, and other rationales must be analysed to

[26] Alvin Goldman and Erik Olsson, 'Reliabilism and the Value of Knowledge' Adrin Haddock, Alan Millar and Duncan Pritchard (eds), *Epistemic Value*, (Oxford University Press 2009) 22
[27] Ibid 23
[28] Ibid
[29] Linda Zagzebski, 'The Search for the Source of Epistemic Good' (2003) 34 Metaphilosophy 12, 13
[30] Ernest Sosa, *A Virtue Epistemology : Apt Belief and Reflective Knowledge Volume I*: (Oxford University Press 2007), 89

provide cogent grounds for its inclusion as a level of awareness.[31] The following section will now address wilful blindness, and the justification for the utilisation of the doctrine in cases where the knowledge of the defendant is an issue that needs to be resolved.

Wilful Blindness As A Substitute For Actual Knowledge

The following is not a treatise on the validity of wilful blindness within the criminal law, but merely provides a brief account of the conditions that justify its inclusion as a form of knowledge. Wilful blindness can be knowledge within a legal sense, but this does not equate to actual knowledge.[32] It has even been suggested that being suspicious as to the existence of a fact equates to a lack of knowledge, rather than knowledge itself.[33] How then can a wilfully blind individual be considered to have knowledge in the eyes of the law? It has been proposed that wilful blindness, as a knowledge standardization, can be defined as 'genuine knowledge',[34] or as a 'substitute for knowledge'.[35] It is considered to be a form of genuine knowledge as the individual is deemed to have actual knowledge. The above discourse on the philosophical understanding of knowledge has identified that the definition of wilful blindness cannot be considered to be actual knowledge as deficiencies are inculcated within the belief condition. Williams has also proposed that wilful blindness is established when a defendant, '*almost…actually knew'*,[36] thereby denoting that the doctrine is not identical, but is an alternative to actual knowledge.

[31] Husak and Callender (n 25)
[32] Deborah Hellman, 'Wilfully Blind for Good Reason' (2009) 3 Law and Philosophy, 301, 303
[33] Comment, 'Wilful Blindness as a Substitute for Criminal Knowledge' [1977] 63 Iowa Law Review 466, 473
[34] Husak and Callender (n 25) 42
[35] ibid
[36] Williams (n 1) 159

The distinction between actual knowledge and wilful blindness is apparent within the context of HIV case law, as a defendant can be considered to have an appropriate level of awareness as all of the information is accessible, but the defendant declines the opportunity to attain actual knowledge. Therefore, he may not possess actual knowledge, but because of his enhanced level of awareness it can be considered to be a substitute for knowledge.[37]

The assertion that wilful blindness is a substitute for actual knowledge is further validated by Wasik's submission that whether a defendant is wilfully blind is a question of law, and not a question of fact.[38] This is logical in relation to the philosophical underpinnings of propositional knowledge. Propositional knowledge cannot be obtained as a fact by a wilfully blind individual, as this would transform that awareness into actual knowledge. It also affirms that, as it is a question of law, wilful blindness is a substitute to knowledge rather than being the threshold equivalence of knowledge. The defendant ought to be considered to be aware of his sero-status when he has actual knowledge or suspect that he has the virus, and does not pursue confirmation of that fact.

An alternative proposition for the inclusion of the doctrine suggests that individuals who are wilfully blind are as equally culpable as those who act knowingly. In these circumstances, it could be said that wilful blindness is the 'moral equivalent'.[39] Charlow suggests that a vital component that connotes equal culpability is that there

[37] Rollin M. Perkins, 'Knowledge as a *Mens Rea* Requirement' (1978) 29 Hastings Law Journal 953, 964
[38] Martin Wasik and MP Thompson, 'Turning a Blind Eye as Constituting *Mens Rea'* (1981) 32 Northern. Ireland. Legal Quarterly. 328, 334
[39] Husak and Callender (n 25), 53

is a 'corrupt motive' for avoiding the truth.[40] The equal culpability thesis is not considered appropriate as a justification for utilising the doctrine of wilful blindness in sexual transmission/exposure of HIV cases. Individuals with actual knowledge, and those who are wilfully blind, should be considered to be equally aware rather than equally culpable. A wilfully blind individual may not have attained actual knowledge, but can still be considered to know that a set of facts exists. He could easily investigate, but declines to confirm his suspicions: Husak defines this conceptually as being 'highly sensitive'.[41] In the current context it is merely utilised to demonstrate that in the eyes of the law the individual knows of their sero-status.[42] The rest of the chapter will provide an overarching rationale for extending criminal sanctions to encompass wilful blind individuals, beginning with an analysis of the English judicial precepts, and the knowledge requirement in the broader context.

The Knowledge Requirement In English Law: The General Criminal Law

Actual Knowledge in English General Criminal Law

An extant exposition of the knowledge requirement of a defendant in sexual transmission/exposure of HIV cases, can beneficially be extrapolated via a contextual examination of what is considered to be 'awareness' within the general criminal law of England requirement. This assists in identifying whether the development of the knowledge in HIV cases ought to correspond to established criminal law doctrines within the particularised jurisdiction. In England, it is the

[40] Robin Charlow, 'Wilful Ignorance and Criminal Culpability' (1992) 70 Texas Law Review 1351, 1417
[41] Husak and Callender (n 25) 55
[42] Hellman (n32) 302

judiciary that have defined the knowledge criterion. Lord Scarman in *Taaffe*,[43] a case concerning the importation of cannabis, held that knowledge must be assessed on the facts as the defendant believed them to be.[44] Belief is an essential constituent of propositional knowledge,[45] but within a legal context certain gradients of belief have been deemed to be superficial, as these are considered a lower form of awareness.[46] For example, if the belief is that a set of facts probably exists[47] or that a defendant possesses a mere belief in the existence of a fact, then these are determined to be insufficient levels of awareness.[48] These variations do not signify that an individual would be unaware of a set of facts existing, it merely denotes that he does not have actual awareness in the existence of a fact, and more is to be expected.

It is clear that there is a distinction to be drawn between a belief and actual knowledge, as an individual can believe in the existence of a fact, but not acquire actual knowledge.[49] To attain actual knowledge, a belief must consist of more than a speculative state; a more precise element must be incorporated.[50] This modification, in a legal sense, has been stated to be whether the facts are true.[51] An alternative proposal suggests that to acquire knowledge there must be a 'positive belief' that a fact exists.[52] In *Saik,*[53] it was affirmed that to have actual knowledge the defendant

[43] *R v Taaffe* [1984] A.C. 539
[44] ibid 546
[45] Above p 67 -68
[46] *R v Reader*(1978) 66 Cr. App. R. 33, 37; *R v Hall* [1985] 81 Cr. App. R. 260, 264
[47] *R v Reader*(1978) 66 Cr. App. R. 33, 37
[48] *R v Hall* [1985] 81 Cr. App. R. 260, 264
[49] Above p 67
[50] ibid
[51] Steven Shute, 'Knowledge and Belief in the Criminal Law' in Steven Shute and Andrew P Simester (eds), *Criminal Law Theory: Doctrines of the General Part* (Oxford University Press 2002) 191
[52] Andrew P Simester, John R Spencer and G Robert Sullivan, *Simester and Sullivan's Criminal Law Theory and Doctrine* (Hart Publishing 4th Edition 2010) 149
[53] *Saik* [2006] UKHL 18

must have a 'true belief' in the existence of a fact.[54] The definition does not accord to the philosophical understanding of the term, and as previously adumbrated, justification is omitted from the legal description of actual knowledge. The express insertion of justification may, however, be unnecessary in sexual transmission/exposure of HIV cases as a defendant will be considered to have acquired actual knowledge of his sero-status if he has tested positive for the virus. In those circumstances it can be inferred that actual knowledge of his sero-status would be justified. English courts have traditionally accepted lesser forms of knowledge within the definitional construct of substantive crimes.

The English General Criminal Laws Approach To The Doctrine of Wilful Blindness

An extension to actual knowledge that is broadly recognised within the criminal law of England is the doctrine of wilful blindness. In these circumstances, the parameters of knowledge can be extended to he who has 'wilfully shut his eyes' to the existence of a fact.[55] Therefore, a fundamental element of the doctrine is that the defendant must 'close their eyes' to a set of circumstances.[56] A further component is that there must be a deliberate intention to refrain from making that enquiry.[57] As the defendant has deliberately chosen to decline the opportunity to confirm the existence of a fact, it can be asserted that that individual is as equally aware as an individual who possesses actual knowledge of a fact.[58]

[54] ibid [26]
[55] *R v Grainge* [1974] 1 All ER 928, 930
[56] *R v Griffiths* (1974) 60 Cr. App. R. 14; *Westminster City Council v Croyalgrange Ltd and Another* [1986] 2 All ER 353
[57] *Roper v. Taylor's Central Garages* (Exeter) Ltd [1951] 2 T.L.R. 284, 288
[58] Wasik and Thompson (n 38) 330

In England, emphasis has initially been placed on the defendant's belief in the existence of a fact. James LJ in *Griffiths,*[59] disregarded a defendant being suspicious and submitted that an individual is wilfully blind if he 'knew or believed … he deliberately closed their eyes to the circumstances'. The contrary position was proclaimed by Lord Bridge, in *Westminster City Council v Croyalgrange,*[60] extending the parameters of wilful blindness to encompass a defendant who 'suspects' that a fact is true.[61] It may be that a suspicion will always suffice to establish wilful blindness, as *Westminster* was decided in the House of Lords, and *Griffiths* was heard by the Court of Appeal. As previously noted, the utilisation of a suspicion rather than a belief distinguishes wilful blindness from actual knowledge, and would be ineffectual in philosophical terms as a belief is a pre-requisite for propositional knowledge. As the defendant is aware of the existence of a fact, but chooses not to confirm that it is true, this denotes that it is possible that he may still possess knowledge of that fact.[62] The final alternative form of knowledge will now be discussed through the legal prism of constructive knowledge

The English Approach To Constructive Knowledge Within The Criminal Law

The third categorisation of knowledge, 'constructive knowledge', has been dismissed for criminal liability purposes.[63] Devlin J. elaborated on the issue by stating, that there is a difference between 'deliberately' avoiding the truth, and 'neglecting' to

[59] *R v Griffiths* (1974) 60 Cr. App. R. 14, 18 : *"To direct the jury that the offence is committed if the defendant, suspecting that the goods were stolen, deliberately shut his eyes to the circumstances as an alternative to knowing or believing the goods were stolen is a* misdirection. To direct the jury that, in common sense and in law, they may find that the defendant knew or believed the goods to be stolen because he deliberately closed his eyes to the circumstances is a perfectly proper direction."

[60] *Westminster City Council v Croyalgrange Ltd and Another* [1986] 2 All ER 353

[61] ibid 359" *it is always open to the tribunal of fact, when knowledge on the part of a defendant is required to be proved, to base a finding of knowledge on evidence that the defendant had deliberately shut his eyes to the obvious or refrained from inquiry because he suspected the truth but did not want to have his suspicion confirmed*"

[62] Above p 67

[63] *Roper v. Taylor's Central Garages* (Exeter) Ltd [1951] 2 T.L.R. 284

enquire.[64] The former denotes awareness, whilst the latter connotes what may be an inability to perceive the circumstances and, therefore, there is a distinction between the two conflicting concepts of knowledge. Such gradients of awareness ought to be excluded in HIV transmission cases, as a defendant may be convicted of an offence when he was unaware of his sero-status. Although it is proposed that constructive knowledge is not sufficient as a level of awareness within the context of HIV transmission, such objective advertence has been employed,[65] and a number of criminal statutes in England accommodate this lower threshold.[66] These primarily focus upon professional misconduct, or where the penalty is less onerous.[67]

It seems evident that the current criminal law position on knowledge encompasses those who possess actual knowledge, and also individuals who are wilfully blind. The general exclusion of constructive knowledge can be founded upon the objectivity of this form of awareness, as a defendant in those circumstances may not be aware of their sero-status, but be deemed to have known. For these reasons the discussion on the English position on knowledge, and the sexual transmission of HIV, will primarily focus upon actual knowledge and its lesser partner, wilful blindness, and these alternatives will now be considered.

[64] ibid 289 "*There is a vast distinction between a state of mind which consists of deliberately refraining from making inquiries, the result of which the person does not care to have, and a state of mind which is merely neglecting to make such inquiries as a reasonable and prudent person would make*."
[65] For example: Protection of Harassment Act 1997; The Proceeds of Crime Act 2002
[66] ibid
[67] ibid

The Knowledge Requirement And English Criminal Law: Cases Of Sexual Transmission of HIV

From the preceding discourse it can be assumed that an individual who possesses actual knowledge that he is a carrier of the virus will be considered to be aware of his sero-status. Issues ensue when the alternative categorisation of knowledge, wilful blindness, is assessed. The aforementioned discussion has identified that wilful blindness can be a substitute for actual knowledge, and may be considered an appropriate level of awareness within the general principles of English criminal law.[68] It does not presumptively accord that wilful blindness will be a substitute for actual knowledge when the offence is concomitant to the criminal transmission of HIV. The current position is that the knowledge requirement has not been fully subject to judicial scrutiny or legislative consideration.

A Law Commission Scoping Paper has recently identified a defendant's awareness as a pivotal consideration.[69] It is recognised by the Law Commission that *Dica*[70](the leading appellate decision in this arena) has not provided any confirmative guidance on whether 'knowing' can extend to cases where the defendant is wilfully blind.[71] The Scoping Paper identifies that there are two schools of thought on the requisite knowledge requirement: those who advocate actual knowledge and academicians who propose that wilful blindness is the requisite threshold.[72] There is a recognition by the Law Commission that, although these circumstances will be rare, individuals who are wilfully blind to the existence of their sero-status should be considered to

[68] *Westminster City Council v Croyalgrange Ltd and Another* [1986] 2 All ER 353
[69] Law Commission, *Reform of the Offences Against the Person* (Law Com CP No 217, 2014) para 6.24
[70] *R v Dica* [2004] QB 1257
[71] Law Commission (n 69) para 6.36
[72] ibid para 6.37

have knowledge of that status.[73] The rationale for this conclusion is that only a defendant who, 'deliberately decides against being tested, despite being aware of evidence of a risk affecting him or her that is significantly greater than the general background risk that must be assumed for any random sexual encounter' should be accountable.[74]Thus, the Law Commission accept that individuals who have actual knowledge of their sero-status, and those who a wilfully blind to the existence of that fact ought to be within the ambit of the criminal law.

The Knowledge Requirement Expounded in R v Dica

The distinct lack of clarity *vis-à-vis* the knowledge requirement in sexual transmission of HIV cases is a direct reflection of the paucity of precedential authorities that have effectively considered this determinant. In *Dica,*[75] the defendant was charged under section 20 of the Offences Against the Person Act 1861,[76] and was convicted of recklessly transmitting HIV to two unsuspecting complainants. Judge LJ, who delivered the leading judgment, appeared to contemplate the extent of the defendant's knowledge requirement as to their sero-status. First, his Lordship 'acknowledged' Professor Spencer's definition of recklessness. [77] Judge LJ implied that he approved of Spencer's proposal, as it was referred to as 'illuminating' within the judgment.[78] Spencer had suggested:

[73] ibid para 6.39
[74] Law Commission (n 69) para 6.38
[75] *R v Dica* [2004] QB 1257
[76] Offences Against The Person Act 1861 s20. Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor (sic), and being convicted thereof shall be liable to be kept in penal servitude
[77] *R v Dica* [2004] QB 1257 [54]
[78] ibid

> "*To infect an unsuspecting person with a grave disease you know you have, or may have, by behaviour that you know involves a risk of transmission, and that you know you could easily modify to reduce or eliminate the risk, is to harm another in a way that is both needless and callous. For that reason, criminal liability is justified unless there are strong countervailing reasons. In my view there are not*."[79]

Thus, under Spencer's proposals, a defendant would be considered to 'know' of their sero-status if he knew or he might know that he has the virus. [80] This is particularly relevant to the question of knowledge, as the term 'might be' infected invariably denotes wilful blindness. It materialised that Spencer's comments were merely observed by Judge LJ, and the dicta was not declarative as his Lordship appeared to offer an alternative proposal as to the knowledge requirement when he stated that:

> "*The effect of this judgment in relation to s.20 is to remove some of the outdated restrictions against the successful prosecution of those who,* ***knowing that they are suffering HIV or some other serious sexual disease, recklessly transmit it through consensual sexual intercourse,*** *and inflict grievous bodily harm on a person from whom the risk is concealed and who is not consenting to it*."[81](emphasis added)

It is evident that Judge LJ refers to the defendant 'knowing' that he has the virus, implicating 'actual' belief, and [82] thereby excluding 'may be' from the primordial definitional construct. The term 'may be' is excluded from this extrapolation, but it does not confirm anything, even though there are those who are under the misapprehension that using the word 'knowing' declaratorily confirmed that actual knowledge is the requirement.[83] Proponents have insisted that any reference to

[79] John R Spencer, 'Liability for Reckless Infection--Part 2' (2004) 154 New Law Journal 448
[80] ibid
[81] *R v Dica* [2004] QB 1257 [58]
[82] ibid
[83] Matthew Weait and Yusuf Azad, 'The Criminalization of HIV Transmission in England and Wales: Questions of Law and Policy' *(2005)* 10 HIV/AIDS Policy and Law Review 1, 6 http://www.aidslaw.ca/site/wp-content/uploads/2013/04/EngWales_HIV-Review10-2-E.pdf accessed 18th April 2015

'knowing' is exclusively attributed to actual knowledge.[84] Weait assumed that *Dica* confirmed that actual knowledge was the requirement in these types of cases, by advocating this 'narrow approach' to knowledge,[85] as this would preclude those who 'ought to know' they are carrying the virus, thereby denoting an exclusion of constructive knowledge. This 'narrow approach', suggested by Weait, indicates that any wilfully blind individual would be excluded from any inculpatory consideration. It is suggested that this is a misapprehension as to the clarity of the prevailing knowledge requirement, as Weait offered no broader deliberation of the general criminal law, and the parameters of knowledge therein. Wilful blindness can be a substitute to actual knowledge, if the offence in question signifies that this is a sufficient part of the fault element. The aforementioned extrapolation of the general criminal law of England denotes that wilful blindness can be considered to be an appropriate threshold to establish that an individual 'knew' across a spectra of offence–definitional constructs.

How can the use of 'knowing', without further qualification, specify exclusivity to this higher form of knowledge? It is disconcerting that it has been presumptively decided that actual knowledge was the requirement when there was an insufficient foundation to base this upon. The deliberate avoidance of acquiring actual knowledge, by not being tested or partaking in further enquiry, exemplifies one instance that justifies the inclusion of wilful blindness for the definitional construct of a specific offence.

[84] Lisa Cherkassky, 'Being Informed: The Complexities of Knowledge, Deception and Consent when Transmitting HIV' (2010) 74 Journal of Criminal Law 242, 252
[85] Weait and Azad (n 83) 5

Knowing indicates awareness on the part of the defendant, and such a term can be, and has been, espoused to incorporate wilful blindness.[86] There is also a presumption that the decision signified that those who 'may know' they have the virus would be liable.[87] It was suggested by Spencer that this struck, 'the appropriate balance';[88] however, this was never specified within any element of *Dica*. Actual knowledge, as the requirement, is not predetermined, nor does Judge LJ specify that wilful blindness is included as a fault prerequisite. No clarification can be affirmed as to the knowledge threshold gradation for the appropriate level of awareness. Any assertions to the contrary are at best ill-founded. If his Lordship desired to confirm the position then it ought to have been expressly stated, rather than left in the ether.

Konzani And Knowledge Of Sero-status

In the subsequent case of *Konzani,*[89] the defendant was charged under s20 and convicted of recklessly transmitting HIV to three unsuspecting complainants. In this case Judge LJ stated that:

> "*If an individual who knows that he is suffering from the HIV virus conceals this stark fact from his sexual partner, the principle of her personal autonomy is not enhanced if he is exculpated when he recklessly transmits the HIV virus to her through consensual sexual intercourse*." [90]

The emphasis was upon 'knowing', and it was also proposed that there should be no conviction unless it is proved that the defendant was 'reckless':[91] recklessness,

[86] *Westminster City Council v Croyalgrange Ltd and Another* [1986] 2 All ER 353, 359
[87] Spencer (n 79) 448
[88] John R Spencer 'Retrial for Reckless Infection' (2004) 154 New Law Journal 762
[89] *R v Konzani* [2005] EWCA Crim 706; [2005] 2 Cr.App.R. 14
[90] *R v Konzani* [2005] EWCA Crim 706; [2005] 2 Cr.App.R. 14. [42]
[91] ibid [43]

generally requires conscious risk-taking.[92] To be capable of being conscious of the risk the defendant must have an awareness that he is carrying the virus otherwise there would be no risk of the virus being transmitted. Weait contends that the knowledge requirement of a defendant is a critical question in ascertaining the risk awareness,[93] therefore the prerequisite ought to be actual knowledge:[94]

> "*In this context a subjective approach to recklessness must mean an awareness of the risk of causing some degree of bodily harm, for which a necessary condition is a person's actual knowledge of their HIV positive status, or of their infection with an STI*." [95]

It has been established that levels of subjective awareness may emanate from actual knowledge or wilful blindness.[96] Under the doctrine of wilful blindness the defendant could still be aware of the risk as he would be deliberately avoiding the truth of their sero-status, thereby having the appropriate level of risk awareness. Knowing in the eyes of the law is not conclusive to actual knowledge; it can, and does, encompass wilful blindness.

R v P: Is The Requirement Actual Knowledge Or Wilful Blindness?

It is evident that Judge LJ in *Dica* and *Konzani* did not afford any comprehensible conclusions as to the parameters of the knowledge requirement within the context of HIV transmission. Indications as to what is the requisite threshold may be gleaned from a peripheral case, where there was an element of elucidation of the necessary

[92] *R v G and Another* [2003] UKHL 50
[93] Matthew Weait, 'Criminal Law and the Sexual Transmission of HIV: *R v Dica'* (2005) 68 Modern Law Review 121, 130
[94] ibid131
[95] ibid 130-131
[96] *Carter v Richardson* [1974] R.T.R. 314

knowledge requirement. In *R v P,*[97] the defendant had been convicted for transmitting the virus to an unsuspecting complainant as the defendant knew of their own sero-status. The transmission of the virus, by the defendant, had taken place after the complainant had received test results confirming that he was HIV negative. There was no issue at trial or appeal in relation to the defendant knowing that she was infected with the virus. The appeal primarily addressed the appropriate level of custodial sentence.

As knowledge was not the basis of the appeal, the Court of Appeal did not express any specific guidance as to the requisite level of knowledge that is expected for a defendant to be deemed to know of their sero-status. The appellate court, however, heard submissions from the Terrence Higgins Trust that specified that there could be severe implications for public health initiatives if a custodial sentence was imposed upon an individual who knows that they are HIV+ and transmits the virus to another. It was stressed that convicting such an individual would discourage individuals from being tested for HIV.[98] In academia there were already submissions that attaching exclusivity to actual knowledge may deter individuals from being tested.[99]

The assertion by the Terence Higgins Trust afforded the Court of Appeal with an opportunity to expound upon the ambit of the knowledge requirement of the defendant in sexual transmission of HIV cases. Regrettably, their Lordships did not perceive the importance of this opportunity as no precise guidance was conveyed as to whether wilful blindness would suffice as knowledge of infection. There were

[97] *R v P* [2006] EWCA Crim 2599
[98] *R v P* [2006] EWCA Crim 2599 [8]
[99] Weait and Azad (n 83) 6

indications of what may equate to knowledge in the circumstances, but this could be considered to be conflicting. Henriques J submitted:

> "*Whilst we accept that there are those suffering from HIV, and indeed from cancer, who, suspecting their illness, prefer not to be diagnosed, we have a duty to deter those who know they are suffering from HIV from recklessly transmitting it to others. Whilst there are those who choose to remain undiagnosed, the illogicality of that stance cannot deter us from punishing properly those who recklessly inflict grievous bodily harm*." [100]

The above dictum incidentally addresses the knowledge requirement, but does not provide clarity, as the statement is conflicting. The discourse may be interpreted so that the requirement is exclusive to actual knowledge, or so as to encompass wilful blindness. The first element of the passage can be understood to denote that actual knowledge was the pre-requisite, as Henrique J appeared to state that prosecutions would still ensue even if individuals refrained from being tested. Alternatively, the final sentence of that passage could infer that wilful blindness would be sufficient. Henrique J stressed that the illogicality of refraining from testing cannot deter convicting 'reckless' individuals, implying that a wilfully blind individual may still be accountable. Thus, the appellate court appeared to offer a snippet of guidance, but did not confirm the knowledge requirement.

Constraining this element of the fault requirement to actual knowledge may be detrimental to public health polices, as individuals who suspect that they have the virus may avoid conviction by evading confirmation of their sero-status. This may signify that more individuals would become susceptible to the virus as more people may refrain from being tested. Whether actual knowledge would deter testing has

[100] *R v P* [2006] EWCA Crim 2599 [9]

been questioned by Ryan who submits that there is no empirical evidence to confirm this, and consequently it is a weak foundation from which to build a definitional schema.[101] It was suggested by Ryan that:

> " *…the law in facts operates as a disincentive to testing and encourages those who suspect they may be HIV positive to avoid having their suspicions medically confirmed so as to escape criminal sanction. It should be noted, however, that while this concern is often expressed there appears to be no empirical evidence to either support or refute it and on the whole it seems a rather weak justification for the utilisation of wilful blindness in HIV transmission cases.."*

As already noted, there is no data available that confirms that wilful blindness would discourage testing, and there is no conclusive evidence that it would have no effect.[102] There is, however, evidence that it is the stigma that has been attached to the virus that acts as a disincentive to being tested.[103] It may be contended that if individuals are unwilling to be tested for the virus, because of the stigma attached, then it is plausible that individuals may refrain from being tested for fear of prosecution. A recent study has also indicated that an individual's understanding of criminal prosecutions for HIV transmission is low: 'awareness and knowledge of the detail of criminal prosecution for sexual transmission of HIV was low in most groups.'[104] This implies that there would be even less consideration given to the intricacies of the knowledge requirement in these cases. As a consequence of these factorisations, the use of the lesser form of knowledge would not undermine or enhance testing, given the lack of understanding in relation to the criminal

[101] Samantha Ryan, 'Reckless Transmission of HIV: Knowledge and Culpability' (2006) Criminal Law Review 981, 987
[102] Scott Burris and Others, 'Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial' (2007) 37 Arizona State Law Journal 467, 472
[103] See Catherine Dodds and Paul Keogh, 'Criminal Prosecutions for HIV Transmission: People Living with HIV Respond' (2006) 17 International Journal of STD and Aids 315, 317 ; Paul Flowers, Barbara Duncan and Jamie Francis 'Community, Responsibility and Culpability: HIV Risk-Management Amongst Scottish Gay Men' (2000) 10 Journal of Community and Applied Social Psychology *285*
[104] Peter Weatherburn and Others, *Multiple chances Findings from the United Kingdom Gay Men's Sex Survey* 2006 (White Horse Press 2008), 46

transmission of HIV. Ultimately, it is the fact that a wilfully blind individual suspects that they have the virus, and deliberately avoids the truth, that is a cogent rationale for the doctrine to be considered as a substitute for actual knowledge in HIV transmission cases.

Wilful Blindness As A Sufficient Level Of Knowledge

A case heard before *Konzani* and not directly attributed to the criminal transmission of HIV, seems to specify that liability would ensue if the defendant is wilfully blind as to his condition. In *Barnes,*[105] Woolf CJ stated that:

> "*This Court held that the man [Dica] would be guilty of an offence contrary to s.20 of the 1861 Act if, being aware of his condition, he had sexual intercourse with them without disclosing his condition."*[106]

The use of 'aware' by Woolf CJ, may denote that a defendant would be accountable if he is wilfully blind. It would be a misconception to disregard this statement, as Judge LJ in *Konzani*[107] referred to Woolf CJ's discourse on knowledge and also approved dictum from *Barnes,* in relation to consent. Wilful blindness as the sufficient fault element has also originated at first instance.[108] In *Adaye,*[109] the defendant, who had not been diagnosed with having the virus, pleaded guilty to sexually transmitting HIV to an unsuspecting complainant. Judge David Lynch stated that the defendant 'knew' it was highly likely that he was infected with the virus.

[105] *R v Barnes* [2004] EWCA Crim 3246 [10]
[106] ibid [10]
[107] *R v Konzani* [2005] EWCA Crim 706; [2005] 2 Cr.App.R. 14.
[108] Adaye Reported in The Times, January 10, 2004
[109] ibid

Further validation of wilful blindness as the appropriate threshold requirement, emanates from the Crown Prosecution Service (CPS) guidelines.[110] The CPS approve of prosecuting defendants who have not been tested, but may be 'aware' that they are carrying the virus.[111] Examples of individuals who may have the requisite awareness include a person who has undergone preliminary diagnosis, but have not taken any formal test, and those who are displaying symptoms of having the virus.[112] The CPS acknowledges that prosecuting cases of wilful blindness will be 'exceptional', but still accept that such individuals ought to be held accountable for their actions and open a pathway to potential inculpation.[113]

It has been promulgated that facilitating awareness based upon wilful blindness would denote that the net of liability may encompass individuals who have had unprotected sex, and have never been tested for the virus.[114] Ryan states that:

> "*imposition of liability in the absence of actual knowledge spreads the net of criminal liability very widely indeed. If actual knowledge is not required then every individual who has ever had unprotected sex and who has not received a negative HIV test result would potentially be liable."* [115]

Ryan's assertion would even exceed the requirements for constructive knowledge. In reality, such defendants would not be accountable, as there must, as a minimum, be some indication that they may have the virus. There must be some prompt that enables the defendant to assess the circumstances. This would enable a defendant

[110] Crown Prosecution Service (CPS) 'Intentional or Reckless Sexual Transmission of Infection' <http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/index.html#Safe accessed 18th April 2015
[111] Crown Prosecution Service (n 110)
[112] ibid
[113] ibid
[114] Ryan (n 101) 988 -989
[115] ibid 988 -989

to contemplate that he may have the virus. Having unprotected intercourse would not achieve this threshold unless others factors came to light.

It has been submitted by other that it is detrimental to promote wilful blindness as the required fault level as an individual can only know they have the virus if he has been tested.[116] The assertion, however, is unquestionably misguided as there are abundant methods whereby it can be postulated that an individual has been wilfully blind as to their HIV status.[117] For example, the individual may have been for a preliminary discussion with a doctor who has recommended a test, and they have then failed to attend the subsequent appointment. An individual could also have a suspicion that he may have the virus. This could be achieved by displaying symptoms that are consistent with being HIV+, and has partaken in high risk activities knowing that their partner is HIV+. Under the aforementioned examples, a defendant could be justified in determining that he has the virus.

The Correct Approach To The Knowledge Requirement in England

In truth, there is a lack of clarity on the parameters of the knowledge requirement in England and Wales. All comments, at appellate level, that have historically discussed knowledge were merely *obiter dicta,* and never confirmed this essential element of the fault requirement. It may be broadly interpreted to encompass wilful blindness, or narrowly so that actual knowledge was the prerequisite. A vital definitional component of the offence remains opaque, and subject to conjecture on

[116] Matthew Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (Routledge-Cavendish: Abingdon, 2007) 122
[117] 'Policing Transmission A Review of Police Handling of Criminal Investigations Relating to Transmission of HIV in England & Wales, 2005-2008' 27 http://www.tht.org.uk/~/media/EB9C4E12A80E4A54B09453909BDDBA72.pdf accessed 18th April 2015

the appropriate threshold. It is, however, conceded that the knowledge requirement was not the pivotal issue in either *Dica* or *Konzani, as* both defendants possessed actual knowledge of their sero-status. The certified appeals focused on the issue of 'consent' more broadly interpreted, and considered in more detail that context.

It is evident that actual knowledge will always suffice, but there is no clarity as to the use of any other form of knowledge. This lack of precision has not enabled a defendant to ascertain when he may be susceptible to prosecution, and arguably contravenes Article 7 of the European Convention retrospectivity provision.[118] Legitimacy must be prescribed to the appropriate threshold level of knowledge, and the current position unfortunately obfuscates any clarity within the law. It is the appellate court that has declined the opportunity to provide guidance on the matter and ambiguity prevails.[119] The lack of authority may indeed discourage testing, but there is nothing to confirm that this would transpire. A defendant may consider that refraining from being tested enables them to exploit the uncertainty within this area, and exonerate themselves from prosecution, but this is unlikely and does not accord with practical reality. The Court of First Instance and CPS provide that wilful blindness is within the ambit of the knowledge criterion within HIV transmission precepts.[120] It appears then that wilful blindness will be considered as knowledge, as it is the CPS who ultimately decides from a practical perspective whether or not to prosecute.[121] Having critically evaluated the position of knowledge within the English jurisdiction, the perception of actual knowledge and wilful blindness within Canada

[118] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 7
[119] *R v P* [2006] EWCA Crim 2599
[120] Adaye Reported in The Times, January 10, 2004; Crown Prosecution Service (n110)
[121] R v Golding [2014] EWCA Crim 889

will now be considered and important comparators will be adduced within the respective legal systems.

Knowledge: The Canadian Legal System And Extant Law

The General Criminal Law Of Canada And The Knowledge Criterion

In Canadian criminal law it is recognised that using 'knowingly' as a definitional offence construct criterion generally excludes an objective assessment of the defendant's awareness.[122] Knowledge has been defined within a number of Canadian Supreme Court decisions.[123] One definition can be taken from *R v Sansregret,*[124] a case that involved a number of offences including rape.[125] The Supreme Court in *Sansregret* affirmed that 'knowingly' is to be ascribed the meaning that was attributed to the term by Glanville Williams.[126] Williams proposed that 'knowledge, then, means either personal knowledge or (in the licence cases) imputed knowledge. In either event there is someone with actual knowledge.'[127] The definition by Williams enables the broader Canadian approach to actual knowledge to correspond to propositional knowledge, as previously adumbrated.[128] In philosophical terms an individual will have attained 'personal knowledge' if he has justified true belief in the existence of a fact.[129] It is also evident that in sexual transmission/exposure of HIV cases that actual knowledge will originate from

[122] *R v. Rees* [1956] S.C.R. 640
[123] For another example see: *USA v Dynar* [1997] 2SCR 462 [41] 'true knowledge'
[124] *R v Sansregret* [1985] 1 S.C.R. 570
[125] ibid: *' The complainant, after living with the appellant for a year ended their turbulent affair. Subsequently, the appellant broke into her house twice. On both occasions, complainant feared for her safety because of his threats and violent behaviour. To calm him down and to protect herself from further violence, she held outsome hope of reconciliation and consented to intercourse.'*
[126] ibid [22]
[127] Williams (n 1) 157
[128] Above p 67
[129] ibid

personal knowledge, as the defendant will have become aware of their sero-status through testing positive for the virus. The same cannot be stated of wilful blindness.

The Canadian Approach To Wilful Blindness

Wilful blindness has proved to be a troublesome concept to compartmentalise within Canadian criminal law.[130] Despite these prevailing difficulties, it has not prevented judicial definitional interpretation of this requirement, consequently providing guidance as to overarching doctrinal principles. The Supreme Court of Canada has on a number of occasions endorsed Glanville Williams' definition of wilful blindness.[131] Glanville Williams stated that:

> *"To the requirement of actual knowledge there is one strictly limited exception. Men readily regard their suspicions as unworthy of them when it is to their advantage to do so. To meet this, the rule is that if a party has his suspicion aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance, he is deemed to have knowledge."*[132]

The endorsement of Glanville Williams' definition of wilful blindness has been in relation to several distinct offences that have required the defendant to have knowledge as a fault element. Two Supreme Court decisions accentuate the eclectic approach to the doctrines' utilisation. In *Sansregret,*[133] it was confirmed by McIntyre J that a defendant would be accountable if he suspected the existence of a fact, and was '*deliberately ignorant as a result of blinding himself*'.[134] This approach to wilful

[130] Christopher Sherrin, 'Wilful Blindness: A Confused and Unnecessary Basis for Criminal Liability' (2014) 47 University of British Columbia Law Review 709, 740
[131] R v Sansregret [1985] 1 S.C.R. 570 [22]; *R v Briscoe* 2010 SCC 13 [2010] 1 R.C.S. 411
[132] Williams(n 1) 157
[133] *R v Sansregret* [1985] 1 S.C.R. 570
[134] ibid [24]

blindness was also approved in *R v Briscoe,*[135] a case that concerned a secondary party to crime, and a number of offences including murder. In *Briscoe,* it was stated that, 'wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries.' [136]

Sansregert and *Briscoe,* in relation to the offences of rape and murder, both referred to Williams' definition of wilful blindness.[137] It may cogently be asserted that a suspicion coupled with deliberate avoidance of the truth are prerequisites for the doctrine within the Canadian jurisdiction. The definition advocated by the Supreme Court accords to the English interpretation of wilful blindness. Under these conditions, it can '*almost be said that the defendant actually knew*.' [138]

Constructive Knowledge In Canadian General Criminal Law

A general presumption in the Canadian criminal justice system is the exclusion of constructive knowledge as a fault ingredient, but the Canadian Criminal Code contains the offence of criminal negligence, adopting a partly normative standardisation.[139] It is a criminal sanction that has been utilised in sexual transmission/exposure of HIV cases, and therefore deserves, and requires, further elaboration.[140] The provision has been portrayed as an ambiguous offence element that utilises terms that equate to subjective and objective assessments of the

[135] *R v Briscoe* 2010 SCC 13 [2010] 1 R.C.S. 411
[136] ibid [21]
[137] *R v Sansregret* [1985] 1 S.C.R. 570 [24]; *R v Briscoe* 2010 SCC 13 [2010] 1 R.C.S.[21]
[138] Williams (n 1) 159
[139] *Criminal Code,* RSC 1985, c C-46, s 219.
[140] *R v Iamkhong* 2009 ONCA 478

defendant.[141] The name attributed to the offence, and the terminology within the provision, implies that offence 'ought' to be examined from an objective perspective.

The Supreme Court of Canada has sought to confirm, in cases of criminal negligence, whether a defendant's awareness should be assessed objectively or subjectively. In *R v Tutton,*[142] the defendants were charged with death of their son through criminal negligence. The Court dismissed the Crown's appeal and held that the test should be subjective. The majority judgement was delivered by Dickson CJ who held that in cases concerning criminal negligence the defendant should be assessed subjectively, as the offence 'requires some degree of awareness or advertence' or that he was wilfully blind.[143] Contrastingly, in the same case, McIntyre J[144] dissented and proposed that the test should be assessed objectively.[145] In the subsequent Canadian Supreme Court decision of *R v Waite,*[146] the defendant was charged with causing death by criminal negligence, and the same majority that had decided *Tutton* reaffirmed the test for criminal negligence. [147] It was held that criminal negligence involves an objective test in relation to the conduct of the defendant, and a subjective element regarding the awareness of the defendant.[148] The dictum in *Waite* and *Tutton* has the potential for uncertainty, as the minority in both cases favoured an objective test. In rejecting the majority approach, in both appeal cases, Mcintyre J stated, that it is whether the conduct of the accused, 'shows a marked and substantial departure from the standard of behaviour expected of a

[141] *R v Tutton* [1989] 1 SCR 1392, 1403
[142] ibid
[143]ibid 1407
[144] ibid, 1430
[145] ibid 1430
[146] *R v Waite* [1989] 1 SCR 1436
[147] ibid
[148] ibid 1438

reasonably prudent person in the circumstances' as the appropriate test.[149] It has been suggested that the decisions in *Tutton* and *Waite,* have 'failed to settle the continuing controversy concerning the elements of the criminal offences that are based on criminal negligence'.[150] The rationale for such an assertion is evident as the significant minority dissenting judgments therein rejected a subjective analysis of the awareness of the defendant; nevertheless, the decision of the majority still prevails within extant Canadian criminal law.

There is a logical rationality to the dissenting minority conclusions in *Tutton* and *Waite.* The counterpoise is that criminal negligence should be assessed objectively as negligence connotes objective elements, but this would be fundamentally inappropriate in cases of HIV transmission/exposure. The facilitation of constructive knowledge connotes that the ambit of culpability may encompass individuals who are oblivious to a particular circumstance, including those who 'ought' to know that they have HIV by being from a high risk group. Such assertions could denote that individuals who have been responsible in their conduct, but are from a high risk group, would be accountable. This is the obverse of how the law should develop. It is manifest that actual knowledge and wilful blindness are requisite levels of awareness in Canadian criminal law across a spectra of offence-definition constructs. It is now appropriate to consider when a defendant will be aware of their sero-status within the jurisdiction, and translate these general principles of knowledge to the legal prism of HIV prosecution.

[149] *R v Waite* [1989] 1 SCR 1436, 1442
[150] Alan D. Gold, 'Notes and Comments - Criminal Law – Criminal Negligence' (1989) 31 Criminal Law Quarterly 405, 407

The Canadian Knowledge Criterion In Cases Of Sexual Transmission/Exposure To HIV

The Canadian jurisdiction has seen a plethora of prosecutions of individuals who have not disclosed their HIV status to unsuspecting complainants.[151] To determine whether an offence has been committed the prosecutorial authorities must first establish that the defendant had knowledge of their sero-status. In the majority of prosecutions there has been no concern as to the knowledge requirement, as the offence has transpired after a defendant has tested positive for the virus.[152] In these cases, the prosecution have presented evidence as to the defendant's sero-status. This has permitted the respective courts to ascertain that the defendant 'knew' he was HIV positive.[153] It is apparent that actual knowledge has been the requisite knowledge threshold in the majority of cases, but does not denote that wilful blindness is excluded.

R v Cuerrier And The Knowledge Requirement

The first case heard by the Canadian Supreme Court on the issue of HIV exposure implies that actual knowledge was the essential ingredient for the defendant to have the requisite level of awareness. In *R v Cuerrie*r,[154] the defendant had actual knowledge of his sero-status, and was informed by health officials that he must use

[151] This is just a few examples: *R v Cuerrier,* [1998} 2 S.C.R 371; *R v D.C.,* 2012 SCC 48; *R v Iamkhong,* 2009 ONCA 478; *R v J.A.T.,* 2010 BCSA 766; *R v J.T.,* 2008 BCCA 463; *R v Lamirande (D),* 2006 MBCA 71; *R v Mabior* 2012 SCC 47; ; *R. v. Mekonnen*, 2009 ONCJ 643; *R. v. Nduwayo,* 2010 BCSC 1277; *R. v. Pottelberg,* 2010 ONSC 5756; *R. v. A.T.R.*, 2011 BCPC 283; *R. v. Felix*, 2010 ONCJ 322; *R. v. Tippeneskum*, 2011 ONCJ 219; *R. V. THOMAS*, 2011 ONSC 7136; *R. v. Mzite,* 2011 BCCA 267; *R. v. Wright,* 2009 BCCA 514; R. *v. Williams* [2003] 2 S.C.R. 134 ; *R. v Wilcox* 2011 QCCQ 11007

[152] *R v Cuerrier*[1998] 2 S.C.R. 371*, R v Mabior* 2012 SCC 47

[153] ibid

[154]*R v Cuerrier* [1998] [1998] 2 S.C.R. 371

condoms and disclose that he was carrying the virus to any prospective partners.[155] Cuerrier had had unprotected intercourse with two women and did not disclose that he was HIV+. It was expressed throughout the judgment by Cory J that the defendant must 'know' he was infected with the virus. [156] This may denote that actual knowledge was the requirement, but may also include wilful blindness.[157] An inclination towards actual knowledge, as the requisite fault element, can be inferred from Cory J dictum that discusses the concerns about individuals refraining from being tested if actual knowledge was the requirement:[158]

> "*It is unlikely that individuals would be deterred from seeking testing because of the possibility of criminal sanctions arising later. Those who seek testing basically seek treatment. It is unlikely that they will forego testing because of the possibility of facing criminal charges…"*[159]

The dictum infers that actual knowledge may be the pre-requisite. To specify that it would not deter testing connotes that requisite awareness ought to be exclusively attributed to individuals who have been tested. It is a common perception that facilitating exclusivity to actual knowledge would discourage testing.[160] Ginn[161] discards this assertion by describing it as a 'faulty logic' [162] It was proposed by Ginn that:

> "…*this argument seems to disregard the fact that there are motives for testing that are unconnected to the decision of what to tell one's sexual partners: a negative test result would presumably set one's mind at rest and a positive result would enable one to make decisions about other aspects of life, such as medical care. Second, presumably anyone who*

[155] *R v Cuerrier* [1998] 2 S.C.R. 371[17]
[156] ibid [125] and [147]
[157] Above p 94 - 95
[158] *R v Cuerrier* [1998] [1998] 2 S.C.R. 371 [43]
[159] ibid [143]
[160] Thomas W. Tierney, 'Criminalizing the Sexual Transmission of HIV: An International Analysis' (1992) 15 Hastings International and Contemporary Law Review 475 , 487
[161] Diana Ginn, 'Can Failure to Disclose HIV Positivity to Sexual Partners Vitiate Consent? ' (2000) 12 Canadian Journal of Women and the Law 235, 241
[162] ibid 242

would be willing to inform sexual partners of a positive test result will not be deterred from being tested by the decision in Cuerrier."

The benefits attributed to testing outweigh any rationale to remain ignorant of HIV status. The most cogent submission as to the advantages of being tested is the advancement of anti-retroviral medication.[163] This medication prolongs the life of an infected individual: a consequence of this is that the virus is now considered to be a chronic illness.[164] If an individual persists with their anti-retroviral medication the chance of transmitting the disease significantly decreases.[165] There are clear advantages to being diagnosed, but there are still those who would prefer to remain wilfully blind, and this should denote that the level of awareness is extended to include these individuals. This may be an exception, but it is still in the realms of possibility. One further concern with only facilitating actual knowledge is anonymous testing of individuals.[166] Under these circumstances it would be difficult to determine that the defendant had actual knowledge of their sero-status, and this presents a further rationale for including wilfully blind individuals within the arena for potential inculpation.

There is also conflicting *dicta* to the previously adduced rationale that suggests actual knowledge is supererogatory, as Cory J in *Cuerrier* proposed that a defendant who is 'aware' that he has the virus had the 'primary' duty to disclosure their HIV status.[167] On this basis wilful blindness may suffice, being 'aware' implies a lesser form than actual knowledge, consequently satisfying the fault criteria, and this

[163] Above ch 1 p 34 -37
[164] https://www.aids.gov/hiv-aids-basics/just-diagnosed-with-hiv-aids/overview/chronic-manageable-disease/ accessed 2nd March 2015
[165] Above ch 1 p 34 -37
[166] Winifred H. Holland, 'HIV/AIDS And The Criminal Law' (1994) 36 Criminal Law Quarterly 279, 290
[167] *R v Cuerrier* [1998] 2 S.C.R. 371[144]

accords with the general Canadian criminal law position as to the parameters of knowledge.[168]

The lack of clarity derived from *Cuerrier* is apparent, and there is conflicting *dicta* transduced from the judgment. It is, therefore, difficult to reconcile the position of knowledge from *Cuerrier per se,* as none of the alternative dicta may be considered as authoritative.[169] The knowledge requirement did not form the basis of the appeal, and there was no true judicial consideration of the term in any real or meaningful sense.[170] It may have been advantageous for the Court to have reviewed the offence of aggravated assault to predetermine whether wilful blindness would be sufficient as a fault element. In practice, it appears that the judiciary took this as a given inculcation.

There are assertions by a number of academicians that actual knowledge should be the requisite threshold. Cornett suggests that:

> "*For criminal sanctions to apply, the Crown should have to prove the accused actually knew he was infected with HIV. In other words, the Crown would have to prove the accused had positive knowledge of his infection, without which he cannot be said to have acted recklessly. Extending criminalization to those who know they may be infected, or who it is felt ought to know they are or may be infected would expose far too many to prosecution."*[171]

Cornett appears to preclude wilfully blind individuals, by incorporating the term into a definition of constructive knowledge, as it is stated that those who may be aware that

[168] Above p 94 - 95
[169] *R v Cuerrier* [1998] 2 S.C.R.370 [144] 'However, the primary responsibility for making the disclosure must rest upon those who are aware they are infected.'
[170] ibid [2]
[171] Matthew Cornett, 'Criminalization of the Intended Transmission or Knowing Non-Disclosure' (2011) 5 McGill Journal of.Law.and Health 61, 90

they are infected should not be accountable. In a contradictory manner, however, it is contended, by Cornett, that liability should only ensue if a medical test shows positivity, or that the defendant has a belief that he has the infection by displaying physical symptoms of having the virus.[172] This may not denote wilful blindness, so defined, but it is an acceptance of an awareness that could be positioned between actual knowledge and wilful blindness. However, to display symptoms, and not be tested for the virus would infer a suspicion that necessitates further enquiry rather than a belief, and this puts Cornett's latter definition of awareness firmly within the ambit of wilful blindness.

The Inclusion Of Wilful Blindness In Canadian Sexual Transmission/ Exposure To HIV Cases: R v Williams

The subsequent Supreme Court of Canada decision of *R v Williams*[173] provided actual elucidation on the requisite fault requirement for a defendant to be considered to know of their sero-status. In *Williams*,[174] the defendant had transmitted the virus to the complainant. At issue was the chronology of the infection as Williams began to have unprotected intercourse with the complainant before he was diagnosed as being HIV+. Williams' awareness of becoming infected was, therefore, the pivotal consideration that was put before the Supreme Court. The Court afforded a detailed examination of the elements of wilful blindness, and ascertained that the doctrine was available in these cases.[175] Binnie J observed that:

[172] ibid 91
[173] *R v Williams* [2003] 2 S.C.R. 134
[174] *R v Williams* [2003] 2 S.C.R. 134 [28]
[175] ibid [27]

> "*Once an individual becomes aware of a risk that he or she has contracted HIV, and hence that his or her partner's consent has become an issue, but nevertheless persists in unprotected sex that creates a risk of further HIV transmission without disclosure to his or her partner, recklessness is established*."

The facilitation of the doctrine is translucent and permits unequivocal clarification of wilful blindness as an appropriate fault element. It seems that utilising wilful blindness connotes that more individuals who are suffering from the virus will be susceptible to prosecution. Morally, submits Holland, those who knowingly risk transmitting the virus to another deserve the sanctions of the criminal law, but measures should be confined to actual knowledge:[176]

> "*Should wilful blindness be sufficient? What of the person of normal intelligence who has a number of symptoms commonly associated with HIV infection who "shuts his eyes to the obvious" and refuses to be tested, yet continues to engage in high-risk behaviour. There is no indication that this is a real problem, most individuals who suspect infection are in fact tested and it is suggested that in the absence of a demonstrated problem, that the law be confined to those who actually know they are seroposite*."[177]

Holland does not provide any statistical data to endorse the proposition. Indeed, there is data that suggests that a significant number of infections emanate from individuals who have not been tested for the virus.[178] These individuals may be as aware of their status as those who have tested positive, and transmit the virus to another. Wilful blindness as an offence definitional element, and constructor of liability, would send out the message that individuals who suspect that they are carrying the virus need to be tested. Ignorance of sero-status, by not obtaining a

[176] Holland (n 166) 286
[177] Holland (n 166) 315
[178] W. Thomas Minahan,' Disclosure Before Exposure: A Review of Ohio's HIV Criminalization Statutes' (2009) 35 Ohio Northern University Law Review 83, 89

positive result, would not exonerate an individual. Furthermore, the constitutive adoption of this doctrine, if utilised, would overcome the complexities associated with determining actual knowledge when there has been anonymous testing.

Grant submits that the utilisation of wilful blindness is a balancing act,[179] between ensuring that those deserving of punishment should be liable, and those that are from high risk groups are not presumed to have the virus. It is difficult to reconcile how utilisation of wilful blindness would be discriminatory, unless an objective test was employed.[180] In order to establish that an individual was wilfully blind there would need to be additional evidence; more would be required than an individual simply being from a high risk group in a representational sense.[181] There is further endorsement of this proposition, as Cornett has stated that facilitating constructive knowledge may lead to bias.[182] The 'ought to know' standard to establish awareness would invariably encompass those individuals who were from high risk groups, and were unaware of their sero-status. Such individuals may have been acting responsibly, and still be liable. To utilise wilful blindness without a subjective standard, would be akin to enabling negligence as the sufficient standard for awareness.[183] The general criminal law in the Canadian criminal justice system, as already documented, demands that wilful blindness is assessed subjectively, and that it is distinct to constructive knowledge.[184]

[179]Isabel Grant, 'The Boundaries of the Criminal Law: the Criminalisation of the Non-Disclosure of HIV' (2008) 31 Dalhousie *Law Journal* 123, 145-6
[180] Grant (n 179) 145-6
[181] Above p 94 - 95
[182] Cornett (n 171) 90
[183] Grant (n 179) 146
[184] Above p 95 - 97

The Wilful Blindness Standardisation In Canadian HIV Transmission/Exposure Cases: Fact Or Fiction?

The acknowledgement by the Supreme Court in *Williams,* presumptively identifying that wilful blindness demonstrates knowledge, may not be as conclusive as initially presented, and a more contemporary Supreme Court decision suggests that actual knowledge 'ought' to be the requisite fault element. In *R v Mabior,*[185] the defendant had been charged with multiple offences of aggravated sexual assault. None of the complainants had contracted the virus. At issue, was whether the defendant using condoms, and having a low viral load, could signify that there was no requirement to disclose his HIV status to prospective sexual partners. Mclachlin J stated:

> "*I turn first to the criticism that the Cuerrier test is uncertain. It is a fundamental requirement of the rule of law that a person should be able to predict whether a particular act constitutes a crime at the time he commits the act. The rule of law requires that laws provide in advance what can and cannot be done: Lord Bingham, The Rule of Law (2010). Condemning people for conduct that they could not have reasonably known was criminal is Kafkaesque and anathema to our notions of justice*. "[186]

It is, therefore, generally accepted that a defendant needs to know what would constitute a criminal act. This would enable an individual to adjust their conduct to evade criminal sanctions. A defendant who is HIV+, following *Cuerrier,* may have a duty to disclose. The duty to disclose, it was held in *Mabior*, only arises when there is a realistic possibility of comprehend transmission. It is possible to contend that a defendant would only be able to that there was a realistic possibility of transmission if

[185] *R v Mabior* 2012 SCC 47
[186] *R v Mabior* 2012 SCC 47 [14]

he possessed actual knowledge of his sero-status, thereby precluding any wilfully blind individuals.

An ancillary case, decided before *Mabior,* had the opportunity to acknowledge that wilful blindness is the requisite fault element. In *Iamkhong,*[187] the defendant was prosecuted for criminal negligence causing bodily harm and aggravated assault. As already noted, the definition of criminal negligence facilitates a subjective test in relation to the awareness of the defendant.[188] This signifies that the knowledge requirement can include wilful blindness, but precludes constructive knowledge.[189] The case facts provided ample opportunity for the appropriate fault element to be affirmed in HIV transmission cases.

The defendant had tested positive in 1995, but stated that she did not believe that the test was accurate.[190] A subsequent test, she believed, by the Canadian authorities had returned negative results as to her sero-status.[191] This was an incorrect presumption by the defendant as she was not tested by the Canadian authorities for HIV.[192] The issue, as to the defendant's level of awareness, may have been interpreted to encompass any of three levels of knowledge. Firstly, that the defendant had actual knowledge following the positive test. Secondly, that she was wilfully blind as she preferred to believe that the first test was inaccurate and that the second test was the correct test, therefore, there was at least a suspicion and a

[187] *R v Iamkhong* 2009 ONCA 478
[188] *R. v. Tutton* [1989] 1 SCR 1392; *R v Waite* [1989] 1 SCR 1436
[189] *R. v. Tutton* [1989] 1 SCR 1392
[190] *R v Iamkhong* 2009 ONCA 478 [7]
[191] ibid [8]
[192] ibid [8]

deliberate avoidance of the truth.[193] The alternative was that as a result of the positive test, and the potentially negative test, she 'ought' to have known that she had the virus as a reasonable person would have known.

On appeal, it was acknowledged by LaFrome J that the defendant at trial had been assessed from her own state of mind, and there was no substantial reason to believe she did not have the virus.[194] It seems that the trial judge, and LaFrome J were content to assume that the defendant had actual knowledge of their sero-status. A more appropriate route may have been to confirm that she preferred to be wilfully blind to the set of facts that were before her, and this would have been adequate for a conviction based upon criminal negligence.

In *Iamkhong,*[195] the defendant's belief was discredited, and a lack of belief does not accord to any legal definition of actual knowledge in Canada.[196] A belief is also deemed to be an essential ingredient of propositional knowledge.[197] If a belief is not a constituent of actual knowledge then it may indicate that inculpation could be achieved, in relation to HIV, without believing a proposition. Under those conditions it has been argued that an individual can attain propositional knowledge, whether they wished to believe it or not.[198] Such a proposal is evident in *Iamkhong,*[199] as the defendant testified that she disbelieved a positive test, and believed that the latter test was accurate. Wilful blindness, within Canada, requires a suspicion, precluding a necessitation of belief. It is argued that the defendant believed that she was not

[193] R. v. Tutton, [1989] 1 SCR 1392 Wilfull blindness is sufficient for criminal negligence
[194] *R v Iamkhong* 2009 ONCA 478 [55]
[195] *R v Iamkhong* 2009 ONCA 478
[196] Above p 93
[197] Above p 67 - 68
[198] For a discussion of knowledge in this context see: Radford (n 12)
[199] *R v Iamkhong* 2009 ONCA 478

HIV+ because of the Canadian test, but would still have suspected that she had the virus. A defendant with an appropriate suspicion is still liable, even if this is contrary to an epistemologist understanding of propositional knowledge. It has already been identified that there are other cogent justifications for including wilful blindness as a requisite fault element.[200]

The Canadian Jurisdiction And The Preclusion Of Constructive Knowledge

Further demarcation of the requisite knowledge requirement can be observed in *Mabior,* where the Court impliedly rejected the utilisation of constructive knowledge. Mclachlin j expressed concerns about facilitating an objective test, when ascertaining whether the defendant had obtained consent via fraud. It was suggested that allowing such a test would be an 'overreach of the criminal law'.[201] Indeed, a defendant's awareness based upon an objective assessment would denote that individuals who was unaware of their sero-status would be accountable. Mclachlin j discarded any reasonable person test from the issue of consent, and this can correlate to constructive knowledge being discarded as the requisite fault requirement for 'knowing'. It seems apparent that constructive knowledge will have no contribution to make in these cases, and this is the appropriate course to take in relation to knowledge.

[200] Above p 73 - 75
[201] *R v Mabior* 2012 SCC 47 [80]

Extending The Parameters Of Inculpation: Wilfully Blind Without Having The Virus

From the above exposition it can be asserted that it is *Williams*[202] that is the extant Canadian authority that provides guidance as to the appropriate knowledge requirement. The decision has been affirmatively discussed by the lower courts, but with further additional complexity integrated within their factorisations.[203] In *R v S(F),*[204] the defendant was alleged to have sexually assaulted his daughter, and as a result of that assault she had contracted gonorrhoea. The defendant also knew that his partner was HIV positive, but refused to be tested for the virus. The Court accepted that knowledge could be derived from individuals who are wilfully blind, but also proposed a wider approach.[205] Fairgrieve J suggested that those who had been exposed to the virus, but did not actually have HIV, could also be liable to prosecution.[206] This would encompass too many individuals, but corresponds to the law of criminal attempts in the realm of inchoate liability, and fault attribution for attempting the factually impossible.[207] Allowing the law to develop to this extent further exemplifies the necessity for HIV specific legislation. The only justification for tolerating any criminalisation is that an essential prerequisite for prosecution must be that the defendant has the virus. To be able to prosecute those who did not have the virus is a misnomer, and must not be within the ambit of the criminal law and cases concerning HIV exposure. This would be too much of a continuum of the law, and lead to obscure outcomes that offends certainty and retrospectivity precepts.

[202] *R v Williams* [2003] 2 S.C.R. 134
[203] *R. v. F.S.,* 2004 ONCJ 230
[204] ibid
[205] *R. v. F.S.,* 2004 ONCJ 230 [43]
[206] ibid [4]
[207] See Glanville Williams, 'Attempting the Impossible – the Last Round?' (1985) 135 New Law Journal 337

Nevertheless, the current position that can be derived from the most authoritative cases within Canada confirm that the defendant 'knows' that he has the virus if he has actual knowledge of his HIV status, or that he 'suspects' that he is HIV+. It is refreshing the courts have utilised actual knowledge and wilful blindness, but it has been demonstrated that there is a specific need for HIV specific legislation, otherwise the law may continue to develop in a haphazard and unstructured manner towards inappropriate effectuation of constructive knowledge or inchoate liability. The next section will now consider the American position in relation to knowledge, before establishing a standardised model for knowledge across the comparator legal systems, as a reform pathway.

