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HIV, Consent and Criminal Wrongs

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Over a decade has elapsed since the Supreme Court first considered how the criminal law should deal with those who knowingly fail to disclose HIV positive status to their sexual partners. In 1998, the court concluded that such an act attracted criminal culpability, though it was not unanimous on the precise contours of liability. The court's decision in *R. v Cuerrier*[1] was not the first time the criminal justice system had been engaged to deal with possible HIV transmission. But it signalled that such cases were to be analyzed under the rubric of assault, in particular aggravated assault, which requires knowing "endangerment" of the complainant's life or health. Somewhat less attention was paid in *Cuerrier* to the elements of sexual assault.

The use of the criminal law to sanction and punish HIV-positive persons has been criticized. Some have argued that the blunt instrument of criminalization is ill-suited to what is essentially a public health concern;[2] that prosecutions undermine education efforts directed at everyone; that criminal liability is tainted by the continuing shadow of "AIDS panic" and discriminatory attitudes[3] and that prosecutorial discretion has led to inconsistent charges and

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1. [1998] 2 S.C.R. 371, 127 C.C.C. (3d) 1, 18 C.R. (5th) 1.
2. Eric Mykhalovskiy, "The problem of 'significant risk': Exploring the public health impact of criminalizing HIV non-disclosure" (2011), 73 Social Science & Medicine 668, online: <http://www.sciencedirect.com/science/article/pii/S0277953611004199>.
3. James Miller, "African Immigration Damnation Syndrome: The Case of Charles Ssenyonga" (2005), 2 Sexuality Research and Social Policy 31; Alison Symington, "HIV Exposure as Assault: Progressive development or misplaced focus?" (November 1, 2010), online: <http://www.ruor.uottawa.ca/en/bitstream/handle/10393/19876/22-Symington-HIV_Exposure_as_Assault.pdf?sequence=33>.

legal uncertainty.[4] It is suggested, as well, that advances in the treatment of HIV-AIDS render several of *Cuerrier*'s key premises tenuous and in need of reconsideration.

The Supreme Court has created an opportunity for such reconsideration in two cases: *R. v Mabior*[5] and *R. v. C. (D.)*.[6] Presenting very different facts, these cases ask whether *Cuerrier* remains the optimal framework for analyzing the scope of criminal liability in cases of deliberate failure to disclose HIV-positive status.

This article considers a few issues arising from *Cuerrier*, including its reliance on a particular conception of fraud and the centrality to its analysis of "harm". We suggest that the court should reconsider *Cuerrier* and engage more squarely with the boundaries of sexual assault. We believe that much of the criticism of *Cuerrier*, while thoughtful and important, nonetheless proceeds from questionable premises of criminal responsibility that carry serious implications for the concept of consent to sexual activity.

1. The Landscape of *Cuerrier*

In 1998 the Supreme Court took Canada into new territory by affirming that the assault provisions in the *Criminal Code* are sufficient to encompass someone who fails to disclose HIV-positive status to a sexual partner. The defendant, Henry Cuerrier, tested positive for HIV in August 1992. At that time he was instructed by a public health nurse to use condoms and to inform prospective sexual partners of his status. Cuerrier reacted negatively to this advice.[7] He subsequently met two women, KM and BH. Cuerrier had unprotected intercourse with KM – who had discussed STDs with him but had not asked specifically about HIV – over 100 times.[8] After KM discovered

4. Isabel Grant, "The Boundaries of the Criminal Law: the Criminalization of the Non-disclosure of HIV" (2008), 31 Dalhousie L.J. 123 ("The Boundaries of the Criminal Law"); Isabel Grant, "The Prosecution of Non-disclosure of HIV in Canada: Time to Rethink *Cuerrier*", *McGill Journal of Law and Health* (forthcoming, 2011, vol. 5) ("Time to Rethink *Cuerrier*").
5. (2011), 258 Man. R. (2d) 166, [2011] 2 W.W.R. 211, 2010 MBCA 93, leave to appeal to SCC granted May 5, 2011 (docket no. 33976).
6. (2010), 270 C.C.C. (3d) 50, 81 C.R. (6th) 336, 2010 QCCA 2289, leave to appeal to S.C.C. granted August 25, 2011 (docket no. 34094).
7. *Cuerrier*, *supra*, footnote 1, at para. 78.

Cuerrier's status, they continued to have unprotected sex, something she later explained as stemming from her love for him and her wish that he not infect anyone else. Later on Cuerrier began a relationship with BH and had sex with her on ten occasions, including a number of times without a condom. BH told Cuerrier she was afraid of diseases. Both women testified that had they known of Cuerrier's status they would not have agreed to unprotected sex.[9]

Cuerrier was charged with two counts of aggravated assault. Neither complainant had tested positive for HIV by the time of trial. The trial judge entered directed verdicts of acquittal. These were upheld by the Court of Appeal for British Columbia.[10] The Supreme Court, however, set aside the verdicts and directed a new trial. The seven-member panel rendered three opinions. Justice Cory penned the majority judgment for four justices, Justice McLachlin (as she then was) wrote for herself and Justice Gonthier, and Justice L'Heureux-Dubé wrote a third opinion.

All of the opinions take, as a starting point, the statutory provisions defining assault as the non-consensual application of force. In addition, the *Criminal Code* sets out the following conditions under which no consent is possible:[11]

> 265(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
>
> (a) the application of force to the complainant or to a person other than the complainant;
> (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
> (c) fraud; or
> (d) the exercise of authority.

This provision applies to all forms of assault including sexual assault and aggravated assault. There are, in addition, several provisions dealing specifically with sexual offences. These were not discussed.

