Pathogens, Punishment and Public Health:

Some jurisdictions have not yet prosecuted exposure to, or transmission of, a pathogen during sexual activities – should they do so now?

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Declaration:

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Edward M. Mathews

September 2016
Abstract

To address the central question, I consider the philosophical and theoretical perspectives relating to criminalisation and punishment, concluding that criminalisation may be justified on a standard harm analysis but that the decision as to criminalisation should be approached from the perspective of a hybrid philosophical model underpinning a minimum criminalisation approach. I then examine the operation of the criminal law in England and Wales and Canada, discussing the nature of the harm associated with criminalisation, the role of risk and recklessness and the issue of consent. This discussion exposes a number of issues and tensions in the operation of offences, but also speaks as to the underlying messages associated with criminalisation, the potential breadth of criminalisation in the sexual sphere, the exceptionalism associated with prosecution in the sexual sphere and the potential for broader criminalisation outside that sphere.

The thesis then interrogates the position in the USA, analysing the influences which drove criminalisation, the range of responses, the exceptional response of specific statutes and the considerable difficulties associated with their use. I then analyse public health efforts, from both a voluntary and coercive perspective, which seek to manage the spread of pathogens using an alternative to the criminal law and additionally the negative effects of criminalisation on those efforts.

Finally, I consider, using Ireland as an example, how criminalisation might be approached in a jurisdiction which has not yet prosecuted, specifically issues which should be borne in mind if prosecutions were to take place, and finally conclude that they should not, save in very limited circumstances. I conclude that criminalisation should be limited to circumstances where a person acts intentionally with reference to a pathogen and as such uses it as a weapon.

In reaching this conclusion I identify the exceptionalism of criminalisation in the sexual context, originating with HIV, which speaks as to the Otherness of those infected and who may infect and the stigma which continues to be a driver of epidemics. I conclude that there has never been a satisfactory disquisition at a judicial level to explain the abandonment of a public health approach to pathogens, and, where specific legislative intervention has occurred, this is to be identified with the exceptionalism and Otherness associated with HIV.

From a principled perspective, and using additional public health and related research, I conclude that the deployment of the criminal law in this area is maladaptive to the achievement of what should be the goal of our societies when dealing with pathogens – the health of the population.

While criminalisation has developed in the context of sexually transmissible pathogens, there is no principled basis upon which criminalisation can be limited to that context; moreover, the criminal law is a blunt instrument which does not assist in the control of pathogen spread and in fact damages institutional and interpersonal relationships, structures and perspectives including normalisation which can assist in the development, implementation and maintenance of a community level response which has the maximum potential to control the spread of pathogens.
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1. Introduction, Structure and Methodology

The criminalisation of the transmission of pathogens during sexual activities was a concern of the criminal law many years ago, however, over time a more nuanced understanding developed which realised that pathogens and their transmission arose within inherently complex and personal circumstances which were better managed as a matter of public health endeavours. Where the criminal law was left to intervene, it was as an adjunct to public health initiatives, engaged only in relation to those who failed to cooperate, and even then quite infrequently and with minor penalties. Moreover, these developments occurred at a time when there were many more pathogens which were incurable and had the potential to wreak significant misery within society.

This was until the advent of the Human Immunodeficiency Virus (HIV) which at first emerged in populations who were, and are, marginalised within our societies, and as such the virus received relatively little attention initially. However, the virus subsequently emerged in the wider population and entered the supply of blood used for transfusion. This was a virus which caused devastation to the immune system with associated high levels of mortality in often young and otherwise healthy persons, and there was an extraordinary reaction to the virus and those infected by it, characterised by fear, misunderstanding and stigma associated with many factors including fear of the unknown and antecedent views towards populations within which the virus first and most often emerged.

The spread of such contagious pathogens did not represent a new challenge for societies, however, this particular pathogen did engender a new response, with criminalisation emerging as a reactionary measure contended for as necessary to both assist in curbing its spread and to punish those who engaged in behaviour causing or risking transmission. This shift in approach proceeded with relative vigour in the USA, where both general criminal laws and newly introduced specific statutes were utilised in this regard. Other jurisdictions responded using an array of general criminal law offences, ranging from relatively minor offences such as nuisance at one end of a spectrum, proceeding to offences of causing harm and rape at the other, and yet still a minority of others, including Ireland, have had no criminal law response.

While illness and deviance have a long association, never before have such significant and severe criminal law responses been used in an effort to control the spread of a
pathogen or to punish those who exposed others to the risk of infection, or where that exposure resulted in infection. Although criminalisation commenced in cases involving HIV, prosecutions have now taken place involving a wider range of pathogens including those which have no potential for life limiting effects. While criminalisation thus far has been limited to exposure or transmission arising in the sexual context, there is now growing advocacy for, and no principled legal reason against, a criminal law response to all pathogens meeting the threshold of harm and other conditions of liability, albeit that such calls have not been matched with attendant prosecutions.

States which have not prosecuted exposure or transmission are in the minority, including Ireland, and it is in this context, and bearing in mind the seriousness of the criminal law response in many jurisdictions, that this thesis seeks to examine whether we should criminalise exposure to, or the transmission of, a pathogen during sexual activities. This is turn exposes a broader question relating to the exposure of others to pathogens, or the transmission of those pathogens, in other contexts.

To address this question, I will first examine philosophical and theoretical perspectives relating to criminalisation and punishment. I will then examine the operation of the criminal law in England and Wales, Canada and the USA to establish how the behaviour with which I am concerned came to be recognised as a legitimate target for criminalisation after so many years and further to facilitate an analysis of the operation, scope and impact of criminalisation. These jurisdictions have been selected as they provide a rich selection of primary legal resources, academic commentary and statistical data to facilitate a comprehensive analysis. Furthermore, they occupy positions on a spectrum in relation to potential approaches to criminalisation which provide important perspectives which have the potential to guide future developments in jurisdictions which have not prosecuted in this area. Finally, in particular, the USA provides an opportunity to examine the operation of a range of approaches, in particular specific statutes, while also providing an opportunity to examine the theoretical and practical considerations relevant to the operation of public health efforts and the interrelationship between criminalisation and those efforts.

The thesis will proceed in four substantive parts, part 2 will examine the philosophical justifications for criminalisation and punishment in order to situate criminalisation in this area within existing paradigms justifying criminalisation generally and specifically in the
context of pathogen transmission. The examination of the philosophical positions will expose tensions in the underlying rationales for criminalisation and punishment generally and in this specific context. While the foregoing analysis will say much as to why or when conduct should or should not be the subject of criminalisation, the thesis will further address the philosophical and theoretical perspectives relating to what specific conduct may be criminalised, and of that which may – what should be criminalised. Again tensions between a number of competing perspectives will be examined, with particular focus on a hybrid model which supports a minimum criminalisation approach. This approach facilitates a consideration of multiple intersecting influences with a view to not only reconciling competing philosophical perspectives but also a consideration of the individual perspective of those potentially subject to criminalisation and the interests of society as a whole.

Part 3, arranged in four chapters, will examine the position in England and Wales and Canada. Chapter 1 will situate the operation of the criminal law in the context of the prevalence of STIs within the population, as well as providing important information in relation to the seminal cases which created liability and developed the principles applicable thereto. Chapter 2 will examine the concepts of harm and causation seeking to identify the conception of harm associated with the offences prosecuted, examining how the law came to recognise pathogens as a form of harm while at the same time exposing important principled issues associated with the approach of the courts thus far. Furthermore, this chapter will examine important alternative conceptions of harm when considering exposure to and transmission of pathogens. Finally, I will examine issues associated with causation in relation to transmission liability. Chapter 3 will consider recklessness and risk, critically analysing the role played by risk in establishing liability whether that be as an element of the actus reus or mens rea of a particular offence. Risk will be analysed both from the perspective of the potential risks involved in each act, the societal conception of risk and whether in the circumstances any risk in reality will be too great thus resulting in potentially wide scale criminalisation. Chapter 4 will consider issues surrounding consent, knowledge and disclosure and address theoretical and practical issues relating to the role of consent in harm offences, the importance of the role of consent as either a defence or an element of the offence and the relevance of the state of knowledge of the complainant generally and specifically. This chapter will also consider whether consent to intercourse should be vitiated by a fraud in relation to the
presence of a pathogen, and whether the status of a relationship should have a bearing on the issue of consent. Throughout this part, I will explore the state of the law in relation to both STIs and the potential for wider criminalisation in the social sphere based on the current state of the law.

Part 4 will examine the position in the USA and the public health perspective in the management of pathogens. Having placed the issue in context with reference to the prevalence of pathogens in the population and the political and social forces which influenced the direction of criminalisation, I will examine the operation of both general and specific criminal law interventions. A range of criminal law approaches will be considered looking at both general and specific responses exposing the exceptionalism evident in the response to HIV and the contradictory, complex and counterproductive interventions which have emerged. I will then examine how public health efforts approach the management of pathogens from a voluntarist and coercive perspective, the ethical and legal considerations associated with public health efforts, and finally the detrimental effects of criminalisation on public health initiatives.

The final part, part 5, will examine potential routes towards criminalisation in jurisdictions which have not prosecuted as yet, referring to Ireland as an example and examining the existing range of criminal law offences in that jurisdiction, and thereafter based on the overall discussion this part will offer an alternative perspective which militates against criminalisation.

The methodology adopted seeks to situate the criminalisation of exposure to, or transmission of, a pathogen during sexual activities in its philosophical, political, social, legal and scientific context. The research is interdisciplinary in its nature drawing from legal texts, academic commentary, criminological literature, social science perspectives, empirical public health research, ethical discussions on public health endeavours, political philosophical reasoning and jurisprudence. I have also drawn material from a discussion with HIV activists during a seminar at which I presented. The aim is to place criminalisation in context from the macro to micro level and to examine the intersecting forces and rationalities which both support and militate against criminalisation.

In approaching my analysis in this manner, the philosophical perspectives on criminalisation and punishment offer an opportunity to both assess the extent to which the current operation of the criminal law in selected jurisdictions fits within accepted
paradigms and to offer an alternative conception, which while remaining within accepted parameters, argues on a principled basis against criminalisation. Furthermore, an examination of the operation of particular offences, be they general criminal laws or specific statutes, offers an opportunity to explore the practical application and effect of such offences, which in turn will assist in the development of normative recommendations for jurisdictions which have not prosecuted as yet. Additionally, the philosophical perspectives in relation to issues such as harm, risk, recklessness and consent offer additional perspectives in relation to the meaning and consequences of such offences, their appropriateness and effect. The structure adopted also allows a consideration of theories and practices associated with public health and related social sciences to examine how pathogens are controlled, how public health operates as an alternative form of social control, the contours and limits of public health endeavours and the public health effect of criminalisation.

These discussions will expose an exceptionalism in the approach of the law to sexually transmitted pathogens, evidencing a simplicity of approach which belies the complexity of human relationships within which transmission occurs and a direct and relational effect of criminalisation on public health endeavours to control the spread of pathogens. I will ultimately conclude that, while there is a basis upon which criminalisation may be justified, in operation the criminal law’s effect is to damage an ultimate good relating to the health of the population, and more efficacious means are available to achieve most of the criminal law’s objectives; moreover, where such means are not available, the furtherance of an objective associated with the criminal law should be foregone in light of its deleterious effect, save with respect to the intentional use of a pathogen to cause harm.
2. The Foundations of Criminalisation
The criminal law is a construct of special social significance in that it represents the strongest form of social censure that our society permits and can lead to significant deprivations of liberty. The social significance and punitive nature of such a construct calls for justification generally, and no less so in the current context. The central concern of this work is the advent of criminalisation relating to transmission of or exposure to pathogens during sexual activities and therefore in this context it is necessary to consider what justifications exist for the criminalisation of behaviour so as to understand the extent to which criminalisation has been or may be justified in this area. Section 1 will consider the nature of a crime and theories justifying the criminal law and punishment, so as to provide a context and normative framework within which to assess criminalisation. Section 2 proceeds from the general to the particular and considers the theories which provide guidance as to what conduct should be criminalised with a view to establishing a framework within which I can additionally consider criminalisation in this context. Section 3, the final part, draws together the arguments in the context of non-fatal offences against the person and offers a view as to whether the criminal law may be justified—and indeed it may—with regard to the censure of this type of conduct, though ultimately I find the deployment of criminal law in this area to be maladaptive to the aims invoked and not calculated to serve the interests of society and the health thereof. While this part provides important theoretical foundations within which to assess the criminalisation of the type of behaviour with which we are concerned, it does not offer, nor does it aim to offer, a full account of all the theoretical aspects relevant to a determination of the central question. Further analysis in relation to harm, risk, consent, the potential states of culpability and public health issues will illuminate points of relevance in resolving the central question. However, in the available literature on this topic, there is relatively little in-depth attention to the overall justifications for the criminal law when applied to pathogen transmission and thus a detailed attention to this area is warranted and useful in substantively addressing the ultimate question.

I. A Crime, Criminal Law and Criminal Punishment

Introduction
Some initial observations are appropriate to contextualise what follows. The first point considered is what amounts to the criminal law in the milieu of laws more generally, and what makes it distinctive. This is an importantendeavour in itself to contextualise the
overall discussion, but is also of particular importance in informing a later debate regarding the boundaries of the criminal law when used as an adjunct to civil law mechanisms, such as public health law. We then turn to the philosophical justifications of the criminal law and punishment. This discussion seeks to illuminate the foundational principles in the area, and will address, among others, moralistic, instrumental, communicative and political paradigms in an effort to discern not the theory of criminal law and punishment, but instead the many theories which can inform and justify criminalisation and punishment. Throughout, I will relate the discussions to the operation of the criminal law in relation to exposure to or transmission of a pathogen during sexual activities.

Overall, I will conclude that there are many competing paradigms justifying the criminal law and punishment and that these normative accounts are important as a philosophical check on the deployment of coercive state power in particular contexts. I will also conclude that the moralistic conception of the criminal law, in the sense of legally moralistic, maintains vitality, as do instrumental, communicative and restorative accounts; however, a hybrid model utilising both retributive and instrumental considerations provides the most cogent basis on which to make decisions regarding criminalisation. However, in relation to the criminalisation of particular conduct, I will also observe that such decisions are more likely to be reflective of positions adopted in a particular time and place, influenced by economic, social and political concerns, which are reflective of the purported shared values of our society as determined through a complex process of value formation and communication which is in essence a political endeavour, which invokes a notion of political morality, as opposed to extra-legal morality, in that the law reflects current day mores as opposed to being representative of transcendental notion of that which is morally correct in an ultimate sense.

**The Nature of the Criminal Law and a Crime**

In this section, I seek to identify that which marks the criminal law as distinctive within laws more generally, and how are we to identify when something is criminally wrong as opposed to merely wrong.

**Seriousness and Morality**
The criminal law is concerned with wrongs against an individual or some societal value or institution, and it was once thought acceptable to say that criminal laws evidenced coercive norms which were representative of collectively acknowledged moral standards.
Indeed, this could still be said of many offences, all things being equal, such as killing or stealing, in that these acts are regarded as wrongful in themselves that is immoral, and indeed potentially seriously harmful, and as such may be termed *mala in se*, and carry with them a strong sense of social censure.

However, a wide range, and perhaps the majority, of current criminal offences would not be regarded as directly referent to underlying moral standards. Health and safety and many motoring offences do not evidence such a connection and may be regarded, at a routine level, as not wrong in themselves, but wrong because they are prohibited, or what may be termed *mala prohibita*. That said, such offences while not directly referable to underlying moral foundations may not, depending on one’s perspective, be devoid of moral content, and can be seen to embody moral principles indicating appropriate standards of behaviour such as not subjecting each other to the unnecessary risk of harm. Therefore, the focus of the criminal law viewed through the moral prism, before further analysis, might be seen to facilitate the advancement of collective and individual interests by punishing deviations from collectively agreed standards of behaviour.

However, there are offences where the social stigma attaching to the offence dissipates to vanishing point such that they would not generally be viewed as carrying a sense of social censure in a truly criminal sense nor indeed would they intuitively be regarded as serious.\(^1\) It is interesting to note that in some legal systems there is a distinction between crimes and violations, such as the German distinction between crimes and violations.\(^2\) In such systems violations would not be regarded as criminal in a true sense, for example minor traffic matters, and the distinction is marked by the relative mildness of sanctions and alternative processes to deal with the issues. In essence, these violations are seen to be wrongs, but not serious enough to warrant the condemnation of criminal conviction.

Therefore it is not possible to contour the boundaries of the criminal law solely either in terms of the seriousness or morality, and in fact the boundaries are more likely determined by political forces at particular moments in history associated with an increased regulatory environment which accompanied and followed industrialisation in our

\(^1\) Andrew Ashworth and Jeremy Horder, *Principles of criminal law* (7th edn, Oxford University Press 2013), at 1 - 2.

societies. The most that can be said at this stage is that behaviour is regarded by the law as defective or wrong, and as such prohibited, and this is not necessarily representative of moral wrongfulness or particular seriousness, reflecting a legally positivistic account of the criminal law.

Crime as a Public Wrong
Crimes are quintessentially seen as a concern of the state not just those affected by them and while conduct leading to criminal wrongs may additionally be civil wrongs, e.g. torts, marking such conduct as criminal indicates there is a public interest in preventing that activity and, where it does happen, potentially punishing those responsible. One distinction keenly related to the public/private dichotomy is the initiation of proceedings: where a matter is pursued as a crime, it is the state and its representatives who have sole discretion in initiating a prosecution, while in the civil realm this rests solely with the person allegedly wronged. This is not to ignore the role of the victim in a criminal process who may by deciding to report or not, or to cooperate or not, be highly influential in the initiation or maintenance of a prosecution. They will not, however, be determinative in the initiation of a prosecution.

In addition, while it is notoriously difficult to offer a satisfactory distinction between the civil and criminal law, when behaviour is criminalised, the remedies are generally different. While in civil law the remedy is usually rectificatory, in criminal law the outcome is conceived as punitive and burdensome in a temporal, pecuniary or liberty sense. This in itself is a less than satisfactory distinction in light of the potential for compensatory orders in criminal processes and punitive damages in civil processes, however, as a general point, the concept of all criminal sanctions is punitive, whereas in civil processes, this is the exception rather than the norm. Furthermore, the criminal law is imbued with a denunciatory function which is not generally representative of civil law. If one is found liable in tort for battery, it is unlikely that this will carry the same symbolic significance, nor indeed practical consequences, as being found guilty of assault. The criminal law as a public law construct therefore has an important symbolic or

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3 Ashworth, Horder, note 1, at 2; Celia Wells, Oliver Quick, and Nicola Lacey, Lacey, Wells and Quick reconstructing criminal law: Text and materials (4th edn, Cambridge University Press 2010), at 5 – 6.
4 Wells, Quick, and Lacey, note 3, at 5 – 6.
5 Wells, Quick, and Lacey, note 3.
communicative function which is not characteristic of civil law processes, and I will consider this point further in due course.

That the criminal law is concerned with public wrongs does not offer a delineation which is concerned with public or private spaces, and instead public interest in the conduct is the touchstone and so we can see conduct which takes place almost exclusively in a private sphere, for example domestic abuse, remains a concern for the criminal law. The traditional connotation of this concept was a crime against the community, however, a more attuned analysis points towards an understanding of crimes as wrongs not against the community, but with which the community is concerned. In this conception of crimes as public wrongs there is a focus on the potential shared values of a society, the importance of such values to human flourishing, breaches of those values and the consequent intervention of the criminal law in the interests of all.

The Quest for a Definition

The foregoing analysis is analytical in that it seeks to define how the criminal law or crimes may be identified and distinguished from other forms of legal regulation, and this is of importance to what follows; although normative theories also to an extent must be in a position to identify the key characteristics of the criminal law or a crime. Additionally, it points to some of the thematic tensions which will emerge as the discussion develops. However, the analytical or definitional process has value in and of itself, to which I now turn.

The quest for a definition of a crime is vexed and Glanville Williams concluded his endeavours to find such a definition with the observation that only a formal definition could be posited which involved a crime being an act which is followed by criminal proceedings which has a criminal outcome. Such a definition immediately raises the question as to what amounts to criminal proceedings, which is generally left to parliamentary control, but in addition is the subject, in Ireland, to the provisions of Article 6 of the European Convention on Human Rights (ECHR). The focus of the ECHR is on the substance of proceedings as opposed to the label attaching, which has been termed an

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8 Glanville Williams, ‘The Definition of a Crime’ [1955] (107) CLP.
“anti-subversion” mechanism which prevents a blurring of the criminal/civil boundary to the extent that the extra procedural guarantees associated with the criminal process might be avoided. The case law of the European Court of Human Rights (ECtHR) establishes that a criminal process is one involving: proceedings brought by a public authority, which have a culpability requirement, or which potentially attract a significant consequences such as imprisonment or a fine and where met will involve being charged with a criminal offence with the attendant protections afforded by Article 6.

These reflections are of particular relevance to so called hybrid measures which have been deployed in England, and elsewhere, to deter or manage what is viewed as anti-social behaviour, where ‘civil preventative’ orders emanating from courts or administrative bodies are issued, and breach of their terms amounts to a criminal offence. Where a transgression is prosecuted, the court’s only concern with the civil order has been the fact of whether or not it has been transgressed, even though the contents of the offence, that which has been breached, were established in the civil proceedings. The courts in the UK, where such measures have been deployed for some time, have declined to follow the ECtHR example of declaring the two proceedings as criminal in substance, thus facilitating a court or administrative body in a civil process to create a personal code of behaviour for a person, the breach of which carries significant sanction without the attendant protections of the criminal law process.

There is an analogy to be drawn between such orders and the deployment of coercive public health law initiatives which invariably carry the potential for criminal sanction in the event of a failure to comply. Such measures require adherence to a personal code of conduct determined by a public official, breach of which may result in criminal conviction, posing a challenge to the paradigm of the criminal law and how it is presented. Simester and von Hirsch have raised serious questions as to whether the use of such civil orders, carrying criminal sanctions for breach thereof, amounts to a fair and proportionate

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9 Ashworth, Horder, note 1, at 3.
10 Engel v Netherlands (1976) 22 EHRR 293.
11 Ashworth, Horder, note 1, at 4 – 5.
12 Ashworth, Horder, note 1.
13 See VTS v HSE & Ors [2009] IEHC 106 concerning section 35 of the Health Act 1953 and civil committal for health reasons, and the related section 38(4) where a person evading detention, wilfully misbehaving during detention, escaping or attempting to escape, or who fails to submit in a peaceful and orderly manner to their detention shall be guilty of an offence punishable by a fine and/or imprisonment for up to three months.
response to the risks that they are deployed to manage. Therefore, it is necessary to consider whether the criminal law deployed as an adjunct to public health measures is a fair response to the difficulties which they are purported to deal with, and whether there are sufficient protections associated with those measures. Moreover, public health law may be seen as a soft option in responding to the type of behaviour with which we are concerned, though others would observe that such laws can be equally liberty-limiting when compared with criminal law and can amount to oppressive interventions, and I will examine this in due course with reference not only to the fairness of the processes but also the normative and practical implications.

Thus far, I have established that the criminal law can no longer be solely identified with reference to moral or serious wrongdoing, but that it may be distinguished on the basis of its public character. I have also considered the extent to which the boundaries between criminal and other forms of law are clearly marked and the potential practical consequences of this. I turn now to theories underpinning the criminal law and punishment to discern why we ought to have the criminal law, why it out to be punitive, and, to an extent, what should be the concern of the criminal law.

Theories of Criminal Law and Punishment
Theories of the criminal law both draw from and inform more general theories in relation to law, for example legal positivism or natural law. Additionally, they have an interdependent relationship with broader philosophical theories in areas such as political philosophy, moral philosophy and the philosophies of action and the mind. So too, theories of the criminal law, and law more generally, must interact with other disciplines such as critical theory which challenge philosophical theories and focus instead on the

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14 Andrew Simester and Andrew von Hirsch, ‘Regulating Offensive Conduct through Two-Step Prohibitions’ in Andrew Simester and Andrew von Hirsch (eds), Incivilities: Regulating offensive behaviour (studies in penal theory and penal ethics) (Hart Publishing (UK) 2006), at 173 – 195; see also the concerns raised by Norrie in: Alan Norrie, ‘Citizenship, Authoritarianism and the Changing Shape of the Criminal Law’ in Bernadette McSherry, Alan W. Norrie, and Simon Bronitt (eds), Regulating deviance: The redirection of Criminalisation and the futures of criminal law (Hart Publishing UK 2008), at 13 – 34; Additionally the operation and ramifications of such hybrid measures have been considered in: Andrew Ashworth and Mike Redmayne, The criminal process (4th edn, Oxford University Press, USA 2010), at Ch 13.

social, political and economic realities within which law operates to the effect that philosophical theories may be seen as a veneer seeking to rationalise the irrational.\textsuperscript{16}

Theories in this area may be either analytical or normative. Analytical theories seek to describe the concept of the criminal law, and its constituent elements, to facilitate identification of criminal law among other laws and those other laws which approximate criminal law though they do not identify as such. Normative theories on the other hand seek to identify what the criminal law should be in terms of the goals and values it should pursue and protect, though of course some analytical account will be necessary to inform the derivation of such principles. The main focus of this chapter is normative in the sense of understanding what the criminal law ought to do, and specifically then informing a discussion of whether it ought to criminalise the type of behaviour in question.