The Approach To Knowledge In The United States Of America

The Model Penal Code And The Knowledge Requirement

The Model Penal Code provides a definition of knowledge,[208] and this facilitates a subjective examination of the requirement. The Code states that:

> "*A person acts knowingly with respect to a material element of an offence when:*
> *(i) If the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and*
> (ii) *If the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result."*[209]

[208] Model Penal Code § 2.02(2)(b)
[209] ibid

In definitional terms, the MPC's approach to knowledge is distinct, and there is a lack of clarity as to the parameters of the inculcated awareness requirements.[210] This may signify that by utilising 'aware' as the requisite level of knowledge that it may be argued that lesser forms of knowledge are acceptable. The provision does, however, have sufficient capacity to align to the philosophical understanding of propositional knowledge.[211] To be aware may be understood to include an individual who is 'justified' in believing that a fact is true. One interpretation of awareness may, thus, equate to a justified true belief and would, therefore, correspond to the traditional philosophical understanding of knowledge.[212] It is wilful ignorance as a form of awareness[213] that it is a more contentious level of knowledge within the U.S. criminal justice process.

The United States: Wilful Ignorance In The General Criminal Law

The MPC also proposes conditions that are synonymous to the doctrine of wilful blindness.[214] In the Code, it is specified that the knowledge requirement is satisfied where:

> "…*knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, Unless he actually believes that it does not exist."*[215]

[210] Jonathan L. Marcus, 'Model Penal Code Section 2.02(7) and Wilful Blindness' (1993) 102 Yale Law .Journal. 2231, 2235
[211] Above p 65 - 70
[212] ibid
[213] This equates to wilful blindness and wilful blindness will be referred to throughout the rest of the American section
[214] Model Penal Code § 2.02(2)(b)
[215] Model Penal Code § 2.02(7)

This seems a contradiction to the English and Canadian approach to wilful blindness, as it precludes a suspicion, and a deliberate avoidance of the truth, from the definition. The Supreme Court of the United States has affirmed the Code's definition, thereby stipulating this is an appropriate fault element within offence-definitional constructs.[216] It was accepted by the Supreme Court that the definition in the MPC was a variant of knowledge.[217] The definition from the Code has also been endorsed by the Ninth Circuit in *United States v Jewell*[218], in a case that concerned the importation of marijuana. It was stated by Browning CJ that 'knowingly' can be established when the defendant is aware of a high probability of the existence of the fact.[219] The Court also aligned the definition from the MPC to the doctrine of wilful blindness by stipulating that a suspicion was synonymous to the high probability of a fact existing.[220] Browning CJ confirmed that knowledge can be established if there is a suspicion, and 'the ignorance… was solely or entirely a result of making a conscious purpose to disregard the truth'.[221]

The definition from *Jewell* purports that knowledge is attained if an individual is aware of a high probability of the existence of a fact, and this is akin to a defendant being wilfully blind. It has been stated that cases following *Jewell* have convoluted the situation by creating a 'vexing thicket of precedent'.[222] In *United States v Heredia,*[223] for instance, the Ninth Circuit in relation to the crime of importation of marijuana reaffirmed wilful blindness as a requisite knowledge requirement. It was held, by Kozinski CJ, that wilful blindness is established when a defendant 'suspects'

[216] *Leary v United States* 395 U.S. 6 (1969).
[217] ibid
[218] *United States v Jewell* 532 F.2d 697 (9th Cir. 1976)
[219] ibid
[220] ibid
[221] ibid
[222] *United States v Heredia* 483 F.3d 913, 919 (9th Cir 2007)
[223] ibid

the existence of a fact and deliberately avoids confirmation of the fact. [224] Therefore, it is safe to assume that the approach to wilful blindness in England and Canada is replicated within the general criminal law principles of the United States, but the latter jurisdiction has an alternative ingredient that can engage a high probability of awareness.

Constructive Knowledge In The General Criminal Law Of The United States

The use of subjective terminology to define knowledge and wilful blindness does not denote that an objective assessment of knowledge is precluded within the United States. An objective level of fault can be observed in a number of State's penal codes.[225] In Washington's Penal Code,[226] it is stated that knowledge may be established, if a 'reasonable man' under the same conditions would have been deemed to have had that knowledge.[227] This invariably denotes constructive knowledge, as there is no consideration of whether the defendant 'would' be aware. The modification of knowledge to encompass constructive knowledge is also evident in Nevada,[228] where it is stated that knowledge is attained if an 'ordinary prudent' man would have known.[229]However, it will be demonstrated that Washington and Nevada have assessed the defendant's HIV status subjectively, thereby precluding constructive knowledge in these particularised cases, and within this type of offence-definitional construct.

[224] ibid
[225] Wash Rev Code § 9A.08.010 (2014) ; Nev. Rev Stat § 193.017 (2014)
[226] Wash Rev Code § 9A.08.010 (2014)
[227] ibid
[228] Nev. Rev Stat § 193.017 (2014)
[229] ibid

An objective knowledge modification is contrary to what subjectivists would consider to be the 'true' awareness of the defendant, and this is the position that is preferred within this thesis.[230] Knowledge within the context of HIV transmission/exposure cases should entail a subjective belief, as a defendant should only be considered to know if he is aware and not that he ought to have been aware. Permitting an objective test is inappropriate in the current context, as it would include individuals who are unaware of their sero-status.[231] The knowledge requirement will now be evaluated within the number of jurisdictions within the United States that have enacted HIV specific legalisation, and set in context with English and Canadian judicial precepts in this arena.

The Criminalisation Of Sexual Transmission/Exposure To HIV In The United States

The Presidential Commission recommended that States should enact legislation that has the capacity to prosecute individuals who know that they are carrying the virus.[232] There was no explanation as to the parameters of knowledge, denoting that any future enactment by a State, could solipsistically encompass any type of knowledge. Each of the States that has acceded to the recommendations of the Presidential Commission have enacted HIV specific statutes that specifies that the defendant has to have knowledge of their sero-status. There is, however, no uniform approach to this consideration. The provisions, at a minimum, necessitate that the defendant has knowledge of their status, thereby excluding those who do not know

[230] Charlow (n 40)1376
[231] Comment, 'Wilful Blindness as a Substitute for Criminal Knowledge' (1977) 63 Iowa Law Review 466, 477
[232] The Presidential Commission on the Human Immunodeficiency Virus Epidemic Report (1988), 130

that they are carrying the virus.[233] A detailed review of the State law reveals an extant binary divide in legislative adoption, and can be separated into two categories: those that expressly state that actual knowledge is the requirement; and limited provisions that have not afforded any elucidation of the knowledge requirement of the defendant. Each of the approaches will now be examined, concentrating initially on an examination of States that require the defendant to have actual knowledge of their sero-status.

U.S. State Law: When The Defendant Must Have Actual Knowledge Of Their Sero-Status

There are several states that have enacted legislation that specifies that a defendant must possess actual knowledge of their sero-status, and only then will he be considered to have the required level of knowledge.[234] These provisions are clearly drafted so that wilful blindness, and constructive knowledge, are excluded as adequate levels of awareness. Nevada is one of the states that require actual knowledge, and stipulates that the defendant knows that he is HIV+ if he has tested positive for the virus.[235] In Arkansas, the statute also specifies that the defendant knows that he has the virus if he has received a positive test result:

> *"… (b) A person commits the offense of exposing another person to human immunodeficiency virus if the person knows he or she has tested positive for human immunodeficiency virus and exposes another person to human immunodeficiency virus infection through the parenteral transfer of blood or a blood product or engages in sexual penetration with another*

[233] Ark Code § 5-14-123 (2012); Nev. Rev Stat § 201.205 (2014)
[234] Ark Code § 5-14-123 (2012)
[235] Nev. Rev Stat § 201.205 (2014)

person without first having informed the other person of the presence of human immunodeficiency virus.'[236]

These definitions clearly maintain a narrow approach to the knowledge question, and avoid any confusion, and there is precision in defining the expectations of knowledge. A statutory provision of this type also corresponds to the traditional philosophical understanding of propositional knowledge, as a defendant who has tested positive would have attained a justified true belief as to their sero-status.

Although Arkansas' statute is obvious as to the knowledge requirement that is expected, the legislative provision has been subjected to judicial review as to its overarching validity. In *State v Weaver,*[237] a case heard in the Arkansas Court of Appeals, the defendant had been convicted of exposing an unsuspecting sexual partner to the virus. The defendant appealed, *inter alia,* on the basis that the judge erred by allowing the prosecution to adduce evidence of the defendant's HIV test results.[238] Medical records are a means whereby it can be established that the defendant has tested positive for the virus, and the wording of the statute indicates that this may be the requirement.[239] Crabtree J dismissed that ground of the appeal as the matter had not been raised as an issue at trial.[240] If the appeal had been allowed, on this particular ground, then the statute may have been rendered superfluous. The exclusion of medical records may have signified that the

[236] Ark. Code § 5-14-123 (2012) *Knowingly transmitting AIDS, HIV*
… (b) A person commits the offense of exposing another person to human immunodeficiency virus if the person knows he or she has tested positive for human immunodeficiency virus and exposes another person to human immunodeficiency virus infection through the parenteral transfer of blood or a blood product or engages in sexual penetration with another person without first having informed the other person of the presence of human immunodeficiency virus.
[237] 56 Ark. App. 104 (1997)
[238] ibid 106
[239] Ark. Code § 5-14-123 (2012) (b) A person commits the offense of exposing another person to human immunodeficiency virus if the person knows he or she has tested positive for human immunodeficiency virus and exposes another person to human immunodeficiency virus infection through the parenteral transfer of blood or
[240] 56 Ark. App. 104, 107 (1997)

prosecutorial authorities would be in an onerous position when attempting to ascertain that a defendant had actual knowledge of 'testing positive'. A subsequent appeal by Weaver, against two further convictions for exposure, confirmed the probative significance of medical records. It was determined by Bird J that the prosecutors had acted within their powers by adducing the defendant's medical records to confirm his sero-status.[241]

The constricted nature of state legislation that requires actual knowledge of HIV status has been the subject of criticism. Kaplan submits that requiring actual knowledge of HIV status is 'under inclusive':

> "*Using knowledge of serostatus as mens rea is also potentially underinclusive. An individual who is not certain of her serostatus may still strongly suspect she is infected and intend to transmit HIV to others, or may still recklessly risk transmission to others*."[242]

The limitation of respective provisions, so as to only encompass actual knowledge, denotes that those who can be considered to be equally aware of their sero-status would avoid criminal sanctions. It has been proposed that statutes that require actual knowledge are, 'irrational' for prosecuting those who have tested positive, as it does not punish HIV positive people who have not been tested.[243] Those that have not been tested that are suffering symptoms, and have consistently partaken in high risk activities, should be included in any knowledge requirement. This would denote that individuals who knew, in the broader sense of wilful blindness, of their sero-status, would be considered to have the requisite knowledge requirement. It has already

[241] *State v Weaver* 66 Ark. App. 249; 990 S.W.2d 572 , 573-4 (1999)
[242] Margo Kaplan, 'Rethinking HIV-Exposure Laws' (2012) 87 Indiana Law Journal 1517, 1533
[243] Jaclyn Schmitt Hermes, ' The Criminal Transmission of HIV: A Proposal to Eliminate Iowa's Statute' (2002) 6 Journal of Gender, Race and Justice 473, 485

been stated that wilful blindness is a substitute for knowledge, and in cases of HIV exposure or transmission such individuals should be accountable, and inculpated accordingly. There should be no exception for individuals who suspect that they have the virus, and deliberately refrain from confirming that suspicion. Any other position would restrict the amount of individuals who could, and should be accountable for their actions in terms of appropriate culpability thresholds.[244] This is self-evident as Minahan[245] has asserted that most transmissions occur when the carrier does not possess actual knowledge that they have the virus.

It is contended by Markus, that these provisions encourage individuals who are aware of their sero-status to abstain from testing.[246] As has already been identified, there has been no empirical data to affirm or refute this assertion, but this does not denote that this is a substantive reason for including a wilfully blind individual.[247] If a function of the criminal law is to ensure that those deserving punishment are prosecuted, then those who deliberately avoid testing, suspecting that they have the virus, ought not to be allowed to evade criminal sanctions.. It may also be contrary to the legislators' intentions to exclude individuals who do not possess actual knowledge. With the benefit of hindsight the drafters may have determined that individuals who have not confirmed their sero-status via a positive test result should be considered to have knowledge.

[244] Donald H.J. Hermann, 'Criminalising Conduct Relating to HIV Transmission' (1990) 9 Saint Louis University Public Law Review 351, 374
[245] Minahan (n 178) 89
[246] Mona Markus, 'A Treatment for the Disease: Criminal HIV Transmission/Exposure Laws' (1999) 23 Nova Law Review 847, 873
[247] Above p 88

Ohio And Methods Of Establishing Actual Knowledge Other Than Confirmation Of A Positive Test Result

The parameters of the restrictive terminology in the statutes that require actual knowledge may necessitate future reconsideration. In Ohio, the criminal statute specifies that the defendant must have knowledge that he has tested positive, thereby demonstrating actual knowledge.[248] This statutory provision can be read in two ways. Firstly, that a positive test result is required, and alternatively that the defendant has to be aware that he has tested positive. It is the latter that judicial precepts in Ohio have affirmed as appropriate. In *State v Russell,*[249] a case heard in Ohio's Court of Appeals, the defendant had been convicted of exposing an unsuspecting complainant to the virus. It was contended by the appellant that the prosecution had not established the sero-status of the defendant, and there was insufficient evidence to confirm that Russell had tested positive for the virus.[250] The appellate court rejected the appeal, as Russell had confirmed his sero-status when he was interviewed for the offence, and also that the complainant was not aware that he was HIV+.[251] This may have identified actual knowledge of sero-status, but is fraught with the potential for discrepancies. What if the defendant had not been tested for the virus, was not HIV+, and was a compulsive liar that was merely acquiescing to the interviewer's assertions? In those circumstances he may not have exposed the complainant to the virus.

[248] Ohio Rev Code § 2903.11 (2014) … (B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly do any of the following:
[249] *State v. Russell*, 2009 WL 3090190 (Ohio App.)
[250] ibid
[251] ibid

The court in Ohio appears to have adopted a purposive approach to interpreting the statute. The case of *Russell* also demonstrates that any concerns about anonymous testing[252] can be circumvented, as there are other means of ascertaining actual knowledge other than adducing positive test results. By extending the stricture to other considerations denotes that there may be other circumstances whereby the courts recognise that actual knowledge can be attained. Does this connote that actual knowledge can emanate from further avenues? An example of an extension to the parameters of actual knowledge may be an aggrieved relative confirming the positivity of the defendant.[253] The opening up of other possibilities that are considered actual knowledge may eradicate the restrictive nature of these provisions, but seems in complete contrast to the legislative framework. It may, however, have been the intention of the legislator to encompass more individuals, and that the drafters of the provision lacked foresight when preparing the statute.

Minnesota's State Law And The Confirmation Of Actual Knowledge By A Medical Professional

Minnesota's statutory provision is also worthy of consideration, as this provides certain limitations as to the requisite knowledge requirement.[254] In Minnesota, the appropriate level of awareness of a defendant as to their sero-status can only be attained by an individual receiving information from a doctor.[255] This would avoid the

[252] David P. Niemeier, 'The Criminal Transmission of AIDS: A Critical Examination of Missouri's HIV Specific Statute' (2001) 45 Saint Louis University Law Journal 667, 692
[253] *State v Dempsey* 610 N.E.2d 208 (Ill. App. Ct. 1993)
[254] Minn. Stat § 609.2241 (2014)
[255] Minn. Stat § 609.2241 (2014)c) "A person who knowingly harbors an infectious agent" refers to a person who receives from a physician or other health professional:
(1) advice that the person harbors an infectious agent for a communicable disease;
(2) educational information about behavior which might transmit the

difficulties that have been identified with Ohio's statute. The precision is indubitably beneficial as the most recent case, before the Minnesota Supreme Court, demonstrates there are no concerns raised as to the knowledge requirement. In the *State v Rick,*[256] the defendant had consensual intercourse with the complainant. There was no issue as to his sero-status as it was confirmed that he was diagnosed as being HIV+ in 2006, three years before the offence was committed.[257] The provision, therefore, provides a restrictive, but confirmative definitional construct, that expresses actual knowledge as the prerequisite requirement without expressing that the requirement is the defendant being aware of a positive test result.

It is evident that actual knowledge is the requisite definitional element in these jurisdictions. Actual knowledge has been defined to be actual knowledge, or when a defendant is 'virtually certain' that a fact exists. [258] In the current context, both can be seen as actual knowledge, and there is no need to differentiate. Actual knowledge of HIV status can only be confirmed by the former, as virtual certainty of sero-status will only be achieved by testing, and this would then transform into actual knowledge making virtual certainty as a category of actual knowledge unnecessary. It is inconceivable to anticipate actual knowledge of HIV status in any other format. Once a test is confirmed as positive it can be affirmed that the defendant is HIV positive, therefore, attaining absolute certainty.

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infectious agent; and
(3) instruction of practical means of preventing such transmission.
[256] *State v Rick* 835 N.W.2d 478 (Minn. 2013)
[257] ibid 481-482
[258] Toh Yung Choeng, 'Knowing, Not Knowing and Almost Knowing and the Doctrine of Mens Rea' (2008) 20 Singapore Academy of Law Journal 677, 678

It is these statutory provisions that provide an account of knowledge that corresponds to a traditional philosophical understanding of propositional knowledge. Thus, a defendant must attain actual knowledge from a positive test result, and under these conditions he would have a justified true belief of his sero-status, and this is the requisite threshold for propositional knowledge. The same cannot be said of a wilfully blind individual, but the aforementioned discourse denotes that although it is contrary to the philosophical understanding of knowledge, he should still be accountable. The position of wilful blindness in other statutory provisions will now be considered

States Where The Provision May Encompass Wilful Ignorance

Illinois' Approach To The Knowledge Requirement

The legislative terminology adopted in a significant number of States is not as clear as the aforementioned actual knowledge criterion. In a cluster of States it is not specified what are the parameters of the knowledge requirement. For example, in Illinois,[259] the requirement is that the defendant knows that he has the virus without any extrapolation of the circumstances under which an individual would know. One point of clarity is that 'knows' is assessed subjectively as the provision specifies that 'he or she knows'.[260] It is, therefore, safe to assume that constructive knowledge is precluded because of the subjectiveness of the vocabulary within the statute. This is

[259] 720 Ill. Comp. Stat. § 5/12-5.01
[260] ibid

not universally endorsed, as Jedrychowski[261] postulates that the definition may accommodate constructive knowledge, thereby encompassing individuals who are members of high risk groups. [262] This suggestion by Jedrychowski does not take into consideration the wording of the statute and the objectivity of constructive knowledge.

Shriver,[263] in this respect, presumes that Illinois' HIV statute lacks precision, as individuals who have not been tested may be susceptible to prosecution. Shriver considers this to be constructive knowledge,[264] but as with Jedrychowski[265] does not take into account the wording of the statutory provision.[266] It is appropriate to exclude constructive knowledge from Illinois' HIV legislative framework, however, the provision may facilitate the prospect of including a wilfully blind individual. Illinois' Penal Code allows for a defendant to be accountable if there he is aware of 'substantial probability' of the existence of a fact.[267] Substantial has been considered to be a lower threshold than high probability,[268] and may be understood to equate to wilful blindness.[269] This is acknowledged by Decker, who propounds that a defendant must 'know' that he is carrying the virus thereby the statute prevents individuals who are unaware of their sero-status from being prosecuted.[270]

[261] Jagoda Jedrychowski, 'Criminalization of HIV-Transmission: Perpetuating Problems Surrounding the Epidemic' (2007) 11 The Holy Cross Journal of Law and Public Policy 29
[262] ibid 36
[263] Christina M Shriver, 'State Approaches to Criminalizing the Exposure of HIV: Problems in Statutory Construction, Constitutionality and Implications' (2001) 21 Northern Illinois University Law Review 319
[264] ibid 333
[265] Jedrychowski (n 261)
[266] 720 Ill. Comp. Stat. § 5/12-5.01
[267] 720 Ill. Comp. Stat. § 5/4-5
[268] Kenneth W. Simons, 'Should the Model Penal Code's *Mens Rea* Provisions be Amended' (2003) 1 Ohio State. Journal of Criminal Law. 179, 187
[269] Charlow (n 40) 1383
[270] Amy Decker, 'Criminalising the Intentional or Reckless Exposure to HIV a Wake Up Call to Kansas' (1998) 46 University of Kansas Law Review 333, 360

The judiciary in Illinois have imparted limited guidance as to the knowledge requirement, but have failed to consider wilful blindness. In *State v Dempsey,*[271] a case heard in the Appeal Court of Illinois, the defendant had been prosecuted for ejaculating semen into his brother's mouth. The admissibility of his doctor's evidence, to demonstrate that the defendant had knowledge of his HIV status, was one of the grounds of the appeal. It was argued that admissibility of this evidence was inappropriate to establish that the defendant was HIV+, as Dempsey had not forgone his privilege to allow the disclosure of this information.[272] The courts did not consider the admissibility of the evidence, and it was deemed that the use of the doctors testimony, 'did not add anything that was not otherwise in evidence', and was unnecessary to establish knowledge.[273] This was on account of a family member of the defendant testifying that Dempsey knew that he was HIV+. It can be seen that *Dempsey* was a case that determined that actual knowledge can be derived from evidence other than a positive test result. The judiciary in *Dempsey* did not consider whether a defendant that is wilfully blind will be accountable as the facts of the case did not afford the opportunity for clarification as to this knowledge requirement.

California And The Lack Of Clarity: Actual Knowledge Or Wilful Blindness?

The lack of clarity as to whether wilful blindness can be considered to be knowledge extends to other States' provisions that have not defined the knowledge requirement. There are those who are under a misapprehension that the Californian exposure

[271] *State v Dempsey* 610 N.E.2d 208 (Ill. App. Ct. 1993)
[272] ibid 223
[273] ibid

laws[274] specifies that the defendant must have tested positive.[275] The provision does not clarify any definition of 'knows', and the Penal Code definition of knowingly is extensive enough to encompass further categorisations of knowledge.[276] It is perplexing to ascertain how it can be concluded that the defendant must test positive, other than an additional distinct statute that infers actual knowledge as a prerequisite.[277] It is conceded that elements of the California's Penal Code do state that the prosecution 'may' establish knowledge through test results, but this is not within the provision on unprotected sexual activity.[278] The HIV exposure statute merely stipulates that knowledge of their sero-status does denote that the defendant acted with specific intent.[279] An individual who has not tested positive, but suspects that he is infected, can be just as aware as an individual who has tested positive, and may still act with specific intent, something that is required in that provision.

There are contentions that knowledge should be broadly interpreted, and McCormick[280] proposes that the Californian statute should expressly include constructive knowledge, principally as such levels of liability have been adequate in civil cases. There is no consideration of wilful blindness by McCormick. The use of constructive knowledge in these cases would include too many individuals, and because of the objectivity of the requirement, eradicate the necessity that the defendant acted with specific intent. It cannot be reiterated enough that an assessment of the defendant's awareness of HIV status, based upon constructive

[274] Cal. Health & Safety Code § 120291 (2014)
[275] Erin McCormick, 'Strengthening the Effectiveness of California's HIV Transmission Statute' (2013) 24 Hastings Women's Law.Journal 407, 422
[276] Cal. Penal Code § 7 (2014)
[277] Cal.Penal Code § 12022.85 (c) (2014)
[278] ibid
[279] Cal. Health & Safety Code § 120291 (2014)
[280] McCormick (n 275) 422

knowledge, is that they ought to have known, and this is akin to civil standards of knowledge. This should not be a criminal standard of inculpation.[281]

Missouri And A More Extensive Approach To Knowledge: The Utilisation Of Wilful Blindness?

An alternative approach to the knowledge requirement can be found in Missouri's statute.[282] In the provision it is stated that the defendant 'knew' of their HIV status.[283] This does not contain an exhaustive list,[284] and may allow the knowledge requirement as to HIV status to include wilfully blind individuals.[285] The breadth of the provision is not evident as the plethora of cases emanating from Missouri has offered no guidance as to the requisite threshold level. The defendants within the appeal cases have tested positive for the virus.[286] It is only *State v Sykes,*[287] a case heard in the Missouri Court of Appeal, that established knowledge of HIV status by alternative means, but this would still equate to actual knowledge.[288] A previous conviction for the same type of offence was deemed to suffice to ascertain that the

[281] Above 90-93
[282] Mo. Rev Stat § 191.677 (2014)
[283] ibid
[284] ibid '*Evidence that a person has acted recklessly in creating a risk of infecting another individual with HIV shall include, but is not limited to, the following:*

a. The HIV-infected person knew of such infection before engaging in sexual activity with another person, sharing needles with another person, biting another person, or purposely causing his or her semen, vaginal secretions, or blood to come into contact with the mucous membranes or nonintact skin of another person, and such other person is unaware of the HIV-infected person's condition or does not consent to contact with blood, semen or vaginal fluid in the course of such activities'
[285] ibid
[286] *State v. Stewart*, 18 S.W.3d 75, 81 (Mo. Ct. App. 2000); *Spicer v. State*, 300 S.W.3d 249, 249 (Mo. Ct. App. 2009); *State v. Newlon*, 216 S.W.3d 180, 182-83 (Mo. Ct. App. 2007); *State v. White*, 247 S.W.3d 557, 560 (Mo. Ct. App. 2007); *State v. Moss*, 83 S.W.3d 604, 604 (Mo. Ct. App. 2002)
[287] *State v Sykes* 372 S.W.3d 33(Mo. Ct. App 2012)
[288] ibid

defendant actually knew of his HIV status, despite the fact the defendant had confirmed his sero-status throughout the trial.[289]

There appears to be a preference towards actual knowledge within the States that have not expressly stipulated the knowledge requirement. The common theme throughout the jurisdictions is that there has been no prosecutions of an individual who has been wilfully blind as to their sero-status. It is conceded that it is undemanding to ascertain that a defendant has actual knowledge of their HIV status as a positive test will confirm that the defendant knew that he was infected. This should not preclude wilfully blind individuals from being considered to know of their sero-status.[290] States can, and should, utilise wilful blindness as an alternative to actual knowledge.[291]

There is a lack of clarity on the knowledge criterion in the U.S. criminal justice codes that do not express any specific guidance as to the overarching requirement. It has been suggested that provisions should specify that a positive test is the requirement for knowledge.[292] As identified in the previous section, to enact such terms would be too restrictive as actual knowledge of HIV status would then be the only relevant requirement. Constraining definitional constructs in this manner excludes those who suspect that they have the virus, but refrain from confirming their concerns.

[289] ibid
[290] Above p 110 - 114
[291] Mo. Rev Stat § 191.677 (2014) ; Cal. Health & Safety Code § 120291 (2014) ; 720 Ill. Comp. Stat 5/12-5.0
[292] Shriver (n 263)343

U.S. State Law: HIV Awareness Based Upon Constructive Knowledge

No specific legislation facilitates constructive knowledge as a primordial consideration in terms of offence definition. As previously noted, the Nevada's Criminal Code affords the opportunity to assess knowledge by using 'a reasonable person' test. The impact is rendered nugatory in practice as the HIV specific provision in Nevada states that 'actual' knowledge of sero-status is the requirement.[293] Contrastingly, Washington's HIV statute has no express provision on the knowledge requirement.[294] Washington's Penal Code's definition of knowledge includes a level of awareness that is assessed by a 'reasonable suspicion', and this may connote that constructive knowledge is sufficient for inculpation in HIV transmission/exposure cases.[295] The cases, however, that have originated from this jurisdiction have concerned individuals who possessed actual knowledge of their sero-status: the requisite level of awareness has not yet been challenged within the appellate courts in Washington.[296]

Commentators have stated that any HIV specific statutes should expressly stipulate the requisite knowledge requirement because of the differing levels of knowledge.[297] Schulman[298] has postulated, in this context, that the general rule in relation to knowledge in HIV transmission/exposure cases should encompass defendants who 'ought to know' that they have the virus, thereby advocating constructive knowledge as the requisite threshold. Another proponent for constructive knowledge,

[293] Nev. Rev Stat § 201.205 (2014)
[294] Wash. Rev Code § 9A.36.011 (2014)
[295] Wash. Rev Code § 9A.08.010 (2014)
[296] *State v Stark (1992)* 66 Wash.App. 423, 832 P.2d 109 (1992); *State v Whitfield* 134 P.3d 1203 (2006); 132 Wash. App. 878 (2006); *State v. Ferguson* P.3d, 97 Wash.App. 1080, 1999 WL 1004992
[297] Amy McGuire, 'Aids As A Weapon: Criminal Prosecution Of Hiv Exposure' (1999) 36 Houston Law Review 1787, 1815
[298] Eric L. Schulman, 'Sleeping With the Enemy: Combatting The Sexual Spread of HIV-AIDs Through a Heightened Legal Duty' (1996) 29 JohnMarshall Law Review. 957, 973

Jedrychowski,[299] states that 'constructive knowledge should be sufficient when knowing is the requirement'.[300] It must be remembered that constructive knowledge ought to be distinguished in criminal cases, particularly HIV transmission/exposure cases. An awareness that is based upon constructive knowledge is unjustified, as too much emphasis is placed upon a defendant being assessed objectively, and may denote that they can be considered to have knowledge of their status when they were actually unaware. The general exclusion of constructive knowledge from these statutes has not obviated proposals that would extend beyond the parameters of an objective assessment of the defendant's awareness.[301]

The Different Levels Of Knowledge Within The HIV Specific Statutes

It is evident that there is significant diversity within the American HIV statutes, and the requisite knowledge requirement that is interposed. The knowledge requirement is clear in a number of States: rather paradoxically it is imprecise in other State's provisions on HIV exposure. This is the result of the legislators failing to define 'knowing' within the designated statute. It may be that actual knowledge is considered to be the requirement, as defendants in appeals within these jurisdictions, have already acquired actual knowledge of their sero-status. This seems to infer that prosecutors are only prepared to pursue cases where it can be ascertained that the defendant had actual knowledge of their HIV status, but this should still not preclude from criminal sanctions those who are wilfully blind as to their sero-status. It is apparent that wilful blindness because of the wording in the

[299] Jedrychowski (n 261) 36
[300] Jodi Mosiello, 'Why The Intentional Sexual Transmission of Human Immunodeficiency Virus (HIV) Should be Criminalized Through the Use of Specific HIV Criminal Statutes' (1999) 15 New York Law School Journal of Human Rights 595, 613
[301] Rebecca Ruby, 'Apprehending the Weapon Within: The Case for Criminalizing the Intentional Transmission of HIV' (1999) 36 American Criminal Law Review 313, 330

statutes, is an alternative that can be utilised for inculpation in some U.S. states.[302] The extent of the facilitation of this requirement is, unfortunately, not obvious within the States that have adopted this broader categorisation. Having considered the position of knowledge in the United States it is now necessary to compare the approaches from the three countries in order to suggest an optimal pathway for standardisation.

A Comparative Extirpation Of The Jurisdictional Approaches To The Knowledge Requirement

The preceding discourse of the knowledge requirement of the defendant demonstrates that there are similarities and differences within each system, and lessons for future reform. It is clear that each jurisdiction facilitates actual knowledge, as this evidently identifies that the defendant knew of their sero-status. This is relatively undemanding, as there is a cogent rationale for facilitating a definitional construct of liability that is based upon actual knowledge. It is the lesser echelons of knowledge that have afforded conflicting accounts of the requisite knowledge requirement in the jurisdictions, and presented dilemmatic choices on implementation. It is instructive to summarise the similarities and differences within the jurisdictions in relation to how actual knowledge has been approached by the legislators and judiciary.

[302] Mo. Rev Stat § 191.677 (2014) ; Cal. Health & Safety Code § 120291 (2014) ; 720 Ill. Comp. Stat 5/12-5.01

Actual Knowledge Of Sero-Status: A Comparison of the Divergent Legislative And Judicial Precepts

The basic premise is that actual knowledge is sufficient within all of the jurisdictions. This is logical as if there is to be a criminal sanction then a defendant must know that he has the virus and this higher level of knowledge achieves this aim. That is not to signify that all of the jurisdictions have confirmed that the knowledge requirement is exclusively attributed to actual knowledge. It is evident that actual knowledge is a sufficient fault element, within England, as the two leading cases have concerned defendants that had tested positive for the virus.[303] The utilisation of actual knowledge within HIV transmission/exposure cases in Canada is also translucent. Any differences can be attributed to the American HIV specific statutes that state that a defendant has to have actual knowledge of their sero-status. These provisions generally stipulate that this is achieved by a positive test result. This evidently excludes any other type of knowledge from consideration.

The provisions that require a positive test result, although narrow in scope, at least provide clarity by stipulating the extent of the knowledge requirement. This does not denote that other methods of ascertaining actual knowledge has not been utilised. In Ohio, where a positive test result is the requirement of the statute, the Court of Appeal held that the defendant confirming that he had the virus during the interview for the alleged offence equated to actual knowledge.[304] Another means of establishing actual knowledge was identified in Illinois. In *Dempsey,*[305] the testimony

[303] *R v Dica* [2004] EWCA Crim 1103; *R v Konzani* [2005] EWCA Crim 706; [2005] 2 Cr.App.R. 14
[304] *State v. Russell*, 2009 WL 3090190 (Ohio App.)
[305] *State v Dempsey* 610 N.E.2d 208 (Ill. App. Ct. 1993)

of the defendant's family as to his sero-status sufficed as proof that the defendant possessed actual knowledge of his sero-status This contrasts with the position in England and Canada, where actual knowledge has only been confirmed by positive test results. What is evident from analysing the American jurisdictions is that HIV specific pieces of legislation, requiring actual knowledge, provide deontological clarity, even if such a statute excludes wilful blindness.

In England, debate over the knowledge criterion remains subject to conjecture as neither *Dica*[306] *or Konzani*[307] clarified the knowledge threshold in any definitive sense. In *R v P,*[308] the appellate court in England appeared to infer that actual knowledge was the prerequisite definitional construct that confirms that the defendant was aware of their sero-status: the same judgment, however, implies that the defendant would be aware if he was wilfully blind. A concomitant of this is that there is no clarification of what equates to knowledge in English jurisprudence. Contrastingly, the judicial precepts emanating from Canada have confirmed that knowledge can be extended beyond defendants who possess actual knowledge. [309]

The main concern, that is a recurring theme throughout all of the countries, is that actual knowledge as the requirement may discourage testing.[310] This is identified by a number of commentators on both sides of the Atlantic.[311] There is no statistical data to confirm or refute this suggestion,[312] and it has been defined as faulty logic as

[306] *R v Dica* [2004] EWCA Crim 1103
[307] R v Konzani [2005] EWCA Crim 706; [2005] 2 Cr.App.R. 14.
[308] *R v P* [2006] EWCA Crim 2599 [8]
[309] *R v Williams* [2003] 2 S.C.R. 134
[310] Ginn (n 161) 241; Ryan (n 101); James B. McArthur, 'As the Tide Turns: The Changing HIV/AIDS Epidemic and the Criminalization of HIV Exposure' (2009) 94 Cornell Law Review 707
[311] Ginn (n 161) 241
[312] Burris and Others (n 102) 472

there are too many benefits to be attributed to being tested for the virus.[313] The 'discouraging testing argument' is not a sufficient reason for allowing knowledge to be established through wilfully blind individuals. It is the general criminal laws acceptance of the doctrine, and that a wilfully blind individual is considered in law to be equally aware, that is the rationale for the doctrines' inclusion in HIV transmission/exposure cases in the eyes of the present author. The ambit of wilful blindness in HIV transmission/exposure cases, across the spectra of comparative jurisdictions, will now be subjected to evaluative critique.

A Comparison Of Wilful Blindness: The Distinct Alternatives

From the previous exposition it is apparent that wilful blindness has been utilised within the general criminal law of all of the jurisdictions. Each country appears to provide the same definition of the doctrine: including a suspicion and a deliberate avoidance of confirmation of the existence of a fact. The effectiveness of the doctrine within the general criminal law does not presumptively denote at first blush that wilful blindness is considered as an appropriate fault element within all HIV transmission/exposure cases. Unlike actual knowledge, neither adoption nor clarity prevails, and it is only Canada that provides unequivocal guidance as to the utilisation of the doctrine within HIV exposure/transmission cases. This is in contrast to the English position where the doctrine has never been fully explored by the senior courts. Complexities also ensue when examining the various legislative frameworks that address HIV transmission/exposure within the USA: none of the

[313] Ginn (n 161)

respective state provisions examined offer any specific guidance as to the utilisation of wilful blindness.

The Canadian jurisdiction has accepted that if a defendant is wilful blind then he will be considered to have knowledge of his sero-status. In *Williams,*[314] the Supreme Court of Canada stated that wilful blindness would be the adequate threshold fault element. However, subsequent acceptance of the doctrine in this context has not emanated from the Supreme Court. In *S(F),*[315] the Ontario Court of Justice reaffirmed that wilful blindness was sufficient in these cases.[316] Further endorsement could have emanated from *Iamkhong,*[317] where the Court of Appeal in Ontario had the opportunity to confirm that a defendant would be accountable if she were wilfully blind as the doctrine can be utilised in cases of criminal negligence, the court did not explore this opportunity. Currently, *Williams* is still the authority that states that a wilfully blind individual will be considered to have knowledge of their sero-status.

The English approach is dissimilar to Canada as there has been no express adoption of the doctrine of wilful blindness by the senior courts. In *Dica,*[318] *and Konzani,*[319] Judge LJ refers to 'knowing', thereby having the potential to encompass wilful blindness. The use of 'knowing' could also infer that actual knowledge is the requirement. The lack of consistency within the judgments has been fertile ground for contention.[320] Wilful blindness, however, has been equated to the requisite

[314] *R v Williams* [2003] 2 S.C.R. 135
[315] *R. v. F.S.,* 2004 ONCJ 230
[316] ibid [42]
[317] *R v Iamkhong* 2009 ONCA 478
[318] *R v Dica* [2004] QB 1257
[319] *R v Konzani* [2005] EWCA Crim 706; [2005] 2 Cr.App.R. 14
[320] See Spencer (n 79); Weait, 'Criminal Law and the Sexual Transmission of HIV: *R v Dica'* (n 93)

knowledge criterion by a Court of First Instance.[321] Further acceptance of the doctrine as the requisite level of knowledge has emanated from the CPS.[322] The organisation does not present any legal basis for this perspective, but it is the CPS who ultimately decides whether to prosecute an individual.[323] It can be asserted that, under extant law in England, if a wilfully blind individual transmits the virus to an unsuspecting complainant he will be considered to have knowledge of his HIV status.

The American legislative provisions, have generally left undefined the knowledge requirement, and are distinct in comparison to the approaches in England and Canada in a number or respects. It is only the U.S State law provisions that restrict awareness to actual knowledge that proffer any legislative certainty. The other provisions provide no lucidity as to whether the knowledge requirement can be extended to include wilful blindness. It is unfortunate that the majority of legislators, within the USA, did not expressly stipulate an adherence to the doctrine. Perhaps, it was presumed that wilful blindness could be within the ambit of HIV specific legislation, as the general criminal law allows the doctrine to be utilised. The jurisprudence of the various States appellate courts have offered no assistance in clarifying the accessibility of the doctrine. This is regrettable, but the appeal cases, under consideration have primarily been concerned with individuals who had actual knowledge of their sero-status. The doctrine may be theoretically accessible to prosecutors, but does not appear to be utilised in the United States. Although the option to prosecute wilfully blind individuals is accessible in the States that do not

[321] Adaye Reported in The Times, January 10, 2004
[322] Crown Prosecution Service (n110)
[323] *R v Golding* [2014] EWCA Crim 889

define knowledge, it emerges that there may have been no opportunity to proceed with such prosecutions. This is in contrast to England where there has been a prosecution of a wilfully blind individual, and Canada where the Supreme Court has accepted the doctrine as an alternative to knowledge.

All of the jurisdictions have academicians who advocate actual knowledge as the fundamental requirement. The rationale for this assertion appears to be a misconceived understanding of knowledge.[324] As already espoused, none of these afford compelling grounds for excluding a wilfully blind individual from criminal sanctions. Possibly the most rational justification for the exclusion of wilful blindness emanates from the philosophical understanding of propositional knowledge. Under the traditional assumption, belief is a prerequisite of knowledge.[325] None of the definitions of wilful blindness from the jurisdictions require a belief: all anticipate suspicion to suffice. This is still insufficient to insulate from inculpation a wilfully blind individual who may be as aware and as culpable as an individual who possesses actual knowledge. The acceptance of the doctrine as a substitute for knowledge, and that the defendant may be equally aware, are the most resounding basis for facilitating the use of the doctrine, even if the definition of wilful blindness is deficient within philosophical terms. Perhaps the definition of wilful blindness needs to be refined so that a suspicion is substituted with a belief, but a discussion on this quandary is beyond the remit of this thesis.

[324] Cornett (n 171); Jedrychowski (n 261)
[325] Above p45

A Comparison Of The Exclusion Of Constructive Knowledge In HIV Transmission/Exposure Cases

It is apparent that the doctrine of constructive knowledge serves no purpose within English criminal law transmission of HIV cases.[326] This is replicated within the U.S. and Canadian legal systems. It is conceded that there is the possibility of individuals in the United States being prosecuted if they 'ought' to have known they had the virus: the possibility of such levels of awareness can be identified within the Washington's general penal statute.[327] The HIV specific legislation, however, has not defined the knowledge requirement and the cases emanating from Washington have concerned individuals who had actual knowledge of their sero-status. The law has not, nor should it, develop in this manner as constructive knowledge must be precluded. To include inculpation when a defendant may not be aware is unjust as he may not know that he is carrying the virus.

A number of Canadian and English academicians are in concurrence that the law should not be assessed on an 'ought' to know basis.[328] In contrast, there appears to be a plethora of writers, within the United States, who suggest that constructive knowledge is an appropriate level of awareness in HIV transmission/exposure cases.[329] The present author, however, refutes this proposition presented by Jedrychowski and others, articulating that authentic insights are provided from broader overarching substantive criminal law principles attained to fault and philosophical constructions adduced herein. As with those who wish to exclude

[326] *R v Dica* [2004] QB 1257
[327] Wash. Rev Code § 9A.08.010 (2014)
[328] Grant (n 179); Cornett (n 171)
[329] Jedrychowski (n 261)

wilfully blind individuals from inculpation,[330] they fail to take into consideration the apposite doctrinal basis for its exclusion: predominately that the doctrine is objectively assessed and contrary to inculcated subjectivist requirements. It is for these reasons that any statute must be sufficiently outlined so that individuals will be deemed to know their sero-status if they have actual knowledge or they suspect that they have the virus but refrain from confirming their suspicion. A novel legislative framework is adduced below as part of cathartic reform principles to provide clarity, and a legislative equipoise for any knowledge standardisation.

Novel Reform: A Suggested Legislative Framework

It is evident that the defendant has to have knowledge that they are carrying the virus. If there is to be criminal sanctions, then the use of actual knowledge can be justified. An individual who possesses actual knowledge that they are HIV+ and does not disclose their status to an unsuspecting partner is morally and legally deficient and the criminal law of each country allows for these individual to be held accountable for their actions. They are being irresponsible by having unprotected intercourse with an individual who is unaware of their sero-status.

There is also a cogent rationale for including within the knowledge framework an individual who is wilfully blind. A defendant who suspects that they may have the virus, but deliberately refrains from confirming the existence of the fact, can be considered to be as aware as an individual who possesses actual knowledge. Anyone who deliberately refrains from confirming their HIV status should be held

[330] Weait, 'Criminal Law and the Sexual Transmission of HIV: *R v Dica'* (n 93)

accountable for their actions when they are carrying the virus. There is no compelling reason for excluding such individuals from the net of culpability. If a defendant who has actual knowledge can face prosecution, then a defendant who deliberately avoids the truth should also be held accountable. It is arguable that the legal definition of wilful blindness does not adhere to a traditional philosophical understanding of knowledge. This does not imply that the doctrine should be excluded, as an individual in those circumstances can be considered to be equally aware as an individual who possesses actual knowledge.

The use of constructive knowledge is more contentious. The objectivity of the test provides sufficient justification for excluding this type of knowledge as the awareness has to be based upon the defendant's advertence. Extending the ambit of the criminal law to encompass those who 'ought to know' is criminalising the conduct of an individual who may not know that he has the virus. It is also essential that any enactment assesses the defendant's awareness subjectively.

If HIV exposure or transmission is to be criminalised it is evident that there are distinct advantages to enabling a legislative framework to curtail this type of egregious behaviour. The American statutes that require actual knowledge demonstrate that it is beneficial to have an expressly stated statute that defines what is considered to be knowledge. This does not denote that the requirement, in the current context, ought to be exclusive to actual knowledge, but these provisions have provided certainty within the law. Any legislation should include a knowledge requirement that facilitates actual knowledge and wilful blindness, as in both

circumstances it can be stated that the defendant knew of their sero-status.[331] The preceding discourse has demonstrated that a defendant who possesses actual knowledge, and those who are wilfully blind, can be considered to be equally aware of their status. Any statutory provision should be structured to state that:

2. Knowledge of HIV status

A defendant is aware that they have contracted HIV if he:

(3) Actually knows (by testing positive or any other means); or

(4) suspects that he is carrying the virus and that he does have that virus

This suggested statutory framework affords for the defendant to be assessed subjectively. There is no indication of an objective evaluation of the facts as there is reference to the defendant knowing throughout this section. This is an appropriate manner in which to assess the level of awareness in HIV transmission/exposure cases. The legislative framework encompasses those who have actual knowledge via a test, and extends actual knowledge so that it can be established by other means. Defining knowledge to encompass individuals who have tested positive corresponds to the lucidity of the American provisions[332] that require actual knowledge, but this does not restrict the stricture of this subsection. There is sufficient scope within the subsection to establish actual knowledge by other means. This is an acceptance of the judicial precepts that have emanated from the American

[332] Ark. Code § 5-14-123 (2012) ;

jurisdictions that have identified that actual knowledge can be derived from other sources other than a positive test result. For example, the defendant's relatives confirming that he knew that he had the virus would suffice.[333]

The suggested statutory provision also accounts for wilful blindness as a sufficient knowledge requirement. This avoids any ambiguity on whether the doctrine can be utilised, thereby evading the necessity of judicial scrutiny. The definition corresponds to the general criminal law approach in each of the countries. Firstly, that he suspects that he has the virus, and secondly that it is clear that the defendant has not endeavoured to seek confirmation of their sero-status. This is obvious as the preceding subsection states that knowledge can be acquired through a positive test, therefore, the provision on wilful blindness is distinct in regards to the subsection on actual knowledge. The subsection would encompass those who are displaying symptoms, and have partaken in high risk activities with other individuals who had the virus. The breadth of the definition would also include those who were awaiting confirmation of their test. The provision circumvents any ambiguity as to objectivity as it is expressed to adopt subjectivity through the eyes of the actor. This eradicates any issues on the type of knowledge that is required for a defendant to be considered to have knowledge of their sero-status. A defendant must also have the virus to be liable. It is acknowledged that a suspicion does not equate to knowledge from a philosophical definition of knowledge, but such individuals can be considered to be as equally aware as those who possess actual knowledge, and that should be sufficient to establish that the defendant knew of their sero-status.

[333] *State v Dempsey* 610 N.E.2d 208 (Ill. App. Ct. 1993)

Having considered the position of defendant's knowledge of his sero-status within the jurisdictions it is now appropriate to assess what type of actions are and should be criminalised. The next chapter will discuss whether transmission of the virus or exposure to the virus ought to be the conduct that is prohibited within the three identified criminal justice system templates. This will be extrapolated by examining causation, the rationale for criminalising harm or the risk of harm, and the current position in each country within the analysis of transmission/exposure substantive doctrinal principles.

Chapter Three

The Importance Of Causation And The Risk Of Harm: The Various Jurisdictional Approaches To Criminalising Transmission And Exposure To HIV

Introduction

If it is to be accepted that individuals who 'know' that they are HIV+ should face sanctions then there must also be consideration of the type of conduct that should be criminalised. Whether transmission of HIV should be the threshold requirement, or if the law should extend to circumstances whereby a defendant exposes another to the virus necessitates examination. The aim of this chapter is to review the importance of causation and the risk of harm in this context towards an optimal reform pathway, and in light of review of comparator judicial precepts. The contemporary position in the majority of jurisdictions has shifted to criminalise transmission and exposure to the virus. *Prima facie*, the criminalisation of transmission and exposure to HIV corresponds to the harm principle, and Feinberg has stated that actual harm and situations that pose a risk of serious harm are a sound basis for state interference.[1]

Within the contextualisation of Feinberg's definition of the harm principle, it is cognate to justify the adoption of specific legislation for criminalising transmission or exposure to the virus.[2] Confirmation of transmission of the virus by the defendant to

[1] Joel Feinberg, *Harm to Others: the Moral Limits of Criminal Law* (Oxford University Press 1984), 11
[2] ibid

the complainant, and what should be the requisite threshold level for criminal exposure so that that conduct accords to the harm principle, requires elucidation. To address these issues the chapter is divided into five sections. The first three parts of the chapter will set out the position of transmission and exposure from a theoretical and doctrinal basis. The first two parts of this section will present a discussion of causation and the harm principle: both of these elements are prerequisites for assessing culpability based upon transmission or exposure respectively. This will demonstrate that in cases of transmission the ordinary principles of causation apply, and that scientific evidence is required to assist in establishing that the defendant caused the infection in the complainant. In cases of exposure it will be determined that not all cases of exposure should be criminalised. If exposure is to be considered culpable conduct then it is the social utility of sexual interaction, the magnitude of the harm, and the probability of harm that must be proportionately balanced.[3]

The chapter will then assess the extant position of transmission and exposure by individually evaluating the legislative and judicial precepts within England, Canada and the United States. In England, the current approach is that individuals will be prosecuted for transmitting the virus, and that there is also the possibility of criminal sanctions when a defendant attempts to transmit the virus.[4] The latter circumstance does not accord to the harm principle. The Canadian jurisdiction allows for criminalisation of transmission, and exposure to the virus. There will be criminal sanctions, within Canada, if the defendant's conduct poses a 'significant risk of

[3] Feinberg, *Harm to Others: the Moral Limits of Criminal* Law (n 1)
[4] *R v Dica* [2004] QB 1257; Crown Prosecution Service (CPS) 'Intentional or Reckless Sexual Transmission of Infection' <http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/index.html#Safe accessed 30 April 2015

serious harm' that has a 'realistic possibility of transmission of the virus'.[5] The test promulgated by the Supreme Court appears to accord to the harm principle, however, it will be demonstrated that the judiciary places too much emphasis upon the magnitude of harm without due consideration of the probability of harm. The final section of this part of the chapter will assess the various American legislative methods that criminalise exposure to the virus. It will be argued that the present situation within the majority of American jurisdictions is devoid of principle as there is no real consideration of what will equate to a harm under Feinberg's definition of the term.

The penultimate part of the chapter critically compares the approaches that have been adopted in the aforementioned countries with emphasis placed upon the harm principle. It will be shown that there are similarities and significant differences in the jurisdictional approaches. The final element of the chapter will propose a statutory footing that will not only criminalise transmission, but will also prohibit certain activities that expose an individual to the virus. To begin the discourse on transmission and exposure it is appropriate to firstly assess issues of transmission and causation.

Causation And The Transmission Of HIV

> "*The prevention of harm, then, is a morally legitimate purpose, an always relevant reason, for restrictive legislation*."[6]

[5] *R v Cuerrier* [1998] 2 S.C.R. 371*; R v Mabior* 2012 SCC 47
[6] Joel Feinberg , 'Harm to Others-A Rejoinder' (1986) 5 Criminal Justice and Ethics 16, 17

For a result crime the defendant must have caused the actual harm. In the majority of non-fatal offences causation will be relatively uncomplicated to determine, but in cases of HIV transmission it is more demanding to conclude that a defendant will have transmitted HIV to an unsuspecting complainant. There must be a causal connection, otherwise it may not be possible to establish that the defendant transmitted the virus to a particular individual. The allegation necessitates that the prosecutorial authorities establish that the defendant was the 'cause' of the infection in the unsuspecting sexual partner. Confirmation of the allegation is successfully accomplished, all other things being equal, if there is sufficient evidence adduced whereby the fact finder can conclude that the virus emanated from the defendant.[7]

Causation is, therefore, in cases of transmission of the utmost importance. Honoré and Hart propose that legal causation consists of two questions. The first asks: 'would Y have occurred if X had not occurred?'[8] This is a question of fact and requires examination by the fact-finder. It is a necessary condition; if this is not answered affirmatively there is no requirement to proceed to the second question.[9] At this initial stage further questions may necessitate clarification.[10] For example, it may be essential to confirm that transmission of HIV occurs through sexual intercourse. In sexual transmission cases it can be assumed that sexual intercourse is a necessary condition and this can be considered to be 'a causally relevant factor'.

[7] See *R v Golding* [2014] EWCA Crim 889 a case concerning genital herpes where the incubation period and the complainant's testimony were sufficient to establish the causal connection.
[8] Tony Honoré and Hebert Lionel Adolphus Hart, *Causation in the Law* (Oxford University Press 1985), 110 (where Y is Harm and X is the act)
[9] ibid 110
[10] ibid 111

It is an essential requirement to complete the act of transmission, and will be the *sine qua non*.[11]

If the defendant had sexual intercourse with the complainant it would be deficient to stipulate that the defendant transmitted the virus to the complainant. The causal question of whether the virus has been transmitted to the complainant is not simply a question that can be answered affirmatively or negatively. It requires supplementary evidence to ascertain whether the defendant did in fact transmit the virus to the complainant. This condition needs to be fulfilled, as this assists in establishing the causal link between the defendant's actions and the subsequent harm that has been caused. It is whether the strain in the complainant is the equivalent to the virus that is in the defendant that is the issue that must be addressed. Any test that can confirm this will be probative in ascertaining whether the strain in the defendant and the complainant are equal.

It is beyond the comprehension of the fact-finder to understand the complexities of the virus, and how the various strains may be related, as there are numerous sub-types of the virus that can be identified.[12] Scientific evidence is necessary, as this can contribute to assisting the fact-finder in determining whether the defendant caused the actual transmission. It can be safely asserted that without the scientific evidence, that the strains are related, there may be insufficient evidence to

[11] ibid 113
[12] Matthew Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (Glasshouse 2006), 98

substantiate that the defendant would have caused the infection in the complainant.[13]

The current method of ascertaining the relationship between two strains of the virus is phylogenetic analysis.[14] This test has the potential, in criminal trials, to establish the causal link between the defendant's actions and the transmission of the virus. The absence of the test could denote that it cannot be demonstrated that the defendant transmitted the virus to the complainant, and therefore a prosecution may not ensue. If phylogenetic analysis were excluded as evidence it would also be possible for the defence to submit that there was no case to answer.

It is accepted that phylogenetic analysis does not conclude that the virus emanated from the defendant, as the test can only be an estimate that the strain has originated from the defendant.[15] Indeed, there are concerns with phylogenetic analysis as evidence as, unlike DNA, it is not unique to the host.[16] It has been stated that this test should not be the sole piece of evidence and should not be considered as conclusive proof of transmission from the defendant.[17] Agencies such as the Crown Prosecutions Service (CPS) acknowledge that phylogenetic analysis in isolation may be deficient and anticipate more evidence needs to be adduced.[18] Despite the absence of absolute certainty with the test, the evidence can still be expected to be probative as this will demonstrate that there is a potential causal link between the strains.

[13] In *R v Golding* [2014] EWCA Crim 889 the complainants testimony and the incubation period of the virus were considered sufficient to establish that the genital herpes emanated from Golding.
[14] Above ch 1 p 37 - 39
[15] Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 12) 99
[16] ibid 98
[17] Edwin J Bernard and Others, 'The Use of Phylogenetic Analysis as Evidence in Criminal Investigation Of HIV Transmission' (2007) < http://ssrn.com/abstract=967915> accessed 18th April 2015
[18] Crown Prosecution Service (n 4)

The strains may be related, but this does not denote that the defendant transmitted the virus to the complainant. It is conceivable that the complainant transmitted the virus to the defendant as the test does not signify the direction that the virus was transmitted. Other discrepancies may also be identified as the defendant, although aware that he has the virus, could never be stated to have known that he actually transmitted the virus to the complainant. There is nothing that is visible for the defendant to conclude that they have infected that person with the virus.[19] However, an HIV+ defendant would be aware that he may have transmitted the virus to the complainant.

Having addressed the first question it is the second question that necessitates consideration. The second question, promulgated by Honoré and Hart, asks whether there is any principle which precludes the treatment of Y as the consequence of X for legal purposes.[20] Generally, if the first question is affirmative there is no issue with the second, as this provides evidence of a causal link between the strain of HIV in the complainant with the virus that is in the defendant. Issues surrounding a break in the chain of causation may still require consideration. There may still be factors that are pivotal in raising a doubt as to whether the virus was transmitted to the complainant by the defendant. It may be that the complainant had sexual intercourse with another individual at the same time as having intercourse with the defendant. Alternatively, it may be that the complainant had a blood transfusion that may have infected them. If there is no break in the chain then an inference can be drawn from

[19] Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 12) 98
[20] Honoré and Hart (n 8)110

the phylogenetic test results. Concerns as to causation are not as apparent in cases of exposure to HIV. The risk of serious harm and exposure will now be evaluated.

Exposure To HIV As A Risk Of Serious Harm

A long-standing basis for permissible criminal prohibitions has been stated to be when one person harms another.[21] Thus, the leading proponents of the harm principle have defined harm to facilitate criminalisation when the sanction prevents harm to others. [22] It is relatively undemanding to construct a case for criminalising conduct when HIV has been transmitted: there is a clear indication of harm. The harm principle is not restricted to actual harm, as Feinberg submits that the risk of serious harm is also within its ambit.[23] The utilisation of risk of serious harm is restrictive in nature as circumstances that pose a risk of trivial harm are not to be taken into consideration.[24] Criminalisation of the risk of trivial harm would invoke the criminal law to an unnecessary extent by encompassing too many disparate situations, and restricting the liberty of individuals within society for no good reason.

It is generally accepted that HIV causes serious harm,[25] and this is an obvious foundation for criminalising the transmission of HIV. Exposure to HIV, and therefore the risk of serious harm, is more problematical to reconcile. This is made more onerous a task when sympathy can be attributed to an individual who may be convicted of exposing another to the virus. This empathy can, and does, begin to

[21] John Stuart Mill, *On Liberty* (John Gray and G.W. Smith (eds), Routledge London, 1991) 30 : "That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others."
[22] Ibid; Feinberg, *Harm to Others: the Moral Limits of Criminal* Law (n 1)
[23]Feinberg, *Harm to Others: the Moral Limits of Criminal* Law (n 1) 11
[24] ibid 189
[25] Margo Kaplan, 'Rethinking HIV-Exposure Laws' (2012) 87 Indiana Law Journal 1517, 1523

erode when the advertence of the defendant, and the activity that that person has partaken in, is taken into consideration. If the activities of the infected individual are of a high risk to the recipient then this is a justification for criminalising that conduct. It seems evident that conduct that would put an individual at risk of serious harm ought to be criminalised. There appears to be no rationale as to why dangerous types of conduct should evade a criminal sanction. The criminalisation of that behaviour is further reinforced by a defendant intending to transmit the virus.