The chief question in *Cuerrier* was whether the word "fraud" in s. 265(3)(c) includes the use of deception concerning HIV

8. *Ibid.*, at para. 79.
9. *Ibid.*, at paras. 81-82.
10. *Ibid.*, at para. 83.
11. *Criminal Code*, R.S.C. 1985, c. C46.

status to induce consent to sexual relations. This provision was added to the Code in 1983. Previously, in the context of a crime against the person "fraud" had been relevant only for rape and indecent assault:[12]

> 143. A male person commits rape when he has sexual intercourse with a female person who is not his wife,
>
> . . . . .
>
> (b) with her consent if the consent
>
> . . . . .
>
> (iii) is obtained by false and fraudulent representations as to the nature and quality of the act.
>
> 149(1) Every one who indecently assaults a female person is guilty of an indictable offence and is liable to imprisonment for five years.
>
> (2) An accused . . . may be convicted if . . . the accused did anything to the female person with her consent that, but for her consent, would have been an indecent assault, if her consent was obtained by false and fraudulent representations as to the nature and quality of the act.

The words "[fraud] as to the nature and quality of the act" corresponded to the old common law rule that consent to sex was vitiated if the complainant gave it (a) under misrepresentations as to the nature of the sexual act (for example that it was presented as non-sexual), or (b) under a deliberately induced misunderstanding going to identity. Since s. 265(3)(c) no longer used such delimiting words, a key issue in *Cuerrier* was whether the new language mandated a new interpretation.[13]

Ultimately, the entire court agreed that a new approach *was* warranted. The members of the panel disagreed sharply, though, on what it should be. Writing for the majority, Justice Cory held that the switch to a single word — "fraud" — indicated that Parliament had intended to change course. He, therefore, rejected post-1983 case law which treated s. 265(3)(c)

12. *Criminal Code*, R.S.C. 1970, c. C-34.

13. A secondary issue was whether the defendant's actions could satisfy the *actus reus* of aggravated assault, which requires, *inter alia*, that the assault "endangered" the life of the complainant. Noting "the particularly lethal consequences of infection", Cory J. had little difficulty accepting this. *Cuerrier*, *supra*, footnote 1, at para. 95; *Criminal Code*, *supra*, footnote 11, s. 267. The other opinions did not address the issue in any depth.

as though it still required deception as to the nature and quality of the act.[14] He found that s. 265(3)(c) was enacted to provide "a more flexible concept of fraud in assault and sexual assault cases".[15] This more flexible concept was a "principled approach consistent with the plain language of the section and an appropriate approach to consent in sexual assault matters".[16] The approach would draw heavily from commercial cases where fraud has two constitutive elements: deception and deprivation/risk of deprivation (of property).[17] While older fraud cases had not included cases of non-disclosure (as opposed to outright lying), more recent cases had accepted that failure to disclose could count, so as long as a reasonable person would view the failure as dishonest.[18]

Cory J. then considered sexual assault. He noted that fraud as to the nature and quality of the act would still vitiate consent in that context. He did not accept, though, that non-disclosure of HIV constitutes a fraud of this nature. Instead, he found that, in the context of the non-disclosure of HIV, dishonesty must relate to "the obtaining of consent to engage in sexual intercourse, in this case unprotected intercourse".[19] It is to be evaluated objectively.[20] For there to be "deprivation", Cory J. held, "the person consenting [must be exposed] to a significant risk of serious bodily harm".[21] This gloss was added to prevent culpability in cases of "trivial" risk.[22] A sufficient level of risk, the majority agreed, would be present anytime there was unprotected intercourse. Cory J. speculated that "the careful use of condoms might . . . reduce the risk"[23] to where it could no

14. *Ibid.*, at paras. 104-105, discussing *R. v. Petrozzi* (1987), 35 C.C.C. (3d) 528, 58 C.R. (3d) 320, [1987] 5 W.W.R. 71 (B.C.C.A.); *R. v. Ssenyonga* (1993), 81 C.C.C. (3d) 257, 21 C.R. (4th) 128, 45 R.F.L. (3d) 349 (Ont. Ct. (Gen. Div.)).
15. *Cuerrier*, *ibid.*, at para. 105.
16. *Ibid.*, at para. 107.
17. *Ibid.*, at paras. 111-14, citing *London and Globe Finance Corp. (Re)*, [1903] 1 Ch. 728; *Scott v. Metropolitan Police Commissioner*, [1975] A.C. 819 (H.L.); *R. v. Olan*, [1978] 2 S.C.R. 1175, 41 C.C.C. (2d) 145, 5 C.R. (3d) 1 and *R. v. Théroux*, [1993] 2 S.C.R. 5, 79 C.C.C. (3d) 449, 19 C.R. (4th) 194.
18. *Cuerrier*, *ibid.*, at para. 115, citing *R. v. Zlatic*, [1993] 2 S.C.R. 29, 79 C.C.C. (3d) 466, 19 C.R. (4th) 230.
19. *Cuerrier*, *ibid.*, at para. 126.
20. *Ibid.*, at para. 127.
21. *Ibid.*, at para. 128.
22. *Ibid.*
23. *Ibid.*, at para. 129.

longer be considered significant, but declined to further consider that issue.[24]