Theories of the criminal law considered in this section are those which justify the criminal law itself as an institution of punishment, and also have something to say about what it is to be criminally liable. They also inform specific concerns which can underpin the criminalisation of certain conduct, although I will return to that point later in the chapter. Prior to discussing such theories, it is apt to note that there is no agreement as to any one theory which best justifies the criminal law and punishment. It has been said that attempts to offer one unified account of these constructs is prone to be complex and ‘messy’, and what follows is thus an account of some of those theories to illuminate justifications for the criminal law and punishment with a view to assisting in an assessment of whether particular behaviour should be criminalised.\textsuperscript{17}

\textit{Instrumental or Consequentialist Conceptions}

One view of the criminal law and punishment is as an instrument which can serve valuable ends related to human welfare, which in turn requires an assessment or agreement in relation to what those ends are.\textsuperscript{18} Criminal law and associated punishment may be justifiable in that it is in a position to make a distinctive contribution, as well as other state interventions, to the protection of these ends by the criminalising of conduct, which in turn forbids and prevents behaviour which threatens or causes serious harm to them.

\textsuperscript{16} Duff, note 2; Norrie, note 14.
\textsuperscript{18} Duff, note 2.
The criminal law and punishment thus conceived may be viewed as a form of social control where encouragement, in the form of penal sanction, is used to ensure those who might otherwise be law abiding do not deviate from socially acceptable forms of conduct and in so doing to engineer a better society.¹⁹ Punishment as such can be seen to perform a significant symbolic function which may delineate those who are socially valuable, and to the contrary those who are socially valueless – in this way it is a weapon of the state to keep order in society.²⁰

An instrumentalist view of the criminal law and punishment is based on a utilitarian philosophical foundation which sees the only justifiable use of state power to be the maximisation of welfare, and, in a classical sense, the justification for the deployment of state power as the maximisation of human happiness.²¹ In this context, state power is seen as a legitimate political tool to maximise social wellbeing where the harm of punishment is outweighed by the benefits resulting. The harm of punishment in this paradigm is understood not only as the set back of the interests of the offender, but also those incidentally affected by the punishment such as the offender’s family and the wider community. In this sense there is a harm-benefit analysis involving the harm of the wrongdoing, the harm of punishment to the offender and the harm of punishment to the community. Given the level of harm associated with the criminal law and punishment, it is suitable only to deal with serious harms to specified interests, and indeed only those unjustifiably threatened or inflicted.

The seriousness threshold is justified on an instrumentalist basis in that costs associated with the harm or punishment would outweigh the benefits where non-serious matters are attended to, which of course may not be representative of the criminal law in reality. The instrumentalist constraint that only unjustifiable harms or threats of harm may be subject to the attention of the criminal law and punishment may be justified on the instrumental basis that the criminal law’s endeavours are not best served by criminalising those who

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engage in faultless or excusable conduct. These are the internal control mechanisms advanced under this theory, which sees force deployed only where it will have a beneficial effect, and only that amount necessary to achieve that effect, and that it is wrong to deploy state force to simply satisfy the moral preferences of the majority.

The essential concern of, and justification for, this basis for the deployment of punishment is harm reduction, as without the reduction of harm there results the imposition of harmful punishment without corresponding benefit. Punishment thus may reduce harm in a number of ways: the threat of punishment at the right level may deter potential offenders; actual punishment of offenders may deter recidivist acts and deter others from committing similar acts; finally, punishment in the form of incarceration may incapacitate a person thus preventing further harm. Other consequentialist justifications may include the channelling of public outrage so as to reduce feuds and vigilantism and the education of the public as to the norms supporting punishment so as to maintain social cohesion.

Thus conceived, the instrumental basis for punishment is forward-looking in that it seeks to deter, incapacitate and educate with a view to reducing harm. This conception has often additionally promoted a rehabilitative justification as a humane societal response to criminal wrongdoing, which recognises that such wrongdoing, as well as being susceptible to punishment, is representative of a dysfunction on the part of the offender and society which should be responded to through reconditioning the offender to socialise him, make him sensitive to normative control and to engender a constructive attitude.

A significant objection to archetypal, or even side constrained, instrumentalist accounts of the criminal law and punishment focuses on the instrumental justification of the use of persons to reduce levels of harm, which is said to violate the Kantian prohibition on treating others as merely a means to an end and which in turn denies the moral agency of those punished which is their due as responsible moral actors. A potential response to

22 While this is an instrumentalist account of this limitation there are also moralistic side constraints which operate to like effect, but with differing justification.
23 Wilson, Ehlermann, note 20, at 49.
24 Wilson, Ehlermann, note 20, at 50; However, retributive theories may also be supported on the basis that they prevent vigilantism – see Alec Walen, 'Retributive justice' (The Stanford Encyclopedia of Philosophy (Summer 2015 Edition) Edward N. Zalta (ed.)) <http://plato.stanford.edu/archives/sum2015/entries/justice-retributive> accessed 18 June 2016.
25 Katherine S. Williams, Textbook on criminology (7th edn, Oxford University Press, USA 2012), at 42 – 43.
26 Duff, note 21.
this is that persons who break the law voluntarily are not used merely as a means to an end, and in fact forfeit their right not to be punished arising from their wrongdoing, a point which is developed somewhat in later sections.

There is also a question as to what exists within instrumental theories to ensure justice in the deployment of criminal law and the distribution of punishment, as such punishment is dispensed based not on the position of the wrongdoer but on the value to society of punishing the wrongdoer. Such a justification for the criminal law and punishment could legitimise draconian sanctions out of proportion with the level of wrongdoing and further, when linked with reforming principles, can justify punishment for recidivists and those who have as yet unacted upon tendencies so as to discourage others from acting on such tendencies. In response to these criticisms, it is argued that such concerns are more postulatory than real as utilitarianism rejects punishment for punishment’s sake, and the deployment of punishment which amounts to the victimisation of individuals would be a self-limiting exercise as it would engender overall anxiety within society which in itself would affect the cost benefit analysis and prevent such a development. Though it remains the case that any limitation on the criminal law and punishment must be grounded in instrumental concerns, otherwise the interference of the criminal law and punishment is justified on such an instrumental basis.

Another difficulty with such theories is the presumption that the deployment of the criminal law will in fact lead to a reduction in harm. Whether punishment, and in particular its purported deterrent effects, reduces harm is difficult to assess and the evidence is far from clear. While it would seem that general criminal prohibitions do have a deterrent effect, it cannot be assumed that there is a correlative relationship between new laws or changed laws and the levels of offending in particular areas. Perhaps in response to this marginal position, the language of such theories has moved towards a protectionist stance grounded in the incapacitating function of punishment which protects

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27 Duff, note 2; Duff, note 21.
those not imprisoned from those who are. One articulation of this development is the advent of longer sentences for recidivist offenders. However, whether this in the longer term has the effect of reducing harm is questionable.

The instrumental account of the criminal law and punishment addresses both the institution of the criminal law and its associated punitive elements and provides a justification based on the ends that are served. The question of which behaviours should be criminalised is less clear, though any liability must serve the ends in question, and must be justified in the overall balancing exercise. Thus, in the circumstances with which we are concerned, an instrumentalist justification for criminalisation would consider the end deserving of protection, that is presumably one’s health as an expression of one’s autonomy and the health of the population, the service that criminalisation and punishment would offer that end, and the potential negative effects which might militate against criminalisation in the overall calculus of benefit to society. The strongest arguments in favour of criminalisation centre on deterrence, incapacitation and education. Though, as will be seen, the ability of the criminal law to achieve these ends is highly contested – save with regard to incapacitation—which seems insufficient to justify criminalisation in the context of the level of prosecution. Though even if this were a cogent argument, the same end can be achieved without the criminal law. In totality, I feel that it is perhaps on this account that the instrumentalist justifications for criminalisation are weakest based on the overall calculus of benefits and detriment to society in the context of controlling pathogen spread. However, there are still those who would argue that it is instrumentally valuable to criminalise, and that this is not outweighed by any rational or reasonable argument regarding corresponding detriment, however, their position is not supported by available evidence as I will demonstrate.

Having considered instrumental justifications for the criminal law and punishment and their potential interface with the behaviour in question, I now turn to moralistic or retributivist explanations.

**Legal Moralism and Retributivism**

Adherents to retributive accounts of the criminal law and punishment place immorality and moral culpability at the heart of matters.\(^{29}\) These theories of the criminal law see culpable wrongdoing as justifying state punishment, in that those who inexcusably and

\(^{29}\) Duff, note 2.
unjustifiably do wrong deserve punishment.\textsuperscript{30} There are a number of variations to theories which are concerned with morality and retribution, and not all those who rely on a moral foundation are strictly retributivist. Theories in this area are concerned primarily with the wrongdoing itself, and as such they are backward-looking unlike instrumental theories which anticipate the goods emanating from punishment. Thus, the criminal law and associated punishment is an end in itself rather than a means to an end, and this is what is owed to the community whose rules have been broken, the wronged who have been violated and the wrongdoer who is respected in the course of denunciation and punishment and in so doing the wrongdoer gets their just deserts.\textsuperscript{31} The punishment arises from the wrongdoer’s disrespect for a value enshrined in our law arising from their unwillingness to be guided by that value in acting.\textsuperscript{32}

There are variations within such accounts with some seeing moral wrongdoing as a positive reason to criminalise and punish, so called positive retributivism; and others seeing moral wrongdoing as a necessary condition for criminalisation and punishment but not in itself a justification, so called negative retributivism. Moore is representative of the positive stance in so far as that which is criminalised should be immoral and moreover that which is immoral should be criminalised, subject to certain constraining principles such as liberty concerns.\textsuperscript{33} In this context, the morality of the law, that is its normative content, is representative of morality in an extra-legal sense.\textsuperscript{34} In this paradigm Moore sees retribution as an intrinsic good which is the function of the criminal law.\textsuperscript{35} Negative retributivism, that is moral wrongdoing representing a necessary condition for criminalisation and punishment but not a positive justification, is often associated with instrumentalist concerns in justifying state action in particular contexts; this will be addressed later in discussing the potential reconciliation of means and ends.

A key issue which emerges for a retributivist account is what makes the punishment of the wrongdoer his desert, which can be difficult to answer without recourse to

\begin{itemize}
  \item Wilson, Ehlermann, note 20, at 54 – 55.
  \item Duff, note 2.
  \item Ashworth, Horder, note 1, at 16 – 17; Lamond, note 7, at 622.
  \item Michael S. Moore, \textit{Placing blame: A theory of the criminal law} (Oxford University Press 2010), at 23 – 30, 35, additionally Ch 18 where Moore deals with “Liberty’s Limits on Legislation”.
\end{itemize}
consequentialist justifications. One answer is that the moral wrongdoing evokes certain emotional responses, resentment and the like, which causes us to seek that the wrongdoer be punished and suffer, and as such the criminal law is an appropriate vehicle for such emotions in a liberal society. In the alternative it may be said, in some senses conflating condemnation and punishment, that someone who engaged in culpable wrongdoing is blameworthy, and thus is deserving of blame and punishment.

This reasoning exposes some further questions for such theories: firstly, how are wrongful acts related to the individual who committed them such as to render them responsible and deserving of censure. An answer to this may arise in the separation of a person from their personal history and social context which relies on a Kantian formulation of an individual as atomised while at the same time people in reality are social beings. This viewpoint indicates that the relational nature of person is ignored so as to maintain the cogency of a retributivist viewpoint at the expense of justice. However, to adopt an entirely relational position in respect to the determination of personal responsibility would be to seek a perfect balance between individual and social justice, which seems unachievable. At most it would seem that what can be achieved is the avoidance of individual victimisation while at the same time allowing for individual responsibility, with punishment matched to that level of responsibility, as opposed to society’s requirements. Thus culpable wrongdoing which breaches a moral rule is a prerequisite, as is proportionality in the retribution which should be representative of the wrong and the culpability of the wrongdoer.

A second challenge to retributivist theories is the extent to which a satisfactory link can be found between wrongdoing and rule infringement such that state punishment is deserved. It is argued that this link cannot be found in all circumstances where rules broken are not always representative of wrongdoing, over and above the wrongdoing of breaking the rule itself, and therefore such theories offer an incomplete account of the justification of state punishment. It is suggested that autonomous individuals who are

36 Duff, note 21.
38 Wilson, Ehlermann, note 20, at 57.
39 Wilson, Ehlermann, note 20, at 57 – 58; In support of this proposition the authors point to Chandler v DPP (1964) AC 763 where the House of Lords upheld a conviction for acting for a purpose prejudicial to the safety or interests of the state, in circumstances where the two participants in a protest at a nuclear facility were accepted to be acting in what they believed to be a manner to promote the interests of the state. This leads to a conclusion that the didn’t get what they deserved, and instead got what they bargained
offered no choice but to submit to a unilaterally imposed rule, where violation will lead to punishment, deprives a retributivist theory of the moral authority which it holds to distinguish itself from consequentialist theories, particularly so where circumstances arise in which the punishment visited is not deserved to negate culpable wrongdoing, and as such is akin to getting what you bargained for rather what you deserved. Thus such theories, in particular circumstances, may support punishment without responsibility. This is essentially a challenge to retributivist accounts based on the number of criminal laws which are broadly and by no means definitively known as *mala in se* rather that *mala prohibita*, a distinction addressed above. To counter this argument, the retributivist will say that where the legislature has seen it necessary to criminalise acts in furtherance of the common good, breaches of such laws may be morally wrongful and thus deserving of criminalisation and punishment.  

A further challenge is the extent to which a link can be established between condemnation and punishment, so that where a rule is violated, assuming that there is a moral content to that rule, such theories can justify both condemnation and punishment. One possible anarchistic answer is that punishment is not justified, and while condemnation at an individual or group level may be, the state does not speak for all and as such cannot condemn; further, the state has no moral authority to inflict punishment, merely the power to do so. Neither a consequentialist nor retributive theory can answer whether the state has the authority to condemn; this is either accepted or it is not. However, both theories accept that the state has such authority and the right to expect compliance, once powers are deployed in the furtherance of social justice. A consequentialist perspective does address the second concern in that punishment is justified as individual autonomy is limited to the extent necessary to secure an increase in overall welfare.

A way in which a retributivist theory might be seen to achieve such a justification is to conflate the moral justification for condemnation and punishment. In this paradigm for in breaking a rule, which leads to a conclusion that such theories support a claim that all offenders deserve punishment as a matter of moral necessity, which is argued to be an implausible claim.

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40 Duff, note 2.
41 Robert Paul Wolff, ‘The Conflict between Authority and Autonomy’ in Joseph Raz (ed), Authority (New York University Press 1990), at 20 – 30; For the author a legitimate (de jure) authority is one that has the right to rule, and whose dictates therefore generate a corresponding obligation to obey. For Wolff, the real problem with legitimate authority is generated directly not by the right to rule, but rather by the obligation to obey. Such an obligation, according to Wolff, would conflict with another, inescapable obligation: the obligation to take responsibility for our own lives, or, in other words, the obligation of autonomy.
42 Wilson, Ehlermann, note 20, at 59; Duff, note 21.
society orders its affairs through rules to achieve the maximisation of choice for all, which in turn creates a moral obligation to follow rules. Where rules are not followed, condemnation and punishment both restore social equilibrium and deprive the offender of the unfair advantage obtained through violation of the standards adopted to facilitate communal living. This unfair advantage theory is appealing to the extent that it embraces criminal offences where offenders are seen to take shortcuts and obtain advantage, but less so when dealing with offences against the person for instance – in that scenario one would be justifying punishment on the basis that others refrained from attacking a victim, and as a result so too should the offender who is being punished. This seems to lack a correspondence between action and desert, and particularly so when determining degrees of wrongfulness as linked to quantum of punishment.

An alternative to an unfair advantage model is that conduct through criminalisation is deemed to be, and is punished as, wrongful behaviour that warrants blame, thus the person who is convicted is deserving of the punishment as an integral part of the condemnatory exercise, and the gravity of punishment is reflective of the gravity of the wrong and the degree of wrongfulness.\(^{43}\) It is said that the relationship between prohibition, the threat of punishment, and punishment itself goes both ways and that the threat involves a publicly made commitment to pursue an offender in the event of transgression. The commitment must be honoured on a number of grounds; truthfulness which has intrinsic as well as instrumental value, the requirement of equality in the application of the law, and the entitlement of the people to rely on the commitment given by the state.\(^{44}\) This model while also conflating condemnation and punishment has the benefit of providing a more cogent link between not only condemnation and punishment, but also the nature of the wrong and degree of wrongfulness with the quantum of punishment.

The legal moralistic and retributivist justifications of the criminal law and punishment provide an account of why we maintain the institution of the criminal law and the associated concept of state punishment. Key to this account is a breach of that which is morally acceptable and the elision of criminalisation and moral wrongfulness is popular and important in modern criminal justice practices, however, the existence of criminal


prohibitions which sit uneasily with this moral paradigm undermine the retributivist account to an extent.\textsuperscript{45} In reality, it would seem that a legally moralistic account alone does not provide a sufficient justification for the range of laws. There are legitimate questions as to the moral content of certain laws, and while most would find expressions of moral revulsion unobjectionable in many criminal processes dealing with major criminal offences, it is hard to see the moral content of certain laws save where one extends the argument of morality from the behaviour in itself to the behaviour as related to the political conception of the community and the morality of having regard to communally decided prohibitions.\textsuperscript{46}

This is of course also raises the question of how to decide on the morally wrong behaviours which are deserving of criminal prohibition and in so doing to decide on the moral position in relation to any particular matter in the context of a pluralist society. Is it that moral wrongs are representative of pre-legal metaphysical conceptions, also referred to or extra-legal morality, or is the purported morality justifying a prohibition representative instead of a political endeavour and mores of the day?\textsuperscript{47} It would seem that considering the range of laws and in particular the significant differences between state criminal justice practices and the private moral sphere of calling others to account that the criminal law and punishment’s normative content is better understood as representative of a public political judgements as part of our liberal constitutional regimes which are concerned with liberty and justified coercion as opposed to the enforcement of moral codes.\textsuperscript{48} This is not to deny the relevance of morality and it remains both theoretically and practically important in the delineation of offences and the treatment of offenders, however, as I will consider later in the chapter it would seem that the source of that morality is best understood as a political rather than extra-legal concept.

Turning to whether a legally moralistic and retributivist account can justify criminalisation in our context. It is clear that offences dealing with exposure to a communicable pathogen, and transmission of those pathogens, are seen to protect certain values and rights, such as bodily integrity and autonomy. If a person disrespects those

\textsuperscript{45} Wells, Quick, Lacey, note 3, at 12 – 13.
\textsuperscript{46} Malcolm Thorburn, ‘Criminal Law as Public Law’ in R. A. Duff and Stuart Green (eds), \textit{Philosophical foundations of criminal law} (Oxford University Press 2013), at 23 also comments on the irreconcilability of the moral account of all laws and the actual content of laws.
\textsuperscript{47} Ashworth, Horder, note 1, at 16 – 17; Wells, Quick, Lacey, note 3, at 12 – 13; Stewart note 34.
\textsuperscript{48} Thorburn, note 46, at 23 – 24.
values in a culpable manner, then such an account would support the criminalisation of
conduct and associated punishment as the just deserts of the offender. Whether such an
account operating in isolation offers a sufficient account for the criminalisation of
behaviour is doubtful, particularly considering the difficulties, and potential negative
consequences, associated with criminalisation of merely that which is immoral. That
to say, this paradigm is powerful in the justification of criminal offences and punishment,
and no less so in this area. It poses one of the most difficult questions in the area of
criminalisation in this context, as it would seem to many that the wrong of exposure or
transmission represents such a significant moral wrong, and one that is associated with
harm or the risk of harm, that denunciation and just desert is the appropriate response.
However, I will conclude that a mixed account, which looks at the values of the
community, but also the ultimate ends of that community, should see criminalisation as
a last resort and only in very limited circumstances. Further I will argue that alternative
societal and legal regimes best serve the interests of the community and as such the
intuitive appeal for criminalisation on the basis of moral wrongdoing and just desert
should be displaced with reference to the ultimate goals of society which in this context
should be a reduction in the transmission of pathogens.

*Punishment as Communication*

The communicative and symbolic nature of criminal law has already been referred to,
and one possible justification for the criminal law and punishment is that it is intrinsically
justifiable as a societal expressive or communicative exercise. This account shares with
a legally moralistic account the relevance of moral determinations of wrongdoing, and to
an extent the justness of criminal responses to breaches of those wrongs, but presents the
matter in a different sense to the extent that instrumental considerations are recognised
and punishment is seen as serving those ends in certain circumstances. Additionally the
law here speaks to us as a member of a normative community or polity and appeals to us,
as opposed to merely threatening us, in expressing the shared values of that community.
In this paradigm, the criminal law and punishment sends a message to the victim, the
offender and the audience which expresses the fact of censure and the disapproval which
the action has engendered in the community.

Criminal punishment viewed in these terms may bridge the argument that condemnation
is the appropriate response rather than punishment, in that punishment does not represent

49 Duff, note 2.
the wages of the wrongdoing; instead it is a symbol which must convey meaning in that it must enunciate how wrongful we view the offenders behaviour to be.\textsuperscript{50} This communicative exercise is bound up with the moral arguments which justify the practice, and as such varying degrees of punishment express varying degrees of condemnation, and moreover the intervention of excuses between wrongdoing and degrees of punishment is an expression of the commitment to the moral values expressed in the standard which has been violated.

This account of the justification for the criminal law punishment moves away from a strictly retributivist account and considers both angles: akin to the retributivist account it seeks to censure for the past offence, but additionally looks forward in seeking a communicate a message to the offender from the community, and to the community, that such behaviour is unacceptable and as such should not be engaged in lest one would be subjected to similar denunciation and punishment. The function of punishment is not one of recompense to the victim, but instead is representative of societies disapproval and the wish of a moral community to communicate its values such that the offender recognises and atones for his wrongdoing, and will not repeat the transgression.\textsuperscript{51} The backward looking censorious aspect is clear, however, the forward looking deterrence function seeks to deter not because one will be punished, the instrumentalist viewpoint, but instead to deter arising from a recognition of right from wrong associated with the communicative meaning derived from the punishment of oneself or others, thus an extra prudential reason not to offend.\textsuperscript{52} However, in addition such accounts may also look to deter arising from the fact of punishment, and in so doing may seek to avoid the criticisms of side constrained instrumental accounts as the moral meaning is the reason for criminalisation but punishment is reserved only for those who are deaf to the moral appeal of the law.\textsuperscript{53}

A question does arise as to the extent of the genuineness of the communicative exercise in that a truly moral community wishing to communicate its values through punishment should offer a space to challenge moral condemnation when faced with punishment founded on a questionable moral foundation. Additionally, why it is justifiable for a moral community to communicate values in this way when the community itself is unable

\textsuperscript{50} Wilson, Ehlermann, note 20, at 62.
\textsuperscript{51} Duff, note 21 refers to this as a type of secular penance; Wilson, Ehlermann, note 20, at 63;
\textsuperscript{52} Simester, von Hirsch, at note 43, at 14 – 16.
\textsuperscript{53} Duff, note 21.
to deliver equilibrium in relations which would justify regarding transgressions themselves as wrong.\textsuperscript{54} This argument is similar to the critique of retributivism epitomised by the notion of a person as atomised instead of relational. Similar to the response in that context, the response here is that it is unrealistic to attune criminal justice entirely to the context in which it occurs, or to the person who engaged in wrongdoing. Instead, if an individual is part of a moral community and can understand the values of that community, there is nothing unjust in punishment arising from an infringement of those values.\textsuperscript{55} The rules of the community serve not merely to secure compliance; they also are guides to good citizenship, and a person is treated respectfully in that it is recognised that although a person may not share the same views as those contained in a rule, they can choose right from wrong, with the rule as a measure, and where they choose wrong they are justifiable subject to punishment.

A communicative account which is morally justified must also be accompanied by a coherent set of sentencing principles which can adequately mediate between the condemnatory function of punishment and the necessary respect for individual autonomy.\textsuperscript{56} The degree of punishment is not only communicative of the degree of censure; it also offers a reason not to offend. As such sentences should be anchored in a baseline set of sanctions which are benchmarked to the sanction applicable to the gravest offences, with like punishment for offences of like gravity and the differing levels of punishment where gravity variates. In so doing, the harsh treatment of punishment is representative of the condemnation deserved, and assists the potential wrongdoer to comply, not because they fear punishment, but because it is right to comply.

The communicative account is intuitively attractive in that it exemplifies the normative messages of a community which is representative of the popular conception of the criminal law when responding to serious offences, while at the same time addressing to some extent a reconciliation of means and ends. However, akin to the retributivist account the reliance on morality raises questions in relation to determination, and the contested dichotomy between offences based on express moral foundations and those enjoying moral content merely arising from their instantiation and breach remains live.

\textsuperscript{54} Norrie, note 39, at Ch 6.

\textsuperscript{55} Wilson, Ehlermann, note 20, at 64.

\textsuperscript{56} Andrew Von Hirsch and Andrew Ashworth, \textit{Proportionate sentencing: Exploring the principles} (Oxford University Press 2005), at 26 – 27; Wilson, Ehlermann, note 20, at 64.
Additionally, it remains unclear that which should be criminalised and punished, save that we know that it should be immoral.

A communicative account of criminalisation and punishment in our context would rest on similar foundations to that of a retributivist account in that it presupposes a shared moral value, instantiated in the criminal law, breach of which brings forward deserved punishment. Again, this conception of denunciation for the sake of the exercise, as well as the instrumental benefits of denunciation, represent popular and powerful concepts in justifying criminalisation and punishment. The instrumental benefits are contested, but the denunciatory effect cannot be. However, I will again argue that is not in itself sufficient, and even if it was taken as such, then other mediating factors should militate against criminalisation in the interest of the community at large.