To enable the criminalisation of the risk of serious harm Feinberg has specified that it is the risk and severity that is fundamental:

> "…*the greater the probability of harm, the less grave the harm needs to be to justify coercion; the greater the gravity of the envisioned harm, the less probable it need be."*[26]

Thus, criminalisation, in Feinberg's view, is dependent upon the seriousness of the harm, and the likelihood of the harm occurring. It is the combination of that magnitude and probability that enables a legislator to criminalise certain risks of serious harm, and the combination of the two is known as risk.[27] The more serious the harm the less likelihood of its occurrence will suffice, and conversely the less serious the harm the more likelihood of the incident transpiring may be sufficient. In cases concerning HIV exposure the magnitude of risk is apparent, as an individual who exposes another to the virus can be said to be putting that sexual partner at risk of contracting a life changing illness. It is evident that because of the seriousness of the illness that low risks of transmission ought to be criminalised. This signifies that,

[26] Feinberg, *Harm to Others: the Moral Limits of Criminal* Law (n 1) 191
[27] ibid 188 -189

if there is a statistical probability of transmission, then this is a sound basis for criminalising exposure. However, this is not the end of the matter as a further ingredient is proposed by Feinberg whereby the social utility of the activity must be considered.[28] It must be accepted that sexual intercourse is beneficial to individuals and society.[29] In these circumstances Feinberg suggests that, 'the greater the social utility of the act or activity in question, the greater must be the risk of harm (itself compounded of gravity and probability) for its prohibition to be justified'.[30] There must be an acceptance of the benefits to society, and that an HIV+ individual cannot be expected to live a life of abstinence. The risk of infecting another with the virus varies, and depends upon a number of factors including the type of sexual activity, and whether the HIV+ positive partner is the insertive or the receptive partner.[31] This implies that too remote a risk of transmission should not be criminalised as the law should not be concerned with activities that pose a low or negligible risk of transmission.[32] Proponents suggest differently, and stipulate that by exposing someone to a risk that it can be considered that that individual has harmed that person.[33] Finkelstein submits that:

> "*A person who inflicts a risk of harm on another damages that interest, thus lowering the victim's baseline welfare. This account distinguishes between risk-based harm, which I call "risk harm," and ordinary, tangible harm, which I call "outcome harm." I claim that risk harm is a form of harm that is independent of outcome harm, on the grounds that minimizing one's risk exposure is an element of an agent's basic welfare. "Real" harm, in other words, is not limited to outcome harm.*"[34]

[28]Feinberg, *Harm to Others: the Moral Limits of Criminal* Law (n 1) 191
[29] Hebert Lionel Adolphus Hart, *Law, Liberty, and Morality,* (Oxford University Press 1963), 22
[30]Feinberg, *Harm to Others: the Moral Limits of Criminal* Law (n 1) 191
[31] Above ch 1 p 32
[32] Feinberg, *Harm to Others: the Moral Limits of Criminal* Law (n 1) 189
[33] Claire Finkelstein, 'Is Risk a Harm' (2003) 151 University of Pennsylvania Law Review 963, 988
[34] ibid 966

It is apparent that Finkelstein considers a risk to be harm, whether or not actual harm has resulted. In cases of exposure to HIV Finkelstein may consider any exposure to be harm to the complainant. This would place too much emphasis on the magnitude of harm, whilst appearing to deem the probability of harm to be irrelevant. The risk of the virus being transmitted can be associated to the Russian roulette example promulgated by Kadish, and noted by Finkelstein.[35] In that example a person who has sexual intercourse with a complainant, who is unaware that they carry the virus, may be understood to be playing Russian roulette with that individual's welfare. The unsuspecting complainant being exposed to the virus does not denote that that defendant is less culpable than an individual who actually transmitted the virus to an unsuspecting complainant as they do the 'same bad act'.[36] Neither individual's conduct can be distinguished from the other, it is only the result that is different. All types of sexual conduct potentially expose another person to the risk of harm, but this does not infer that all types of exposure ought to be criminalised. The appropriate method to distinguish between criminal and non-criminal harm, within the context of HIV exposure, is by acknowledging the state of mind of the defendant and the level of risk within an activity. There should be a demarcation line that may exclude certain circumstances and types of conduct, as being considered to be a risk of serious harm.[37] The rationale being that the likelihood of transmission under these conditions is significantly reduced.[38] When these parameters are ascertained it will be possible to construct a legislative framework that will criminalise risky behaviour, and exclude behaviour that can be considered to be a nominal risk. It is only then

[35] Finkelstein (n 33) 988
[36] ibid 988
[37] For example unprotected oral intercourse
[38] There has been no reported criminal cases of transmission with low risk activities

that the law can be stated to be considered as a just tool for criminalising risky behaviours.

The harm principle establishes a case for criminalising transmission, and also lays the foundation for the criminalisation of exposing another to the virus. It is the basis for ascertaining when risky behaviour will be considered to be a harm that necessitates clarification. It is suggested that any type of exposure, where transmission has not taken place, would offend the complainant, but has not harmed them *per se*.[39] If an individual is exposed when there is a significant risk, or exposed where there is a negligible risk, it can still equate to the same psychological impact upon an exposed individual. It is the defendant's state of mind that is important, as intentional exposure that causes a significant risk of serious harm should be subject to prosecution, as exposure that poses a low or negligible risk infers no culpability on the part of the defendant: rather, it can infer that that individual was acting responsibly.[40] The position of exposure and the transmission of HIV within each of the jurisdictions will now be considered.

The Criminalisation of Sexual Transmission and Exposure To HIV In England

In 1993, the Law Commission proposed that intentional and reckless transmission of HIV ought to be included in any enactment on non-fatal offences.[41] It was recognized that the seriousness of the disease, and the degree of risk, needed to be taken into

[39] Feinberg, *Harm to Others: the Moral Limits of Criminal* Law (n 1) 45
[40] See chapter other defences
[41] Law Commission, *Offences Against the Person* (Law Com No 218, 1993) para 15.17

consideration. The Law Commission did not propose any exposure provisions.[42] The Government, in 1998 disregarded the propositions, in part, by stipulating only the most serious cases should be prosecuted, and that intentional transmission should be criminalised.[43] To do otherwise, it was suggested, may lead to discrimination of HIV infected individuals.[44] The draft Bill of 1998, by the Home Office, did not take into account the risk of serious harm, as exposure was excluded from criminalisation.[45] The current Law Commission Scoping Paper in 2014 suggests that the draft Bill could be enacted, but also offers potential alternatives: a modification of the Bill to incorporate reckless transmission or 'adopt some other scheme'.[46] The latter proposition suggests that a specialised offence of transmission of the virus would be enacted. None of these proposals consider the risk of serious harm as all are concerned with the transmission of the virus. It is unfortunate that the Commission have disregarded exposure by primarily focussing upon cases of transmission as there is a clear rationale for risk of serious harm to be included.[47]

The current English position, suggested as one of the alternatives by the current Law Commission's Scoping Paper, is that the defendant must have recklessly transmitted the virus to an unsuspecting complainant.[48] There are currently no cases whereby the defendant has exposed an unsuspecting complainant to the virus, and section 20 of the Offences Against the Person Act 1861 does not accommodate a prosecution based upon exposure. The CPS affirms this position by specifying that there can be

[42] Law Commission, *Offences Against the Person* (Law Com No 218, 1993) para 15.19
[43] Home Office, *Violence: Reforming the Offences Against the Person Act 1861* (1998) para 3.17 - 3.20
[44] ibid para 3.16
[45] ibid
[46] Law Commission, *Reform of Offences against the Person A Scoping Consultation Paper* (Law Com SP no217,2014) Para 6.65
[47] Above p150 - 154; Law Commission, *Reform of Offences against the Person A Scoping Consultation Paper* (Law Com SP no217,2014) Para 6.106
[48] *R v Dica* [2004] EWCA Crim 1103

no prosecution for exposing another to the virus when the defendant has acted recklessly.[49] This does not denote that there is no potential to prosecute when there has been exposure to the virus. For a successful conviction, for exposing another to the virus, the defendant must have acted intentionally.[50] In cases of intentional exposure the CPS have stated that it would be in the public interest to prosecute these individuals.[51] It is apparent that liability in the English criminal justice system can ensue when there has been reckless transmission of the virus or if the defendant has intended to expose the complainant to HIV. Currently, prosecutions have been exclusively attributed to transmission of the virus, and there has been no cases where the defendant exposed the complainant to HIV. It is for that reason that the analysis of England will primarily focus upon cases concerning the transmission of the virus.

English Judicial Precepts And The Sexual Transmission Of HIV

The leading authorities in England, *Dica*[52] and *Konzani,*[53] have been cases when the virus has been transmitted. In *Dica,*[54] the defendant was alleged to have transmitted the virus to two unsuspecting complainants, whereas, in *Konzani,*[55] the defendant was believed to have transmitted the virus to three individuals. The basis of the appeal, in both cases, concerned the availability of consent as a defence, and there was no particularised issue raised in relation to transmission of HIV. There were still posited questions as to whether the conduct of the defendant equated to a criminal

[49] Crown Prosecution Service (n 4)
[50] Criminal Attempts Act 1981
[51] Crown Prosecution Service (n 4)
[52] *R v R v Dica* [2004] EWCA Crim 1103
[53] *R v Konzani* [2005] EWCA Crim 706; [2005] 2 Cr.App.R. 14
[54] *R v Dica* [2004] EWCA Crim 1103
[55] *R v Konzani* [2005] EWCA Crim 706; [2005] 2 Cr.App.R. 14

act. At the time of *Dica,* the transmission of infectious disease was not considered to be an offence under section 20 of the Offences Against the Person Act 1861.[56] Judge LJ resolved to remedy this lacuna, and held that an offence under that statutory provision could consist of more than actual physical assaults.[57] The change in position by Judge LJ provided an elaborate discussion that finally overruled *Clarence*[58] as the authority that s20 can only be committed via a physical assault. Judge LJ reaffirmed the endorsement[59] of Hawkins J minority dictum in *Clarence*. [60] In *Clarence,*[61] Hawkins J's stated that the word 'inflict' was not exclusively attributed to physical assaults.[62] Judge LJ asserted that:

> "*Whether the consequences suffered by the victim are physical injuries or psychiatric injuries, or a combination of the two, the ingredients of the offence prescribed by s.20 are identical. If psychiatric injury can be inflicted without direct or indirect violence, or an assault, for the purposes of s.20 physical injury may be similarly inflicted*"[63]

His Lordship therefore overruled the precedent from *Clarence,*[64] and stated that cases where transmission of HIV has transpired will equate to grievous bodily harm:

> *"In our judgment, the reasoning which led the majority in Clarence to decide that the conviction under s.20 should be quashed has no continuing application. If that case were decided today, the conviction under s.20 would be upheld."*[65]

[56] Offences Against the Person Act 1981 s20 "Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour"
[57] *R v Dica* [2004] EWCA Crim 1103
[58] (1888) 22 QBD 23.
[59] *R v Wilson (Clarence)* [1984] AC 242
[60] *R v Dica* [2004] EWCA Crim 1103, [24] –[26]
[61] *R v Clarence* (1888) 22 QBD 23.
[62] ibid 50
[63] *R v Dica* [2004] EWCA Crim 1103, [30]
[64] *R v Clarence* (1888) 22 QBD 23.
[65] *R v Dica* [2004] EWCA Crim 1103, [30]

This is an acknowledgement, by Judge LJ in *Dica*, that the sexual transmission of HIV was firmly entrenched within the ambit of s20 of the Offences Against the Person Act 1861. Cherkassky submits that the court accepted the erosion of *Clarence* by confirming that there was no longer a distinction to be drawn between immediate and delayed harms.[66] It is therefore the harm, and not the timing of the harm, that became of paramount importance.

The appellate court did not address any issues in relation to how actual harm may be confirmed. This does not denote that there are no apprehensions about how transmission of the virus may be established. Weait proposes, because of the silent nature of transmission, a defendant is in an onerous position as he would not know that he has caused the transmission.[67] A defendant may never be 'fully aware' that he has caused harm, but an infected individual would be fully aware that he may have transmitted the virus through sexual intercourse. If the threshold for inculpation is to be based upon transmission then it is the issue of causation, and not the awareness of the defendant that he has transmitted the virus, that necessitates consideration. The utilisation of phylogenetic analysis assists in addressing these concerns, as the test contributes to identifying an association between the strains in the complainant and the defendant. The prosecutorial authorities have relied upon phylogenetic analysis evidence to support identifying the relationship between the two strains.[68]

[66] Lisa Cherkassky, 'Being Informed: The Complexities of Knowledge, Deception and Consent when Transmitting *HIV'* (2010) 74 Journal of Criminal Law 242, 246
[67] Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 12) 98
[68] Crown Prosecution Service (n 4)

Weait suggests that phlyogenetic analysis is not sufficiently conclusive to be employed in these cases.[69] It is also the lack of probity as to the accuracy of phylogenetic analysis by defence counsel that concerns Weait, as this evidence should be 'sufficiently robust'.[70] The CPS, in deference, has stipulated that phylogenetic analysis does not prove that the defendant transmitted the virus to the complainant as the use of this evidence, in isolation, would be defective.[71] Phylogenetic analysis is merely one of the components to establish that the defendant transmitted the virus to an unsuspecting complainant. The use of phylogenetic evidence is highly probative in assisting the fact-finder, and can be said to be a necessary component in determining whether the defendant transmitted the virus to the complainant. Furthermore, the duty of any expert lies with the court,[72] and it would be misconceived to anticipate that an expert would stipulate that the phylogenetic analysis confirms that the defendant transmitted the virus to the complainant.

Should s.20 Be The Appropriate Offence For The Transmission Of HIV?

The utilisation of the particular statutory provision in s20 (infliction of grievous bodily harm) has caused unease. Weait specifies it was not the purpose of the provision to be applied to the transmission of disease:

> "*Much of the difficulty in Dica stems from the fact that he was charged and convicted under s 20 of the OAPA 1861. This is not a provision that was designed to deal with the transmission of disease, let alone the*

[69] Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 12) 98
[70] ibid 98
[71] Crown Prosecution Service (n 4)
[72] Criminal Procedure Rules 33.2

complexities associated with the transmission of disease in the context of intimate sexual relations."[73]

There is nothing contemporary about the criminalisation of transmission of disease and the use of the Offences Against the Person Act 1861. In *Sinclair,*[74] a case that concerned the transmission of a sexually transmitted disease, the defendant was successfully prosecuted for a non-fatal offence.[75] It appears that the criminalisation of the transmission of disease has been accessible to prosecutors since the inception of the 1861 Act.

It is apparent that criminalisation of the reckless transmission of HIV is firmly entrenched within English criminal law, and that the magnitude of harm is not the primary consideration.[76] In *Dica,*[77] and *Konzani,*[78] it was emphasised that the prosecutors were not attempting to prosecute the defendants for intending to transmit the virus, but it follows that if an offence can be committed under s20 then a defendant who intends to transmit the virus can also be subject to prosecution under s18 of the Offences Against the Person Act 1861. This has been confirmed in CPS guidelines.[79] Currently, there have been no cases where it has been alleged that a defendant has intended to transmit the virus. There could be a number of reasons for exclusion of intentional transmission, but primarily it is less demanding to ascertain that a defendant acted recklessly when he transmitted the virus. However, intentional exposure can also be considered to be a criminal act and the English position on exposure to the virus will now be explored.

[73] Matthew Weait, 'Criminal Law and the Sexual Transmission of HIV: *R v Dica'* (2005) 68 Modern Law Review 121, 133
[74] *R v Sinclair* (1867) 13 Cox , C. C. 28.
[75] Section 47 Offences Against the Person Act 1861
[76] Weait, 'Criminal Law and the Sexual Transmission of HIV: *R v Dica'* (n 73) 125
[77] *R v Dica* [2004] EWCA Crim 1103
[78] *R v Konzani* [2005] EWCA Crim 706; [2005] 2 Cr.App.R. 14
[79] Crown Prosecution Service (n 4)

English Statutes And Intentional Exposure To HIV

Currently, there have been no prosecutions in England for exposing another to the virus. [80] Prosecutions have ensued when the defendant has transmitted the virus to the complainant through unprotected sexual intercourse. This is not to stipulate that issues surrounding exposure cannot be considered, as there is the possibility that the prosecutorial authorities may bring a case when a defendant has exposed another to the virus. The CPS guidelines stipulate that intentional attempts at transmitting the virus may be subject to prosecution under s1 of the Criminal Attempts Act 1981 for attempting to commit an offence under s18 of the Offences Against the Person Act 1861.[81]

Not only should the intention of the defendant be relevant in exposure cases, the risks associated with the types of sexual activity should also be considered. Throughout *Dica,* Judge LJ referred to the risks associated with having intercourse with an individual who is HIV positive, thereby insinuating that the risk is a significant factor.[82] Furthermore, the constructional elements of the harm principle, and thereby the risk of serious harm, specify that conduct that poses a serious risk of harm 'ought' to be considered for criminalisation. Under Feinberg's definition it may be asserted that if the activity did not pose too great a risk of serious harm then the defendant's conduct should not be considered criminal.[83]

[80] ibid
[81] ibid
[82] *R v Dica* [2004] EWCA Crim 1103 [52]
[83] Feinberg, *Harm to Others: the Moral Limits of Criminal* Law (n 1)

The current position in England, *vis-à-vis* the attempted infliction of grievous bodily harm, is that the risk of infection would be irrelevant. [84] It would be immaterial that the defendant partook in an activity that posed virtually no risk of transmission. In these circumstances a defendant would be guilty of an attempt if he intended to transmit the virus to another.

Theoretically, it may denote that an individual who believed that he was infected with the virus, but was in fact HIV negative, would be liable to a criminal sanction if he intended to transmit the virus through intercourse.[85] This would be what Hogan describes as an 'absolute impossibility'.[86] No matter how much the defendant tried he would not be able to transmit the virus. The absurdity of the situation in relation to this particular type of conduct is evident, and is an affront to rationality. The only exclusion to inculpation based upon the law of attempt is when there an intent to commit an 'imaginary' crime, in other words a crime that does not exist.[87] It seems; therefore, that it would be immaterial whether the defendant could transmit the virus provided that there was sufficient evidence adduced that demonstrates his actions were more than preparatory and that he intended to infect another with HIV through sexual intercourse.

[84] Criminal Attempts Act 1981
[85] See Criminal Attempts 1981 s1(2); *R v Shivpuri* [1987] A.C. 1
[86] Brian Hogan, 'Attempting the Impossible' (1986)10 Trent Law .Journal 1,4
[87] Glanville Williams, Attempting the Impossible – The Last Round?'. (1985) New Law Journal 337, 338 Williams gives the example of the individual who is 'smuggling sugar into the country, believing that this is prohibited, when in fact there is no prohibition on importing sugar'

It has been demonstrated that the judiciary and prosecutorial authorities in England have endeavoured to address transmission and exposure to the virus. Only those who intended to transmit the virus, but were unsuccessful, would be subject to sanctions for exposing another to HIV. This does not take into consideration the risk of serious harm as it is the defendant's mental state that is of paramount importance. Therefore, the extant law in England that facilitates criminalisation of exposure does not correspond to the harm principle and this is not how the law should develop. The suggested statutory provision herein, will demonstrate that the risk of serious harm must be accounted for within any statute that criminalises exposure to the virus. Further to extirpation of English law substantive principles, the legal kaleidoscope turns to examine Canadian law on the criminalisation of exposure and transmission of HIV that will now be critically evaluated as part of comparative analysis critique.

Canada: Exposing or Transmitting the Virus to an Unsuspecting Sexual Partner

The Canadian jurisdiction has general criminal laws that enable the prosecution of a defendant who transmits the virus to an unsuspecting complainant.[88] The statutory offences also accommodate criminal sanctions for a defendant who exposes another to the virus.[89] There have been a significant number of prosecutions within Canada, particularly as exposure is considered sufficient for inculpation purposes. The effect is so considerable that by 2011 criminal prosecutions for exposure accounted for

[88] Criminal Code, RSC 1985, c C-46, s 265, s268
[89] ibid

39% of all of the criminal convictions in relation to the sexual transmission/exposure of HIV within the Canadian jurisdiction.[90] This was subsequent to the leading judgment of *R v Cuerrier,*[91] where it was confirmed that transmission of the virus was not a pre-requisite for the *actus reus* element of aggravated assault.[92] It was stipulated that the defendant can be inculpated if he exposed an unsuspecting sexual partner to the virus.[93]

This does not signify that all HIV + individuals are expected to disclose their sero-status to prospective sexual partners. An expectation of disclosure is subject to a number of factors. There will be a requirement of disclosure if the exposure poses a 'significant risk of harm' that has a 'realistic possibility' of the virus being transmitted.[94] Anything devoid of this threshold will not be considered to pose a sufficient risk to the complainant, and therefore a defendant will not be expected to disclose their HIV status. The current position appears to accord to the harm principles definition of the risk of serious harm.[95] The significant risk of serious harm test will now be examined.

The Criminalisation of the Significant Risk of Serious Harm: Endangering Life

As previously stated, the assault provisions within the Canadian Criminal Code are formulated in such a manner that actual transmission or exposure to HIV can be

[90] Eric Mykhalovskiy, and Glenn Betteridge, 'Who? What? Where? When? And with What Consequences? An Analysis of Criminal Cases of HIV Non-disclosure in Canada' (2012) 27 Canadian Journal of Law and Society 31, 47
[91] *R. v. Cuerrier*, [1998] 2 SCR 371
[92] ibid
[93] ibid [95]
[94] *R. v. Cuerrier*, [1998] 2 SCR 371; *R v Mabior* [2012] SCC 47
[95] Feinberg, *Harm to Others: the Moral Limits of Criminal* Law (n 1)

within the ambit of the general criminal law.[96] In aggravated assault charges the burden lies with the Crown to prove all elements of the offence, and this includes that the defendant 'wounds, maims, disfigures, or endangers the life of the complainant'.[97] No physical harm needs to transpire, as the Supreme Court have affirmed that exposing another to the virus can endanger that individual's life.[98] In *Cuerrier,*[99] the defendant was convicted of exposing two unsuspecting complainants to the virus. At issue was whether this type of conduct amounted to aggravated assault. It was held that the defendant will be considered to have committed the offence if the exposure caused a significant risk of serious harm. Cory J stated that:

> "*The respondent was charged with two counts of aggravated assault. This charge requires the Crown to prove first that the accused's acts "endanger[ed] the life of the complainant" (s. 268(1)) and, second, that the accused intentionally applied force without the consent of the complainant (s. 265(1)(a)). Like the Court of Appeal and the trial judge I agree that the first requirement was satisfied. There can be no doubt the respondent endangered the lives of the complainants by exposing them to the risk of HIV infection through unprotected sexual intercourse. The potentially lethal consequences of infection permit no other conclusion. Further, it is not necessary to establish that the complainants were in fact infected with the virus. There is no prerequisite that any harm must actually have resulted. This first requirement of s. 268(1) is satisfied by the significant risk to the lives of the complainants occasioned by the act of unprotected intercourse."*[100]

The lucidity of Cory J's statement demonstrates that actual harm is not a pre-requisite for criminal liability to ensue. The decision of the Supreme Court also appears to express that the judiciary have endorsed Feinberg's proposal that the risk of serious harm is an action that can be considered to be a criminal harm.[101] Cory J

[96] *Criminal Code,* RSC 1985, c C-46, s 265, 268
[97] *Criminal Code,* RSC 1985, c C-46, s 268(1)
[98] *R. v. Cuerrier*, [1998] 2 SCR 371[95]
[99] ibid
[100] ibid [95]
[101] Feinberg, *Harm to Others: the Moral Limits of Criminal* Law (n 1)

interpretation of 'endangering life' has been described as an unsuitable interpretation of the statutory provision by Grant,[102] who submits that endangering life was taken out of context, and "may be overreaching the appropriate boundaries" of the offence.[103] It was suggested that there was no deliberation of the lexicon construct of the statute, as it was assumed that exposing another to the virus endangered that person's life.[104]

Any endangerment, submits Grant, ought to be direct and immediate, something that the risk of transmission does not achieve.[105] Cory J was correct in proposing that exposure to the virus can endanger the life of the complainant because of the 'potential lethal consequences of infection'. The risk is no different than the example promulgated by Grant, it is merely luck on the part of the complainant that denotes that there is no infection.[106] It is accepted that HIV no longer poses the risks to health that it did initially when it came to prominence in the 1980's, and should no longer be considered to be a 'death sentence'.[107] If the virus is left untreated, or the complainant has an adverse reaction to the medication it would endanger that individual's life. The discrepancies identified by Grant in relation to the interpretation of aggravated assault do not provide a cogent rationale for excluding exposure from the ambit of prosecution. It does, however, identify that a specific piece of legislation addressing HIV exposure is more appropriate. There were also alternative tests proposed by the minority in *Cuerrier,* and these are also worthy of consideration.

[102] Isabel Grant, 'The Prosecution of Non-disclosure of HIV in Canada: Time to Rethink *Cuerrier'* (2011) McGill Journal of Law and Health 7
[103] ibid 47-8
[104] ibid
[105] ibid
[106] Grant, 'The Prosecution of Non-disclosure of HIV in Canada: Time to Rethink *Cuerrier*' (n 102) 47-8 Grant suggests that If a person is pushed into oncoming traffic but miraculously escapes harm, the endangerment of life is direct and immediate.
[107] Erin Dej and Jennifer M. Kilty '"Criminalization Creep": A Brief Discussion of the Criminalization of HIV/AIDS Nondisclosure in Canada' (2012) 27 Canadian Journal of Law and Society 55, 60.

The Alternative Test's That Were Proposed By McLachlin J And L'Heureux-Dubé J

It was evident that Cory J took the 'middle ground',[108] as the minority judgments in *Cuerrier* offered alternative tests for assessing what ought to be considered fraud in cases of aggravated assault. Either of the suggestions would have evoked clarity, and have evaded the problems attributed to the precision of the test that was initially set out in *Cuerrier.* These tests essentially required absolute disclosure by the defendant as the risk of the exposure was not considered relevant. McLachlin J suggested that the definition for fraud should revert to the old common law position, and would have expected any individual to disclose their sero-status to prospective sexual partners.[109] The alternative, promulgated by L'Heureux-Dubé J would also have anticipated disclosure on all occasions of intimacy.[110] L'Heureux-Dubé J proposed that a defendant needed to disclosure their status regardless of the risk.[111] Neither of these interpretations of fraud would take into account the probability of risk occurring. McLachlin J and L'Heureux-Dubé J placed too much emphasis upon the magnitude of harm, without due consideration of the risk of attendant harm thereby devoid of constructive principle.

The Cuerrier Test: Exposure As A Probability Driven Duty

It is apparent that the significant risk of harm test has the potential to correspond to Feinberg's harm principle, but the assessment of risk that was proposed in *Cuerrier* has been criticised for being more inclined towards the probability of harm, as

[108] Martha Shaffer, *'R v Mabior* and *R v D.C.:* Sex, Lies, and HIV: *Mabior* and the Concept of Sexual Fraud' (2013) 63 University of Toronto Law .Journal 466, 471
[109] *R. v. Cuerrier*, [1998] 2 SCR 371 [67]
[110] ibid [16]
[111] ibid

opposed to the magnitude of harm.[112] This 'probability driven duty' has been deemed to be unique to this type of case, but Flaherty proposes that there was no consideration of the 'magnitude of harm'.[113] By failing to contemplate the relevance of the magnitude of harm, Flaherty suggests that the social cost of disclosing an HIV status was the prevailing concern.[114] If there is to be criminalisation of the risk of serious harm then the social utility of the conduct, the probability of transmission and the magnitude of harm, are essential ingredients.[115] Flaherty's proposal places exclusivity towards the magnitude of harm rather than considering the social utility of sexual intimacy, and the probability of harm, as it was stipulated by Flaherty that if the seriousness of infection were taken into account then disclosure would be expected on all occasions.[116] This is an inadequate proposal that would not fully assess the risk of serious harm, as both the magnitude and the probability of harm are countervailing measures that are necessary for establishing whether a risk should be considered to be sufficient to be a criminal harm. The magnitude of harm confirms that non-trivial harm should not be criminalised, and the courts recognise that HIV exposure is a serious harm.[117] At some point the probability of the risk occurring will become so remote that the magnitude of harm will bear no relevance in relation to the risk of serious harm, and the courts endorsed this by proposing that the test for inculpation is when there is a significant risk of serious harm.

[112] John Flaherty,' Clarifying the Duty to Warn in HIV Transference Cases' (2008) 54 Criminal Law Quarterly 60, 61
[113] ibid 61
[114] Ibid 62
[115] Above 150 - 154
[116] Flaherty (n 112) 62
[117] *R. v. Cuerrier*, [1998] 2 SCR 371

Inculpation Based Upon Attempting To Transmit The Virus: R v Williams

If all of the constructional elements of aggravated assault cannot be established then the Supreme Court are satisfied that defendants still can be convicted of attempting to commit the offence. In *R v Williams,*[118] the defendant had transmitted the virus to the complainant. At issue was whether the full offence of aggravated assault had been committed as there was no consensus of when the complainant acquired the virus. The transmission of HIV may, or may not, have taken place before the defendant was aware that he had the virus. The Supreme Court held that the full offence was not proved as it could not be said that Williams had endangered the life of the complainant. Binnie J held that the Crown could not determine an essential ingredient of the offence.[119] The facts of the case indicated that this was the correct application of the law, as the complainant may have acquired the virus before the defendant was aware of their sero-status.[120] It was stated by Binnie J that there was nothing in the facts of the case that would enable the Court to conclude otherwise.[121]

An attempt requires intent,[122] and the Canadian Courts have confirmed that the inchoate offence can be committed when there is an impossible attempt providing that it was the defendant's intention to commit the offence.[123] *Williams* may have been a case of impossible attempt as the defendant may have been having unprotected intercourse with an already infected complainant. Stewart proposes that the critical issue in this situation is what can equate to intention. Williams may have

[118] *R v Williams* [2003] 2 S.C.R. 134
[119] *R v Williams* [2003] 2 S.C.R. 134
[120] ibid [14]
[121] ibid [57]
[122] *Criminal Code,* RSC 1985, c C-46, s 24:
"Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence..."
[123] *United States of America v. Dynar,* [1997] 2 SCR 462, 1997 CanLII 359 (SCC) [59]

believed that he was exposing the complainant to the virus every time he had had unprotected intercourse with that individual.[124] This would embrace oblique intent. If the attempt to transmit the virus were considered to be direct intent then the narrowness of that intention would denote that prosecutions for attempts would be rare.

It may have been superfluous to utilise the law of attempts as the full constructional elements of the offence may still have been satisfied. The full offence could have been established if the courts had deferred to the medical evidence that was put before the Supreme Court. The Medical Officer who gave evidence in *Williams* stipulated that the virus can mutate and cause medically resistant strains.[125] This would have been the platform for the prosecution for the full offence of aggravated assault, but the opportunity was declined. Perhaps it would have been more pertinent to adduce evidence of conditions that are necessary to demonstrate how the virus mutates, then the court may have accepted the Medical Officer's evidence. It may then have been established that the defendant's conduct posed an endangerment to the life of the complainant. In that circumstance it would have been more probable that Williams' conduct posed more of an endangerment to life than the activities of Cuerrier and the significant risk of serious harm would have been established. The test has since been extended to when there is a realistic possibility of the virus being transmitted. This will now be explored in terms of threshold levels of risk-taking attached to culpability and inculpation.

[124] Hamish Stewart, 'When Does Fraud Vitiate Consent? A Comment on *R. v. Williams'* (2004) 49 Criminal Law Quarterly 144, 162-3
[125] *R v Williams* [2003] 2 S.C.R. 134 [15]

Mabior And The Realistic Possibility of Transmission

The seriousness of the risk of infection was also recognised in the Supreme Court decision of *R v Mabior,* [126] where the test from *Cuerrier* was further qualified. It was the realistic possibility of transmission test that was set out in *Mabior,*[127] and this further endorsed an assessment of the relationship of the risk of transmission, and the seriousness of infection. The court appeared to recognize that there must be a balance between the magnitude of harm and the probability of harm as a test set to this standard can be justified under the harm principle. It seems apparent that the courts have incorrectly utilised the test to encompass activities that pose a low, or no risk of infection, such as condom use, or an undetectable viral load.[128] Enabling exposure to be criminalised in this manner is overly complicated and runs counter to public health initiatives. As Feinberg states, the assessment of risk is not a simple task.[129] There are a number of factors that need to be measured to be able to ascertain whether there was a significant risk of serious harm that posed a realistic possibility of transmission. The abundance of appeals emphasise that there is no appropriate demarcation line as to the requisite threshold within Canada, and demonstrates that the use of the general criminal law may be inadequate in cases of HIV transmission or exposure.[130]

[126] *R v Mabior* [2012] SCC 47 [18]
[127] ibid
[128] Cecilé Kazatchkine and others, 'HIV Non-disclosure and the Criminal Law: An Analysis of Two Recent Decisions of the Supreme Court of Canada' (2013) 60 Criminal Law Quarterly 30, 37
[129] Feinberg, *Harm to Others: the Moral Limits of Criminal* Law (n 1)
[130] There has been a significant number of appeals since *Mabior*

Grant[131] proposes that convictions for serious offences should entail actual transmission, and that this would remove the intricacies that are involved in ascertaining what would constitute a significant risk of serious harm.[132] It was stated that exposure, where there was a negligible risk of serious harm, would equate to the same mental harm as exposure when there was a significant risk of serious harm. [133] Under either of these circumstances the complainant has not suffered any long-term effects, but has been exposed to the virus. It was also suggested Grant that there should be a 'stronger nexus between the non-disclosure and the endangerment' and this should be transmission.[134] Contrastingly, there are proponents who suggest that to exclude exposure would be inappropriate, as an individual who recklessly and persistently has unprotected intercourse may avoid liability.[135] Persistent conduct, it may be argued, could denote intentional behaviour, and therefore may justify criminalisation of intentional exposure. The risk of serious harm should take into consideration the defendant's mental state, as well the magnitude of risk, and the probability of risk. Criminalising exposure ought to encompass those who intend to transmit the virus by partaking in acts of unprotected intercourse. This would accord to Feinberg's harm principle, and correspond to public health and policy contemplations, and may eventually facilitate the reduction of infections.

[131] Grant, 'The Prosecution of Non-disclosure of HIV in Canada: Time to Rethink *Cuerrier*' (n 102) 56
[132] ibid
[133] Grant, 'The Prosecution of Non-disclosure of HIV in Canada: Time to Rethink *Cuerrier*' (n 102) 56
[134] Isabel Grant, '*R v Mabior* and *R v DC*: Sex, Lies, and HIV: The Over-Criminalization of Persons with HIV' (2013) 63 University of Toronto Law Journal 475
[135] Matthew Cornett, 'Criminalization of the Intended Transmission or Knowing Non-disclosure of HIV in Canada' (2011) 5 McGill Journal of Law and Health 61, 89-90

It is obvious that the Canadian prosecutorial authorities will prosecute defendants who are HIV+ for exposure, transmission and attempts. The jurisprudence of this jurisdiction, in relation to exposure, *prima facie* corresponds to Feinberg's definition of risk of serious harm. The significant risk of harm that has a realistic possibility of transmitting the virus being transmitted, could correspond to the magnitude of the harm and the probability of harm as pre-requisites for criminalising the risk of serious harm. This is not to stipulate that the utilisation of these requisites is a simple undertaking, particularly as there is speculation on what will be considered to be criminal conduct, and the courts appear to place more emphasis on the magnitude of harm.[136] It may be more perceptive to criminalise actual transmission and the intentional exposure of the virus when there is a risk of serious harm. The suggested statutory provision in this chapter emulates such a proposal. The American position on exposure will now be evaluated, to provide comparative extirpation of the transmission/exposure dichotomy.

The U.S. State Laws Divergent Approaches To Criminalising Sexual Exposure To HIV

The Presidential Commission stipulated that any specific piece of legislation should criminalise behaviours that are likely to transmit the virus.[137] It was stated that, 'HIV-infected individuals who knowingly conduct themselves in ways that pose a significant risk of transmission to others must be held accountable, for their actions'. [138] The Presidential Commission also proposed that the criminalisation of exposure to the virus ought to be

[136] Below ch 5
[137] The Presidential Commission on the Human Immunodeficiency Virus Epidemic Report (1988),
[138] ibid 130

based upon scientifically accepted routes of transmission.[139] It is at once noticeable that the suggestions correspond to Feinberg's classification of a risk of serious harm thereby facilitating a justification for criminalising exposure to the virus. The Model Penal Code (MPC) also addresses risky behaviour, but does not have an expressly stated provision in relation to transmission or exposing an unsuspecting individual to HIV.[140]

The lack of a legislative framework on HIV, within the MPC does not denote that exposure has been excluded from criminalisation. All of the specific pieces of HIV legislation within the various States allow for the criminalisation of exposure. Actual transmission, although criminalised within a number of the jurisdictions, is not the principal consideration. Shriver states that the 'primary reason' for States criminalising exposure was difficulty in establishing that the defendant transmitted the virus to the complainant.[141] This may no longer be the case, as scientific evidence may be adduced to assist in establishing the route of transmission.

There are a significant number of HIV specific laws that detract from defining the parameters of the conduct that is prohibited. These states do not demonstrate any uniformity, as terms such as 'could result in transmission', 'sexual conduct' and 'expose'[142] have been employed by the state legislators to describe the prohibited activities. These definitions have the potential to incorporate all manner of harm, even if the conduct poses a negligible risk of harm occurring. For example, in a literal sense any type of activity would 'expose' another to the virus. The following exposition will focus upon HIV specific criminal provisions that can be separated into

[139] ibid
[140] Model Penal Code § 211.2
[141] Christina M Shriver, 'State Approaches to Criminalizing the Exposure of HIV: Problems in Statutory Construction, Constitutionality and Implications' (2001) 21 Northern Illinois University Law Review 319, 323
[142] For example: Wash Rev Code § 9A.36.011 (2014); Iowa Code § 709C.1(2)(b) (2011); La. Rev. Stat. Ann..§ 14:43.5 (2014)

four distinct groups. There are statutes that specify exposure as the sufficient level of culpability; those that criminalise sexual contact; provisions that criminalise the risk of harm or words to that effect, and a provision that precludes intentional exposure through unprotected intercourse. It is the legislation that directly or indirectly criminalises the risk of harm that corresponds to the harm principle, as the other provisions generally support criminal sanctions for situations where there is a low or negligible risk of the virus being transmitted. It is appropriate to firstly examine the provisions that criminalise exposure.

States Facilitating Exposure as the Requirement For Inculpation

It is paradoxical that the various codes that afford no definitional clarification of 'expose' are devoid of appellate cases relating to the ambiguity of the term. For example, In Maryland, there has been more appeals in relation to HIV exposure from the utilisation of the general criminal law[143] than the former HIV specific statutory provision.[144] Thus, 'exposure' received no consideration by the appellate courts of Maryland and that definitional element has now been removed from the statutory offence.[145] Other states also provide no extrapolation of what can or will equate to exposure.[146] Could this denote that statutory provisions that provide no precision indirectly impart clarity? Perhaps not, as it emerges that the majority of prosecutions, from these jurisdictions, have concerned unprotected anal or vaginal

[143] *State v Smallwood* 343 Md. 97; 680 A.2d 512; 1996 Md. LEXIS 71; 65 U.S.L.W. 2127
[144] Md. Code Ann., Health-Gen. § 18-601 - 1.(2014) : *Exposure of other individuals -- By individual with human immunodeficiency virus (a) Prohibited act. -- An individual who has the human immunodeficiency virus may not knowingly transfer or attempt to transfer the human immunodeficiency virus to another individual.*
[145] ibid
[146] For an example see: Wash. Rev. Code § 9A.36.011 (2014)

intercourse.[147] The issue of exposure has, therefore, received virtually no judicial consideration.

Exposure And The Interpretation Of Washington's Statute

One statutory provision that has received judicial examination is Washington's legislative framework. The statute specifies that a defendant will be guilty of the offence if he intentionally: 'administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus...' [148]

It is obvious that that particular section of the provision provides no definition of 'exposes' and this is evident throughout the rest of particularised statute. MacArthur proposes that the rationale for a specific law that criminalises 'exposure', rather than specifying the prohibited conduct, is that the statute avoids any accusations of being overbroad.[149] However, the breadth of the provision is apparent; it may encompass activities that pose a negligible risk or no risk of transmission. Any activity that would expose another to the virus, regardless of the risk of transmission, could be within the ambit of the statute. If it is accepted that the provision is not overbroad then it is still possible that the statute is 'vague', as there is no specifics of what will equate to exposure. The lack of legislative clarity has been determined by the appellate Court of Washington. This, however, only offers partial guidance as to what can be considered to be exposure.

[147] See: Rashida Richardson, Shoshana Golden and Catherine Hanssens, ' Ending & Defending Against Hiv Criminalization A Manual For Advocates: Volume 1 State And Federal Laws And Prosecutions' , 149 http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/HIV%20Crim%20Manual%20%28updated%204-3-15%29.pdf accessed 21 April 2015

[148] Wash. Rev. Code § 9A.36.011(1)(b) (2014)

[149] Amy McGuire, 'Aids as a Weapon: Criminal Prosecution of HIV Exposure' (1999) 36 Houston Law Review 1787, 1811 'Constitutional challenges to HIV-specific statutes have generally focused on the statutes' lack of specificity with respect to prohibited conduct. A statute will likely be deemed overbroad if it could interfere with constitutionally protected behavior.'

In *State v Stark,*[150] a case heard in the Court of Appeals of Washington, the defendant had been charged with three counts of assault in the second degree. The defendant had had unprotected intercourse with three different complainants. Stark was convicted of one count and appealed, *inter alia*, on the basis that there was no definition of 'expose' within the statute. It was contended that the provision was vague, but Petrich CJ opposed the argument promulgated by Stark by stating:

> "*Any reasonably intelligent person would understand from reading the statute that the term refers to engaging in conduct that can cause another person to become infected with the virus. Stark engaged in unprotected sexual intercourse with other human beings after being counselled on several occasions that such conduct would expose his partners to the virus he carries. He was not forced to guess at what conduct was criminal*."[151]

It is obvious from Petrich CJ's dictum that the defendant, having unprotected intercourse, and being counselled on the risks associated with unprotected activities, were detrimental to Stark's contentions. Thus, the evidence of discussions at the counselling sessions proved to be influential in Petrich CJ determining that the defendant 'knew' that exposure, by unprotected intercourse, had a risk of the virus being transmitted. Uncertainty as to a definition of 'exposes' still prevailed as at no point within the judgment did Petrich CJ expressly set out the parameters of exposure. There was also no deliberation, either expressly or impliedly, of the risk of the virus being transmitted.

Washington's Court of Appeal has since extended the parameters of exposure to encompass 'other activities'. On the next occasion the strictures of 'expose' was held

[150] *State v Stark* 66 Wash.App. 423, 832 P.2d 109 (1992)
[151] ibid

to include activities where the probability of the virus being transmitted was more remote than unprotected intercourse. In *State v Whitfield,*[152] the defendant had been charged with assault in the first degree by exposing or transmitting the virus to seventeen women. Five of the women had tested positive for the virus. One of the grounds of appeal was on the basis of lack of evidence in relation to the twelve women who were HIV negative. Houghton J disregarded this contention by affirming that either actual transmission or exposure was sufficient for the charge to be satisfied.[153] The Court also appeared to acknowledge that oral, anal or vaginal intercourse, was sufficient to establish that the defendant exposed the complainants to the virus.[154] Waldman, when discussing *Whitfield* and factors that may have been relevant to the risk of the virus being transmitted, proposes that the wording of the statute denotes that any sexual contact is considered exposure.[155] The decision to include anal, oral and vaginal intercourse seems to concur with the accuracy of Waldman's suggestions. However, dicta that can also be derived from *Whitfield* inferred that some activities may not be considered to be exposure.[156] It was implied by Houghton J that protected intercourse would not be considered as exposure.[157] The allowance of protected intercourse may be seen as an attempt to balance the magnitude of harm and the probability of risk. However, the court, are still placing less emphasis on the probability of harm, and primarily focusing upon the magnitude of harm, as unprotected oral intercourse can, in some circumstances, pose less of a risk than protected sexual intercourse.[158]

[152] *State v Whitfield* 134 P.3d 1203 (2006); 132 Wash. App. 878 [46]
[153] ibid [47]
[154] ibid
[155] Ari Ezra Waldman, 'Exceptions: The Criminal Law's Illogical Approach to HIV-Related Aggravated Assaults' (2011) 18 Virginia Journal of Social Policy and Law 550 , 584
[156] *State v Whitfield* 134 P.3d 1203 (2006); 132 Wash. App. 878 [47]
[157] ibid [47]
[158] Above ch1 p 32

Criminalising exposure through oral intercourse can be seen to be contrary to the parameters set out by Feinberg's harm principle, as the social utility of sexual interaction, and the probability and the magnitude of harm should be counterbalanced when assessing the risk of serious harm. What is also evident is that describing the prohibited activity as 'expose' or 'exposure' does not accord precision or certainty, rather it convolutes the issue. The deficiencies of the provisions that require exposure provide a cogent rationale for an enactment that meticulously defines a risk of serious harm. Other provisions have also failed to define exposure. One of these being where the prohibited conduct has been expressed in terms such as 'could result in transmission'.[159]

American Provisions That Criminalise The Risk Of The Virus Being Transmitted

Iowa's 2011 statute stipulated that the defendant must not engage in intimate contact that 'could result in transmission'.[160] This appeared to be an acknowledgement of the harm principle within Iowa, as it would be plausible to assume that the provision restricted criminalisation to cases where exposure would pose a significant risk of the virus being transmitted. Initially, this was not the rationale that the appellate courts in Iowa adhered to, as the parameters of 'could result' were scrutinised to encompass a number of activities, regardless of the risk, thereby demonstrating the difficulties with an ill-defined statute.

[159] Iowa Code § 709C.1(2)(b) (2011) This is just for illustrative pursposes this is no longer the statutory provision in Iowa
[160] ibid

In *State v Keene,*[161] a case heard in the Supreme Court of Iowa, the defendant was convicted of exposing another to the virus by having unprotected sexual intercourse. It was contended, by the appellant, that the statute was vague as to the meaning that is to be attributed to 'could'. The Court disregarded Keene's contention, and Cady J stipulated that the statute was 'sufficiently clear' as long as transmission was possible the offence was sufficiently defined.[162] Cady J stated that: '"[c]ould" is the past tense of "can," which is "used to indicate possibility or probability.'[163] It seems that it would have been beneficial to have a more clearly drafted statutory provision, something that the current statutory framework has achieved.[164] Indeed, Hermes identified deficiencies with the former provision, as there was no clarification of what types of acts are prohibited by the statute.[165] Using a term such as 'could', and the courts expanding the definition to embrace 'possible' transmission,[166] did not place emphasis on the significance of the probability of the virus being transmitted. Possible can be ascribed to a multitude of meanings as to the likelihood of an occurrence, and there was no clarification by the Court in *Keene* of these parameters.[167] It seemed that the Court placed too much importance upon the magnitude of harm in *Keene*, although it is accepted that Keene had partaken in unprotected intercourse.

A subsequent case, in Iowa, that interpreted the former statutory provision sought to specify what other conduct would fall within the 'umbrella' term and resolutely

[161] *State v Keene,* 629 N.W.2d 360(Iowa 2001)
[162] Ibid 365
[163] ibid
[164] Iowa Code § 709D.3 (2014).
[165] Jaclyn Schmitt Hermes, ' The Criminal Transmission of HIV: A Proposal to Eliminate Iowa's Statute' (2002) The Journal of Gender, Race & Justice 473, 480-81
[166] *State v Keene,* 629 N.W.2d 360, 365 (Iowa 2001)
[167] *State v Rhoades,* 848 N.W.2d 22, 27-28 (Iowa 2014)

incorporated oral sex to be equiparated to exposure. In *State v Stevens,*[168] a case heard in the Supreme Court of Iowa, the defendant had ejaculated into the complainant's mouth. At issue was whether the conduct fell within the ambit of the former statute, as it was contended that the provision was not sufficiently defined. The court applied *Keene,* and held that oral sex was a well known mode of transmission.[169] There was no elaboration of the risk of the virus being transmitted, and the court again placed more emphasis on the magnitude of harm rather than the probability of the virus being transmitted and the social utility of sexual interaction. The effect of *Stevens* could have been far-reaching as the decision appeared to include all low risk activities.

Stevens[170] can no longer be considered a binding authority, and the Supreme Court of Iowa and the legislators[171] now recognise that there may not be a risk of serious harm with certain cases of exposure.[172] In *State v Rhoades,*[173] a case concerning exposure to the virus through unprotected oral and protected anal intercourse, the Court distinguished *Keene,* and impliedly overruled *Stevens.* It was recognised that oral or protected anal intercourse does not necessarily denote that there could be a risk of transmission of the virus.[174] Wiggins J acknowledged that utilising the term 'possible' may encompass situations that had a remote chance of the virus being transmitted, therefore, the definition necessitated the 'reality of a thing occurring, rather than a theoretical chance'.[175] Iowa's extant approach to the criminalisation of exposure is to be commended. This is a State where the judiciary

[168] *State v Stevens,* 719 N.W.2d 547 (Iowa 2006)
[169] ibid 550
[170] ibid
[171] Iowa Code § 709D.3 (2014).
[172] *State v Rhoades,* 848 N.W.2d 22 (Iowa 2014)
[173] ibid
[174] ibid
[175] ibid

are recognising that a statutory provision necessitates an appropriate evaluation of the harm principle. The legislators have also accepted the limitation of a 'significant risk of harm' as the new statutory framework provides an appropriate balance between the social utility of sexual interaction, the probability of harm and the magnitude of harm.[176]

Tennessee State Law: The Significant Risk Of Transmission That Must Not Be A Faint, Speculative Risk

The same cannot be said of Tennessee, where the penal provision affords limited guidance of intimate contact. In Tennessee, intimate contact is considered to be 'exposure' if 'that presents a significant risk of HIV transmission'.[177] It seems that the legislator endeavoured to restrict the parameters of 'intimate contact' to those acts that had a high probability of the virus being transmitted, thereby aligning the provision to the harm principle, and the suggestions of the Commission. This leads to the presumption that only the most high risk activities should be criminalised.[178] The Court of Criminal Appeals in Tennessee addressed the issue in *State v Bonds,*[179] where it may be inferred that the wording of the statute applied to all manners of activity, where there was any risk of contact with bodily fluids that posed a significant risk of harm.[180] This imparts no clarity as there is no explanation of what

[176] Iowa Code § 709D.2(2014): Definitions:
3. "*Practical means to prevent transmission" means substantial good faith compliance with a treatment regimen prescribed by the person's health care provider, if applicable, and with behavioral recommendations of the person's health care provider or public health officials, which may include but are not limited to the use of a medically indicated respiratory mask or a prophylactic device, to measurably limit the risk of transmission of the contagious or infectious disease.*
[177] Tenn. Code Ann. § 39-13-109 (2014)
[178] Leslie E. Wolf and Richard Vezina, 'Crime And Punishment: Is There a Role for Criminal Law in HIV Prevention Policy?' (2004) 25 Whittier Law Review 821, 879
[179] *State v Bonds,* 189 S.W.3d 249 (Tenn. Ct. App. 2005)
[180] ibid 259

would equate to significant risk of harm. The decision in *Bonds*[181] afforded no foundational basis to exclude certain activities; rather the provision may criminalise low risk activities, thereby disregarding the probability of harm; the social utility of sexual activity and the intention of the legislator.[182] Gostin submits that significant risk has not received adequate attention, and it is clear that this was not sufficiently addressed in *Bonds*. It is stated by Gostin that:

> "*It should be based upon epidemiologic evidence of the gravity of the harm and the probability of the harm occurring. A risk is significant only if the mode of transmission is scientifically well established, there is a reasonable likelihood that viral transmission will take place, and the potential harm is serious*."[183]

The proposal advanced by Gostin accords to the harm principle, but there is no clarification of how the two elements of risk would be reconciled. It is apparent that each element requires serious consideration before ascertaining whether the risk is sufficient for criminalisation. The Supreme Court of Tennessee has recently re-visited the 'significant risk of harm'. In *State v Hogg,*[184] the defendant had been convicted of exposing a minor to the virus by participating in a number of sexual activities. Hogg appealed to the Supreme Court on the premise that the activities did not pose a significant risk of harm. The appeal was partly allowed, and the court provided some much needed clarification of what would equate to the significant risk of harm. Sharon J stated that:

> "*We conclude that "significant risk" is a product of both the severity of the consequences and the likelihood that HIV will be transmitted. The question of whether a risk is significant is fact specific and should not be hamstrung*

[181] ibid
[182] Below ch 5
[183] Larry Gostin, 'From The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties' (1989) 49 Ohio State Law Journal 1017, 1021
[184] *State v Hogg* 448 S.W.3d 877; 2014 Tenn. LEXIS 668

> *by a mathematical straightjacket. Because the contraction of HIV and the development of AIDS can lead to death, the consequences are severe. But simply using severity as the benchmark would be too broad. If the chance of transmitting HIV is but a faint possibility and no more than speculative in nature then the risk is not "significant" for purposes of the criminal exposure statute, despite the severity of the potential consequences. We hold that in the context of the criminal exposure to HIV statute, "significant risk" requires a chance of HIV transmission that is more definite than a faint, speculative risk, as shown by expert medical proof."*[185]

The test of 'faint speculative risk' does not provide clear guidance, particularly as it specified that each case must be dealt with on its own facts. It was apparent that the court attempted to set out the parameters of the requirement by accepting the relevance of balancing the probability of harm and magnitude of harm, but this did not fully transpire. The court may well have been restricted by the definitional elements of the statutory provision, and still proceeded to upheld a conviction where the risk of transmission was significant reduced. [186]

The lack of uniformity between Iowa's and Tennessee's statutes demonstrates that a statutory provision would better correspond to the harm principle by expressly stating what type of conduct is to be prohibited. The divergent approaches can also be observed in jurisdictions that criminalise exposure through sexual contact. This will now be examined in more detail.

[185] ibid 888-889

[186] The defendants convictions for committing the act of fellatio and masturbating the minor were quashed. A conviction for exposure when the minor committed the act of fellatio on the defendant was upheld.

U.S. State Provisions That Criminalise Exposure Through 'Sexual Contact'

If the provision does not stipulate what should equate to sexual contact then it is not easily identified.[187] In *State v Gamberella*,[188] a case heard in the Court of Appeal in Louisiana, the appellant questioned the validity of 'sexual contact'. It was contended that the term may include a number of sexual acts that posed no risk of infection. The appellant was undoubtedly relying upon the probability of harm as the crux of his appeal. This contention was emphatically rejected by Fogg J who stated:

> "*While it is possible this terminology includes sexual acts which are not capable of transmitting the virus, the phrase "sexual contact" unambiguously describes the unlawful conduct with sufficient particularity and clarity that ordinary persons of reasonable intelligence are capable of discerning the statute's meaning*."[189]

What is apparent from the dicta is that the court was reluctant to define the parameters of 'exposure through sexual contact'. There is also circularity to the dicta, as Fogg J stipulates that contact that is incapable of transmitting the virus could be included, and then specifies that there is also a presumption that people of average intellect would be aware of what type of sexual contact would be criminalised. The court afforded no enlightenment of the term, other than inferring that the provision applied to all types of sexual acts irrespective of the risk of the virus being transmitted.

[187] La. Rev. Stat. Ann. § 14:43.5 (2014)
[188] *State v Gamberella,* 633 So.2d 595 (La. Ct. App. 1993)
[189] ibid

The probability of the risk appears to be considered irrelevant and this is an affront to the risk of serious harm.[190] It is that, generally, the 'law makers appear to have difficulty incorporating notions of risk.'[191] There are advantages to providing definitions of the 'prohibited conduct' as this would denote what type of activity is criminalised.[192] By failing to distinguish between the levels of risks the legislators are not providing individuals with any incentive to act more responsibly. [193] A statute ought to set out the parameters of criminal activity so there can be no uncertainty of what will be considered culpable behaviour. This should, and must also, correspond with the probability of the risk occurring.[194] To correspond with the probability of harm the provision must consider contemporary scientific data and public health initiatives. An individual would then be able to participate in low risk activities without fear of prosecution. Therefore, culpability should only be based upon activities that 'reach a certain threshold'.[195] A statutory provision should provide this precision, but the current position in the majority of States entails that any intimacy with an HIV positive individual is 'unclean', and there is no consideration of the risks.[196] The Californian statute has provided a finite list of prohibited activities and this will now be examined.

[190] Carol L Galletly and Steven D. Pinkerton, 'Toward Rational Criminal HIV Exposure Laws' (2004) 32 Journal of Law Medicine and Ethics327, 329
[191] ibid 331
[192] James B. McArthur, 'As the Tide Turns: The Changing HIV/AIDS Epidemic and the Criminalization of HIV Exposure' (2009) 94 Cornell Law Review 707, 718
[193] Sarah J Newman, 'Prevention, not Prejudice: The Role of Federal Guidelines in HIV-Criminalization Reform' (2013) 107 Northwestern University Law Review 1403, 1419
[194] Mona Markus, 'A Treatment for the Disease: Criminal HIV Transmission/Exposure Laws' (1999) 23 Nova Law Review 847, 867-869
[195] Kaplan (n 25) 1540
[196] ibid 1539

The Californian Statute: Criminalisation Restricted Unprotected Intercourse

The benefits of defining the prohibited conduct can be seen in California. Although not explicitly stipulating a preference to the harm principle, and primarily specifying the type of sexual activity, the Californian statute needs to be considered at this juncture in providing a pre-eminent account of only criminalising exposure when there is a 'high risk' of the virus being transmitted. The Californian statute proposes that exposing an unsuspecting complainant to the virus through unprotected sexual activity may lead to a successful prosecution.[197]Sexual activity is further defined to be unprotected anal or vaginal intercourse; clearly the conduct that is prohibited must pose a significant risk of harm. Prosecutions under this provision will only ensue if the exposure by the defendant was intentional.[198] The restriction of prosecutions to unprotected activity may be seen to strike the appropriate balance between social utility, the probable risk of serious harm and the magnitude of harm. None appear to operate in a supererogatory manner as the statutory definition affords an effective acknowledgement of these factors; this is necessary to accord to the aforementioned harm principle. Wolfe and Vezina are strong proponents of this legislation, contending that it has struck the 'correct balance'.[199]

Advocates of the Californian statutory perspective have suggested the statute is the 'model'' code to follow because of the precision in the drafting.[200] This is evident throughout the Californian statute as it is specific in restricting the types of exposure that are criminalised. It is apparent that the legislators have balanced the risk of

[197] Cal. Health & Safety Code § 120291 (2014); 720 Ill. Comp. Stat. § 5/12- 5.01; Kan. Stat. Ann. § 21-5424 (2014)
[198] Cal. Health & Safety Code § 120291 (2014)
[199] Wolf and Vezina (n 178) 879
[200] Hermes (n 165) 479

harm and the magnitude of harm, and only prohibited conduct that poses a significant risk of harm is criminalised.[201] It is for this reason that Klemm opines that the provision is 'instructive' for other state legislators.[202]

In contradiction, some academicians have propounded that the Californian statutory provision is 'under inclusive' by excluding oral intercourse from the prohibited conduct.[203] It is conceded that oral intercourse may pose a risk of transmission, but various studies state that that risk is more remote than unprotected intercourse.[204] Currently, there have been no prosecutions in any jurisdiction for transmission of the virus when the defendant has partaken in oral intercourse with the complainant. The social utility of sexual intercourse denotes that not all risks of transmission should be criminalised,[205] and it would also be 'unreasonable to prohibit all activity'. [206]

The Californian statute may be too narrow as the offence must have been committed by a defendant who has acted with specific intent. An individual who transmits the virus may evade prosecution if they did not act with specific intent.[207] There is undoubtedly a lacuna in the Californian legislation. The provision ought to include circumstances whereby a defendant who has transmitted the virus to an unsuspecting complainant is also subject to criminal sanctions. It would be virtuous to have these two provisions conjoined, one addressing exposure and the other apportioned to actual transmission.

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[201] Sara Klemm, 'Keeping Prevention in the Crosshairs: A Better HIV Exposure Law for Maryland' (2010) 13Journal of Health Care Law and Policy 495, 523
[202] ibid 523
[203]Shriver (n 141) 328
[204] Above ch 1 p 32
[205] Hart (n 29) 22
[206] Jagoda Jedrychowski, 'Criminalization of HIV-Transmission: Perpetuating Problems Surrounding the Epidemic' (2007) 11 The Holy Cross Journal of Law and Public Policy 29, 40
[207] See Erin McCormick, 'Strengthening the Effectiveness of California's HIV Transmission Statute' (2013) 24 Hastings Women's Law.Journal 407

The United States And A Preference Towards The Magnitude Of Harm

It is evident from the aforementioned exposition of the various States approaches that exposure will suffice for prosecutions. Proponents of criminalisation tend to place emphasis on exposure as the requisite level for inculpation as this avoids the inherent difficulties in utilising the general criminal law.[208] Various States have enacted legislation that is more accessible to prosecutors by criminalising conduct that exposes another to the virus. Generally, these do not consider the probability of harm and are an affront to the harm principle. While it is conceded that HIV can be a life debilitating virus, and therefore the magnitude of harm is particularly relevant, it must be offset by the social utility of sexual interaction and the probability of harm.

This position can be surveyed in Iowa and California where there is an adherence to the risk of serious harm. It is California that provides the most lucid statute in relation to exposure, as prosecutions only ensue when there has been intentional exposure through unprotected intercourse. The review of the extant law across the comparator legal systems has revealed significant divergencies in perspective *vis-à-vis* the conduct threshold of transmission/exposure within particularised offences. It is now appropriate to further compare the respective legal systems juxtapositions with a view to providing overarching reform suggestions via a new statutory pathway.

[208] Donald H.J. Herman, 'Criminalizing Conduct Related to HIV Transmission (190) 9 Saint Louis University Public Law Review 351, 371

A Recognition Of The Harm Principle Or An Acceptance Of The Magnitude Of Harm: A Comparison Of The Legal Systems

The preceding discussion demonstrates that each of the jurisdictions can accommodate criminalisation of exposure and transmission of HIV. This does not connote that the approaches within each jurisdiction are analogous. There is significant diversity as to how these issues are addressed. A comparative examination of a number of U.S. States and consideration of the Canadian criminal justice system reveals a significant number of prosecutions for both categorisation of harm; whereas, the extant English law is primarily focused upon prosecutions for transmitting the virus.