Justice McLachlin, by contrast, noted that for over a century the common law approach to fraud included only fraud as to the "nature of the act or identity of the partner".[25] Fraud with respect to venereal disease had been characterized as a mere "collateral" aspect of consensual relations.[26] There was insufficient evidence to conclude that the 1983 amendments were intended to usurp the common law.[27] The question thus related to the common law, not statute, and had to respect the normal framework by which changes to the common law can be made: they must be incremental, contained and predictable.[28] She characterized Cory J.'s expansion of fraud to cover dishonest acts *only* where there was a risk of bodily harm as an *ad hoc* attempt to prevent the natural overbreadth that would result from importing into an assault offence the commercial element of "deprivation causing a risk of harm".[29] McLachlin J. claimed that this *ad hoc* element was unworkable.[30] Equally, McLachlin J. found, by equating non-disclosure with lack of consent, the majority had "oversimplifie[d] the complex and diverse nature of consent".[31] She noted that a person might "take a risk", but that her partner could still be penalized for non-disclosure.[32]

Instead, McLachlin J. proposed what she called a smaller, incremental change: a reversion to pre-1888 jurisprudence which had recognized that deception as to the presence of a venereal disease could vitiate consent.[33] A return to the former rule was incremental, as it simply reversed the previous change, which had deemed deception irrelevant to consent. The new

24. *Ibid.*
25. *Ibid.*, at para. 25.
26. *Ibid.*
27. *Ibid.*, at para. 34.
28. *Ibid.*, at para. 43.
29. *Ibid.*, at para. 48.
30. *Ibid.*
31. *Ibid.*, at para. 49.
32. Note, though, the Cory J. stated as a prerequisite that the Crown prove beyond a reasonable doubt that the complainant would not have consented had the disclosure been made. *Ibid.*, at para. 130.
33. *Ibid.*, at para. 61 citing *R. v. Bennett* (1866), 4 F. & F. 1105, 176 E.R. 925, *R. v. Sinclair* (1867), 13 Cox C.C. 28.

change reflected current societal values. It was "unrealistic, indeed shocking"[34] that consent would be "unaffected by blatant deception"[35] on an issue like the presence of HIV.

Finally, L'Heureux-Dubé J. proposed an altogether different understanding. Like Cory J. she found that Parliament had intended to move away from the strict common law approach to fraud, which she said was part of an overall initiative to modernize and sensitize[36] the law's approach to sexual offences. But she focused on the high value the law places on personal and physical integrity.[37] Consistent with the very broad definition of assault (which she noted applies even to minor applications of force), L'Heureux-Dubé J. took a broader approach to fraud:[38]

> [F]raud 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[.]

In response to the concern that her approach meant that heretofore accepted sexual dynamics could now constitute a criminal offence,[39] L'Heureux-Dubé J. noted that various other elements must be proved by the Crown,[40] and that the doctrine of *de minimus* could respond to over-zealous prosecutions.[41]

The foregoing discussion of *Cuerrier* reveals the following. First, all of the justices agreed that the appropriate terrain of inquiry was s. 265(3)(c) and thus focused on what constitutes "fraud". That focus led the majority to adapt the elements of commercial fraud to the assault context, motivated Justice McLachlin's proposal to return to the 19th-century rule vitiating consent in cases of venereal disease, and framed

34. *Cuerrier*, *ibid.*, at para. 66.
35. *Ibid.*, at para. 41.
36. *Ibid.*, at para. 4.
37. *Ibid.*, at paras 12.
38. *Ibid.*, at para. 16.
39. Cory J. levels this charge, *ibid.*, at para. 131; McLachlin J. at para. 52.
40. *Ibid.*, at para. 20.
41. *Ibid.*, at para. 21.

L'Heureux-Dubé J.'s proposal for a broader understanding of fraud's role in assault.

Second, while all of the opinions reference the offence of sexual assault, none of them engage with the specific Code provisions enacted in 1992 which for the first time articulated consent as an operative and distinct concept for sexual offences, including the conditions under which (a) consent to sexual activity does not obtain and (b) the accused can rely on the defence of honest but mistaken belief in consent. Given the court's subsequent landmark decisions in *Ewanchuk* and *A. (J.)*, which do engage these provisions, *Cuerrier*'s approach appears comparatively sketchy and inadequate.

Third, the decision does not engage in depth the public health implications of criminalizing the non-disclosure of one's HIV-positive status. Justice Cory rejected the idea that the spread of HIV is primarily a public health rather than criminal law concern, and was openly sceptical of arguments that criminalizing non-disclosure would discourage testing, undermine education efforts or unfairly stigmatize those who are HIV positive.[42] Justice McLachlin did rely on social science[43] scholarship to demonstrate the pitfalls of the other (broader) approaches of her two colleagues. With respect to her own "small, incremental change" she concluded that while there may be some impact on, for example, willingness to be tested, "[c]onduct like that in [*Cuerrier*] shocks the conscience and should permit of a criminal remedy".[44] Justice L'Heureux-Dubé did not discuss the issue.

2. Nagging Questions in the post-*Cuerrier* Universe

In our view, *Cuerrier* gives rise to several concerns. First, it requires us to ask whether the risk posed by the defendant is "significant". As we will see, this has required the courts to decide which risks are sufficient to ground criminal liability and which are not, embroiling them in policy disputes they are not well-suited to settle. Second, *Cuerrier* does not adequately acknowledge sexual assault's uniqueness within the "family" of

42. *Ibid.*, at paras. 140-145.
43. *Ibid.*, at paras. 55 and 74.
44. *Ibid.*, at para. 74.

assault offences, and so fails to recognize that deception about sexual health can vitiate consent whether or not there is a significant risk of bodily harm.

