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Research at the medico-legal borderland: perspectives on HIV and criminal law

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In recent years, the criminalization of HIV transmission, exposure and non-disclosure has become a hot topic among those working within the global AIDS milieu. Social scientists have become increasingly attentive to the complex and varied consequences and impacts of HIV criminalization. Not surprisingly, at this year's [Association of the Social Science and Humanities on HIV \(ASSHH\) Conference](#) there was a wide variety of innovative work on the issue. A majority of the research was presented from social scientists working in the two countries with some of the greatest number of per-capita criminal charges and prosecutions related to HIV non-disclosure and exposure: the United States and Canada.

The conference held two formal sessions highlighting new work in this area entitled: *Viral Politics: HIV Criminalization & Social Inquiry* and *Social Science, Criminal Law and HIV Transmissions Risks: Novel Research Perspectives*. In this article I summarize highlights and key findings from these presentations, and examine some of the methodological approaches and theories employed by social scientists working on the 'medico-legal borderland'. I also provide a brief critical analysis in order to pose questions for future potential inquiry.

The medico-legal borderland

Social research into HIV criminalization is most often situated within the theoretical and discursive space described by Timmermans and Gabe (2003) as the 'medico-legal borderland'. The medico-legal borderland emerges from the intersection of the medical and the legal wherein both forms of knowledge and power join together to constitute new regimes of knowledge; ones that produce hybrid legal and medical subjects who are governed through normative knowledge on health and illness, as well as legal regulation, discipline and forms of social control (Mykhalovskiy, 2011). This intersection of crime and health contains elements of both realms but cannot be simply reduced to either one. The medico-legal borderland itself constitutes a hybrid disciplinary environment in which state institutions mobilize medical knowledge for legal purposes, and

where the medical becomes intertwined with other mechanisms of power – both legal and extra-legal. As highlighted by HIV criminalization scholar Eric Mykhalovskiy (2011), Timmermans and Gabe use the term medico-legal borderland to “decry the absence of dialogue between criminology and medical sociology and to encourage critical analyses of sites in which health care and criminal-legal practices intersect” (pg. 674, 2011).

Day One: Deviance, Advocacy & Model Laws

During the first session at the ASSHH conference, Trevor Hoppe presented his doctoral work titled: *‘From Sickness To Badness: Punishing, Regulating, and Controlling HIV in Michigan’*. Michigan is one of the 24 American states to have enacted criminal laws requiring that people living with HIV disclose their HIV status prior to engaging in sexual acts with partners. In the presentation, Hoppe employs sociological theories of social control and mobilizes the work of Conrad and Schneider (1980) to examine how people with HIV are constituted as deviants to be punished within the juridical apparatus of Michigan, USA. Conrad and Schneider’s *‘Deviance and Medicalization: From Badness to Sickness’* (1980), elaborates how the medicalization of deviant behaviour has been organized socially. This includes how issues such as attention deficit, learning disabilities, drug use and alcoholism have been transformed from being understood as acts of deviance, to those that are regulated through medical ways of knowing.

In an attempt to build on the work of Conrad and Schneider, Hoppe’s research reveals that medicalized knowledge of HIV has no traction in Michigan courts where legal decisions are guided by fear, stigma and moralistic judgements, thus: “From Sickness to Badness”. Hoppe argues that the decisions made under Michigan’s HIV disclosure law are not formed through benevolent medical or public health considerations (i.e. to prevent further HIV transmissions), but rather, they are formed by punitive and moralizing narratives that frame people living with HIV as social deviants who need to be under state control. Hoppe’s theoretical engagement ends there and one is left thinking: has HIV not always been akin to badness?

Additionally, it is unclear in Hoppe’s project what is to be achieved theoretically through the polarization of sickness and deviance. Under a regime of medicalization, are people living with HIV not also governed by law? Hoppe’s work suggests that a more nuanced investigation is required of the ways in which medical and legal knowledges intersect to create complex hybrid rationalities of governance.