An Acceptance Of The Criminalisation Of HIV Transmission Within All Of The Countries

The findings have established that England is unique; the jurisdiction has only prosecuted individuals who have transmitted the virus to unsuspecting complainants. The criminalisation of this type of conduct evidently accords to the harm principle, as transmitting the virus to an unsuspecting complainant can be considered to be a serious harm.[209] It is the compartmentalisation of the prohibited activity within a s.20 offence, and how the transmission of the virus between the parties can be established that is contentious within England. Weait[210] has suggested that phylogenetic analysis is deficient in identifying the relationship between the strains in the complainant and the defendant, and there is an acceptance of the inadequacies

[209] Above p 145 - 150
[210] Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (n 12) 98

of this as evidence by the CPS.[211] The test, however, is still probative and can assist in identifying the causal link between the actions of the defendant and the transmission of the virus to the complainant.

Any concerns in relation to transmission have not been fully addressed in Canada, except for Grant suggesting that criminalisation should only ensue if the virus has been transmitted.[212] It was proposed that this would avoid the judiciary having to elucidate upon the test set out in *Cuerrier.*[213] To exclude criminalisation of exposure, would remove any consideration of the risk of serious harm. There seems to be no rationale for restricting the criminalisation to the actual transmission of the virus, as exposure can fulfil the requirement of the harm principle.[214] In the United States, the primary consideration has been upon enactments defining exposure, rather than issues concerning transmission. This will now be analysed in the context of exposure standardisations and contemporary doctrinal principles.

A Spectrum Of Approaches To Exposure To HIV Within The Criminal Justice System

The differences within each legal system are not in relation to transmission, but can be attributed to the parameters of what is deemed to be exposure. It is exposure that causes significant disparity between the jurisdictions. The diversity is easily identified, and jurisdictions have criminalised activity that is devoid of the harm

[211] Crown Prosecution Service (n 4)
[212] Grant, 'The Prosecution of Non-disclosure of HIV in Canada: Time to Rethink *Cuerrier*' (n 102) 56
[213] *R v Cuerrier* [1998] 2 S.C.R. 371
[214] Above 150 - 154

principle, whilst other administrations accede to the parameters of Feinberg's proposal on the risk of serious harm.[215]

Canada, Tennessee, Iowa and California appear to have criminalised conduct that can pose a significant risk of the virus being transmitted. In Canada, the test to ascertain whether a defendant has exposed another to the virus is derived from *Cuerrier,*[216] where Cory J stated that activity that poses a significant risk of harm will be considered to be exposing another to the virus. The Canadian legal system had seen a plethora of appeals requesting a significant risk of serious harm standardisation, until the Supreme Court reaffirmed *Cuerrier,* and further qualified the test to include where there is a realistic possibility of transmission.[217] This proposed test, if used appropriately, would invariably attain to Feinberg's definition of the risk of serious harm. The test is not sufficiently robust as the ambit of exposure has encompassed conduct that has a low risk of transmission. It is apparent that the extant Canadian law has struggled to provide comity between the harm principle, and the tests set out in *Cuerrier* and *Mabior.*

In the United States, Iowa's recent statutory response conforms to the harm principle, as exposure is criminalised when the contact could result in a significant risk of the virus being transmitted.[218] Initially, the legislators and the appellate court in Iowa declined to acknowledge the relevance of risk by criminalising oral intercourse.[219] The judiciary then began to recognise that certain activities may be precluded, and this approach now accords to the harm principle and the current

[215] Above p150 -154
[216] *R v Cuerrier* [1998] 2 S.C.R. 371
[217] *R v Mabior* [2012] SCC 47
[218] Iowa Code § 709D.2 (2014)
[219] *State v Stevens,* 719 N.W.2d 547 (Iowa 2006)

statute reinforces this.[220] Kaplan has suggested that any statutory provision should expressly state that exposure to HIV will be considered to be criminal conduct if that activity poses a 'substantial and unjustifiable risk'.[221] The above extrapolation of Canada and Iowa's original approach only serves to demonstrate the inherent difficulty of utilising tests to that effect. These difficulties can also be seen within the judicial precepts that have emanated from Tennessee. The Supreme Court in Tennessee accepted that the magnitude of harm and the probability of harm must be balanced, but declined to provide any specific guidance.[222] It is clear that any provision necessitates precision on what is considered to be a prohibited activity.

California provides that precision by specifying that only high risk sexual activities are criminalised.[223] There are distinct advantages to be derived from this statute as it is evident that the legislators proceeded with an enactment that balanced the probability of harm and the magnitude of harm. If the risk of serious harm is to be a recognised as a rationale for criminalisation then the primary focus should not be exclusively based upon the magnitude of harm.

Other American jurisdictions appear to be on a 'frolic of their own', by failing to determine any definition of exposure or sexual conduct.[224] The States that have criminalised exposure and sexual conduct are deficient as the parameters of what is believed to be restricted activities are not defined. These States have criminalised activity that poses a low risk of infection. There has been no consideration of the type of action that should amount to exposing another to the virus. There has been

[220] *State v Rhoades,* 848 N.W.2d 22, 27-28 (Iowa 2014); Iowa Code § 709D.2 (2014)
[221] Kaplan (n 25) 1542
[222] *State v Hogg* 448 S.W.3d 877; 2014 Tenn. LEXIS 668
[223] Cal. Health & Safety Code § 120291 (2014)
[224] For example see: Wash. Rev. Code § 9A.36.011(1)(b) (2014); La. Rev. Stat. Ann. § 14:43.5 (2014)

no acceptance of or an alignment to the risk of harm. It is left to the judiciary to ascertain the parameters of prohibited conduct. In the Appeals Court of Washington, the Court extended the stricture of exposure to encompass activities that pose a low risk of transmission. The issues surrounding the terminology that has been utilised in these provisions demonstrate that a statute must be constructed in a manner that expressly accounts for the risk of serious harm.

The Criminalisation of Attempting To Transmit The Virus Within England And Canada

It has been accepted by the prosecutorial authorities[225] in England that a conviction for an attempt will ensue if the defendant intentionally exposes another to the virus, the risk of transmission being irrelevant. In Canada, the law of attempts has successfully lead to conviction, and Williams was prosecuted for attempting to transmit the virus to an unsuspecting complainant.[226] The most disconcerting element of the facilitation of the law of attempts is that attempts do not necessitate that the defendant is HIV+ or that there is a significant risk of the virus being transmitted. This provides further justification for requiring a HIV specific law that is sufficiently defined to prohibit specific types of conduct. Proposals for a new legislative framework will now be discussed, and set out, articulating a suggested culpability threshold for transmission/exposure inculpatory conduct, predicated on a review of comparator substantive laws.

[225] Crown Prosecution Service (n 4)
[226] *R v Williams* [2003] 2 S.C.R. 134

Criminalising Exposure And Transmission: A Suggested Statutory Provision

A legislative framework for criminalising transmission can be justified as a defendant will only be convicted if he transmitted the virus to an unsuspecting complainant. The harm principle advocates this proposal, and the onus will be on the prosecution to adduce sufficient evidence to establish that transmission of the virus to the complainant emanated from the defendant. The discrepancies and deficiencies of utilising the general criminal law for acts of exposure are more evident. In England and Canada, the general criminal law can, or has been, utilised in cases concerning exposure.[227] This has led to an incremental development of the law in Canada and advocates the need for a specific statutory provision. It would be more appropriate to have a specific piece of legalisation that criminalises HIV exposure to avoid the haphazard development of the law. An HIV specific law would generally, remove issues of exposure from the law of attempts. This does not infer that all of the bespoke U.S. legislative frameworks correspond to the harm principle as a number of States have enacted laws that are not in accordance to the risk of serious harm.[228]

This lack of lucidity is apparent in all of the countries, but is more noticeable in the majority of the States that have been analysed. Most of the provisions do not take into account the social utility of sexual intimacy and the probability of harm; the primary focus is upon the magnitude of harm. Proponents suggest that any statutory provision that is enacted should utilise terms that equate to the significant risk of harm, as a threshold standardisation.[229] Any cathartic statutory reform should

[227] Criminal Attempts Act 1981; *R v Williams* [2003] 2 S.C.R. 134
[228] For example see: Wash. Rev. Code § 9A.36.011(1)(b) (2014); La. Rev. Stat. Ann. § 14:43.5 (2014)
[229] Kaplan (n 25) 1542

provide enhanced simplicity and certainty in the law, and stipulate directly the type of prohibited activities within the ambit of liability boundaries. Then there is no necessitation to refine the law to provide what is or is not included within the definition. The suggested statutory provision, set out below, delineates two specific offences: one where transmission of the virus will be an offence and the other provision criminalises exposure. A suggested provision that encompasses exposure and transmission could be simply stated to be:

1. A person will have committed an offence under this statute if he:

(1) Intentionally or Recklessly transmits HIV to another through unprotected vaginal or anal intercourse or;

(2) Intentionally exposes another to HIV by having unprotected vaginal or anal intercourse

Subsection one above ensures that the harm of the virus being transmitted is criminalised and this is an acknowledgment that protective measures are potentially relevant, a further rationale for this stance will be examined in chapter five. This is primarily based upon the current English position, and the question will be whether the jury were convinced that the defendant was reckless in his conduct. This ought to appease proponents of criminalisation of transmission. The core issue *vis-a-vis* transmission is causation and the ordinary principles of the criminal law would apply in this regard. It does not allow for any further scope, because if a defendant transmits the virus to an unsuspecting complainant through unprotected intercourse he will have committed the offence, unless it can be established that he was

responsible rather than reckless with his conduct.[230] The life debilitating aspects of the virus justify criminalising this type of harm.

The proposed framework that addresses exposure is heavily reliant upon California's legislation. Subsection two above states that intentional behaviour and high risk activities are criminalised. The suggested provision accounts for the magnitude and probability of harm precepts, whilst considering the social utility of sexual interaction. As unprotected intercourse is criminalised the suggested legal framework encourages condom use, something that will be addressed in a later chapter within the contextualisation of appropriate defences to liability.

[230] Below ch 5

Chapter Four

The Applicable Conditions for the Defence of Consent to Operate

Introduction

The aim of this chapter is to contextualise current doctrinal principles relating to consent as a defence, or otherwise, in HIV transmission/exposure cases within each of the adduced comparator jurisdictions. The objective, subsequently, is to provide a suggested statutory framework position for consent that may beneficially be promulgated across the spectra of impacted legal systems. It must be noted from the outset that the prevailing discussion is in the legal sphere of unprotected intercourse.[1] Issues concerning protected intercourse will be discussed in the subsequent chapter.[2] It will be demonstrated that the current conceptualisation of consent is deficient in the majority of the reviewed jurisdictions. Not every complainant is afforded the opportunity to make a fully informed decision, as the basic premise asserts that the defence is fully operational once a complainant becomes 'aware' of the defendant's sero-status.[3] The disclosing of one's sero-status does not signify that the complainant is attentive to the risk of the virus being transmitted. Consenting to unprotected intercourse with an HIV+ individual does not indicate that the complainant is versed in the risks associated with such conduct, nor

[1] Anal or vaginal
[2] Below ch 5
[3] *R v Dica* [2004] EWCA Crim 1103, 3 All ER 593; *R. v. Cuerrier*, [1998] 2 SCR 371; Ark. Code Ann. § 5-14-123 (2012); Cal. Health & Safety Code § 12029(2014) ; Minn. Stat. § 609.2241(201$)

should it be assumed. If there is no awareness of the risk then this cannot be considered to be an adequate consent.

The first section of the chapter will provide a discussion of autonomy and when a state deems it appropriate to intervene with the complainant consenting to certain activities. This is a necessary component of the chapter as it enables the reader to understand why it can, or should, be appropriate to allow an individual to run the risk of becoming infected with a potentially lethal virus (although HIV is now considered a chronic illness). The next part of the chapter will provide an effective definition of consent, within the context of HIV transmission/exposure, where factual and normative consent are considered. It will be demonstrated that both of these elements are necessary for there to be a fully informed and effective consent. It is essential to outline the parameters of a fully informed consent in order to be able proceed to evaluating the effectiveness or deficiency within the various legislative frameworks, and judicial precepts of the jurisdictions within this analysis.

The third section will set out the applicable law in England relational to consent and the transmission/exposure of HIV. The current position is that the consent of the complainant may be a defence that can be put to the fact finder for deliberation. [4] It will be demonstrated that the extant law is deficient, and that there has been no real consideration of normative consent. Disclosure of an individual's HIV status will not always equate to a fully informed consent by the complainant. The leading judgments do not offer express guidance as to the parameters of an effective consent. This is particularly relevant as the Court of Appeal has held that an implied

[4] *R v Dica* [2004] EWCA Crim 1103

consent can also form the basis of a defence. [5] The subsequent part of the chapter considers the Canadian position where it will be demonstrated that consent can be a defence in these cases. [6] However, the decisions that emanate from this jurisdiction have not explored the parameters of an effective consent, other than excluding an implied consent as a defence.[7] The position, like England, is that there may not be a fully informed consent on all occasions, and disclosure of one's sero-status is deemed sufficient for exculpation purposes.

The American position on consent will then be evaluated. This critical analysis will highlight that there are divergent approaches to consent within the HIV State specific legislative frameworks. There are States that allow consent;[8] those that require disclosure;[9] and those where there is no expressly stipulated provision on disclosure or consent.[10] It will be shown that the majority of states do not take into account that the complainant 'ought' to be consenting to running the risk of infection. There are, however, states that have enacted legislation to accommodate normative consent, and thereby allow a fully informed consent.

The penultimate part of this chapter will provide a comparative analysis that identifies the similarities and differences within each designated jurisdiction. It will be ascertained whether factual[11] or normative consent[12] is the requisite threshold for the applicable defence. The comparison is divided into three distinct approaches: basic

[5] *R. v Konzani* [2005] EWCA Crim 706 [2005] 2 Cr. App. R. 14
[6] *R. v. Cuerrier*, [1998] 2 SCR 371
[7] *R v Williams* [2003] 2 S.C.R. 134
[8] 720 Ill. Comp. Stat. § 5/12-5.01; N.D. Cent. Code § 12.1-20-17 (2014); Nev. Rev. Stat. § 201.205 (2014); Mo. Rev. Stat. § 191.677 (2014)
[9] Ark. Code Ann. § 5-14-123 (2012); Cal. Health & Safety Code § 120291 (2014); Minn. Stat. § 609.2241(2014) and Ohio Rev. Code Ann. § 2903.11(2014)
[10] Wash. Rev. Code § 9A.36.011
[11] Jonathan Witmer-Rich, 'It's Good to be Autonomous: Prospective Consent, Retrospective Consent, and the Foundation of Consent in the Criminal Law' (2011) 5 Criminal Law and Philosophy 377, 379
[12] Peter Westen, *The Logic of Consent* (Ashgate Publishing 2004) 7

disclosure; quasi-enhanced disclosure; and enhanced disclosure. It is argued that in the majority of jurisdictions the current law has developed so that only factual consent is relevant, and that there is no true consideration of the significance of normative consent. There will also be an extrapolation of distinct approaches to implied consent within the jurisdictions. Finally, the culmination of the chapter will provide a suggested statutory footing for facilitating consent as a defence prospectively, and this relies upon elements of Ohio's statutory provision, ensuring that factual consent and normative consent need to be attained for an effective consent.

Restricting Consent as a Defence: Autonomy, Moralism and Paternalism

It is a well recognised principle of the general criminal law that an individual, in certain circumstances, can consent to being harmed or the risk of being harmed.[13] In accordance with this proposition, all of the legal systems considered herein have empowered individuals with the opportunity to consent to partaking in unprotected intercourse with an HIV+ individual. Facilitating the defence is in accordance with a United Nations communication that advocated that informational decision-making, based upon acquiescence, should enable a defendant to circumvent any criminal sanction for HIV transmission/exposure.[14]

[13] *R v Brown* [1994] 1 A.C. 212; *R v Jobidon* [1991] 2 S.C.R 714;. Model Penal Code § 2.11
[14] Carolyn Bennett *et al* 'Handbook for Legislators on HIV/AIDS, Law and Human Rights' (1999) 50 www.ipu.org/PDF/publications/aids_en.pdf accessed 7 December 2014

The Relevance of Autonomy

For a complainant to be competent to consent to running the risk of infection they must be autonomous.[15] Autonomy, at its bare 'minimum', can be described as an individual having the capacity to 'self rule' without any interference.[16] The significance of autonomy should not be misjudged. How autonomy is warranted is unsubstantiated but two prominent theorists articulate disparate conceptions of why autonomy should be respected. Each endorses the inviolability of autonomy, but present differing rationales for the concept. Mills suggests that people are the best judges to decide what is in their interests,[17] whilst Feinberg advocates that an individual is entitled to decide what harm they will agree to, as they are the sovereign of their own choices.[18] The same conclusion can be drawn from both considerations. Whether an individual makes a good choice is irrelevant, and it is the person's right to decide whether there can be any interference that is generally supererogatory. It is apparent from these differing conceptualisations that the application of either definition permits an informed individual to act autonomously and consent to running the risk of transmission, even if they acquired the potentially debilitating disease.

This does not signify that the criminal law will not impinge upon autonomous conduct. Any interference can be assessed normatively in terms of policy objectives

[15] Joel Feinberg, *Harm to Self* (Oxford University Press 1989) 59
[16] Tom L. Beauchamp and James F Childress, *Principles of Biomedical Ethics*. (6th ed. Oxford: Oxford University Press 2008) 100–1
[17] Witmer-Rich (n 11) 380
[18] ibid

when exploring personal autonomy and rational autonomy.[19] Personal autonomy can be distinguished from rational autonomy as this allows an individual the freedom of choice. Rational autonomy, conversely, is the equivalent of dignity, and an individual should not be allowed to sanction any encroachment upon their human dignity.[20] It has been suggested that an individual's right to autonomy should be restricted when there is a violation of rational autonomy.[21] There are those that stipulate that this constraint would pertain to 'HIV consentors'.[22] Therefore, an individual's right to autonomy would generally be respected unless it encroaches upon their dignity. It is when conduct bears no social utility that intervention with an individual's autonomous decision-making is generally accepted to be for their own good. These points have been clarified on a number of occasions, and any exceptions to these principles tend to be constrained in nature. Any intrusion to the sexual interaction between an individual who is fully aware of their partners HIV status, and the risks of infection through unprotected intercourse, would be an interference with that persons' reproductive autonomy.[23]

Interfering With An Individual's Autonomous Decision Making: The Relevance Of Moralism and Paternalism

Further restrictions to an individual's autonomy may be seen via the impact of moralistic inclinations and considerations. Morality may diminish an individual's right to act autonomously as all moral beliefs generally affirm that any immorality can be

[19] Dennis J. Baker, 'The Moral Limits of Consent as a Defence in the Criminal Law' (2009) 12 New Criminal Law Review 93, 98
[20] ibid
[21] Vera Bergelson, 'Consent to Harm' (2008) 28 Pace Law Review 683, 730
[22] Baker (n19) 99
[23] Jed Rubenfield, 'The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy' (2013) 122 Yale Law Journal 1372, 1383

criminalised.[24] If an individual consents to a risk then it may be permissible to tolerate that conduct, but it may also be contended that infecting or exposing another to a potentially fatal virus is morally repugnant. Conventional morality[25] would advocate the criminalisation of these behaviours. Legal moralism[26] would also endorse the criminalisation of this conduct even when no actual harm accrued.[27] It would be irrelevant whether or not the individual was infected and whether or not they consented. A complainant, under these moralist contentions, would be unable to run the risk of infection, regardless of their affections towards another person or the wish to procreate.

The characteristics of legal and conventional moralism correspond to a hard paternalistic rationalisation of the criminalisation of the sexual transmission/exposure of HIV. The main characteristic of any paternalistic approach, intersecting with a proposed legislative framework, can be understood to be the balanced interference with an individual's autonomy to protect their welfare.[28] Any state intrusion must be for an individual's own well-being, otherwise it cannot be considered to be a legitimate paternalistic intervention.[29] A hard paternalist rationale for the negation of the informed consent of an HIV negative partner would be that the restriction is protecting that individual from a potential harm.[30]

[24] Leo Zaibert, 'The Moralist Strikes Back' (2011) 14 New Criminal Law Review 139, 145
[25] Baker (n19) 99
[26] Jefferie G Murphy 'Legal Moralism and Liberalism' (1995) 37 Arizona Law Review 73, 74
[27] Zaibert (n 24) 141: 'it is legitimate (at least prima facie) for the state to criminalize whatever is morally wrong, regardless of whether or not it harms anyone.'
[28] JD Trout,'A Restriction Maybe but is it Paternalism? Cognitive Bias and Choosing Governmental Decision Aids' (2007) 2 New York University Journal of Law and Liberty 455, 456 Trout submits that paternalism is best described as: 'the interference of a state or an individual with another person, against their will, and justified by a claim that the person interfered with will be better off or protected from harm.'
[29] Law Commission, *Consent in the Criminal Law* (Law Com No 139, 1995) para C 60 paternalism '…justifies criminal prohibitions exclusively on the grounds that they promote an actor's own welfare'.
[30] Thaddeus Mason Pope, 'Counting the Dragon's Teeth and Claws: The Definition of Hard Paternalism' (2004) 20 Georgia State University Law Review 659, 683 Pope proposes how one could define hard paternalism. It was suggested that in order for a law to be classed as hard paternalism it must fulfil a set criteria. This, proposes Pope, consists of four conditions that need to be satisfied and that these are 'logically necessary'. However, the first three conditions could be equally applied to an interpretation of soft paternalism.

A ‘soft’ paternalistic approach would propose that any impediment to the decision-making of the subject would be justified if that person had not been given the opportunity to make an informed choice. If an individual is HIV positive, and does not disclose their status to a partner, it may be said that the partner has not had the opportunity to make an informed decision. For the legal restriction to be considered soft paternalism the constraint must either protect an individual from harm or ensure that that person has had the opportunity to consent to that harm.[31]

There are cogent justifications for not facilitating a soft paternalist legislative framework to the criminalisation of HIV. Trout asserts that individuals may find it arduous to comprehend that their current behaviours can affect their future well-being.[32] These are termed short term goals and long terms goals. A long term goal of any individual should be to be healthy. If the consensual transmission of HIV transpires then the short term goal would take precedence over the long term goal of health. As Trout propounds, ‘our short-term desires appear to swamp our ability to defer gratification’.[33] Accommodating a curtailment of this magnitude would advocate a hard paternalistic perception to law-making. Trout’s proposition also corresponds with Young’s alternative definition that is known as strong paternalism.[34] Young states that paternal intervention does not interfere with autonomy of an individual, and there is a distinction between autonomy at the current time (instant autonomy) and the individual’s long term autonomy (global autonomy).[35] By restricting instant autonomy, that can cause an individual serious harm, Young submits that individual

[31] Pope (n 30) 678
[32] Trout (n 28) 465-469
[33] ibid 467
[34] Robert Young, ‘Autonomy and Paternalism’ (1981) Bulletin of the Australian Society of Legal Philosophy 32
[35] ibid 43

global autonomy remains intact thereby enhancing the individual's overall autonomy.[36] It is evident from the above extrapolation that permitting soft or hard paternalist restrictions can signify that autonomy, whether contemporaneous or in the future, will ultimately be respected.

As can be seen from the above exposition, there is a convincing rationale for accommodating consent, and there are also justifications for restricting the defence. The crucial factor, that is evident throughout the preceding discussion, is that it transpires that a complainant will always be running a risk of injury rather than consenting to actual injury. If the complainant's consent meant that the infection would transpire, this would be compelling grounds for a hard paternalistic deportment to the criminalisation of HIV. However, implementing a hard paternalistic approach would interfere with an individual's reproductive autonomy.[37] To exclude the defence of consent to the risks of unprotected intercourse, 'would involve an unwarranted intrusion into the pre-eminently private sphere of adult sexual relations',[38] obfuscating and eviscerating balanced policy considerations. For this reason, and the respecting of an individual's autonomy, it is suggested that a soft paternalistic legislative framework has been, and should be, adopted as this permits a complainant to make a fully informed decision. How a fully informed consent is constructed will now be considered.

[36] ibid
[37] Rubenfield (n 23)1383
[38] Weait, 'Criminal Law and the Sexual Transmission of HIV: R v Dica' (n 38) 124

The Essential Ingredients For A Fully Informed Consent In Cases of Sexual Transmission/Exposure To HIV

Consenting to harm, or a risk of harm, seems to be a relatively undemanding concept to comprehend as an individual will either grant their consent or refuse to acquiesce. The simplicity of consent is delusional,[39] and it is imperative to determine the constructional basis of valid consent within criminal HIV transmission/exposure cases.[40] Generally, consent, that is legally permissible, transpires if a complainant permits the defendant to perform an act that will cause harm, or a risk of harm, to the consentor, and fits within the overarching public policy of the particularised legal system.[41] Enabling that person to consent provides an individual with the authority over the consenter to commit an act that would otherwise be criminal: subject, as stated, to overarching public policy considerations.[42] For there to be sufficient consent, it must be given voluntarily by an individual who has made an informed choice.[43] The complainant in these circumstances bestows the defendant with authorization to interfere with their bodily integrity.[44]

Witmer-Rich[45] submits that a 'legally valid consent' consists of two elements. Firstly, there must be 'factual consent', in that the complainant acknowledges that they consent to allowing that person to embark upon the course of conduct that infringes

[39] See generally Westen (n 12)
[40] See generally Matthew Weait and Yusef Azad, 'The Criminalization of HIV Transmission in England and Wales: Questions of Law and Policy (2005) 10 HIV/ AIDS Policy and Law Review 1 http://www.aidslaw.ca/site/wp-content/uploads/2013/04/EngWales_HIV-Review10-2-E.pdf accessed 18th April 2015; John R. Spencer, 'Retrial for Reckless Infection' (2004) 154 New Law Journal 762
[41] *R v Brown* [1994] 1 A.C. 212
[42] Bergelson, 'Consent to Harm' (n 21) 683
[43] Bergelson, 'Consent to Harm' (n 21) 701
[44] Witmer-Rich (n 11) 397
[45] ibid 379

upon their bodily integrity.[46] This form of concurrence may be established either subjectively, performatively or as a hybrid of the subjective and performative models.[47] Factual consent is a necessary component of a valid consent, but can be deficient in ascertaining that there has been a fully informed consent.

As Factual consent, alone, will not suffice there is a second element that must also be satisfied. [48] 'Normative consent' reinforces the factual consent if three conditions are met.[49] It is generally recognised that normative consent consists of knowledge, freedom and competence: however, the parameters of these conditions are contentious.[50] If any of these ingredients are omitted then it is pertinent to assume that there cannot be a legally valid consent.[51]

Factual Consent: Subjective, Performative Or A Hybrid?

Factual consent is considered an essential, but insufficient, component to the defence.[52] It forms the foundation on which the court/fact-finder can determine whether the complainant has truly consented to normally prohibited conduct. There are three schools of thought on the construction of factual consent.[53] The subjective view is promulgated upon the assumption that factual consent is attributed to the mental state of the complainant.[54] Hurd, a proponent of the subjective model, suggests that the primary focus of factual consent must be assessed subjectively, as

[46] ibid
[47] Alan Wertheimer 'What Is Consent? And is it Important?' (2000) 3 Buffalo Criminal Law Review 557, 566
[48] Witmer-Rich (n 11) 379
[49] ibid 7
[50] ibid
[51] Joel Feinberg, *Harm to Others* (Oxford University Press 1984) 35-36
[52] Westen (n 12) 25
[53] Wertheimer (n 47) 566
[54] ibid

it affects the rights and duties of the individuals involved.[55] By enabling subjective consent it demonstrates the 'exercise of free will'.[56] It has been considered that it is the intention of the consentor to engage in the risky activity that enables an individual to cross any moral boundary or, alternatively, it is believed to be an intention to forgo any moral objection to the interference.[57] Both suggestions equate to a subjective assessment of factual consent, and neither need take preference over the other. This subjective analysis may seem appropriate in defining factual consent in certain types of criminal offence, for example rape,[58] but may be incongruous to HIV transmission/exposure cases because the forming of the intention, by the complainant, to permit the defendant to interfere with their bodily integrity, may be deficient. How would a defendant be aware that the complainant was willing to embark upon acts of intimacy when the complainant has merely formed a mental agreement. More than a cognitive recognition can be expected as the defendant may be oblivious, without further indications, that the complainant agrees to any unprotected activity.[59]

The next variant of factual consent is the performative model.[60] This advocates that the consentor must express that they acquiesce to the interference with their autonomy and bodily integrity.[61] Under this proposition the agreement can originate via words or by actions.[62] An expression of the agreement, it has been suggested,

[55] Heidi Hurd, 'The Moral Magic of Consent' (1996) 2 Legal Theory 121,124-25
[56] ibid 124-25; Larry Alexander, 'The Moral Magic of Consent (II)' (1996) 2 Legal Theory 165
[57] Hurd (n 55) 124-25; Larry Alexander, The Moral Magic of Consent (II) (1996). 2 Legal Theory 165; Wertheimer (n 47) 567
[58] David P. Bryden, 'Redefining Rape' (2000) 3 Buffalo Criminal Law Review 317,355
[59] Wertheimer (n 47) 568
[60] ibid 566
[60] ibid 567
[61] ibid 567
[62] J.L. Austin, *How to do Things with Words* (Oxford University Press 1962) 99

unequivocally conveys to the recipient that the complainant consents.[63] To view factual consent exclusively upon the performative assumption would not be applicable to HIV transmission/exposure cases because the complainant must also form an intention to agree to unprotected intercourse. Words or actions may not have this effect as what we say is not conclusive in these circumstances. The complainant may expressly consent to having intercourse, however, cognitive recognition of that acceptance is still essential.

The hybrid method takes into consideration both subjective and performative consent as part of an eclectic and evaluative duality of considerations. The blending of both of these elements may appease proponents of both persuasions. Westen[64] proposes that performative consent is extrapolated from subjective factual consent as this is a core concept,[65] thereby indicating that subjective factual consent is necessary. It is incomprehensible to understand how an individual can consent without mentally complying with any interference. An individual would only be able to express their factual consent after mentally acknowledging they acquiesce. It follows that a subjective agreement cannot be recognized unless there is some type of express accord, whether by words or actions. This is at its most evident in cases of consensual intercourse as there must be words or actions that signify that that person agrees to sexual intimacy. A combination of the subjective and performative consent clarifies the position of acquiescence by accommodating a mental agreement and some form of action by the complainant. This hybrid model is at its most apposite in criminal HIV transmission/exposure cases as a mental agreement,

[63]Wertheimer (n 47) 99
[64] Westen (n 12)
[65] Westen (n 12) 27 'it is a core concept of consent in that other conceptions of consent are conceptually derivative of it including factual expressive consent'

and the performative aspect, would conclusively embody that the complainant was factually consenting before normative consent can be taken into account.

The Essential Ingredients Of Normative Consent

It is generally recognised that the complainant's awareness must consist of knowledge, freedom and competence, but the parameters of these conditions are contentious.[66] The contentions surrounding the various components could provide a thesis in itself, therefore, the prevailing discussion is limited to a brief definition of each. It is assumed, for current determination, that a complainant's knowledge will emanate from the traditional philosophical assumption of the term.[67] If knowledge is to be portrayed in this manner then the complainant must be fully aware that the defendant is carrying the virus and that there are risks of having the virus transmitted by having unprotected intercourse with an individual with that status. The complainant, under these conditions, must have that justified true belief in the defendant's HIV status, and the implications of having intercourse with that person, to be capable of consenting to running the risk of harm, because only then can it be said that they are fully aware.[68]

The freedom to make that choice signifies that the complainant must not be coerced into making a decision or be deceived.[69] She must act autonomously without any external influence, otherwise the freedom of choice would be deficient.[70] A truly liberal approach to consent endorses this freedom of choice and provides a

[66] Westen (n 12)) 7
[67] Above ch 2 p45-53
[68] Westen (n 12) 187 -189
[69] ibid 180
[70] Feinberg *Harm to Others* (n 51) 116

complainant with the opportunity to forego their right to protect themselves from potential bodily harm.[71] Any individual who consents must also be competent[72]. For example, a mentally incapacitated, intoxicated or an under-age individual would be incapable to consent to running the risk of harm. Only if the three conditions of knowledge, freedom and competence coalesce can it eventuate that there is normative consent.[73]

Beyond consideration of the concepts of consent in the abstract, and from a theoretical rationale, it is important to explore the extant substantive position in English law, and this will be critically analysed before evaluating the other comparator jurisdiction perspectives. In general terms, the ambit of consent as a defence in English law to the potential liability for non-fatal/sexual crimes has arisen in an *ad hoc* and solipsistic manner. The truism that hard cases make bad law[74] is reflected in the uncertain moral barometer that governs this arena.

The English Position on Consent and HIV Transmission

Generally, common law and statute authorise a defendant to rely upon a complainant consenting to various non-fatal and sexual offences.[75] In other circumstances the defence is not permissible.[76] The contemporary premise, within the criminal transmission of HIV, is that the consent of the complainant can operate

[71] ibid
[72] Westen (n 12) 189-191
[73] Westen (n 12)7
[74] *R v Brown* [1994] 1 A.C. 212; *Slingsby* [1995] Crim. LR 570; *Wilson* [1996] 2 Cr App R 241; Crim. LR 573; *R v Emmett* (CA 18 June 1999)
[75] *R v Brown* [1994] 1 A.C. 212; s74 Sexual Offences Act 2003
[76] *R v Brown* [1994] 1 A.C. 212

as a defence, and a soft paternalistic approach has been embraced.[77] The defence is available to defendants who have transmitted the virus to a complainant, where that complainant has consented to unprotected intercourse knowing that that person has the virus.[78] It is 'logical' to presume that the defendant could not have a reasonable belief of the complainant consenting to intercourse with an HIV+ individual if the defendant has not divulged their status.[79] An alternative position is that if the defendant intentionally transmits the virus then he would be unable to rely upon the complainant's consenting to that activity.[80]

In *Dica*[81], the Court of Appeal expressly stipulated that consenting to intercourse does not imply that the complainant consented to intercourse with an HIV+ individual. In order for the complainant to fully consent she must be aware that the defendant has the virus; there must be a disclosure by the defendant of their sero-status. Consent may even be deemed to be a 'collateral issue' as disclosure can emerge as the crux of the matter. This is at its most evident when the complainant may acquire the requisite information from a source other than the defendant, as was stated in *Konzani*.[82] The judiciary are unequivocal on this matter as Judge LJ promulgated examples whereby the complainant would acquire that knowledge from other sources.[83]

[77] *R v Dica* [2004] EWCA Crim 1103, 3 All ER 593
[78] ibid
[79] Lisa Cherkassky, 'Being Informed: The Complexities of Knowledge, Deception and Consent when Transmitting *HIV'* (2010) 74 Journal of Criminal Law 242, 248
[80] *R v Dica* [2004] EWCA Crim 1103, 3 All ER 593. [57]
[81] ibid
[82] *R. v Konzani* [2005] EWCA Crim 706 [2005] 2 Cr. App. R. 14[44]
[83] ibid

In *Dica,*[84] the defendant was charged under section 20 of the Offences Against the Person Act 1861[85], and accused of transmitting HIV to two unsuspecting complainants. At trial, Dica sought to rely upon the consent of the complainants. It was stated that consent, even if it existed, was irrelevant.[86] Justice Philpott relied upon *Brown* as the authority for this proposition.[87] In *Brown*,[88] the majority determined that where any harm was intended and/or caused there would be no consent unless it fell within a legitimate public policy exception.[89] These exceptions have subsequently been determined in an ad hoc and solipsistic fashion, and applied at the criminal law interface with public policy standardisations. At the time of Dica's trial there was no exception for consensual unprotected intercourse where HIV was transmitted.

The decision in *Brown*[90] was distinguished by the Court of Appeal in *Dica,*[91] and delineated in terms of parameters and ambit.[92] Judge LJ demarcated the judicial precepts established in *Brown* from cases involving the sexual transmission of HIV.[93] It was highlighted that the factual pattern of behaviour in *Brown* comprised of acts

[84] *R v Dica* [2004] EWCA Crim 1103, 3 All ER 593
[85] Offences Against the Person Act 1861 s20. Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor (sic), and being convicted thereof shall be liable to be kept in penal servitude
[86] *R v Dica* [2004] EWCA Crim 1103, 3 All ER 593 [13]
[87] ibid
[88] *R v Brown* [1994] 1 A.C. 212
[89] ibid
[90] ibid
[91] *R v Dica* [2004] EWCA Crim 1103, 3 All ER 593
[92] ibid [46]
[93] ibid

where there was the 'deliberate and intentional inflection of bodily harm',[94] whereas *Dica* concerned consensual intercourse:

> "*It does not follow from them, and they do not suggest, that consensual acts of sexual intercourse are unlawful merely because there may be a known risk to the health of one or other participant."*[95]

The judgment in *Dica* unmistakably distinguished *Brown* as the earlier decision was founded upon the deliberate infliction of harm. *Dica* was a case that involved consensual unprotected intercourse and the 'risk of harm'. Weait and Azad concur as to how Judge LJ distinguished *Dica* from previous judgments.[96] Clearly, consensual unprotected intercourse, and 'running of the risk' were the pivotal issues that enabled the defence of consent to be galvanised, or not, in terms of informed consent. Cherskassky[97] proposes that by delineating the running of the risk to the contrary position of policy, advocated in *Brown,* the case 'drew an interesting line regarding consent and HIV transmission'.[98] If unprotected sexual intercourse between two consenting adults, meant that the virus would always be transmitted, then the defence may not have been permitted, and the policy decisions and construct adopted by the majority in *Brown* might have prevailed in HIV transmission precedents.

Judge LJ in *Dica* impliedly endorsed running the risk as one of the 'good reasons' that were set out in *Brown*.[99] The rationale of the dicta has been questioned as it has been suggested that permitting an individual to consent to be infected with a

[94] ibid [45]
[95] ibid [46]
[96] Weait and Azad (n 40) 7
[97] Cherkassky (n 79)
[98] ibid 248
[99] *R v Dica* [2004] EWCA Crim 1103, 3 All ER 593. [46]

potentially deadly virus can never be a 'good reason'. [100] It is not consent to being infected with the virus that was being endorsed; it is the running the risk of infection to which the informed complainant would be autonomously consenting via 'lawful' sexual intercourse.

An alternative rationale for permitting the defence of consent to operate was proposed in relation to long term relationships. Judge LJ referred to a number of scenarios within the judgment in *Dica,* whereby an individual's autonomy should be respected.[101] One of the examples entailed a Roman Catholic couple and the consequential dangers of passing HIV through unprotected intercourse.[102] It was determined that by withdrawing the opportunity from this couple of having unprotected intercourse would conflict not only with the autonomy of the individuals but also their religious persuasion.[103] Such a proposition, it was suggested, justified consent to be a defence as a hard paternalist approach may have been 'a step too far'.[104] It was further acknowledged that the HIV negative partner would be aware of the risks of the virus being transmitted.[105] This example seemed to infer that more than disclosure of HIV would be required. A further illustration was more tenuous in that it provided a discussion of the dangers that may be perceived in relation to procreation when both parties are willing to take that risk.[106] Again it can be seen that emphasis was placed upon the awareness of risk. However, *Dica* was not concerned with procreation, so it is problematic to reconcile this example to the case that was before the Court. It seems that his Lordship may have been

[100] George R. Mawhinney, 'To be Ill or to Kill: The Criminality of Contagion' (2013) Journal of Criminal Law 202, 207
[101] *R v Dica* [2004] EWCA Crim 1103, 3 All ER 593 [48]
[102] ibid
[103] ibid
[104] ibid
[105] ibid
[106] ibid

attempting to state that HIV infected individuals must also have the opportunity to procreate, and this is why unprotected intercourse, when there is a risk of the virus being transmitted, should not be criminalised. It would have been beneficial for his Lordship to expressly stipulate that correlation. Indeed, allowing the defence in these circumstances can be seen as an 'objective justification' for interfering with a 'mothers dignity'. [107] It was further proposed that in these circumstances any interference with a complainant's autonomy should emanate from Parliament.[108] Therefore the defence was allowed, and if '… the victim consents to the risk, this continues to provide a defence under s.20,'[109] thereby connoting that it is the risk that is relevant.

There was no exposition as to how a complainant would acquire the appropriate 'knowledge' that would enable them to provide a fully informed consent. Throughout the judgment, acknowledgement of the risk was recognised. Judge LJ did state that:

> "*if the appellant concealed the truth about his condition from them, and therefore kept them in ignorance of it, there was no reason for them to think that they were running any risk of infection, and they were not consenting to it. On this basis, there would be no consent sufficient in law to provide the appellant with a defence to the charge under s.20*."[110]

The statement implies that if a defendant discloses their sero-status this would be a sufficient revelation to be able to rely upon the defence of consent. Yet a disclosure of this type fails to take into consideration whether the complainant was fully aware that unprotected intercourse would create a risk of infection. Spencer[111] even

[107] Baker (n19) 114 :"But the importance of having a child might provide an objective justification for tolerating disrespect for the mother's dignity."
[108] *R v Dica* [2004] EWCA Crim 1103, 3 All ER 593. [52]
[109] ibid [39]
[110] ibid
[111] John R. Spencer, 'Retrial for Reckless Infection' (2004) 154 New Law Journal 762,

suggests that the complainant must have full knowledge of the facts,[112] and proposed that *Dica* struck the 'appropriate balance' as a defendant who does not disclose will be liable, whilst those who do disclose will not be accountable.[113] This proposition indicates that disclosure of the HIV status is the requirement, and that this factorisation will enable the defence of consent to operate; nothing of the risk associated with such activity needed to be established. It is presumed that a complainant would always be aware of the risk of transmission, but this is simply not the case. Allowing disclosure in isolation does not take into account statistics on the awareness of transmission routes.[114] A 'significant minority' appear to be unaware that the virus can be transmitted via sexual intercourse.[115] It signifies that a naïve individual may be blissfully unaware of this risk associated with certain activities. If such a person is unaware then how could they be said to have fully consented to the risk of infection? This is not the realms of fantasy, for example, a complainant aged sixteen may not be fully aware that they were consenting to running the risk of infection, but they would still be competent to have unprotected intercourse with an HIV+ individual.

Konzani: The Complainant Being Aware Of The Risk Of Transmission Through Sexual Intercourse

In *Konzani,*[116] the defendant was accused of infecting three females with HIV. It was alleged that none of the complainants were aware of the defendant's sero-status.[117] The defendant appealed on the basis that the complainants had consented to

[112] ibid 767
[113] ibid762; Cherkassky (n 79)248
[114] Rachel Harker, *Social and General Statistics: HIV and Statistics,* House of Commons Library Standard Note 2210, 25 October 2012
[115] ibid
[116] *R. v Konzani* [2005] EWCA Crim 706 [2005] 2 Cr. App. R. 14
[116] *R. v Konzani* [2005] EWCA Crim 706 [2005] 2 Cr. App. R. 14
[117] ibid [[3]

unprotected intercourse, and it could be implied that they had consented to running the risk of infection.[118] It was claimed that the judge had misdirected the jury by removing the opportunity to contemplate whether the defendant may have had an honest belief that they had consented.[119] The case addressed how a complainant can acquire knowledge of a defendant's sero-status, and clarified the parameters of consent. It was confirmed that any consent must be fully informed and that:

> "*the defendant is not to be convicted if there was, or may have been an informed consent by his sexual partner to the risk that he would transfer the HIV virus to her*."[120]

This connotes that the complainant must not only be aware of the status of the defendant, but also that they must be alert to the risks associated with unprotected intercourse. Any such assertion corresponds to, and contradicts elements of the dictum that can be derived from *Dica*. It is a disclosure where the complainant knows of the risk that the virus may be transmitted that ought to be considered appropriate. *Konzani* also raised the issue of implied consent and that inculcation requires further elaboration.

Konzani And The Complainant Impliedly Consenting To Intercourse With An HIV+ Individual

The judgment in *Konzani,*[121] reiterated that any consent must be fully informed, but in total contrast stipulated conditions whereby consent could be implied, denoting

[118] *R. v Konzani* [2005] EWCA Crim 706 [2005] 2 Cr. App. R. 14 [5]
[119] ibid [36]
[120] ibid [43]
[121] ibid

that the defendant may potentially form an honest belief that the complainant is consenting to running the risk of becoming infected. Judge LJ opined how knowledge of the defendant's sero-status could be acquired, but afforded no indication as to how the knowledge of the risks associated with unprotected intercourse with an HIV+ individual could be obtained.[122] This did not signify that the disclosure of the HIV status must originate from the defendant, as his Lordship provided illustrations of when a complainant may acquire knowledge of the defendant's HIV status. It was recognised that the complainant could gain the requisite facts from a hospital environment or via a third party.[123] This insinuates that the defendant would not have to participate in any declaration of their HIV status, thereby enabling implied consent to enter into the realms of HIV transmission. Authorising the consenter to acquiesce by acquiring knowledge from another source may be understood to have enhanced that person's autonomy. They may be making an informed choice, and it may be asserted that it is a free willed decision evading any coercion from the defendant. Contrarily, such information may be inadequate as the complainant may only discover the most basic of information. The judgment is contradictory by requiring an informed consent, then stipulating that the disclosure of HIV status, whether by the defendant or another party, was sufficient to establish that the complainant was willing to run the risk as nothing else needed to be adduced.[124]

[122] ibid [44]
[123] ibid
[124] ibid

Weait,[125] pre *Konzani,*[126] presciently in light of the actual judgment, set out a liberal perspective on consent, extending the parameters of implied consent to circumstances where the complainant is aware of the risks:

> "*…the defence should be available because in each of these cases that person is aware of the risk of transmission. They may be ignorant of a partner's HIV positive status in the sense that this has not been disclosed to them by him, but to deny the defence if there is in fact knowledge of the risk, and a willingness to accept it, would be tantamount to saying that the person infected bears no responsibility for their own sexual and physical health*"[127]

It was suggested that under these conditions the complainant would potentially have knowledge of the defendant's HIV status, and thereby would be consenting to running the risk of transmission. Weait has subsequently stated that the examples promulgated in *Konzani* were not extensive or limited to situations where disclosure has effectively taken place.[128] This would extend the parameters of the defence to circumstances whereby a complainant is aware that there is a possibility of the defendant having the virus, and they have not disclosed their status to the complainant.[129] Note must be taken that the term 'possibility' does not equate to actual awareness, and therefore is not actual knowledge. Contrastingly, under conditions where there has been no disclosure by the defendant, it would be feasible for the complainant to envisage that the defendant did not have the virus. Ryan[130] also advocates that position, as previously postulated by Weait, as it is:

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[125] Weait, 'Criminal Law and the Sexual Transmission of HIV: R v Dica' (n 38)
[126] *R. v Konzani* [2005] EWCA Crim 706; 2 Cr. App. R. 14
[127] Weait, 'Criminal Law and the Sexual Transmission of HIV: R v Dica' (n 38)128
[128] Matthew Weait, 'Knowledge, Autonomy and Consent: R. v Konzani' (2005) Criminal Law Review 763, 768
[129] ibid
[130] Samantha Ryan, 'Risk-Taking, Recklessness and HIV Transmission: Accommodating the Reality of Sexual Transmission of HIV Within a Justifiable Approach to Criminal Liability' (2007) 28 Liverpool Law Review 215

> "… *the right approach to take. Individuals can be aware of the risk of HIV transmission even without disclosure by their sexual partner and, if with such knowledge they consent to sexual intercourse, they must be treated as consenting to the risk of infection*". [131]

Weait and Ryan anticipate an extension of implied consent that would potentially sanction further deceitful conduct by the defendant, and place the onus upon the complainant. This is arguably incorrect as it would swing the pendulum too much towards the awareness of risk and disassociate consent from disclosure. A less onerous position, for culpability purposes, would stipulate that the complainant must not only know that the defendant has the virus, but also that the type of activity may run the risk of becoming infected. The onus ought be on the defendant to disseminate the relevant facts; the issue of implied consent should be negated in these cases.

Placing the onus upon the complainant is also morally reprehensible and disregards that individual's global autonomy. Why should we expect a potential recipient of HIV to proactively seek confirmation from a non-disclosing defendant? Seeking confirmation does not indicate that the defendant will be receptive to the request and may encourage individuals to remain silent. Indeed, such a proposition relies upon the integrity of the defendant and may, for practical purposes, enable a deceitful defendant to evade liability. The reasoning behind enabling the fully informed consent of the complainant is to enable autonomous decision making so that that person can consent to not only having intercourse with an HIV positive individual, but that they consent to running the risk of transmission. Those who are unaware of the

[131] ibid 221

defendant's status can never be said to have properly consented, and exculpatory policy considerations are counterfactual.

Judge LJ erred in *Konzani* by yielding to certain pro-defendant concessions. Furthermore, acknowledging that the information may originate from various sources, does not denote that the complainant would be aware that there may be risk of infection.[132] Allowing an individual to rely upon the information emanating from a third party does not imply that the defendant would have an honest belief that the complainant was consenting to unprotected intercourse with a HIV+ individual, everything is speculative. This is an unfortunate element of the judgment as it enables a defendant to avoid conviction for culpable conduct. Enabling the knowledge of the virus to emanate from a third party permits a defendant to act with the appropriate *mens rea*, transmit the virus, and still evade liability for their conduct. This haphazard development of how the defence functions warrants more clarification. The 'loophole' allows a defendant to be reckless, whilst placing the onus upon the complainant. Cherkassky has cogently adumbrated in this regard that enabling the consent to derive from other parties, 'would render the defendant's knowledge of his own HIV status irrelevant, leading to the dangerous assumption that the assailant need not divulge his status at all.' [133] If the knowledge from a third party is to act as a defence that functions correctly then Cherkassky argues that the complainant must inform the defendant of their awareness.[134] Reed and Cooper concurred with this overarching culpability proposition:

[132]Cherkassky (n 79)255
[133] ibid 253
[134] ibid

> "*Where the defence of consent is to operate, it should surely be limited to those situations where it removes the defendant's culpability and blameworthiness because he is aware that the victim has knowledge of the risk at the relevant time and is therefore consenting*."[135]

Even where the complainant discloses awareness of the defendant's condition it does not indicate a fully informed consent, but this may equate to a 'reluctant consent' that has very recently received appellate endorsement, albeit controversially in *Watson,*[136] and falls firmly within the ambit of factual consent. Dodds *et al,*[137] consider that disclosure is currently, a 'precondition for relying upon the defence but it is the consent to the risk that actually matters'.[138] A basic disclosure is insufficient; it is the complainant being aware of there being a risk of transmission that fulfils the obligation that attains a fully informed consent. Only then will an essential constructional element of normative consent be achieved. There must be recognition that the complainant is aware that there was a risk of transmission of the disease.

The *Konzani* judgment emphasised the importance of there being a balance between public policy and autonomy, and that is why a fully informed consent was utilised.[139] It is, therefore, clear that the consent of the complainant is a defence to the reckless transmission of HIV. An approach of this type evidently denotes a soft paternalistic interpretation of the criminalisation of HIV. It is uncertain whether the disclosure of HIV status is sufficient for the defendant to rely upon the complainant

[135] Simon Cooper and Alan Reed, 'Informed Consent and the Transmission of Sexual Disease: Dadson Revivified' (2007) 71 Journal of Criminal Law 461, 464
[136] *R v Watson* [2015] EWCA Crim 559 [34]
[137] Catherine Dodds, Adam Bourne and Matthew Weait, 'Responses to Criminal Prosecutions for HIV Transmission among Gay Men with HIV in England and Wales' (2009) 17 Reproductive Health Matters 135
[138] ibid 139
[139] *R. v Konzani* [2005] EWCA Crim 706, 2 Cr. App. R. 14 [42]

consenting to the risk. In *Dica,*[140] it was suggested that disclosing an HIV status sufficed, but Judge LJ provided conflicting *dicta* throughout the judgment. *Konzani* appeared to imply that more was necessary.[141] Numerous scholars have also identified that the crucial issue is what the complainant must 'know' to be able to provide a fully informed consent.[142] The other important element is that implied consent has been enabled by *Konzani,* but the parameters have not been fully ascertained. It seems that what constitutes consent will need to be revisited by the judiciary. The English position on consent, as identified, may be contrasted with the Canadian perspectives to identify synchronicity or otherwise with normative consent.

The Canadian Judiciary And The Requirement Of Consent And Disclosure In HIV Transmission/Exposure Cases

The current position, within the Canadian jurisdiction, is that consent to unprotected intercourse does not convey that that person has consented to unprotected intercourse with an HIV positive individual.[143] There will only be a legally valid consent if the defendant, under certain conditions, discloses their status to the complainant; otherwise consenting to unprotected intercourse is considered to have been obtained by fraud.[144] It will be demonstrated that the current position does not take into consideration that the complainant may be unaware of the risk of the virus being transmitted. There is no obligation placed upon a defendant to disclose to any

[140] *R v Dica* [2004] EWCA Crim 1103, 3 All ER 593
[141] *R. v Konzani* [2005] EWCA Crim 706, 2 Cr. App. R.
[142] Cherkassky (n 79) 253
[143] *R. v. Cuerrier*, [1998] 2 SCR 371
[144] ibid

prospective sexual partner that there is a risk of virus being transmitted. [145] It is assumed that the complainant would always be versed on the risks, and this may not be the case. Consent, in these circumstances may not transform into a fully informed consent.

The Judicial Precepts Of Canada And The Disclosure/ Consent Requirement

An agglomeration of appellate cases,[146] before the Canadian Courts, have confirmed that there is no issue with the complainant consenting to unprotected intercourse with an HIV+ individual. It is when a defendant has to disclose their HIV status that has been the focus of the courts' deliberations. This quandary primarily surfaced in *R v Cuerrier*.[147] The complainant (KM) had embarked upon an 18 month relationship with Cuerrier. Cuerrier had already tested positive for the virus before embarking upon the relationship. At the beginning of the relationship Cuerrier and KM had discussed sexually transmitted diseases, but Cuerrier had specified that he had tested negative for HIV.[148] Eventually, Cuerrier and the complainant were tested and Cuerrier was confirmed to be HIV positive. The complainant continued to have unprotected intercourse with him, but stated that the reason for this was so that he could not infect anyone else. Cuerrier then embarked upon a relationship with another woman (BH) where he had unprotected intercourse without disclosing his sero-status. He was charged with two offences of aggravated assault in relation to KM and BH.[149]

[145] ibid; *R v Mabior* [2012] SCC 47
[146] For example see: *R. v. Cuerrier*, [1998] 2 SCR 371; *R v Mabior* [2012] SCC 47; *R v Williams* [2003] 2 S.C.R. 134
[147] *R. v. Cuerrier*, [1998] 2 SCR 371
[148] ibid [77]
[149] *Criminal Code,* RSC 1985, c C-46, s 265

Cory J, delivering the leading judgment, overruled an age old common law precedent by not following *Clarence.*[150] It was stated that that decision was based on, a 'harsh and antiquated view of marriage'.[151] By departing from that decision, it was unequivocally confirmed that consent to unprotected intercourse did not signify consent to unprotected intercourse with an infected person. It was unanimously confirmed that the fundamental issue that needed to be resolved in the case was whether the consent was obtained by fraud. The pre-*Cuerrier* position stipulated two types of fraud existed: fraud as to the act or fraud as to the person.[152] Both of these definitions had been removed from the Canadian Criminal Code.[153] This enabled the Court to sequentially extend the parameters of the law on fraud.[154] Each member of the court was prepared to extend the boundaries of fraud to encompass other circumstances.[155] The majority proposed that fraud, within a commercial context, was analogous to the current situation.[156] It would be considered to be fraud in this circumstance if the defendant did not disclose important facts, and thereby caused a 'deprivation or risk of deprivation.'[157] The defendant, not disclosing or concealing their HIV status, would constitute fraud.[158] Cory J stated that:

> "*Without disclosure of HIV status there cannot be a true consent. The consent cannot simply be to have sexual intercourse. Rather it must be consent to have intercourse with a partner who is HIV-positive. True consent cannot be given if there has not been a disclosure by the accused of his HIV-positive status. A consent that is not based upon knowledge of the significant relevant factors is not a valid consent*.'[159]

[150] *R. v Clarence* (1888) 22 Q.B.D. 23 In *Clarence* the defendant had transmitted gonorrhoea to his unsuspecting wife. It was held that he had not committed an offence under s20 or s 47 Offences Against the Person Act 1861
[151] *R. v. Cuerrier*, [1998] 2 S.C.R. 371 [103]
[152] *R. v. Cuerrier*, [1998] 2 S.C.R. 371 {36}
[153]*R. v. Cuerrier*, [1998] 2 SCR. 371[108]; *R v Mabior* [2012] SCC 47[40]
[154] *R. v. Cuerrier*, [1998] 2 SCR. 371 [97] –[103]
[155] ibid
[156] ibid [117]
[157] ibid [116]
[158] ibid [124]
[159]ibid [127]

Cory J's dictum is potentially contradictory. Throughout the judgment it is stated that disclosure of HIV status is the requirement, and then contrastingly proposes that there cannot be consent unless the complainant is aware of 'significant relevant factors'. 'Significant relevant factors' indicate that an awareness of the risk is a necessary component that should be attributed to the complainant, and this would assist in that person being afforded the opportunity to provide an informed consent. An informed consent can be stated to be 'informed, voluntary, and decisionally capacitated consent',[160] whereby all the relevant facts have been disseminated. Anything devoid of these 'significant relevant factors' would denote that there was no legally valid consent. Could or should 'significant relevant factors' be extended to the defendant enlightening the complainant about there being a risk of transmission?

It appears that the judgment is interpreted so that disclosure of HIV status is the only requirement that is expected of the defendant. Once disclosure has taken place it may be deemed that the complainant is consenting to the 'risk' of infection. Basic disclosure does not connote that the complainant is consenting to running the risk of infection, but the court seems to impute that the complainant is consequently aware of the possibility of the virus being transmitted. There is a presumption that a complainant accepts the risks that are associated with sexual activity with an HIV+ individual.[161] This is an acceptance of factual consent, and not necessarily normative consent. A complainant cannot be understood to have truly consented if they are oblivious to the risk that the activity may pose. The judgment suggests that all complainants will be fully conversant with the risks that are associated with having

[160] Nir Eyal, 'Informed Consent' *Stanford Encyclopaedia of Philosophy* (Fall 2012 Edition), Edward N. Zalta (ed.), URL= http://plato.stanford.edu/archives/fall2012/entries/informed-consent/ accessed 3rd April 2014
[161] John Flaherty, 'Clarifying the Duty to Warn in HIV Transference Cases' (2008) 54 Criminal Law Quarterly 60, 65

unprotected intercourse with an HIV+ individual, and fails to take into consideration the significant minority, or the naivety of certain individuals.[162] It seems that factual consent takes precedence, thereby excluding normative consent in these situations. It is conceded the awareness will not be relevant in all cases as the majority of individuals will be aware of the risk of infection by having unprotected intercourse, but a significant minority are unaware of the modes of transmission. Normative consent may be defunct when the naïve complainant has not been given all of the relevant facts to acquire the requisite level of knowledge.

The use of basic disclosure as the threshold appears to transcend all Supreme Court decisions. The Supreme Court have reiterated on a number of occasions that disclosure of one's status was the only requirement. In *R v DC,*[163] it was inferred that basic disclosure would be sufficient to ascertain that the complainant consented.[164] An acceptance of basic disclosure as the requirement cannot be assumed, as the Supreme Court in *R v Mabior*[165] appear to acknowledge that a complainant may withhold their consent if they were aware of the risk of harm. In *Mabior,* the defendant was charged with nine counts of aggravated sexual assault. The language used by the Court is at best convoluted:

> "*Failure to disclose (the dishonest act) amounts to fraud where the complainant would not have consented had he or she known the accused was HIV-positive, and where sexual contact poses a significant risk of or causes actual serious bodily harm (deprivation)*."[166]

[162] Harker (n 114) 13
[163] *R v D.C.*2012 SCC 48
[164] ibid
[165] *R v Mabior* [2012] SCC 47
[166] ibid [104]

The dictum may have multiple interpretations. Firstly, that disclosure by the defendant is sufficient as it is stated the complainant would not have consented if they were aware of the defendant's sero-status. Alternatively, if the complainant was aware they would not have partaken in activities that posed a risk of serious harm. It seems that it is the former that takes preference as it was again presumed throughout the judgment that an individual would be aware of the risk of the virus being transmitted by consenting to unprotected intercourse with an HIV+ individual. Yet it should be the latter that is preferred as it demonstrates that the complainant would need an awareness of the risk.

There has been no confirmation about the extent of informed consent. It has been presumed that disclosure and acceptance of that disclosure denotes that the complainant will be consenting to running the risk of infection. Grant[167] presumes such a stance, but expresses that the complainant will always withhold their consent when the defendant's HIV status is revealed to them: 'It also assumes that the accused knows his or her HIV status and that his or her sexual partner will withhold consent once disclosure takes place.' [168]

There can be no such assumption as all that is required is a basic disclosure. This signifies that consenting to intercourse with an HIV + individual is sufficient and consenting to the risk need not be taken into account. In these situations a complainant who is unaware of the risk will only be consenting to unprotected intercourse with an HIV+ individual. This perception may have been altered if a truly

[167] Isabel Grant, 'The Prosecution of Non-disclosure of HIV in Canada: Time to Rethink Cuerrier'(2011) McGill Journal of Law and Health 7
[168] ibid

informed consent is required as there would be awareness that the virus could be transmitted. The case law places the assessment of the risk onto the defendant, thereby excluding a complainant from any consultation on the matter, and this cannot be justified.