Thus far I have considered an entirely morally based account of criminal law and punishment as an end in itself, an instrumental account looking to means only, and a morally based account with some elements of instrumentality. I will now consider how the means and ends conflict might be resolved.

**The Means and Ends Conflict**

When considering the theories justifying the criminal law and punishment there is an obvious tension between those who see them as a means to an end, an end in itself, or an end in itself which also has the means to prevent further wrongdoing. Moreover, the dialogue of the criminal law and punishment fails to dissociate justifications, which gives rise to theoretical and functional elisions. Additionally, there is the tension of rehabilitation which militates against the severity of punishment associated with retributivism or deterrence.

The rhetoric of punishment, and as a result the elision of concepts, is seen by some as representative of an inevitable feature of all systems of state punishment which is a pragmatic decision to profit from a purported impossibility to reconcile whether punishment’s essential form is either retributive or preventative.57 It becomes difficult then to conceptualise what is deserved and consequently the preventative justifications become paramount without clear identification.

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The question is whether there can ever be a reconciliation of these principles, and in so doing whether moralistic retributivist accounts can have an interdependent relationship with instrumental accounts. A number of models have been identified, and two general positions are the so called weak and strong consequentialist retributive models, or positive and negative models. As mentioned previously, positive legal moralists and retributivists believe that immorality provides a positive or significant reason to criminalise, albeit constrained in certain circumstances by liberty concerns, and thus it is an end in itself. Negative moralists, like negative retributivists, believe that immorality is a necessary condition for criminalisation, but does not provide a positive justification, and as such instrumental concerns should be addressed in seeking a reason to criminalise and punish. This concept is in turn linked to side constrained instrumentalism, in that that which is criminalised must be morally justified, and thereafter the justification for criminalisation and punishment is to be found in instrumentalist concerns, and the moral side constraint acts both as a check on the use of state power generally and against those who are not culpable, and also against excessively harsh punishments. Such hybrid models provide an integrated account of the criminal law and punishment which restrains the worst possible excesses of instrumentalist accounts, and provides a justification beyond mere moral wrongdoing as a reason to criminalise and punish. While of course they seek a synthesis of the parts to make an acceptable whole, the synthesis does not entirely address the concerns expressed in relation both those who see punishment as an end, as a means, or as an end which can also bolster a means. However, this account, criticisms aside, provides a rational basis from which to reason as when it is appropriate to criminalise and punish, and one which allows for a consideration of an appropriate range of factors to ensure that criminalisation does not do more harm than it is deployed to address.

In combining desert with social utility, there is an effort to avoid a charge that such a theory results in individual interests being subsumed by the interests of the collective. However, the emphasis on desert as the criterion for punishment may make desert the bottom line in relevant respects, thus evidencing an inability to offer a unified theory of the criminal law and punishment unless there is true commitment to the implementation of the theory. While desert is a sufficient principle to justify punishment in relation to

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58 Wilson, Ehlermann, note 20, at 67; Duff, note 21;
59 Though as mentioned above instrumental justification for such constraints have been argued for.
crimes which have a clear moral component, it runs into difficulty with other crimes which do not, and while this may be addressed by looking to the morality of rule infringement where the rule is an instantiation of necessities of communal flourishing, it is perhaps more realistic to say that certain crimes have a potential moral foundation and others do not and are merely justified on instrumental grounds.60

Desert based theories face certain problems which are only partially addressed by expressive or communicative theories, in that desert presumes that like wrongs should be punished in a like fashion, and while the form and quantum of punishment for a particular wrong may be difficult to establish, cases with like wrongs and similar levels of culpability should be treated similarly. However, this fails to address the complexities of punishment in practice and in particular questions relating to taking previous convictions into consideration in sentencing, whether one’s desert is a function of a breach of the rule or the moral values which the rule represents, and the overt consequentialist rhetoric associated with sentencing.

A hybrid model addresses these points to some extent, in that consequentialist concerns can fix the form and quantum of punishment, with desert operating as a legitimising force for instances of criminalisation alongside setting the anchor points of punishment, or setting a range so to speak. An example of this type of approach in practice can be found in the Swedish Penal Code where: A person who takes the life of another shall be sentenced for murder to imprisonment for ten years or for life, and If, in view of the circumstances that led to the act or for other reasons, the crime referred to in Section 1 is considered to be less serious, imprisonment for manslaughter shall be imposed for at least six and at most ten years.61 In this scenario the range of punishment is established, it might be said, on a desert basis, and between those points there is room for consequentialist concerns to be expressed dealing with problem posed by a particular offender and the particular offence.

The level of perceived danger associated with an activity has seen a departure in certain instances from the norm of proportionality in punishment and in certain circumstances it has been seen as justified to depart from the norm where the offender or offence pose a

60 Wells, Quick, Lacey, note 3, at 5 – 13.
61 Swedish Criminal Code 1999 (Part 2, Chapter 3), Sections 1 & 2; See also discussion in: Wilson, Ehlermann, note 20, at 70.
particular concern for, or danger to, society. Where this occurs the individual offender’s rights, that is to be punished according to their desert, are overridden expressly in the interests of social policy concerns of the collective. Where social policy concerns are to the fore, ‘extra’ punishment is seen as justified in furtherance of the concerns of the collective regarding the dangerousness of the particular type of offence or offender, for example recidivist sex offenders, or terrorist acts and actors. In these circumstances, offender’s rights are overridden for the good of all, and a parallel has been drawn with coerced quarantine in communicable pathogen cases. The argument here is that clear cases justify exceptional measures, and thus deviation from a desert criterion, and that this involves not simply a general weighting of the collective versus the individual, but instead a morally justified deviation to deal with pressing collective concerns which trump individual fairness. While this may be intuitively appealing, the license for deviation is far from clear, and for instance mobile phone offences have in the past represented a basis for such a deviation and it is hard to see a cogent basis on which to proceed, save to say that in certain circumstances it appears justifiable for society to take exceptional measures to deal with exceptional threats – though threats must be understood in context, and the criminal law does not lend itself to a particularly context driven assessment of conduct nor the context of those breaching norms. Moreover, there are dangers of excess in permitting exceptional measures, as one US Supreme Court justice warned: ‘emergency powers … tend to kindle emergencies.’

It may be that the criminal law suffers from an incoherent mix of welfare and autonomy concerns, concepts which will be considered in further detail in a later section. At the level of autonomy, the harm principle, retributive punishment and notions of subjective fault require moral justifications for interference with individual autonomy. At the welfare level, punishment must be justifiable at a societal level in that it makes a difference to those subjected to its force, i.e. it makes a difference to the collective. Critics of the orthodox justifications for the criminal law see that balance is achieved between these competing agendas through compromising the principles of individual autonomy in furtherance of the collective goals in society, thus exposing an argued incoherence underlying the philosophy of punishing offences. Instead, it is suggested

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62 Robinson, note 57.
64 Youngstown Sheet & Tube Co. v. Sawyer 343 U.S. 579 (1952), at 650 per Justice Robert Jackson.
65 Norrie A, at 20, at Ch 10; Norrie A, at 14, at 13 – 34.
that we should particularise the varying contexts and relations which underpin the
decision of individuals to violate norms and thus affect collective interests, or in the
alternative abandon the precondition of personal moral fault and accountability as the
foundation for criminal liability, and instead create a system overtly capable of attending
to our collective needs.\(^{66}\)

A more conventional view acknowledges that the criminal law represents competing
philosophies and objectives, but at the same time is not inherently incoherent or
contradictory.\(^{67}\) In this regard sometimes individual rights are subjected to the interests
of the collective and this is not representative of a failure of justice, but a consequence of
collective social life. The law operates, on this analysis, using complimentary as opposed
to competing archetypes. One of those is the principle of welfare which addresses itself
to the needs of the collective, which does not require proof of moral wrongdoing or desert
to justify punishment.\(^{68}\) On this account in order to live an autonomous life, all things
being equal, we require certain collective needs and interests to be available without risk
of harm; to drive, eat, work and so on. The criminal law can contribute satisfactorily to
the maintenance of these interests, and in so doing require persons to satisfy standards of
behaviour, rather than requiring them to be morally blameless in their behaviour.\(^{69}\)
Crimes centred on welfare maximisation seek to prevent harm as opposed to punish
morally wrongful behaviour, though of course the distinction between the two paradigms
is not a perfect one, and freedom is thus curtailed to maximise welfare. Another relevant
principle is autonomy, which is concerned with so called ‘core’ offences, which involve
the negation of an agreed moral value which the criminal law seeks to vindicate.\(^{70}\) Crimes
pursued on this basis, again recognising the imperfect separation of the paradigms, do
require moral fault which is the criterion for desert epitomised in punishment. This
archetype views all persons, subject to qualifications related to individual culpability, as
equally autonomous agents who have acted in manner which denies the autonomy of the
victim, and therefore to have negated the former’s right not to be punished.

The foregoing analysis seeks to place the means and ends conflict in context, and to
provide an account of the hybrid justifications which operate in practice. While synthesis

\(^{66}\) Wilson, Ehlermann, note 20, at 71.
\(^{67}\) Wells, Quick, Lacey, note 3, at 5 – 13.
\(^{68}\) Wilson, Ehlermann, note 20, at 72.
\(^{69}\) Duff, note 21.
\(^{70}\) Ashworth, Horder, note 1; Wilson, Ehlermann, note 20, at 72.
is sought in the deployment of a hybrid model it is far from clear that any theory discussed, or any theory available, offers a unitary account of the justifications for the criminal law and punishment. What such theories do allow is a consideration of individual instances of criminalisation and punishment and the identification of which paradigm is being used to justify punishment and to ensure that one is not used in place of the other in an inappropriate manner. Thus perhaps moral fault need not be sought for welfare based offences, and perhaps even those who do not consciously violate rules may be punished if this is an effective method to advance collective interests. Similarly, where moral values are to be enforced through offences then each similar offence must be treated similarly, and the offender must be morally blameworthy.

Of the available models a hybrid model seems most appropriate; however, in saying that there is still only a vague sense of the types of behaviours which may be criminalised pending further analysis. Such a model allows for the recognition of the potential duties of persons infected with a pathogen, and the breaches of those duties in certain circumstances. Such a breach of duty may well be morally wrongful, whichever sense of morality is used or however that is determined; yet, that would not be the end of the matter. There is then a necessity to consider the utility and disutility of criminalisation and punishment. On such an account, it should be that mediating factors militate against criminalisation and punishment. Furthermore, and as we shall see later in the chapter, it is possible to use such a hybrid account to support a staged process in terms of consideration, which looks to the potential justifiability of punishment, but also looks to the alternatives which are available to avoid what has been termed excessive criminalisation.

At this stage, I have examined competing moral and instrumental foundations for the criminal law and punishment, and adverted to an extent to which each or both may be acceptable justifications, and in addition I have briefly adverted to the difficulties associated with each. I will now consider alternative theories one of which looks to the moral concerns of a civic community without committing itself to retributive desert, another which looks to deterrence but seeks to avoid commonplace instrumentalist critiques and finally the concept of restorative justice.

Civic Community, Republican Responsibility and Public Wrongs
We have already referred to the distinguishing feature of a crime as a quintessentially public wrong. At a normative level theories have developed which aim to set the
normative limits of the criminal law and punishment with reference to our collective lives within a polity.71 These theories seek to move away from the culpable rights violations so central to retributivist theories, violation of which is a justification for the deployment of state power, and instead focus on the communal or civic bonds which bind us as a community.

One of the many attempts which have been made to offer a more integrated analysis is exemplified in the work of Braithwaite and Pettit.72 Theirs is an instrumental theory with a legally moralistic side constraint of only punishing morally culpable agents where the desired goal is not the maximisation of collective welfare or the minimisation of collective harm, which under a utilitarian model renders one vulnerable to subjugation in furtherance of the interests of the collective, but instead the goal is the maximisation of dominion.73 In furtherance of those objectives, they believe that the criminal law should only arise in circumstances of culpable wrongdoing which interferes with that dominion.74

Their work proposes what they believe to be a comprehensive theory of criminal justice that directs the system to the promotion of freedom in a republican sense of that term, i.e., freedom in the sense of dominion.75 In this way they intend to offer both a criminological and philosophical account of criminal justice. Dominion is conceived of as the republican concept of full citizenship, and in their context refers to a sense of self which is unencumbered by unpredictable or arbitrary interference with self-actualisation. Criminal acts interfere with a sense of dominion on the part of the victim as their individual capacity is either obliterated or impeded, and in addition the dominion of the community is also impeded by an anxiety related to the interference with others and the potential interference with one’s self. Punishment deployed against wrongdoers increases the community’s sense of dominion, and while it limits the offender’s self-determination, this is justified by the sense of dominion in the community at large. They additionally argue that the deployment of criminal punishment should be limited by significant rights

72 Braithwaite, Pettit, at note 71.
73 Braithwaite, Pettit, at note 71, at 8 – 10, 99.
74 Braithwaite, Pettit, at note 71, at 99.
75 However, whether they have achieved what they propose has been the subject of debate such as in; Nicola Lacey, 'Book Review: Not just deserts: A republican theory of criminal justice' (1991) 41(164) The Philosophical Quarterly 374.
attaching to those to be subjected to state power, and the consequentialist endeavours related to dominion are also coupled with rehabilitative endeavours to return the sense of dominion to the offender as well as the community.

In such theories criminal law and punishment, and as such the definition of criminal offences, is a product of the social project of living together as a civic community. On this account the law is involved in both the enforcement of extra-legal moral norms and other socially and politically determined norms. The moral norms are defined as criminal but recognised by the community as pre-existing public wrongs, and they are public in the sense that they are part of the duties that we owe to each in a social and political community. Further, those wrongs which are not extra-legal moral wrongs are the product of political deliberation which presupposes that something has been determined as necessary in furtherance of the common good. Once this has been determined, the question then is whether breaches of such norms should be criminalised, and they should if, and only if, a breach is a moral wrong. Whether such a breach will amount to a moral wrong depends on whether such breach represents a serious interference with our continued project of living together in a community. Therefore, a synthesis between legal moralism and instrumentalism is offered, in that ‘immorality of the right kind’ is criminalised. As such, republican theories see criminal wrongs as those which undermine the ways in which human beings flourish in a community and they are public wrongs to the extent that they represent hostility to goods and values that make civic commitments and a civic community possible.

Braithwaite and Pettit advert to the dangers in the utilisation of excessively harsh punishment which in itself could result in a loss of dominion among the community, and as such they argue for parsimony; that only the minimum amount of punishment necessary to maximise dominion should be deployed. Additionally they argue for the checking of power through mechanisms of accountability, reprobation, and the reintegration of offenders and victims. In this regard, they believe that this will lead to a

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76 Yankah, note 71.
77 Duff (b), note 6, at 127 – 130.
78 Duff (b), note 6, at 127 – 130 grounds his theory in relation to mala in se offences strictly within the extra-legal moral realm; However, Yankah, note 71 sees the determination of all criminal wrongdoing as a product of social relations simpliciter.
79 Duff, at 2.
80 Yankah, note 71.
81 Braithwaite, Pettit, note 71, at 88.
reduction in the level of punishment within society. However, it would seem that the exact opposite is possible in that the deployment of the minimum amount of punishment necessary to enhance general dominion may lead to an increase in the level of punishment in society.

One argument in favour of republican theories is that they will preclude unmediated reactions to essentially public health matters, such as drug use. As an alternative, the republican viewpoint, focused as it is on civic union, will purportedly reject the retributivist impulse to criminalise for culpable impositions on freedom, and instead seek less harsh interventions focused on repairing civic union. This is an interesting example, however, it might be said that there is little to separate the deployment of punishment in pursuance of dominion from similar deployments in pursuit of collective welfare or the minimisation of collective harm, and as such one may remain equally vulnerable to subjugation in the interests of the collective pursuit of maximum dominion. This has particular relevance in the construction of the offences with which we are concerned, which have regarded an essentially public health issue as a form of corporeal harm which represents a violation of autonomy and bodily integrity. This conception of these offences is no doubt a by-product of social and political forces at particular places and times, and while the republican alternative sounds promising in combating this conception, it is far from certain whether the supposed inherent self-limiting mechanisms would prevent the enlargement of current offences or the creation of new offences to deal with this type of behaviour.

**A Duty Based Model**

I have examined how means and ends issues might be addressed through a mixed theory, however, Tadros has made a recent contribution in this area with a theory of punishment as instantiated in the criminal law which is based on duties, and promotes a model of deterrence which contends that it avoids the consequentialist critique of using people as a means to an end by incorporating a deontological constraint, while at the same time rejecting desert. The essence of the duty view is that punishment is justified on the basis of general deterrence where the beneficiary of general deterrence is the victim and wider society, further offenders incur compensatory duties toward victims and others

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82 Yankah, note 71.
which go beyond full compensation, and finally because offenders have incurred relevant duties, which are enforceable, harming them to protect their victims is not wrong. 84

The elements of the duty view are that offenders may be used to protect others, in that they may be harmed in furtherance of that aim if, and to the extent that, they are liable to be harmed for this end. The theory provides that an offender may be harmed as a means to secure an end only if they have an enforceable duty to serve that end, furthermore offenders incur enforceable duties to serve ends as a result of their wrongdoing. The scope of duties owed by an offender through wrongdoing depends on a range of issues, including: the opportunity to avoid wrongdoing, their level of moral responsibility for their wrongdoing, and the magnitude of harm caused by the wrongdoing. The level of harm is mediated by the extent to which this is necessary to protect victims and others, this is so notwithstanding that the victim or others may end up being better off than they would have been had the offending not occurred, and the level of harm actually occasioned to an offender in furtherance of ends must be proportionate to the good achieved by harming them. In terms of the state’s role in punishment, it is permitted and required to punish in light of its unique capacity, from an instrumentalist viewpoint, to achieve the goals of punishment, to protect the innocent from being punished, and to protect the guilty from being punished disproportionately. Furthermore, the state must punish arising from the duty citizens owe to each other to protect all from harm.

The kernel of the matter is a range of developing duties: not to harm, to rescue and to rectify, giving rise to the duty of those who unjustifiably harm others to allow themselves to be used to prevent similar harms.85

Essential to this view is that the wrongdoer has a duty to provide a remedy to the victim who is harmed, and the appropriate way to provide a remedy is to protect victims from future harm. To achieve this, it is appropriate and permissible for us to harm wrongdoers as a means to achieve greater protection, that is to achieve general deterrence through punishment. The duties of the wrongdoer go beyond the compensation of victims, and

84 Tadros (a), note 83, at Chs 12 – 15, where the theory is explained; also see Victor Tadros (b), ‘Punishment and the appropriate response to wrongdoing’ [2015] Criminal Law and Philosophy <http://link.springer.com.elib.tcd.ie/article/10.1007/s11572-014-9352-2/fulltext.html?view=classic> accessed 15 June 2016, where the author provides an explanation and clarification of his theory. What follows, in terms of the elements of the theory is taken from these materials.

increased harm to wrongdoers may be justified to achieve the general deterrent effect. In this manner the theory presupposes a duty, arising from wrongdoing, to improve the situation of victims and potential future victims. To justify this position there is a required pooling of responsibilities between wrongdoers such that their punishment is justified in the interests of other victims as opposed to merely the interests of their victim. In terms of the justification of duties towards non-victims, Tadros suggests that victims, such as those who have died, are also owed duties and these may be transferred to others, such as their loved ones, but moreover, within our political construct there is a general duty between citizens such that punishment is justified.

The theory is clearly sited within the consequentialist paradigm but seeks to avoid the critique of such theories, specifically that they merely use people as a means to an end. Tadros contends that this is avoided by a deontological constraint which prevents the use of people merely to achieve an end which is maintained in his theory through the deployment of general deterrence based punishment which sees persons having a duty to allow themselves to be used arising from their unjustifiable wrongdoing, essentially the deontological constraint is cancelled by the wrongdoing and corresponding duty which arises.\(^86\) While the theory unashamedly espouses the good of general deterrence, there is little in the way of critique of the utility or effectiveness of general deterrence as a construct, and as such a fundamental justification for punishment. As referred to previously the reductive claims underpinning instrumental theories are difficult to assess but the evidence supporting them is meagre at best.\(^87\)

In setting out his theory, Tadros sets himself against retributivist and communicative theories. As referred to above, most accounts which seek to limit the impact of consequentialist justifications utilise desert to varying degrees as a constituent justification, however, Tadros rejects desert in that he contends, contrary to his account of retributivism, that it is not impersonally valuable to set back the interests of wrongdoers and is in fact self-destructive.\(^88\) He believes that the harm occasioned to wrongdoers and others through desert based punishment must be obviated by the benefits of punishment, and that wrongdoing is not in itself a justification for punishment which

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\(^86\) Alexander, note 85.


\(^88\) Tadros (a), note 83, at Ch 4; Tadros (b), note 84.
he finds impersonally disvaluable. This entire rejection of desert is not uncontroversial and has been referred to as a determinist-incompatibilist rejection of moral responsibility which could undermine the notion of wrongness and normativity generally.\textsuperscript{89}

Tadros further rejects the communicative account as providing an incomplete justification, and while recognising the communicative value of the criminal law in certain circumstances, he holds that communication without instrumental justifications is of doubtful importance.\textsuperscript{90} He considers that the harm done to wrongdoers and others arising from punishment cannot be accounted for on a communicative basis, and additionally contends that punishment is neither the best nor most appropriate manner in which to communicate disapproval and without added instrumentalist benefits then better ways to communicate should be found.

There are a number of important observations regarding the construction of and reliance upon this theory.\textsuperscript{91} The theory may not provide a satisfactory account of attempt liability as attempts would not give rise to duties to prevent harm as there is no harm to be prevented, furthermore, the theory may exempt the rich from punishment as they will potentially be in a position to fully compensate a victim, undermining the general deterrence rationale. Additionally, the theory may run into difficulty in the manner in which it sets up duties as being owed to victims, and then permitting these to be transferred to others and ultimately the state. Questions also emerge as to how the duty to make reparation to a victim becomes a duty to accept punishment in furtherance of general deterrence, which is exemplified by a policy choice to adopt punishment which achieves general deterrence in favour of all, including non-victims, as opposed to those which might achieve greater protection to victims against future harms, and on duty view it would seem that the latter is preferable.

Such questions are answered by Tadros through a duty to do the next best thing, to suffer in furtherance of protection, which is in turn assailed on the basis that it rests on the passing of duties owed from wronged victims to their loved ones or to society. Tadros argues that although a duty is owed to a victim, the victim does not always have a right, or ability, to vindicate their position personally, and as such the state is best placed to

\textsuperscript{89} Alexander, note 85.
\textsuperscript{90} Tadros (a), note 83, at Ch 5; Tadros (b), note 84.
\textsuperscript{91} Alexander, note 85; Kasper Lippert-Rasmussen, ‘To serve and protect’: The ends of harm by Victor Tadros’ (2013) 9(1) Criminal Law and Philosophy 49–71; Ferzan, note 85.
punish in furtherance of the vindication of the duties owed in the political order underpinning our societies. However, in theorizing that the state is best placed to do so, there is a utilisation of victims and, in some instances, a forced expropriation of the duty owed from the victim in favour of the state, which is insufficiently justified in the theory itself. Furthermore, the theory is not clear as to why a choice of generalised protection should be made over increased individual protection when the duty to the victim is the foundation of the theory.

Tadros’s contribution is interesting as a theory justifying punishment. While it is novel in the sense of the duty view, it shares with instrumental theories the deterrence of further crime causing harm, and while distinct from the retributivists in the rejection of desert it shares the concept of owing something to others, here the duties described.

Restorative Justice
Restorative justice sits oddly with theories underpinning criminal law and punishment; however, given its relevance as an approach it merits attention. It seems inapposite to this area as it is often seen as an alternative to or diversion from, as opposed to a justification for, archetypal punishments, and it is most often defined by and posited as an alternative theory of justice. Restorative theories are strongly related to republican theories of justice, such as those of Braithwaite and Pettit where restoration is an aim of the criminal justice system, however, they may also be linked to abolitionist movements where restorative justice is seen as the business of people and not the state.

Such theories are founded on interrelated propositions which focus on crime being a violation of people and interpersonal relationships, that violations create obligations and liability, and restorative justice seeks to heal and put right the wrong. Conceptually these theories seek reparation for wrongdoing. These have been described as a third model between retribution and rehabilitation, which involves a bringing together of all stakeholders affected by the consequences of an injustice with a view to putting things right and redressing the harm done through pecuniary or personal reparations to individual victims and/or the community. The chief concerns are the determination of liability, conveying disapproval, and reparations as opposed to criminalisation itself.

93 White, Haines, note 92; Braithwaite, Pettit, note 71; Duff, note 21.
Political or Moral Foundations

A common theme in theories justifying the criminal law and punishment has been the notion of morality in determining the normative content of the law, indeed even within instrumental accounts morality plays a role to the extent that there is a moral rectitude in serving the ends protected. Either that morality has been put forward in an extra-legal form which is then instantiated in the criminal law, or morality is seen as arising from the necessity to have regard to rules enacted as deemed necessary to maintain our human flourishing; however, in both accounts we have been referring to extra-legal morality as the foundation of the normative content of the criminal law. However, I have adverted to the difficulty in determining the moral content which should form the basis of the criminal law and punishment, and what values should be protected. Furthermore, I referred to the possibility that such determinations, that is as to the normative content of the law, are not products of extra-legal morality but instead are politically decided as a function of societal determinations in relation to limitations and duties that we expect of each other, that is a political as opposed to extra-legal moral determination of the values which the criminal law should protect. This opens the debate concerning whether the normative content of the law has a political or moral foundation. An instrumentalist account is paradigmatically on the political side of this debate, albeit still with a moral foundation, and a legally moralistic and retributivist account on the other.

