

## Why we must go beyond focusing on the ‘overrepresentation’ of racialized people in HIV criminalization

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By

*We can trace an unbroken record of injustice back through generations, to our grandfathers and our grandmothers, our great-grandfathers and to those before them. We can trace them back to the time when a label was put on our people, legitimate victim. Other people learned that they could victimize us and nothing would happen because the laws, your laws, did not protect us.*

—Rufus Prince (Ojibway, Long Plain), former Vice-President, Manitoba Indian Brotherhood, *Aboriginal Justice Inquiry of Manitoba*, 1991

Overrepresentation of racialized people in media reports of HIV non-disclosure and in non-disclosure criminalization cases is a significant problem. It is a problem in the media because hyper-sensationalized reports of racialized people—particularly immigrant Black men—are profoundly stigmatizing, as Mykhalovskiy *et al.* (2016) demonstrate in their longitudinal research from the Canadian context. Media overrepresentation also affirms, for the public, longstanding and harmful racist discourses about Black immigrant crime, Black men’s virility, and the ‘monsterization’ of Black men’s sexuality (Persson & Newman, 2008; Walcott, 2010). The affirmation of these discourses serves to justify forms of systemic racist practices, including mass incarceration.

Racist discourses in the media and legal spheres tie together with health discourses about HIV transmission, and more specifically, who is to blame for the spread of HIV/AIDS (Decena, 2008). As McClelland (2013) explains, HIV criminalization occurs at a medico-legal borderland, where health and law intersect, but are not in dialogue.

In this essay, I draw attention to the limited engagement with critical race theory and Indigenous studies analyses in HIV criminalization literature. I suggest that such analyses provide significant insight into the particularities of HIV criminalization cases against racialized people in

Canada. The disproportionate number of convictions of racialized people in HIV non-disclosure cases is a continuation of the broader historical and contemporary overrepresentation of racialized people in the criminal justice system (ACCHO, 2010, p. 11). I argue that we need to pay attention to what activists and scholars, particularly Indigenous and Black people, have thought and written about the overrepresentation of racialized bodies in the courts and prisons in order to be able to move forward with interventions that will benefit racialized people, not just white people. Racist discourses about hypersexuality and monsterization permeate our scientific legal interventions, such as [U=U \(undetectability=untransmittability\)](#), thereby limiting the interventions' effectiveness for racialized people who are implicated in the criminal justice system.

Clearly, we need to expand our analysis beyond the overrepresentation of racialized people. African, Caribbean, and Black people are not the only ones overrepresented in the Canadian criminal justice system. This is important to note because Indigenous people have been and are overrepresented as well. There is a long history in Canada of Indigenous people pushing back against Canadian law, and more specifically, against the institutional racism embedded within it.

Since its inception, Canada's criminal justice system is plagued by and built upon systemic racism that targets Indigenous people. The 1991 Aboriginal Justice Inquiry of Manitoba squarely locates racism and colonialism as causal factors in the overrepresentation of Indigenous people in the justice system. As Sherene Razack (2012) notes, the articulation of this causal link is an atypical position issued by a government inquiry. Yet, in this instance, the Inquiry does not stop its analysis at overrepresentation. The problem is larger and deeper than overrepresentation. The Inquiry highlights how and in what ways the justice system itself plays a role in enacting racism and supporting racist practices: "the best evidence of systemic discrimination lies in the adverse impacts that the system has on Aboriginal people" (Hamilton & Sinclair, 1991, Vol.1, Ch. 4). The Inquiry describes the different ways that the criminal justice system discriminates against Indigenous people: over-policing, over-incarcerating, and over-charging; disproportionate rates of convictions, bail denials, and pre-trial detentions; less time with lawyers; harsher sentencing; and pressures to plead guilty (ibid). This report provides vital signposts and evidence for scholars and advocates who work in legal reform with regard to how to examine and understand the impacts of racism in the context of HIV criminalization. These findings also show that there are problems in need of addressing that go deeper than the matter of overrepresentation.

When we focus on overrepresentation of racialized people as the primary

issue, we miss seeing the other impacts the Inquiry notes, as well as the root of the problem, which is racism. Razack (2012) points out that for the last 150 years in Canada, inquiries into the deaths of Indigenous people who were held in police custody or jailed found that the justice system was indifferent to and abandoned Indigenous people. Razack also argues that colonization continues to mark Indigenous bodies as “bestial and as human waste [while] the white body [is] the maker of order, the modern subject of the settlers’ city” (p. 910). The persistence of these practices demonstrates how colonialism and racism intersect in the Canadian criminal justice system, which serves to maintain a dominant and subordinate relationship between the colonial-settler state, Indigenous people and Black people: by marking Indigenous bodies as human waste and Black bodies as monstrous, and by marking white bodies as controlled and civil, the naturally superior race who is entrusted with creating the racial hierarchy and maintaining law and order. I argue that we urgently need to pay attention to and address the material and bodily consequences of such colonial and white supremacist relations.

Rinaldo Walcott (2010) elaborates on the connections between the monstrous Black body and medico-legal spaces of power:

Even when black people struggle to come into humanhood, we are often offered and perceived as a lesser kind of human, a different genre of the species. Our difference gets marked by skin, hair, lips and genitals; then by place; then by sex and sexuality; then by poverty and crime; then by disease and death. (p. 2)

Place, disease, and law imprint on bodies in particular ways, marking some bodies as infectious and dangerous and others as deserving of protection. The medico-legal borderland is as much about the intersection between medicine and law as it is about racial hierarchies and white supremacy. According to Foucault (2003), practices that create and maintain human health, which are the goals of modern medicine, are deeply rooted in biopower, the power to proliferate life. Biopower’s incisive tool for deciding whose lives are fostered, and whose are not, is racism. Similarly, the creation of order and rule is deeply entrenched in systems that uphold white supremacy by delineating which bodies are inherently criminal, and which ones are innately righteous.

From Indigenous, Black, and anti-racist perspectives, Canadian law is not benevolent or fair. Ovide Mercredi (Cree), the former National Chief of the Assembly of First Nations, remarked:

In law, with law, and through law, Canada has imposed a colonial system of government and justice upon our people without due regard to our treaty and Aboriginal rights. We respect law that is fair and just, but we

cannot be faulted for denouncing those laws that degrade our humanity and rights as distinct peoples. (Hamilton & Sinclair, 1991: Ch. 1)

As we see, Mercredi's claim challenges white liberalism embedded within the Canadian justice system by undermining the assumed fairness and justice in Canadian law. His denouncement asks us to see the implications of the colonial project for people's lives as inherently dehumanizing. Those of us interested in interrogating and alleviating the harms of HIV criminalization need to be aware of the historical and contemporary challenges of the criminal justice system, and not only how it impacts people currently living with HIV. If we widen our view and understand the historical and contemporary critiques outside of the field of HIV, we will be better prepared to address how racism and colonialism work specifically in HIV non-disclosure cases.

When we begin by understanding the criminal justice system as an ongoing colonial project, many more forms of analysis of HIV criminalization come into focus. We can then act on the problem of overrepresentation of racialized people as a symptom rather than the problem.

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