An Alternative Disclosure Requirement: The Minority Judgments in Cuerrier And Disclosure On All Occasions

In *Cuerrier*, the two dissenting judgments offered alternative approaches to fraud, and both of these anticipate disclosure in all incidents of HIV exposure. The simplicity of the proposals are evident, and each suggestion avoids the complexity of the majority judgment, in that there is no requirement of an assessment of the risk of transmission by a defendant. McLachlin J proposed that consent to intercourse would be vitiated if a defendant does not disclose that he has an infectious disease.[169] There was no consideration of the complainant's awareness of the risk of infection. L'Heureux-Dubé J also proposed a definition of fraud whereby disclosure would be a requirement on all occasions, and it was suggested that:

> *"…fraud is simply about whether the dishonest act in question induced another to consent to the ensuing physical act, whether or not that act was particularly risky and dangerous. The focus of the inquiry into whether fraud vitiated consent so as to make certain physical contact non-consensual should be on whether the nature and execution of the deceit deprived the complainant of the ability to exercise his or her will in relation to his or her physical integrity with respect to the activity in question."*[170]

[169] *R. v. Cuerrier*, [1998] 2 S.C.R. 371 [67]
[170] ibid [16]

This proposal evidently necessitates that the defendant discloses their sero-status on all occasions. Primordially, it is simplistic to adopt, but fails to consider the awareness of the complainant in relation to the risk of the virus being transmitted. L'Heureux-Dubé J did not clarify the parameters of the disclosure requirement, other than the requirement of basic disclosure, and this still puts certain complainants in an onerous position. There is a presumption that the complainant would be aware of the risk of infection as long as there was disclosure.[171] It was also stated that the purpose of s265(3) was to ensure that consent, 'was a true reflection of a person's autonomous will'.[172] This could not be a true reflection of an individual's will unless they are 'consciously aware' that unprotected intercourse poses a risk of the virus being transmitted.

The adoption of this alternative approach would have broadened the definition of fraud, and embrace situations where conduct would not normally be considered fraudulent in the criminal sphere.[173] To enable any misrepresentation to amount to fraud would be too much of an extension to the usually rigid legal definition of fraud, and the spectrum of consent vitiation. Although it would simplify this area, it does not assist in confirming the extent of the disclosure by the defendant. Subsequently, the decision of *Mabior,*[174] discarded an approach based upon absolute disclosure. Thus, the position of an informed consent remains unclear, but there has been contentions that would have extended consent to encompass circumstances where the consent may be implied.

[171] ibid [17]
[172] ibid [15]
[173] Fraud as to the act and Fraud as to the person
[174] *R v Mabior* [2012] SCC 47 {67]

The Supreme Court of Canada: Williams And An Implied Consent

In *R v Williams,*[175] the Supreme Court affirmed that a defence based upon an implied consent was not appropriate in HIV exposure/transmission cases. Here the defendant was charged with aggravated assault after he had infected an unsuspecting partner with the virus. The basis of the appeal centred upon the timing of the infection, and whether the defendant had infected the complainant before he became aware that he had the virus. It was argued that an essential ingredient of the offence had not been made out, as Williams could not have endangered the life of the complainant as she may have already been infected. It was held that a conviction of aggravated assault was unattainable as the court stipulated that there was an inability to determine when the complainant became infected. The alternative charge of attempted aggravated assault could be upheld. It was confirmed that an absence of consent for *actus reus* purposes is evaluated subjectively from the complainant's perspective.[176] The court held that the complainant had not subjectively consented to having unprotected intercourse with an HIV+ individual, thereby excluding implied consent. It was clear that the Court were unwilling to extend the parameters of the defence of consent to encompass an implied consent.

The court applied the definition of consent from *R v Ewanchuk.*[177] In *Ewanchuk,* a case unrelated to HIV exposure, the defendant had been charged with sexual assault. It was the Crown's case that the defendant had intimately touched the complainant on a number of occasions. Each time that the complainant said 'no' the

[175] *R v Williams* [2003] 2 S.C.R. 134
[176] ibid [37]
[177] *R v Ewanchuk* [1999] 1 S.C. 330

defendant refrained from the conduct. He then persisted to a more serious assault where the complainant stated that any acquiescence was out of fear. Ewanchuk argued a defence based upon implied consent, as it seemed to the defendant that the complainant had consented. It was held that there was no defence of implied consent as a complainant either consents or they do not consent thereby emphasising the importance of subjectivity.[178]

It is reasonable for the Court in *Williams* to follow the decision in *Ewanchuk* as a defendant must disclose their HIV status when there is a significant risk of serious bodily.[179] The onus is on the defendant to confirm that they have the virus. If implied consent were to be assessed from any point other than the complainant's subjective state of mind, it could be cogently argued that a defendant would anticipate that the complainant had impliedly consented simply by engaging in unprotected intercourse. This would put the complainant in an onerous position, and would afford a defence to individuals who did not consider it appropriate to disclose their status to prospective partners.

The utilisation of the ratio in *Ewanchuk,*[180] and, thus, the exclusion of implied consent, has not been universally accepted. Stewart[181] distinguished the case from cases of HIV transmission/exposure as *Ewanchuk* did not stipulate that the decision should be applied to non-sexual offences, and *Williams* was charged with aggravated assault.[182] Indeed, this may prove an accurate contention, but the court did not exclude the utilisation of its interpretation of consent to other offences. The

[178] ibid [31]
[179] *R. v. Cuerrier*, [1998] 2 SCR 371
[180] *R v Ewanchuk* [1999] 1 S.C. 330
[181] Hamish Stewart, 'When Does Fraud Vitiate Consent? A Comment on *R. v. Williams'* (2004) 49 Criminal Law Review 144
[182] ibid 147

conclusive acceptance of the *Ewanchuk* approach can, and should, be relevant to any assault provisions[183] as the fundamental issue that must be established is whether the complainant consented to the interference. This corresponds with the subjective nature of factual consent, and ensures that any acquiescence can begin to align to the fundamental elements of normative consent.

An implied consent defence may still be envisaged if the defendant discloses their sero-status, and the complainant stipulates that they consented, but would not have consented if they were aware of the risks. In these circumstances the complainant would have consented to intercourse with an individual who is HIV+, being unaware of the risk of transmission by having intercourse. The current position is that the courts recognize that if an individual consents to intercourse with a person who is HIV+ then it is assumed that that individual accepts the risk. This may be inadequate, in some circumstances, and will not always accord to normative consent, thereby connoting an implied consent.

The current obfuscatory position of implied consent in extant Canadian law, and the palpable anomalies created, does not give the impression that this is the end of the matter. Rawluk[184] postulates that the decision of the Supreme Court in *Mabior*[185] resurrected implied consent. Here it was proposed that if disclosure is not required the complainant had effectively consented to partaking in intercourse with an individual who was HIV positive.[186] It is stated that the decision, 'fails to protect a

[183] Carissima Mathen and Michael Plaxton 'HIV, Consent and Criminal Wrongs' (2011) 57 Criminal Law Quarterly 464, 482
[184] Kevin Rawluk, 'HIV and Shared Responsibility: A Critical Evaluation of Mabior and DC' (2013) 22 Dalhousie Journal of Legal Studies 21
[185] *R v Mabior* [2012] SCC 47
[186] Rawluk (n 184) 24

person's right to choose who to have sex with…'. [187] If that is a precise account then the equivalent could be promulgated in relation to the test that was originally set out in *Cuerrier*.[188] Rawluk appears to promote L'Heureux-Dubé J's development of the definitional construct of fraud, whereby total disclosure would be mandatory. This approach was unanimously excluded by the judiciary in *Mabior* as the 'net of culpability would be cast too wide'. [189]

Canada And The Judicial Preference Towards Factual Consent

As has been demonstrated by the critical evaluation above, the tenets of Canadian law affords and promotes disclosure, and this forms the basis of any defence to the charges that are presented.[190] The jurisprudence from this jurisdiction facilitates a soft paternal inclination to this type of situation. If sexual intimacy follows disclosure it equates to the complainant consenting to having unprotected intercourse with an HIV+ individual.[191] This requisite level can be considered to be a basic disclosure as a defendant is only expected to disclose their sero-status. No dissemination of further information is anticipated as the judiciary presume that the complainant will always be aware of the risks associated with having unprotected intercourse with an HIV+ defendant. There is judicial concurrence on expectations of disclosure, but divergence of how to interpret fraud.[192] The alternative frauds, that were proposed, and promulgated by L'Heureux-Dubé J and McLachlin J, necessitate disclosure on all occasions where the defendant has the virus. These proposals are heterologous

[187] ibid 27; Lucinda Vandervort, 'HIV, Fraud, Non-disclosure, Consent and a Strake Choice: *Mabior* or Sexual Autonomy?' (2013) 60 Criminal Law Quarterly 301, 312-13
[188] *R. v. Cuerrier*, [1998] 2 SCR 371
[189] *R v Mabior* [2012] SCC 47 [67]
[190] *R. v. Cuerrier*, [1998] 2 SCR 371
[191] *R. v. Cuerrier*, [1998] 2 SCR 371
[192] ibid

in compelling the defendant to disclose their status, but still pervade discrepancies as to the complainants' awareness of the associated risks. The exclusion of implied consent for *actus reus* purposes is to be welcomed as the subjective awareness of the complainant is the pre-eminent preference.[193] It seems that a fully informed consent is secondary in Canada as disclosure takes precedence, thereby denoting that in certain situations factual consent will suffice.

The critique of Canadian law in relation to consent and HIV exposure/transmission has revealed discrepancies and confusion within extant doctrinal principles. Attention will now focus on consent and disclosure within the United States, and examination of prevailing orthodoxy.

Consenting To Unprotected Intercourse With An HIV+ Individual and The Disclosure Of Ones' Sero-Status Within The United States

The Presidential Commission submitted that any States with specific criminal provisions should permit a defendant to be exculpated if they disclose their HIV status to prospective sexual partners, and thereby attain the consent of the complainant to run the risk of transmission.[194] The majority of States, that are subsequently considered, have enacted legislation where disclosure or consent can exculpate the defendant. Disclosure, *prima facie*, is synonymous with consent as the majority of States have utilised either of these terms interchangeably.[195] This has

[193] *R v Williams* [2003] 2 S.C.R. 134
[194] The Presidential Commission on the Human Immunodeficiency Virus Epidemic Report (1988) 131
[195] Ark. Code Ann. § 5-14-123 (2012); Cal. Health & Safety Code § 120291 (2014); Minn. Stat. § 609.2241(2014) And Ohio Rev. Code Ann. § 2903.11 (2014); 720 Ill. Comp. Stat. § 5/12-5.01; N.D. Cent. Code § 12.1-20-17 (2014) Nev. Rev. Stat. § 201.205 (2014) Mo. Rev. Stat. § 191.677 (2014)

translated to an affirmation that a complainant has agreed to have unprotected intercourse with the defendant.

The Model Penal Code's (MPC) Approach to Consent

The purpose of enabling the defence of disclosure/consent is categorised as, 'decriminalizing or justifying otherwise prohibited conduct.'[196] The MPC does not provide for a criminal offence that specifically addresses the transmission/exposure of HIV. A specific provision does facilitate the defence of consent,[197] but does not prescribe any elucidation or parameters of any type of disclosure. The MPC states:

> "***Consent***.
>
> *(1) In General. The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.*
>
> *(2) Consent to Bodily Harm. When conduct is charged to constitute an offense because it causes or threatens bodily harm, consent to such conduct or to the infliction of such harm is a defense if:*
>
> *(a) the bodily harm consented to or threatened by the conduct consented to is not serious; …"*[198]

The provision clearly stipulates that consent can negate criminal conduct, but definitional elements have been criticised for lacking any 'guidance' on enabling the defence.[199] Allowing consent to bodily harm is narrowly drawn, and is restricted to

[196] Carol L Galletly and Steven D. Pinkerton, 'Toward Rational Criminal HIV Exposure Laws' (2004)32 Journal of Law Medicine and Ethics 327, 331
[197] Model Penal Code § 2.11
[198] Model Penal Code § 2.11 (1985)
[199] Vera Bergelson, 'The Right to Be Hurt: Testing the Boundaries of Consent' (2007) 75 The George Washington Law Review 165, 174

three particular circumstances.[200] It is specified that consent may not be a defence if the harm or potential for harm is serious, unless it is the context of sporting activities or is considered an exception.[201] As HIV transmission is considered to be a serious infliction of harm it would indicate that an individual would not be able to consent to being exposed or having the virus transmitted to them.[202] The MPC has formed the basis for many Penal Codes within the United States, but there are a number of HIV specific statutory provisions that allow the complainant to consent to having unprotected intercourse with an individual who is HIV+. These provisions will now be analysed in turn.

Alternative State Approaches to Consent and Exposure To HIV: The Putative Search for Uniformity

There are distinct advantages to utilising a specific statutory provision that authorises a defence based upon consensual activities with an HIV+ individual.[203] States that have enacted legislation that permits consent or a defendant to disclose their status have implemented a soft paternalistic legislative framework. Enabling such convergence may protect a fully informed complainant by facilitating them with the possibility of exercising their right to act autonomously.[204] Indeed, a soft paternal model can be more meritorious than enacting hard paternalistic legislation.[205] The consent of the complainant, under the conditions of hard paternalism, would be

[200] Model Penal Code § 2.11 (2) (a)-(c)
[201] Model Penal Code § 2.11 (2) (b)
[202] Above ch 3
[203] Above p202 - 208
[204] Above p202
[205] Above p203 - 208

deemed immaterial. [206] The restriction of the defendant's opportunity to disclose, or retracting the complainant's right to consent to unprotected intercourse, would unduly interfere with the sexual autonomy and reproductive autonomy of both individuals.[207]The use of soft paternalism is not prevalent throughout the United States. Disturbingly, the hard paternalistic model has been allotted in military cases of sexual transmission/exposure to HIV. [208] Any discussion of this particularised development is, however, beyond the remit of this thesis.

The allowance of a specific provision on HIV transmission/exposure necessitates legislative precision as this presumptively would ensure no contentious issues would subsequently ensue, and this may be why the MPC is vague on the matter. This 'precision' cannot be seen within U.S. State law as there is no uniform approach to the defence of consent in exposure/transmission cases. The provisions can be compartmentalised into three distinct considerations: currently, there are States that allow disclosure by the defendant to act as a defence;[209] States that anticipate the consent of the complainant;[210] and finally jurisdictions that have no express provision that exists in relation to consent or disclosure.[211] The analysis will begin by a critique of the jurisdictions that require the defendant to disclose their status.

[206] Above p203-208
[207] Rubenfield (n 23)1383
[208] See *United States v Bygrave* 46 MJ 491 (Ct App Armed Forces 1997)
[209] Ark. Code Ann. § 5-14-123 (2012); Cal. Health & Safety Code § 120291 (2014); Minn. Stat. § 609.2241(2014) And Ohio Rev. Code Ann. § 2903.11 (2014)
[210] 720 Ill. Comp. Stat. § 5/12-5.01; N.D. Cent. Code § 12.1-20-17 (2014) Nev. Rev. Stat. § 201.205 (2014) Mo. Rev. Stat. § 191.677 (2014)
[211] Wash. Rev. Code § 9A.36.011 (2014)

U.S State Law That Requires The Defendant To Disclose Their Sero-Status

A number of State penal codes have specifically recognized a defendant disclosing their HIV status as a means of precluding a conviction for exposing or transmitting the virus to another individual.[212] The disclosure statutes can be allocated into two categories. At present, the majority of sections of the specific legislatory provisions require disclosure of ones' sero-status.[213] A further provision imposes more extensive conditions that can require an establishment of the awareness of the risk on the part of the complainant.[214] The following exposition will firstly focus upon States that expect the defendant to disclosure their sero-status.

States That Require Basic Disclosure By The Defendant

The statutory provisions of three particularised States, those of Arkansas,[215] California[216] and Minnesota,[217] compel a defendant to disclose their sero-status to prospective sexual partners. There is a lack of clarity therein as to the requisite level of knowledge that the complainant must possess in order to make an informed decision.[218] The only expectation is disclosure of HIV status on the part of a defendant. Therefore, there is no obligation placed upon the defendant to ensure that the complainant is aware of the risk associated with the activity that they are to partake in and this may be considered to be a major flaw with the overarching statutory framework.

[212] Ark. Code Ann. § 5-14-123 (2012); Cal. Health & Safety Code § 120291 (2014); Minn. Stat. § 609.2241(2014) And Ohio Rev. Code Ann. § 2903.11 (2014)
[213] Ark. Code Ann. § 5-14-123 (2012); Cal. Health & Safety Code § 120291 (2014); Minn. Stat. § 609.2241(2014)
[214] Ohio Rev. Code Ann. § 2903.11 (2014)
[215] Ark. Code Ann. § 5-14-123 (2012);
[216] Cal. Health & Safety Code § 120291 (2014);
[217] Minn. Stat. § 609.2241(2)(1)(2014)
[218] Ark. Code Ann. § 5-14-123 (b) (2012); Cal. Health & Safety Code § 120291 (a) (2014); Minn. Stat. § 609.2241(2)(1) (2014)

Each of the relevant provisions under consideration stipulate that the defendant must inform the complainant that they have the virus.[219] Thus, there is a presumption that any individual who consents to unprotected intercourse with a HIV+ individual consents to the risk of infection. This connotes that disclosure of HIV status is the threshold expectation: such informational dissemination may be termed a basic disclosure. A basic disclosure ignores any awareness by the complainant of the implications of having unprotected intercourse with an HIV + individual.

The Californian statutory provision ascribes a defendant with the opportunity to disclose their status.[220] It is stated that:

> *"(a) Any person who exposes another to the human immunodeficiency virus (HIV) by engaging in unprotected sexual activity when the infected person knows at the time of the unprotected sex that he or she is infected with HIV,* ***has not disclosed his or her HIV-positive status****, and acts with the specific intent to infect the other person with HIV, is guilty of a felony punishable by imprisonment in the state prison for three, five, or eight years."*[221] (emphasis added)

There is no elucidation as to the extent of the required disclosure, and it may be presumed, as a result of the terminology utilised within the section, that the defendant expressly stating that they have the virus will suffice for exculpatory inculcations. A disclosure, under these conditions, could be contended to equate to an implied consent.[222] Intrinsically, all that is required is a basic disclosure, and this does not denote a fully informed consent. As previously observed, not all

[219] Ark. Code Ann. § 5-14-123 (b) (2012); Cal. Health & Safety Code § 120291 (a) (2014)
[220] Cal. Health & Safety Code § 120291 (a) (2014)
[221] Cal. Health & Safety Code § 120291 (a) (2014)
[222] Above p 219 -225

complainants will be conscious of the risk associated with unprotected intercourse, and this should be a cause for concern. Currently, within California, there are no cases to substantiate the effectual interpretation of this provision, but this can be attributed to the overriding *mens rea* requirement of the section.[223]

The penal code of Minnesota also equips the defendant with the mechanism that allows them to disclose their status, and avoid criminal sanctions for exposing a complainant to the virus.[224] The constructional elements of the provision require basic disclosure as a defendant must enlighten prospective partners of their sero-status.[225] It does not require any supplementary information being disseminated to the complainant as to the risk. Case law offers no guidance on the possibility of extending the statutory provision beyond basic disclosure. In *State v Rick,*[226] a case heard in the Supreme Court of Minnesota, the defendant had transmitted the virus to his sexual partner. Rick was acquitted of 'sexual penetration' without informing his sexual partner,[227] but was convicted of transfer of semen.[228] It was contended that the statute was ambiguous in relation to defining transferring bodily fluids, and whether it applied to sexual contact.[229] There was no discussion as to the parameters of disclosure as this did not form the basis of the appeal. The defendant had testified that he disclosed his status prior to any intercourse, and the jury appeared to accept his testimony.[230] It seems that those infected with the virus may sometimes be placed in a more onerous position, but on this occasion the

[223] Cal. Health & Safety Code § 120291 (a) (2014)
[224] Minn. Stat. § 609.2241(2014)
[225] Minn. Stat. § 609.2241(2) (1) (2014)
[226] *State v Rick*, 835 N.W.2d 478 (Minn. 2013)
[227] Minn. Stat. § 609.2241(2) (1) (2014)
[228] Minn. Stat. § 609.2241(2) (2) (2014)
[229] ibid
[230] *State v Rick*, 835 N.W.2d 478, 481 (Minn. 2013).

defendant's testimony carried sufficient weight, although this was still a case that concerned basic disclosure.

An incremental development of the determination of disclosure can be surveyed in Arkansas.[231] The statutory provision instructs a carrier of the virus to 'inform' a potential sexual partner that they are HIV+.[232] This connotes that once the complainant assents to intercourse, in the knowledge of the sero-status of the defendant, then the defendant cannot be accountable for exposing or transmitting the virus to that person. The disclosure requirement is pivotal within this jurisdiction, and informing the complainant must be undertaken before any sexual intimacy.[233] It is not a defence, but forms a basis for the offence,[234] with the burden on the prosecutorial authorities to establish non-disclosure, thereby permeating into an absence of consent by the complainant.

The issue of disclosure has not been extensively explored in Arkansas. In *State v Weaver,*[235] a case heard in the Court of Appeals of Arkansas, an issue in relation to disclosure did arise. The prosecution relied upon third party evidence to ascertain that the defendant had been unwilling to disclose his sero-status.[236] This evidence was adduced to rebut the defendant's testimony. The third party specified that the defendant had informed him that he wanted to transmit the virus to as many people as possible.[237] The Court held that there was no error by the judge for allowing the admission of this evidence. Although the case did not specifically address the issue

[231] *State v Weaver* 939 S.W.2d 316 56 Ark. App. 104 (1997)
[232] Ark. Code Ann. § 5-14-123 (b) (2012)
[233] ibid
[234] Jagoda Jedrychowski, 'Criminalization of HIV-Transmission: Perpetuating Problems Surrounding the Epidemic' (2007) 11 The Holy Cross Journal of Law and Public Policy 29, 42
[235] *State v Weaver* 939 S.W.2d 316 56 Ark. App. 104 (1997)
[236] ibid 108
[237] ibid

of disclosure, and the parameters of factual or normative consent, it did denote that basic disclosure, and to a certain extent, factual consent, was the apposite level. By implication, it would seem that the extent of normative consent may be deficient in cases within Arkansas.

An obvious extraction that can be derived from *Weaver* is the incremental development of disclosure as there may be circumstances where evidence, other than the complainants', can assist in determining whether the complainant had been informed of the defendant's HIV status. This corroborating evidence may assist the fact-finder in ascertaining whether there has been disclosure, but this does not confirm whether the complainant recognises that there can be severe implications to having unprotected intercourse with an HIV+ individual. So, although useful in assisting the fact-finder in determining whether disclosure took place, it does not permit an extension of disclosure to encompass the realms of normative consent.

Kaplan[238] submits that the basic disclosure provisions are defective, and attention should focus on the awareness of risk.[239] Allowing an enhancement of basic disclosure would correspond to the requirements of normative consent being fulfilled, on all occasions. This is all the more pertinent when there is a distinction to be drawn between consenting to unprotected intercourse with an HIV+ individual, and consenting to having unprotected intercourse that carries the risk of being infected with HIV.[240] An enhanced disclosure would ameliorate any discrepancies in a

[238] Margo Kaplan, 'Rethinking HIV-Exposure Laws' (2012) 87 Indiana Law Journal 1517,
[239] ibid 1534
[240] ibid

provision by ensuring that a complainant was fully aware of the risk of consenting to intercourse with an HIV + individual.

Ohio And A Quasi-Enhanced Disclosure

An alternative to basic disclosure can be seen in Ohio's statutory provision that facilitates that a defendant will be exonerated if he discloses his status to prospective sexual partners.[241] The provision specifies that the disclosure of status must be before, 'engaging in the sexual conduct'.[242] This has since been affirmed in *State v Gonzalez,*[243] where it was stated that disclosure after sexual contact was irrelevant: retrospective consent would be invalid.[244] The court also confirmed that disclosure was only required at first contact with a perspective partner.[245] In such circumstances the burden is on the prosecution to establish that there was no disclosure.[246]

It is evident that basic disclosure[247] will suffice, but the provision conjoins supplementary ingredients to ensure that a complainant is fully alert to the circumstances.[248] It is a condition that is activated if a complainant lacks the 'mental capacity' to be able to consent to the risks that can be associated with unprotected intercourse with an HIV+ individual. This infers that a fully informed consent is essential in all instances, and signifies that it is the capacity rather than the knowledge of the complainant that is relevant to normative consent. The provision

[241] Ohio Rev. Code Ann. § 2903.11 (b) (2014)
[242] Ohio Rev. Code Ann. § 2903.11 (b) (1) (2014)
[243] *State v. Gonzalez* 796 N.E.2d 12 154 Ohio App.3d 9 (2003)
[244] ibid 21
[245] ibid 23
[246] ibid 22
[247] Ohio Rev. Code Ann. § 2903.11 (b) (1) (2014)
[248] Ohio Rev. Code Ann. § 2903.11 (b) (2) (2014)

still denotes that knowledge of the risk is relevant, as the assessment of the complainant's 'mental capacity' can be assessed subjectively or objectively. This obliquely places the onus onto the defendant that in some cases he may need to seek clarification that the complainant understands the implications of sexual contact with an HIV+ individual.[249] This provision can been seen to reinforce the importance of normative consent as an essential component that empowers a complainant to provide a fully informed consent.

The use of disclosure as the requisite threshold has received further judicial examination. In *State v Gonzalez,* a case heard at the Court of Appeals of Ohio, the defendant contended, *inter alia*, that the statute was vague, and that there was no definition of disclosure within the provision.[250] The court disregarded the argument and held that disclosure should be given its ordinary English dictionary meaning and that verbal disclosure of the defendant's status would be adequate.[251] The approach, endorsed by the court, equiparated and balanced the position of the disclosure defence as the English meaning is relatively undemanding, and basic disclosure, can and will, be sufficient if the conditions permit this to be appropriate.[252] Unfortunately, there no assessment of the enhanced provisions of the statute. Minahan[253] submits there are still prevailing issues, and the definition of disclosure has not been tested by other appellate courts.[254] It seems that the court were obviously satisfied with using the ordinary literal meaning that was attributed to 'disclosure' as no further appeal was pursued. The more contentious issue would be

[249] ibid
[250] *State v. Gonzalez* 796 N.E.2d 12 154 Ohio App.3d 9, 21 (2003)
[251] ibid 22
[252] ibid
[253] W. Thomas Minahan, 'Disclosure Before Exposure: A Review of Ohio's HIV Criminalization Statutes' (2009) 35 Ohio Northern University Law Review 83
[254] ibid 106

ascertaining whether a complainant had the capacity to fully understand the implications of unprotected intercourse with an HIV+ individual.

It is apparent from the preceding discussion that the four identified States have not implemented any standardised approach to the requirement of disclosure. The preponderance of the jurisdictions examined require basic disclosure as the threshold for exculpation purposes. This does not imply that basic disclosure is the most apposite method. It is Ohio that exclusively anticipates that there may be occasions where basic disclosure will be deficient. This is when the complainant does not have the mental capacity to understand the implications of with having unprotected intercourse with an HIV+ individual.[255] Tierney[256] proposes that disclosure alone does not establish a fully informed consent: 'consent by the partner after full disclosure of the risks associated with the activity should be a defense.'[257] To acquire this requisite threshold there would need to be amplification of the risk of transmission via sexual contact.[258] Further endorsement of an enhanced legislative framework originates from MacArthur[259] who proposes that basic disclosure does not encapsulate all culpable behaviours and is 'underbreadth' as an unaccompanied basic disclosure would not furnish the complainant with essential information to determine the risk of transmission. [260] This may not allow a complainant to make an informed choice of whether to consent to the risk of the virus being transmitted, but this would not always be the case. McGuire[261] also questions basic disclosure

[255] Ohio Rev. Code Ann. § 2903.11 (b) (2) (2014)
[256] Thomas W. Tierney, 'Criminalizing the Sexual Transmission of HIV: An International Analysis (1992) 15 Hastings International and Comparative Law Review 475
[257] ibid 512
[258] ibid 498
[259] James B. McArthur, 'As the Tide Turns: The Changing HIV/AIDS Epidemic and the Criminalization of HIV Exposure' (2009) 94 Cornell Law Review 707,
[260] ibid 735-6
[261] Amy L. McGuire, 'Comment: Aids as a Weapon: Criminal Prosecution of HIV Exposure' 36 Houston Law Review 1787

provisions as they protect the defendant, and suggests that a fully informed consent should be the requisite approach to protect the complainant by ensuring that they have a sufficient awareness of the circumstances.[262] As previously stated, in order for the complainant to fully consent they must have all of the relevant facts disclosed to them and this may include an explanation that there is a risk of transmission.

If more than basic disclosure is required then what would need to be disclosed? Would the defendant need to become a statistician by stipulating the risk involved in the type of sexual activity or would they need to denote the level of their viral load or even the type of strain? If more than basic disclosure is required then would it suffice for the defendant to state that they have the virus and that it can be transmitted through intercourse. Anything other than that may be impractical to enforce as some defendant's may not be able to absorb and disseminate this information. The next part of the chapter will evaluate provisions that have specified that the fundamental consent of the complainant will be the basis of a defence.

State Statutory Provisions That Require The Consent Of The Complainant

There are a number of States that have enacted soft paternalistic legislation that allows the complainant to consent. The provisions enable the defendant to evade liability if the complainant consents to having intercourse with that person knowing that they are HIV+ and that they will be exposed to the virus. It is evident that the requirement of these statutes is a fully informed consent. This can, and does, form the basis to ascertain whether the conditions of normative consent have been

[262] McGuire (n 261) 1803 -04

fulfilled. Lucidity prevails as the provisions denote that the complainant must be fully aware of the defendant having the virus, and also of the risk of the virus being transmitted through sexual contact. McGuire acknowledged that an informed consent may include an awareness of risk,[263] and proposes that:

> *"…an effective HIV statute should include a defense of informed consent. The defendant should have to prove that she adequately informed her partner of her HIV infection and that her partner subsequently consented to engage in the high risk conduct*."[264]

A truly informed consent should envisage an individual having the opportunity to assess the circumstances by being furnished with all of the facts. The extent of those facts may need to include the risk of transmission. Only then can the threshold for normative consent be fulfilled. An informed consent of this magnitude could correspond to the MPC definition of consenting to a risk being reasonably foreseeable, but that section does not ordinarily address sexual activity, instead focusing on non-fatal offences.[265] Enabling an efficiently constructed foundation for informed consent may promote disclosure as the defendant would be fully aware of the expectations of the statutory provision. Exculpation would follow if the defendant informs the complainant of their HIV status and that unprotected sexual intercourse runs the risks of becoming infected.

These states[266] perceive that a basic disclosure will be defective, and that supplementary conditions are essential for there to be a fully informed consent. Such

[263] ibid 1802-3"This requirement of informed consent may impose a burden upon the defendant not only to disclose her HIV status to her partners, but also to educate them on the risks of transmission before engaging in any activity that exposes them to the virus."
[264] McGuire (n 261)1814-15
[265] Tierney (n 256) 498
[266]720 Ill. Comp. Stat 5/12-5.01; N.D. Cent. Code § 12.1-20-17; Nev. Rev. Stat. § 201.205; Mo. Rev. Stat. § 191.677

a provision, by way of illustration, is contained within Illinois' Penal Code. It is stated that:

> "*it is an affirmative defense that the person exposed knew the infected person was HIV positive, knew the action could result in infection, and consented with that knowledg*e." [267]

The provision is lucid to the extent that an informed consent is the requirement. Nevertheless, the terminology attributed to the provision raises a number of impediments that must be overcome for a defendant to rely upon the complainant's consent.[268] The complainant must know that the defendant is infected. This is relatively undemanding, either the complainant will know or they would be unaware of the defendant's sero-status. There is no indication as to how the complainant could acquire that knowledge. Would such revelations have to emerge from the defendant or can that information emanate from a third party, for example the defendant's mother? Any information emanating from a third party may connote that the defendant can rely upon an implied consent, and this has not been scrutinised within the jurisdiction.

The second limb is more ambiguous. What is meant by "action"? Does this denote the type of sexual activity? Logically it can be presumed that it would relate to the sexual activities that are described within the statute. Once the awareness of these linguistic obstacles have been overcome, can a complainant give consent? The language that is used in this provision evidently stipulates that the complainant must give a fully informed consent. They must be fully aware of all of the facts and anything devoid of this will not suffice. There has been no exploration of the defence

[267] 720 Ill. Comp. Stat 5/12-5.01
[268] 720 Ill. Comp. Stat 5/12-5.01 (d)

of consent by the appellate court of Illinois, to assist clarification of interpretative difficulties.

In 1990, Herman[269] prophetically stated that the Illinois provision would survive judicial scrutiny because of the availability of the defence of consent.[270] There have been no appeals concerning the issue of consent, but there have been unsuccessful challenges to the statute. In *State v Russell,*[271] a case heard in the Supreme Court of Illinois, the defendant challenged the statute arguing that the provision violated the defendant's right to intimacy because there is an expectation that an individual discloses their HIV status to all prospective sexual partners. The Court dismissed the challenge as it was stated that the right did not exist and, therefore, it was 'preposterous' to argue on this ground as the statute was unequivocal.[272] This obligation does not connote that the defendant's right to intimacy, if it did exist, would be infringed, as they can still partake in sexual liaisons following disclosure. It does, however, indicate that 'public health outweighs the individual's privacy interest',[273] as the requirement of disclosure takes priority over the individual ability to withhold personal information.

The requirement of a fully informed consent can be surveyed within other statutory provisions. In Missouri's statute it is stated that a defendant will have a defence if a prospective partner has knowledge and consents to being exposed to the virus.[274] An exposition of knowledge and consent excludes consent in isolation. It can be

[269] Donald H.J. Herman, 'Criminalizing Conduct Related to HIV Transmission (1990) 9 Saint Louis University Public Law Review 351
[270] ibid 375-6
[271] *State v. Russell* 158 Ill. 2d 23; 630 N.E.2d 794; 1994 Ill. LEXIS 1; 196 Ill. Dec. 629
[272] *State v. Russell* 158 Ill. 2d 23; 630 N.E.2d 794; 1994 Ill. LEXIS 1; 196 Ill. Dec. 629 796
[273] Amanda Weiss, 'Criminalizing Consensual Transmission of HIV' (2006) the University of Chicago Legal Forum 389, 398
[274] Mo. Rev. Stat. § 191.677 1(2) (2014)

surmised that knowledge denotes the complainant being fully aware of the defendant having the virus, and with the knowledge that they will be exposed to the virus. In this context, the complainant will be making an informed choice, and this conforms to normative consent. In *State v Wilson,*[275] a case concerning statutory rape and other offences, the Supreme Court of Missouri Court confirmed that the statute stipulates that a defendant must disclose their status to any individual who they are planning on having intercourse with, but there was no elaboration as to raising that person's awareness of risk.[276]

The 'type' of consent has been confirmed before the appellate courts in Missouri to exclude an implied consent. In *State v Yonts,*[277] the complainant testified that she had heard rumours of the defendant having the virus and that the defendant had denied the assertions. The fact that she may have been aware of the defendant's status prior to any intimacy was not considered, and infers that an implied consent is irrelevant within this State. The disregard of the potential awareness of the complainant is obvious, as the statutory provision connotes that knowledge within the context of normative consent is required, and an implied consent does not achieve this gradation. It was confirmed by the Appellate Court that a defendant commits the offence if he exposes a sexual partner to the virus without their knowledge or consent at the time of the contact,[278] thereby implying that disclosure must emanate from the defendant. The unfortunate incidental effect of the decision is that intricacies of 'knowledge' were not explored, and there was no clarity as to the complainant's 'awareness' of the risk of the virus being transmitted.

[275] *State v. Wilson* 256 S.W.3d 58 (Mo. 2008)
[276] ibid 64
[277] *State v Yonts* 84 S.W.3d 516, (Mo. Ct. App. 2002)
[278] *State v Yonts* 84 S.W.3d 516, 519 (Mo. Ct. App. 2002)

The issue of whether the defendant has disclosed their status to prospective partners appears to be persistently contentious at appellate level within Missouri.[279] There is still no expectation that the complainant is made aware of the risk of transmission. This is evidenced by *State v Sykes,*[280] a case heard in the Missouri Court of Appeals, where a prior conviction was adduced as evidence to establish that the defendant neglected to disclose their status.[281] The complainant had written a letter to the defendant's parole officer confirming that the defendant had disclosed his status prior to any sexual intimacy.[282] Once the relationship ended the complainant recanted that letter by writing another confirming that when they had first had intercourse she was unaware of the defendant's status.[283] Thus, the complainant had made inconsistent statements on the timing of the disclosure. The Court held that the 'evidence of Sykes's prior convictions was admissible to prove intent, motive, and lack of consent.'[284] The case emphasises the difficult issues surrounding evidence as to informed consent, and what can be derived from the cases that have gone to appeal in Missouri is that the defendant's testimony will not be considered to be as reliable as the complainant's, even if the complainant's evidence lacks consistency. The appellate cases also demonstrate that the definitional construct of the provision requires precision. Awareness of the risk is not generally taken into consideration as a contentious issue within the jurisdiction, even though the statutory provision accommodates an expectation of such advertence.

[279] *State v. Sykes* 372 S.W.3d 33 (Mo. Ct. App 2012)
[280] ibid
[281] ibid 35-6
[282] ibid 35
[283] ibid 35
[284] ibid 43

The necessitation of a fully informed consent is apparent within another State's statutory template. Nevada's provision postulates appendages that must be satisfied for the complainant to have consented to sexual activity.[285] Firstly, the complainant must know the defendant has the infection; they must be aware that they would be exposed to the virus; and have consented with this awareness.[286] If the complainant is conscious of these conditions, then they will have consented to partaking in the relevant conduct. The element that lacks clarity is how the complainant would become aware of the defendant's status, and the risk, as it is not specified whether the defendant must disclose both elements. Does the provision imply that it would be the defendant's duty to elucidate not only that they have the virus, but also that the activity they are about to partake in will expose the complainant to the virus? There have been no appellate cases where the issue of consent has been raised, other than that the defendant's HIV status was relevant when that individual engaged in unprotected oral intercourse.[287] The requirement for disclosure in Nevada relates to any type of sexual activity, even if the risk of transmission is negligible, and this has been demonstrated to represent a flawed perspective in chapter three, relationally to transmission/exposure.[288]

The Dual Obligation Of Consent And The Use Of Protection

An alternative approach to consent may be highlighted by the framework adopted in North Dakota. Here basic disclosure is insufficient as the complainant must be aware

[285] Nev. Rev. Stat. § 201.205 2. (2014)
[286] Nev. Rev. Stat. § 201.205 2.(a)-(c) (2014)
[287] *State v. Shelton* 281 P.3d 1218, 2009 WL 1490929 (Nev.)
[288] Above Ch 3

of the risk and must also use some form of protection.[289] This can be seen to be a quasi-hard paternalistic approach to the law as the State is not enabling the complainant to run the risk of unprotected intercourse with an infected partner. Such a measure is draconian as the defendant has to not only disclose their status and risks associated, but must also use protection. The provision restricts the opportunity for the complainant to procreate with the defendant. This type of statute may be said to be in line with public health initiatives as use of condoms is an element of the defence but it is too far along a conservative societal continuum as condom use should be a defence of its own standing, as deconstructed in the following chapter.[290]

Washington And The Lack Of Legislative Clarity

In Washington, the legislative template *vis-à-vis* HIV exposure is demarcated by the omission of any particularised section identifying a specific defence predicated upon disclosure or consent.[291] It may be assumed that the consent of the complainant to sexual intimacy with an HIV+ individual is irrelevant for culpability purposes. This exclusion of consent or disclosure, by the legislator, would denote that the State has acceded to a hard paternalistic legislative framework. The concerning element of this type of provision is that it indicates that a defendant may be expected to embark upon a life of abstinence from unprotected intercourse. The criminal provision of Washington has received societal endorsement but negatively precludes fully consenting partners. Weiss submits that:

[289] N.D. Cent. Code § 12.1-20-17 3. (2014)
[290] Below ch 4
[291] Wash. Rev. Code § 9A.36.011(2014)

> "*Virginia's and Washington's statutes, then, are the only statutes that are designed so that they criminalize the "gift-giving"/"bug-chasing" phenomenon while not criminalizing accidental transmission of HIV between an HIV-positive partner and an informed partner*."[292]

Weiss assumes that a defendant would not be accountable if their prospective partner was 'informed'. The assertion is problematic as there is nothing that can be extracted from the provision that specifies that there can be a defence of consent or disclosure. The vacuity of the provision may impinge upon a defendant who anticipated that the consent of a complainant would have been a defence. The absence of any expressly stated constructional definition of consent or disclosure is concerning. It implies that the defendant would be unable to rely upon consent, even if it was a purely voluntary sexual interaction with a fully informed complainant acting autonomously, and an individual's rights are potentially rendered nugatory.

The appellate cases, within Washington, may have presented some conciliation to patrons of a soft paternalistic inclination.[293] In *State v Ferguson,*[294] a case heard in the Court of Appeals of Washington, the complainant had consented to protected intercourse in the knowledge that the defendant was HIV+. On the third occasion, the complainant stated that the defendant removed the condom without her knowledge, thereby vitiating the consent to protected intercourse. The defendant appealed, *inter alia*, on the basis that he should have been given the opportunity to raise the defence of consent.[295] This provided the court with the means to clarify the parameters of consent, but the appellate court imparted conflicting statements on

[292] Weiss (n 273) 393
[293] *State v. Ferguson* P.3d, 97 Wash.App. 1080, 1999 WL 1004992 (Wash.App. Div. 2); State v. Whitfield 134 P3d 1203 (2006) 132 Wash App 878
[294] *State v. Ferguson* P.3d, 97 Wash.App. 1080, 1999 WL 1004992 (Wash.App. Div. 2)
[295] ibid 6

whether the consent of the complainant can act as a defence in exposure cases. It was first postulated that the Court would not clarify whether the defence could be utilised.[296] The Court then proceeded to demonstrate, through case law, that consent can act as a defence, but declined to elaborate on whether consent could be an appropriate mechanism for exculpation in HIV cases.[297] It was assumed by the Court, but they would not hold, that consent may be the basis of a defence in these cases.[298] The Court refused to do so as the defence of consent was deemed to be irrelevant to the case that was before the them.[299]Thus, the parameters of factual consent or normative consent were not fully explored.

State v Whitfield,[300] provided incremental guidance on the utilisation of a defence of consent in Washington. In *Whitfield*, the defendant was charged with multiple assault charges, having had unprotected intercourse on a number of occasions.[301] It was proposed that the defendant, by 'deliberately concealing his HIV status' assisted the prosecution in determining that he was acting with intent. [302] The judgment did not expressly stipulate that the defence may be available, but implied that disclosure or consent may assist in exonerating a defendant as intent is an essential ingredient of the offence.[303] The Court did provide some clarification by stating that there can be no consent unless the complainant is fully aware of the defendant's HIV status, but declined to confirm that it may form the basis of a defence to such a charge.[304] This may still be seen to have strengthened the utilisation of the defence, but the Court

[296] ibid 6
[297] ibid 6-7
[298] ibid 7
[299] ibid 7
[300] State v. *Whitfield* 134 P3d 1203 (2006) 132 Wash App 878
[301] ibid
[302] ibid [48]
[303] ibid [57]
[304] ibid [55]-[57]

did not expressly stipulate any amplification on the requisites for a valid consent, thereby excluding any discourse on the awareness of the risk.

The Distinct Approaches to Disclosure and Consent Within The United States

A multitude of U.S. States have enacted a soft paternalistic legislative framework to the criminalisation of HIV transmission/exposure. There is a clear distinction between provisions that require disclosure, and those that necessitate the consent of the complainant. The legislative provisions that require disclosure appear to denote a more basic approach. In the majority of those provisions, the defendant is obliged to disclose their sero-status, and this alone will be considered adequate for exculpation purposes.[305] Basic disclosure is deficient, as not every complainant will appreciate the potential severity of the situation. For example, they may not be fully conversant to the risk of the virus being transferred through unprotected intercourse. This is only identified, within their disclosure provisions, by the State of Ohio, where the complainant must be aware of the risks to be able to provide a fully informed consent.[306]

The provisions[307] that require the consent of the complainant are more translucent than those that express disclosure. Each of those statutes necessitate an awareness of the defendant's HIV status that is conditional upon the complainant consenting to the risk of becoming infected with the virus. The provisions acknowledge that potential complainants are informed of the risk of the virus being transmitted, but fail

[305] Ark. Code Ann. § 5-14-123 (2012); Cal. Health & Safety Code § 120291 (2014); Minn. Stat. § 609.2241(2014)
[306] Ohio Rev. Code Ann. § 2903.11 (2014)
[307] 720 Ill. Comp. Stat. § 5/12-5.01; N.D. Cent. Code § 12.1-20-17 (2014); Nev. Rev. Stat. § 201.205 (2014); Mo. Rev. Stat. § 191.677 (2014)

to recognise that the majority of defendants would already be aware. Nevada seems to provide the most simplistic provision as it requires the complainant to fully understand the implications of consenting to sexual activity with an individual who is HIV+.[308] North Dakota has the most restrictive provision, as it does not enable the complainant to consent to unprotected intercourse with the defendant.[309] Such a provision fails to take into consideration a number of relevant factors, including the autonomy of individuals or parties having the opportunity to procreate. The appellate cases within these indentified jurisdictions have not explored the provisions that expressly stated that the complainant must be aware the risk of infection, as the wording of the statute seems to be taken as a given. Beyond these particularised legal system approaches it is necessary to articulate a comparative juxtaposition of the extant law, to establish the similarities and differences in the approach to consent, and present preferred reform pathways.

A Cross-Jurisdictional Analysis Of The Defences Of Consent And Disclosure

It is evident from the aforementioned discussion that consent may negate otherwise culpable conduct. Allowing the defence of consent is advantageous for two reasons. It can, if the conditions permit, enable the complainant to make an informed choice and respect that individual's autonomy. The utilisation of the defence can also encourage a defendant to act in a responsible manner. By permitting consent, the majority of the jurisdictions considered have implemented a soft paternalistic approach to criminalising such proclivity. It is generally accepted that providing that the complainant is aware of the defendant's sero-status then there is a freedom to

[308] Nev. Rev. Stat. § 201.205 (2014
[309]. N.D. Cent. Code § 12.1-20-17 (2014)

run the risk of becoming infected. There is no scope for retrospective consent in any of the jurisdictions as each legal system compels the defendant to disclose their sero-status before the relevant intimate act has taken place, and this is clearly the appropriate standardisation. This does not imply that there has been a uniform approach to consent. The utilisation of the defence does not denote that all of the jurisdictions specify the extent of the information that the defendant needs to disseminate for the defence to be fully operational. There are divergent approaches to the expectation of disclosure within the jurisdictions.

The Contrasting Levels Of Disclosure Within The Legal Systems Levels of Disclosure

The extent of the disclosure requirement is a crucial determinant that has received limited judicial or legislative scrutiny, and significant distinctions in this important respect can be drawn between England, Canada and the various U.S. State laws. The divergent levels of disclosure, and therefore consent, can be compartmentalised into three distinct groups: there are those jurisdictions that require basic disclosure;[310] a quasi-enhanced disclosure;[311] and/or an enhanced disclosure.[312] A basic disclosure compels the defendant to divulge that they have the virus, advocated and identified within the Canadian jurisdiction.[313] The quasi-enhanced provision expects the defendant to disclose their sero-status, but the provision may exclude a defence of basic disclosure if the complainant is unaware of the risk of becoming infected and this is the approach that is adopted within the State of

[310] *R v Dica* [2004] EWCA Crim 1103, 3 All ER 593; *R v Cuerrier,* [1998} 2 S.C.R 371; Ark. Code Ann. § 5-14-123 (2012); Cal. Health & Safety Code § 120291 (2014); Minn. Stat. § 609.2241(2014
[311] Ohio Rev. Code Ann. § 2903.11 (2014)
[312] 720 Ill. Comp. Stat. § 5/12-5.01; N.D. Cent. Code § 12.1-20-17 (2014) Nev. Rev. Stat. § 201.205 (2014) Mo. Rev. Stat. § 191.677 (2014)
[313] *R v Cuerrier,* [1998} 2 S.C.R 371

Ohio.[314] The final alternative is an enhanced disclosure template that obliges the defendant to disclose their HIV status, and that there is a risk of infection being transmitted.[315] It is an altered quasi-enhanced model that is the preferred approach herein, and further reflective considerations in this regard are subsequently iterated.

An Analysis Of The Criminal Justice Systems That Require Basic Disclosure

As discussed above, the development of basic disclosure does not anticipate the defendant professing anything other than that they have the virus. This 'basic' disclosure is undemanding, and there are distinct advantages to allowing limited information to be disseminated. The requirement is relatively simple to adhere to, and it is unproblematic for the defendant and the complainant to substantiate that the relevant information had been communicated to the complainant, although in practice this can be a contentious issue, as previously stated.[316]

The English jurisdiction provides conflicting dicta on the utilisation of basic disclosure, and equiparation with more straitened enhanced disclosure.[317] There is too much emphasis placed within the leading judgments on the complainant having the 'opportunity' to make an informed choice.[318] There is obfuscation as to how a complainant would be able to cognitively formulate an informed choice. In *Dica,*[319] it was inferred that a basic disclosure was the appropriate method of informing a

[314] Ohio Rev. Code Ann. § 2903.11 (2014)
[315] 720 Ill. Comp. Stat. § 5/12-5.01; N.D. Cent. Code § 12.1-20-17 (2014) Nev. Rev. Stat. § 201.205 (2014) Mo. Rev. Stat. § 191.677 (2014)
[316] For example see *State v Rick*, 835 N.W.2d 478 (Minn. 2013); *State v Weaver* 939 S.W.2d 316 56 Ark. App. 104 (1997)
[317] *R v Dica* [2004] EWCA Crim 1103, 3 All ER 593; *R. v Konzani* [2005] EWCA Crim 706 [2005] 2 Cr. App. R.
[318] *R v Dica* [2004] EWCA Crim 1103, 3 All ER 593; *R. v Konzani* [2005] EWCA Crim 706 [2005] 2 Cr. App. R
[319] *R v Dica* [2004] EWCA Crim 1103, 3 All ER 593

complainant.[320] It was presumed that once disclosure had transpired the complainant would know of the risks.[321] A contradictory illustration of this essential requirement is provided within the judgment of Judge LJ in *Dica,* postulating a scenario where the risk may be concealed, and that a complainant may not be consenting to that risk.[322] The position is further convoluted by *Konzani,*[323] whereby Judge LJ stipulates that a complainant should be aware of the risks, and alternatively that the complainant can acquire the information from other sources.[324] The former denoting an enhanced disclosure whilst the later demonstrates a basic disclosure.

In complete contrast with the English precedential vacillations, there is clarity surrounding basic disclosure in a number of jurisdictions within the United States, notably Arkansas,[325] California[326] and Minnesota.[327] It is expressly stipulated that basic disclosure is the threshold requirement as the defendant is obligated to inform the prospective partner that they have the virus.[328] The advantage of those particularised legal systems is that the provisions are unambiguous, provide certainty and a simplistic standardisation. The counterpoise is that the doctrinal difficulties that England faces are still operative, as it fails to denote that not all complainants will be able to make a fully informed decision.

The Canadian juridical precepts are similar to the aforementioned jurisdictions. However, the jurisprudence is unique and, therefore, paradoxically distinct to the

[320] ibid [39]
[321] ibid [39]
[322] ibid [58]
[323] *R. v Konzani* [2005] EWCA Crim 706 [2005] 2 Cr. App. R
[324] ibid [43]-[44]
[325] Ark. Code Ann. § 5-14-123 (2012);
[326] Cal. Health & Safety Code § 120291 (2014);
[327] Minn. Stat. § 609.2241(2014)
[328] Ark. Code Ann. § 5-14-123 (2012); Cal. Health & Safety Code § 120291 (2014); Minn. Stat. § 609.2241(2014)

U.S. States that require basic disclosure to consensual activity and the English position.[329] *Prima facie,* the leading judgments endorse basic disclosure by expecting the defendant to disclose their sero-status to the complainant.[330] This jurisdiction is dissimilar as disclosure of one's status is only required when there is a 'significant risk of harm' that poses a 'realistic possibility' of the virus being transmitted.[331] The judiciary have endeavoured to provide guidance on when disclosure is required, but this is not extensive.[332] It seems that the onus is on the defendant to evaluate the level of risk, and thereby excludes any consultation with the unsuspecting partner. This denotes that the defendant is aware of the risk of the virus being transmitted, but the complainant may still be oblivious to that fact, thereby connoting that basic disclosure is the requirement.

Basic disclosure denotes that factual consent will be achieved, but there is no certainty that normative consent will always be attained. As previously noted, a significant minority of individuals seem to be unaware that the virus can be transmitted through unprotected intercourse.[333] If one in five are uninformed as to the risk, it would signify that normative consent cannot be achieved on all occasions. If there is factual consent, but no consensus *ad idem* in terms of normative consent, then consent in a strict legal sense, cannot be fulfilled. There cannot be a fully informed consent. Any legislative framework must ensure that the constructional definitional elements of an acute awareness of the actual risk, on the part of the complainant are not only satisfied in practice, but reflected in new legislation.

[329] *R v Dica* [2004] EWCA Crim 1103, 3 All ER 593; *R. v Konzani* [2005] EWCA Crim 706 [2005] ; Ark. Code Ann. § 5-14-123 (2012); Cal. Health & Safety Code § 120291 (2014); Minn. Stat. § 609.2241(2014)
[330] R v Cuerrier [1998] 2 S.C.R. 371; *R v Mabior* 2012 SCC 47
[331] ibid
[332] *R v Mabior* 2012 SCC 47
[333] Harker (n 114) 13

Ohio And The Quasi-Enhanced Disclosure Model

Ohio appears to recognise a quasi-enhanced disclosure equipoise.[334] The provision affords for a basic disclosure that will assist in exonerating a defendant.[335] It does not anticipate that a basic disclosure will always provide a defence to the charge. Accordingly, there is also an inbuilt mechanism whereby basic disclosure will not suffice if the defendant becomes aware of, or ought to be aware that, the complainant is lacking the mental capacity to understand the risk associated with having unprotected sexual intercourse with an HIV+ individual.[336] The provision invariably is concerned with capacity of the complainant rather than their knowledge, but in that circumstance it may still equate to an enhanced disclosure. The obligation to enhance that disclosure would come to prominence if a defendant became aware that the complainant did not understand that there are risks associated with unprotected intercourse with an HIV+ individual.[337] This provision has the benefit of the simplification of basic disclosure where it can be ascertained that the complainant has provided a fully informed consent, that also embraces factual and normative elements of consent. It facilitates further disclosure when the complainant would otherwise be providing a legally deficient consent, as articulated above.

[334] Ohio Rev. Code Ann. § 2903.11 (2014)
[335] Ohio Rev. Code Ann. § 2903.11 (b)(1) (2014) (B) (1)
[336] Ohio Rev. Code Ann. § 2903.11 (b)(2)(2014)
[337] ibid

The provision augments any jurisdictional inclinations towards basic disclosure as it has the potential to take into account the 'significant minority'.[338] The statute appears to focus upon the capacity of the complainant, rather than requisite knowledge of risk, but still implies that an enhanced disclosure may need to be expressed. There is an acceptance that the majority of individuals will be conscious of the risks. Furthermore, the constructional definitional elements of a fully informed consent are attained as the juncture of factual and normative consent could be absolute in all incidences of exposure. The soft paternal preferences of the provision permit the complainant's autonomy to be preserved on all occasions. A statute of this type should be welcomed, but the 'mental capacity' criterion should be superseded with an awareness of risk requirement on the part of the complainant. As the thesis is based upon a subjective awareness of the defendant there are also concerns with facilitating an objective test for fact finder determination.

The Legal Systems That Expect An Enhanced Disclosure On All Occasions

Specific legislation that facilitates enhanced disclosure has taken a number of forms, and presented distinctive lexicon constructs as potential exemplars for other legal systems to follow.[339] All of the highlighted enhanced disclosure templates emanate from the United States. They provide a more restrictive facility for the defence of consent to operate, and a more constrained exculpatory pathway, as there is an expectation that demands significantly more than disclosure of an individual's sero-

[338] Harker (n 114) 13
[339] 720 Ill. Comp. Stat. § 5/12-5.01; N.D. Cent. Code § 12.1-20-17 (2014) Nev. Rev. Stat. § 201.205 (2014) Mo. Rev. Stat. § 191.677 (2014)

status. Each State[340] has enacted supplementary formulae that must be adhered to for the defendant's conduct to negate culpability.

All of these provisions place emphasis on the complainant having the opportunity to fully consent to the particular activity. In Illinois it is specified that disclosure anticipates more than the defendant divulging their status.[341] For a fully informed consent of this persuasion there must be dissemination of HIV status and attendant risk.[342] There are ambiguities as to what would equate to an 'action' but it may be presumed that the provision is referring to sexual activity. It would have been beneficial to have express wording to that effect within the provision.

A more accurate account of the requirement emanates from Nevada, where greater lucidity is provided on what is to be expected for the defence of consent to be fully functional.[343] The statute specifies that the complainant must have knowledge of the defendant's HIV status, and an awareness that they will be exposed to the virus.[344] There is no explanation of how the complainant would acquaint themselves with the awareness of the status or the risk of being exposed. It can be presumed that the burden would lie with the defendant if they expect to utilise the defence.

The provisions in a number of U.S. States specify that the complainant must be aware of more than the defendant's status for the defence of consent to be

[340] ibid
[341] 720 Ill. Comp. Stat. § 5/12-5.01
[342] ibid
[343] Nev. Rev. Stat. § 201.205 2 (2014)
[344] Nev. Rev. Stat. § 201.205 2 (2014)

activated.[345] The same cannot be iterated in English law where there is no conformity within the leading appellate judgments. It is not apparent whether a basic or enhanced disclosure will suffice for operation of the defence. Judicial precepts are opaque and are delineated more by mud rather than crystal. In *Konzani,*[346] for instance, there seems to be focus on enhanced disclosure as there is an acknowledgement that the complainant must be aware that there are risks associated with unprotected intercourse with an HIV+ defendant.[347] Unfortunately, there was no expansion of whether this should form a prospective template, and there are elements of *Dica* and *Konzani* that confusingly refer to basic disclosure as the touchstone.[348] In those circumstances, it seems that it was presumed that the risks would be common knowledge. Further elucidation of the expectations of disclosure, as has transpired with the legislative provisions in the U.S. States that express 'consent' as the requirement, would provide clarification to domestic extant law.

There are certain impracticalities associated with facilitation of an enhanced disclosure template. Respective U.S. States infer that all complainants would be unaware of the risks that can be associated with unprotected intercourse with an HIV+ individual. It has been affirmed that four out of every five individuals are aware that the virus can be transmitted through unprotected sexual intercourse.[349] It is not necessary to expect an enhanced disclosure on all occasions. If such a proposition is adopted, the onus is on the defendant to 'educate' the complainant on all

[345]720 Ill. Comp. Stat. § 5/12-5.01 ; N.D. Cent. Code § 12.1-20-17 (2014); Nev. Rev. Stat. § 201.205 (2014) Mo. Rev. Stat. § 191.677 (2014)
[346] *R. v Konzani* [2005] EWCA Crim 706 [2005] 2 Cr. App. R. 14
[347] ibid [43]
[348] *R v Dica* [2004] EWCA Crim 1103 [39]; *R. v Konzani* [2005] EWCA Crim 706 [2005] 2 Cr. App. R. 14 [44]
[349] Harker (n 114) 13

occasions. This may be too burdensome a requirement for the operation of the defence. What would the defendant need to inform the complainant about? If this is the case then would the defendant need to be a statistician, or provide a portfolio of the substantive risks of transmission before a fully informed consent can be obtained? A preferred option would be to simply inform the complainant that they may risk becoming infected if they have unprotected intercourse with an HIV+ individual. There should be nothing else that needs to be disseminated by a defendant for the operation of the defence.

If disclosure is required then it must be a basic disclosure, unless it is obvious that the complainant does not appreciate that there is a risk that the virus may be transmitted. Anything more would be too onerous on the defendant. If there is to be a statutory provision on whether disclosure/consent can act as a defence then it needs to be constructed in this manner, reflecting the operative equipoise that has been highlighted in consideration of the review of comparative principles.