The normative account of the criminal law as imbued with extra-legal moral content is well sketched in the foregoing sections. However, here I will consider whether a political account is more suitable, and indeed will conclude that it is. The political as opposed to moral view as to the normative content of the criminal law sees a divergence between the normative content of extra-legal morality and the normative content of the criminal law in that the latter is representative not of extra-legal moral norms, but instead of a political determination of values within a polity which is representative of the political, economic and social concerns of that polity at a given time.

94 Stewart, note 34; Thorburn, note 46.
95 Anthony Duff and others (eds), The structures of the criminal law (Oxford University Press 2011).
96 Wells, Quick, Lacey, note 5, at 6.
97 See for example Moore’s approach as dealt with in the section on Legal Moralism and Retributivism, also Duff’s approach in the Communicative account, and also the moral side constraints inherent to the Civic or Republican account particularly in the eyes of Duff.
98 See contributions by Norrie, Thorburn and Ramsey in: Duff and others (eds), note 95; Wells, Quick, Lacey, note 5, at 5 – 13.
Thorburn argues that legal moralistic accounts—those representative of extra-legal morality—fail to explain the public and coercive nature of the criminal law in liberal societies where the function of the law is to maintain the maximum amount of freedom possible.\textsuperscript{99} He argues that without the law there is no possibility of singularly acting in accordance with one’s moral principles without the assurance of others doing likewise. He accepts that we are all free and equal moral agents, but that to maintain our equality we have the state and its laws to provide some assurance of our equal moral standing and to facilitate us acting in accordance with our moral values. However, the state is concerned with the values of the political community, and those are the maintenance of maximal freedom for all, thus the state makes value judgements regarding that which is necessary to maintain freedom and transgressions are those which are criminally wrongful.\textsuperscript{100} This is not a moral decision in the form of extra-legal morality, it is a political decision concerned with freedom, a decision which he terms representative of ‘political morality’.

The political view is favoured in relation to the determination of the harm of exposure to or transmission of pathogens during sexual intercourse.\textsuperscript{101} That general statutory and common law principles have developed to comprehend such offences, and indeed that specific statutes have been introduced, is not best explained by a developing moral conception of the rights or wrongs in extra-legal moral terms of such behaviours. Such extra-legal moral views exist, but in reality the development of these offences has more to do with developments in relation to immunological conceptions of the self and integrity, conceptions of autonomy and the role the state in risk management. For example, the genesis of such offences in the USA arose partly from the findings of a Presidential Commission which was as concerned with the maintenance of safety in the blood supply as with types of personal and intimate relationships and behaviours within them that might give rise to criminal liability. Additionally, we can see that different political communities have made decisions as to the boundaries of autonomy and integrity in this area, and as such behaviours amounting to criminal offences vary significantly.

\textsuperscript{99} Thorburn, note 46, at 23 – 29; Malcolm Thorburn (b), ‘Serving Morality Indirectly: The Special Role of Criminal Law Within the Legal System’ in R. A. Duff and others (eds), \textit{The structures of the criminal law} (Oxford University Press 2011), at 90 – 97.
\textsuperscript{100} Thorburn (b), note 99, at 100 – 105.
\textsuperscript{101} Weait, note 15.
These arguments do not deny the existence or relevance of extra-legal morality to everyday life, nor indeed the potential relevance of such morality to the determination of wrongfulness in a general sense. However, the political account offers a more compelling understanding of how the state might establish and sustain a system of criminal law and which accounts for the range of laws, the coercive nature of the system and the limitations on the law without recourse to extra-legal morality as the touchstone for decision making. While it remains difficult, and some might say impossible, to discern the values of a polity which are instantiated in criminal offences the political account at least allows us to look to our existing structures and institutions for a source of those values which in terms of the reality of criminal justice systems offers a less vague and more realistic account of criminal practice.

**Conclusion**

Several accounts of justifications for the criminal law and punishment have been provided. In essence these fall in a number of categories, there are those with a moralistic and retributivist viewpoint which see morality as the touchstone for liability, and the breach of values commonly shared as deserving of punishment. These accounts are closely related to those which look to the moral values of a community and see criminalisation and punishment as an expressive or denunciatory exercise which communicates to the person and the community the violation and expected behaviours. Instrumentalist accounts rely on the establishment of ends valuable to human flourishing and resort is made to the criminal law in defence of those ends where the overall benefit of criminalisation and punishment outweighs the damage done by harsh treatment. Hybrid accounts, which are to be preferred, rely to varying extents on moral values and instrumentalist concerns in seeking a balance which prevents the criminalisation of all that is immoral without regard to cost. Of all the available theories, the hybrid theory offers a rational basis to balance competing agendas and to facilitate a conception of criminalisation which looks to the moral agenda of a community while at the same time taking into consideration the harm of criminalisation itself, allowing appropriate and considered service of the interests of society as whole.

Whichever model is chosen, it is best to understand the moral component as an exercise in political morality and as such an instantiation of purported values of community representative of the concerns of that community in a place and time; in this sense morality is localised, temporalized and contextualised.
These theories are important to predicate the criminalisation of the type of behaviour with which we are concerned, and to consider the competing justifications in doing so. In summary, the justifications are best described as: retribution, denunciation, incapacitation, deterrence, and something owed (duty) to the community. I will consider each of these justifications in due course, which I will argue must be placed, tentatively, in the balance of the competing and overarching concerns of our community, and the availability of alternatives which avoid, where possible, the most formal and censorious aspect of our communities – the criminal law.

II. Criminalisation

In each of the theories of the criminal law and punishment that I have considered, there has been commentary concerning why we should maintain the criminal law and associated punishment. There have also been critical observations which point towards the type of behaviour which may be criminalised, such as: moral wrongdoing, harms to human welfare, harm to the values of the community and harms to the civic bonds that tie us together. That said, the foregoing accounts remain relatively unclear as to exactly what type of behaviour should be subject to the attention of the criminal law, save a conclusion that, whichever account is adopted, where references are made to morality this is best understood in terms of political morality.

The previous discussion might be termed the justification for offences, whereas here I intend to elaborate in a detailed manner how those offences may be defined, though as with the preceding analysis, the source of and justification for offences is as ever contested and in attempting to articulate the philosophical underpinnings of the criminalisation of conduct it is impossible to provide one unified account of the large number and wide variety of criminal offences.¹⁰² What I aim to do is to identify what objectives or principles should be considered when deciding whether to use the criminal law in specific circumstances by addressing issues of autonomy and welfare, the harm principle and a minimalist approach to criminalisation. This will further facilitate the final element of the chapter which will address non-fatal offences against the person and the type of behaviour with which we are concerned.

¹⁰² Wilson, Ehlermann, note 20, at 17.
**Autonomy and Welfare**

Central to a consideration of the criminalisation of conduct is the concern of the liberal society with autonomy. In such societies, coercive state rules should be the subject of ethical restraints, arising from the concern to promote individual autonomy rather than restrict it, with a significant concern being attached to liberty and individual rights in deciding what the state ought to do, and as such guarding against excessive intrusion of the state in the personal sphere. Additionally persons are regarded and respected as autonomous in that they are treated as responsible for their behaviour. Autonomy is thus both a justification for and limitation upon criminalisation.

At a normative level autonomy presupposes that each individual should be respected and treated as an agent capable of make choices in relation to their actions which is in turn linked to liberal political theory and a concern for each person and their entitlement to equal concern and respect. This conception of free will is related to the culpable choice which is seen by most as an essential characteristic of criminal liability. Whether as a matter of fact we actually have free will is a contested concept, with particular reference to determinism which claims that all human behaviour is determined by causes that are outside our control. From a determinist point of view the concept of autonomous free will which underpins notions of culpability is a perspective of the privileged which fails to recognise the inherent ideological and material impediments which may hinder our self-actualisation. Neither free will nor determinism may be proved, however, autonomous decision making does underpin very many social practices and as such most philosophers reconcile these competing conceptions by recognising that all behaviour is not so pre-determined that blame is generally unfair, while at the same time recognising that in certain circumstances there may be behaviour which is the subject to strong determining factors such that free will may be displaced. This admits the possibility of qualifications to liability such as those related to capacity, or defences relating to duress.

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103 Wilson, Ehlermann, note 20, at 18; Ashworth, Horder, note 1, at 23 – 26.
107 Ashworth, Horder, note 1, at 23 – 24.
However, the principle of individual autonomy can only take the discussion so far, as while clearly this is a limitation on the justifiability of state interference, purely individualistic autonomy is not conducive to structured communal living and it presupposes an equality of position and power between people which is not evidenced in reality. Thus, a more attuned autonomy argument finds place for collective goals which create the conditions for maximum autonomy within a society, but also are alive to the possibilities of bias and failure to regard the individual difference in capacity and choices which may limit the range of options available to a person.\textsuperscript{108}

A system which creates the conditions of maximum autonomy may be determined through a communitarian or welfare paradigm.\textsuperscript{109} Welfare interests, that is the collective goals necessary for the exercise of maximum autonomy, are determined through a political process which regards the interests of the collective as well as the individual and as such purportedly create those conditions through legal regulation which limits individual freedoms to the extent necessary to maximise individual freedom. The communitarian or welfare perspective often leads to security and protection issues being of paramount concern, and care must be taken that majoritarian determination of collective goals does not ignore individually marginalised positions nor individual rights such as to erroneously justify harsh or intrusive policies.\textsuperscript{110}

Welfare concerns justify or permit criminalisation so that the coercive power of the state is deployed against those who act in ways which may diminish the autonomy of others, and those subject to those rules are given fair warning so that they may order their conduct so as to avoid unnecessary coercion by the state. The system is seen to maximise autonomy as to be autonomous our possessions and personal security must be protected from interference, and as a consequence individual freedom may be legitimately limited to maximise autonomy which is the more valuable social commodity. In this paradigm, persons are criminalised not only as a result of what may be termed moral wrongdoing, but as a result of making personal choices maximising one’s own position to the detriment of the choices available to others, an essentially instrumental concern.

\textsuperscript{110} Ashworth, Horder, note 1, at 26 – 28.
Individual autonomy and welfare may operate symbiotically or may be in conflict. That said, placing emphasis purely on individual autonomy, as mentioned, is not conducive to structured communal living. Where conflict emerges, individual autonomy remains an important check on collective action and one way in which it does so is by the determination and defence of key autonomy based rights of the individual, for example human rights recognised in law, and subjects any restraint on those rights to scrutiny as to their necessity and justifiability in general and individual contexts. Therefore, the autonomy and welfare paradigms presuppose the determination of individual and collective interests, and the deployment of the criminal law to protect those interests, and a restraint on the law against undue interference with personal interests. One way in which theories of criminalisation have sought such a balance is through the harm principle to which I now turn.

**Harm and Wrongdoing**

The concept of harm is generally the starting point in relation to discussions of what type of conduct should be the concern of the criminal law. Harm is a commanding yet at the same time relativistic determinant which requires consideration in the assessment of the type of behaviour which may be, or has been, criminalised. Harm, and associated concepts of wrongdoing, do not provide a single answer to the question of what may be the subject of the criminal law, and indeed no single answer is likely available. They do, however, provide conceptual assistance in distilling and marshalling to a degree a range of arguably vaguer moralistic and instrumental concerns into a more coherent picture of how the question may be answered. To facilitate this discussion, I will consider the work of Feinberg who examined the area in considerable detail, alongside more recent contributions which seek to clarify or critique the concept. The literature in this area is voluminous, however, here the focus will be on fundamentally normative and analytical contributions to facilitate an exposition of key points which will in turn inform the application of those points to the behaviour in question.

Feinberg’s harm principle builds on the work of Mill who famously stated that; ‘the only reason power can rightly be exercised over any member of a civilized community, against his will, is to prevent harm to others’, and while Feinberg’s works have in common with Mill concerns regarding the legitimacy of the exercise of state power, Feinberg recognises
a greater range of legitimacy. Feinberg’s works, in four volumes, seek to answer the
question of what sort of conduct may the state rightly make criminal, and as such what
are the moral constraints on criminalisation. Feinberg recognises that his work is a
search for principles which may be applied by legislators who will, if using his account,
have a range of potential behaviours which it is permissible to criminalise, and then will
make political decisions on whether to criminalise taking into consideration matters such
as utility, potential effects and the demands of politics. In this way the harm principle can
have links with legally moralistic accounts of the criminal law in so far as it identifies
among those things which are morally wrongful, those which should become the attention
of the criminal law. It additionally can be linked to instrumental accounts in relation to
the determination of the goods which should be pursued, and thus defended by the
criminal law, and the role of utility in the ultimate determinant of criminalisation.

Feinberg’s work embraces both moral and instrumental concerns in that he recognises
that laws should have moral legitimacy, and in the definition of the harm principle he
seeks to stipulate the type of criminal prohibitions which are both morally legitimate and
useful. His endeavour is premised on a strong support of the concept of liberty in that
a person should be free from state interference unless there is a strong case which can be
made for that interference. In making out this case, he develops what are termed liberty
limiting principles, which carry a strong presumption in favour of liberty, but which also
delineate the moral limits of individual liberty and thus justify invasion of the individual
morally-justified zone of freedom from state coercion. Such principles, when identified
and supported, are contended to always provide a morally relevant reason in support of
criminal legislation, yet they do not alone amount to a sufficient reason to criminalise, in
that those reasons may be outweighed by individual liberty or communitarian concerns.

While a range of potential liberty limiting principles are identified Feinberg settles on
only two morally relevant reasons for the limitation of individual liberty, those being
harm to others and offences to others, with all others being morally unjustifiable.

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113 Feinberg, note 104, at 6 – 7.
114 Feinberg, note 104, at 7 – 14.
115 Feinberg, note 104, at 14.
While harm and offense are referred to, we will confine ourselves to harm and its meaning. An important preliminary observation, which remains relevant in the consideration of all that follows, is that Feinberg in defining harm to others as a morally relevant reason to support criminalisation confines this to serious harms, and additionally the creation of unreasonable risk of such harms. Moreover, he specifically recognises battery and aggravated assaults as comprising, among other crimes, the clearest cases of legitimate criminalisation in that the need to prevent serious harm, or the creation of unreasonable risk of serious harm, to others is morally justified when criminalisation is reasonably necessary and effective.

On the requirements that criminalisation be reasonably necessary and effective, he recognises that harms must be graded using criteria related to seriousness, and in addition he recognises that criminalisation and associated denunciation and punishment are in themselves harmful so that criminalisation should be deployed only where effective to prevent further harms of that type. There is also a recognition that the criminal law represents a drastic and serious invasion of liberty and that in many circumstances the same purposes can be achieved at a lesser cost through other methods of social or legal control. In keeping with earlier arguments, in seems then that harm to others, in the manner which will be described, provides a supporting reason to criminalise behaviour but not in itself a sufficient justification. As such, other relevant matters, referred to as mediating principles by Feinberg, such as the cost to the individual and community, must be weighed in the balance when making such a decision.

Prior to turning to the definition of harm, Feinberg acknowledges the scepticism of others in relation to the advancement of any general scheme which will provide the particulars necessary to justify criminalisation in any given context. In that regard, he refers to the writings of Nagel to the effect that no such general scheme can be identified, and indeed any definition of harm, and as such a justification for criminalisation, is inherently relativistic in the context of prevailing social and moral norms in a given society. To similar effect, others have observed that the term *harm* is a morally loaded and contested

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116 Feinberg, note 104, at 12.
concept which must take account of the moral, political and cultural contexts in which
the term operates and that Feinberg’s definition fails to do this. While Feinberg
believes that his careful articulation of the concept of harm in living contexts does provide
a general scheme, and he does explicitly recognise that the definition of harm would
inevitably include moral judgements and value weightings, it is reasonable to conclude
that the concept of harm which I will now analyse does provide important guiding and
limiting principles, but at the same time in practice has displayed considerable flexibility
to allow the frame of reference of the legislator or judge to determine the meaning of
harms in a more indirect and distant manner than perhaps originally conceived.

Feinberg offers three conceptions of harm; the first is in the sense of something factually
happening, for example: a window being broken. This is not the sense with which we are
concerned, however, the concept is further developed in that the criminal law can only
be concerned with harms which affect human beings and human beings have a range of
interests. Therefore, harm in the sense of criminalisation is the thwarting, setting back or
defeating of a human interest, that is something we as humans have a stake in. The
things we have an interest in are those interests which are essential to a person’s wellbeing
and flourishing, and one harms another when one thwarts or sets back those interests.
Feinberg identifies a range of human interests, in the sense mentioned, and refers to these
broadly as welfare interests, which individually and collectively contribute to and are
necessary for the achievement of our ultimate goals in life, which are termed our ulterior
interests. While a range of such interests are specifically referred to, perhaps most
pertinent to our discussion he adverts to interests in the continuation for the foreseeable
future of one’s physical health and vigour and the integrity and normal functioning of
one’s body. Referring specifically to welfare interests which may be legally protected by
the criminal law, Feinberg refers to interests which when set back amount to an attack on
one’s personal wellbeing, and includes within those harms occasioned to one’s health and
a diminution in security by the creation of threats and dangers. In this sense, harm, and
as such an assessment as to whether one’s interests have been thwarted, is a relativistic

120 Neil D. MacCormick, Legal right and social democracy: Essays in legal and political
philosophy (Oxford University Press 1982), at 28; Bernard E. Harcourt, ‘The collapse of the harm principle’
(1999) 90(1) The Journal of Criminal Law and Criminology 109, at 192 – 194; Ashworth, Horder, note 1,
at 28 – 29.
121 Harcourt BE, note 120; Feinberg, note 104, at 32.
122 Feinberg, note 104, at 32 – 34.
123 Feinberg, note 104, at 32 – 34.
124 Feinberg, note 104, at 61 – 64.
concept which requires an ex-ante assessment of the state of that interest prior to the impugned behaviour having taken place. However, there is no necessity for one’s interest to have been defeated, and the taxonomy of effects can include setting back, thwarting, defeating or impeding, thus encompassing a wide range of harmful effects.\footnote{Feinberg, note 104, at 51 – 55.}

Simester and von Hirsch have made a recent contribution in the area of criminal theory which focuses on both the elements of harm and wrongdoing in criminalisation.\footnote{Simester, von Hirsch, note 43.} There is little to separate their account of harm as a justifying principle and they share the requirement that criminal laws should not only be justified on the basis of harm, but additionally on the basis of effectiveness in preventing harm from occurring.\footnote{Simester, von Hirsch, note 43, at 36.} They too advocate a position that harm is something which impairs one’s interests or creates a risk of doing so, although they refer to these as resources instead of interests, and these are to be understood as one’s longer-term means and capabilities which may be instrumental or constitutive, or both as in the case of good health which can be facilitative of other endeavours and may be enjoyed in itself.\footnote{Simester, von Hirsch, note 43, at 37, 43 – 46, 54 – 57.} Such resources, impairment of which may justify criminalisation, share a number of characteristics in that they: subsist over a longer term, impinge upon one’s quality of life and have an objective quality. In recognising the role of the criminal law in dealing with actual harms and the creation of a risk of such harms, they assess constitutive and non-constitutive crimes, the former arises where the harm is occasioned and the latter where an unreasonable and unjustifiable risk of harm is created.\footnote{Simester, von Hirsch, note 43, at 43 – 46.} In relation to offences of creating a risk of harm, they believe, akin to Feinberg, that these should be confined to circumstances of creation of direct risk, and even then this should only occur where it has been deemed appropriate following an assessment which takes into consideration the gravity and likelihood of the harm, the social value of the conduct and the degree of intrusion associated with criminalisation.\footnote{Simester, von Hirsch, note 43, at 43 – 46; Feinberg, note 104, at 216.}

I turn now to the third sense of harm in Feinberg’s analysis which is the normative sense of wrongdoing. By addressing the concept of wrongdoing, he recognises that not all harms, in the sense of setback of interests, which I will refer to as the narrow sense, may amount to wrongdoing and as such there is a concept of non-wrongful harming which is
not the concern of the criminal law and may arise quite frequently.\(^{131}\) Of note, he also addresses the concept of wrongs which do not amount to harms, but suggests that these are comparatively rare occurrences. A harm in the narrow sense becomes a harm in the wrongful sense when the actor who sets back the interests of another also violates a right which they hold, thus a harm in the normative sense refers to a setback of interest which also involves the violation of a right held.\(^{132}\) He also recognises the roles of culpability and moral indefensibility of actions in the context of the overall scheme of wrongdoing, such that the a more complete understanding of the term harm is as a culpable act, which was engaged in without justification or excuse, which sets back the interests of another and in so doing violates a right which they hold.\(^{133}\)

The question which must then be addressed is as to the rights a person holds which may be violated in course of setback of interests, such as to make a matter the legitimate concern of the criminal law. In his analysis of rights, he recognises two senses of a right in this context, that is a call to others not to interfere and a call to the state to enforce such non-interference. In ascertaining what rights a person holds Feinberg denies that such rights are merely legal in nature, nor are they solely moral in the sense of extra-legal morality. Instead he offers a confined moral viewpoint, which recognises that welfare interests are grounds for valid moral claims against others and the state.\(^{134}\) Therefore, we have a moral claim, that is a right, against all others in relation to non-interference with our welfare interests, and behaviour which sets back those interests amounts to a violation of that right, thus is a harm to others in the sense discussed. However, not all setting back of interests will amount to a violation of rights and, in particular, he recognises that those who consent to a set-back of their interests incur no violation of their rights once their consent was voluntary and informed.\(^{135}\) One further limitation on the violation of rights relates to conflicting interests, and Feinberg recognises that any reasonable application of the harm principle requires a system of ranking of interests such that a setting back in certain circumstances may not amount to the violation of rights.\(^{136}\)

\(^{132}\) Feinberg, note 104, at 105 – 114.
\(^{133}\) Feinberg, note 104, at 105 – 106.
\(^{134}\) Feinberg, note 104, at 109 – 112.
\(^{135}\) Feinberg, note 104, at 115 – 117.
\(^{136}\) Feinberg, note 104, at 113, Ch 5.
Simester and von Hirsch similarly require wrongfulness as a prerequisite to criminalisation. They recognise, in common with Feinberg, that not all harms amount to wrongs, and as such issues such as consent and the weighing of competing interests can militate against a harm constituting a wrong. Additionally, they in a sense coalesce with Feinberg in that some harms are wrong generating, such as attacks on physical integrity, though they differ on the source of the wrongfulness. While Feinberg limits his sense of wrongfulness to a limited moral claim, a right against interference with welfare interests, it would seem that the authors call extra-legal morality in aid of their definition of wrongfulness, in that they refer to the requirement that conduct be reprehensible prior to criminalisation and additionally have particular regard to the moral voice of the law in the proscribing and punishment of conduct. They support both a necessity and insufficiency thesis in that wrongdoing is prerequisite for criminalisation yet wrongfulness without harm is in itself insufficient to justify criminalisation in a given context. Their theory shares with Feinberg a twostep criminalisation process, but in enlarging the place of morality, there enters a degree of uncertainty and the potential that the harm principle is effectively subsumed within the powerful concept of moral wrongdoing. Additionally, as mentioned earlier in the examination, it is likely that claims relating to extra-legal morality in the criminalisation process are often more properly understood as instances of political morality related to the values of a given society as expressed through political processes rather than any extra-legal conception.

The harm principle, and associated connotations of wrongfulness, do not answer all the questions as to that which may be, or should be, the attention of the criminal law. They do place a limitation on that which may be criminalised, but even the definitional aspects leave much room for debate in a given context. As to what should be criminalised, all theorists, in keeping with a hybrid model of justification, leave room for militating factors which can mediate between what may be criminalised and what should be. It is clear how these principles seek a place between autonomy and welfare, however, the significant room for political judgements in relation to the interests deserving of protection, the moral wrongfulness of certain behaviour and the mediating factors which

may militate against criminalisation leave much to be decided on a case by case basis depending on the prevailing winds in a given society. Further while the principles deal with harm and the risk of harm, risks are relatively under attended to particularly in the context of non-consummated or endangerment offences, the actual interests which are set back and the nature of the wrongfulness associated with them. Criticisms aside, the harm principle does provide an important normative and analytical framework within which to assess competing autonomy and welfare concerns in the decision as to whether to criminalise particular behaviour. I turn now to one final approach to criminalisation which seeks to draw together the threads of argument just addressed.

The Minimalist Approach
One particular and welcome approach to criminalisation which seeks to balance autonomy, welfare and other forms of social control is the minimalist approach.\textsuperscript{141} This approach presupposes four overarching considerations: a respect for human rights, respect for the right not to be subjected to state punishment, criminalisation as a form of social control of last resort and the deployment of the criminal law only when it is beneficial and not counterproductive. This approach harbours deep anxiety over the proliferation of criminal offences and the expansion of criminal law far beyond its core.

The first principle is that any consideration of criminalisation should first consider the protection of human rights. That is not to say that criminal offences and associated punishments cannot abridge human rights, but in doing so there should be a principled consideration of both the necessity for and extent of the abridgement so that a limitation only arises where this is necessary, and only to the extent that is necessary in pursuance of a stated objective which is necessary in a democratic society.\textsuperscript{142}

The second principle, the right not to be punished, flows from the significance of public censure and the inevitable abridgement of human rights associated with conviction and


\textsuperscript{142} Ashworth, Horder, note 1, at 32.
punishment. The implications of this position are that arising from the censorious nature of the criminal law, the abridgement of human rights associated with punishment and the particular interference consequent to imprisonment, there should be a compelling justification for the use of the criminal law and that those who argue for criminalisation should bear a burden of proof. This is similar to the first filter in Schonsheck’s three filter system, where he proffers three filters through which any proposed criminalisation should pass. The first is termed the Principles Filter, and refers to the moral authority of the state to criminalise in the particular circumstances; and perhaps it is best related to the threshold of harm which justifies state interference with individual liberty.