(1) "Significant Risk"

In the wake of *Cuerrier*, courts have had to wrestle with just what it means to say that the defendant imposed a "significant risk" of infection upon the complainant. Since the majority focused on *unprotected* sex, it is not clear whether criminal liability for aggravated assault should attach to the defendant who failed to disclose but used condoms. Nor is it clear whether the "risks" associated with contracting HIV have been affected to a legally relevant degree by the fact that anti-retroviral drugs can reduce a person's viral load.[45] In *Mabior* and *C. (D.)*, the respective provincial courts of appeal held that the reasoning in *Cuerrier* does not apply to situations where either condom use, low viral load or a combination thereof significantly lowers the risk of transmission.[46]

In *Mabior* the defendant failed to disclose his condition to multiple complainants, and used condoms inconsistently. As part of his treatment for AIDS, his viral load was tested at various points in time. The Manitoba Court of Appeal held that careful and consistent use of condoms can reduce the risk below significance.[47] It found, further, that despite the fact that viral loads do not remain static, they cannot be ignored where the

45. Viral load refers to "the number of copies of the virus in a millilitre of body fluid, such as blood, semen or vaginal secretions". *Mabior*, *supra*, footnote 5, at para. 98.

46. *Mabior*, *ibid.*; *C. (D.)*, *supra*, footnote 6. A number of courts have assumed that condom use renders the activity non-criminal: *R. v. Agnatuk-Mercier* [2001] O.J. No. 4729 (QL) (S.C.J.); *R. v. Edwards*, 2001 NSSC 80 at para. 25, 194 N.S.R. (2d) 107, 50 W.B.C. (2d) 255 (S.C.); *R. v. Smith*, [2007] S.J. No. 116 (QL) at para. 59 (Q.B.), affd on other grounds 2008 SKCA 61, 423 W.A.C. 230, 310 Sask. R. 230 (C.A.). See, *contra*, *R. v. T. (J.)*, 2008 BCCA 463, 256 C.C.C. (3d) 246, 88 W.C.B. (2d) 586; *R. v. Felix*, 2010 ONCJ 322, [2010] O.J. No. 3371, 89 W.C.B. (2d) 282; *R. v. Parenteau*, 2010 ONSC 1500 at para. 6, [2010] O.J. No. 1795, 92 W.C.B. (2d) 442. Cases in which viral loads have been determinative include *R. v. McKenzie* (unreported, March 9, 2006, Windsor, Ont. S.C.J., Donohue J.) and *R. v. Wright*, 2009 BCCA 514, 256 C.C.C. (3d) 254, 88 W.C.B. (2d) 587, leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 22. *Mabior* appears to be the first case in which evidence of viral load was used to acquit.

47. *Mabior*, *ibid.*, at para. 87.

load is at such a level that there is a greatly reduced risk of transmission.[48] The court then considered the "risk" present in the encounters involving each complainant and acquitted Mabior of some of the charges.[49]

The female defendant in *C. (D.)* was charged after her former common law partner accused her of failing to disclose her HIV status at the beginning of their relationship. DC ultimately did disclose and the relationship continued for some time. At the relevant time DC's viral load was undetectable. The trial judge, however, found that a condom had not been used.[50] On that basis, the trial judge convicted. The Court of Appeal overturned, finding that the viral load rendered the risk below the level required in *Cuerrier*.

It is no accident that the courts in *Mabior* and *C. (D.)* focused on condom use and viral load. The reasoning in *Cuerrier* appears to compel the conclusion that these are relevant — even determinative — factors. Some commentators and jurists have suggested that this is wrongheaded, though different reasons have been advanced for thinking so. The Crown has argued, in a number of cases, that the consequences of contracting HIV are sufficiently dire that *any* amount of unnecessary risk is "too much". On this view, we should endorse something like the "precautionary principle", and say that the "significant risk" threshold is passed once it has been shown that the defendant failed to disclose his HIV-positive status, no matter *what* other steps he took to lower the risk of transmission. The courts in *Mabior* and *C. (D.)* rejected this contention, but it will certainly be argued again before the Supreme Court.

One might also object to the focus on condom use and viral load on the basis that it requires the sort of line-drawing that should be left to Parliament, not the courts. We may all agree that HIV-infected persons should use condoms before engaging in sexual activity. For that reason, we may be prepared to accept a reinterpretation and expansion of the

48. The court accepted that a result of less than 40 copies of the virus per millilitre would count as "undetectable": *ibid.*, at para. 103.

49. Mabior was charged with counts relating to six women. The Court of Appeal allowed his appeal and substituted acquittals in the case of four of them: *ibid.*, at paras. 126-27.

50. *C. (D.)*, *supra*, footnote 6, at paras. 12-13.

offence of aggravated assault, which has the effect of encouraging more condom use. The trouble is that condom use is not all or nothing. Condoms may be used more or less effectively. Depending on how they are (mis-)used, the risk of transmitting HIV may yet be "significant". In *Mabior*, the Court of Appeal identified ten factors that should be considered when deciding whether the condom was used "properly" — *i.e.*, effectively as a prophylactic:[51]

(1) The condom must be used before the expiry date on the package. If no expiry date is present, then it must be used within five years of the manufacture date.

(2) The condom must be taken out of the package carefully. It should not be opened with teeth or cut open as that may damage the condom.

(3) The condom must be stored in cool temperatures.

(4) The condom must not be squished or sat on.

(5) The condom must be made of latex. Animal membrane condoms allow HIV to pass through.

(6) The condom must be correctly applied, which includes squeezing the air out of the tip of the condom and rolling it completely down the shaft of the penis.

(7) Lubricant made out of specific materials must be used (no petroleum products, Vaseline or oils).

(8) If there are any problems with the condom during intercourse, the condom must be replaced.

(9) When removing the penis from the vagina, the condom should be held around the base of the penis to prevent spillage.

(10) Both parties should be sober as the ability to optimize the use of a condom will be impaired if under the influence of drugs or alcohol.