The Utilisation of Factual Consent Within The Jurisdictions

Whether the complainant has factually consented is obvious within all of the expectation levels of disclosure. The most disconcerting element is that factual consent is the prerequisite for basic disclosure. This cannot, and should not, be the case as a fully informed consent consists of two elements: factual consent and normative consent.[350] If the complainant has only factually consented can they be said to have the applicable information to formulate an informed choice to run the

[350] Westen (n 12)

risk of the virus being transmitted? An individual may have the desire to have unprotected intercourse with an HIV+ individual, but not have the appropriate awareness to authorise unprotected intercourse that runs the risk of the virus being transmitted. It must be reiterated that this will not be the situation in all cases as the majority of complainants will be fully conversant with the risks associated with unprotected intercourse with a person who has the virus.

England, Canada and a number of U.S. States' Penal Codes place emphasis on factual consent without true consideration of normative consent. This approach is devoid of rationality as the complainant who is unaware of the risk of transmission can never be said to have truly consented. Although they may have stipulated that they have agreed to intercourse with an individual who is HIV+, that is deficient for normative consent. The complainant must have agreed to intercourse with an HIV+ individual with the knowledge that there is a risk of the virus being transmitted.

A further discrepancy can be seen with how the complainant will factually consent as there is no confirmation of the matter. In England and Canada, there is no discussion or analysis of the complainant expressing that they factually consented to unprotected intercourse with the defendant. Invariably, this is synonymous with the position in the USA, as none of the states specify the parameters of factual consent with any precision. None of the jurisdictions specifically address this issue. There is no exploration of factual consent as the issue relates to whether the defendant disclosed their status to the complainant. It can be presumed that a

subjective/performative factual consent model needs to be implemented.[351] The engagement in unprotected intercourse denotes that factual consent comprises of subjective and performative elements. Either of these in isolation would be deficient as the complainant must subjectively agree to the intercourse and further endorse the acquiescence by conduct. It may be inferred that factual consent can be obtained by a hybrid method, as it is intimated that once the defendant has informed the complainant, and once intimacy transpires, there has been acquiesance to the activity. Factual consent, in these circumstances, must be a hybrid approach as the complainant mentally acquiesces and then expresses that consent by words or conduct.

Beyleveld[352] suggests that there can be no informational deficiencies if the defendant discloses their status. This neglects to take into consideration that a complainant may be unaware of the risks associated with unprotected intercourse with an HIV+ individual. It is also contrary to what Beyleveld had previously advocated when stipulating that to have knowledge and understanding the complainant's acceptance must be within their field of awareness.[353] The latter proposal is the most appropriate as this conveys the significance of normative consent and rejects factual consent as the requisite threshold that the former proposition promotes.

[351] Above p208 -211
[352] Brownsword Beyleveld, *Consent and the Law* (Oxford Hart 2007) 147
[353] Beyleveld (n 352)145

The Utilisation of Normative Consent Within The Jurisdictions

In each jurisdiction basic disclosure pervades factual consent. However, not every circumstance that necessitates basic disclosure adheres to the proposed working definition of a fully informed consent. It is normative consent that is deficient as the 'significant minority' would not have the requisite knowledge to acquiesce to unprotected intercourse.[354] A complainant must have the apposite levels of awareness that acknowledge that the defendant is HIV+ and that unprotected intercourse may result in the virus being transmitted. This would ensure that that individual is proficient to be able to make an informed decision that may affect their health and welfare. Only when factual and normative consent have been met may it be determined that the complainant has truly consented. This can be seen in a number of jurisdictions in the United States, but there is no clarification of normative consent in England and Canada.

Canada And England: The Utilisation Of Implied Consent

A further issue that needs to be addressed is the utilisation of an implied consent. The acceptance of an implied consent within extant English judicial precepts is akin to proclaiming that normative consent is irrelevant. The Canadian courts have gone to great lengths to exclude implied consent by adopting the jurisprudence that was set out in *Ewanchuk,*[355] and ensuring that it applied to all forms of assault.[356] This does not indicate that there has been an acceptance of the exclusion of an implied

[354] Harker (n 114) 13
[355] *R v Ewanchuk* [1999] 1 S.C. 330
[356] *R v Williams* [2003] 2 SCR 134 [37]

consent within Canada. Rawluk[357] identified that, following the decision in *Mabior,*[358] an implied consent transpires when there is no realistic possibility of transmission of the virus as the choice of whether to have intercourse with a HIV+ individual is removed from the complainant.[359] An allowance of this magnitude would endorse the minority dicta of L'Heureux-Dubé J or McLachlin J in *Cuerrier,* and anticipate disclosure on all occasions, even when there was no risk of the virus being transmitted. The exclusion of an implied consent in Canada is in complete contrast to how the law has developed in England where the decision in *Konzani*[360] indicated that implied consent may be an available defence.[361]

In the majority of the U.S. States it can safely be assumed that consent must be an informed consent and that an implied consent would be deficient as the onus is on the defendant to disclose their status. Can there ever be an implied consent if the requirement of the statutory provision is enhanced disclosure? It appears that this cannot be the case. In Missouri, the court appeared to be unwilling to accept that the complainant may have acquired the knowledge from a third party.[362] In *State v Yonts,*[363]the complainant testified that they had heard that the defendant had the virus but the court deemed such knowledge irrelevant. This denotes that implied consent is irrelevant, and follows the Canadian approach to this type of consent; as previously asserted, this is in complete contrast to the English position that was set out in *Konzani.*[364] A complainant cannot be said to have consented to the risk of transmission just because they had received information from a third party. The

[357] Rawluk (n 184)
[358] *R v Mabior* [2012] SCC 47
[359] Rawluk (n 184)
[360] *R. v Konzani* [2005] EWCA Crim 706 [2005] 2 Cr. App. R. 14
[361] ibid [44]
[362] *State v Yonts* 84 S.W.3d 516, (Mo. Ct. App. 2002)
[363] ibid
[364] *R. v Konzani* [2005] EWCA Crim 706 [2005] 2 Cr. App. R. 14[44]

threshold requirement of a fully informed consent, and for that matter, normative consent, has not been satisfied in such a postulated hypothecate.

An Optimal Pathway To Ensure That Normative Consent Is Achieved On All Occasions

The respective jurisdictions have all endorsed consent or disclosure as a defence to the criminal transmission/exposure to HIV. It is the U.S. State provisions that anticipate more than a basic disclosure that provides real clarity of what is a fully informed consent. This does not denote that all of these statutes can be considered as the appropriate legislative framework. The statutes that require an enhanced disclosure fail to take into account that the majority of individuals will always be aware of the risk of the virus being transmitted; this should not be the appropriate threshold. A more suitable legal construct is a quasi-enhanced disclosure. This acknowledges that there are individuals who are unaware of the risks associated with unprotected intercourse. If such a situation arises, then the onus is on the defendant to inform that person that there is a risk of the virus being transmitted.

If there is to be a *de novo* legislative framework it is pertinent to assume that it should endeavour to provide a detailed extrapolation of how a fully informed consent can be attained. The suggested provision below corresponds with Robinson's proposal that criminal law defences can be compartmentalised into five categories, and that consent may be considered to be a defence that is within the ambit of

'offence modification' or 'failure of proof'.[365] The offence modification defence denotes that all elements of the offence have been completed and that the defence of consent is independent of the offence.[366] Failure of proof denotes that, 'all of elements of the offence have not been proven'.[367] Clause 1 (1) of the proposed offence denotes that consent would act as an offence modification defence as all elements of the offence would be satisfied, but the defendant should not be accountable as the complainant would be aware of the defendants status.[368] Clause 1(2) of the proposed offence denotes that consent cannot act as a defence to that charge. A suggested provision should embrace the complainant's opportunity to provide a fully informed consent, and may resemble the recommended provision that is set out below:

3. Disclosing HIV status

It is a defence to a criminal charge of transmission or exposure to HIV that the complainant consented to running the risk of acquiring the virus. For that person to consent to running the risk of acquiring the virus:

(1)The defendant must disclose that he has the virus;

(2)That disclosure must take place before any unprotected sexual activity;

(3) The defendant must only partake in that activity if following disclosure he is confident that his prospective partner is aware that there is a risk that the virus may be transmitted

[365] Paul H Robinson, *Structure and Function in Criminal Law,* (Clarendon Press, Oxford 1997) , 69
[366] Paul H. Robinson, 'Criminal Law Defenses: A Systematic Analysis' (1982) 82* Columbia law Review 199, 212
[367] ibid 204
[368] Above p 195-198

(4) It is for the prosecution to establish that the complainant did not consent

(5) Consent will not form a defence if that person intended to transmit the virus or the complainant desired that they acquire the virus from that person.

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The recommended statutory provision promotes consent as a defence to the charge of criminal transmission of HIV. It compels the defendant to furnish prospective sexual partners with all of the relevant facts before that person can acquiesce to unprotected sexual intercourse. Subsection (1) stipulates basic disclosure is the minimum pre-requisite. It is anticipated that basic disclosure would be sufficient in the majority of cases and thus will fulfil the expectations of factual and normative consent. Subsection (2) confirms that the disclosure must take place before any restricted intimate acts. This is an essential provision as it prevents any ambiguity as to the timing of the disclosure. It is logical to presume that it must occur before any intimate acts as retrospective consent is normally precluded within the criminal law, and would be undesirable in this area.[369]

Subsection (3) is reliant in part upon Ohio's provision as this quasi-enhanced disclosure template conflates basic and enhanced disclosure. The suggested statutory provision necessitates further disclosure when it becomes apparent to the defendant that the complainant is unaware of the risk of the virus being transmitted, thereby encompassing a subjective analysis at that juncture.[370] The onus is on the defendant to explicate the relevant information. He would not be expected to go into the intricacies of the risks involved as this would be too onerous a task. An obligated

[369] It seems that there is an acceptance of retrospective consent within Canada see: *R. v. J.T.C.,* 2013 NSPC 105 [76]
[370] That corresponds to a liberal approach to criminal law

defendant would, however, be expected to stipulate that there may be a risk that the virus can be transmitted. It is imperative that this section is inserted as it fulfils the obligation of normative consent, particularly as statistical information signifies that one in five do not understand that the virus can be transmitted via unprotected heterosexual intercourse.[371] The burden of proof lies with the prosecution to establish lack of consent as any other requirement would unduly evade issues in relation to the right to a fair trial,[372] and the presumption of innocence. [373] The final element ensures that defendants who are intent on transmitting the virus would not be able to rely upon a consenting complainant. This would also denote that 'bug chasers' could not consent to running the risk of the virus being transmitted as the impacted issue is constitutionally an affront to public policy imperatives in this substantive arena.[374]

The provision would ensure that the complainant has had adequate opportunity to assess whether they desire to participate in unprotected intercourse with a HIV+ individual whilst knowing that there are risks involved. This does not denote that consent or disclosure may be the only defence that is available to HIV+ individuals. A defendant using a condom, partaking in low risk activities or having a undetectable viral load may also act as potential defences. The issues in relation to these other potential defences are considered in detail in the next chapter.

[371] Harker (n 114) 13
[372] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 6
[373] *Woolmington v DPP* [1935] AC 462
[374] Weiss (n 273) 398

Chapter Five

Exculpation Based Upon The Probability Of The Virus Being Transmitted: A Comparison Of Condom Use, Viral Load And Type Of Sexual Activity As Defences To The Criminal Transmission/Exposure Of HIV

Introduction

As discussed in the preceding chapter, a cogent rationale exists for enabling an individual to consent to running the risk of becoming infected with HIV. This is not, nor should it be, the end of potential defences as there are a number of other circumstances whereby it can be argued that an individual has behaved in a responsible manner. If a defendant uses condoms, or is aware of the level of their viral load, or knows that certain sexual activities pose less of a risk of transmission, then they should be able to utilise any of these as a defence to criminal sanctions. The aim of this chapter is to set out the legal position of these defences within each of the jurisdictions with the objective of providing a suggested statute that facilitates their wider inclusion.

The statistical probability of transmission through safe sex, the advancement of anti-retroviral medication, and that certain types of sexual activity pose less of a risk of transmission, signify that there are more circumstances where the defendant should not be criminally responsible for his actions. Condom use, viral load, and certain types of sexual activity can be considered to be defences of 'reasonable

precautions',[1] as the defendant has attempted to reduce the risk of the virus being transmitted, and that that risk was a reasonable one to take. As the overarching aim of this thesis is to provide a bespoke legislative framework, it is no coincidence that these defences can be categorised as a 'failure of proof' defences.[2] There is, however, limited scope for a treatise of defences within this thesis, but the suggested statutory provision identifies that condom use, viral load and low risk sexual activities negate definitional elements of the offence and these equate to 'failure of proof' defences.[3] Robinson when categorising defences proposes that a:

> "*Failure of proof defenses consist of instances in which, because of the conditions that are the basis for the "defense," all elements of the offense charged cannot be proven. They are in essence no more than the negation of an element required by the definition of the offense.*"[4]

The above definition signifies that an undetectable viral load can be considered to be a failure of proof defence. With this type of defence it can be proposed that it is the *mens rea* of the offence that is not established, because the defendant has awareness of his non-infectious viral load through a medical practitioner. An alternative categorisation of defences is 'offence modification', and Robinson proposes that these type of defence 'do more than negate an element of the offence',[5] and 'they apply even where all elements of the offense are satisfied'.[6] The defence of undetectable viral load should not be considered as an offence modification defence,[7] but rather as a failure of proof, as the awareness of one's undetectable viral load denotes that that person is not being reckless or acting

[1] Keith JM Smith, 'Sexual Etiquette, Public Interest and the Criminal Law' (1991) 42 Northern Ireland Law Quarterly 309, 328
[2] Paul H. Robinson, 'Criminal Law Defenses: A Systematic Analysis' (1982) 82 Columbia law Review 199, 204
[3] ibid
[4] Ibid 204
[5] ibid 208
[6] ibid 208-9
[7] Robinson (n 2) 208-9

intentionally. In this circumstance a defendant cannot be considered to be reckless or act intentionally, as it will be demonstrated that an undetectable viral load significantly reduces the risk of the virus being transmitted, and that the defence is only accessible if a medical practitioner has confirmed that the individual was not infectious at the time of sexual contact. In order to avoid any ambiguity it is necessary to expressly stipulate these requirements within the proposed legislative framework, equating an undetectable viral load to the failure of proof defence.

It is contended that the use of condoms and type of sexual activity also negate the *mens rea* of the offence.[8] A defendant who is aware that the correct use of condoms, or that he has deliberately partaken in a low risk sexual activity, displays responsible characteristics, rather than reckless or intentional behaviours. Thus, condom use and type of sexual activity can be identified as failure of proof defences by the negation of the *mens rea* of the offence, but the extrapolation of the extant criminal justice systems, and the deficiencies identified therein, demands that any statute provides more clarity as to the availability of defences.

The alternative, and preferred proposal, is that the alternative defences to viral load, those of condom use and type of sexual activity, can negate the *actus* reus element of the criminal offences. The proposed statutory provisions that were set out in chapter three identified that an element of both of the offences is that the defendant has unprotected vaginal or anal intercourse, within the realm of high risk viral transmission. The use of condoms is considered as a failure of proof defence as the requirements of the suggested criminal sanctions cannot be committed if a

[8] For a discussion on the negation of *mens rea* within this context see: Kate Harker and Ellen Wright, 'The HIV Stigma: Duty Or Defence?' (2015) 4 UCL Journal of Law and Jurisprudence 55, 65-69

defendant had correctly used protective measures, and the conduct is lawful in such circumstances. An equivalent rationale can be recognized in cases of sexual activity, as only unprotected vaginal and anal intercourse is criminalised. Therefore, if an individual partakes in any other sexual activity an element of the offence cannot be established.

Condom use as a defence is in line with public health initiatives, and using such precautions should be encouraged, given that they can significantly decrease the risk of transmission of the virus, thereby encouraging safe sex practices. It is proposed that if condom use can be a defence then viral load, and certain types of sexual activity, should also be permitted as these are *ejusdem generis.* The defences are of the same kind because the statistical probability of transmission through protected intercourse can be the same as, or more risky than, a low or undetectable viral load, and can be akin to certain types of sexual activity.

The chapter is split into four sections. As with the previous chapters, the relevance of condom use, viral load and type of sexual activity as defences will be examined within an individual legal system contextualisation: England, Canada and the United States. The extirpation of individual legal systems will then be subjected to review by a comparative analysis and then followed by a suggested statutory footing for these defences.

The Defences Of Condom Use, Viral Load And Type Of Sexual Activity In Extant English Criminal Law

Condom Use As A Potential Defence To The Reckless Transmission Of HIV

Neither the common law of England nor specific legislation stipulate that any defence, other than consent, can be raised in a sexual transmission of HIV case.[9] In *R v Dica,* [10] Judge LJ stated that levels of precaution may lead to a defence and that it could be left for jury to assess whether such protection would be sufficient:

> *"If protective measures had been taken by the appellant that would have provided material relevant to the jury's decision whether, in all the circumstances, recklessness was proved*. "[11]

Further comments seemed to indirectly indicate that the use of condoms could be a defence.[12] This is evident when Judge LJ discussed why consent to running the risk of becoming infected should not be invalidated, as it would inhibit certain individuals who wish to participate in sexual relationships. His Lordship paid particular attention to a number of examples; one being a Catholic couple[13] who, because of their religious beliefs, are unable to use precautions, even though one may become infected by the other. This statement appears to infer that condom use may be utilised as the risk of transmission is significantly reduced, and the use of precautions in such circumstances would demonstrate that a defendant was acting responsibly. Emphasis was also made of condom use when referring to casual

[9] The Law Commission has recently considered the relevance of condom use in cases of HIV Transmission: Law Commission, *Reform of Offences against the Person A Scoping Consultation Paper* (Law Com SP no217,2014)
[10] *R v Dica* [2004] EWCA Crim 1103 [11]
[11] ibid [11]
[12] ibid [49]
[13] ibid [48]

encounters.[14] Additional support for this proposition can be found in the Crown Prosecution Service (CPS) guidelines,[15] where it is acknowledged that prophylactic measures may signify that no prosecution should ensue, as it would be problematic to establish that the person using the precautions was being reckless.[16] The CPS appears to concede that a defendant's actions demonstrate responsibility rather than recklessness. It was, however, emphasised that it is the responsibility of the infected person to ensure that precautions are taken. The CPS guidelines also indicate that public policy rationalisations implicate that prosecutions will not take place when precautions have been used.[17] The statement of Judge LJ in *Dica,* and the CPS guidelines, are rational proposals, as an individual would be acting responsibly, and by acting responsibly his conduct should be excused. If the infected person is practising safe sex then it would be extremely difficult for the prosecution to prove that he acted recklessly or intentionally. The use of condoms is more effective in restricting the spread of the virus than informed consent, as consenting to running the risk of infection offers no protection.

Further support for this proposition emanates from a number of leading academics.[18] As early as 1991, it was advocated that condom use could be defence in these types of cases, as it is 'a proper and necessary concession to human nature'.[19] To restrict an individual from becoming intimate with another person as a result of their condition and allowing consent as the only means to circumvent liability, is a

[14] *R v Dica* [2004] EWCA Crim 1103 [47]
[15] Crown Prosecution Service (CPS), 'Intentional or Reckless Sexual Transmission of Infection' <http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/index.html#Safe accessed 18th April 2015
[16] ibid
[17] ibid
[18] Matthew Weait, 'Criminal Liability for Sexually Transmitted Infections'(2009) 173 Justice of the Peace 45; Samantha Ryan, 'Risk-Taking, Recklessness and HIV Transmission: Accommodating the Reality of Sexual Transmission of HIV within a Justifiable Approach to Criminal Liability' (2007) 28 Liverpool Law Review, 215
[19] Smith (n 1) 328

threshold that may be set too high. There must also be some margin whereby an individual can still maintain sexual relationships as it would be difficult to conform to such a restriction, particularly as stigma is still attached to those who are carrying the virus.[20] It is paradoxical to allow consent to act as a defence, but not the use of condoms. It is conceded that consent gives a person the opportunity to make an informed decision, and this is not an attempt to exclude consent as a defence, but consent does not reduce the risk as significantly as precautions. In concurrence with this proposition, it has been suggested that precautions should be rated more highly than consent, and that even attempted use of protective measures should be sufficient as a defence to transmission. [21] The effective use of protection should be a defence, but attempted use should not, as it is the equivalent to unprotected intercourse. In such circumstances disclosure of ones HIV status should be a requirement to ensure that the party who is unaware has the opportunity to make an informed decision. A distinction must also be drawn between a moral duty and a legal duty, when referring to the use of precautions,[22] and the disclosing of ones' HIV status. Indeed an individual has a moral duty to inform all of their prospective sexual partners, even when he is using protection, but a moral duty does not necessarily equate to a legal duty.

If a defendant uses a condom does that mean that he is being reckless, or otherwise? It is arguable that even if the defendant used precautions the Crown, in contrast to the CPS guidelines, may still establish that the defendant foresaw harm,

[20] Emily Mackinnon and Constance Crompton, 'The Gender of Lying: Feminist Perspectives on The Non-Disclosure of HIV Status'(2012) 45 University of British Columbia Law Review 407, 425
[21] Dennis Baker, 'The Moral Limits of Consent as a Defence in the Criminal Law' (2009) 12 New Criminal Law Review 93, 114
[22] James Chalmers, 'The Criminalisation of HIV Transmission' (2002) 28 Journal of Medical Ethics 160, 162

and still took the risk.[23] This is unsustainable, as the use of condoms demonstrates that the user is seeking to alleviate the risk of transmission, thus being responsible rather than reckless in their conduct.[24] Recklessness is best defined as unjustifiable risk taking,[25] and Judge LJ stated in *Dica* that recklessness is established, 'if he knew or foresaw that the complainant might suffer bodily harm and chose the risk that she would'.[26] The use of a condom establishes that the defendant is conscious that he may infect another, and as he has used precautions it can be persuasively asserted that he has endeavoured to eradicate the risk of transmitting the virus. This is even more evident when referring to protected receptive vaginal intercourse, as it has been stated that the approximate risk in such a situation is even more remote at one in twenty thousand.[27] It is, therefore, feasible that either the absence of *mens rea* or the use of a defence could be applied to these type of cases,[28] and the use of prophylactics indicate that the threshold for reckless behaviour has not been met, and furthermore that as a result of this the risk has been so significantly reduced that his actions do not establish culpability.

Extant English Law And The Relevance Of An Individual's Viral Load

It has been suggested that those with an undetectable viral load would not be considered reckless in England,[29] but there is no judicial clarity on the matter.[30] There is no clarification as to whether an undetectable viral load can act as a

[23] Simon H. Bronitt, '*Spreading Disease and the Criminal Law'* (1994) Criminal Law Review 21
[24] Ryan (n 18) 234
[25] *R v G* [2003] UKHL 50
[26] *R. v Konzani* [2005] EWCA Crim 706 [2005] 2 Cr. App. (Judge LJ) [37]
[27] Scott Burris and Others, 'Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial' (2007) 37 Arizona State Law Journal 467, 486
[28] Ryan (n 18) 233-35
[29] James Chalmers, *Legal Response to HIV and AIDS* (Hart Publishing, Oxford, 2008) 146
[30] The Law Commission has recently considered the relevance of viral load in cases of HIV transmission: Law Commission, *Reform of Offences against the Person A Scoping Consultation Paper* (Law Com SP no217,2014)

defence in England, as this has not been an issue that has been directly raised within the courts. The other leading appellate case on the criminal transmission of HIV did not consider the defendant's viral load. *Konzani*[31] was concerned with unprotected intercourse, and the issue of consent. If a defendant has a low or undetectable viral load he would need to be aware of the level in order to be able use it as a defence. Support for this proposition has been advanced by Smith, who submits that relying on medical advice should enable the defendant to evade responsibility.[32] This would be achieved by regular testing of the level of the viral load. The World Health Organisation endorse such proposals by suggesting that the level of an individual's viral load is one of the greatest risks in transmitting the virus to another person, and that reducing the viral load can be one of the most effective ways of diminishing the possibility of HIV transmission.[33] It can be stated that the level of an individual's viral load can be a deciding factor as to whether the virus will be transmitted: the lower the load the less likely is the possibility of infecting another person.[34] The viral load is reduced by taking antiretroviral treatment (HAART), and consistent use of the medication can decrease the load to an amount where it will be undetectable.[35] A further, and more radical, endorsement emanates from the Swiss Federal Commission for HIV/AIDS, which issued a statement regarding the use of HAART, and the transmission of HIV. It was announced that if an individual does not have another sexually transmitted disease, complies with their HAART, and has had an undetectable load for at least six months, they will be unable to transmit the

[31] *R v Konzani* [2005] EWCA Crim 706, [2005] 2 Cr. App. R. 14
[32] Smith (n 1) 328
[33] World Health Organisation 'Antiretroviral Treatment as Prevention (TasP) of HIV and TB: 2012 update WHO/HIV/2012.12' (June 2012)< www.who.int/hiv/pub/mtct/programmatic_update_tasp/en/index.html> accessed 20 April 2015
[34] Above ch1 p34
[35] World Health Organisation (n 33)

virus.[36] In light of this factorisation, the CPS have acknowledged that the risk may be significantly reduced, and that it can be argued that the level of the viral load can be just as effective as condom use.[37] This may denote that an individual's viral load might need to be taken into consideration when deciding whether to prosecute an individual. If the accuracy of the Swiss statement is to be assumed then an undetectable viral load is even more effective than condom use.

England: The Transmission Of HIV And The Type Of Sexual Activity

Although experts recognise the complexity of providing a precise assessment of the risk of sexually transmitting HIV it is accepted that some activities carry less of a risk than others.[38] Even though there is no exact formula for assessing the risk it is evident that certain types of sexual activity can reduce the risk of transmitting the virus. As the risk of transmission fluctuates between the types of conduct, Bennett *et al,*[39] propose that if an individual participates in low risk activities these do not require a duty to inform the other person of ones' HIV status as the risk is reduced, and they are therefore acting in, 'a responsible and morally justifiable way'.[40] Thus, it is suggested that the type of activity in which the defendant partakes may signify that he has been acting in a responsible manner if he knew that this would reduce the risk of infecting another person. The type of activity is important in assessing the probably of transmission, and It is recognised that unprotected anal intercourse,

[36] Pietro Vernazza and others' 'HIV-positive individuals not suffering from any other STD and adhering to an effective anti-retroviral treatment do not transmit HIV sexually ' (January 2008) http://www.edwinjbernard.com/pdfs/Swiss%20Commission%20statement_May%202008_translation%20EN.pdf accessed 20 April 2015
[37] Crown Prosecution Service (n 15)
[38] Eric Mykhalovskiy, Glenn Betteridge and David McLay 'HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario' (August 25, 2010) http://www.catie.ca/pdf/Brochures/HIV-non-disclosure-criminal-law.pdf accessed 20 April 2015
[39] Rebecca Bennett, Heather Draper and Lucy Frith, 'Duties to Forewarn Ignorance is Bliss? HIV and Moral Duties and Legal' (2000) 26 Journal of Medical Ethics 9
[40] ibid, 12

where the insertive partner is HIV+, is the most precarious activity.[41] The risk of transmitting the virus becomes more remote when assessing other types of interaction. Unprotected vaginal intercourse poses less of a risk[42] when it involves male to female transmission. The risk is even more diminished when it encompasses potential transmission from unprotected female to male vaginal intercourse. What ought to make the type of sexual activity a defence is that when the HIV+ partner is the receptive partner the statistical probably of transmission through protected intercourse is thought to be the equivalent of female to male unprotected vaginal intercourse.[43] If condom use is to be a defence, particularly as public health initiatives encourage their use, then certain types of sexual activity should also be included.

It is disconcerting to assume that different types of activity should carry the same penalty particularly when some types are less likely to transmit the virus. Currently, under English law, the type of sexual activity would be irrelevant as long as transmission occurred, and the complainant had not consented to running the risk of infection. The absence of perspicuity does not assist anyone who has the virus and wishes to reduce the risk of transmission by participating in low risk activities. This lack of lucidity conflicts with the criminal law being certain,[44] and treating all types of activity the same 'would be irrational and unfair'.[45] An individual who deliberately takes part in low risk activities would not be, and should not be, as culpable as a person who only partakes in high risk activities. There are suggestions that type of

[41] Above ch1 p34
[42] Carol Galletly and Steven D Pinkerton 'Toward Rational Criminal HIV Exposure Laws' 2004 32 Journal of Law Medicine and Ethics 327,328
[43] ibid
[44] Amelia Evans, ' Critique of the Criminalisation of Sexual HIV Transmission' (2007) 38 Victoria University of Wellington Law Review 517, 523
[45] Ryan (n 18) 229

sexual activity should not be taken into account, because someone involved in sexual intimacy that is a low risk may, on that particular occasion, be as likely to have transmitted the virus as someone taking part in high risk activity.[46] This is indefensible as it implies that they are at the same level of risk. This cannot be the case; if they were then they would both pose the same level of risk on each occasion. It is the equivalent of saying that someone who has placed a bet on a 2000 to 1 horse winning a race is just as likely to win as someone who has put wager on the favourite on that occasion. The level of risk is calculated for a reason, the more remote the risk of transmission the less likely that an individual will transmit the virus. The Canadian position on the three possible defences will now be analysed in terms of availability of other potential avenues for a defence.

Canadian Judicial Precepts And The Defences Of Condom Use, Viral Load And The Type Of Sexual Activity

Canada And The Inclusion And Exclusion Of Condom Use

The Canadian position is that a defendant can be prosecuted, for a variety of offences,[47] if he does not disclose his HIV status to sexual partners. It is irrelevant whether the virus is transmitted. Some find it problematic to comprehend how there are a number of different charges that can be brought for the same conduct as a defendant never really knows what offence they can potentially commit.[48] This invariably conflicts with the law being certain. The first case that was heard in the

[46] Matthew Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission,* (Routledge-Cavendish, Abingdon 2007) 176
[47] For example common nuisance: R v *Summer* 1989 98 A.R. 191, A.J. No. 78 to Murder: R v Aziga 2011 ONSC 4592, 2011
[48] Isabel Grant, 'The Prosecution of Non-Disclosure of HIV in Canada: Time to Rethink Cuerrier' (2011) 5 McGill Journal of Law and Health 7, 9

Supreme Court was *R v Cuerrier,*[49] where the defendant was prosecuted under the aggravated assault provisions of the Canadian Criminal Code.[50] Cuerrier had had unprotected intercourse with two women, and did not disclose that he was HIV+; this was despite the fact that he had been told, on a number of occasions, by health officials that he must use condoms, and disclose he was carrying the virus. It was held that consensual intercourse without disclosure of HIV status was fraud if there is, 'a significant risk of serious harm', and thus vitiated consent.[51] The majority judgment stated that fraud not only included the nature and quality of the act and the identity of the person, but that it extended to circumstances where there was a significant risk of serious harm. It was felt that a broader view of fraud was justified as any definition of fraud had been removed from the Canadian Criminal Code.[52]

Cory J[53] stated that the 'proper use of condoms' might reduce the risk so it would no longer be considered 'significant'. The judgment, therefore, set out that the use of condoms may be a defence to any charge that could be put before the courts, but emphasis was made about each case being dealt with on its own facts. The minority in that case were more specific, and stated that condom use would be a defence when the defendant had not disclosed his HIV status.[54] Subsequent cases have endorsed the comments made by Cory J, whilst others completely disregarded them as precautions were not even taken into consideration.[55] Other courts took the middle ground and declined to confirm whether using a condom meant disclosure

[49] *R v Cuerrier* [1998] 2 S.C.R. 371
[50] Criminal Code, RSC 1985, c C-46, s. 268
[51] *R. v. Cuerrier*, [1998] 2 SCR 371 [128]
[52] ibid [105]
[53] ibid [129]
[54] *R. v. Cuerrier*, [1998] 2 SCR 371[73]
[55] *R v Mokennen* 2009 ONCJ 643, 2009 ON.C. LEXIS 5031

was not a requirement.[56] Further permutations can be seen when it has been held that *Cuerrier* did not establish the use of precautions as a defence *per se,* and that each case must be dealt with on its own facts.[57] It was also stated that the comments merely provided a basis whereby the court could conclude that the harm may be trivial.[58] These cases demonstrated a lack of consistency, but the Manitoba Court of Appeal had held that condom use was pivotal in assessing liability and the requirement of disclosure.[59] It has also been proposed that deficient use of condoms will mean that there is a requirement of disclosure.[60] It seems that the cases following *Cuerrier* did not provide any lucidity on the matter, but prosecutors in Canada seemed to be more specific and endorsed the use of condoms as they were prepared to distinguish between protected and unprotected intercourse.[61]

The Supreme Court decision in *R v Mabior*[62] has provided explicit guidance on condom use, and the duty to disclose. In *Mabior,*[63] it has been stated that condom use will only be a defence if the defendant has a low viral load, thus stating that a combination of factors are essential if disclosure of ones' sero-status is not a requirement. In the judgment both parties had requested that the decision should provide clarity on when a defendant would be liable. This did not materialize, and merely placed a defendant in a more onerous position. Ambiguity prevails, as the court concluded that further medical advancements and other matters could be taken into account. The decision sends out an inappropriate message, and can be seen as discriminatory to women as the odds of transmission from the recipient are greater

[56] *R v DC* 2010 QCCA 2289(available on CanLII)
[57] *R v Wright* 2009 BCCA 514 [37](available on CanLII)
[58] *R v Thomas* 2011 ONSC 7136(available on CanLII)
[59] *Mabior* 2010 MBCA 93, 258 Man.R. (2d)
[60] *R. v. Nduwayo* 2010 BCSC 1277, 2010 BC.C. LEXIS 1755 [160]
[61] *R v McGregor* 2008 ONCA 831, 240 CCC (3d) 102 [7]; *R v Wilcox* 2011 QCCQ 11007(available on CanLII)
[62] *R v Mabior* [2012] SCC 47
[63] ibid

than from the insertive partner. Furthermore, it is detrimental to public health initiatives, as the defendant who has used protection will still be susceptible to criminal sanctions. This now means that there is no incentive for using a condom, and could increase reckless behaviour. Even more perplexing is the rather contradictory manner of the court in acknowledging that proper use of good quality condoms would mean that the virus will not be transmitted to another individual.[64] If this is the case then why criminalise the use of protection? The judgment does not confirm anything; rather, it compounds the issue and widens the net of liability. It seems that unprotected or protected intercourse is now unimportant in Canada, as it is no longer considered to be the demarcation line for prosecutions.[65]

Prior to the decision in *Mabior,* condom use as a defence, had received academic approval. It has been suggested that allowing condom use is a more effective way of reducing transmissions than relying on disclosure.[66] There is also a consensus of opinion that it is generally accepted that condom use is one of the most widely recognised ways to prevent transmission. [67] If there is such a general acceptance then it seems illogical to criminalise something that can protect the populace from infection. Allowing the use of condoms is particularly relevant when a significant number of infections take place before the person is aware they are carrying the virus.[68] As previously stated, consent will not protect an individual from the risk of infection, but condom use can be an effective way protecting against infection. An individual who uses condoms is being conscious of his own, and others, sexual

[64] *R v Mabior* [2012] SCC 47 [98]
[65] This has been affirmed in a number of cases for an example see *R. v. Felix*, 2013 ONCA 415 [48]
[66] Grant 'The Prosecution of Non-Disclosure of HIV in Canada: Time to Rethink Cuerrier' (n 48) 19
[67] Isabel Grant 'Rethinking Risk: The Relevance of Condoms and Viral Load in HIV Nondisclosure Prosecutions' (2009) 54 McGill Law Journal 389, 398
[68] Grant 'The Prosecution of Non-Disclosure of HIV in Canada: Time to Rethink Cuerrier' (n 48) 19

health. By using such protection it can be seen that there is a genuine attempt at reducing the risk of not only HIV, but a number of infections. If criminalisation of sexual exposure of HIV does not act as a deterrent, then allowing the use of condoms at least sends a message that is consistent with health policies,[69] and as a matter of policy using protection should be encouraged.[70]

It has been proposed that disclosure should be a requirement when condoms have been used.[71] The court's stance on the use of condoms suggests that an individual is now obliged to divulge that he is HIV+. If condom use were to be a defence it could be perceived to be 'sanctioning deceit',[72]and from a moral perspective this is an acceptable suggestion, but there is a distinction between a moral and a legal obligation. It seems that, following the decision in *Mabior,* the Supreme Court concur with aligning a moral and a legal duty, by specifying that not disclosing that your sero-status to a sexual partner is deceit to sexual activity if there is a realistic risk of harm, and condom use, alone, will be insufficient.[73] While there is such stigmatism attached to people suffering from the virus then the practising of safe sex should be encouraged rather than discouraged. If the defendant is still criminally liable when practising safe sex then he may decide to involve himself in unsafe sex practices as there would be nothing to gain from using protection, thereby encouraging reckless behaviour.

[69] Grant 'Rethinking Risk: The Relevance of Condoms and Viral Load in HIV Nondisclosure Prosecutions' (n 67) 400
[70] ibid 398
[71] John Flaherty, 'Clarifying the duty to Warn in HIV Transference Cases' (2008) 54 Criminal Law Quarterly 60, 67
[72] ibid 66 -67
[73] *R v Mabior* [2012] SCC 47

Canadian Judicial Precepts And The Viral Load Of The Defendant

The viral load of a defendant can be a method of assessing whether there is a risk of significant harm.[74] Cases appeared to indicate that when the viral load is undetectable disclosure of an individual's HIV status is not a requirement.[75] In *Mabior,*[76] the Manitoban Court of Appeal allowed part of the defendant's appeal when it was established that the viral load was at a level that was so low it did not pose a significant risk of serious harm.[77] The case was applied in *R v DC,*[78] where the Court of Appeal in Quebec confirmed that when the viral load is at such level to be undetectable then it will not pose a significant risk of harm, therefore, disclosure of one's HIV status was not required, meaning consent is not vitiated.[79] Even when the viral load is low (not undetectable) the courts had held that the Crown has failed to establish a significant risk of harm.[80] As the judgments did not emerge from the Supreme Court there needed to be further elucidation on the matter. Indeed, Steel J, in the Court of Appeal decision of *Mabior,* stated that the position, in relation to viral loads, needed to be clarified by the Supreme Court, particularly as the advancement of anti-retroviral treatments has shown that the risk is significantly reduced by their use.[81]

The Supreme Court has clarified the position and stated that a low viral load will not be a defence in non-disclosure cases.[82] It was stated a that viral load poses

[74] *R v Wright* 2009 BCCA 514 [37](available on CanLII) [32]
[75] *R v Mabior* 2010 MBCA 93, 258 Man.R. (2d); *R v DC* 2010 QCCA 2289
[76] *R v Mabior* 2010 MBCA 93, 258 Man.R. (2d)
[77] ibid [129] and [133]
[78] *R v DC* 2010 QCCA 2289
[79] ibid
[80] *R v JU* [2011] ONCJ 457(available on CanLII)
[81] *R v Mabior* 2010 MBCA 93, 258 Man.R. (2d) [152]
[82] *R v Mabior* [2012] SCC 47 [101]

evidential difficulties.[83] If this is correct then why enable a low viral load and condom use to be a defence?[84] The case demonstrates that a low viral load in isolation is irrelevant, but the court appears to indicate that an undetectable load may still be relevant. [85] In *D.C,* the Supreme Court affirmed that an undetectable viral load could not be a defence.[86] Lower courts, however, have not strictly applied the test that was set out in *Mabior*. In the recent case of *R v J.T.C.,*[87] the Provincial Court of Nova Scotia has affirmed that providing there is cogent expert evidence of the remoteness of the possibility of infection a defendant will not be considered to have criminally exposed another through unprotected intercourse. Judge Campbell stated that 'the Supreme Court of Canada did not intend in *R. v. Mabior* and *R. v. D.C*. to impose evidentiary findings on trial courts that are incompatible with the evidence actually before those courts'.[88] Dr Schlech, the expert in the case, proposed that the odds of transmission could be one million to one of the virus with an undetectable viral load.[89] It was accepted by Judge Campbell that his decision was specific to that case, and there was no realistic possibility of the virus being transmitted by the defendant. It seems that there was disregard of the unequivocal guidance in *Mabior*, and that Judge Campbell clearly preferred scientific estimates to judicial precedent. Although the present author agrees that an undetectable viral ought to be a defence, the decision appears disregard the relevance of the condom use and viral load as a defence, and runs contrary to what was stated in *Mabior* and *D.C.*

[83] ibid [102]
[84] ibid [102]
[85] ibid [102]
[86] *R v D.C.,* 2012 SCC 48 {29}
[87] *R. v. J.T.C.,* 2013 NSPC 105
[88] ibid [99]
[89] ibid [55]

It is evident that the courts are recognising that understanding of viral loads has developed to such an extent that the viral load needs to be taken into consideration when assessing the risk that is posed.[90] When there is an undetectable viral load it is arguable that harm is not foreseeable,[91] and there should be no prosecutions when a load is at that level.[92] It is inexplicable to contemplate that the defendant with a low or undetectable viral load would need to disclose their status when the risk of transmission is negligible or non-existent.[93] The decision in *Mabior* appeared to accept medical evidence of how quickly the viral load can reduce, if the appropriate medication is taken, but it still stated that a low viral load could pose a realistic possibility of transmission.[94] Yet the Supreme Court decision is contrary to medical evidence; it too easily discarded the Swiss statement by accepting one expert's opinion of it.[95] It is acknowledged that some research suggests that non-disclosure occurs when the defendant has a low or undetectable load, and this may encourage individuals to stop using condoms.[96] It is further accepted that a low or undetectable viral load does not demonstrate that the defendant is practising safe sex, within the context of using precautions, but it is another method whereby the risk of infection can be reduced. Furthermore, it is in the individual's interest to continue using precautions due to the risk of catching other sexually transmitted diseases. The real issue with viral load is that not everyone is able to take the appropriate medication, but this does not justify disallowing it as a defence. When the viral load is at an undetectable or low level, any non-disclosure requirement ought not to be affected.

[90] Grant 'The Prosecution of Non-Disclosure of HIV in Canada: Time to Rethink Cuerrier' (n 48) 20
[91] ibid 25
[92] ibid 11
[93] Something that was confirmed in *R. v. J.T.C.,* 2013 NSPC 105
[94] *R v Mabior* [2012] SCC 47 [100]
[95] ibid [102]
[96] Grant 'Rethinking Risk: The Relevance of Condoms and Viral Load in HIV Nondisclosure Prosecutions' (n 67) 402 -3

Concerns have been raised about the accuracy of viral loads, and what is not detectable one day does not mean it will remain the same the next.[97] This was addressed by the Supreme Court in *Mabior* when deciding that viral load could not be used in isolation, [98] but developments within the lower courts appear to indicate otherwise.[99] A further issue that has been identified is that defendant's may begin to make their own 'risk assessments',[100] but to do this the defendant would need to know the level of the viral load. To be able to know that level would require the appropriate test and medical advice. Grant also proposes that the viral load can lead to problems regarding the burden of proof.[101] The courts, before the Supreme Court decision in *Mabior*, had been using their good sense by looking at average viral loads, and stating that it is an evidential rather than legal burden when raising the issue of viral loads.[102] When there is no precise information the courts had been willing to accept average viral loads for determining whether there was a significant risk, and in such circumstances, it would be an evidential burden of showing that they had a low or undetectable viral load over that period of time.[103] This position has been clarified by the Supreme Court, and it would be an evidential burden that also required condom use.[104]

[97] Grant 'Rethinking Risk: The Relevance of Condoms and Viral Load in HIV Nondisclosure Prosecutions' (n 67)401
[98] *R v Mabior* [2012] SCC 47 [102]
[99] *R. v. J.T.C.*, 2013 NSPC 105
[100] Grant 'Rethinking Risk: The Relevance of Condoms and Viral Load in HIV Nondisclosure Prosecutions' (n 67) 402
[101] ibid 402
[102] *R v Wright* 2009 BCCA 514 [32} –[33}
[103] ibid
[104] *R v Mabior* [2012] SCC 47 [105]

A further development can be seen in *R v J.A.T,*[105] where statistics regarding the type of sexual activity were utilised in order to acquit the defendant. It was proposed that whether the defendant's conduct means there is a significant risk of harm, needs to be assessed by the type of sexual activity, and the statistical probably of transmitting the virus. In that case, the receptive partner was HIV+, and in such circumstances It was accepted that the risk was insufficient to be considered a serious risk of harm.[106] The Court also heard expert opinion that stated that this type of sexual activity was equal to protected intercourse where the insertive partner had the virus.[107] It appears that this case embodied the fundamental issues, as it indicated that a defendant may still have a defence when he participates in certain sexual activities. The case demonstrates that there was a pressing need for clarity on where the demarcation point lies. The type of sexual activity can no longer be used in isolation, it may, however, be utilised with either protected intercourse or viral load. There is no guidance on these matters; clear unequivocal direction is required, and this was not achieved by the Supreme Court in *Mabior*.[108] Courts have recently addressed the relevance of low risk sexual activities and a defendant's viral load. In *R v McKonnen,*[109] the Court of Appeal in Nova Scotia seemed to accept that oral intercourse and a low viral load would not pose a realistic possibility of the virus being transmitted. There has also been an acceptance of a defence based upon oral intercourse and an undetectable viral load in the Superior Court of Justice in

[105] *R. v. J.A.T.,* 2010 BCSC 766
[106] ibid [88]
[107] ibid [31]
[108] Alison Symington, 'R v Mabior and R v DC: Sex, Lies, and HIV: Injustice Amplified by Hiv Non-Disclosure Ruling' (2013) 63 University of Toronto Law Journal 485
[109] *R v Mekonnen*, 2013 ONCA 414

Ontario.[110] In this latter case there was confirmation that a defence based upon low viral load and oral intercourse did not pose a realistic possibility of the virus being transmitted. The expert in *Murphy*[111] stated that odds of becoming infected in this circumstance could be as high as one hundred thousand to one.[112] It seems that there is an acceptance of oral intercourse and a low or undetectable viral load acting as a defence, but there is not clarity as to whether low risk sexual activities can be used in isolation.

Grant submits that if condom use and the viral load are to be defences then why not the type of sexual activity?[113] Although these are no longer relevant when argued in isolation, the type of sexual activity may also play a pivotal role in ascertaining whether disclosure is required. As a result of this development it is suggested that under the current law each case is dealt with on its own facts, rather than on evolving common law precepts as declared by the court.[114] This means that any combination of the three suggested defences may be used to lower the realistic risk of transmission. Such a proposition may lead to further unpredictability as cases will still be relying heavily on expert evidence to ascertain whether there is realistic possibility of transmission.[115] It must be noted that the court in *Mabior* left the door open to such a proposition by stating that medical advancements and, 'other risk factors', may mean that there is no realistic possibility of transmission.[116] This can

[110] *R v Murphy* 2013 CanLII 54139 (ON SC)
[111] ibid
[112] ibid [82]
[113] Grant 'The Prosecution of Non-Disclosure of HIV in Canada: Time to Rethink Cuerrier' (n 48) 27
[114] *R v Mabior* [2012] SCC 47 [81]
[115] Grant 'The Prosecution of Non-Disclosure of HIV in Canada: Time to Rethink Cuerrier' (n 48) 44
[116] *R v Mabior* [2012] SCC 47 [95]

cause issues with the accuracy of expert evidence,[117] and it is questionable whether expert opinion becomes a 'numbers game'.[118]

The above exposition of the extant judicial precepts within this jurisdiction appear to affirm that following the Supreme Court decision in *Mabior,* that expert evidence on the statistical probability is pivotal in ascertaining whether a realistic probability of transmission existed, but this does not denote that the courts are robustly following the test as was set out in *Mabior*. It appears that the jurisprudence emanating from the jurisdiction is providing conflicting accounts on how to utilise the test. This reinforces the assertion that a bespoke legislative framework is necessary. Having considered the Canadian approach to condom use, viral load, and type of sexual activity it is now necessary to examine the American position in relation to these defences.

U.S. State Provisions And The Defences Of Condom Use, Viral Load And Type Of Sexual Activity: An Eclectic Approach At Best

United States And Condom Use As A Defence

The Presidential Commission recognised that the use of precautions ought to be utilised, and recommended that their use had to correspond to a complainant consenting to protected intercourse with an HIV+ individual.[119] There are States that have enacted legislation to that effect, however, the approaches to condom use are

[117]Grant 'The Prosecution of Non-Disclosure of HIV in Canada: Time to Rethink Cuerrier' (n 48) 27
[118] Grant 'The Prosecution of Non-Disclosure of HIV in Canada: Time to Rethink Cuerrier' (n 48) 14; for an in-depth analysis of McLachlin J's use of statistics see Patrick Hartfordy, 'Case comment: A Critique of the Supreme Court of Canada's Use of Statistical Reasoning in R v. Mabior' (2014) 13 Law Probability and Risk 169
[119] The Presidential Commission on the Human Immunodeficiency Virus Epidemic Report (1988) 131

diverse, and may be compartmentalised into three classifications. There are States that have enacted the recommendations of the Commission and facilitated the use of precautions as a defence when their use is aligned to the consent of the complainant. Other statutes have exceeded the recommendations of the Presidential Commission and approved condom use as the basis of a defence against sexual transmission/exposure to HIV. Finally, there are States that reject condom use as a defence to the specific criminal sanction. The allowance of condom use as a defence corresponds to public health initiatives within the United States and accedes to the harm principle by recognising the relevance of the probability of the risk of serious harm.[120] The facilitation of the defence is further cemented by various studies that denote that using such measures reduces the risk of the virus being transmitted by 95%, in comparison to unprotected intercourse, therefore, their use significantly reduces the risk of infection.[121] A defence of this type also achieves a legitimate equipoise to,'...minimise legislative intrusion into intimate sexual activity...'.[122]

Missouri And The Exclusion Of Condom Use As A Defence

It is only Missouri that has expressly disregarded the Commission's recommendations by assimilating a legislative framework that stipulates the exclusion of condom use as a defence.[123] There is an advantage that can be attributed to this statute as it conveys precision, but the provision disregards any theoretical foundation or policy basis for the exclusion of condom use. There is no consideration given to the probability of harm and it is contrary to public health

[120] http://www.cdc.gov/hiv/prevention/programs/condoms/ accessed 20 April 2015
[121] Above ch1 p34
[122] Kathleen M Sullivan and Martha A. Field, 'Aids and the Coercive Power of the State' (1988) 23 Harvard Civil Rights-Civil Liberties Law Review 139, 185
[123] Mo. Rev. Stat § 191.677 (2014)

initiatives.[124] The offence requires exposure to the virus, but it is evident that the legislators did not perceive the importance of balancing the social utility of sexual interaction, the magnitude of harm and the probability of harm. The exclusion of condom use as a defence also conveys a message that their use is immaterial to individuals who are already infected with the virus.

Arkansas And The Rejection Of Condom Use As A Defence

Generally, if there is no expressly stated provision as to the inclusion of condom use, the defence will not be accessible to a defendant.[125] Any assertions by a defendant that he has utilised protective measures have been disregarded by several State's appellate courts. For example, in *State v White,*[126] the Supreme Court of Arkansas did not consider the defendant's contention in relation to condom use, as it was determined that sufficiency of evidence favoured the State.[127] The statute does not provide any assistance as there is reference to various activities that pose virtually no risk of transmission, therefore, the legislator placed emphasis on the magnitude of harm, implying that condom use is irrelevant. The court affirmed that the offence was committed once a defendant had sexual intercourse with an unsuspecting complainant.[128] There was no discourse concerning unprotected intercourse, thereby inferring that the statute applied to unprotected and protected intercourse. There are assertions that failing to facilitate condom use as a defence may prove detrimental in

[124] http://www.cdc.gov/hiv/prevention/programs/condoms/ accessed 20 April 2015
[125] However, see *State v Rhoades,* 848 N.W.2d 22, 27-28 (Iowa 2014)
[126] *State v White* 370 Ark. 284 (2007)
[127] ibid 289
[128] ibid 290

raising awareness of their effectiveness in reducing the virus being transmitted.[129] Perone submits that States that are disregarding the defence of condom use are indirectly suggesting that protective measures are ineffective in preventing the virus being transmitted.[130]

Louisiana And Tennessee And The Exclusion Of Condom Use

Appellate courts in other States also appear to have declined the opportunity to afford any real deliberation of condom use as a defence. In *State v Gamberella*,[131] a case heard in the Court of Appeal of Louisiana, the court would not explore the defence, and the judiciary were inattentive to the defendant's submissions in relation to the use of protective measures. The lack of interest by the Court in Louisiana is perplexing, as the provision in Louisiana stipulates that a defendant must act with an intention and it is plausible to anticipate that the use of condoms may have negated that intent. The judiciary took a contrary position, and held that the intent of the defendant was established when he knew that he was HIV+, and that he could transmit the virus to another. The Criminal Appeals Court of Tennessee has also afforded no deliberation on the matter, and the Court muddied the waters as to the availability of the defence. In *State v Bonds*[132] it was stated that:

> "…*the majority of the convictions were upheld without evidence of an "exchange" of bodily fluids. Indeed, our prior case law's emphasis on "unprotected" sex supports the conclusion that "exposure" means simply to submit to a risk of contact with bodily fluids, such a risk being substantially*

[129] Angela Perone, 'From Punitive to Proactive: An Alternative Approach for Responding to HIV Criminalization that Departs from Penalizing Marginalized Communities' (2013) 24 Hastings Women's Law Journal 363
[130] ibid 386
[131] *State v Gamberella,* 633 So.2d 595 (La. Ct. App. 1993)
[132] *State v Bonds,* 189 S.W.3d 249 (Tenn. Ct. App. 2005)

more prevalent in unprotected sex than when some form of prophylactic is utilized."[133]

The convoluted dictum in *Bonds,* articulated above, fails to accord due consideration to whether condoms may act as a defence. It merely signifies an acknowledgement of the levels of risk attributed to intercourse, and is inconclusive in verifying whether the court recognises that condom use may form the basis of a defence. The availability of condom use as a defence may require reconsideration following the recent Supreme Court of Tennessee's decision in *State v Hogg.*[134] The case did not concern condom use, but it was stated that the risk of transmission must be 'more definite than a faint, speculative risk',[135] and it can be argued that the risk of infection can be speculative if protective measures have been used.

In contrast to the dicta of appellate court of Tennessee in *Bonds*, that neither confirmed or disregarded the defence, a number of academicians have rejected condom use as a prevailing defence. Markus[136] proposes that condoms are not conclusive in impeding transmission, and should, therefore, not act as a defence.[137] Schulman also specifies that because of the deficiencies that are intrinsically linked to condoms that these protective measures should not be considered to be an alternative defence.[138] It is conceded that there may be deficiencies that can be identified with condom use, but this does not superimpose a conclusive rationale for excluding their use as a defence. This is all the more evident when there have been no case before the courts where the virus has been transmitted when the defendant

[133] *State v Bonds,* 189 S.W.3d 249, 259 (Tenn. Ct. App. 2005)
[134] *State v Hogg* 448 S.W.3d 877; 2014 Tenn. LEXIS 668
[135] ibid 889
[136] Mona Markus, 'A Treatment for the Disease: Criminal HJV Transmission/Exposure Laws' (1999) 23 Nova Law Review 847
[137] ibid 870 -871
[138] Eric L. Schulman, 'Sleeping With the Enemy: Combating The Sexual Spread of HIV-AIDs Through a Heightened Legal Duty' (1996) 29 John Marshall Law Review. 957, 986

has used a condom. Studies also demonstrate the effectiveness of condom use when they are correctly and consistently used as a protective measure.[139] Under those conditions they significantly reduce the risk of the virus being transmitted. Criminalisation should not include those who have used condoms, and it is unrealistic to assume that there are activities where it is certain that transmission cannot transpire, something that other states appear to have accepted.

Expressly Stated Statutory Provisions That Allow Condom Use

The use of protection forms the basis of a statutory defence within a minority of States.[140] Illinois is one of the states that accommodate condom use in a statutory form. The legislation in Illinois stipulates that:

> "(*a) A person commits criminal transmission of HIV when he or she, with the specific intent to commit the offense:*
>
> *(1) engages in sexual activity with another without the* ***use of a condom*** *knowing that he or she is infected with HIV;* " (Emphasis added)

It is obvious that the aforementioned provision encompasses condom use as a defence. This statute, and also the legislative responses of California, Iowa and Minnesota, are definitive and translucent, thereby leaving no ambiguity as to the availability of the defence.[141] It is observable that if the statute is sufficiently worded then there can be no contentions as to the availability of the defence.

[139] Above ch1 p33 - 34
[140] Cal. Health & Safety Code § 120291 (2014); Minn. Stat. § 609.2241(2014); 720 Ill. Comp. Stat. § 5/12-5.01; Iowa Code § 709D.2
[141] Minn. Stat. § 609.2241(2014); 720 Ill. Comp. Stat. § 5/12-5.01; Iowa Code § 709d.2; Cal. Health & Safety Code § 120291 (2014); put Iowa in and california

Condom Use As A Defence: The Negation Of Mens Rea

The appellate courts of other States, where the jurisdiction has not enacted a legislative framework for the defence, have held that the use of protective measures can negate the *mens rea* of the offence. In *State v Richardson,*[142] a case heard in the Supreme Court of Kansas, it was held that use of condoms may be relevant when considering whether the defendant had formed an intention to expose the complainant to the virus.[143] It was stated that:

> "*[Kansas' Statute] not only requires proof that the defendant knowingly engaged in sexual intercourse, but it also requires evidence of a specific intent to expose the defendant's sexual partner to a life-threatening communicable disease. Thus, under our statute, condom use can be germane to the defendant's specific intent*."[144]

The use of condoms ought to exculpate a defendant when inculpation is based upon a fault element of intention or recklessness. Their use is indicative in ascertaining whether the defendant intended to transmit the virus.[145] It is apparent that a defendant who has used protective measures has endeavoured to remove the risk of the complainant becoming infected with the virus. It may be that the onus is upon the defendant to act in a responsible manner, but the alternative countenance may be prosecution for having unprotected intercourse with an unsuspecting complainant. Minahan proposes that enabling the defence may 'create a false sense of security' on the part of that complainant, as expectation is upon the infected party to reduce

[142] *State v Richardson* 289 Kan. 118; 209 P.3d 696; 2009 Kan. LEXIS 180
[143] ibid 128
[144] ibid 128 -129
[145] Margo Kaplan, 'Rethinking HIV-Exposure Laws' (2012) 87 Indiana Law Journal 1517, 1545

the risk.[146] However, it would seem irrational for an infected individual not to use a condom if he knew that their use may form the basis of a defence or negate the *mens rea* of the criminal sanction.

The potential for the negation of the *mens rea* of the offence, and consequential exculpation, is primordial in a number of statutes, notably Washington. The legislative framework in Washington necessitates that a culpable defendant must intend to transmit or expose the complainant to the virus.[147] Judicial opinion, from the particularised jurisdiction, infers that the use of condoms demonstrates a lack of intent, although this correlation to the defence, is more tenuous in practical reality. In *State v Stark,*[148] a case heard by the Washington's Court of Appeal, emphasis was made throughout the judgment of the defendant committing the offence by having unprotected intercourse.[149] An acceptance of condom use as a defence may be inferred from another case that was heard by the Court of Appeal in Washington.[150] In *State v Whitfield,*[151] a case concerning sexual transmission and exposure through unprotected intercourse, an expert's opinion of exposure was examined. It was stated by that expert that exposure equated to unprotected oral, anal or vaginal intercourse, thereby implicating that condom use is a relevant consideration, however, the court did not express any concurrence with the expert's testimony in their judgment. [152]

[146] W. Thomas Minahan, 'Disclosure Before Exposure: A Review of Ohio's HIV Criminalization Statutes' (2009) 35 Ohio Northern University Law Review 83, 106
[147] Wash. Rev Code § 9A.08.010 (2014)
[148] *State v Stark* 66 Wash.App. 423, 832 P.2d 109 (1992)
[149] ibid
[150] *State v Whitfield* 134 P.3d 1203 (2006); 132 Wash. App. 878
[151] ibid
[152] ibid [48]

The relevance of condom use in reducing the risk of becoming infected is pivotal in its utilisation as a defence or the negation of *mens rea,* and currently there have been no cases of transmission when protection has been used. Whilst there is a stigma attached to an individual who is HIV+, the allowance of the defence must be accessible as holistically it will reduce the number of infections per year. An alternative suggestion is that the use of condoms should serve as a mitigating factor when sentencing a defendant, and this would encourage their use and correspond with public health initiatives.[153] A defendant in those circumstances would still be inculpated, even when he has acted responsibly. There would be no incentive to use precautions as the vigilant defendant would still be subject to criminal sanctions.