On the use of criminalisation as a last resort, it is perhaps an exaggeration to say that it should always be a last resort, however, the criminal law should only be engaged where there has been a detailed consideration of alternative methods of social control. The criminal law is one such method, and one of significance which carries censorious and potentially preventative characteristics, however, there are other methods of informal social control such as extra-legal morality, social convention and peer pressure. There also exist other more formal methods of social control such as the education system, public health efforts and laws, civil liability and administrative regulatory processes. Therefore, for each form of unwelcome conduct there is a choice to be made as to whether the criminal law, other legal forms or no legal intervention is the appropriate choice.

On what factors should apply when making that choice, arising from the associated right not to be punished then the criminal law should be reserved for serious harms or threats of same, where lesser forms of harm are dealt with by non-criminal or non-legal interventions. There is an instrumental foundation to support this approach, in that if the same results can be achieved at a lesser cost to the individual and society then the alternative to criminalisation should be adopted, which accords to Schonsheck’s second filter, the Presumptions Filter, which calls for an assessment of the possibility of equally efficacious but less coercive and intrusive alternatives. This instrumental justification is important, but depending on the frame of reference from which one approaches the

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143 Husak (b), note 141, at 92 – 102.
145 Husak (a), note 141, at 69; Husak (d), note 141; Jareborg, note 141, at 17; Ashworth, Horder, note 1, at 33.
146 Ashworth, Horder, note 1, at 33; Ashworth, note 141.
147 Schonsheck, note 144.
justification of criminal law and punishment the censuring and punishment of a person may be deserved in itself, notwithstanding any analysis of costs and benefits. There are no doubt instances where a purely instrumental analysis could be used to argue for the decriminalisation of conduct which is commonly regarded as reprehensible and such an argument would be so counter intuitive as to reside in the realm of theory only, as opposed to reality. However, with reference to our later analysis, a mixed approach which focuses on the wrongfulness and harmfulness of conduct and which also considers alternatives seems more respectful of individuals and permits a more rounded assessment of conduct, criminalisation and its effect, which in turn is more conducive to the regulation of our collective as well as individual positions.

The last element of this model focuses on an instrumental assessment of the impact of criminalisation as an element in the assessment of whether to criminalise. This presupposes that behaviour should not be criminalised where to do so would be ineffective or would create more social harm than good. This relates to the third Schonsheck filter, the Pragmatic filter, which calls for an assessment of the costs and benefits of criminalisation. This component requires a focus on two separate elements: effectiveness and social cost. The element of effectiveness is perhaps the weaker of the two arguments in that the more serious the harm the greater the argument that the criminal law will have a symbolic role to play in denouncing a particular type of behaviour and exacting some element of preventative or deterrent effect. Although the question of deterrence is contested some element of general deterrence is recognised and even if full deterrence is not evidenced, then there may still be a justification for criminalisation. However, while limited efficacy may not be a conclusive reason against criminalisation, it does represent an important argument in favour of considering more efficacious methods and additionally for considering the impact of criminalisation in an overall context which includes a consideration of the overarching goals of a society in relation to the behaviour in question. On the costs of criminalisation, there may be unwelcome social consequences such as stigmatisation of populations, selective prosecutions, differentially more severe effects on the disadvantaged or, in our context, the impediment of public health efforts to control epidemics and pathogen transmission. These again may

148 Husak (b), note 141, at 120 – 158.
149 Schonsheck, note 144.
150 Ashworth, Horder, note 1, at 34 – 35.
not represent conclusive reasons not to criminalise, but they weigh heavily in the balance of any assessment.

**Conclusion**

There is no one model which justifies the criminal law and punishment, and similarly there is no satisfactory single model which address the totality of principles which should be considered when deciding whether to criminalise particular behaviour. However, both autonomy and welfare provide important structural means to understand the competing objectives at play when individual instances of criminalisation are being considered; they inform the application of particular principles such as the harm principle, and conceptualise the individual and the collective and the balance to be sought between the two. The harm principle offers a welcome, albeit incomplete, particularisation of principles to be considered when balancing the position of the individual and the collective and is highly relevant in the selection of conduct which may become the attention of the criminal law, save that there remain many choices as to that which may and should be selected. The minimalist approach, it is submitted, represents the appropriate manner in which to analyse that which has been, or may be, criminalised and this accords to the preference I have afforded the hybrid model of justification earlier in the thesis. Moreover, it facilitates to a great extent an examination of the competing philosophical justifications of the criminal law and punishment while also permitting an examination of the harm in question in the context of the society within which it occurs and which will be affected by the impugned behaviour and the consequences of criminalisation.

**III. Criminalisation of Non-Fatal Offences Against the Person**

In this section I will examine the justifications for non-fatal offences against the person which emerge from the literature and critically analyse their application in the current context. Additionally, I will examine criminalisation with reference to the justifications for the criminal law and punishment in the first section and the principles which should underpin the criminalisation of conduct discussed in the second, ultimately concluding that while there exists a basis for criminalisation a reasoned assessment should militate against this type of intervention.
Non-Fatal Offences and Exposure to, or Transmission of, Pathogens During Sexual Intercourse

In subsequent parts of the thesis I will consider the offences prosecuted in England and Wales, Canada and the USA with a view to examining the conditions of liability and the manner in which legislatures and courts have approached questions such as harm, causation, recklessness and risk, consent and disclosure. That analysis will deal with theoretical and practical issues relevant to those topics in some detail, and thus those are not addressed in substance here, though it is recognised that a full analysis of criminalisation requires a detailed appreciation of the conditions of liability and their effect. I will proceed in stages dealing with a number of issues here, addressing further issues in the subsequent parts, and drawing the strands together in the penultimate part. However, one of the key questions which will ultimately be addressed is the extent to which the criminal law should be used at all, and this section aids in that assessment by providing a theoretical construct supporting the criminalisation of existing offences.

At a very general level, at this stage, the offences prosecuted in the selected jurisdictions either involve the occasioning of harm through the transmission of a pathogen, generally HIV, or endangerment of life through exposure to the risk of transmission although transmission does not occur. In England and Wales, the matter has been addressed solely using section 20 of the Offences Against the Person Act 1861 (the Act) relating to malicious wounding or infliction of grievous bodily harm, with the grievous harm arising from the transmission of the pathogen in the absence of specific consent to exposure to the risk of transmission.

Canada addresses the issue in a number of ways, but most illustrative from our point of view is the use of sections 268 and 273 of the Canadian Criminal Code (Code), an aggravated assault and aggravated sexual assault, hence assault is a constituent element of the offence, and the aggravated element in these circumstances is endangerment of life through exposure to a serious pathogen during intercourse or transmission of the pathogen, in the absence of specific consent to exposure to the risk of transmission.

I say ‘generally HIV’ as the majority of cases have concerned that virus. There have also been prosecutions relating to Hepatitis B, Hepatitis C, Herpes Simplex Virus (HSV) and Gonorrhoea in the jurisdictions I will consider.

Although prosecutions have only taken place using section 20, there also exists the possibility of prosecution pursuant to section 18 of the Act for intentionally causing GBH, and an attempted transmission could also be addressed using an attempt offence relating to section 18 though no such case has been reported.
in turn vitiates consent to bodily contact. The foundational case law of the Canadian courts initially addressed this area in terms of an aggravated general assault statute, though they explicitly regarded such cases as akin to a sexual assault, there not being a rape offence in Canada, however, more recent Supreme Court authority confirms that the appropriate charge in such cases is aggravated sexual assault pursuant to section 273 of the Code.

The USA provides an intensely interesting mix of approaches to this area, influenced in part by the requirement to introduce criminal prohibitions in return for state funding for treatment of HIV. Across states there is a mix of general statutes, public health approaches and most illustrative from a comparative and analytical perspective is the use by thirty-three states of specific statutes predominantly dealing with HIV. These specific statutes parallel to the range of positions evidenced in England and Canada prohibiting at one extreme mere exposure to HIV during intercourse in the absence of specific consent to exposure to the risk of transmission, and, at the other, infection with HIV in the absence of the same type of consent, albeit that even consent is not a defence in some states.

Therefore, across the jurisdictions the offences centre on the issues of assault, infliction of serious harm and endangerment in relation to the creation of a risk of serious harm. The analysis in this section focuses specifically on the issue of harm, the infliction of harm and the creation of risk of harm. This is not to ignore the complex and important issue of non-consensual sexual intercourse, evidenced in the Canadian jurisprudence, which on one level might be seen as a necessary consequence of the conflated assault provisions of the Code rather than a principled decision in relation to non-consensual intercourse in this context. However, a more focused analysis shows that there is a complex relationship which looks at the wrong and harm of non-consensual intercourse in and of itself which is also linked, perhaps paradoxically where there is a focus on sexual autonomy and integrity, with the harm of infection or the risk of infection with a serious sexually transmitted pathogen. I have chosen to analyse the issues of consent, the vitiating of consent and the relationship to the harm of infection in a later chapter which will facilitate an integrated analysis of the comparative positions in England and Wales and Canada.
Therefore, we are in a position to consider what has been said about the harms and wrongs associated with such criminal prohibitions in general terms so as to understand the place of such offences in the general scheme of offences and the justifications for the criminal law, punishment and criminalisation. The essential issues here are harm and the risk of harm and in the main such harm has been associated with HIV, though herpes, gonorrhoea and hepatitis have also been considered. That serious harm is associated with HIV is intuitively unremarkable, and it certainly was at the time when criminalisation emerged in all the jurisdictions we will consider. At that time, infection with HIV led to the development of AIDS and predominantly led to an untimely death. In that context, it is perhaps not surprising that people were gripped with fear and criminalisation was seen by some, if not most, as a necessary response to deal with people who were taken to have inflicted this type of harm or risk thereof on what were regarded by some, if not most, as unsuspecting victims who had visited upon them a most unacceptable and egregious bodily harm or risk thereof. In this context, the bodily harm must be taken to be the effect that the virus has on one's immune system, and everything which flows from infection is related thereto.

Although, as we proceed, the analysis will mainly focus on HIV and other sexually transmitted infections (STIs), it is noteworthy that there is a growing recognition of the potential for criminalisation in the sexual context to creep into other areas in society, and we shall see there are very few, if any, legally principled reasons why criminalisation has been or shall be limited to the sexual sphere. In this context, I hazard to say that what is now regarded as within the realm of sexual conduct, most often confined to certain sections of our society or certain types of people, will become of much greater import in the context of ever increasing levels of serious communicable pathogens admitting of limited treatments, which are now more often encountered in the ‘developed’ world due

to increased travel. Additionally, the arguments which will follow must also be considered in relation to the warnings and premonitory reports regarding antimicrobial resistance which threaten to render currently commonplace, communicable and treatable pathogens – deadly. Therefore, while what follows might in a general sense be understood as an analysis of the criminalisation of a failure to behave in a manner which shows sufficient regard for the rights of others instantiated in the values of a community relating to sexual behaviour in the context of communicable pathogens, it remains to be seen how those rights, values and associated duties would be interpreted were the criminal law to stray into areas of what I will term social intercourse as opposed to sexual intercourse.

The conceptualisation of such pathogens, for example HIV, as a form of serious harm is a solely biological construction of harm and is related to both the concepts of autonomy and bodily integrity. This is not an uncontested account and in the following chapter I will consider whether the principles of autonomy and bodily integrity are appropriately supportive of the construction of harm associated with HIV by the law, alongside issues such as trust, justice and the values of a sexual community. While I will examine a powerful critique of the harm of HIV as a mere corporeal harm, which in turn questions the use of offences relating to physical harm or threats thereof as an appropriate basis for criminalisation, for the moment, and for the purposes of analysis, I propose to accept that HIV does amount to a corporeal harm, and a serious one at that. Proceeding on that presumption then it is necessary to examine the conceptual underpinnings of the types of offences prosecuted. To facilitate this, I will first examine the English provisions and then Canadian, and the points emerging from both are facilitative of a consideration of the variety of specific offences in the USA which occupy points on a spectrum.

In England, prosecutions have solely taken place using section 20 of the Offences Against the Person Act 1861. As mentioned, the offence involves, for our purposes, the infliction of grievous bodily harm, which is not an assault-based offence, and courts in England have specifically rejected assault as appropriate on the basis that the act of consensual intercourse will not normally amount to an assault. The section 20 offence is one of

154 On the growing threats of emerging infections, antimicrobial resistance and the potential for the criminal law see: Margaret Brazier and Lawrence O. Gostin, 'FOREWORD to: Criminalising contagion: Legal and ethical challenges of disease transmission and the criminal law' in Catherine Stanton and Hannah Quirk (eds), Criminalising contagion: Legal and ethical challenges of disease transmission and the criminal law (Cambridge University Press 2016), at xiii – xvi.

155 David Ormerod and Karl Laird, Smith and Hogan's criminal law (14th edn, Oxford University Press 2015), at 739 – 744; John Gardner, 'Rationality and the Rule of Law in Offences Against the
violence which involves both a harm and a wrong; the harm being the corporeal consequence and the wrong being that it was been inflicted by violence. This approach involves an important normative statement, not only is it wrong to inflict the harm in question, additionally the person who does so is normatively in a different category; they are a person who has engaged in personal violence. This distinction between the harm and wrongdoing accords with the accounts of the harm principle in criminalisation. It differs from Feinberg’s account to the extent that the wrong of harming is related to a narrow moral prism constituting a moral claim of non-interference with the interests interfered with. This account resonates more with the account of Simester and von Hirsch, and other proponents of a legally moralistic view of the criminal law, in that there is a claim to moral wrongfulness in the sense of extra-legal morality and the moral reprehensibility of engaging in such conduct which generates such wrongs, however, this moral wrongfulness is also representative of a political moral evaluation.

Defining the crime in this way resonates with the popular imagination, that is the normative views of the community, and provides an important description of the type of wrongful conduct and harms which are prohibited, and sends a message about those convicted to the community. This important normative characteristic, that is one of violence, is relatively under attended to in the literature in respect of the behaviour with which we are concerned. Most commentary focuses on the nature of the harm of infection with HIV, and whether the conditions of liability or liability itself are appropriate, with proponents of criminalisation referring to the harmful effects and moral wrongfulness of non-disclosure and opponents referring to questionable conditions of liability and the harmful effects of criminalisation. The normative message remains important, and this is notwithstanding that it is acknowledged that a violent act is not required to inflict grievous bodily harm, as the message is associated with the label attaching to the offence.

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156 Gardner, note 155, at 36 – 37, Ashworth, Horder, note 1, at 313; In saying this it is recognised that neither violence nor indeed an assault is required to inflict grievous bodily harm, however, here we are limited to the normative sense of the offence.

157 A useful brief account of the pro and anti-criminalisation arguments is found in; The Law Commission (a), note 153, at 163 – 165.

158 Horder, note 155.
In one sense, the courts in England have adopted the best possible approach, within the range of available offences, if criminalisation is to permitted. I say this as they have avoided vitiating consent to what was otherwise a consensual sexual act, and thus mistaking the wrong of rape, a point to which I will return. However, the mode of responsibility conveys an unwelcome normative message that those infected with HIV, and other STIs, who are convicted are violent persons when in fact no violence generally forms part of the sexual act which results in transmission. To avoid this type of message involves using perhaps an assault based provision which is unwelcome for the reasons referred to or instead using a specific statutory provision, which in the circumstances as we shall see is not recommended due to the exceptionalism and resulting stigma which arises. Therefore, the normative message associated with the label of the offence, arising from the nature of the wrongdoing associated with the harm, is problematic, though of course not determinative, no matter what type of offence is utilised.

Returning to the harm associated with the English offence, which is conceived as the transmission of a pathogen, it is argued that it is not the particular type of injury which matters but the value that the injury impedes or destroys.\textsuperscript{159} The harms associated with grievous bodily harm are those which affect the value we attach to those parts of our body and its functions such as the limbs, the senses, the functioning of internal organs or what may be termed overall our vitality. In this sense the harm is a setback of an interest or resource which is both instrumental and constitutive, that is our health, something which can be enjoyed and is also facilitative of our ulterior goals.\textsuperscript{160} Such injuries, that is bodily injuries, are used as one of the primary examples of harmful conduct, all other things being equal, which justify criminalisation. While terms such as interests, resources, autonomy, vitality, bodily integrity and many others are used in connection with this type of harm, the crux of the invasion is generally related to an unacceptable and unjustifiable interference with autonomy in that there is an interference with the set of opportunities and options from which one is able to choose what to do in one’s life.\textsuperscript{161}

Aside from a consideration of the nature of the harm of infection in itself, an issue which will be addressed in the following part is the seriousness of the harm with reference to infection in the context of available and effective treatments. It is taken as a given that

\textsuperscript{159} Horder, note 155.

\textsuperscript{160} Feinberg, note 104, at 14, 32 – 34; Simester, von Hirsch, note 43, at 35 – 38.

infection with HIV is a serious harm, and indeed it inevitably led to death in times past. Accounts of harm sufficient to justify criminalisation in using the section 20 offence have focused on a seriousness threshold with terms such as ‘serious’ or ‘really serious’ having been used, though the term grievous is to be given its ordinary meaning. However, where that threshold lies is a matter for social or political determination in a given society predominated by concerns to ensure non-interference with our autonomy or physical integrity, and indeed the Court of Appeal has recently determined that an assessment of harm done is one for the jury applying contemporary social standards. It is certainly a relevant consideration as to whether the transmission of a given pathogen, in the context of available treatments, meets the seriousness threshold and there is a real concern that stigma rather than empirical or qualitative analysis will be the determinant of harm in a given context. Therefore, in considering whether the violation of autonomy, or other interests, is sufficient to justify criminalisation it should at least be considered whether the harm of HIV, or other pathogens, is now of a sufficient magnitude to justify criminalisation, and of course, even if it is, there remains other countervailing considerations to which we will turn in due course.

As such the offence prosecuted in England carries with it a strong normative message, a sense of moral nominalism, that the person who transmits HIV has committed a crime of personal violence, yet in none of the cases has violence been reported. Presuming, as we have, that the harm of infection is a serious corporeal harm, setting aside the issues of treatment and effect, then it is clear that infection may eventually, but will not immediately, represent a significant setback of interests we hold in our health, vitality and autonomy. Whether the transmission of a pathogen in the absence of consent is an extra-legal moral wrong, a moral wrong in the sense of political morality or still narrower a moral wrong in the sense of a right unjustifiably abridged depends on the perspective one adopts. These conclusions point to issues which are relevant in deciding whether criminalisation may be justified, and without regard to the detailed exposition of nature of the harm in itself or in the context of treatment, it would seem that there is at least a

162 R v Ashman (1858) 1 F&F 88 referred to any serious harm which interferes with health or comfort; R v Smith [1960] All ER 161 referred to the words bearing their ordinary meaning; R v Janjua [1999] 1 Cr App R 91 and R v Carey [2013] EWCA Crim 482 both reference that really serious harm need not be ascertained; Ormerod, note 155, at 741 – 742.

prima facie justification for criminalisation which must be considered in the context of significant countervailing factors.

The initial offence prosecuted in Canada, section 268 of the Code, is an aggravated assault offence which requires endangerment of life. The *actus reus* of the basic offence is established through the non-consensual direct or indirect application of force to another person, in this context this is satisfied by the sexual act, consent to which is vitiated as a result of: dishonesty in terms of failure to disclose HIV status, accompanied by deprivation in the form of a significant risk of serious harm, and finally a determination that the dishonest act induced the giving of consent where it otherwise would have been withheld. The test to establish the aggravated element of the offence also involves a finding of a significant risk of serious harm which endangers life; notably though transmission does not have to occur. Thus in essence the tests are conflated: in all cases where the basic offence is made out the more aggravated offence will likewise be established. The offence prosecuted is complex in terms of the physical and contextual elements, and the associated states of mind required. These factors have much to say about the offence prosecuted, not least when aggravated sexual assault is utilised, and all elements of the offence will be addressed in due course, however, the key distinction with this offence is that transmission need not have occurred, and hence it is an endangerment offence which is where the main focus of this section of the analysis will lie.

It is first necessary to recognise that the offence is one of assault which seeks to protect from a range of behaviours from apprehension of physical contact up to contact itself. In the Canadian context there was a reform of the criminal code which led to the grouping of a range of offences from apprehension of physical contact up to sexual assault, rape as it would be labelled here, under a range of offences which all have as their foundation the assault offence. Whether such an approach to law reform and offence labelling is satisfactory has been the subject of debate in Canada and in England in the context of proposed reforms of the 1861 Act. In that context, it has been remarked that such an approach represents an inappropriate conflation of harms and wrongs which denudes or denatures the normative messages associated with particular offences. One certain

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167 Gardner, note 155.
consequence in Canada was to require that all occasioning of harm be preceded by an assault, which requires an absence of consent to physical contact. In Canada, therefore, any conviction in this area requires that a person be found to have non-consensual intercourse. I will discuss the normative issues arising from this situation in the next part, however, I believe it to be unsatisfactory as it creates a situation where a person convicted of the aggravated assault offence, now it seems to be prosecuted as aggravated sexual assault, has actually committed a rape, which also involves endangerment of life. Whether it is correct to criminalise endangerment of life in this context is one question, however, it seems entirely inappropriate to categorise the nature of the intercourse which has taken place as a rape. The wrong of rape, while not uncontested, seems best described as deception as to the physical act, specifically penetration which carries with it a significant social meaning, and non-consent to that act as properly understood, thus objectifying the complainant, whereas in HIV cases the act itself does not change although results flowing from it may.\textsuperscript{168} While the Canadian Supreme Court specifically adverts to the purging of gender stereotypes and misogyny from the law as a justification for the approach taken to frauds sufficient to vitiate consent, in doing so they perhaps have selected the autonomy of one group of women over competing anti-subordination considerations which should be of equal concern.\textsuperscript{169}

Focusing on the assault foundations for a moment, justifications for assault offences lie in the realm of protection of our autonomy that is our freedom from interference.\textsuperscript{170} Assault offences are also seen to protect our physical integrity, related to our autonomy, which protects our body space from the slightest invasion at a psychic or corporeal level.\textsuperscript{171} In this manner, what is protected is the value that we hold in a particular interest, that is our autonomy and integrity, and assault is seen to represent, all other things being equal, an illegitimate set back of that interest.\textsuperscript{172} Taken alone an assault based offence would create a different moral message to the infliction of grievous bodily harm in England in that the essence of that offence is not generally one of violence, although depending on the legal and political context in which the offence occurs of course it may

\textsuperscript{169} Alana Klein, 'Feminism and the Criminalisation of HIV Non-disclosure' in Catherine Stanton and Hannah Quirk (eds), \textit{Criminalising contagion: Legal and ethical challenges of infection transmission and the criminal law} (Cambridge University Press 2016), at 175 – 200; \textit{R v Mabior} [2012] SCC 47, at 46 – 48.
\textsuperscript{171} Gardner, note 155, at 39.
\textsuperscript{172} Horder, note 155.
be. Further, a more global view of the offence clearly creates a very powerful and negative normative message in that the offender is recognised as having committed an assault in a particular context, and thus to have effectively engaged in rape.

The significant risk of serious harm elements of the Canadian offence, which are required to make out both the basic and assault based offences, give rise to the same issues and arguments outlined above in terms of the harm of HIV. In terms of the criminalisation risk of harm, those who support the harm principle have in general supported the criminalisation of not only the causing of harm, but the creation of significant risk of serious harm. However, I wish to additionally reflect on the criminalisation of the mere risk, as opposed to actuality, of such a harm being occasioned. This, in essence, brings us one step further away from the harm itself and to consider the criminalisation of endangerment, it is possible to look at both the English and Canadian offences.

The infliction of grievous bodily harm is a result offence, in that the harm must be occasioned, however, in terms of the culpable state of the offender prosecutions may take place both on the basis of recklessness and intent. All prosecutions in England and Wales to date have alleged recklessness, that is the advertence to a risk of any harm, and proceeding to act, which is then regarded as an objectively unjustifiable risk in the circumstances, resulting in the harm in question. Similar, albeit more complex, mens rea requirements apply in Canada. This is the essence of culpability on the part of the offender, and an issue which we will considered in some detail in the following chapter. However, I advert to it here as it raises the issue of risk, the taking of risks and the resultant normative account of the offences, and the objective element of the test which looks to the justifiability of the taking of a risk with reference to a number of criteria which can impact on the decision as to whether to criminalise. The English offence may be regarded as risky conduct which results in harm while the Canadian offence is the criminalisation of risk creation without the necessity of resulting harm. Duff analyses the section 20 offence with reference to risk from both the subjective perspective of the offender in terms of their advertence to the taking of a risk and the normative consequences of that proposition as opposed to intentional action, and the position of the objective assessment of the justifiability of the risk with reference to issues such as the

gravity of the harm, probabilistic assessment in relation to the risk of occurrence and the social utility of the conduct.

Duff regards the section 20 offence as one of consummated endangerment, and by analogy the Canadian offence falls within his category of non-consummated endangerment. He distinguishes the section 18 offence under the 1861 Act which requires intent to cause grievous bodily harm, from section 20 which requires malicious, reckless or intentional, infliction of grievous bodily harm. The former, arising from the requirement of intentionality, speaks of an attack in the sense of hostility towards interests, whereas in cases where recklessness is sufficient it is not the object of the behaviour to cause harm instead it is, in the case of a consummated offence, an offence arising from a failure to show proper concern, equally he would categorise the Canadian offence as non-consummated offence arising from a failure to show proper concern.