The Court of Appeal observed that it may only be in the "ideal" case where all these criteria are satisfied. It opted not to decide

51. *Mabior*, *supra*, footnote 5, at para. 91.

whether the risk of transmission can be rendered "insignificant" so long as some of these criteria are satisfied and, if so, which ones.[52] It is not difficult to understand why: it is one thing for the courts to encourage HIV-positive people to wear condoms, and another thing for them to pick and choose the precise circumstances under which the treatment and use of condoms will make a material difference to someone's criminal liability. Alcohol, after all, is frequently consumed before sexual intercourse. Condoms are frequently stored in wallets and back-pockets, where they are almost certainly sat upon and squished. Given that there is no social consensus as to when a person behaves in a sexually responsible manner, this might seem rather too great an intrusion by the courts into the sphere of social policy.

The above point ties into another: the difficulty of proof. Depending upon which of the factors cited by the Court of Appeal are important or dispositive to the "significant risk" analysis, we may run into thorny evidentiary problems. In many cases, neither the defendant nor complainant can credibly claim to remember the expiration date of the condom used, or whether the air was squeezed from the tip of the condom. Where the condom belonged to the complainant, the defendant may not be in a position to say how it was stored or otherwise treated; the reverse is also true. In most cases, the condom will not be present for examination. In some, the condom will be used, but not at the outset of sexual activity. The evidentiary problems may be even greater with respect to viral load. An HIV-positive individual can reduce his viral load only if he has access to external resources like drug therapy and regular testing. Where the accused was taking anti-retroviral drugs at the relevant time, but had not recently been tested, it may be decidedly difficult for the Crown to prove that his viral load was "detectable".[53]

Finally, some have objected that condom use and viral load raise distinct policy concerns that warrant treating them differently. Isabel Grant suggests that society has such a powerful interest in encouraging condom use that a failure to

52. *Ibid.*, at para. 92.
53. *Ibid.*, at para. 115.

disclose where the accused used condoms should not be criminalized. In contrast, she believes that people should not be encouraged "to assess their own viral load and determine their own risk of transmission".[54]

These points together reveal a troubling fact about the *Cuerrier* framework: because criminal liability now hinges on whether the defendant's conduct presented a sufficient actual risk of infection, aggravated assault trials have become forums for debating just how much risk of HIV transmission is too much. That is indeed a question worth asking, and the courts have more or less had the question thrust upon them, but we doubt that they are particularly well-suited to answer it. In an ideal world, it would be Parliament that decides whether non-disclosure of HIV status before sexual intercourse should, without more, amount to an offence in law on the basis of its inherent riskiness, or whether the societal interest in promoting condom use is so great that proof of such use should always be a full and complete defence, or whether certain kinds of condom (mis-)use should be positively deterred and others not. With its vastly greater access to expert epidemiological, sociological, and other kinds of evidence Parliament is in the better position (as compared to courts) to decide just how grave is the risk to individuals upon becoming infected with HIV; whether the societal interest in promoting condom use should justify (as a matter of policy) acquitting defendants who have arguably behaved in a morally blameworthy fashion and just how risky it is to use condoms in one way rather than another. Moreover, it has the institutional legitimacy to settle questions of social policy that courts lack. To be clear, the approach devised by Cory J. in *Cuerrier* is not necessarily "unworkable".[55] We suspect that, with some tinkering and a bit of line-drawing, it can be made to work. Our point is that the courts have neither the institutional competence to draw those lines in an informed way, nor the legitimacy to set social policy — that the current approach to prosecuting and trying those who have failed to disclose their HIV-positive status has thrust courts into an uncomfortable role.

54. Isabel Grant, "Rethinking Risk: The Relevance of Condoms and Viral Load in HIV Nondisclosure Prosecutions" (2009), 54 McGill L.J. 389 at p. 403.

55. *Cuerrier*, *supra*, footnote 1, at para. 48 (*per* McLachlin J.).

The peculiar nature of this role can be seen in the suggestion that the courts should refuse to recognize non-disclosure as a criminal wrong where doing so will promote responsible sexual practices.[56] There is nothing unreasonable about the suggestion that we would better control the risks attached to a type of behaviour, not by treating it as a wrong that must be deterred and punished, but by treating it as a phenomenon with public health implications to be controlled and managed. Thus we may deal with some of the public health effects of heroin use — in particular, those that stem from needle-sharing — not by criminalizing its use, but by creating sites where users can inject themselves safely.[57] In England, the persistent problem of "glassing" in pubs — *i.e.*, stabbing others with broken pint glasses — has been recently addressed by designing pint glasses that cannot be broken.[58] We might manage the risks attached to terrorist attacks on nuclear and water treatment plants, not (or not only) by criminalizing such attacks, but by devising procedures and failsafe mechanisms to limit their impact.[59] We could manage the risks associated with drunk driving not by using the criminal law, but by requiring the installation of ignition interlock devices on automobiles.

So it is possible in many contexts to treat risky courses of action as public health concerns rather than criminal law concerns. Indeed, it may be a good idea to resort to the criminal law less often.[60] But, again, we would generally think that the decision to address risk in one way rather than another belongs to Parliament, not the courts. It is not open to judges to unilaterally decide that heroin users, drunk drivers or terrorists

56. See Grant, "Boundaries of Criminal Law", *supra*, footnote 4, at p. 146.

57. Consider, *e.g.*, the Insite Program in Vancouver. See *PHS Community Services Society v. Canada (Attorney General)*, 2010 BCCA 15, esp. at paras. 80-81, 250 C.C.C. (3d) 443, 314 D.L.R. (4th) 209 (*per* Huddart J.A.).