U.S. States And The Acceptance Of The Presidential Commission's Proposal In Relation To Condom Use

The final categorisation of statutory provision within respective U.S. States permits the use of condoms on the proviso that the defendant has already disclosed their sero-status to a prospective sexual partner. In North Carolina and North Dakota, the legislative framework stipulates words to that effect thereby connoting condom use, in isolation, to be irrelevant.[154] It seems that the provisions within these states are following the recommendations of the Commission, but are placing an undue burden upon a defendant to disclose their status, even when the risk of transmission is significantly reduced. There are suggestions that disclosure and condom use serves

[153]Erin McCormick, 'Strengthening the Effectiveness of California's HIV Transmission Statute' (2013) 24 Hastings Women's Law.Journal 407, 426
[154] 10A N.C. Admin. Code 41A.0202; N.D. CENT. CODE § 12.1-20-17 (2014).

the purpose of protecting those who are unsure as to what they have consented.[155] This concern would be eradicated if the recommended statutory provision on consent herein were enacted, as a potential sexual partner would need to be fully aware of the risks associated with having unprotected intercourse with an infected defendant.[156]

The statutory defence of condom use and disclosure has its proponents. For example, Sullivan and Field advocate the use of precautions and disclosure by submitting that:

> "*It more clearly imposes on persons with AIDS and AIDS carriers affirmative duties, as a condition of engaging in sexual intercourse, to disclose their condition to their sexual partners, to obtain their partners' knowing consent, and to use precautions such as condoms. Such a statute has a more realistic chance of influencing behavior, because it permits a person to pursue a sexual relationship if he complies with these affirmative duties.*" [157]

Sullivan and Field do not consider that an individual should be given the opportunity to consent to unprotected intercourse, even when that would increase the risk of transmission. By facilitating a hard paternalistic approach to unprotected sexual liaisons the provisions preclude any right to intimate connection, procreation and the autonomy of the prospective partner. The allowance of a defence of condom use in isolation would also allow individuals to pursue sexual relationships, and would act as a greater incentive to individuals to use protective measures. Newman legitimately recommends a defence that is based upon protective measures as their use is an important factor that assists in reducing the risk of infection, even if it has

[155] Sullivan and Field (n 122) 182
[156] Above ch3 p211 - 212
[157] Sullivan and Field (n 122) 186

an impact upon the frequency of a defendant disclosing their status.[158] Thus, the defence of condom use ought to be an alternative to, but not replace, disclosure. If the ultimate aim is to encourage condom use then indubitably a defence of protective measures affords a more solid foundation that encourages individuals to be proactive in their use. By allowing condom use in isolation would provide a further juncture for a defendant to act responsibly. If every individual who has contracted the virus used a condom, under the principle of unity, the virus would eventually be eradicated.[159] Therefore, consent and condom use should be distinct, as should an undetectable viral load, and this will now be considered.

U.S. State Law And The Risk Of Transmission: The Relevance Of Viral Load

The Presidential Commission proposed that states enact legislation that would criminalise conduct that,'… according to scientific research, is[sic] likely to result in transmission of HIV'. [160] It is conceivable that the level of a defendant's viral load may be relevant to the likelihood of risk of the virus being transmitted, and may form the basis of another defence. There are studies that stipulate that if the defendant's viral load is consistently undetectable for a period of six months then the virus cannot be transmitted.[161] A low viral load also significantly reduces the risk of the virus being transmitted.[162] The majority of States have not considered, or continue to disregard, the relevance of a defendant's viral load. There are only two enacted statutory provisions that have the potential to examine the relevance of a defendant's viral

[158] Sarah J Newman, 'Prevention, Not Prejudice: The Role of Federal Guidelines in HIV-Criminalization Reform' (2013) 107 Northwestern University Law Review 1403, 1422
[159] Steven D. Pinkerton and Paul R. Abramson, 'Effectiveness of Condoms in Preventing HIV Transmission' (1997) 44 Social Science and Medicine 1303, 1310
[160] The Presidential Commission (n 119) 131
[161] Pietro Vernazza 'and others (n 36)
[162] Above ch1 p34

load.[163] There are also judicial precepts that recognise that the defendant's viral load may be a factor that ought to be taken into account.[164] Other State legislators have taken an alternative stance by disregarding the probability of harm, and primarily focus upon the magnitude of harm; this appears to be a recurrent theme within the majority of states.

Idaho: An Expressly Stated Statutory Provision On Viral Load?

Idaho's statute facilitates the potential for the defence of an undetectable viral load.[165] The provision states that:

> " *(3) Defenses:*
>
> *… (b) Medical advice. It is an affirmative defense that the transfer of body fluid, body tissue, or organs occurred after advice from a licensed physician that the accused was noninfectious*."[166]

The statute is clear in that it enables a defence when the virus cannot be transmitted. There is, however, no articulation to profess how the defence corresponds to an undetectable viral load. It is also heavily reliant upon a medical professional confirming that the defendant cannot transmit the virus. This provides the judiciary with the appropriate mechanism to clarify that an undetectable viral load is within the ambit of the legislation. The trial courts of Idaho have taken the contrary premise, and disregarded that section of the statute by allowing a defendant with an

[163] Idaho Code Ann. § 39-608 (2014); Iowa Code § 709D.2 (2014)
[164] *State v Rhoades,* 848 N.W.2d 22, 27-28 (Iowa 2014)
[165] Idaho Code Ann. § 39-608 (2014)
[166] Idaho Code Ann. § 39-608 (3)(b) (2014)

undetectable viral load to plead guilty.[167] The provision, therefore, appears to be devoid of any substance. This disregard of probative evidence is particularly disappointing when the wording of the statute is clear. The judiciary neglected to consider any literature that illustrates the significance of scientific research pertaining to the likelihood of infection. Furthermore, to be able to determine that the defendant has an undetectable viral load their status must be consistently monitored by a health care professional. Criminalising a low or undetectable viral load, Waldman denotes, is an incident of the accident fallacy.[168] The generalisation of the law is failing to take into consideration the specifics of an individual case and therefore the law is being 'inappropriately applied'.[169] This is at its most evident in Idaho.

Iowa And Judicial And Legislator Acceptance Of Viral Load As A Defence

The may be no acceptance of the relevance of a defendant's viral load in Idaho, but the contrary position can be surveyed in Iowa. Recent developments in Iowa have indicated that the defendant's viral load will be a relevant factor in ascertaining whether there is a risk of the virus being transmitted. The previously enacted legislative framework of Iowa stated that:

[167] See *State v Thomas* 154 Idaho 305 (Ct. App. 2013): the defendant had pleaded guilty even though he had an undetectable viral load. The Court denied the defendant the motion to withdraw his guilty plea as he stated that he was not forewarned about the severity of the custodial sentence. There was no discussion of his viral load within the judgment as the appeal was not based upon this issue. http://www.washingtonblade.com/2014/06/13/iowa-high-court-reverses-conviction-hiv-criminalization-case/ accessed 23 April 2015 also see Perone (n 129) 381

[168] Ari Ezra Waldman, 'Exceptions: The Criminal Law's Illogical Approach to HIV-Related Aggravated Assaults' (2011) 18 Virginia Journal of Social Policy and Law 550, 561: "The Accident Fallacy occurs when a general rule is applied to a specific situation in which the rule-because of unique individual facts, or "accidents"-is inapplicable. The mistake occurs when the general rule is applied inappropriately so it misses salient differences in a heterogeneous population and fails to recognize exceptions where they should exist or when a rule of thumb is used to come to over-inclusive conclusions. It has two steps: (1) generalize about a population, and (2) incorrectly use that generalization to describe a unique subset of that population."

[169] ibid 564

> "*1. A person commits criminal transmission of the human immunodeficiency virus if the person, knowing that the person's human immunodeficiency virus status is positive, does any of the following:*
> *a. Engages in intimate contact with another person.*
> *. . . .*
> *b. "Intimate contact" means the intentional exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of the human immunodeficiency virus."*[170]

The former provision in Iowa, identified above, reveals in stark form an absence of any expressly stated provision that could be ascribed to a defendant's viral load, and the statute signified that the offence is committed if a HIV+ defendant engages in 'intimate 'contact', 'that could result in transmission'. The lack of an appropriately worded legislative framework was highlighted in judicial pronouncements. In *State v Rhoades,*[171] a case heard in the Supreme Court of Iowa, it was held that the court could no longer take judicial notice of the defendant having the potential to transmit the virus when he has an undetectable viral load:

> "*With the advancements in medicine regarding HIV between 2003 and 2008, we are unable to take judicial notice of the fact that HIV may be transmitted through contact with an infected individual's blood, semen or vaginal fluid, and that sexual intercourse is one of the most common methods of passing the virus to fill in the gaps to find a factual basis for Rhoades's guilty plea*."[172]

The court in *State v Rhoades*[173]acknowledged that the level of risk may become so insignificant that it no longer poses a likelihood of the virus being transmitted. The appeal was upheld, and it was clear that there was no longer an acceptance, by the judiciary in Iowa, that sexual contact can potentially transfer the virus to another

[170] Iowa Code § 709C.1
[171] *State v Rhoades,* 848 N.W.2d 22, 27-28 (Iowa 2014)
[172] ibid 33
[173] ibid

when the defendant has a low or undetectable viral load and this is replicated within the new statutory provision:

> "3. "Practical means to prevent transmission" means substantial good faith compliance with a treatment regimen prescribed by the person's health care provider, if applicable, and with behavioral recommendations of the person's health care provider or public health officials, which may include but are not limited to the use of a medically indicated respiratory mask or a prophylactic device, to measurably limit the risk of transmission of the contagious or infectious disease. "[174]

The provision is clear by stipulating that if an individual follows the, 'treatment regimen prescribed by the person's health care provider' he will be considered to have taken steps to prevent transmission of the virus. The statute may have benefited from more precise wording, but it can be seen that the legislator is referring to the use of antiretroviral medication, and the defendant's viral load. Furthermore, the decision that has emanated from *Rhoades* may now form the basis of subsequent appeals within other jurisdictions, particularly if the contested statute considers the offence committed when there is a risk of the virus being transmitted.[175]

U.S. *States That Have Not Considered The Defendant's Viral Load*

The decision in *Rhoades,*[176] and the new legislative framework in Iowa, can be considered positive developments, however, the facilitation of the defence of an undetectable viral load is not apparent when surveying other jurisdictions within the United States. There has been no allowance attributed to the defendant's viral load

[174] Iowa Code § 709D.2 (2014)
[175] For example: Tenn. Code Ann. § 39-13-109 (2014)
[176] *State v Rhoades,* 848 N.W.2d 22 (Iowa 2014)

in the statutes or case law precepts. For example, in Nevada, a defendant had an undetectable viral load, but pleaded guilty to the statutory offence of exposing another to the virus on the basis that he would be convicted of a lesser charge.[177] It is evident that there is no consideration of the relevance of a defendant's viral load. Further disregard of the significance of a viral load can be seen in *State v Richardson,*[178] a case heard in the Supreme Court of Kansas, where the defendant also raised the issue of their undetectable viral load. Throughout the judgment there was superficial discourse of the viral load issue, but ultimately the defendant's undetectable viral load was not fully considered.[179]

The current position is that the majority of statutes are 'overbroad' as the law does not compartmentalise individuals into those who act in a culpable manner, and those who act responsibly by ensuring that they have consistently had an undetectable viral load.[180] It is obvious that these provisions are not accounting for the advancements of preventative measures within the medical sphere. Newman expresses the importance of the medication by stipulating that the use of antiretroviral therapy has changed HIV from a 'death sentence', and it is unfortunate that the law has not kept up with medical advancements.[181] The advancement in preventative medicine should, but has not, lead to many statutory amendments.[182] By constructing a legislative framework that takes into account the concentration of

[177] Rashida Richardson, Shoshana Golden and Catherine Hanssens, ' Ending & Defending Against Hiv Criminalization A Manual For Advocates: Volume 1 State And Federal Laws And Prosecutions' , 149 http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/HIV%20Crim%20Manual%20%28updated%204-3-15%29.pdf accessed 21 April 2015
[178] *State v Richardson* 289 Kan. 118; 209 P.3d 696; 2009 Kan. LEXIS 180
[179] ibid
[180] Perone (n 129) 400
[181] Newman (n 158) 1410
[182] Kaplan (n 145) 1566

the virus within the defendant's blood would denote that an undetectable and possibly a low viral could form the basis for a defence.

The abundance of statutes and cases in the United States demonstrate that there is generally no consideration of the defendant's viral load by legislators or the judiciary. It emerges that it is whether the defendant is HIV positive that is the crux of the matter. Disregard of the viral load factorisation is an affront to the scientific communities' research on the relevance of the viral load. Perone identifies the deficiencies within the criminal law on HIV transmission/ exposure and submits that such statutory provisions:

> *"…produce contrary results and actually increase misconceptions about HIV transmission by criminalizing people with HIV regardless of a person's likelihood of transmitting HIV because of condom usage, viral load, and/or engaging in activity with a very low or nonexistent likelihood of transmission."* [183]

It is bewildering that a defendant who poses less of a risk can still be subject to the same criminal sanctions as someone who intends to transmit the virus.[184] If a defendant is fully aware of the level of their viral load, and that the virus cannot be transmitted, it seems irrational that these individuals are subject to prosecution when they pose virtually no risk to a sexual partner.

Despite research that signifies the relevance of a defendant's viral load, States have not amended their statutes to accommodate these medical advancements. Only two statutory provisions express an acceptance of circumstances where the virus cannot

[183] Perone (n 129) 379
[184] ibid 400

be transmitted, but judgments from Idaho have disregarded a defendant's undetectable viral load.[185] The judiciary and legislator within Iowa have adopted a contrary approach by acknowledging the relevance of an undetectable viral load.[186] What is apparent from the exposition of the current position in the United States is that the relevance of an undetectable viral load should not be left to the judiciary to consider in isolation, and that it necessitates an expressly stated statutory footing.

The United States And The Criminalisation And Decriminalisation Of Sexual Activity

The Presidential Commission specified that HIV+ individuals whose conduct posed a significant risk of harm should be accountable for their actions.[187] The risk of the virus being transmitted depends upon a number of factors including the type of sexual activity. This has been confirmed by empirical studies that specify that certain types of intimacy pose less of a risk of transmission than other intimate acts.[188] This does not denote that the risk of the virus being transmitted has been accommodated by all of the States that have enacted HIV specific legislation. Newman is concerned that these States did not consider the recommendations of the Presidential Commission by targeting modes of transmission that were negligible.[189] It emerges that the significant majority of States do not consider the likelihood of the virus being transmitted, and the preponderance of statutory provisions do not define the type of sexual activity that is to be prohibited.[190] Thus, there is a diverse legislative

[185] Idaho Code Ann. § 39-608 (2014); Iowa Code § 709D.2 (2014)
[186] *State v Rhoades,* 848 N.W.2d 22, 33(Iowa 2014); Iowa Code § 709D.2 (2014)
[187] The Presidential Commission (n 119) 130 -131
[188] Above ch1 p32
[189] Newman (n 158) 1418
[190] Above ch3 p173-187

framework within the United States on the criminalisation of HIV, and the type of prohibited sexual activity. For current purposes the focus will be on two main categorisations: States that ensure that all types of sexual activity[191] are encapsulated by the legislation; and States that have, or have attempted to restrict prosecutions to specific sexual acts.[192]

Exposure To HIV Through A Broad Spectrum Of Sexual Activities

There are a number of States that have expressly stipulated an extensive list of prohibited sexual activities.[193] Wolf suggests that the criminalisation of activities that pose no risk emanates from the legislators utilisation of the wording of other criminal offences: 'it seems likely that this result is the unintentional effect of adopting definitions from sexual assault or rape statutes'.[194] It may also have been the outcomes of the legislator drafting the statute in a manner that requires a defendant to always disclose their sero-status to prospective partners. Whatever the motive these provisions have been criticised for failing to take into account the risk of harm,[195] and they are, 'all consistent in one way: they do little to link the actual risk of infection with violation of the law.'[196] These wide-ranging statutes can be surveyed, rather ominously, in a number of states.[197] Two of these States are Arkansas[198] and Michigan,[199] where the individuated statutes criminalise:

[191] Ark Code § 5-14-123 (2012); Mich. Comp. Laws Ann. § 333.5210
[192] Cal. Health & Safety Code § 120291 (2014); 720 Ill. Comp. Stat. § 5/12- 5.01; Kan. Stat. Ann. § 21-5424 (2014)
[193] Ark Code § 5-14-123 (2012) ; Mich. Comp. Laws Ann. § 333.5210
[194] Leslie E. Wolf and Richard Vezina, 'Crime And Punishment: Is There A Role For Criminal Law In Hiv Prevention Policy?' (2004) 25 Whittier Law Review 821, 851
[195] Christina M Shriver, 'State Approaches to Criminalizing the Exposure of HIV: Problems in Statutory Construction, Constitutionality and Implications' (2001) 21 Northern Illinois University Law Review 319, 326
[196] James B. McArthur, 'As the Tide Turns: The Changing HIV/AIDS Epidemic and the Criminalization of HIV Exposure' (2009) 94 Cornell Law Review 707, At 719
[197] For example see: MINN. STAT. § 609.2241 (2014) ;OHIO REV. CODE ANN. § 2903.11 (E) (4)(2014)
[198] Ark Code § 5-14-123 (2012)
[199] Mich. Comp. Laws Ann. § 333.5210

> *"… sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into a genital or anal opening of another person's body*."[200]

It is evident that Arkansas and Michigan's statutes encompass a number of activities that pose virtually no risk of the virus being transmitted. The provisions extend culpability to conduct where an HIV+ individual may not have physically come into contact with the sexual organs of the complainant. Evidently, emphasis is placed upon the seriousness of infection with no consideration of the risk of the virus being transmitted. This is an affront to contemporary scientific literature that has reviewed the type of sexual activity, and the possibility of the virus being transmitted.[201] The disparity of this type of legislative framework is apparent, and Galletly and Pinkerton propose that it is 'unacceptable' for statutes to include activities that pose no risk of transmission.[202] These provisions have invariably achieved the echelons of 'unacceptable' by including activities that pose virtually no risk of transmission. By encompassing an extensive range of activities without due consideration of the risk only further exacerbates the stigma that is attributed to the virus. It appears to have been a 'knee-jerk' reaction to the epidemic and reinforces the presumption that sexual activity with an HIV+ individual is itself a harm.[203] The extent of the prohibited conduct is also detrimental to public health initiatives, and conveys the message that HIV+ individuals should abstain from sexual activities. [204] In these provisions it is the HIV status of an individual that appears to be of paramount importance.[205]

[200] Mich. Comp. Laws Ann. § 333.5210 (2)
[201] Above ch1 p32
[202] Galletly and Pinkerton (n 42) 335
[203] Kaplan (n 145) 1536
[204] Wolf and Vezina (n 194) 859
[205] Newman (n 158) 1426

Challenging The Inculpatory Sexual Activities in Michigan's Statute

In *State v Flynn,*[206] the breadth of Michigan's statutory provision was unsuccessfully challenged. The case involved allegations of exposure due to unprotected intercourse, and the Court of Appeals in Michigan rejected the defendant's contention that the statute was 'too broad' for defining sexual penetration to include the use of 'objects'. The challenge was disregarded, as the activities that Flynn had partaken in were not those that he was challenging. Markman J stated that:

> "*This case, which does not involve a charge that defendant used an object to commit sexual penetration of the victim, requires the same conclusion. Defendant cannot challenge the scope of M.C.L. § 333.5210; MSA 14.15(5210) as overbroad where his charged conduct is encompassed by the language of the statute."*[207]

The above passage places emphasis upon court restrictions, addressing simply a bespoke concern, as it did not embrace the conduct that formed the basis of the appeal.[208] Flynn was unable to dispute the validity of the statute, as he had been convicted of exposure due to unprotected intercourse, and this did not include the use of objects.[209] The judgment has not assisted in determining whether the wording of the statute is appropriate. Currently, there have been no further appeals on the matter; it seems that any type of sexual exposure is within the 'umbrella' of potential criminalisation.

[206] *State v Flynn* 1998 WL 1989782 (Mich.App.)
[207] ibid
[208] See *Broadrick v. Oklahoma,* 413 U.S. 601, 614–615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).
[209] *People v. Jensen*, 586 N.W.2d 748, 751-52 (Mich. Ct. App. 1998)

It is only substantial risks that ought to be criminalised, thereby eradicating the 'over-inclusiveness' of these statutes.[210] To overcome this 'over-inclusiveness' it has been suggested that these statutes replace the list of prohibited sexual activities with terms such as 'likely to transmit'. [211] Adopting this type of terminology would appear to correspond to the risk of serious harm, but there is trepidation linked to such an approach.[212] This can lead to a lack of certainty.[213] Any reform of these statutes should expressly state what is 'unnecessary risk taking',[214] something that Illinois and the Californian provisions have taken into consideration.

States That Restrict Criminalisation To Certain Types of Sexual Activity

An opposing postulation can be surveyed in California's and Illinois' statutory provisions.[215] It is only the most high-risk types of sexual conduct that are criminalised in California and Illinois. This corresponds to scientific literature that acknowledges that unprotected sexual intercourse is most likely to transmit the virus. It also denotes that there may have been contemplation of the harm principle, as previously defined.[216] By expressly stating what type of activity is prohibited creates certainty and enables individuals to tailor their conduct in order to engage in a responsible manner. The advantages and countervailing arguments regarding the sufficiency of the Californian statutory definition of sexual activity has already been deliberated in chapter three in relation to transmission and exposure.[217] The certainty within the Californian and Illinois provision is not replicated within the Floridian

[210] Kaplan (n 145) 1540
[211] Galletly and Pinkerton (n 42) 330
[212] Above ch3 173-187
[213]Galletly and Pinkerton (n 42) 330
[214] McArthur (n 196) 737
[215] Cal. Health & Safety Code § 120291 (2014); 720 Ill. Comp. Stat. § 5/12- 5.01; Kan. Stat. Ann. § 21-5424 (2014)
[216] Above ch3 p150 - 154
[217] Above ch3 p187-188

statute where the judiciary have provided conflicting accounts of a definition of sexual intercourse.

Florida's Statute And The Uncertain Approach to Sexual Intercourse

Florida's statute prohibits exposure through sexual intercourse, and the judicial precepts from this jurisdiction have not easily identified the restricted activities.[218] The provision has received extensive judicial scrutiny, and sexual intercourse has been interpreted to be exclusive to vaginal penetration by the penis, and contrastingly, to encompass other types of sexual activity.[219] There has been no consideration of the statistical probability of transmission within any of the judgments. In *State v L.A.P,*[220] a case where the defendant exposed the unsuspecting complainant to the virus through oral intercourse and digital penetration, the Court of Appeal in Florida held that sexual intercourse was exclusive to vaginal penetration by the penis.[221] Two further appellate decisions have since extended the definition of sexual intercourse to include anal, vaginal and oral intercourse. In *State v D.C,*[222] the appellate court interpreted the statute so that it included all of the aforementioned activities. The definition from *D.C.* was affirmed by the majority in *State v Debaun*.[223] There was a lack of comity within *Debaun* and Shepherd CJ dissented, suggesting that the majority were mistaken for neglecting to consider previous decisions, and for utilising a dictionary definition of sexual

[218] Fla. Stat. Ann. § 775.0877 (2014) 384.24
[219] *State v LAP* 62 So. 3d 693; 2011 Fla. App. LEXIS 8462; *State v Debaun* 129 So. 3d 1089; 2013 Fla. App. LEXIS 17224; *State v D.C.* 114 So. 3d 440; 2013 Fla. App. LEXIS 8595
[220] *State v LAP* 62 So. 3d 693; 2011 Fla. App. LEXIS 8462
[221] ibid
[222] *State v D.C.* 114 So. 3d 440; 2013 Fla. App. LEXIS 8595
[223] *State v Debaun* 129 So. 3d 1089; 2013 Fla. App. LEXIS 17224

intercourse.[224] Shepherd CJ reasserted that sexual intercourse should be defined as insertion of the male sex organ into female genitalia.[225] What is evident from these judgments is that 'sexual intercourse' may include all types of sexual activity. It is also clear that the judiciary did not adopt a purposive approach to interpreting the statute, and there was no consideration of the uniqueness of the statutory provision, or the statistical probability of the virus being transmitted.

The judicial conflict in Florida, in determining the applicable definition of sexual intercourse, signifies that any legislative framework should be precise, and that this must also correspond with the probability of the risk occurring.[226] A statute necessitates clarification of the parameters of criminal activity, and then there can be no ambiguity as to what will be considered to be culpable conduct. Therefore, culpability should only be based upon activities that, 'reach a certain threshold'.[227] That 'threshold', in cases of exposure, should only be the most riskiest activities, and there has been no reported cases of the virus being transmitted through oral intercourse.[228] The demarcation line must be unprotected anal and vaginal intercourse, even though there are permutations depending upon who is the receptive or insertive partner.

The Divergent Approach To Sexual Activity Within The United States

There are substantial variations as to what will equate to culpable sexual activity within the jurisdictions of the United States. The provisions that have facilitated all

[224] ibid 23
[225] ibid
[226] Markus (n 136) 867 -869
[227] Kaplan (n 145) 1540
[228] http://www.cdc.gov/hiv/risk/behavior/oralsex.html accessed 24 April 2014

types of sexual activity may be described as 'too broad', and as there is no consideration of statistical probability of the virus being transmitted. While it is conceded that HIV can be a life debilitating virus, and therefore the magnitude of harm is particularly relevant, it must be offset with the probability of harm. At some point the risk of transmission must be considered immaterial for criminalisation purposes. The Californian statute is the most suitable in this context, and is considered further in the next section that presents a comparative review of the defences of condom use, viral load, and the type of sexual activity.

A Comparative Extirpation Of The Jurisdictional Approaches To Condom Use, Viral Load And Type Of Sexual Activity

It is evident that in all of the jurisdictions the issue of consent may be raised, and the law is unequivocal regarding this consideration. The differences emanate when considering the other potential defences. In England, the law is uncertain; it lacks clarity in relation to all of the potential defences. *Prima facie* the law is more refined in Canada as condoms and a low viral load together are permissible as a defence.[229] However, the issue of sexual activity has not been addressed by the Supreme Court of Canada, and this needs to be remedied. The respective U.S. State law impart some degree of clarity when assessing whether condom use, sexual activity and viral loads can form the basis of a defence. This is at its most apparent when condom use, viral load and certain types of sexual activity can assist a defendant in terms of exculpation, and this has been seen in statute and relational judicial

[229] *R v Mabior* 2012 SCC 47; *R v D.C.,* 2012 SCC 48

precepts. However, the majority of U.S. States do not accommodate any of the defences, and operate within a constricted boundary.

A Lack Of Uniformity: Condom Use As A Defence

The three jurisdictions are distinct in their approaches to the particularised defence of condom use. In England, there is no certainty as to the accessibility of the defence. But for an observation by Judge LJ in *Dica,* and the prosecutorial discretion of the CPS, there is nothing to suggest that condom use may be a defence.[230] There is no definitive precedent in law that an individual can confidently rely upon. The Canadian approach to condom use is more refined. The decision in *Mabior*[231] confirmed that the use of a condom will not form the basis of a defence as a defendant must disclose their status even when using protective measures: it will, however, be the foundation of a defence if the defendant also has a low or undetectable viral load.[232] This leads to speculation as to whether condom use and a low risk sexual activity may also be a defence. The U.S. State law provides a diverse range of results as to the accessibility of the defence. In one State the statute expressly excludes the defence;[233] whilst States facilitate the defence,[234] and others U.S. State statutes[235] anticipate condom use only when disclosure of HIV status has taken place.

[230] *R v Dica ;* Crown Prosecution Service (n 15)
[231] *R v Mabior* 2012 SCC 47
[232] ibid; *R v D.C.,* 2012 SCC 48
[233] Mo. Rev. Stat § 191.677 (2014)
[234] Cal. Health & Safety Code § 120291 (2014); Minn. Stat. § 609.2241(2014); 720 Ill. Comp. Stat. § 5/12-5.01
[235] 10A N.C. Admin. Code 41A.0202; N.D. CENT. CODE § 12.1-20-17 (2014)

It is, therefore, evident that the English approach is exclusive to that jurisdiction, as none of the other jurisdictions afford the same lack of uncertainty, or reflective considerations. It is conceded that the issue has not been raised at court, and the uncertainty may also emanate from the offence requiring transmission. Canada and the U.S. have addressed the defence in a far broader sense with divergent outcomes to England. The Canadian approach can be compared to those U.S. States that require disclosure and condom use to form the basis of the defence. Both of these jurisdictions expect more than condom use, and do not appear to consider the realistic possibility of the virus being transmitted. It seems that emphasis is placed upon the magnitude of harm. The distinction between these approaches, other than the American States also requiring consent, and Canada expecting condom use with a low or undetectable viral load, is that the American jurisdictions[236] have endorsed the approach by legislative means, whilst in Canada the law has developed through judicial precepts.[237]

It is only a minority of U.S. jurisdictions[238] that facilitate condom use as a defence, and contrastingly only one State[239] that expressly rejects the utilisation of protective measures as a defence. The majority appear to exclude the defence.[240]The rationale for excluding the defence is not apparent, and there seems to be no firm basis for this exclusion. There have been suggestions that they should not be the basis of a defence because they are not 100% effective in preventing the transmission of the virus, and that protective measures are prone to defect.[241] This

[236] ibid
[237] *R v Cuerrier,* [1998} 2 S.C.R 371; *R v Mabior* 2012 SCC 47; *R v D.C.,* 2012 SCC 48
[238] Cal. Health & Safety Code § 120291 (2014); Minn. Stat. § 609.2241(2014); 720 Ill. Comp. Stat. § 5/12-5.01
[239] Mo. Rev. Stat § 191.677 (2014)
[240] Above p301 -309
[241] Above ch1 p33 - 34

still does not afford a convincing justification for excluding their use. This is all the more pertinent when it is widely recognised that their use significantly reduces the risk of infection,[242] and that the use of condoms corresponds with public health priorities. Legislators that have utilised the defence are to be commended as there has been due consideration given to public health initiatives, and significant risk of harm. As already emphasised in the preceding discourse, there has been no prosecutions where the defendant has used a condom and transmitted the virus to another, and the principle of unity further commends the use of condoms.[243]

The Acceptance, The Uncertainty And The Exclusion Of Viral Load Within The Jurisdictions

The relevance of viral load has not been deliberated upon within the English appellate courts. It has not received any judicial consideration, and it has not been an issue that has been raised on appeal. As with condom use, it may be there has been no examination of viral load in these cases as the offence can only be committed if the virus has been transmitted to a complainant. It is apparent that the issue has received consideration within the Canadian and American jurisdictions. The Canadian jurisdiction's Supreme Court has discarded the defendant's low or undetectable viral load: neither can act as a defence when used in isolation.[244] It is expected that the defendant must use a condom and have a low/undetectable viral load to be exculpated.[245] This fails to consider relevant medical studies and has led

[242] Above ch1 p33 -34
[243] Pinkerton and Abramson (n 159) 1310
[244] *R v Mabior* 2012 SCC 47; *R v D.C.,* 2012 SCC 48
[245] Ibid

to indecision as to what entails a realistic possibility of the virus being transmitted.[246] The lower courts have completely disregarded *Mabior* by accepting expert opinion over judicial precedent when acquitting a defendant who had an undetectable viral load and unprotected intercourse.[247] This confirms that the issue needs further consideration by the Supreme Court, and demonstrates the haphazard development of the law on HIV exposure in Canada.

The American jurisprudence, unlike either the Supreme Court of Canada or England, recognises that there have been scientific developments, and that the defendant's viral load may be relevant *per se*. Despite this recognition, however, there are cases where the relevance of the viral load has not been considered.[248] This is at its most obvious in Idaho where the statutory provision expressly stipulates, and provides for a statutory defence that corresponds to an undetectable viral load, but this has not been considered by the judiciary within that jurisdiction. The development of the defence of a low or undetectable viral load has emanated from Iowa's new legislative framework, and this statute has a particularised section that takes into account a viral load.[249] This novel recent initiative is laudable. The judiciary within Iowa have also recognised that there may be 'reasonable dispute' about the likelihood of transmission when a defendant has an undetectable viral load.[250]

[246] *R. v. J.T.C.*, 2013 NSPC 105; *R v Murphy* 2013 CanLII 54139 (ON SC)
[247] *R. v. J.T.C.*, 2013 NSPC 105
[248] See *State v Thomas* 154 Idaho 305 (Ct. App. 2013): the defendant had pleaded guilty even though he had an undetectable viral load. The Court denied the defendant the motion to withdraw his guilty plea as he stated that he was not forewarned about the severity of the custodial sentence. There was no discussion of his viral load within the judgment as the appeal was not based upon this issue. http://www.washingtonblade.com/2014/06/13/iowa-high-court-reverses-conviction-hiv-criminalization-case/ accessed 23 April 2015 also see Perone (n 129) 381
[249] Iowa Code § 709D.2 (2014)
[250] *State v Rhoades,* 848 N.W.2d 22 (Iowa 2014)

The general lack of recognition of a defendant's low/undetectable viral load does not denote that it is not a relevant factor. The World Health Organisation, prosecutorial authorities, and studies, denote that the level of the viral load is important in ascertaining whether the virus can be transmitted.[251] An HIV + individual should be encouraged to reduce their viral load by taking the appropriate medication, and this would ultimately assist in achieving the goal of reducing infections.

A Comparison Of The English, Canadian And American Approaches To Sexual Activity

In England, it is even less obvious as to whether the type of sexual activity may act as a defence: this consideration is not even at an embryonic stage of developmental consideration. This may also be due to the fact that transmission must occur; consequently the judiciary have not needed to consider this as a bespoke issue. The type of sexual activity has been recognised in Canada where the Supreme Court of British Columbia in *JAT,*[252] stated that unprotected anal intercourse[253] did not pose a significant risk of serious harm. Following the decision in *Mabior,* the position of *JAT* is no longer tenable as an authority that unprotected anal intercourse is exculpatory conduct. However, the *Mabior* test of a 'realistic possibility' of transmission is paved with uncertainty, particularly as in *Murphy*[254] the Superior Court of Justice in Ontario stated that there is no requirement of disclosure if the defendant has an undetectable viral load and partakes in a low risk sexual activity.[255]

[251] Crown Prosecution Service (n 15)
[252] *R v J.A.T.,* 2010 BCSA 766
[253] where the receptive partner was HIV+
[254] *R v Murphy* 2013 CanLII 54139 (ON SC)
[255] ibid

It seems that confirmation of the type of sexual activity that is to be criminalised is required.

Consistently with the other defences, the American position is unique in comparison to the English and Canadian jurisdictions. The specific laws on the transmission/exposure to HIV cover the full spectra of sexual activities.[256] This denotes that some jurisdictions only criminalise unprotected anal and vaginal intercourse,[257] whilst other jurisdictions criminalise all types of sexual activity even if it poses a negligible or no risk of transmission.[258] The risk of transmission is irrelevant in the States that have criminalised all types of activity. Amidst these differing ends of the spectrum sits Florida, imparting no legislative clarity as to the parameters of sexual intercourse.[259] Their statutory provision appears to recognise the probability of harm, but concerns as to what type of activity will equate to exposure have been left for the judiciary to ascertain. This has lead to conflicting judgments and serves to reinforce the assertion that statutory reform is prescient to provide certainty and structure.[260]

Concluding Comments And The Suggested Statutory Provision

The issue of condom use, viral loads and type of sexual activity have not been raised in the English courts, but have been addressed in the Canadian and American legal systems. The distinction may be attributed to the fact that all cases within England

[256] Cal. Health & Safety Code § 120291 (2014); 720 Ill. Comp. Stat. § 5/12- 5.01; Kan. Stat. Ann. § 21-5424 (2014); Ark Code § 5-14-123 (2012) ; Mich. Comp. Laws Ann. § 333.5210
[257] Cal. Health & Safety Code § 120291 (2014); 720 Ill. Comp. Stat. § 5/12- 5.01; Kan. Stat. Ann. § 21-5424 (2014)
[258] Ark Code § 5-14-123 (2012) ; Mich. Comp. Laws Ann. § 333.5210
[259] Fla. Stat. Ann. § 775.0877 (2014)
[260] *State v LAP* 62 So. 3d 693; 2011 Fla. App. LEXIS 8462; *State v Debaun* 129 So. 3d 1089; 2013 Fla. App. LEXIS 17224; *State v D.C.* 114 So. 3d 440; 2013 Fla. App. LEXIS 8595

have involved transmission of the virus, whilst in Canada and the United States transmission is not a requirement. It is still disconcerting that there is such disparity within the comparator jurisdictions. This is at its most evident with the States that have enacted HIV specific legislation, and there is conflicting variations as to the availability of the defences, and underlying predicates. It is unfortunate that the majority of those jurisdictions have not enacted legislation that would facilitate the defence of condom use, viral load or restrict culpability to certain types of sexual activity, and a new statutory pathway is needed to reflect altered societal expectations, and appropriate thresholds of culpability.

Legislation is the appropriate direction as it would eliminate the uncertainty that is evident within England and Canada, and avoid retrospectivity challenges. Both countries demonstrate that the use of non-specific HIV laws denotes that the law can and will develop in a haphazard way. However, the use of legislation has not provided consistency within the U.S. State laws, and it can be asserted that there is a multiplicity of definitional constructs of liability contained in the divergent provisions, but no structured template as to offence-definition modification. This is not to stipulate that all of the HIV specific laws are erroneous, and there are still statutory offences that beneficially accommodate the defences. The specific laws within the U.S. State laws have generally omitted to consider important scientific data, therefore, any new legislation needs to develop with this contemporary awareness.[261] Any proposed legislation would need to specify that the factorisation of condom use, viral load or type of sexual activity within defined circumstances and

[261] As was suggested *R v Mabior* 2012 SCC 47

parameters could be utilised as a defence.[262] This would enable sufferers to continue to engage in sexual activity without the fear of prosecution or rejection, as they would not generally be required to disclose their status within the boundaries of a new offence-definition modification.

It is unfortunate that the English courts have not taken the opportunity to clarify the position, although it is conceded that some of the issues were not identified or raised at the time of *Dica* or *Konzani*. It is suggested that the orthodoxy adopted in Canada, before the Supreme Court decision in *Mabior,* represents the preferred approach to the criminalisation of the sexual exposure/transmission to HIV. Allowing these defences would promote safe sexual practices and be in line with public health policies initiatives:[263] the ultimate goal being to reduce transmission of the virus.

The proposed legislation must take into account condom use, viral load and consider that certain types of sexual activity should be precluded from criminal sanctions. The criminalisation of certain types of sexual activity, and the indirect utilisation of condom use, has already been considered in the chapter three within the purview of a suggested statutory provision, and needs no further elaboration at this point, but for illustrative purposes the provision will be set out below. An expressly stated defence is still necessary in relation to condom use and this is set out below. This would ensure that a defendant would be aware that their correct use may act as a defence to either of the suggested criminal sanctions. The legislation in relation to viral load must be constructed in a manner that promotes the administration of anti-retroviral medication. The benefits of this are twofold: it will encourage individuals to

[262] An evidential burden rather than legal
[263] See generally: Harker and Wright (n 8)

get tested; and encourage defendants to achieve an undetectable viral load. The suggested statutory provision on the defence of condom use, viral load and sexual activity may be stated as follows:

1. Transmission of HIV

A person commits an offence under this statute if he:

(3) Intentionally or recklessly transmits HIV to another through unprotected vaginal or anal intercourse or;

(4) Intentionally exposes another to HIV by having unprotected vaginal or anal intercourse

Unprotected intercourse means that a defendant has not used protective measures to reduce the risk of the virus being transmitted

4. **Defences:**

(1) Protective Measures: Condom Use

Only the correct and consistent use of condoms (protective measures) will form the basis of a defence to the criminal acts of intentional exposure and intention or reckless transmission of HIV

(2) Viral Load

(a) An accused will not be considered to have exposed/ transmitted the virus to another if he had an non-infectious viral load at the time of the sexual act

(b) In order to establish that the accused had a non-infectious viral load the sexual act must have transpired after advice from a medical professional that he was non-infectious

The wording of the suggested legislative defence of condom use ensures that a defendant can rely upon the exculpatory nature, but may still be held accountable if they are not used correctly or consistently. This would ensure that defendants are aware that their use may exonerate them from criminal sanctions, and encourage the correct use of these protective measures. It is also an acceptance that there may be a chance of the virus being transmitted; in practical terms this is unlikely to transpire, but the mechanism is in place if transmission occurs. This may also indirectly encourage disclosure by the defendant.

The preponderance of medical studies encourages the exclusion of a non-infectious viral load from the ambit of criminal sanctions. The first subsection articulates that the defendant can assert that he had a low or undetectable viral load at the time of the sexual contact. This avoids any ambiguity in relation to the defence. It also anticipates that the defendant has the burden of adducing evidence to establish that he had a low or undetectable viral load. This will be a relatively undemanding burden to discharge as the defendants' medical records will confirm their viral load at that time, and will not contravene the defendant's presumption of innocence. The second

element of the suggested statutory provision relies upon Idaho's recognition that the advice must emanate from a legal professional, ensuring that there is a formal requirement to the defence.

Chapter Six

Conclusion

Introduction

This thesis has sought to test the appropriateness of s20 of the Offences Against the Person Act 1861 for inculpation for the sexual transmission/exposure to the HIV virus, and to adumbrate the lack of judicial clarity on substantive issues that has transpired following the utilisation of this antediluvian statutory offence. A lack of a specific legislative framework within England has signified that too much of the onus has been placed upon the appellate courts, and none of the identified concerns herein have been thoroughly reviewed by the judiciary. The overarching aim was to address these concerns by providing a bespoke legislative framework that expressly stipulates what is considered to be criminal conduct, and an apposite gradational threshold for culpability with exempting defences.

These concerns signified that a number of research questions needed to be addressed to test the hypothesis that the utilisation of s20 was seriously flawed. Each question was dealt with in isolation and formed the basis of each chapter. The outcome of the investigation identified that a number of statutory provisions within the comparative jurisdictions were suitably worded to criminalise the sexual transmission/exposure to HIV, whilst acknowledging that there were deficiencies with the judicial precepts from each of the respective countries highlighted.

Dissecting s20, and critically evaluating the leading cases in England, was essential. The restrictive nature of the statute was obvious, as only transmission could be criminalised within that statutory framework, whilst the other jurisdictions emphasised the importance of extending the parameters of criminalisation to certain categories of exposure. A lack of coherence was evident for this fundamental issue, and this was also apparent when critiquing the additional research questions in chapters two - five.

The comparative analysis adopted has confirmed the problems within extant English position, and there is no clarity of the limitations or extent of criminalisation. The result of the research has identified potential solutions, predominantly through novel statutory provisions, and the majority of the recommendations have emanated from already enacted legislation within the bespoke jurisdictions. It is only the requirement of 'knowledge' that has been extracted from judicial precepts. The proposals articulated have formed the conclusions to the four fundamental reform chapters, and these suggest a *de novo* statutory pathway with different culpability thresholds. For clarifications purposes the proposed statute is set out below:

Criminal Transmission of HIV Bill 2014

An Act to legislate for the criminalisation of the sexual transmission or exposure of the Human Immunodeficiency Virus (HIV)

1. Transmission of HIV

A person commits an offence under this statute if he:

(1) Intentionally or recklessly transmits HIV to another through unprotected vaginal or anal intercourse or;

(2) Intentionally exposes another to HIV by having unprotected vaginal or anal intercourse

Unprotected intercourse means that a defendant has not used protective measures to reduce the risk of the virus being transmitted

2. Knowledge of HIV status

A defendant is aware that they have contracted HIV if he:

(1) Actually knows (by testing positive or any other means); or

(2) suspects that he is carrying the virus and that he does have that virus

3. Disclosing HIV status

It is a defence to a criminal charge of transmission or exposure to HIV that the complainant consented to running the risk of acquiring the virus. For that person to consent to running the risk of acquiring the virus:

(1)The defendant must disclose that he has the virus;

(2)That disclosure must take place before any unprotected sexual activity;

(3) The defendant must only partake in that activity if following disclosure he is confident that his prospective partner is aware that there is a risk that the virus may be transmitted

(4) It is for the prosecution to establish that the complainant did not consent

(5) Consent will not form a defence if that person intended to transmit the virus or the complainant desired that they acquire the virus from that person.

4. **Defences:**

(1) Protective Measures: Condom Use

Only the correct and consistent use of condoms (protective measures) will form the basis of a defence to the criminal acts of intentional exposure and intention or reckless transmission of HIV

(2) Viral Load

(a) An accused will not be considered to have exposed/ transmitted the virus to another if he had an non-infectious viral load at the time of the sexual act

(b) In order to establish that the accused had a non-infectious viral load the sexual act must have transpired after advice from a medical professional that he was non-infectious

Recommendation One: A Defendant Who Has Actual Knowledge Of Their Sero-Status Or Is Wilfully Blind Ought To Be Accountable

The first research question addressed the extent of the awareness that a defendant must possess as to their sero-status to be inculpated for the sexual transmission/exposure to HIV. The validity of this question was also tested against the traditional philosophical understanding of knowledge, and the result suggested that criminal sanctions should only be based upon actual knowledge. Within the examination of the general criminal law of the designated jurisdictions it was also confirmed that actual knowledge can be a requirement for a number of offences, but this does not denote that culpability is exclusively attributed to this level of awareness.

This analysis established that wilful blindness, within a legal sense, did not correspond to the philosophical understanding of knowledge, as a suspicion does not equate to belief. An investigation into an alternative rationale for its inclusion had to be examined, and this determined that the 'equal culpability' iteration justified the incorporation of the doctrine. Wilful blindness as an established criminal doctrine within all of the jurisdictions further cemented the possibility of its utilisation in these specific cases. The inquiry further recognized that constructive knowledge was generally excluded within the criminal justice systems.

The findings of this thesis identified that in England there has been no clarification as to the parameters of the knowledge requirement, and the two leading appellate

cases have concerned defendants that had tested positive for the virus.[1] The utilisation of actual knowledge within HIV transmission/exposure cases in Canada was evident; however, a judicial precept emanating from that jurisdiction has confirmed that knowledge can be extended beyond defendants who possess actual knowledge of their sero-status. [2] In the United States, it was illustrated that a number of legislative frameworks within designated States have only accommodated actual knowledge as the requirement, thereby excluding other types of knowledge from consideration.

These U.S. statutes are narrow in ambit, but provide clarity for this essential fault element. The investigation also found that in America a positive test is not the only mechanism to ascertain that a defendants possessed actual knowledge of their sero-status. The Court of Appeal in Ohio, held that a defendant confirming, that he had the virus during a police interview, equated to actual knowledge.[3] An alternative means of establishing actual knowledge was also identified in Illinois, whereby the defendant's family testimony was sufficient to confirm that he had actual knowledge of his sero-status.[4]

Wilful Blindness As A Basis For Inculpation

It is only Canadian judicial directions that provide unequivocal guidance as to the utilisation of a wilful blindness criterion, as an examination of the judicial precepts in Canada identified the Supreme Court decision in *Williams* as the authority that held

[1] *R v Dica*[2004] EWCA Crim 3246 ; *R v Konzani* [2005] EWCA Crim 706; [2005] 2 Cr.App.R. 14
[2] *R v Williams* [2003] 2 S.C.R. 134
[3] *State v. Russell*, 2009 WL 3090190 (Ohio App.)
[4] *State v Dempsey* 610 N.E.2d 208 (Ill. App. Ct. 1993)

that a wilfully blind individual will be considered to have knowledge of their sero-status. The examination of the extant position in England established that there has been no such explicit guidance by the senior courts. In *Dica,*[5] *and Konzani,*[6] Judge LJ on a number of occasions referred to 'knowing', thereby connoting the potential to encompass wilful blindness. There is no binding authority for its inclusion, but the investigation identified that, in England, a Court of First Instance and the prosecutorial authorities, have proposed that wilful blindness is the requisite fault element. None of the respective U.S State provisions that were examined offered any specific guidance as to the utilisation of wilful blindness in cases of sexual transmission/exposure to HIV. There was also no lucidity emanating from the appellate courts within the States as all of the individuals that have been prosecuted have had actual knowledge of their status.

The Proposed Legislative Provision That Includes Actual Knowledge And Wilful Blindness

The US States that criminalised actual knowledge of HIV status confirmed that there are benefits to providing clarification of the knowledge requirement within a specifically drafted statute. These provisions have ensured that there is certainty within the law; however, the knowledge requirement must extend beyond actual knowledge. In answering the first research question it was demonstrated that a defendant who possesses actual knowledge, and those who are wilfully blind, can be considered to be equally aware of their HIV status. A statutory provision must incorporate both, as in either circumstance it can be stated that the defendant 'knew'

[5] *R v Dica*[2004] EWCA Crim 3246
[6] R v Konzani [2005] EWCA Crim 706; [2005] 2 Cr.App.R. 14

of their HIV positivity. Therefore, following the comparative analysis, the recommended statutory provision is structured in this manner:

2. Knowledge of HIV status

A defendant is aware that they have contracted HIV if he:

(1) actually knows (by testing positive or any other means); or

(2) suspects that he is carrying the virus and that he does have that virus

Recommendation Two: Transmission And Exposure Should Be Criminalised

The second research question sought clarification of whether the law in England should be extended to specifically criminalise exposure to HIV. There was no real concern in relation to transmission itself, as it was initially accepted that there is a cogent rationale for criminalising this type of serious harm. The investigation did; however, identify the importance of causation, and this can be addressed with sufficient evidence being adduced to establish that the defendant transmitted the virus to the complainant. It was also demonstrated that only criminalising sexual transmission of HIV was exclusive to England, and it is only the English jurisdiction that has prosecuted individuals when they have transmitted the virus, whereas Canada and the American states have criminalised transmission and exposure. Thus, the more pressing concern that necessitated a thorough examination related to what types of exposure should be criminalised?

An examination of the jurisdictions identified that each country has the potential to criminalise exposure. In England, although there had been no prosecutions, a defendant may be prosecuted under the law of attempts for exposing another to the virus. Further inspection denoted that to criminalise exposure through the law of attempts was inappropriate, as potentially an individual who was not HIV+ may be successfully prosecuted. The findings of this examination also established that criminalisation of exposure is fully functional within Canada and America, but with distinct results. It was shown that the criminal justice systems of both jurisdictions have successfully convicted a number of individuals for exposing another to the virus. At first blush it appeared that the Canadian jurisdiction test of 'a significant risk of harm', that posed a 'realistic possibility of transmission', would accord to the harm principle, and be most suited as the legislative framework. On further examination, it was established that criminalisation of exposure within Canada did not equate to the harm principle and the risk of serious harm. The focus upon the magnitude of harm has left individuals unsure of what conduct will be considered to be exposure. There has been no consideration given by the Canadian judiciary of the probability of harm, and the social utility of sexual interaction; the test that was established was not definitive enough. It was identified that if the risk of serious harm is to be recognised as a rationale for criminalisation then the primary focus should not be upon the magnitude of harm.

An extrapolation of American statutory provisions identified the problems of failing to precisely define the type of conduct that is prohibited. This was recognized in the majority of states' statutes; to the exclusion of California. As there was no precision in these legislative frameworks it has been the judiciary who have defined the

conduct that is considered to be criminal exposure to HIV. The majority of decisions signified that the courts have not counterbalanced the magnitude of harm with the social utility of sexual interaction, or the probability of harm. It has only been the Supreme Court of Iowa, and the current legislative framework within that State, that recognise an appropriate evaluation of the risk of serious harm. All other jurisdictions, with the exception of California, have not attributed any true consideration of the risk of serious harm. The Californian provision has criminalised exposure to HIV with precision, as only the most high risk activities are prohibited. It was evident that there are real benefits to be derived from this statute, as a defendant knows what type of conduct is prohibited. The inquiry established that the legislators in California had given serious consideration to the risk of serious harm.

The Proposed Legislative Framework For Transmission and Exposure

The second research question did not necessitate an in-depth discourse of the criminalisation of sexual transmission of HIV, as from the outset it was clear that this conduct could always be considered to be a serious harm. As the investigation needed to address exposure to the virus this was observed in concurrence with the harm principle and the law of the jurisdictions. The discourse on the extant English and Canadian jurisdictions identified that the utilisation of the general criminal law is inadequate. There is too much uncertainty and unfairness. An examination of the HIV specific legislation in the USA also identified that a legislative framework necessitates careful consideration. It was found that there must be precision in the wording of a statutory provision as this avoids the appellate courts being required to literally interpret a statute, and thereby potentially failing to consider the risk of

serious harm in cases of exposure. For this reason the suggested statutory provision placed much emphasis upon the Californian statute. The proposed legislative framework achieves that aim of precision and identifies two specific offences:

1. A person commits an offence under this statute if he:

(1) Intentionally or recklessly transmits HIV to another through unprotected vaginal or anal intercourse or;

(2) Intentionally exposes another to HIV by having unprotected vaginal or anal intercourse

Unprotected intercourse means that a defendant has not used protective measures to reduce the risk of the virus being transmitted

Recommendation Three: Any Consent Must Be Fully Informed Consent

The third area of concern effectuated upon the hypothesis that within the English jurisdiction the defence of consent is only applicable where the complainant is fully informed. It was acknowledged that an individual should be able to consent to unprotected sexual intercourse with an HIV+ individual, but it was recognised that a complainant may not provide an informed consent on all occasions. To achieve the optimal evaluation of this proposition the validity of the position in England had to be examined against definitions of factual and normative consent, and the legislative and judicial precepts of the Canadian and American jurisdictions. An inquiry into the requirement of consent concluded that a complainant must be fully aware that they

are agreeing to unprotected intercourse knowing that there is a risk that the virus may be transmitted.

The judicial precepts in England did not clarify the extant circumstances of a fully informed consent. There was inconsistent dicta on the essentials of this requirement, as a defendant disclosing their status was deemed adequate, but in other elements of the leading judgments[7] it was stated that the complainant must be 'aware' of the risk of the virus being transmitted. The leading case of *Dica,*[8] illustrates these inaccuracies by presuming that a defendant disclosing their status causes a complainant to be aware of all of the circumstances.[9] This was further convoluted by Judge LJ in *Dica* stating that a complainant may not be consenting to the risk. These inaccuracies are replicated in *Konzani,* but via differing mechanisms.[10] The inquiry also established that the English criminal justice system would allow the defence of implied consent. This reinforced the presumption that the extant position in England was more inclined to factual consent than normative consent.

The inspection of Canada and America identified that there was no uniform approach to consent. There were three distinct methods adopted by legislators and the judiciary: basic; quasi-enhanced; and enhanced disclosure. It was found that a number of jurisdictions had adopted an approach that necessitated the defendant disclosing their HIV status before the complainant would partake in unprotected sexual intercourse. Other jurisdictions had approached the issue by anticipating that

[7] *R v Dica*[2004] EWCA Crim 3246 ; *R v Konzani* [2005] EWCA Crim 706; [2005] 2 Cr.App.R. 14
[8] *R v Dica* [2004] EWCA Crim 1103, 3 All ER 593
[9] *R v Dica* [2004] EWCA Crim 1103, 3 All ER 593. [39]
[10] *R. v Konzani* [2005] EWCA Crim 706 [2005] 2 Cr. App. R [43] [44]

disclosure of ones' sero-status may be sufficient, but there may be circumstances whereby the defendant may need to inform their prospective sexual partner of the risk of infection through unprotected intercourse. The final categorisation signified that a defendant must inform the complainant of their status and the risk of the virus being transmitted.

In Canada, and a number of U.S. States, the requirement was identified as basic disclosure. It was the American statutes that were more definitive with this particularised requirement, demonstrating the benefits of a bespoke statutory provision. In these circumstances, once the defendant had disclosed their status, it was presumed that the prospective sexual partner agreed to unprotected sexual intercourse knowing there are associated risks. In reality, this does not denote that the complainant would be aware of the risks, and the inadequacies of this approach are evident.[11] Basic disclosure denotes that factual consent will be achieved on all occasions, but the deficiencies of facilitating a limited obligation on the part of the defendant are evident. There is no certainty that normative consent will always be attained.

There is, however, certainty of normative consent identified within a number of U.S. State laws. The investigation identified that disclosure of HIV status, and the risk therein, were pre-requisites for the defence of consent to operate. It is evident that this requirement fulfils the obligation of a fully informed consent, but does not articulate the most pertinent approach, as the majority of individuals would already be aware of the risks of intercourse with an HIV+ individual.

[11] Rachel Harker, Social and General Statistics: *HIV and Statistics,* House of Commons Library Standard Note 2210, 25 October 2012, 13

The inquiry identified that in Ohio the HIV specific statute expects the defendant to disclose their sero-status, and this anticipated that a complainant must always provide an informed consent, thereby corresponding to normative consent. Ohio's provision identifies that a basic disclosure may be adequate. This did not denote this is always the requirement as the provision may expect an enhanced disclosure if the circumstances dictate this facilitation.[12] The provision invariably is concerned with capacity of the complainant rather than their knowledge of risk, but in that circumstance it may still equate to an enhanced disclosure. Ohio's statute acknowledges that there may be occasions when the complainant is unaware of the risk and this can be considered to be fair and reflective of a complainants awareness.

The Suggested Statutory Provision.

The conclusion of the investigation of consent confirmed that an individual must be given the opportunity to provide a fully informed consent. This could emanate from either an enhanced disclosure or a quasi-enhanced disclosure, and either would conform to normative consent. The inquiry ascertained that the most appropriate route to construct the legislative framework was through the legislation that provided for basic and enhanced disclosure, a quasi-enhanced disclosure. This would take into consideration that the majority of individuals would be aware of the risk of sexual intercourse with an HIV+ defendant. There were also other collateral factors that needed to be considered in any statutory provision. This denoted that the

[12] OHIO REV. CODE ANN. § 2903.11 (B) (2)

prosecution must establish lack of consent, so as to infringe the presumption of innocence, and the consent whereby the complainant desired that the virus would be transmitted would be invalid. The suggested section of the statute states:

3. Disclosing HIV status

It is a defence to a criminal charge of transmission or exposure to HIV that the complainant consented to running the risk of acquiring the virus. For that person to consent to running the risk of acquiring the virus:

(1)The defendant must disclose that he has the virus;

(2)That disclosure must take place before any unprotected sexual activity;

(3) The defendant must only partake in that activity if following disclosure he is confident that his prospective partner is aware that there is a risk that the virus may be transmitted

(4) It is for the prosecution to establish that the complainant did not consent

(5) Consent will not form a defence if that person intended to transmit the virus or the complainant desired that they acquire the virus from that person.

Recommendation Four: The Allowance Of Other Defences

The final question, and the final recommendation of this thesis, addressed the issue of what other types of defence ought to be available to individuals in cases of sexual transmission or exposure. It was identified that the allowance of these defences would encourage responsible behaviour. From the outset it was apparent that

condom use, viral load and the type of sexual activity had not been explored by the English courts, and none of these had been contended to be a defence at trial or within the appellate courts. It was noted that the rationale for no deliberation of these defences in England is that it is only cases of transmission *per se* that have come before the courts. In contrast, the inquiry identified that these issues have received contemplation by the Canadian courts, and American legislators and judicial precepts, but with varying degrees of endorsement. The review did not infer that the Canadian position was appropriate as the examination of the Canadian jurisdiction identified that the utilisation of a general criminal statute, and the subsequent judicial precepts related thereto, do not provide certainty or rationality. The findings established that there was no binding judicial direction on the parameters of the defences, other than that condom use and a low viral load would exonerate a defendant.

The examination of the U.S. States' identified that there had been a number of methods used to address these defences. The minority of states had enacted legislation that facilitated the defence of condom use, viral load or type of sexual activity, but no states afforded for all of the defences. There were states that allowed for one or two of the defences, but these were in the minority. It was unfortunate that there was such diversity with the American States' HIV specific legislation, but this still did not detract from the hypothecate that these defences should be expressly available. It did; however, confirm that the law should not be developed in a haphazard manner by waiting for judicial examination of these matters.

The Proposed Legislation

Throughout the thesis the suggestion has been that the criminalisation of the sexual transmission/exposure to HIV necessitates a bespoke piece of legislation. This was just as apparent in the discourse of 'other defences'. It was clear that the legislative parameters within the United States has not enumerated uniformity, and there are divergent approaches to the utilisation and/or exclusion of the defences. Generally, it was noted that the majority of States had retrenched from considering the statistical probability of the virus being transmitted. The extrapolation of the divergent approaches identified that there was a requirement that the defences need to be specifically stipulated within the statutory provision as this would enable infected individuals to partake in certain activities, aware that they did not need to inform their sexual partner that they are HIV+. The investigation confirmed that the allowance of these defences would also promote safe sexual practices and be in line with public health policies initiatives.