Hoppe’s work primarily consists of a case-by-case thematic analysis of

prosecutorial documents to highlight the court's perpetration of moralizing tropes towards positive people as the violent criminal "other". However, Hoppe makes up for what is lacking in the project's theoretical rigour with his greatest contribution to the field: bringing to light detailed evidence from 58 felony HIV non-disclosure convictions in Michigan through undertaking extensive research from police data and media archives. Hoppe's research constitutes 95% of all convictions between 1992-2010 in the state. In many of these cases, in sentencing, HIV is taken into account by judges in the same way as the use of a violent weapon. Hoppe presents a number of disheartening scenarios in which people living with HIV are charged and prosecuted for variety of sex acts, even an act of vaginal to nasal penetration in which a stripper was prosecuted for rubbing her labia on an undercover police officer's nose.

The injustices that Hoppe's work reveals leave one wanting more in terms of understanding what drives such punitive and state-sponsored stigma. There is no doubt that the work of social scientists is to document the forces that marginalize so as to interrogate and reveal oppressive power structures. But if our work is merely descriptive and not aimed at revealing how such events have come to be in the first place, at what point does such straightforward documentation become gratuitous? Since the beginnings of the epidemic, people living with HIV have been framed as social outcasts, deviants and criminals. What new contributions can we make to the body of social research in this area to advance understandings of *how* and *why* regimes of medical and legal governance are historically, socially, culturally and economically constituted?

The following presentations in the session were by Canadian researcher, Eric Mykhalovskiy, an Associate Professor at York University, and by Daniel Grace, a post-doctoral researcher with the University of British Columbia and visiting fellow at the London School of Hygiene and Tropical Medicine. Both researchers employ forms of feminist sociologist Dorothy Smith's (1987) institutional ethnographic inquiry to examine how relations with institutions structure people's everyday lives. Because of its focus on mundane everyday activity, as well as broader social, economic, political and cultural power relations, institutional ethnographic inquiry can offer both a useful and critical micro and macro analysis to explore aspects of the criminalization of HIV transmission, exposure and non-disclosure.

In the presentation: *HIV, Criminalization, and the Limits of Science: Rethinking Activism*, Eric Mykhalovskiy explored the Canadian activist milieu in reaction to the recent Supreme Court *R v. Mabior* decision and disjuncture that occurred between biomedical knowledge of HIV and judicial decision-making. Building on the work of sociologist George Smith, Mykhalovskiy's intervention elaborated a reflective ethnographic analysis of activists who mobilized in reaction to the 1998 Supreme Court *R v.*

Cuerrier decision, and the consequences of the promotion of “science-based” law reform. In “*Political Activist as Ethnographer*”, George Smith (1990) proposed grass-roots political organizing as a research method aimed at providing communities living with HIV an opportunity to step outside of their current realities in order to change the harmful social conditions that lead to structural violence and forms of oppression. The work of the activist ethnographer is then to extend and promote knowledge to help themselves and others understand how “a ruling regime works with a view to transforming it” (Smith, 1990). Mykhalovskiy follows this tradition in the Canadian AIDS activist milieu where his work aims to counter the increasing punitive nature of legal governance of people with HIV. Most recently he has been working on an Ontario-wide campaign to call on the Attorney General to develop guidelines for prosecutors in HIV non-disclosure cases.

In 2012, the highest court in Canada extended the role of law in relation to HIV non-disclosure: now legally requiring the use of a condom *and* a ‘low viral load’ if someone does not tell a sex partner their HIV-positive status. Without both a condom and a ‘low viral load’ consent is legally vitiated. This ruling ignores the fact that many people are not able to use condoms for complex reasons, or achieve a ‘low viral load’. Interpreted by activists, this ruling over-extends the law, puts the legal burden solely on people living with HIV, and is inconsistent with years of HIV prevention work.

Previously, the law had been murkier: the 1998 Supreme Court decision required that someone with HIV must disclose if the sexual behaviour they engaged in posed a “significant risk” of transmitting HIV to their partner(s). But the court did not define “significant risk” and this led to years of uncertainty for people living with HIV and many inconsistent charges and prosecutions. Growing rapidly since the early 1990s, Canada has seen approximately 150 charges faced by 140 defendants in relation to non-disclosure – with a disproportionately high conviction rate. Those who are prosecuted are often added to a lifetime sex offender registry and have known to be held in what is called ‘protective custody’ or ‘administrative segregation’.