58. See Justin McGuirk, "A pint of shatterproof glass, please: What the Design Council does for us", The Guardian, March 31, 2011, available online: <http://www.guardian.co.uk/artanddesign/2011/mar/31/design-council-cuts-glass>.

59. See Kent Roach, *September 11: Consequences for Canada* (Montreal: McGill-Queen's University Press, 2002), c. 7.

60. *Ibid.*; Douglas Husak, *Overcriminalization* (Oxford University Press, 2009); Alan Young, "Done Nothing Wrong: Fundamental Justice and the Minimum Content of Criminal Law" (2008), 40 S.C.L.R. (2d) 441; Andrew Ashworth, "Is the Criminal Law A Lost Cause?" (2000), 116 L.Q.R. 225.

cannot or should not be prosecuted anymore. Parliament has already settled those questions. Along the same lines, once the courts decide that non-disclosure of significant risks of HIV transmission amounts to a criminal wrong proscribed by Parliament, the matter is settled. The only question left to decide is *when* it will amount to that wrong.

We do not take issue, then, with the courts' attempt to sort out the precise circumstances under which non-disclosure of HIV amounts to a criminal wrong, without regard to what doing so will mean for the spread of HIV in our community. It is, however, unfortunate that the courts have been preoccupied with whether and when non-disclosure amounts to an *aggravated* assault. As we have seen, doing so has bogged the courts down with policy questions they are not well placed to address. This is especially unfortunate given that non-disclosure could have been addressed, not through the lens of aggravated assault, but through that of *sexual* assault.

(2) Sexual Assault, Objectification and Consent

The "risk problem" arises because Cory J. informed his analysis of fraud in the context of assault, a crime against the person, by looking to commercial fraud. In crimes against property, fraud has always required dishonesty combined with a risk of deprivation. This makes sense for property crimes: it promotes fair dealing while recognizing that people are most concerned about loss of property — that neither dishonesty nor risk alone should ground criminal liability.[61] It is not so clear that it makes sense in cases of assault — and even less so in cases of *sexual* assault. Significantly, proof of risk was not required for the older categories of "fraud" in sexual crimes — there, fraud related to the nature and quality of the act (or to knowledge of one's partner's identity). Those categories were, to be sure, animated by outdated ideas concerning female virtue. We suspect, though, that an approach to fraud in the sexual context that required only deception could be defended, without reliance upon such ideas, by looking to the core wrong that the offence of sexual assault targets. It is important, for

61. Note, though, that once there is dishonesty *any* risk would seem to be sufficient to constitute fraud.

that reason, not to blur together aggravated assault and sexual assault.

We cannot, here, provide a sustained analysis and defence of what criminal law theorists describe as "the principle of fair labelling".[62] There is a common intuition, however, that the offence with which a person is charged and convicted should reflect not just the fact that the accused engaged in criminal wrongdoing, but also the "nature and magnitude" of his *particular* wrongdoing.[63] This is not just because it would be unfair to the defendant to label his act in such a way that it appears more grave or depraved than it really was. It may also be unfair to the *victim* to label the accused's act in a manner that inadequately reflects the precise nature of his wrong.[64] To, for example, charge a person who caused the death of another with aggravated assault rather than manslaughter could be construed as a sign that we do not care about the most morally salient aspect of the defendant's action; namely, that it caused *death*.[65] Likewise, it would strike many as abhorrent to charge a person who forcibly penetrated a woman without her consent — that is, who engaged in what would once have been described as "rape" — with simple assault.[66] To do so would, we intuit, treat the defendant's alleged wrong as if it were fundamentally the same as that committed by someone involved in a bar fight. Such a myopic approach may not only be unfair to the alleged victim. It may also implicate the state — in a way that deeply offends *us*, the public it represents — in the wrong actually committed by the defendant; *i.e.*, the wrong for which he is *not* being called to account.[67]

62. But see James Chalmers and Fiona Leverick, "Fair Labelling in Criminal Law" (2008), 71 M.L.R. 217.

63. Andrew Ashworth, *Principles of Criminal Law*, 5th ed. (Oxford University Press, 2006), p. 88.

64. See the discussion in Chalmers and Leverick, *supra*, footnote 62, at pp. 235-36.

65. *R. v. Creighton*, [1993] 3 S.C.R. 3 at para. 85, 83 C.C.C. (3d) 346, 23 C.R. (4th) 189 (*per* McLachlin J.).

66. See Chalmers and Leverick, *supra*, footnote 62, at p. 236, noting that some victims of rape would object to the perpetrator being charged with other sexual offences that do not require proof of penetration.

67. For the view that criminal trials are, first and foremost, forums for calling individuals to account for public wrongs, see R.A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Portland, OR: Hart

When we think of what is wrong with sexual assault, we naturally tend to focus on the physical and psychological harms suffered by the victim.[68] In 1983 the language of "rape" was removed from the *Criminal Code*, and replaced with the language of "sexual assault", as a means of recognizing that non-consensual sexual touching is a crime of violence and is, in that sense, part of the larger "family" of assault. In taking this step, Parliament was acknowledging the instinctive revulsion we have towards violence and the *harm* it causes. Sexual assault is not, it implicitly claimed, a harmless crime. It can, and frequently does, cause considerable physical and psychological damage. To that extent, we should look upon sexual assault with *at least* as much revulsion as any other assault. The 1983 reforms thus may contribute to an impression that sexual assault is not uniquely wrong, that it is simply one more variation on a theme we can track throughout the assault "family".[69]

That, however, would be a false impression. Harm will often result from sexual assault. It is possible, though, to imagine a scenario in which the victim of a sexual assault suffers no physical or psychological injuries — in which she is, and forever remains, unaware that the violation even took place.[70] The fact that there would be no prosecution in such a case is neither here nor there. The point of the substantive criminal law is, first and foremost, to guide citizens away from wrongful courses of action.[71] Indeed, it is when the criminal law is actively *obeyed* that we will be most inclined to think that it is working effectively. And when we imagine the above hypothetical, we surely think that the assailant has engaged in a terrible wrong

Publishing, 2007); John Gardner, *Offences and Defences* (Oxford University Press, 2008).