Duff sees a normative distinction in these offences in that an attacker is motivated by improper reasons, whereas culpable endangerment arises from failing to be guided by the right reasons. In this sense Duff distances himself from Feinberg’s conception of a wrong in the harm principle as related to a culpable choice to violate a right, and calls for a focus on the wrong of the behaviour in a wider moral sense, creating a normative distinction which is sufficiently yet differently culpable. Duff thus maintains a distinction between the harm and the wrong and when the offence is conceived as one of either consummated or non-consummated endangerment the wrong emerges where we act without justification in a manner we realise may harm others, and where the prospect of the harm in question creates a reason not to so act we do wrong to those that we endanger. The wrong is not merely in the creation of a risk of serious harm, but in the creation of an unreasonable and unjustifiable risk which manifests in the ultimate wrong of a lack of proper concern for those who are endangered, whereas the harm is the risk itself.

Alexander and Ferzan take a similar approach in that they regard the creation of risk in certain circumstances to be the essence of criminal liability and criminalisation.

The offences with which we are concerned are regarded as explicit or direct endangerment offences, or ‘easy wrongs’, in that they identify the creation of a particular

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176 Duff, note 175, at 53 – 55.
risk, through the definitions now provided in case law, in defining the offence and such a risk is sufficiently serious as to create reasons to act differently or to take precautions, a failure of which amounts to the wrong of insufficient regard for others.\textsuperscript{178} Such offences require probabilistic assessments of the degree of risk and the nature of harm prior to considering criminalisation generally or in individual cases. There are many factors which may be considered. These include: gravity of the potential harm, probability of its occurrence, the social utility of the conduct, context of the activity and the responsibility to take precautions.\textsuperscript{179}

In order to do this there is a requirement for a collective conception of acceptable risk, reasonable precautions and contextual factors which should be embraced. There is a significant drawback in that, for cases involving HIV, it is often regarded that no level of risk is appropriate, again a judgement originally conceived of in times of certain death. Additionally, normative conclusions as to acceptable levels of risk and reasonable precautions are paradigmatically associated with those who are not infected and have no regard to the lived experience of those who are. As a result, the normative conclusion is seen as simplistic and intuitively correct; one must always disclose that one is infected, and one must always use condoms. These may be intuitively attractive assumptions, however, they belie the complexity of human relationships and the actual behaviour of people within them. It is a real question, particularly in offences which criminalise risk as opposed to actual harm, that the resulting wrong is one of breach of trust which presupposes of highly contested set of norms within relationships, which receive little attention in a court, and, where they do, are only related to consent.\textsuperscript{180} It suffices to say at this stage, as I will examine these points in much greater relief later on, that such judgements are prefaced on a conception of risk management related to our autonomy and integrity and the welfare concern to manage those concepts, which should not be accepted without challenge.

Although those who have written about the justifications for criminalisation in the context of the harm principle refer automatically to the criminalisation of harm, and significant

\textsuperscript{178} Duff, note 175, at 53 – 55; Simester AP, von Hirsch A, note 43, at 43 – 45; However, note that Alexander and Ferzan reject a substantiality requirement in the determination of criminal liability in that the regard risks to be at “zero or one”, and once there is a belief as to a risk, which in fact exists, on the part of an actor the analysis shifts to whether his reasons were licit or illicit, and if illicit he is criminally culpable: Alexander and Ferzan, note 177, at 25 – 31, and Ch 2 more generally.

\textsuperscript{179} Feinberg, note 104, at 216; Simester AP, von Hirsch A, note 43, at 43 – 45; Duff, note 175, at 59 – 60.

\textsuperscript{180} Duff, note 175, at 60.
risk of serious harm, the analysis leaves something to be desired in terms of the wrong and harm of risk offences. If one refers to the harm, then the harm is not to a particular interest, in our context their corporeal wellbeing, the harm is the risk of the harm, and the introduction of risk as a singular harm creates the potential for exceptional breadth in criminalisation. The harm principle, as articulated above, also requires a wrong in the sense of a violation of a right in the work of Feinberg, or a moral wrong in the work of others. The moral wrong of insufficient concern for others is addressed above, and therefore if applying Feinberg’s formulation, the right which would be violated must be right not to be subjected to risk, which requires a significant political determination as to the quantum or quality of acceptable risks. These issues are not determinative in any sense as it is quite possible to say that the harm is risk, referable to a recognised corporeal harm, and the right violated is the right not to be subjected to unreasonable risks, the limits of which can be determined in a deliberative process, although the scope for criminalisation does seem quite extensive.

One difficulty from a legal moralist’s point of view may be that if one presumes a legal right not to be punished, unless justifiable, the punishment should be justifiable on a moral basis without resort to the type of instrumental calculations that would be inherent in the determination of the wrong associated with the right, which would be violated in the harm principle formulation. Husak identifies this as a particular problem, and contends that the harm principle is insufficient to address non-consummated offences such as those considered here. While not rejecting that offences of creating risk can exist, he posits that such offences lie in realm of the interests of the state and not the rights of individuals such as suggested by those utilising the harm principle. He proffers an alternative rubric which he believes applies critical morality to facilitate the imposition of such offences on a moral basis, without resort to instrumental calculations. To be justified, any non-consummated offence should delineate the consummate harm to be guarded against, and there should be a high culpability requirement centred on intention, though he recognises recklessness as potentially sufficient. While recognising that recklessness might suffice, he stresses that introducing any level of culpability below intentionality requires the addition of a theory of privileges in relation to areas of conduct.

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182 Husak, note 181.
which should fall outside the sphere of the criminal law. The next requirement is a causal requirement, and although he refers to the “common sense” of the non-consummate acts increasing the likelihood of the consummate harm, he then refers to probabilities, which in essence brings us back to the assessment of risks and their probabilities. The final two requirements are proximity in the sense that the conduct is not too remote from the potential harm, and persistence which relates to abandonment and attempts. This formulation does provide an alternative means to understand or justify non-consummate or endangerment offences, however, in essence it shares much with that of Duff in terms of the ultimate harm to be guarded against and probabilistic considerations, and differs only the extent of the potential states of culpability which is relevant.

A potentially welcome element where crimes of risk are utilised is the requirement for a wide ranging analysis of factors which touch upon the nature of the risk, the nature of the harm risked and the surrounding context. On a probability assessment the risk of occurrence of transmission is relatively low, however, as mentioned the perceived magnitude of the harm may be so high that any risk is too much.\textsuperscript{183} However, it has been argued that substantiality requirement should be abandoned in relation to risk assessment, as the crux of the matter is the advertence to any risk, which is cast in terms of “zero” or “one” and a consideration then of the reasons for acting in determining culpability.\textsuperscript{184}

That said, where criminalisation has been adopted there is much to commend rational and science based assessment of probabilities so as to avoid criminalisation of conduct carrying virtually no risk, moreover, convictions based on bad science result in the inhibition of safe sex messages which has the potential to damage the community at large. These points of course must be understood in the context of the actual approach of courts, and the position as referred to above that triers of fact may regard any risk as unacceptable and as such inevitable liability.

Focusing again on the Canadian offence, and setting aside the rape connotation associated with it, we see that as an assault based offence it is seen to set back, in a direct fashion, a set of autonomy and related physical integrity issues thus it is harmful in that sense. It is additionally regarded as harmful in the sense that it creates a significant and unjustifiable risk of serious harm. The wrongfulness arises from the failure to have sufficient regard for others in a society, a facet potentially shared by the English offence. While marginally

\textsuperscript{183} Duff, note 175, at 60.
\textsuperscript{184} Alexander and Ferzan, note 177, at 25 – 31, and Ch 2 more generally.
different normative conclusions may be drawn through the conception of the offence as one of endangerment rather than attack, conviction remains a powerful signifier, and taken in the round the Canadian offence communicates messages of interference, rape, insufficient concern for others and the endangerment of life.

Conclusion
This discussion has developed some of the principles relevant to the criminalisation of conduct with particular reference to issues such as the harm principle, autonomy and welfare. Many issues relating to the conditions of liability require further assessment, such as the nature of the harm, the nature of the risk, the concept of risk criminalisation in context and issues relating to consent and disclosure. Only when these have been analysed, alongside relevant countervailing factors, will a full picture emerge as to the justifiability of criminalisation and the critiques thereof. However, I think the fullest assessment of both whether criminalisation is justified at face value, and if so what might militate against, provides the best opportunity to expose and consider the options for jurisdictions which have not prosecuted to date. Very little of the literature to date has sought to place the conception of criminalisation in this area in the context of arguments for and against criminalisation in normative sense, and where this literature has, it has provided arguments against the concepts of autonomy and integrity or the criminalisation of risk creation. This is not to criticise the efforts thus far, however, I believe that the strongest arguments against criminalisation, or for limited criminalisation, rest in the possibility of an alternative for that form of state control, in circumstances where most of the population would, I think, support criminalisation. It is in this context that I have made the case, not uncritically at this stage, for criminalisation on what I will term the standard normative basis. However, I turn now to an assessment of whether the criminal law should be deployed working upon the assumption that criminalisation may be justified in certain circumstances, and in doing so I will examine the philosophical justifications for the criminal law and punishment and the minimalist approach to criminalisation.

Should Exposure to or Transmission of a Pathogen During Sexual Intercourse be Criminalised
In concluding the theoretical section of my analysis, I wish to draw some conclusions about whether, at a general level, criminalisation should occur. These conclusions will be supported by later discussions looking at how criminalisation has proceeded, how courts
have approached the conditions of liability and what has been said about the efforts of public health when the criminal law intervenes.

In considering the issue of criminalisation it is necessary to consider individuals and the community. There is an individual who is affected by a pathogen and a person who becomes infected. In looking at the individual, I have deliberately conceived them as persons infected and those who become infected, not as persons who infect another or who were infected by another. I think that it is important to recognise that organisms which invade our bodies during our interaction with others, sexually or socially, should not to be regarded as equivalent to weapons wielded by an agent, or the use of one’s body as a weapon. To do so conceptualises a person infected with a pathogen as a weapon, and this represents a false or problematic essentialism in this context.

This is not to deny the effect of infection on a person. These effects, depending on the pathogen, can be long term, incapacitating, painful, life-limiting and potentially fatal. That these are the potential consequences makes this a most serious matter, and notwithstanding the debates in relation to the harm of infection, I accept that the harm amounts to a corporeal harm of potentially very serious effect. That these harms can be avoided through disclosure, the use of protection or other methods makes it intuitively acceptable there should be some regulation of this conduct and criminal regulation seems again intuitively appropriate considering the nature of the harm. However, what is sought to be regulated is the complex space of the sex act, one which is tied up with the circumstances of one’s relationship, one’s personal and professional life, one’s level of understanding and appreciation of the illness and its transmission and various other factors. Sexual acts happen every day everywhere and I do not think that the criminal law is best placed to regulate that type of commonplace and interpersonal contact.

I do believe that persons who are living with a pathogen have a duty to others who are not. I also believe that they should disclose that they have carry a pathogen in most circumstances, save where the risk of infection reaches a level which is concordant with accepted public health practices to reduce the level of transmission in the community, for example safer sex acts, condom use, or low or undetectable viral loads. Additionally, they may be relieved of their duty due to fear of violence or other devastation, social or economic consequences. I believe that persons who do not disclose where this is deemed necessary have committed a wrong, and I accept that this wrong may be a wrong which
either causes harm or causes an unacceptable risk of harm, such that criminalisation may be justified.

In saying this, I also recognise that the circumstances of non-disclosure, absent the specific mitigating factors outlined, remain an incredibly complex process which engages with psychological, social, economic, contextual and relationship dynamics which make disclosure far from easy and at times personally impossible. The difficulties with disclosure are inherently related to the stigma associated with living with a disease, for example HIV, which is a societal construction which is both instantiated and enhanced by criminalisation. Conscious of critiques which portray such factors, including stigma, as nothing more than a discomfort which was not overcome is representative of callousness on the part of the person, I recognise the force of such criticisms and at the same time reject them as in themselves callous and unrealistic. While full recognition of such factors impeding disclosure, particularly in all circumstances, would render persons living with a pathogen as incompetent, I believe that as a society we should not individuate responsibility to such an extent that such factors have no, or very little, meaning. As such we should approach the issue from a community perspective which recognises the complexity and peculiarity of personal and sexual relationships and not seek recourse to the criminal law to control sexual behaviour which is not undertaken with the purpose of bringing about harm. To do so renders the individual as part of a community, recognises that the community is concerned with the management of disease and that the community as a whole take the most appropriate and efficacious steps to curb the spread of infectious organisms, instead of blaming the vector alone.

In this regard some societies have made a decision to use the criminal law as a form of social control which has no other function save the denunciation of conduct and the provision of just deserts to those who have been convicted, and I do not accept that this is a sufficient justification on its own in this context. Further consideration is required both in the context of the effect of the criminalisation on the community and the possibility of alternative forms of state or other controls to deal with such conduct prior to any resort to criminalisation.

From the community perspective, I operate from the premise that our collective interest is in the control of the spread of pathogens, and that other concerns, important as they are or appear, must be subordinated to the overall interests of the community in this context.
Therefore, any decision to criminalise must be considered in relation to the potential
detriments and benefits to the community. It seems clear that the criminalisation of such
conduct has little particular deterrent effect, and, if it has a general deterrent effect, there
is also a probability that such criminalisation and its associated symbolic denunciation
will injure public health efforts to curb the spread of pathogens. While this is essentially
an instrumental calculation which is open to being contested when it comes to the control
of pathogens which are rightly contended to impose so significantly on our lives then
there is a heavy burden I contend on those advocating criminalisation to displace risks
related to that endeavour.

I am at pains to recognise the place of the person infected, who may have an expectation
that the criminal law answer as the archetypal response to wrongful behaviour, and indeed
the community may have an expectation of denunciation and just desert. However, in
principle this relates to a decision as to how conduct is to be regulated and I contend that
conduct relating to the spread of pathogens should be regulated, but not principally by
the criminal law. As a society I believe we should commence with the premise that such
behaviour may be wrongful, all other things being equal, and then proceed to analyse
whether we should criminalise. It may be found wrongful at an extra-legal moral level
or as an expression of political morality. Additionally, applying the harm principle as
generally conceived, and again all things being equal, then transmission or the creation
of significant risk of transmission would seem to meet the harmfulness and wrongfulness
thresholds.

Accepting these arguments, I believe the minimalist approach to criminalisation is the
correct one in principle, and as such the first point to consider is whether the protection
of human rights militates against criminalisation. I do not believe that it does in a
determinative sense, as the limitation of human rights in the control of serious pathogens
is a compelling state objective which could justify the limitation of human rights in the
interests of the community. That is not to ignore the very significant effect on the human
rights of those living with pathogens arising from criminalisation, nor to ignore that
populations most affected by such pathogens are generally marginalised and
discriminated against prior to and resulting from pathogens. However, these do not seem
to be determinative reasons against criminalisation considering the potential effect on
others arising from infection.
Proceeding to the right not to be punished, or the Principles Filter, I accept that according to the articulation of harm and wrongfulness offered then it would appear that there is room for the state’s authority to intervene and a justifiable basis on which criminalisation may be considered.

The next principle, known as the Presumptions Filter, looks to whether there are equally efficacious but less intrusive or coercive methods to achieve the same object. I contend that this is the strongest objection to criminalisation in this context. For many years, we have grappled with the spread of incurable pathogens, some much more virulent and in current day terms comparatively more lethal, and we have done so without reference to the criminal law as a first or significant line of defence or response. This is so given the operation of public health efforts focusing on voluntary testing, education, counselling, partner tracing and notification and as an absolutely last resort the incapacitation of those who fail to follow public health advice. I believe that the objects of the criminal law can be achieved for the most part through non-coercive, and as a last resort coercive public health methods. This is not so in relation to deterrence, denunciation and desert, and I will address those in the following point. However, if the ultimate goal of our society through the deployment of the criminal law is to control the spread of pathogens then public health efforts offer a more efficacious method than the criminal law, and at less personal and societal costs.

This leads to the final analysis, the Pragmatics Filter, the relative costs and benefits of the criminal law. Three benefits, or perhaps better described as outcomes, not overtly available to public health endeavours are deterrence, denunciation and desert. In relation to deterrence the effect of the criminal law on the type of behaviour we are concerned with is not evidenced from the literature, though one cannot discount the possibility of a general deterrent effect. Clearly public health efforts cannot offer denunciation or desert, however, one must consider in this analysis the potential costs of the criminal law as well as the benefits. The absence of deterrent effect is not determinative, and indeed the

185 I acknowledge in this regard that many jurisdictions have long standing, generally minor, offences relating to communicable diseases on their statute books. However, for many years no prosecutions have been brought under these statutes generally or in the context of STI’s, see for example the Candian infection disease provisions which were repealed in 1985, and which had not been utilised in 50 years: Richard Elliott, 'Criminal Law & HIV/AIDS: Final Report' (Canadian HIV/AIDS Legal Network and Canadian AIDS Society 1996) <http://sagecollection.ca/en/system/files/criminallawfinalreport-eng.pdf> accessed 1 March 2016.
symbolic nature of the wrong may presuppose a powerful indicator towards
criminalisation on denunciation and desert grounds.

The potential ill effects of criminalisation are much reported and much contested. It has
been argued that criminalisation may impede testing as people are afraid to confirm their
status, but this seems a weak argument given the potential benefits of detection and
treatment, and indeed the wilful blindness element of recklessness offers no benefit to
such a position in the determination of criminal liability. That said there is no evidence
to support a positive effect of criminalisation on testing, and evidence supporting a
delaying effect, and given that the majority of infections occur with persons who are not
diagnosed state interventions should promote and not even potentially damage public
health efforts.

A more powerful argument is an unwillingness of person fearing criminalisation to
participate in partner tracing given the fear of criminal liability. This methodology offers
a key opportunity to detect those in the community who may have been affected and who
in turn are most infectious shortly after transmission and potentially prior to them being
diagnosed. Additionally, the stigma associated with criminalisation is shown to drive
communities predominantly effect by such pathogens away from their health professionals, or to drive a wedge between the professional and the service user, which
in turn impede the efforts of public health professionals to control the spread of pathogens
through counselling and assisting behavioural change. Additionally, and some would say
paradoxically, there is evidence to support a conclusion that criminalisation actually
impedes disclosure and increases levels of high risk behaviour.

There are, I think, exceptions to the aversion to the deployment of the criminal law in the
context of pathogens, and that is where a pathogen is used as a weapon. In saying this, I
refer to those who engage in activities, be they sexual or others, for the purpose of
bringing about the infection of others. I say this as to my mind there is a qualitative
difference in social or sexual intercourse which carries a risk of infection and the person
living with the pathogen knows this versus where they set out to infect others. I recognise
the evidential difficulties in proving an intention to infect, however, where persons set
out to infect others I believe that they have committed a wrong, the criminalisation of
which is not outweighed by the countervailing factors outlined. In setting out the
qualitative difference I believe we must draw a distinction between those day to day
activities, including sex, which carry various risks, and where persons may contribute to what are regarded as unacceptable risks. These persons are engaging in what may be termed normal day to day activities, and the risk of infection is a normal risk, albeit one that we may wish to control using counselling, risk reduction strategies and various public health interventions. In this sense illness is not representative of deviance, and conduct regarded as unacceptably risky in relation to illness is to be recognised as a behavioural pattern related to illness and not deviance, hence the aversion to criminalisation. To criminalise in this context is to conflate normal day to day conduct with deviance, and thus illness with deviance, and this is unhelpful in the normalisation of control measures and population health endeavours. However, where one sets out with the intention to infect others that is not representative of normal day to day conduct, and thus places one in a different normative category. In reaching this conclusion one must be conscious of those who regard acting intentionally, that is acting for the wrong reasons, as being equally culpable as those who act recklessly, acting without being guided by the right reasons. However, the qualitative difference in the position of those who act recklessly in relation to a pathogen which is part of their inherent being, and those who act intentionally to infect others, is to my mind justifiably different and the distinction may be drawn as between one who is living one’s life and one who is weaponising oneself. Additionally, I recognise that the transmission of a pathogen through conduct that does not amount to social or sexual intercourse, such as injecting someone with contaminated bodily fluids is again an act outside normal day to day conduct, the criminalisation of which is not overcome by militating concerns.

The presumptive right not to be punished which calls on us to consider equally efficacious methods of controlling behaviours of concern, when matched with the potential costs of criminalisation, in my view creates a powerful argument against the use of the criminal law generally in this area which is not overcome by the arguments of desert or denunciation. However, I recognise that in adopting this analysis, I may be seen to fall squarely within the paradigmatic arguments which pervade the literature that there should be no criminalisation as a result of public health concerns. I hope to have offered a more principled approach which looks not only at costs, but at the right not to have the criminal law engaged, in light of its consequences, where other methods are available. Additionally, I have mentioned the role of coercive public health endeavours, and I recognise that these are highly contentious in and of themselves. However, where all
other methods have failed I recognise that the community has a right to protect itself from the spread of pathogens. Such coercive measures will be addressed in some detail later on, however, for the moment they should be deployed as a last resort, should not be limited to the spread of pathogens during intercourse, and indeed they are not currently, and should conceptualise the central issue as the health of the community and the maintenance of same so as to recognise that any wholesale deployment of coercion could have the same deleterious effect on public health endeavours and relationships which offer the only realistic prospect of controlling the spread of pathogens at a community level.
3. Transmission, Exposure and General Criminal Law Statutes

Introduction

In this part, I will critically examine how criminal liability for either the transmission of, or exposure to, a sexually transmitted infection (STI) during sexual intercourse arose in England & Wales and Canada under the general provisions of non-fatal offences against the person statutes.¹ The purpose of this chapter is to examine the chosen methods of criminalisation and to expose the issues which arise from the use of general statutes. Such an analysis points to important issues which must be considered in deciding whether to use the criminal law, and, if so what type of offences should be prosecuted and how the actors in the criminal justice system have and should approach this area. In approaching this analysis, I am mindful that direct comparisons are difficult between different legal regimes and across cultures. However, the approaches adopted in England and Canada have, with certain modifications, the potential to be adopted in jurisdictions which have not prosecuted to date and, as such, the differing approaches will provide necessary supportive information to assist in the development of normative conclusions for such jurisdictions. This analysis will be supplemented by a later chapter, which will consider the situation in the USA. The USA will provide a rich perspective on the diversity of potential responses, evidencing the use of general criminal statutes in some states, public health measures in others and additionally a variety of specific statutes which have been enacted to address mainly exposure to or transmission of HIV.

These jurisdictions which form the subject matter of this chapter have been chosen as they occupy opposite ends of spectrum in the criminalisation of the conduct at issue, utilising general criminal law statutes. Moreover, the issues arising from attention to them address many of the issues which arise in the thirty-five countries where prosecutions have taken place using such statutes.² Canada, at the broadest end of the spectrum, criminalises non-consensual exposure, without the need for transmission, and as such

¹ References hereinafter to England should be taken to refer to both England and Wales. Further the phrase sexually transmitted infection (STI) is preferred to sexually transmitted disease, as a disease refers in the main to a symptomatic condition, whereas infection with a STI may be asymptomatic.

might be regarded as the world leader in prosecutions. In contrast, England criminalises reckless transmission only, thus operating at the narrower, if not narrowest, end of the spectrum.

The focus here is on the conditions of criminal liability and to ascertain liability in a given case, a number of elements must be established. Essentially, three elements must be proven to establish liability: the actus reus, in general, the physical conduct and associated circumstances or the objective element of the offence, the mens rea that is, the state of culpability of the defendant, and, finally, the absence of a valid defence, although the role of defences is controversial—whether they obviate liability through negation of an element of the offence, or operate as either a justification or excuse in respect of prohibited conduct. In several offences, and no less so with the offences with which I am concerned, there may be a number of elements to both the actus resus and mens rea.

In the theoretical chapter, I have considered in some detail the justifications for the criminal law and punishment and the interrelationship between the type of behaviour in question with principles underpinning criminalisation and non-fatal offences against the person. That analysis looks in many respects at the archetypal justifications, and the discussion in this chapter adds to that analysis with a more particularised and critical consideration of issues relevant to the transmission of pathogens and criminal liability, through the deployment of concrete examples. The discussion will place the criminalisation process within the broader context of the operation of the criminal law—how and why this area has attracted the attention of the criminal law—and contribute to a discussion regarding the interrelationship between the criminal law and public health efforts in this area, with a view to establishing the benefits of and risks inherent to the criminalisation process.

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6 The structure for this Chapter is taken in part from; Matthew Weait (a), Intimacy and responsibility: The criminalisation of HIV transmission (Routledge-Cavendish 2007).
To facilitate an analysis of each area, the part will proceed in four chapters, Chapter I will outline the current situation in relation to HIV and other STIs in the selected jurisdictions alongside the facts and key findings in the seminal cases which gave rise to criminal liability so as to contextualise a discussion of the various elements of the offences and the operation of the criminal law. Chapter II will examine harm and causation to establish the harm contemplated by the offences, how this has been represented, and the important issues of proof of causation. While infection as a form of harm may regarded as unremarkable, and indeed I accept that most will see it as a serious harm demanding of a state response in certain circumstances, it will be argued that the harm of HIV infection can be looked at differently as not relating to transmission, or a risk of transmission, but the meaning and context of actual transmission. This alternative construction of harm, if accepted, could, on its own, militate against a justification of criminalisation, however, as discussed in an earlier chapter, it is unlikely that such a justification would be regarded as acceptable to many, if not most, and as such I will agree that such an analysis is welcome and contributes significant questions in relation to the criminalisation in this area.