As Mykhalovskiy elaborates, to quell the growing number of charges and prosecutions, activists’ had strategically called for “science-based” law reform aiming to ensure more consistency and greater restraint from the courts. An example of such reform would be ensuring that charges could only be laid when there was a scientific basis for transmission to have occurred and where there was wilful intent or reckless behaviour involved. However, what resulted is that the Supreme Court’s 2012 decision interpreted scientific knowledge of HIV risk and transmission using a legal rationality that views non-disclosure as sexual assault. Such logic can be only understood through looking back to the legacy of second wave

feminist legal scholars, who invoked 'consent' as a locus of governance, thus expanding the role of the state juridical and punitive apparatus so as to protect women from rape and sexual assault. Mykhalovskiy thus calls into question the activist strategy of mobilizing scientific knowledge on HIV in the context of this legal rationality because of the way it backfired in the Canadian context, resulting in a new legal test that is inconsistent with years of transmission science and HIV prevention work.

Another contribution of this presentation is the examination of the person with a low viral load (and conversely the person who cannot achieve a low viral load) as new medico-legal subjects that the Supreme Court's decision constitutes. Or what the session discussant Martin French noted as the emergence of "techno-scientific identify profiles cloaked in jurisprudence". As a technique of governance, the judicial management of viral load will be increasingly important to understand for social researchers, especially in the context of 'treatment as prevention' regimes, viral load mapping projects, and with the development of new technologies of therapeutic surveillance.

Mykhalovskiy's reflexive approach is encouraging in the wake of the discouraging Supreme Court decision. More work like this is needed to interrogate and evaluate strategies to counter the increasingly punitive climate for people with HIV. Mykhalovskiy's work on the strategy of law reform employed by activists in the HIV social movement suggests that a number of questions remain. With the current reality of the negative consequences of second wave feminist legal reform related to how consent now legally frames HIV non-disclosure, what are the unforeseen impacts that could result from AIDS activists-led legal reform for prosecutorial guidance? Who could get left behind with the new prosecutorial guidelines? And will such guidance for prosecutors help draw a further dividing line between the sick and the well, or the virally detectable and the virally undetectable?

In the case of Daniel Grace's doctoral thesis work: *'Best Practice as Coordinating Genre in the Criminalization of HIV Transmission'*, the researcher proposes a form of transnational institutional ethnography through examining the proliferation of USAID-written omnibus model laws on HIV that were adopted across 15 west and central African nations between 2005-2010. The model laws include a provision for criminalizing the transmission of HIV and are known as the USAID/Action for West African Region (AWARE) legislation. In Grace's work, the researcher notes that the laws act as a "pre-operative" and "harmonizing" text that were claimed to be "best practice" grounded in "human rights". As a legal instrument the model legislation was also promoted as a simple 'one-size fits all' solution for legislators working to address HIV/AIDS. Grace calls into question the mobilization of "best-practice" and "human

rights” language and elaborates that through his international fieldwork, many policy actors view these transnational legislative practices as harmful and are now actively working to counter them.

A critical analysis of the transnational macro-level coordinating and governance function of “best practices” in the global AIDS response is refreshing. However, the presentation left me wondering how these model laws are so easily adopted. I was left wanting a better sense of the geopolitics, political economy and colonial aspects of this practice, particularly in the context of the American neo-colonial project aimed at exporting forms of morality to African nations and at continuing forms of aid dependency. Grace’s project is a large scale one, and it is likely these analyses are in the work but just did not come out in the short span of the conference presentation. It will be important for social scientists to continue to track the social impact of this legislation in the region to better understand the consequences of this American legislative “best practice” on the lives of people living with HIV.

Day Two: Service Provider Perspectives & Viropolitics

The following day of the conference saw the second session during which research was presented from the USA and the UK. The UK is an interesting case, as England and Wales only prosecute ‘intentional’ and ‘reckless’ transmission of HIV. In 2008, the Crown Prosecution Service established policy guidance for prosecutions, which only allows for prosecutions in cases for which a transmission has occurred. As such, there are notably fewer prosecutions (a total of 17 prosecutions as of 2010) than in countries such as Canada and the USA. For some, the example of the UK is regarded as a progressive law reform achievement and has resulted in the push for prosecutorial guidance in other countries.