68. On this point, though, it is interesting to consider *R. v. McDonnell*, [1997] 1 S.C.R. 948, 114 C.C.C. (3d) 436, 6 C.R. (5th) 231, in which the majority suggests that the offence of sexual assault *simpliciter* does not presuppose any findings of harm.

69. See *R. v. Osolin*, [1993] 4 S.C.R. 595 at para. 165, 86 C.C.C. (3d) 481, 26 C.R. (4th) 1.

70. See John Gardner and Stephen Shute, "The Wrongness of Rape" in Jeremy Horder, ed., *Oxford Essays in Jurisprudence*, Fourth Series (Oxford University Press, 2000).

71. See the analysis in Meir Dan-Cohen, "Decision Rules and Conduct Rules: Acoustic Separation in the Criminal Law" (1984), 97 Harv. L. Rev. 625.

notwithstanding the fact that no harm has straightforwardly befallen the victim.[72] That strongly suggests that the wrongfulness of sexual assault cannot be reduced to the wrongfulness of inflicting harm.[73] This in itself is a good reason to distinguish between sexual assault and other assault offences.

When we imagine the above hypothetical situation, and other paradigm cases of sexual assault, we are invariably struck by the way in which the perpetrator has *used* the victim's body for his own sexual pleasure. He has treated the victim simply as an object for his enjoyment, rather than as an autonomous being in her own right, with her own ends and feelings that deserve respect. Like Gardner and Shute, we are inclined to think that it is this particularly callous type of "objectification"[74] — whereby a human being is turned into an instrument for one's sexual gratification — that the offence of sexual assault is designed to address.[75] Because women have traditionally been more likely than men to be regarded as objects to be used, and specifically as objects to be used sexually, the fact that sexual assault targets the wrong of "objectification" is closely bound up with the gendered nature of the offence.[76] Though other types of assault — and indeed many moral wrongs — also entail treating a person as (to use Kant's language) a means rather than an end in herself, none *inherently* involves the "sheer use" of another's body.[77]

The special concerns animating the offence of sexual assault have dictated a special sensitivity to questions of consent.

72. See Gardner and Shute, *supra*, footnote 70, at p. 197. But see Douglas Husak, "Gardner on the Philosophy of the Criminal Law" (2009), 29 O.J.L.S. 169 at pp. 184-87.
73. But see Alan Wertheimer, *Consent to Sexual Relations* (Cambridge University Press, 2003) (arguing that the wrongness of non-consensual sexual touching is based on the experiences of the victim).
74. For the classic analysis of objectification, and the circumstances under which it is morally problematic, see Martha Nussbaum, "Objectification" (1995), 24 Phil. & Public Affairs 249.
75. Gardner and Shute, *supra*, footnote 70, at p. 204. Though Gardner and Shute in fact argue that objectification is the core wrong of rape, we take it as uncontroversial that this conclusion applies just as surely to sexual assault.
76. See *Osolin*, *supra*, footnote 69, at para. 165.
77. Gardner and Shute, *supra*, footnote 70, at p. 204. Justice Cory himself acknowledged the offence's unique nature in *Osolin*, *ibid.*, noting that it both assaults human dignity as well as denies gender equality.

Section 273.1 of the *Criminal Code* defines consent as "the voluntary agreement to engage in the (sexual) activity in question".[78] It states, further, a number of circumstances where consent does not obtain. In addition, s. 273.2 states that an accused may not rely on an honest but mistaken belief in consent where he or she fails to take "reasonable steps, in the circumstances known to the accused at the time, to ascertain" that consent. These provisions apply only to sexual offences.

In *R. v. Ewanchuk* the Supreme Court confirmed that the primary goal of the assault provisions is to protect personal autonomy, noting the centrality of "having control over who touches one's body, and how".[79] The quote (quite properly) covers all forms of assault, but in *Ewanchuk* it was used not just to support the complainant's right to "say no". It grounded an approach to fault in which the defendant cannot rely upon *objectifying* attitudes and beliefs — *e.g.*, that silence and passivity are "invitations" to sexual touching — to excuse mistakes about consent.[80] Most recently, in *R. v A. (J.)* the court had to consider whether consent can be given in advance to sex expected to occur while one is unconscious.[81] A majority of the court ruled that consent does not persist once a person loses consciousness. It noted that the consent provisions in s. 273 exist in part to prevent sexual exploitation, and that consent must be voluntary and revocable at all points during the sexual activity.

Ewanchuk and *A. (J.)* might seem to have little to say about cases of non-disclosure. Let us assume that, in such cases, A has purported to consent to B's sexual touching, was conscious throughout, did not "consent" out of fear, and had a competent grasp of what it means to engage in sexual touching. The sole question, in other words, is whether A's consent is vitiated. We will also suppose, for the sake of clarity, that B's deception was by omission, not commission — that A never asked about B's state of sexual health, and that B opted not to volunteer information about it. On these facts, we might be tempted to

78. *Criminal Code, supra*, footnote 11.
79. *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para. 28, 131 C.C.C. (3d) 481, 22 C.R. (5th) 1.
80. *Ibid.*
81. *R. v. A. (J.)*, 2011 SCC 28, 271 C.C.C. (3d) 1, 335 D.L.R. (4th) 108.

proceed simply on the basis that A exercised her autonomy and took a risk with her own health. Sexual activity involves inherent and well-known risks of physical injury and abuse of trust.[82] In choosing not to inquire into B's sexual health, one could argue, A opted to take her chances.