Chapter III will address the issues of recklessness and risk, both a constituent of the actus reus and mens rea of the offences, and the issue of risk management as part of the criminalisation process. While recklessness is the paradigmatic state of culpability, the operation of the test of recklessness will be interrogated as to whether it has the potential to impose an objective world view which ignores the reality of life and what impact this may have on public health initiatives. Chapter IV will then consider the issue of consent, and the related matters of knowledge and disclosure, which taken together may either negate elements of an offence, or offer a defence to a defendant. I will consider the issue of consent both from the perspective of consent to sexual intercourse and specific consent to risk and what those entail, and further the implications for offences which regard non-disclosure as a fraud sufficient to vitiate consent to intercourse.

The choice of this form of analysis draws on the importance of elements analysis, as opposed to what has been termed offence analysis, in providing a rational, clear and internally consistent account of how criminal liability is established.7 In this regard, we

are concerned to consider, and specify, each objective element of the offence, and the corresponding mental elements for each objective element.\(^8\)

I – The Population and Legal Landscape

The recognition of criminal liability in both England and Canada rests primarily on a small number of important cases. In order to contextualise the discussion of criminalisation, I will consider the facts and findings of the key cases.

Prior to understanding how the law has applied it is useful to consider the state of affairs in relation to HIV and other STIs, and the number of prosecutions which have taken place. In the United Kingdom, there are approximately 103,700 people living with HIV representing 0.16% of the overall population, of which 17% are thought to be undiagnosed.\(^9\) There were 6,125 diagnoses in 2014 and of those 40% were diagnosed late in the sense that treatment should have already commenced by the time diagnosis occurred.\(^10\) Additionally, 55% of new diagnoses were among men who have sex with men (MSM), but the rate of infection among heterosexuals continues to increase, with rates of late diagnosis being highest among that group, and within that group, rates of late diagnosis were high among those from minority ethnic communities.\(^11\) The two most affected groups in terms of HIV infection, are MSM and black African heterosexual men and women and the source of infection was overwhelming through sexual contact, with only 150 out of 6,125 new infections arising from injection drug use, and instances of transmission from mother to child and through receipt of blood products are considered rare. Rates of infection with other STIs are also clearly relevant in the context of England in light of prosecutions to date.

Hepatitis B prevalence in the population is difficult to pinpoint, but was previously estimated to be in the region of 180,000 representing 0.27% of the population.\(^12\) More

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8 Robinson, Grail, note 7, at 682 – 685, 694 – 705.
10 Terrence Higgins Trust, note 9.
11 Terrence Higgins Trust, note 9.
recent data from Public Health England shows that the rate of infections is increasing, with an incidence of 0.91 per 100,000 of population, and the majority of infections arose from heterosexual intercourse, and a significant minority from MSM. In 2015 there were 41,193 new diagnoses of Gonorrhoea in the UK with an 11% year on year increase between 2014 and 2015. Herpes simplex virus has two variants and while it has not been possible to pinpoint definitive research, community prevalence with infection of one or other variant has been estimated as high as 70%. In 2015 there were 33,216 new diagnoses in the UK, with diagnoses increasing significantly in the last decade.

Overall there were 434,456 new diagnoses of STIs, excluding HIV, in 2015 in the UK and while not all of these will meet the threshold of GBH, a substantial proportion will or may be located within the current definition. Moreover, from a public health perspective, there are concerns regarding increasing rates of transmission in certain areas, such as with Gonorrhoea, where concerns are multiplied by the emergence of antimicrobial resistance. However, considering this high rate of annual infection both in terms of HIV and other STIs the level of prosecutions bears no resemblance to this trend. Information available indicated that since 1998 only twenty-nine prosecutions have been brought for reckless transmission of a STI.

In Canada, matters are more confined in that prosecutions have been thus far mainly been confined to HIV. In 2014, an estimated 75,500 people were living with HIV in Canada representing 0.21% of the overall population, and 2,570 new infections were diagnosed

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17 Public Health England, note 14 in relation to the overall rate of new diagnoses.
19 NAM, 'Transmission of HIV as a criminal offence - Timeline of developments in the criminalisation of HIV and STI transmission in the UK' (15 July 2015) <http://www.aidsmap.com/Timeline-of-developments-in-the-criminalisation-of-HIV-and-STI-transmission-in-the-UK/page/1504201/> accessed 1 March 2016; I have included in the twenty-nine any cases which made it to court, and not a number of cases where charges were dropped prior to court hearings.

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in 2014.\textsuperscript{20} There has been an increasing prevalence within the population over recent years as a result of both an increase in the rates of infection and increased life expectancy of those infected with HIV.\textsuperscript{21} Just over 20\%, or one in five persons, do not know they are infected with HIV, with the highest proportion of undiagnosed cases among heterosexual persons and the lowest among MSM.\textsuperscript{22} The rate of new infections recently has been highest among aboriginal populations, followed sequentially by those from HIV-endemic countries, MSM and heterosexuals. In terms of communities most affected by HIV, MSM make up the highest proportion at 53\%, followed by the heterosexual population at 31\%, however, within the heterosexual population 15\% of all people living with HIV come originally from HIV-endemic countries (Sub-Saharan Africa or the Caribbean).\textsuperscript{23}

In terms of the prosecution pattern in Canada, again similar to the UK, the pattern bears little if any resemblance to the rate of infection or prevalence in the community. A study published in 2012 established that there had been 122 cases between 1999 and 2010, with a sharp rise in prosecutions in 2004, with the rise being dominated with the prosecution of heterosexual Black, African and Caribbean men,\textsuperscript{24} and more recent estimates place the total number of prosecutions to date at 145.\textsuperscript{25}

Rates of prosecution relative to rates of new infection or prevalence in the community are fuelled by a wide range of factors including the circumstances of transmission i.e. whether consent was given, knowing the identity of the person who has passed the infection, the fact that persons are, in the sense of HIV, most infectious when they are likely undiagnosed, rates of undiagnosed presence of infection in the community, a sense by a person who becomes infected that the law has or has not a relevance to what has occurred, the activities of professionals who may encourage or discourage recourse to the


\textsuperscript{21} Public Health Canada, note 20.

\textsuperscript{22} Public Health Canada, note 20.

\textsuperscript{23} Public Health Canada, note 20.


law, the situation of the newly infected person in terms of their membership of a particular community and associated confidence in the legal system, fear, trauma, police investigations and prosecutorial discretion.

This is by no means an exhaustive account of the factors which may cause such a gross mismatch between the two rates in either jurisdiction. However, a number of points may be made at this stage: first, the rate of prosecution is so low that incapacitation has no real role to play in controlling the spread of such pathogens at present. Second, the breadth of possibility for criminalisation is worryingly substantial and any shift in police, prosecutorial or public health practices could give rise to a significant increase in prosecutions. Third, especially with reference to HIV, the virus is most prevalent and continues to arise in communities whose membership may be or are marginalised prior to the intervention of the criminal law, and as we shall see, those populations, taking into account their position prior to legal intervention, respond in ways which are worrying to such intervention.

Having considered the positions in relation to populations and prosecutions, I turn now to the legal landscape which saw the development of criminal liability in this area.

**The Narrower Approach - England and Wales**
The approach in English jurisprudence to criminal liability for the transmission of a STI was dominated for many years by the case of *R v Clarence*, which held, in brief, that the transmission of a STI during sexual intercourse did not amount to an assault, which was thought to be required to make out the offences of Actual or Grievous Bodily Harm (GBH), in accordance with, respectively, sections 47 and 20 of the Offences Against the Person Act 1861, nor did the concealment of such pathogens amount to a fraud sufficient to vitiate consent. This position changed dramatically in *R v Dica*, and was developed further in *R v Konzani* and *R v Golding*.

In *Dica*, the English Court of Appeal (Criminal Division) considered an appeal against the conviction of Mohammed Dica in relation to two counts of GBH contrary to section 20 of the Offences Against the Person Act 1861 (the Act).

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26 (1888) 22 Q.B.D. 23.
27 [2004] EWCA Crim 1103 (Hereinafter referred to as *Dica*).
28 [2005] EWCA Crim 706 (Hereinafter referred to as *Konzani*); [2014] EWCA Crim 889 (Hereinafter referred to as *Golding*).
Section 20 of the Act provides:

> 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, and being convicted thereof shall be liable . . . to be kept in penal servitude . . .

Dica was HIV positive and had a sexual relationship with the two complainants who later tested positive for HIV. Dica had been diagnosed as HIV positive in 1995 and he commenced an appropriate medication regime to treat his infection. The two complainants later developed sexual relationships with Dica and became infected with HIV. The first complainant alleged that Dica had never disclosed his HIV status, and that he had insisted that they have unprotected sex, the second complainant stated that initially they had protected sex, later unprotected, and apart from Dica her only sexual partner for the preceding eighteen years was her husband. Dica, for his part, contended that he had informed the first complainant of his HIV status and she had indicated that she too may be infected; concerning the second complainant, he contended that they had a casual relationship, and later a more concerted one, at which time she knew he was HIV positive, and, moreover, he contended that she was involved with six to ten men at the time.

The case, in essence, concerned the circumstances in which a person may be found guilty of a criminal offence, where another person becomes infected with a STI after sexual intercourse. Although the case concerned the transmission of HIV the Court specifically adverted to the increasing rates of transmission of other STIs, and opined that the issues discussed in the case were not limited to the transmission of HIV. The prosecution alleged that Dica, while having consensual sex knowing that he was HIV positive, was reckless as to whether the complainants might become infected, thus he was charged with having inflicted GBH. The Court of Appeal observed that in light of the unprotected nature of the sex on the majority of occasions, recklessness was not in issue, but had the sex been protected, this was identified as a material consideration in determining whether, in all the circumstances, recklessness had been proved.

30 [2004] EWCA Crim 1103, at paras 2, 5- 10.
At trial, at the end of the prosecution’s case, the trial judge made two rulings which formed the basis of the appeal hearing. First, it was ruled that notwithstanding, *R v Clarence*, it was open to the jury to convict Dica, as that case, notwithstanding its historical status as an important precedent, had been thoroughly undermined. Further, as a consequence of, *R v Brown & ors*, the complainant’s knowledge as to Dica’s HIV status, or consent, if any, was irrelevant and provided no defence, as the ratio in *Brown* had deprived the complainants of the legal capacity to consent to such serious harm. The Court of Appeal considered the validity of these two rulings, and in granting the appeal reached a number of important conclusions.

The case established that where a defendant intends to transmit HIV or another serious sexual disease, the principles in *Brown* apply, and as such even where there is apparent consent, or consent in fact, by all parties, this is not available as a defence. The central findings establish that a person may be criminally liable for the reckless transmission of a serious sexually transmitted infection, via consensual intercourse, which inflicts GBH, where one party is aware of the presence of a disease, and the other person is unaware of the risk of infection, and as such does not consent to it, and in this manner the authority of *Clarence* was excised. The other party’s ignorance of the risk of infection does not vitiate consent to the sexual act, and the case separates consent to sexual intercourse, with the separate and distinct consent to running the risk of infection with a STI. Further, in so far as *Clarence* was authority for the proposition that consent to intercourse amounted to consent to consequent infection with a STI, that is no longer authoritative. If the victim consents to the risk of infection, this is a valid defence to a charge of inflicting GBH, and while consent and knowledge are separate factors, knowledge forms an important part of consent, and in the absence of knowledge, a complainant would be unlikely to have consented to the risk.

Turning now to the case of *Konzani*, the defendant, being HIV positive, had a sexual relationship with three complainants, without disclosing this fact; all three were later...

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33 (1888) 22 Q.B.D. 23 (Hereinafter referred to as *Clarence*).
35 [2004] EWCA Crim 1103, at para 2; *R v Brown & ors.* [1994] 1 AC 212. (Hereinafter referred to as *Brown*); which determined that there could be no consent to actual bodily harm save as provided for in recognised exceptions.
diagnosed as being HIV positive. At the time of diagnosis, Konzani had been advised in relation to the consequences of unprotected sex in terms of transmitting the pathogen and the evidence was that he had unprotected sex repeatedly with the three complainants. At trial, the defendant did not give evidence. However, it was conceded on his behalf that he had been reckless, in that he had sexual relations with the women without wearing a condom, and that he had caused the complainants to become infected. Although he had failed to disclose his HIV status, and each complainant denied they consented to the risk of being infected, it was contended at trial that by consenting to unprotected sex, the complainants were implicitly consenting to the risk of being infected. In essence, it was argued that contracting HIV was one of the possible consequences of unprotected intercourse, thus the complainants were consenting to such a risk. The issue on appeal was the judge’s direction to the jury on the matter of consent.

The appeal court canvassed in some detail the evidence of the complainants in so far as it was relevant to the issue of consent. One complainant indicated she never thought of a risk of becoming infected, another realised the risk but didn’t advert to it at the time, and the third again knew of the risk but felt that in the context of a relationship, there was duty on the infected partner to disclose. The trial judge’s direction had focused specifically on the necessity for the complainants to give “willing consent” to the risk of infection, clarifying that they must consent “consciously”.

In short, the Court of Appeal termed the judge’s direction as requiring that, before the complainant’s consent could provide a defence, it was required to be an informed and willing consent. The mainstay of the appeal dealt with whether this direction effectively required the defendant to disclose his HIV status, and as such denied him a defence of honest belief in the consent.

This case confirmed the ratio of Dica in terms of reckless infliction of GBH in this context. The case also confirmed that the consent of the complainant must be informed, in that the consenting party must have the requisite knowledge to consent to running the risk of infection, and reiterated that consent to unprotected sex does not amount to consent to running the risk of infection with a serious disease, and moreover that consent to

40 [2005] EWCA Crim 706, at paras 1 – 6.
42 [2005] EWCA Crim 706, at para 34.
intercourse is not vitiated by concealment of the presence of such a disease.\textsuperscript{45} The absence of knowledge on the part of the complainant, and thus consent, was linked to the diminishing of personal autonomy, which permitted the criminal law to intervene in the public interest of preventing the spread of disease.\textsuperscript{46} As to an honest belief as to informed consent, the court did concede a limited range of circumstances where this might arise, all of which are linked to an evidential basis for a defendant honestly believing that their partner had obtained the requisite information in relation to their condition from another source, and as such they subsequently consented to unprotected sex, giving rise to the inference that an honest belief as to informed consent may have existed, which would then be for the prosecution to disprove.\textsuperscript{47} Notwithstanding the principled acceptance of the possibility of a honest yet mistaken belief in consent, in the light of the evidence the appeal was rejected and the conviction upheld.

In \textit{Golding} the defendant’s partner became infected with Herpes Simplex Virus Type 2 (HSV-2).\textsuperscript{48} The complainant gave evidence that she became infected while having a sexual relationship with Golding in circumstances where she would not have consented had she known he was infected with HSV, and the defendant had not disclosed this to her. Golding had been diagnosed as infected with HSV, variant unknown, in 2007 and again experienced symptoms in 2008.\textsuperscript{49} While there were a number of procedural and substantive issues addressed in the appeal, those of interest centred on causation, recklessness and the threshold of harm. Golding had originally offered a plea of guilty in relation to either a section 47 offence of assault occasioning actual bodily harm or section 20 infliction of grievous bodily harm. There was some question as to which plea was offered due to a purported error in a plea document, however, the Court proceeded on the basis of a plea to the section 20 offence and much of the judge\textsuperscript{ment} centred on the acceptability of that plea in light of the information known to Golding at that time, alongside then the subsequent additional evidence which was received on appeal.

On the issue of causation, that is whether Golding had inflicted HSV, the period of time during which infection was alleged to take place was late 2009, and while there was some

\begin{footnotes}
\footnotetext[45]{[2005] EWCA Crim 706, at para 41.}
\footnotetext[46]{[2005] EWCA Crim 706, at paras 41 – 43.}
\footnotetext[47]{[2005] EWCA Crim 706ibid., at paras 44 – 45.}
\footnotetext[48]{[2014] EWCA Crim 889, at para 3.}
\footnotetext[49]{[2014] EWCA Crim 889, at para 4; Variant unknown is relevant to the extent that there are two type of Herpes Simplex Virus, HSV-1 and HSV-2, and at the time of trial the variant of the complainant’s infection was known, but not that of Golding.}
\end{footnotes}
dispute as to whether the source of the infection was Golding, the Court accepted, based on circumstantial evidence, that he was the source. The matter rested on circumstantial evidence as there was no evidence of the variant of HSV that Golding was infected with, and although not addressed by the Court even if there were, this would not have been conclusive as to identifying him as the source. Therefore, given that the Defendant was infected before the relevant time, the Court, having accepted the evidence of the complainant that their relationship was monogamous from her perspective and having considered the relevant incubation period for symptoms to become evident, was satisfied that the defendant was the source of the infection.

Considering recklessness, the Court was satisfied that the defendant knew that he was infected with HSV. As to whether he understood the risks of transmission there were questions as to the nature of the advice that he had been or may have been given about such risks by physicians at the time of diagnosis. However, on the basis of the plea entered, where Golding had admitted he was aware of the risk of transmission, and a statement as to his state of mind made to the probation service, where he admitted he should have been honest, the Court was satisfied that he knew of the risk of transmission and was thus reckless. The points thus far are consistent with the Court applying the principles from the decisions of Dica and Konzani to the facts at hand.

When considering the threshold of harm necessary to make out the offence of recklessly inflicting GBH, in one sense, this case might additionally be seen to merely implement the decision in Dica, which, while focused on HIV, specifically adverted to the more general application of the principles to other STIs. In Golding, the Court considered both the evidence of the complainant and of physicians in relation to the effect of HSV. The medical evidence varied in the description of HSV, however, all agreed that it was not life threatening, was incurable and recurring. The initial infection was described as an unpleasant and painful acute illness with debilitating effect, or as initially very severe associated with painful genital ulcers with less severe recurrences, there was also a reference to HSV as a devastating condition. The complainant gave evidence of feeling disgusting, dirty, soul-destroyed, inadequate and in fear of an outbreak. She additionally

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54 [2014] EWCA Crim 889, at paras 9, 20, 57 – 64, 77.
described a poor sleep pattern and a fluctuating mental state. The court expressly discounted her emotional feelings in the determination of criminal liability, as these did not amount to a recognised psychiatric condition, though such feelings were influential in the consideration of sentencing.\textsuperscript{55} In terms of physical symptoms, she described soreness and pain on urination, progressing to excruciating pain which necessitated the attendance of a doctor.

The Court considered the definition of GBH, and ultimately concluded that the evidence of painful symptoms, their effect at the time, their recurrence and the prospect of future recurrence without effective cure for an indefinite period of time was sufficient to allow a jury find that the harm amounted to ‘really serious harm’.\textsuperscript{56} The Court ultimately determined that the assessment of harm done was a matter for the jury to determine applying contemporary social standards, but that a jury would be entitled to conclude GBH had been inflicted based on the evidence available.\textsuperscript{57} This case is a notable advancement of the criminal law’s reach into the transmission of pathogens which are not life threatening, potentially widening the sphere of criminalisation quite significantly.\textsuperscript{58}

Having considered what might be termed a narrow approach to criminalisation, in that transmission is required, I turn now to the Canadian case law, which while comprehending criminal liability for transmission also provides for a more general offence of exposure to the risk of transmission.

\textsuperscript{55} [2014] EWCA Crim 889, at paras 63, 87.
\textsuperscript{56} [2014] EWCA Crim 889, at para 62.
\textsuperscript{57} [2014] EWCA Crim 889, at para 64.
\textsuperscript{58} Also of note prosecutions have taken place in relation to the transmission of Hepatitis B and Gonorrhoea. In November 2008 Ercan Yasar was the first person in the UK to be convicted of inflicting grievous bodily harm for recklessly transmitting Hepatitis B, and he is reported to have entered a guilty plea, see: NAM, note 19. Additionally, in \textit{R v Peace Marangwanda} [2009] EWCA Crim 60 the defendant entered a guilty plea to recklessly transmitting gonorrhoea contrary to section 20 of the Act through casual touching. The plea is reported as a compromise related to parallel child sexual offence allegations where a first trial had failed to reach a verdict, and prior to a retrial an alternative plea in relation to the section 20 offence was entered and accepted. On appeal the Court accepted that there was a possibility of transmitting gonorrhoea through normal day to day touching, e.g. providing hygiene care, and the defendant was found reckless on the basis of having known he was suffering from the infection, and knowing the he could transmit it, failed to exercise proper hygiene precautions, and reference is made to a duty to do so. See: Matthew Weait, ‘UK: Gonorrhoea prosecution ‘a dangerous development” (23 April 2009) <http://www.hivjustice.net/news/uk-gonorrhoea-prosecution-a-dangerous-development/> accessed 1 March 2016, for commentary on this decision relating to the possibility of the court creating a prospective duty to take care which is currently not a duty recognised in law.
**Exposure and Transmission Liability in Canada**

Canadian criminal law focuses mainly on the prosecution of a person who exposes another to the risk of infection with a serious sexually transmitted infection, although those who actually infect another are also prosecuted. The predominant approach can be discerned from the case of *R. v Cuerrier*, where the Supreme Court for Canada upheld an appeal by the state against the acquittal of Cuerrier on two counts of aggravated assault, where Cuerrier, who was HIV positive, had unprotected sex with the two complainants, both of whom did not contract HIV. Cuerrier had been diagnosed as being HIV positive, and the evidence was that he had been explicitly instructed by health professionals to inform all prospective partners of his HIV status, and to use condoms while having sex. Subsequently, he had unprotected sex with the two complainants, and did not inform them of his HIV status. Both complainants consented to unprotected sex, however, they contended in evidence that they would not have done so if they had known of his HIV status. Neither complainant contracted the HIV virus, and the trial judge directed an acquittal at trial, a decision which was upheld on appeal, and which ultimately became the subject matter of the Supreme Court appeal by the state, which was upheld.

The defendant had been charged with two counts of aggravated assault contrary to s. 268 of the Canadian Criminal Code (the Code) in that he had endangered the lives of the complainants. Section 268 provides:

(1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant...

Also important in terms of the reasoning in this case, are the provisions of s. 265 of the Code which refer to assault and consent, and which provides:

(1) A person commits an assault when

   (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

   (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or

   (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

**Application**

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This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

**Consent**

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.

**Defendant’s belief as to consent**

Where a defendant alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the defendant’s belief, to consider the presence or absence of reasonable grounds for that belief.

It is significant that the Canadian legislature reformed the Criminal Code in the early 1980’s, and in so doing grouped what were historically disparate non-fatal offences against the person under the heading of assault, thus requiring the elements of the assault offence to be made out where aggravated offences are being prosecuted, and further, the formulation of consent in relation to such offences was changed. 60 In the instant case therefore, the defendant was charged with the offence of aggravated assault; specifically, that he had endangered the lives of the complainants through having unprotected sexual intercourse in circumstances where he had not disclosed his HIV status. The attendant proofs were that the defendant had endangered the lives of the complainants contrary to section 268(1), and that he had intentionally applied force to the body of the complainant without her consent contrary to section 265(1)(a). 61

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intercourse had been vitiated by non-disclosure.\textsuperscript{62} Key then to the court’s analysis was the meaning of fraud in section 265(1)(c) of the Code.\textsuperscript{63}

The historical position in Canada at common law was dominated by a number of English cases culminating in \textit{R v Clarence}.\textsuperscript{64} Pre \textit{Clarence}, the law had permitted fraud as to the presence of a “venereal disease” to vitiate consent to sexual intercourse.\textsuperscript{65} However, the approach of the courts later changed, finding that such deceit was not sufficient to vitiate consent with a shift in focus to frauds as to the nature of the act as those capable of vitiating consent.\textsuperscript{66} This approach was copper-fastened in the \textit{Clarence} case which referred to frauds as to the nature of the act or the identity of the man.\textsuperscript{67} The position in England and Canada therefore was significantly influenced by the ratio of \textit{Clarence}, however, on a reassessment of the situation, while both jurisdictions found that criminal liability now flowed from issues surrounding STIs, the approach is remarkably different.

The majority judgment in \textit{Cuerrier}, delivered by Cory J, determined that contrary to \textit{Clarence}, the failure to disclose the presence of a STI was a fraud sufficient to vitiate consent to sexual intercourse.\textsuperscript{68} Drawing from commercial fraud concepts in order for the fraud to have this effect, the defendant must have been dishonest, as objectively determined; this dishonesty must expose the complainant to deprivation in the form of a significant risk of serious harm; and the dishonesty must have induced the complainant to engage in sexual intercourse she otherwise would not have. As such the appeal was granted and a new trial ordered.\textsuperscript{69}

As mentioned, the current approach in Canada is very much informed by historical reforms to the Criminal Code pertaining, \textit{inter alia}, to non-fatal offences against the person.\textsuperscript{70} As part of those reforms, the offence of rape was abolished and replaced with a general offence of sexual assault, and also aggravated sexual assault, which has a wider

\textsuperscript{64} (1888) 22 Q.B.D. 23.
\textsuperscript{65} \textit{R v Bennett} (1866) 176 E.R. 925; \textit{R v Sinclair} (1867) 13 Cox C.C. 28
\textsuperscript{66} Hegarty v Shine (1878) 14 Cox C.C. 145.
ambit and is also based on the basic assault offence. While the defendant in Cuerrier was not prosecuted for sexual assault, the findings of the court have applied equally where a defendant has been charged with that offence, and as we shall see the Canadian Supreme Court has now determined that aggravated sexual assault is the offence to be charged in such cases. It is also important to reflect, in the context of the shift in policy in Cuerrier and the stated rationale, that an historical provision of the Canadian Criminal Code, not in being at the time of Cuerrier, contained a specific offence which criminalised the knowing transmission of certain venereal diseases or sexually transmitted infections. However, this was repealed in 1985, on the basis that such matters were deemed a public health rather than criminal law concern, and the offence was deemed to be counterproductive in terms of facilitating proper monitoring and testing for such pathogens.