Catherine Dodds, researcher from the UK’s Sigma Research and the London School of Hygiene and Tropical Medicine presented her team’s research entitled *Keeping Confidence: HIV and Criminal Law From Service Provider Perspectives*. Dodd examines the medico-legal borderland from the perspective of service providers who support people living with HIV. As a result of the legal environment, Dodd’s qualitative research with 75 service providers reveals a conflict between the professional liability and the ‘duty of care’ for those they work with, and the ‘duty to the law’, or the legal liability to report a client if they fear they could be having unprotected sex. Dodd’s work shows how many providers had a basic understanding of the law, but they lacked a nuanced understanding so as to effectively communicate legal obligations to clients.

With this project, the roles of providers have become conflicted which, Dodd notes, creates professional uncertainty around service provision and the potential new burden that has emerged for them to communicate accurate legal information. In some cases, providers now see themselves as having to enforce the law and/or build legal literacy (re: people living with HIV's criminal law obligations), as well as providing care and support. This has complicated service provider/client relations and has potentially negative consequences for the delivery of care. In a small number of instances this issue has directly impacted how people do their jobs, as a few providers noted that they have stopped detailed note-taking during client sessions to avoid the potential for health records to be subpoenaed.

As service providers' jobs are becoming entangled with new legal obligations, Dodd's work is important in expanding understandings of the impacts of criminalization on the services that people living with HIV access to support their health and wellbeing. Additionally, this project is an important step toward revealing how the day-to-day juridical management of people living with HIV is increasingly diffused throughout extra-legal actors in society.

Martin French ended the session with his presentation titled *The Viropolitics of HIV Testing: Counselling and Criminalization in Tennessee*. French – a new faculty member in the Sociology Department at Montreal's Concordia University – presented on his fieldwork in the American state of Tennessee with HIV voluntary testing and counselling providers. The state leads all other American jurisdictions with 48 prosecutions related to various forms of HIV criminalization between 2008-2010. French's work concerns a number of issues specific to the negative impact that HIV criminalization has on public health outcomes. This includes examining how hybrid legal and medical principles result in promoting HIV stigma, and examine what occurs when public health knowledge, such as health records, are "recoded" in a juridical context.

In his work, French reveals how the macro level punitive legal environment negatively impacts the micro level practice of voluntary HIV testing and counselling. Through qualitative interviews with Tennessee service providers, French describes the emerging sense of anomie produced by the apparatus of criminalization. French notes that the counselling milieu has been theorized in the past as a site of normalization, in which medical knowledge from across populations is measured against the individual to evaluate the "normal" and "abnormal". Under criminalization, this emerging anomic environment of normlessness leaves people living with HIV and service providers who work with them in a state of increasing stress, confusion and uncertainty.

Seeking to advance conceptions of the biopolitical, French is proposing

what he has labelled “viropolitics”, or the “latent indeterminacy prior to biopolitics”. Biopolitics aims to describe a situation in which human biological life becomes the “object of political strategy” (Foucault, 2007, pg. 1). In the early 2000s Achille Mbembe took biopower to the grave by elaborating the concept of ‘necropolitics’. With necropolitics, Mbembe seeks to elaborate “under what practical conditions is the right to kill, to allow to live, or to expose to death exercised?” (Mbembe, 2003, pg. 2). For French, viropolitics is at the analytic margins of biopolitics and necropolitics. His work seeks to further develop and mobilize this concept, which would be a theoretically and analytically useful tool for revealing and understanding the emerging hybrid forms of medico-legal governance that people living with HIV face.

The second ASSHH conference provided a useful platform for taking forward the concept of the medico-legal borderland. It promises to be a useful tool for thinking about how the complex intersection of regimes of medical and legal knowledge shape responses to the HIV epidemic. Social scientists play an important role in this area and by examining the criminalization of HIV at the medico-legal borderland our field will continue to expand and interrogate these complex relations so as to understand how criminal law shapes the social relations of people living with HIV, health care workers, service providers, other actors in the global response to HIV.

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