That conclusion strikes us as too pat. It proceeds on the basis that, when an individual purports to consent to sexual touching, without requesting information about her prospective partner's state of sexual health, she must be indifferent to such information. That is certainly possible: different people will be more or less ready to take risks with their own health, and the law generally allows people to take those kinds of risks.[83] But that hardly means that we are entitled to *assume* our partners' indifference simply on the basis of their silence or passivity on the issue. People may choose not to ask about such matters for any number of reasons: embarrassment, a fear of spoiling the mood, concerns about appearing intrusive, trust in one's partner, or sheer thoughtlessness (whether it is the result of intoxication or not). We do not claim that these are *good* reasons not to ask; only that a partner's failure to ask about matters of sexual health provides a poor basis for inferring indifference to it. Where there is no clear signal of genuine indifference, we may well take the view that respect for one's partner's sexual autonomy should cash out as a presumption that she wants such information. To adopt the opposite presumption — to automatically proceed on the basis that one's partner is not invested in her own health and well-being, and is therefore willing to make herself sexually available in spite of obvious risks — may be to treat her as if she had no plans or priorities beyond her own immediate sexual gratification. It effectively denies that one's partner has any *meaningful* autonomy in *any* sphere, not just in the instant sexual context.[84] There is, in this attitude, at least a hint of the sort of objectification rejected in *Ewanchuk* and *A. (J.)*.

82. See Michelle Dempsey and Jonathan Herring, "Why Sexual Penetration Requires Justification" (2007), 27 O.J.L.S. 467 (discussing the kinds of physical injuries that may flow from sexual penetration).

83. But see *A. (J.)*, *supra*, footnote 81; *R. v Brown*, [1994] 1 A.C. 212 (H.L.) (where the majority refused to recognize consent to homosexual sadomasochistic practices).

This may seem a harsh view. It may appear softer when we consider two points. First, even if the person who fails to disclose his HIV-positive status objectifies his partner, his partner may nonetheless be able to consent to sexual touching. As we have noted, people have different tolerances for risk, and it is not necessarily the case that non-disclosure in fact affected the uninformed party's decision to consent. The important question, though, would not be whether the defendant's conduct satisfied some objective threshold of riskiness, but simply whether the complainant would not have consented but for the defendant's non-disclosure of his HIV-positive status. The complainant's subjective state of mind, at the *actus reus* stage of analysis, would be dispositive. Non-disclosure, on this view, would be only contingently relevant to the question of consent, and actual risk would never be relevant in itself.

The second point goes to *mens rea*. Nothing we have said so far precludes a non-disclosing defendant from arguing that, in the particular circumstances of his case, he had an honest but mistaken belief in consent. This would require the defendant to show, not just that the complainant was silent as to her interest in his sexual health, but that she had signalled her genuine indifference on the matter (or, even better, her positive desire not to discuss it), and that he relied upon this signal in deciding not to broach the topic. In a case where non-disclosure did not in fact reflect objectifying attitudes towards the other party, but was instead based on a misunderstanding, the accused could avail himself of a defence.

A number of judges have observed that HIV-positive persons have a moral obligation to disclose their status to their sexual partners. Indeed, the court in *Cuerrier* was unanimous in thinking that there is such a moral duty[85] — their disagreement

84. This line of reasoning might give some clues as to why other forms of deception and non-disclosure, though morally wrong, do not *objectify* in a comparable way: they do not similarly diminish or demean the plans and projects *generally* that the victim of the deception has. Say, for example, that A lies to B about his educational background, falsely claiming that he graduated from Harvard Law School in order to induce B into consenting to sex. It may be that B would not have consented to sex but for that deception. Nonetheless, it could hardly be supposed that A, by making this lie, has necessarily assumed the worthlessness of B's other life plans.

85. *Cuerrier*, *supra*, footnote 1, at paras. 47 and 135.

concerned only whether there was a legal duty. More recently, Justice Fenlon of the B.C. Supreme Court stated:[86]

> I should not be taken to condone the behaviour of the accused. He had a moral obligation to disclose his HIV-positive status to his partner and to give the complainant the opportunity to assume or reject the risk involved in sexual activity with the accused, *no matter how small*. But not every immoral or reprehensible act engages the heavy hand of the criminal law.

For the reasons we have (albeit briefly) stated, we suspect that deception (qua non-disclosure) regarding one's HIV-positive status will often amount to the very sort of wrong (*i.e.*, objectification) that the offence of sexual assault is supposed to target. To that extent, the idea that there must be *more* than that kind of deception to vitiate *sexual* consent should be revisited. Simply put, sexual assault does not target the same wrongs as other kinds of assault – and certainly does not target the same wrongs as commercial fraud. Our approach to consent, and so our understanding of when and how deception and non-disclosure can vitiate consent, should vary in each context to reflect these different aims.[87] As the Supreme Court revisits *Cuerrier*, it has an opportunity to devise an analytical framework that better reflects the diversity of wrongs and offences in play.

86. *R. v. T. (J.A.)*, 2010 BCSC 766 at para. 89, 88 W.C.B. (2d) 306 (emphasis added), cited in Grant, "Time to Rethink *Cuerrier*", *supra*, footnote 4, at pp. 49-50.

87. A majority of the Supreme Court acknowledged this point in *R. v. A. (J.)*, *supra*, footnote 81.