Thus, it was determined that any new legislative response must express that condom use, the level of the viral load and that certain types of sexual activity can be a defence. The suggested statutory provision on condom use considered the various statutory provisions, but is written in its own unique way. The provision in relation to viral load is heavily reliant upon Idaho's provision in that confirmation of an undetectable viral load can only emanate from a medical professional, as this avoids any ambiguity. The thesis identified that the prohibited sexual activities should be only high risk activities and this was addressed in chapter two on transmission and exposure. This restricts criminalisation to unprotected vaginal and anal intercourse

and corresponds to the Californian approach to exposure, and forms the basis of the statutory provision under recommendation two. The recommended legislative response as to the defence of condom use and viral load is articulated in the following terms:

4. **Defences:**

(1) Protective Measures: Condom Use

Only the correct and consistent use of condoms (protective measures) will form the basis of a defence to the criminal acts of intentional exposure and intention or reckless transmission of HIV

(2) Viral Load

(a) An accused will not be considered to have exposed/ transmitted the virus to another if he had an non-infectious viral load at the time of the sexual act

(b) In order to establish that the accused had a non-infectious viral load the sexual act must have transpired after advice from a medical professional that he was non-infectious

Concluding Comments

This thesis has sought to identify the optimal pathway to the criminalisation of the sexual transmission/exposure to HIV. In order to achieve this it was necessary to enquire into the deficiencies of the extant English position. This has been reviewed by assessing the various jurisdictional approaches to criminalisation, and via an analysis of philosophical, theoretical and doctrinal teachings. The comparative analysis and critique provided has highlighted the strengths and weaknesses within all of the countries approaches to criminalisation of the sexual transmission/exposure to HIV. A result of this is that it is contended that a bespoke piece of legislation will overcome the inadequacies of the current English position.

From the inception of this comparative analysis, the primary consideration was to construct a legislative framework that could be enacted within the English criminal justice system. There has been a demonstration that all of the jurisdictions do not fully address the issue of sexual transmission/exposure to HIV sufficiently. This has shown that the requirement of an appropriately drafted HIV specific statute is necessary, otherwise too many issues are not sufficiently addressed or left in a vacuum. The recommendations from this thesis could be adopted within either the Canadian or American legislative frameworks, and it is suggested would beneficially address concerns of certainty and retrospectivity.

The work revealed that a defendant who recklessly transmits or intentionally exposes an unsuspecting sexual partner to HIV through unprotected intercourse should be accountable for his actions. The investigation also found that an individual should be

able to consent to unprotected intercourse and that condom use, viral load and low risk sexual activities should form the basis of a potential defence. The advantage of this comparative analysis are manifest. The promulgation of this *de novo* legislative enactment would be beneficial to an infected individual and society, and the contemplated provision encourages responsible behaviour. There is clarity of what can be considered to be criminal activity within the sphere of sexual transmission/ exposure to HIV. Essentially, the proposals provide certainty whilst acting as a special and general deterrent and retaining appropriate culpability thresholds.[13]

[13] Michael Moore, *Placing Blame: A Theory of Criminal Law* (Clarendon Press Oxford 1997), 84

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Appendix Of Published Work

Journal of Criminal Law

2013

Condom use, viral load and the type of sexual activity as defences to the sexual transmission of HIV

David Hughes

Subject: Criminal law. **Other related subjects:** Health

Keywords: Canada; Consent; Contraception; Criminal liability; Defences; HIV; Infections; Sexual behaviour

Case: R. v Mabior 2012 SCC 47 (Sup Ct (Can))

***J. Crim. L. 136** *Abstract* This article considers the position regarding the criminal transmission of HIV in English and Canadian law. It considers the use of condoms, viral loads and types of sexual activity and whether they can be used as defences in such cases. The article will look at the current position in England and also focus on recent decisions that have originated from the Canadian courts. It is argued that the recent Canadian Supreme Court judgment of *R* v *Mabior* is not in the public's interest and that the position should be that of the cases that were decided before that decision. It is also argued that the defences regarding the criminalisation of the sexual transmission of HIV are in need of a statutory footing.

Keywords HIV transmission; Defences; Canada; Viral load; Condoms

In England an individual who is HIV+ and who has consensual unprotected intercourse with another person can be prosecuted under s. 20 of the Offences Against the Person Act 1861. He[1] will be guilty of the offence if he recklessly transmits HIV to an unsuspecting complainant. If the complainant consents to unprotected intercourse and has knowledge of the defendant's HIV status, it will act as a defence and the defendant will be able to avoid liability.[2] The statistical probability of transmission through safe sex, the advancement of anti-retroviral medication, and the type of sexual activity signifies that there are more circumstances where the defendant should not be accountable for his actions. Whether condom use, viral load and type of sexual activity will negate recklessness or act as a defence is debateable, but for present purposes it is proposed that they will be a defence and the defendant will be excused if he took the reduced risk and did so with the necessary awareness. It is submitted that these are defences of 'reasonable precautions'[3] as the defendant has attempted to reduce the risk of transmission by participating in certain types of conduct and that that risk was a reasonable to take.

***J. Crim. L. 137** As will be discussed, the social utility of sexual intimacy dictates that the defendant's actions should be excused[4] as there appears to be no grounds to justify his conduct. Two propositions for this stance are put forward. First, it is generally accepted that a complainant can resist excusable conduct, but cannot do so when the behaviour is justified.[5] This would mean that if the complainant became aware of the

defendant's HIV status, then she could refuse to partake in consensual intercourse. Secondly, that under the deeds theory of justifiable defences,6 an individual does not need to be aware that such circumstances exist, whilst with excusable conduct, the defendant needs to be aware of the availability of the defence.7 The utilisation of these defences also corresponds with Lanham's proposal of there being three elements to a crime: the *actus reus, mens rea* and the absence of a valid defence.8 Under this formulation of a criminal offence it is the third element that would not be satisfied as a defendant would have a valid defence. Furthermore, condom use as a defence is in line with public health initiatives as using such precautions should be encouraged given that they can significantly decrease the risk of transmission of the virus, thereby encouraging safe sex practices. It is therefore proposed that if condom use can be a defence, then viral load and certain types of sexual activity should also be permitted as these are *ejusdem generis.* The defences are of the same kind because the statistical probability of transmission through protected intercourse can be the same as or more risky than a low or undetectable viral load and can be akin to certain types of sexual activity. Allowing these as defences would also be in line with the awareness requirement that is derived from *R* v *Dadson.*9 Thus, the defendant would not be able to rely on any of the suggested defences unless he was aware of their existence at the time of the alleged offence. It can be said that the defendant would be excused by participating in an act of sexual intimacy, without disclosing his HIV status, as long as he had taken into account and utilised necessary precautionary measures.

In England there have been *obiter* comments made10 and academics who propose that the use of condoms can be a defence.11 Medical studies have shown that when the defendant's viral load is at such a level that it is undetectable, it is extremely unlikely that he will transmit the virus.12 There are also experts who state that particular types of sexual activity are low risk and akin to some types of protected intercourse.13 These issues have not been raised in an English court and there has been little discussion on the viral load or types of sexual activity within the jurisdiction. The purpose of this article is to evaluate some recent developments in Canada, a country where transmission is not a requirement for liability. Cases had sought to clarify that the use of condoms, the viral load and particular sexual activity would signify that the defendant did not need to disclose his HIV status and can therefore act as a defence. However, the recent Supreme Court decision in *R* v *Mabior*14 has established that condom use or the viral load cannot be used as defences in isolation. In order to evade liability, and to avoid disclosing ones HIV status, condom use and low viral load must be used together. Rather than clarifying the position the judgment further compounds the issues. The decision causes more problems and has done nothing to encourage safe sex practices. It is submitted that these 'new' defences should be accepted in England and that the Canadian position is unique to that jurisdiction, ensuring its exclusion from English law. It will also be proposed that if these defences are to be used, then the law in this area is in need of a statutory footing as it is not for the courts to set out new defences.15 A statute would unequivocally clarify when a person will not be subject to prosecution and under what circumstances he can be prosecuted for the transmission of HIV.

The position in England

Condom use

Neither the common law nor statute stipulates that any defence, other than consent, can be raised in a sexual transmission of HIV case. In *R* v *Dica,*16 Judge LJ stated that levels of precaution may lead to a defence and that it could be left for jury to assess whether such protection would be sufficient.17 Further comments seemed to indirectly indicate that the use of condoms could be a defence.18 This is evident when Judge LJ discussed why consent to running the risk of becoming infected should not be invalidated as it would inhibit certain individuals who wish to participate in sexual relationships. His Lordship paid particular attention ***J. Crim. L. 139*** to a number of examples, one being a Catholic couple who, because of their religious beliefs, are unable to use precautions, even though one may become infected by the other. This statement appears to infer that condom use may be utilised as the risk of transmission is significantly reduced and the use of precautions in such circumstances would be excused. Emphasis was also made of condom use when referring to casual encounters.19 Further support for this proposition can be found in Crown Prosecution Service (CPS) guidelines where it is acknowledged that prophylactic measures may signify that no prosecution could ensue as it would be problematic to establish that the person using the precautions was being reckless.20 The CPS appears to concede that a defendant's actions could be excused. It was, however, emphasised that it is the responsibility of the infected person to ensure that precautions are taken. The CPS guidelines also indicate that it is public policy to ensure that prosecutions will not take place when precautions have been used. The statement of Judge LJ and the CPS guidelines are rational proposals as an individual would be acting responsibly and by acting responsibly his conduct could be excused. If the infected person is practising safe sex, then it would be extremely difficult for the prosecution to prove that he acted recklessly or intentionally. It is submitted that the use of condoms is more effective in stopping the spread of the virus than informed consent, as consenting to running the risk of infection offers no protection.

Further support for this proposition has come from a number of academics.21 As early as 1991 it was advocated that condom use could be defence in these types of cases, as it is 'a proper and necessary concession to human nature'.22 To restrict an individual from becoming intimate with another person as a result of his condition and allowing consent as the only way of circumventing liability is a threshold that may be set too high. There must also be some margin whereby an individual can still maintain sexual relationships as it would be difficult to conform to such a restriction, particularly as stigma is still attached to those who are carrying the virus. It is rather paradoxical to allow consent to act as a defence, but not the use of condoms. It is conceded that consent gives a person the opportunity to make an informed decision, and this is not an attempt to exclude consent as a defence, but consent does not reduce the risk as significantly as precautions. In concurrence with this proposition it has been suggested that precautions should be rated more highly than consent and that even attempted use of protective measures should be sufficient as a defence to transmission.23 It is submitted that the effective use of protection should be a defence, but attempted use should not as ***J. Crim. L. 140*** it is the equivalent to unprotected intercourse. In such

circumstances disclosure of one's HIV status should be a requirement to ensure that the party who is unaware has the opportunity to make an informed decision. A distinction must also be drawn between a moral duty and a legal duty when referring to the use of precautions24 and the disclosing of one's HIV status. Indeed an individual has a moral duty to inform all of his prospective sexual partners, even when he is using protection, but a moral duty does not necessarily equate to a legal duty.

If a defendant uses a condom, does that mean that he is being reckless? It is arguable that even if the defendant took precautions, the Crown, in contrast to the CPS guidelines, may still establish that the defendant foresaw harm and still took the risk.25 This is unsustainable as the use of condoms demonstrates that the user is seeking to alleviate the risk of transmission, thus being responsible rather than reckless by his conduct.26 'Recklessness' is best defined as unjustifiable risk-taking, and Judge LJ stated that recklessness is established 'if he knew or foresaw that the complainant might suffer bodily harm and chose the risk that she would'.27 The use of a condom establishes that the defendant is conscious that he may infect another and as he has used precautions it could be persuasively asserted that he has endeavoured to eradicate the risk of transmitting the virus. This is even more evident when referring to protected receptive vaginal intercourse as it has been stated that the approximate risk in such a situation is even more remote at 1 in 20,000.28 It is therefore feasible that either the absence of *mens rea* or the use of an excusable defence could be applied to these type of cases29 as the use of prophylactics indicate that the threshold for reckless behaviour has not been met and furthermore that as a result of this the risk has been so significantly reduced that his actions can be excused.

Viral load

It has been suggested that those with an undetectable viral load would not be considered reckless in England,30 but there is no clarity on the matter. Whether a low or undetectable viral load can act as a defence has not been an issue that has been raised or addressed by the courts in England. The other leading case, on the criminal transmission of HIV, did not consider the defendant's viral load. *R* v *Konzani*31 was concerned with unprotected intercourse and the issue of consent. It is submitted that if the defendant has a low or undetectable viral load, he would need to be aware of its level in order to be able use it as a defence. Support for this proposition is given by Smith who submits that relying on medical ***J. Crim. L. 141*** advice should enable the defendant to evade responsibility.32 This would be achieved by regular testing of the level of the viral load. The World Health Organisation states that the level of an individual's viral load is one of the greatest risks in transmitting the virus to another person and that reducing the load can be one of the most effective ways of diminishing the possibility of HIV transmission.33 It can be stated that the level of an individual's viral load can be a deciding factor as to whether the virus will be transmitted, the lower the load the less likely is the possibility of infecting another person. The viral load is reduced by taking antiretroviral treatment (ART) and consistent use of the medication can decrease the load to an amount where it will be undetectable.34 A further, and more radical, endorsement of this comes from the Swiss Federal Commission for HIV/AIDS which issued a statement regarding the use of ART and the transmission of HIV. It was

announced that if an individual does not have another sexually transmitted disease, complies with his ART and has had an undetectable load for at least six months, he will be unable to transmit the virus.35 In light of this, the CPS has acknowledged that the risk may be significantly reduced and that it can be argued that the level of the viral load can be just as effective as condom use.36 This may denote that an individual's viral load might need to be taken into account when deciding whether to prosecute. If the accuracy of the Swiss statement is to be assumed, then an undetectable viral load is even more effective than condom use.

Sexual activity

Although experts recognise the complexity of providing a precise assessment of the risk of sexually transmitting HIV, it is accepted that some activities carry less of a risk than others.37 Even though there is no exact formula for assessing the risk it is evident that certain types of sexual activity can reduce the risk of transmitting the virus. As the risk of transmission fluctuates between the types of conduct Bennett *et al.* propose that if an individual participates in low-risk activities these do not require a duty to inform the other person of his HIV status as the risk is reduced and he is therefore acting in 'a responsible and morally justifiable way'.38 Thus, it is suggested that the type of activity in which ***J. Crim. L. 142*** the defendant partakes may signify that he has been acting in a responsible manner if he knew that this would reduce the risk of infecting another person. The type of activity is important in assessing the probably of transmission as it is recognised that unprotected anal intercourse where the insertive partner is HIV+ is the most precarious activity.39 The risk of transmitting the virus becomes more remote when assessing other types of interaction. Unprotected vaginal intercourse poses less of a risk40 when it involves male to female transmission. The risk is even more diminished when it encompasses potential transmission from unprotected female to male vaginal intercourse. What ought to make the type of sexual activity a defence is that when the HIV+ partner is the receptive partner the statistical probably of transmission through protected intercourse is thought to be the equivalent of female to male unprotected vaginal intercourse.41 If condom use is to be a defence, particularly as public health encourages condom use, then certain types of sexual activity should also be included.

It is disconcerting to assume that different types of activity should carry the same penalty, particularly when some types are less likely to transmit the virus. Currently under English law the type of sexual activity would be irrelevant as long as transmission occurred and the complainant had not consented to running the risk of infection. The absence of perspicuity does not assist anyone who has the virus and wishes to reduce the risk of transmission by participating in low-risk activities. This lack of lucidity conflicts with the criminal law being certain42 and treating all types of activity the same 'would be irrational and unfair'.43 It is submitted that an individual who deliberately takes part in low-risk activities would not be and should not be as culpable as person who only partakes in high-risks activities. There are suggestions that type of sexual activity should not be taken into account because someone involved in sexual intimacy that is a low risk may, on that particular occasion, be as likely to have transmitted the virus as someone taking part in high-risk activity.44 This is indefensible as it implies that they are at the same level of risk. This cannot be the case; if they were then they would

both pose the same level of risk on each occasion. It is the equivalent of saying that someone who has placed a bet on a 2,000 to 1 horse winning a race is just as likely to win as someone who has put wager on the favourite on that occasion. It is submitted that the level of risk is calculated for a reason, the more remote the risk of transmission the less likely that an individual will transmit the virus.

Condom use

The Canadian position is that a defendant can be prosecuted, for a variety of offences,45 if he does not disclose his HIV status to a sexual partner. It is irrelevant whether the virus is transmitted. Some find it problematic to comprehend how there are a number of different charges that can be brought for the same conduct as a defendant never really knows what offence he can potentially commit.46 It is suggested that this conflicts with the law being certain. The first case that was heard in the Supreme Court was *R* v *Cuerrier*47 where the defendant was prosecuted under the aggravated assault provisions of the Canadian Criminal Code.48 The defendant had had unprotected intercourse with two women and did not disclose that he was HIV+. This was despite the fact that he had been told, on a number of occasions, by health officials that he must use condoms and disclose he was carrying the virus. It was held that consensual intercourse without disclosure of HIV status was fraud if there is 'a significant risk of serious harm', and thus vitiated consent.49 The majority judgment stated that fraud not only included the nature and quality of the act and the identity of the person but that it extended to circumstances where there was a significant risk of serious harm. It was felt that a broader view of fraud was justified as any definition of fraud had been removed from the Criminal Code.50

Justice Cory51 stated that the 'proper use of condoms' might reduce the risk, so it would no longer be considered 'significant'. The judgment therefore set out that the use of condoms may be a defence to any charge that could be put before the courts, but emphasised that each case should be dealt with on its own facts. The minority in that case were more specific and stated that condom use would be a defence when the defendant had not disclosed his HIV status.52 Subsequent cases had endorsed the comments made by Justice Cory whilst others completely disregarded them as precautions were not even taken into account.53 Other courts took the middle ground and declined to confirm whether using a condom meant disclosure was not a requirement.54 Further permutations can be seen when it has been held that *Cuerrier* did not establish the use of precautions as a defence *per se* and that each case must be dealt with on its own facts.55 It was also stated that the comments merely provided a basis whereby the court could conclude that the harm may be trivial.56 Although these cases demonstrate a lack of consistency, the Manitoba Court of Appeal had held that condom use was pivotal in assessing liability and the requirement of disclosure.57 It has also been proposed that deficient use of condoms will mean that there is a requirement of disclosure.58 It seems that the cases following *Cuerrier* did not provide any lucidity on the matter, but prosecutors in Canada seemed to be more

specific and endorsed the use of condoms as they were prepared to distinguish between protected and unprotected intercourse.59 However, the Supreme Court decision in *Mabior*60 has now given guidance on condom use and the duty to disclose. In *Mabior,* it was stated that condom use will only be a defence if the defendant has a low viral load, thus stating that a combination of factors are essential if disclosure of one's HIV status is not a requirement. In the judgment both parties had requested that the decision should provide clarity on when a defendant would be liable. This did not materialise, and the case has merely moved the defendant to a more onerous position. Ambiguity prevails as the court concluded that further medical advancements and other matters could be taken into account. The decision sends out the wrong message and can be seen as discriminatory to women as the odds of transmission from the recipient are greater than from the insertive partner. Furthermore, it is detrimental to public health initiatives as the defendant who has used protection will still be prosecuted. This now means that there is no incentive for using a condom and could increase reckless behaviour. Even more perplexing is the rather contradictory manner of the court in acknowledging that proper use of good quality condoms would mean that the virus will not be transmitted to another.61 If this is the case, why criminalise the use of protection? The judgment does not confirm anything; rather it compounds the issue and widens the net of liability. It seems that unprotected or protected intercourse is now unimportant in Canada as it is no longer considered to be the demarcation line for prosecutions.

Prior to the decision in *Mabior,* condom use, as a defence, has received academic approval. It has been suggested that allowing condom use is a more effective way of reducing transmissions than relying on disclosure.62 There is also a consensus of opinion that it is generally accepted that condom use is one of the most widely recognised ways to prevent transmission.63 If there is such a general acceptance, it seems illogical to criminalise something that can protect the populace from infection. Allowing the use of condoms is particularly relevant when a significant number of infections take place before the person is aware ***J. Crim. L. 145*** they are carrying the virus.64 As previously stated, consent will not protect an individual from the risk of infection, but condom use can be an effective way in protecting against infection. Anyone who uses condoms is being conscious of his own and others' sexual health. By using such protection it can be seen that there is a genuine attempt at reducing the risk of not only HIV, but a number of infections. If criminalisation of sexual exposure of HIV does not act as a deterrent, then allowing the use of condoms at least sends a message that is consistent with health policies,65 and as a matter of policy using protection should be encouraged.66

It has been proposed that disclosure should be a requirement.67 The court's stance on the use of condoms suggests that an individual is now obliged to divulge that he is HIV+. If condom use were to be a defence it could be perceived to be 'sanctioning deceit'68 and from a moral perspective this is acceptable suggestion, but, as already noted, there is a distinction between a moral and a legal duty. However, the Supreme Court concurs with aligning a moral and a legal duty by specifying that not disclosing that you are HIV+ to a sexual partner is deceit to sexual activity if there is a realistic risk of harm, and condom use, alone, will be insufficient. It is submitted that while such stigma is attached to people suffering from the virus, the practising of safe sex should be encouraged rather than discouraged. If the defendant is still criminally liable when

practising safe sex, then he may decide that he might as well become involved in unsafe sex practices as there would be nothing to gain from using protection, thereby encouraging reckless behaviour.

Viral load

The viral load of a defendant can be a method of assessing whether there is a risk of significant harm.69 Cases appeared to indicate that when the viral load is undetectable disclosure of an individual's HIV status is not a requirement. In *Mabior,* the Manitoban Court of Appeal allowed part of the defendant's appeal when it was established that the viral load was at a level that was so low it did not pose a significant risk of serious harm.70 The case was applied in *R* v *DC*71 where the court confirmed that when the viral load is at such level to be undetectable, then it will not pose a significant risk of harm and therefore disclosure of one's HIV status is not required, meaning consent is not vitiated.72 Even when the viral load is low (not undetectable) the courts have held that the Crown has failed to establish significant risk of harm.73 As the judgments did not come from ***J. Crim. L. 146*** the Supreme Court, there needed to be further elucidation on the matter. Indeed, Steel JA in *Mabior* stated that the position, in relation to viral loads, needed to be clarified by the Supreme Court, particularly as the advancement of antiretroviral treatments has shown that the risk is significantly reduced by their use.74 The Supreme Court has clarified the position and stated that a low viral load will not be a defence in non-disclosure cases.75 It was stated that viral load poses evidential difficulties. If this is correct, why allow it with condom use?76 The case demonstrates that a low viral load in isolation is irrelevant, but the court appears to indicate that an undetectable load may still be relevant.77

It is evident that the courts have recognised that the understanding of viral loads has developed to such an extent that the viral load needs to be taken into account when assessing the risk that is posed.78 When there is an undetectable viral load it is arguable that harm is not foreseeable79 and there should be no prosecutions when a load is at that level.80 It is inexplicable to contemplate that the defendant with a low or undetectable viral load would need to disclose his status when the risk of transmission is negligible or non-existent. The decision in *Mabior* appeared to accept medical evidence of how quickly the viral load can reduce when the appropriate medication is taken, but it still stated it could pose a realistic possibility of transmission.81 Yet the Supreme Court decision is contrary to medical evidence; it too easily discarded the Swiss statement by accepting one expert's opinion of it.82 It is acknowledged that some research suggests that non-disclosure occurs when they defendant has a low or undetectable load and this may encourage individuals to stop using condoms.83 It is further accepted that a low or undetectable viral load does not demonstrate that the defendant is practising safe sex, within the context of using precautions, but it is another method whereby the risk of infection can be reduced. Furthermore, it is in the individual's interest to continue using precautions due to the risk of catching other sexually transmitted diseases. The real issue with viral load is that not everyone is able to take the appropriate medication, but this does not justify disallowing it as a defence. When the viral load is at an undetectable or low level, any non-disclosure requirement ought not to be affected.

Concerns have been raised about the accuracy of viral loads and what is not detectable

one day does not mean it will remain the same the next.84 This was addressed by the Supreme Court when deciding that viral load could not be used in isolation.85 A further issue that has been ***J. Crim. L. 147*** identified is that defendants may begin to make their own 'risk assessments',86 but to do this the defendant would need to know the level of the viral load. To be able to know that level would require the appropriate test and medical advice. Grant also proposes that the viral load can lead to problems regarding the burden of proof.87 It is submitted that the courts, before the Supreme Court decision, had been using their good sense by looking at average viral loads and stating that it is an evidential rather than legal burden when raising the issue of viral loads. When there is no precise information the courts had been willing to accept average viral loads for determining whether there was a significant risk and in such circumstances it would be an evidential burden of showing that a defendant had a low or undetectable viral load over that period of time.88 This position has now been clarified by the Supreme Court and it would be an evidential burden that also required condom use.89

Sexual activity

A further development in Canada can be seen in *R* v *JAT*90 where statistics, rather than viral load or protected sex, regarding the type of sexual activity were utilised in order to acquit the defendant. It was proposed that the question as to whether the defendant's conduct means there is a significant risk of harm needs to be assessed by reference to the type of sexual activity and the statistical probability of transmitting the virus. In *JAT,* the receptive partner was HIV+ and in such circumstances it was accepted that the risk was insufficient to be considered a serious risk of harm. The court also heard expert opinion that stated that this type of sexual activity was equal to protected intercourse where the insertive partner had the virus.91 It appears that this case exasperated the issues as it indicated that a defendant may still have a defence when he takes part in particular sexual activities. The case demonstrates that there was a pressing need for clarity on where the demarcation point lies. It is submitted that the type of sexual activity can no longer be used in isolation. It may, however, be utilised with either protected intercourse or viral load. There is no guidance on these matters; clear unequivocal direction is required as this was not achieved by the Supreme Court in *Mabior.*

Grant submits that if condom use and the viral load are to be defences, then why not the type of sexual activity?92 Although these are no longer relevant, when argued in isolation, it is submitted that the type of sexual activity may also play a role in ascertaining whether disclosure is required. As a result of this recent development it is suggested that under the current law each case is dealt with on its own facts rather than on an evolving common law as declared by the court.93 This means that ***J. Crim. L. 148*** any combination of the three suggested defences may be used to lower the realistic risk of transmission. Such a proposition may lead to further unpredictability as cases will still be relying heavily on expert evidence to ascertain whether there is realistic possibility of transmission.94 It must be noted that the court in *Mabior* left the door open to such a proposition by stating that medical advancements and 'other risk factors' may mean that there is no realistic possibility of transmission. This can cause issues with the

accuracy of expert evidence95 and it is questionable whether expert opinion becomes a 'numbers game'.96

Comparison

It is evident that in both jurisdictions the issue of consent can be raised and the law is clear regarding this consideration. The differences emanate when considering the other potential defences. In England the law is uncertain; it lacks clarity. But for an observation by Judge LJ and prosecutorial discretion, there is nothing to suggest that condom use or an undetectable or low viral load can be a defence. So there is nothing in law that an individual can confidently rely upon. It is even less clear when beginning to assess the type of sexual activity as this is not even at an embryonic stage. *Prima facie* the law is more refined in Canada as condoms and a low viral load together are permissible as a defence. However, the Canadian approach is not as obvious as it first appears as consideration of an undetectable viral load has been disregarded97 and the type of activity has not been taken into account by the Supreme Court. The test of a realistic possibility of transmission is exposed to uncertainty. Does a low-risk type of activity and low viral load demonstrate that a realistic possibility of transmission exists? What about an undetectable viral load by itself? Moreover, do the use of a condom and a low-risk activity mean that disclosure is not a requirement? It is disappointing that the Canadian Supreme Court did not take the opportunity to clarify the full extent of a realistic possibility of transmission. As there is no clear guidance on these matters, it is again going to be left to the tribunal of fact to decide whether such likelihood exists. This will lead to ambiguity and there will be even more reliance on expert evidence to ascertain the realistic possibility. This will make it just as difficult to predict the outcome of cases. If experts are having difficulty coming to a consensus of opinion, then how is the jury expected to come to consistent conclusions? The lack of consensus would be down to the permutations.98 For example, in *DC*99 it was stated that a number of factors need to be taken into account to ascertain whether the conduct ***J. Crim. L. 149*** posed a significant risk; the same can be said of a realistic possibility. The lack of clarity regarding the realistic possibility of transmission has not assisted in the administration of justice.

Although the issue of condom use, viral loads and type of sexual activity have not been raised in the English courts, they have certainly been addressed in the Canadian courts. This distinct difference could be down to the fact that all cases that have been heard in England have involved transmission of the virus whilst in Canada transmission is not a requirement. There may be an occasion when a case with one of these issues comes before the courts in England. For example, a situation may arise where the complainant has contracted HIV, but the defendant is in disagreement stating that he could not have transmitted the virus as he had a low or undetectable viral load at the time of the intimate act. This may mean that evidence of the strain and the level of the viral load could be critical in assessing liability. The law is not clear whether the level of the viral load could be used as a defence; the same can be said of condom use. Furthermore, the type of sexual activity would not be a defence in England. Under such circumstances if transmission did occur, even though there are experts who state that particular activities are the same as condom use, the defendant would not have a basis to establish a

defence if the strain was the same.

Concluding comments

It is evident that these defences discussed above may at some point need to be raised in the courts, so that there needs to be clarification on whether they can succeed as a defence. The problem is that, for the common law to develop, cases must come before the courts. Even if they do, such issues may be dismissed for Parliament to determine, as was suggested in *Dica* when discussing consent.100 Perhaps legislation may be the appropriate direction as it would eliminate the uncertainty that has been seen in Canada. In both countries the use of non-specific HIV laws demonstrates that the law can and will develop in a haphazard way. On the other hand, specific laws may omit important advancements and therefore any legislation may need to develop with contemporary needs.101 There would need to be an inbuilt mechanism that would allow the law to adapt to change.102 Any proposed legislation would need to stipulate that any of these could be used as a defence.103 This would enable sufferers to continue to engage in sexual activity without the fear of prosecution or rejection, as they would not be required to disclose their status. It is unfortunate that the English courts did not take the opportunity to clarify the position, although it is conceded that some of the issues were not identified or raised at the time of *Dica* or *Konzani.* Thus, it is suggested that the law before the Supreme Court decision in ***J. Crim. L. 150** *Mabior* is the preferred approach to the criminalisation of the sexual transmission of HIV. Allowing these defences would promote safe sexual practices and be in line with public health policies initiatives, the ultimate goal being to reduce transmission of the virus. Legislation is not forthcoming in the near future so clarification from the judiciary may be required. This may equate to judicial law-making, but it is ineluctable as HIV+ defendants would be relying upon CPS guidance and a vague comment. Other than abstinence or disclosure, there currently appears to be no other way forward.

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1. He includes she.

2. *R* v *Dica* [2004] EWCA Crim 1103, [2004] 3 All ER 593; *R* v *Konzani* [2005] EWCA Crim 706, [2005] 2 Cr App R 14.

3. K. J. M. Smith, 'Sexual Etiquette, Public Interest and the Criminal Law' (1991) 42 NILQ 309 at 328.

4. P. Robinson, *Structure and Function in Criminal Law* (Clarendon Press: Oxford, 1997) 82--Robinson suggests that excusable conduct is wrong but the 'actor's situation vitiates the actor's blameworthiness'.

5. J. C. Smith, *Justification and Excuse in the Criminal Law* (Stevens: London, 1989) 19.

6. Robinson, above n. 4 at 101.

7. Smith, above n. 5 at 28.

8. D. Lanham, '*Larsonneur* Revisited' [1976] Crim LR 276.

9. (1850) 14 JP 754. A constable (Dadson) was employed to guard a copse from which wood was being stolen. Dadson saw the victim coming out of the copse and asked him to stop, the victim ran away and Dadson fired at him. Stealing wood was not a felony unless the person in question had two previous convictions. If the thief had two previous convictions, then the constable was entitled to shoot at the felon. The victim was a felon, but Dadson did not know of this at the time of the shooting. It was held that Dadson could not rely on upon the victim being a felon, as a defence, as he did not know this at the time of the incident. The conviction of grievous bodily harm with intent was upheld.

10. *R* v *Dica* [2004] EWCA Crim 1103, [2004] 3 All ER 593 at [11], *per* Judge LJ.

11. S. Ryan, 'Risk-taking, Recklessness and HIV Transmission: Accommodating the Reality of Sexual Transmission of HIV within a Justifiable Approach to Criminal Liability' (2007) 28 Liverpool LR 215; V. Munro, 'On Responsible Relationships and Irresponsible Sex--Criminalising the Reckless Transmission of HIV *R* v *Dica* and *R* v *Konzani'* (2007) 19 CFLQ 112.

12. P. Vernazza *et al.,* 'HIV-positive Individuals Not Suffering from Any Other STD and Adhering to an Effective Anti-Retroviral Treatment Do Not Transmit HIV Sexually', January 2008, available at *http://www.aidsmap.com/page/1429357/* and *http://www.edwinjbernard.com/pdfs/Swiss¨Commission¨statement_May¨2008_translationËN.pdf,* accessed 27 February 2013.

13. *R* v *JAT* 2010 BCSC 766 at [29].

14. 2012 SCC 47.

15. Smith, above n. 5 at 2.

16. *R* v *Dica* [2004] EWCA Crim 1103, [2004] 3 All ER 593 at [11], *per* Judge LJ.

17. Ibid.

18. Ibid. at [49].

19. Above, n. 16 at [47].

20. Crown Prosecution Service, 'Intentional or Reckless Sexual Transmission of Infection', available at *http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/index.html#Safe,* accessed 17 February 2013.

21. M. Weait, 'Criminal Liability for Sexually Transmitted Infections'(2009) 173 JPN 45; Ryan, above n. 11.

22. Smith, above n. 3 at 328.

23. D. Baker, 'The Moral Limits of Consent as a Defence in the Criminal Law' (2009) 12 New Crim L Rev 93 at 114.

24. J. Chalmers, 'The Criminalisation of HIV Transmission' (2002) 28 J Med Ethics 160 at 162.

25. S. H. Bronitt, 'Spreading Disease and the Criminal Law' [1994] Crim LR 21.

26. Ryan, above n. 11 at 234.

27. *R* v *Konzani* [2005] EWCA Crim 706, [2005] 2 Cr App R 14 at [37], *per* Judge LJ.

28. S. Burris *et al.,* 'Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial' (2007) 39 Ariz St LJ 467 at 486.

29. Ryan, above n. 11 at 233-5.

30. J. Chalmers, *Legal Response to HIV and AIDS* (Hart: Oxford, 2008) 146.

31. *R* v *Konzani* [2005] EWCA Crim 706, [2005] 2 Cr App R 14.

32. Smith, above n. 3 at 328.

33. World Health Organisation, 'Antiretroviral Treatment as Prevention (TASP) of HIV and TB', Programmatic Update, WHO/HIV/2012.12, June 2012, available at *www.who.int/hiv/pub/mtct/programmatic_update_tasp/en/index.html,* accessed 17 February 2013.

34. Ibid.

35. Vernazza, above n. 12.

36. Crown Prosecution Service, above n. 20.

37. E. Mykhalovskiy, G. Betteridge and D. McLay, 'HIV Non-disclosure and the Criminal Law: Establishing Policy Options for Ontario', 25 August 2010, available at *http://www.catie.ca/pdf/Brochures/HIV-non-disclosure-criminal-law.pdf,* accessed 17 February 2013.

38. R. Bennett , H. Draper and Lucy Frith, 'Duties to Forewarn Ignorance is Bliss? HIV and Moral Duties and Legal Duties to Forewarn' (2000) 26 J Med Ethics 9 at 12.

39. C. Galletly and S. Pinkerton, 'Toward Rational Criminal HIV Exposure Laws' (2004) 32 JL Med & Ethics 327 at 328.

40. Ibid.

41. Ibid.

42. A. Evans, 'Critique of the Criminalisation of Sexual HIV Transmission' (2007) 38 VUWLR 517 at 523.

43. Ryan, above n. 11 at 229.

44. M. Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (Routledge-Cavendish: Abingdon, 2007) 176.

45. For example, common nuisance: *R* v *Summer* 1989 98 AR 191, AJ No. 78 to murder: *R* v *Aziga* 2011 ONSC 4592.

46. I. Grant, 'The Prosecution of Non-disclosure of HIV in Canada: Time to Rethink *Cuerrier'* (2011) 5 McGill JL & Health 7 at 9.

47. [1998] 2 SCR 371, 162 DLR (4th) 513.

48. Canadian Criminal Code, s. 268.

49. *R* v *Cuerrier* [1998] 2 SCR 371, 162 DLR (4th) 513 at [52].

50. Ibid. at [29].

51. Ibid. at [55].

52. Ibid. at [73].

53. *R* v *Mokennen* 2009 ONCJ 643, 2009 ONC LEXIS 5031.

54. *R* v *DC* 2010 QCCA 2289.

55. *R* v *Wright* 2009 BCCA 514 at [37].

56. *R* v *Thomas* 2011 ONSC 7136.

57. *R* v *Mabior* 2010 MBCA 93 at [125], 258 Man R (2d) 38.

58. *R* v *Nduwayo* 2010 BCSC 1277 at [160], 2010 BCC LEXIS 1755.

59. *R* v *McGregor* 2008 ONCA 831 at [7], 240 CCC (3d) 102; *R* v *Wilcox* 2011 QCCQ 11007.

60. *R* v *Mabior* 2012 SCC 47.

61. Ibid. at [98].

62. Grant, above n. 46 at 19.

63. I. Grant, 'Rethinking Risk: The Relevance of Condoms and Viral Load in HIV Nondisclosure Prosecutions' (2009) 54 McGill LJ 389 at 398.

64. Grant, above n. 46.

65. Grant, above n. 63 at 400.

66. Ibid. at 398.

67. J. Flaherty, 'Clarifying the Duty to Warn in HIV Transference Cases' (2008) 54 Crim LQ 60 at 67.

68. Ibid. at 66.

69. *R* v *Wright* 2009 BCCA 514 at [32].

70. *R* v *Mabior* 2010 MBCA 93 at [129] and [133], 258 Man R (2d) 38.

71. *R* v *DC* 2010 QCCA 2289.

72. Ibid.

73. *R* v *JU* [2011] ONCJ 457.

74. *R* v *Mabior* 2010 MBCA 93 at [152], 258 Man R (2d).

75. *R* v *Mabior* 2012 SCC 47 at [101].

76. Ibid. at [102].

77. Ibid.

78. Grant, above n. 46 at 20.

79. Ibid. at 25.

80. Ibid. at 11.

81. *R* v *Mabior* 2012 SCC 47 at [100].

82. Ibid. at [102].

83. Grant, above n. 63 at 402-3.

84. Ibid. at 401.

85. *R* v *Mabior* 2012 SCC 47 at [102].

86. Grant, above n. 63 at 402.

87. Ibid.

88. *R* v *Wright* 2009 BCCA 514 at [32]-[33].

89. *R* v *Mabior* 2012 SCC 47 at [105].

90. *R* v *JAT* 2010 BCSC 766.

91. Ibid. at [31].

92. Grant, above n. 46 at 27.

93. *R* v *Mabior* 2012 SCC 47 at [81].

94. Grant, above n. 46 at 44.

95. Ibid. at 27.

96. Ibid. at 14.

97. *R* v *Mabior* 2012 SCC 47 at [102].

98. See NAM aidsmap, 'HIV Risk Levels for the Insertive and Receptive Partner in Different Types of Sexual Intercourse', for some examples of statistical differences, available on *http://www.aidsmap.com/HIV-risk-levels-for-the-insertive-and-receptivepartner-in-different-types-of-sexual-intercourse/page/1443490/,* accessed 17 February 2013.

99. 2010 QCCA 2289.

100. *R* v *Dica* [2004] EWCA Crim 1103, [2004] 3 All ER 593.

101. As was suggested in *R* v *Mabior* 2012 SCC 47.

102. For example, allowing the Secretary of State to enact regulation if new circumstances arise.

103. An evidential burden rather than a legal one.

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The Criminal Transmission of HIV: Issues with Condom Use and Viral Load

David Hughes

Abstract: *This article considers two issues in relation to the criminal transmission of HIV. Currently the use of condoms, and a defendant's viral load, has not been an issue that has been raised in the courts. The article considers how the defence, prosecution and judge may deal with such evidential issues. It will discuss how an expert opinion may be utilised or discredited by counsel for the defendant and counsel for the prosecution. The article will consider how the defence can demonstrate that the defendant was not reckless and how the prosecution can establish that the defendant was actually reckless. It was also assess how the judge, in trial, may address condom use and the level of the defendant's viral load when directing the jury. Finally it is argued that it is in the public interest to allow condom use and viral loads to be used to negate recklessness.*

Introduction

Much has been written on the criminalisation of HIV transmission. The law is unequivocal in one respect, namely that an individual who is HIV+ and has consensual unprotected intercourse with another person can be prosecuted under s. 20 of the Offences Against the Person Act 1861.[1] He[2] will be guilty of the offence if he transmits HIV to an unsuspecting complainant. If the complainant consents to unprotected intercourse and has knowledge of the defendant's HIV status, this will act as a defence and the defendant will be able to avoid liability.[3]

The statistical probability of transmission through safe sex, the advancement of anti-retroviral medication and the level of the defendant's viral load[4] signify that there are more circumstances where a defendant may be able to evade conviction or mount a successful defence. Given that these issues have not been addressed in the English courts there may, at some point, be a case where competing viewpoints maybe raised. In the event of a victim contracting the virus, and a subsequent prosecution being made, the defence counsel could attempt to rebut the allegation that the defendant was reckless in transmitting the virus to another. This could be achieved, by adducing evidence that would assist in establishing that the defendant was using condoms or that they had a low or undetectable viral load. It is currently uncertain as to what the outcome would be in these cases and as such these areas need further elucidation.

Both the judiciary[3](*Dica* [11]) and academics have proposed that the use of condoms may mean that the defendant should not be liable.[5] Medical studies have shown that when a defendant's viral load is at such a level that it is undetectable, it is extremely unlikely that he will transmit the virus. The viral load can be reduced by taking medication.[6] If such evidence were to be admissible it would be left to the jury to decide whether the defendant should be guilty of recklessly transmitting the virus to another. The purpose of this paper is to assess what needs to be taken into account when evidence of condom use or low or undetectable viral load has been put before the court.

The Role of the Prosecution and the Defence

The prosecution, in order to secure conviction, must prove each element of the offence.[7] It must be established that the defendant knew that he had the virus and

that he still took an unjustified risk. This means that the prosecution also needs to establish that the virus came from the defendant. In order to overcome this obstacle the prosecution would require scientific evidence of the direct relationship of the virus in the defendant and in the complainant and this is achieved by phylogenetic analysis. This is the process whereby it can be established that the defendant and the complainant's strains of the virus are related. The analysis attempts to match the strain of the virus in the complainant with the strain that the defendant is carrying. This does not mean that it is 100% accurate. Bernard *et al* state that phylogenetic analysis has its limitations[8] and that any expert giving evidence of such matters would need to explain this to the court. For example, the strain could be attributed to more than the two people involved in the case.[8] The Crown Prosecution Service (CPS) acknowledges the fears that Bernard expresses and states that such analysis would only show that the defendant possibly transmitted the virus to the complainant and that more evidence would be required.[1]

The defence may adduce evidence that the defendant knew that using a condom or having unprotected intercourse with a low or undetectable viral load would reduce the risk of transmission. Raising such issues would mean that expert opinion would be required. So in these types of cases the defendant would be proposing that he was not reckless in his conduct as they were aware that condoms significantly reduce the risk of transmission and this was the reason why they used such protection. The same can be assumed of the viral load as a defendant may be able to establish that, on the number of occasions that they were tested, the viral load at was such a level that they could not have transmitted the virus to another.[6]

Condom Use

The law surrounding condom use in sexual transmission of HIV cases is indeterminable. There is a distinct lack of clarity as to whether condom use can demonstrate that the defendant was not being reckless. If the defendant is aware that consistent use of protection significantly reduces the risk would this enable him to claim that he should not held to account for his conduct? In the trial of Feston Konzani the use of condoms appeared to be a pivotal issue as the prosecution, in evidence in chief, sought to establish that the defendant began to use protection with the same person then ceased doing so.[9] This seems to imply that the use of condoms are relevant in these types of case.

In *R v Dica,*[3(Dica[11])] Judge LJ stated that levels of precaution may be an issue that could be left for the jury to assess whether such protection would be sufficient for the defendant to evade liability, thereby indicating that such evidence would be admissible. Further endorsement emanates from Crown Prosecution Service (CPS) guidelines where it is recognised that prophylactic measures may signify that there could be no prosecution as it would be difficult to ascertain that a person who was using precautions was being reckless.[1] Emphasis is also made on the defendant ensuring that such precautions are used. Although the CPS concede that condom use may not establish reckless behaviour they do not provide any legal basis for such assertions but ultimately it is the CPS who decide whether or not to prosecute.

If the infected person is practising safe sex, then it may be difficult for the prosecution to prove that the defendant acted recklessly or intentionally in transmitting the virus. For a successful conviction under s20 OAPA 1861 the prosecution must establish that the defendant was reckless as he foresaw that he might transmit the virus and still took that risk.[1] 'Recklessness' is best defined as

unjustifiable risk-taking, and Judge LJ stated that recklessness is established 'if he knew or foresaw that the complainant might suffer bodily harm and chose the risk that she would' [3] (*Kpnzani* [37])

There are potentially two schools of thought in ascertaining whether the defendant's behaviour was reckless whilst using condoms.[5] (Ryan) Firstly, it is suggested that he knew there was a risk of transmission and therefore he reduced the risk by using a condom, thereby being responsible rather than reckless in their conduct. The use of a condom establishes that the defendant is conscious that he may infect another, and as he has used precautions, it could be persuasively asserted he was not being reckless. Secondly, it is possible to stipulate that even if the defendant took precautions, the Crown, in contrast to the CPS guidelines, may still establish that the defendant foresaw harm and still took the risk[10] and such a risk was not a reasonable one to take.[11] Therefore he knew there was still a risk of transmitting the virus and he still decided to proceed with that awareness.

What is evident is that the use of condoms will significantly decrease the risk of infection. This can be supported by a number of medical studies in relation to female and male protected intercourse. The estimations suggest that the chance of transmission is significantly reduced by the use of precautions. This is even so when taking into account the various permutations that surround the issue.[12] It can also be stated that there is a lack of certainty in the various meta-analysis of condom use and risk of transmitting the infection. The studies rely heavily on the accuracy of the information they have been given by the people who were being studied.[13]

All of the studies accept that consistent and correct use of condoms will significantly reduce the risk of transmitting HIV to another. Utilising such studies may be

problematic as there is no common consensus of what is the actual risk but ultimately there is still some type of risk. The estimations of reducing the risk of transmission range from 80% to 94%. These are by no means certain. For example, it is acknowledged by Pinkerton *et al* that there can still be a number of factors that can increase or decrease the risk.[12(pp 1303-4)] The factors that can affect the level of risk were stated to be the number of 'sexual contacts, frequency of condom use and the serostatus of the infected person's partner'. [12(p 1309)] It was further specified that for accuracy their study only consisted of material from studies that compared consistent condom use with inconsistent or no use. [12(p 1306)] The study concluded that the use of condoms will reduce the risk by 94% for male to female transmission.

The methodology of the study was deemed to be defective by Weller as it utilised information from three sources. It was suggested that only data from people who either used condoms or did not use them should have been used.[13(p6)] This, logically, would have provided more accurate information. Contrastingly, Hearst and Chen propose that the Pinkerton study was the most rigorous of the studies that are available as it used a number of different studies to ascertain the risk.[14] Although the study used a number of sources this still does not take away that the accuracy of the data being questionable. Even though they advocated the Pinkerton study Hearst and Chen suggest that the risk of infection is decreased by 90%. In 1999 Weller estimated the risk would reduce to 87%.[15] This study was based upon couples who used condoms and couples who do not use such protection. A subsequent study by Weller concluded that protected vaginal intercourse reduced the risk by 80%.[13(p6)] Thus the two studies by Weller show inconsistent results.

Such statistics would seem to assist the defence in that the risk is significantly reduced when condoms are used. This is so even though there are differing estimates as to the risk factor. It would surely be in a defendant's interest to raise consistent condom use as an issue that should be put to the jury and that expert opinion would be required. However, it is submitted that there are problems with the accuracy of the figures as the only measure of use of condoms is by self-reporting. Therefore the odds of transmission could be potentially higher or lower as the studies are heavily reliant on the couples providing accurate and truthful information. As mentioned earlier it has also been recognised that the 'effectiveness' of condoms may be significantly altered by other factors.[13(p7)]

The prosecution may question the accuracy of these studies for the reasons set out above. It may also be in the prosecution's interest to use the Canadian cases, particularly as there is a lacuna in our own law on such matters. The leading case of *R v Mabior*[16] is quintessential in establishing the prosecution's argument as to the risk posed even when condoms are used. In *Mabior*, it was stated that condom use will only negate a charge if the defendant also has a low viral load as there would no longer be a 'realistic possibility' of transmitting the virus.[16 ([104])] Thus that judgment dictates that combination of factors are essential if disclosure of one's HIV status is not a requirement. It seems that unprotected or protected intercourse is now unimportant in Canada as it is no longer considered to be the demarcation line for prosecutions as a low viral must also be taken into account. This may yet be the case in England. It is submitted, however, that there can be a cogent argument constructed that is an alternative to the decision and more favourable to the defendant. Why would it be necessary to disclose that you have the virus if you have

significantly reduced the risk of transmission? The use of condoms demonstrates that he is reducing the risk of transmission and being responsible rather than irresponsible. The use of condoms is also in line with public health initiatives.

Viral load

The World Health Organisation states that the level of an individual's viral load is one of the greatest risk factors in transmitting the virus to another person and that reducing the level of the load can be one of the most effective ways of diminishing the possibility of HIV transmission.[17] Another study has also clarified that the level of a person's viral load is the chief predictor in the risk of transmission.[18]

It has been suggested that those with an undetectable viral load, who have unprotected intercourse knowing they are HIV positive, would not be considered reckless.[19] Whether a low or undetectable viral load can be utilised by the defendant to establish that they were not reckless has not been addressed by the courts. Neither of the leading cases on the criminal transmission of HIV considered the defendant's viral load as these cases[3] were concerned with consent. It is submitted that if the defendant has a low or undetectable viral load, he would need to be aware of its level in order to be able utilise it as an issue that the defence can put before the jury.

As previously stated the level of an individual's viral load can be a deciding factor as to whether the virus will be transmitted, the lower the load the less likely is the possibility of infecting another person. The viral load is reduced by taking antiretroviral treatment (ART) and consistent use of the medication can decrease the load to an amount where it will be undetectable.[17] In such circumstances, the CPS

acknowledge that the risk may be so significantly reduced that it can be contended that the level of the viral load can be just as effective as condom use in alleviating transmissions.[1] This may denote that an individual's viral load would need to be taken into account when deciding whether to prosecute. This does not eradicate the fact that the defendant's viral load may still be an issue that is raised at trial.

It is evident that the level of the viral load is intertwined with the use of antiretroviral medication. The studies suggesting that the reduction of the viral load can also reduce the risk of transmission may assist the defence counsel in establishing that the defendant was not reckless. Anglemyer *et al* found that the use of antiretroviral medication lowered the risk by at least 40% of the uninfected partner contracting the virus in comparison to the couple where the infected partner is not taking the medication.[20] If the sufferer of the virus continues to take the appropriate medication the amount of copies/ml of the virus in the blood significantly decreases.[6]

Other studies propose that the virus cannot be transmitted when the individual has a viral load that is undetectable. The Swiss Federal Commission for HIV/AIDS issued a statement regarding the use of ART and the transmission of HIV. It was announced that if an individual does not have another sexually transmitted disease, complies with his ART and has had an undetectable load for at least six months, they will be unable to transmit the virus.[6] If the accuracy of the Swiss statement could be assumed, then an undetectable viral load is even more effective in prevention than condom use. However, the sheer complexities of adhering to the obstacles in the Swiss study may make this study inadequate for the defence counsel.

Following that study it was stated that if the viral load remains below or at 50 copies/mL,for several tests then the viral load remains undetectable 94% of the

time.[21] This clearly indicates that after a number of consistent results there is a high probability that the virus will remain undetectable. The same study further amplified the need for condom use where it was stated that even though the medication can reduce the viral load to inhibit the risk of transmission it should not replace protective measures.[22] Wilson et al were also critical of the Swiss statement stating that it sends out the wrong public health message. However, the Swiss statement does actually state that couples should only abandon the use of protection if the HIV negative partner agrees. There was also suggestions that there is a distinction in risk between heterosexual and homosexual couples.[22]

As with condom use the prosecution may need to seek guidance from other jurisdictions. The Supreme Court of Canada has clarified the position in relation to a low viral load and that alone would allow a defendant to avoid liability in non-disclosure of HIV cases.[16([101])] Undetectable viral loads were distinguished as it was stated there is difficulty in establishing accuracy as such they pose evidential difficulties. [16([102])] The case demonstrates that a low viral load in isolation is irrelevant. [16([102])] It is submitted that there is no authority to assist the prosecution in cases where the defendant can establish that they had an undetectable viral load. Rather interestingly the court in *Mabior* appeared to endorse medical evidence of how quickly the viral load can be reduced when the appropriate medication is taken but it still stated it could pose a realistic possibility of transmission. [16([100])] Other factors that may support the prosecution case would be the aforementioned study that suggested that condoms should still be used even when the levels of the viral load have been significantly reduced.

When there is an undetectable viral load it is arguable that the risk of transmission is not foreseeable[23 (p25)] and there should be no prosecutions when a load is at that level.[23(p11)] The defence counsel could argue that it is inexplicable to contemplate that the defendant with a low or undetectable viral load would need to disclose their status when the risk of transmission is negligible or non-existent. Further support is that the Canadian Supreme Court decision is contrary to some medical evidence as it too easily discarded the Swiss statement by accepting one expert's opinion of it. The expert stated that there was difficulty with the 'qualifications', required further research and that it was only based upon a review of literature. [16([102])]

Directing the Jury

When directing the jury the judge would need to explain whether the defendant was aware of the risk of transmitting the virus.[24 (p53)] This subjective awareness would need to be considered within the context of condom use and/or viral load. This is a difficult proposition for a judge to evaluate as a direction could indicate that the defendant was certainly aware of the risk hence why they took precautions and that it can still equate to being aware of reducing the risk. It would depend on the specifics of each individual case. If the issue is the viral load it would depend on whether it was low or undetectable. If the defendant has, through medical advice, been made aware of the significantly reduced risk could any direction state that they were aware that there was still a risk or could it be submitted that there was no risk? The second limb for a direction on recklessness is an objective test of whether the risk was a reasonable one to take.[11] As in the case of condom use it can be stated that there are persuasive arguments for either side.

Conclusion

As has been demonstrated the current law as to whether condom use or the level of the viral load can exonerate a defendant is uncertain. It is the complexities of such evidential issues that are rather paradoxically clear; either side in a criminal trial can provide a cogent argument. Even though there are strong contentions for either party the law should still be able adapt to an ever changing environment as was the case when prosecutions under s20 came to prominence.[3(Dica)] As such either condom use or a low or undetectable viral load could be accommodated. It is the lack of precision, in relation to the issues, that makes it a difficult proposition for either counsel to provide clarity when advising. In fact the only way that the outcome of the case could be predicted would be by referring to the CPS guidelines or by utilising the case law from Canada. This provides an element of an appropriate balance as one favours defence and the other assists the prosecution, but there is still uncertainty.

It is submitted that the use of condoms would demonstrate a more responsible attitude to sexual liaisons and therefore the prosecution may find it difficult to ascertain that the defendant was being reckless when the virus was transmitted. There could be one possible way of establishing reckless behaviour, in these situations, if the defendant did not use protection in the correct manner. Such a situation would be case specific and would be problematic to prove as it may be too high an obstacle to overcome. It would probably be a case of the defendant's testimony against the complainant's.

The various studies can be beneficial to either side as they can be interpreted in a number of ways. The statistical possibilities of reducing the risk would assist any

defendant who wished to establish that he was aware of the risk and chose to reduce the risk. It is proposed that this would raise doubt in the mind of any juror. The prosecution would be assisted by identifying the deficiencies of the various studies albeit with the use of an expert opinion. It is submitted that there are distinct inconsistencies with the studies as none of them took place in laboratory conditions, they predominantly rely on the participants being open and honest in relation to their sexual activity. This would give counsel on either side the opportunity to question the accuracy of a study that the other counsel would be relying upon.

It is proposed that the law should develop so that it embraces both condom use and viral load. The use of condoms significantly reduces the risk of transmitting the virus as does the level of the viral. The use of these to negate recklessness would enable sufferers to continue to engage in sexual activity without the fear of prosecution or rejection, as they would not be required to disclose their status. Although it is conceded that morally individuals should disclose their HIV status. It is unfortunate that the English courts have not clarified the position, although it is acknowledged that some of the issues were not identified or raised at the time of Dica or *Konzani*. Thus it is suggested that the law before the Canadian Supreme Court decision in *Mabior* is the preferred approach to the criminalisation of the sexual transmission of HIV in England. This being that condom use or the level of the viral load would be sufficient. Allowing condom use to negate recklessness would promote safe sexual practices whilst being in line with public health policies initiatives. If condom use and viral load were allowed then the ultimate goal could be achieved, this being the reduction of virus being transmitted to others.

1 Crown Prosecution Service, Intentional or reckless sexual transmission of infection available at http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/ (last checked 20th September 2013)

2 He includes she

3 *R v Dica* [2004] EWCA Crim 1103, [2004] 3 All ER 593; *R v Konzani* [2005] EWCA Crim 706, [2005] 2 Cr App R 14

4 This is the amount of HIV in individuals blood see http://www.aidsmap.com/Viral-load/page/1044622/ (last checked 26th August 2013)

5 Ryan, S *Risk-taking, Recklessness and HIV Transmission: Accommodating the Reality of Sexual Transmission of HIV within a Justifiable Approach to Criminal Liability* (2007) 28 Liverpool LR 215; Munro, V *On Responsible Relationships and Irresponsible Sex--Criminalising the Reckless Transmission of HIV R v Dica and R v Konzani* (2007) 19 CFLQ 112.

6 Vernazza P, *Hirschel B, Bernasconi B, Flepp M.* HIV-positive individuals not suffering from any other std and adhering to an effective anti-retroviral treatment do not transmit hiv sexually. See *http://www.aidsmap.com/page/1429357/* and *http://www.edwinjbernard.com/pdfs/Swiss%20Commission%20statement_May%2008_translation%20EN.pdf*, (last checked 20th September 2013)

7 Offences Against the Person Act 1861

S20. Inflicting bodily injury, with or without weapon.
Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour

8 Bernard E, Azad Y, Geretti AM, Van Damme AM, Weait W.

The use of phylogenetic analysis as evidence in criminal investigation of

hiv transmission p 3. See

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=967915 (last checked 21 August

2013)

9 Weait M. *Intimacy and Responsibility: The Criminalisation of HIV Transmission,* Abingdon: Routledge-Cavendish 2007 45 -55

10 S. . H. Bronitt, 'Spreading Disease and the Criminal Law' [1994] Crim LR 21

11 *R v G* [2003] UKHL 50, [2004] AC 1034

12 Pinkerton SD, Abramson PR. Effectiveness of condoms in preventing hiv transmission. *Soc. Sci. Med* 1997; 44: 1303, 1309

13 Weller SC, Davis-Beaty K, Condom effectiveness in reducing heterosexual HIV transmission 6. See http://apps.who.int/rhl/reviews/CD003255.pdf (last checked 6th September 2013)

14 Hearst N, Chen S. Condom promotion for aids prevention in the developing world: is it working? 5 . See http://www.ip.usp.br/portal/images/stories/Nepaids/condom.pdf (last checked 6 September 2013)

15 Weller SC, Davis-Beaty K. The effectiveness of condoms in reducing heterosexual transmission of HIV. *Fam Plann Perspect* 1999; 31; 272 -79

16 *R v Mabior [*2012] SCC 47 (available on CanLII)

17 World Health Organisation. Antiretroviral treatment as prevention (TASP) of HIV and TB Programmatic Update. See *www.who.int/hiv/pub/mtct/programmatic_update_tasp/en/index.html*, (last checked 17 February 2013)

18 Quinn TC, Awer MJW, Sewankambo N, *et al.* Viral load and heterosexual transmission of human immunodeficiency virus type 1 N Engl J Med 2000; 342; 921 -929

19 Chalmers J. *Legal Response to HIV and AIDS* Oxford: Hart 2008 146

20 Anglemyer A, Rutherford GW, Horvath T, Baggaley RC, Egger M, Siegfried N. *Antiretroviral therapy for prevention of HIV transmission in HIV-discordant couples* (Review) page 2. See http://apps.who.int/rhl/reviews/CD009153.pdf (last checked 22 September 2013)

21 Combescure C, Vallier N, Ledergerber B, et al. **How reliable is an undectectable viral load?** *HIV Medicine* 2009; 10; 470–476

22 *Wilson DP, Law MG, Grulich AE, Cooper DA, Kaldor JM.* Relation between HIV viral load and infectiousness:a model-based analysis. *Lancet* 2008; 372: 314–20

23 Grant I. The Prosecution of Non-disclosure of HIV in Canada: Time to Rethink *Cuerrier* (2011) 5 McGill JL & Health 7, 25

24 Crown Court Bench Book page 53 available at: http://www.judiciary.gov.uk/Resources/JCO/Documents/Training/benchbook_criminal_2010.pdf accessed 6th September 2013