In R v Mabior, the Supreme Court took matters one step further in determining that such cases should proceed not on the basis of an aggravated assault, but instead on the basis of an aggravated sexual assault pursuant to section 273 of the Code. Here, the evidence was that the defendant had unprotected sex with nine women while HIV positive and did not disclose this to them, and that he had done so in return for alcohol, drugs and housing. In his defence, he claimed that he had a low viral count which reduced his infectivity and on occasion used a condom, both of which reduced the risk of transmission. Key to the Court’s analysis, aside from the factual matrix, was a call for a revisiting of the test in Cuerrier, which was regarded as difficult to operate and which, it was contended, provided insufficient guidance.

The Court took the opportunity to reaffirm the decision in Cuerrier with regard to frauds sufficient to vitiate consent, and at the same time recognised that the essential elements of the test in relation to such frauds in this context is a dishonest act in the sense of a failure of disclose HIV status or falsehood, and deprivation which denies the complainant knowledge which would have caused her to refuse sexual intercourse which involved

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72 Grant, note 70, at 477 – 478.
exposure to a significant risk of serious harm. In doing, so the Court focused heavily on the interpretation of fraud in the context of sexual assault and engaged in a lengthy disquisition of potential factors which might be of use in the determination of frauds sufficient to vitiate consent. McLachlin J addressed the purposes of the criminal law, the common law and statutory history of frauds vitiating consent to sexual relations, Canadian Charter values and the experience of other common law jurisdictions.

On the purposes of the criminal law the Court, in a relatively brief exercise, focused on the identification, deterrence and punishment of criminal conduct, with the principal objective being the public identification of wrongdoing which violates the public order and is sufficiently blameworthy. In so doing, although explicitly identifying that not every immoral act is a criminal act, the Court then proceeds to identify that the key question in determining criminal liability lies in differentiating those acts which are sufficiently morally blameworthy. Having traced the common law and statutory reform, the Court concluded there were three phases in the approach to frauds sufficient to vitiate consent: the pre Clarence era which recognised fraud as to STIs as sufficient, the Clarence era where they were not, and the post Clarence era where Charter values should inform a different approach. The Court reached a conclusion that an understanding of consent, and frauds sufficient to vitiate it, consonant with the Charter values of equality and autonomy required an understanding of such frauds as broader than those related to the nature and quality of the act and the identity of the perpetrator. They also concluded that the same Charter values resulted in a recognition of sexual assault not only as a crime associated with physical and emotional harm, but as a crime associated with the wrongful exploitation of another human being; the law should thus act to preserve the human dignity of persons engaged in sexual relations as autonomous, equal and free persons. Having reached a conclusion that a broader understanding was warranted, the Court then considered the position in other common law jurisdictions and noted a variety of approaches, none of which recognised fraud as to the presence of an STI as sufficient to vitiate consent, which the Court observed was not conclusive but at the same time

75 [2012] 2 S.C.R. 584, at para 12 per McLachlin C.J.
76 [2012] 2 S.C.R. 584, at paras 23 – 24 per McLachlin C.J.
79 [2012] 2 S.C.R. 584, at paras 49 – 54 per McLachlin C.J.
sounded a note of caution with regard to the spread of the criminal law into what they termed a ‘complex and emerging area of law’.

Despite the foregoing observations, the Court still was left with the task of determining which frauds would be sufficient to vitiate consent and a number of approaches, all specifically related to disclosure of HIV, were considered, those being: active misrepresentation, absolute disclosure, a case by case fact-based approach, judicial notice of the effect of condom use, relationship-based distinctions, the reasonable partner and an evolving common law approach.

The Court recognised the certainty of an active deception approach which would prevent an overbreadth in the criminal law, but at the same time adverted to the difficulties in distinguishing active deceit from passive deceit in a relationship context, which in turn also fuelled a rejection of this approach given that as a matter of principle a fraud exists from the perspective of a complainant whether or not it was active or passive. Considering an absolute disclosure duty, this would remove the significant risk of serious harm test where this would add in clarity, it was rejected as it would involve the criminalisation of conduct where there was no harm or risk of harm, and was recognised in addition as being unduly stigmatising of HIV positive persons who were responsible and posed no risk. Considering whether to proceed on a case by case basis, this would have involved the continued operation of the significant risk of serious harm approach as applied to the facts of a given case; however, the Court adverted to the continued necessity for expert evidence in every case, the onerous nature of the approach, increased costs and the risk of conflicting judgments which would be systemically unfair. As to whether the Court should take judicial notice of the fact that condom use always negates a significant risk of serious harm, the Court was unwilling to do so given the debate regarding whether condom use does negate such a risk to a sufficient extent. On whether liability should be confined to special relationships, that is those in which there is a relationship of trust and confidence, the Court considered a shared responsibility model where, in effect, the protection of the law would only be engaged where there was no duty to protect oneself.

82 [2012] 2 S.C.R. 584, at paras 68 – 69 per McLachlin C.J.
84 [2012] 2 S.C.R. 584, at paras 72 – 75 per McLachlin C.J.
86 [2012] 2 S.C.R. 584, at paras 81 – 92 per McLachlin C.J.
This was rejected on the basis that even in commercial relationships there is at times a duty to disclose, and moreover the Court felt that a move in this direction would be insufficiently protective of those involved in casual relationships who deserve equal protection to those in long term relationships. Further the Court discounted any categorical approach, which would be akin in its mind to a return to case law which saw wives and prostitutes as never being able to assert a fraud vitiating consent.

Finally, the Court considered an evolving common law approach which was favoured and resulted in the Court contending that a position was to be found between no risk of transmission and a significant or high risk, that being a realistic possibility of transmission. The position of no risk was unacceptable as it involved absolute disclosure, which had been rejected, and high risk was equally unacceptable as it failed to have regard to the nature of the potential harm, with there being in the mind of the Court an inverse relationship between the seriousness of the harm and the level of acceptable risk such that the more serious the harm the lesser the risk required to make out significant risk of serious harm. The realistic possibility test was seen to strike the appropriate balance in terms of both under- and over-criminalisation, and to be consonant with the statutory and common law reforms in relation to frauds sufficient to vitiate consent which should be limited to serious deceptions with serious consequences, with realistic possibility striking the balance in the context of infection with a disease with life-altering consequences. On the issue of Charter values, the Court felt that a realistic possibility test was in keeping with the equality and autonomy of individuals which gives them a right to choose whether to have intercourse, and struck the correct balance between respect for that concept and the need to confine the criminal law only to serious wrongs and serious harms.

The Court thus determined that in order to make out the offence, in the context of a failure to disclose one’s HIV status or deceit as to that matter in the context of vaginal intercourse, there must be a reasonable possibility of the transmission of HIV, and therefore if one has a low viral load count and uses a condom such a reasonable possibility will not exist. 87 This finding is confined to HIV, and indeed vaginal intercourse, and the Court specifically recognised the potential for further medical advancements both in terms of the science of transmission such that the risk profile might change, and indeed treatment for HIV such that might render it no longer a serious life altering or life

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87 [2012] 2 S.C.R. 584, at paras 4, 93 per McLachlin C.J.
expectancy effect. The latter finding also excludes infections which do not represent a serious alteration to life or life expectancy, and while the alteration of life expectancy certainly has some limiting effect it is not clear how the life altering characteristics will be determined when applied to other sexually transmitted infections.

On the move by the Court to determine that the appropriate offence in these circumstances arises under section 273 dealing with aggravated sexual assault, which is identical in content to section 268 in relation to aggravated assault, and the elements of the offence do not change as they both rely on the basic assault offence, there is a difference in relation to sanction which in aggravated sexual assault is mandatory life imprisonment, compared with aggravated assault where the sentence is a maximum of fourteen years thus the stakes could not be higher in liberty terms alone. Such a move is not analysed in any respect by the Court, save with reference to the potential life sentence and the reach of the criminal law. However, there is no analysis of the difference in charges between Cuerrier and Mabior, and perhaps this is simply related to the charge before the Court, or more properly a recognition of the de facto situation in Cuerrier which was that this issue should be dealt with in the realm of sexual assault, the implications of which will be considered in due course.

A final Supreme Court authority of relevance is R v Williams, where Williams had been convicted of common nuisance and aggravated assault at trial, and on appeal, the conviction in relation to aggravated assault was vacated and substituted with a conviction in relation attempted aggravated assault, against which the Crown appealed. Williams had been in a relationship with the complainant during which they had unprotected sexual intercourse. The evidence was that at the commencement of the relationship Williams did not know he was HIV positive, but was later diagnosed. He failed to disclose this to his partner while continuing to have unprotected intercourse contrary to medical advice and the complainant was later diagnosed as HIV positive. Williams conceded that he had passed the infection to the complainant, however, it was not clear whether she became infected prior to or after Williams became aware of his HIV status. The essence of the appeal was whether a person could be convicted of aggravated assault through failing to disclose HIV status where the complainant at the time could already have been infected

89 [2003] 2 SCR 134 (Hereinafter referred to as Williams).
with HIV. It was found that they could not, arising from a failure to make out the *actus reus* of endangerment of life.

However, most important for our purposes is the attention paid in the case to the *mens rea* for the relevant offence, given that other authorities do not attend to this matter to any significant extent. In *Cuerrier* the relevant *mens rea* was stated as intention to apply force to the body of the complainant contrary to section (265)(1)(a). In *Williams*, the position was developed further in that the defendant’s mental state will be assessed with reference to not only to the application of force which must occur intentionally, but also with reference to the consent of the complainant, with regard to which there must be intentional, reckless or wilful blindness to the fact that they do not consent coupled with an objective foresight of the risk of bodily harm. In terms of assessing when a person will be regarded as having acted intentionally, recklessly or with wilful blindness as to the consent of partner, the decision indicates that these concepts will be engaged where defendant develops sufficient awareness as to HIV status and continues to have unprotected sex. The decision does not address the element of objective foresight of a risk of bodily harm and the relevance, if any, of the defendants understanding of the risk of transmission.

As a final point, it should also be noted that aggravated assaults are not the only offences prosecuted in this area, and prosecutions have been grounded in offences relating to common nuisance, assault, aggravated assault, attempted aggravated assault, sexual assault, aggravated sexual assault, criminal negligence and first-degree murder, all of which are criminalised under the Code.

**Conclusion**

The cases considered show that both jurisdictions are concerned with the harm of HIV, and potentially other sexually transmitted infections. In England, the focus of the harm is the fact of infection whereas in Canada the focus is on the risk of the harm or the harm itself, in both cases the harm is corporeal in nature: in England, GBH, and Canada, endangerment of life embodied in the test of significant risk of serious harm. The culpable state of mind in England is predominantly that of recklessness, whereas in Canada there

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93 Merimond, note 70, at 6; Grant, note 70, at 254.
is a mix of both intention and recklessness as to differing elements of the offence. Risk plays an important role in both jurisdictions, both in terms of the defendant’s state of advertence and the objective acceptability of running a particular risk. Consent is also of central concern in both jurisdictions where consent to unprotected sex does not, in itself, amount to consent to running an unknown risk of contracting a serious infection. Finally, England recognise informed consent as a defence, whereas in Canada informed consent will negate an element of the offence and the absence of such consent will be analysed with reference to concepts of risk and harm which may vitiate consent to intercourse itself.

II – Harm and Causation
In this part, I am concerned with elements of the actus reus or external elements of an offence, that is, in this context, the conduct and result, or consequence as it is referred to in Canadian literature, giving rise to criminal liability, and the necessity to prove that the defendant caused the harm alleged. Here, I will analyse how the issue of harm has been approached and also a critique of the conception of the harm of infection with a STI as a type of harm with which the law should be concerned, which, in turn, will address critiques of paradigmatic representation of both the wrong and harm of infection as represented in the theoretical chapter. This exposition will give rise to a challenge to the paradigm of infection as a harm with which the law should be concerned in all circumstances, which may or may not be determinative of the issue of criminalisation depending on one’s perspective. Additionally, I will consider the breadth of potential application of the criminal law to the transmission of diseases outside a sexual context, which will in turn expose issues of broader consideration in relation to the relationship between public health efforts in the control of the spread of pathogens and the criminal law implications for those efforts, alongside the exceptionalism evident in the focus on sexual behaviour. Finally, I will consider issues related to proving causation, the snare evident in the reliance on certain scientific methods and evidence and the potential impact of matters related to the issue of causation on the exceptional, even doctrinaire, nature of the criminal law’s current focus on solely sexual behaviour in relation to criminal liability.
**Harm**

**Introduction**

The harm of either exposure to or transmission of a STI is a controversial area within literature. On one hand, and one might say almost intuitively, and as discussed in the theoretical chapter, that a biomedical construction of the effect, or potential effect, of infection with a STI places this harm among a genus of physical harms with which the criminal law in the form of non-fatal offences against the person should be concerned, or at the very least may be concerned.\(^{94}\)

A more critical interpretation argues that the construction of this harm as a mere corporeal harm is unrealistic given that this rests on an *a priori* theory of bodily integrity which fails to recognise the inherent contingency of this concept in so far as our existence in society requires us to manage risks in our lives to maintain our integrity.\(^{95}\) This in turn may be linked to a risk dominated societal discourse, which ignores the lived experience of those infected. The result is that persons living with a pathogen are categorised as the paradigmatic “Other” in society, that is persons who come to be regarded as outside the norm and therefore a threat to the norm, and as such are exposed to increased stigma which has the potential to inhibit public health efforts.\(^{96}\) A related matter is whether the risk of harm from particular sexual acts, or from a person’s viral load in the case of HIV, reaches the required threshold of risk to make out an offence, and further whether the resulting harm from HIV in the modern era of active antiretroviral therapy (ART) reaches the required threshold of harm.\(^{97}\)

These are some of the thematic issues which arise from criminalisation using general offences, and indeed from criminalisation itself. I will explore these issues to throw into

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\(^{95}\) Weait (a), note 6, at 107 – 112; Weait (b), note 94, at 107 – 108.

\(^{96}\) Weait (a), note 6, at 107 – 112; Weait (b), note 94, at 107 – 108.

stark relief further points which should be considered in approaching a decision to whether to criminalise and, if so, to decide how.

The Infliction of Harm in England & Wales
In Dica and Konzani, the English courts established that the transmission of HIV in the course of sexual intercourse may amount to the *actus reus* of unlawful infliction of grievous bodily harm contrary to section 20 of the Offences Against the Person Act 1861 (the Act), which is the offence under which transmission of HIV and other STIs have been exclusively prosecuted.98 The *actus reus* of this offence involves both conduct and a result, that is infliction and resulting GBH, the law concerns itself equally with both elements, that is there must be both infliction and resulting GBH.99

At the outset, it is important to remind ourselves that, to date, prosecutions in England have only been concerned with the transmission of, not exposure to, a STI, HIV, Hepatitis B, Gonorrhoea and HSV, and, as such, we must examine how and why, within the broader context of the criminal law, reckless transmission of an infection during sexual intercourse has come to be viewed as the infliction of GBH, when no prosecutions outside the context of sexual relations have been recorded to date, and how this arose after a century of contrary authority and in the presence of Governmental opposition to the imposition of such liability.100 In saying this, I recognise that one guilty plea has arisen in relation to transmission of Gonorrhoea from casual touching in *R v Peace Marangwanda*. However, this is an unsatisfactory authority as the plea of guilty to the section 20 offence is reported as having been an alternative to a further trial following an earlier failure to reach a verdict in the context of child sexual offence charges, and as a

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98 [2004] EWCA Crim 1103; [2005] EWCA Crim 706; Weait (a), note 6, at 27 – 35; Catherine Dodds and others, ‘Grievous harm? Use of the offences against the person act 1861 for sexual transmission of HIV briefing paper’ (Sigma Research 2005) <http://siganresearch.org.uk/files/report2005b.pdf> accessed 1 May 2016, at 25 – 30; Samantha Ryan (b), ‘Reckless transmission of HIV: knowledge and culpability’ [2006] Criminal Law Review 981–992, at 982; Karl Laird, ‘Criminalising Contagion - Questioning the Paradigm’ in Catherine Stanton and Hannah Quirk (eds), *Criminalising contagion: Legal and ethical challenges of disease transmission and the criminal law* (Cambridge University Press 2016), at 211 – 214; NAM, note 19. All prosecutions to date have proceeded on the basis of reckless infliction of GBH contrary to section 20, however, the potential exists to prosecute intentional infliction of GBH contrary to section 20 of the Act, the intentional causing of GBH contrary to section 18 of the Act, and additionally the offence of attempt in relation to section 18 where transmission does not occur.

99 Treacy v DPP [1971] 1 All ER 110, at 120.

result the matter remained, although not addressed explicitly, within the broad realm of sexual conduct.\textsuperscript{101} Therefore, the criminal law has only intervened in the transmission of disease in a sexual context and this was so after a century of the criminal law regarding the transmission of pathogens as matter falling squarely within the realm of public health endeavours.

\textit{The Legacy of R v Clarence}\textsuperscript{102}
For 116 years, from the case of \textit{Clarence} up to the case of \textit{Dica}, England did not recognise the transmission of a STI during sexual intercourse as an offence contrary to section 20 of the Act involving infliction of GBH, nor section 47 of the Act involving assault occasioning actual bodily harm (ABH).\textsuperscript{103} The manner in which the law changed was representative of a change in perceptions both in relation to the nature of harms protected against by the criminal law and the manner in which they may be inflicted in the context of section 20 of the Act. Clarence had sex with his wife when he knew that he was infected with gonorrhoea and she did not, and his wife contracted the infection. He was convicted of infliction of GHB contrary to section 20 and assault occasioning ABH contrary to section 47, and on appeal the matter was considered by a thirteen judge court of appeal.

The position of the majority, nine to four, was that both offences required an assault, in that they required non-consensual application of force to the body of another, which was not evidenced in the case of Clarence having intercourse with his wife.\textsuperscript{104} In this sense, the word ‘inflict’ in section 20 of the Act was interpreted as requiring the infliction of some sort of violence on a complainant akin to a blow or the use of a weapon.\textsuperscript{105} Moreover, as to whether the act amounted to an assault contrary to section 47 of the Act similar, rationales applied and in addition Stephen J noted that the transmission of pathogen did not amount to an assault in itself, and as to the physical act of intercourse, he found that concealment of the presence of a ‘venereal disease’ did not amount to a fraud sufficient to vitiate consent, thus no assault was made out.\textsuperscript{106} While Stephen J

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\textsuperscript{101} [2009] EWCA Crim 60.  \\
\textsuperscript{102} (1889) 22 QB 23.  \\
\textsuperscript{103} (1889) 22 QB 23; [2004] EWCA Crim 1103.  \\
\textsuperscript{104} In this sense, and indeed in the discussions which follow where assault is mentioned as a potential prerequisite to infliction of GBH, the courts are actually referring to a battery when they use the term assault, that is the application of unlawful force on the body of another, albeit that the elements of assault and battery offences are distinct.  \\
\textsuperscript{105} (1889) 22 QB 23, Wills J referred to the infliction of violence at 36, similarly Pollock B referred to the infliction of GBH flowing as a natural consequence of some action or violence which was illegal in itself, similar remarks were also made by Stephen J at 41.  \\
\textsuperscript{106} (1889) 22 QB 23, at 42 – 43 per Stephen J.
\end{flushright}
considered the point in relation to consent from the perspective of frauds sufficient to vitiate consent to sexual intercourse in general, others were motivated by the particular facts and the quondam irrevocable consent by a wife to sexual intercourse with her husband.\textsuperscript{107} As to whether the transmission of a pathogen amounted to a physical harm, it was equated in some respects to poisoning seeming to indicate that it was regarded as physically harmful, though it could not be occasioned in a manner consonant with the offences charged.\textsuperscript{108}

The minority judgments took a different approach, clearly viewing the transmission of pathogens as potentially amounting to either ABH or GBH, and, at the same time, interpreting terms used in sections 18, 20 and 47 of the 1861 Act, respectively; ‘cause’, ‘inflict’ and ‘occasioning’ as being synonymous terms, therefore focussing on the result as opposed to the mode of causation and seeing the terminology of the Act as no bar to conviction as the unlawful application of unlawful force was not a prerequisite.\textsuperscript{109}

While it is clear that the majority in \textit{Clarence} found that the conviction could not be sustained arising from the absence of the application of force, and related matters as to consent, there was agreement between the majority and minority as to the harmful nature of diseases and as such the Act might be regarded as a mere technical bar to conviction.\textsuperscript{110} However, while the majority were clearly alive to the harms associated with pathogens, they, at the same time, were also concerned regarding the considerable consequences of extension of the criminal law into the area of the transmission of pathogens. There was a concern that no principled distinction could be drawn between the transmission of a disease during sexual intercourse and transmission during day-to-day contact such as by shaking hands and potentially transmitting disease from parent to child in the home.\textsuperscript{111} Stephen J was concerned regarding ‘wide and uncertain’ changes in the law, and in particular felt that the transmission of a disease was not a crime in itself but was a matter of public health to be dealt with through extant public health legislation.\textsuperscript{112} Stephen J, in making these remarks, noted that a person exposing others to risk of infection may be blameworthy, but if so it was a matter for public health legislation and not the criminal

\textsuperscript{107} (1889) 22 QB 23, at 62 – 63 per Pollock B
\textsuperscript{108} (1889) 22 QB 23, at 42 per Stephen J.
\textsuperscript{109} (1889) 22 QB 23, at 48, per Hawkins J.
\textsuperscript{110} Laird, note 98, at 205.
\textsuperscript{111} (1889) 22 QB 23, at 38 - 39 per Stephen J, see also the remarks of Pollock B at 64.
\textsuperscript{112} (1889) 22 QB 23, at 38 - 39 per Stephen J
law relating to offences against the person, thus it would seem that the majority recognised the transmission of pathogens as potentially deserving of a legal response, but not of one which amounted to individuated responsibility for transmission of pathogens in the context of offences against the person. In essence, one is left with the impression that the majority recognised the transmission of pathogens as a community concern, and one which may require a legal response, but they recognised the potential breadth of circumstances comprehended, the aversion against resort to offences against the person notwithstanding the long history and devastating effects of infectious diseases, and the myriad of potential circumstances in which transmission could occur such that the matter was better dealt with as a public health rather than criminal law concern.

Clarence thus left a legacy that to make out an offence pursuant to section 20 of the Act, an assault was necessary, and the gradual erosion of this element of the authority, alongside shifting judicial conceptions as to the nature of harm, would pave the way for later convictions. However, what has not been addressed, or considered to any extent in subsequent judgments dealing with the transmission of pathogens, is the potential range of conduct comprehended by the criminalisation of the transmission of pathogens and the seeming move away from public health efforts and legislation towards an individuation of responsibility for disease transmission.

The Changing Nature of Harm and Infliction
To understand how the courts came to recognise that transmission of a disease during sexual intercourse can amount to the infliction of GBH, it is essential to understand developments in the law over a number of years.

There has been an emergent understanding as to the type of harms which may amount to GBH, and historically it was referable to harm which interfered with health or comfort.113 This definition was abandoned in preference for the ordinary and natural meaning of the term grievous, which is “really serious”.114 Some debate surrounds the necessity or efficacy of the term “really” as its meaning is unclear, and it is not a required adjunct to the term “serious” in a jury direction.115 The Court of Appeal in the context of examining the meaning of ABH, and in particular “bodily harm”, has held that the term should be

113 R. v Ashman (1858) 1 F&F 88.
114 DPP v Smith [1961] AC 290, HL.
given its ordinary meaning, and that the term harm could be equated to injury. In terms of an injury, the Court held that an injury can involve an injury to health such as by infecting someone with a disease, and the injury may be internal with or without any external injury and can include unconsciousness, and, in the context of ABH, the injury need not be permanent but should not be so trivial as to be wholly insignificant. The conclusion then is that GBH takes the form of bodily harm which is coterminous with an injury which includes an injury to health, which must in turn be serious, but need not be permanent.

In keeping with this wide definition case law has recognised: unconsciousness, internal injuries without external wounding, psychiatric injury resulting for example from obscene phone calls, and obviously in the current context infection with a STI as amounting to injuries capable of giving rise to GBH. In addition, the injury need not be life threatening, permanent, have lasting consequences, or require treatment; this leads to a conclusion that the type of harm comprehended by this offence is extremely wide.

Having considered the definition of GBH, the determination of whether harm reaches the required level so as to amount to GBH is regarded as an objective assessment to be made by the jury in a given case, and not from the perspective of the victim who has suffered the harm. While it is judged from an objective standpoint, in determining whether the appropriate threshold of harm has been reached, the jury may take into consideration the effect of the injury on the victim before them, that is any antecedent characteristics which might render one type of harm more serious for one victim, where it might not for another. Further the assessment of harm done is a matter for the jury to determine applying contemporary social standards.

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116 R v Chan-Fook [1994] 99 CAR 147, at 694 per Hobhouse LJ.
117 R v Chan-Fook [1994] 99 CAR 147, at 694 per Hobhouse LJ.
118 R v Hicks [2007] EWCA Crim 1500.
119 R v Wood (1830) 1 Mood CC 278.
125 R v Golding [2014] EWCA Crim 889, at para 64.
Two particular difficulties emerge from the approach of the courts thus far. First is the extension into the realm of intangible injuries, and the combined effect of the jury determination based on contemporary social standards and the definition of harm as encompassing intangible harms. In a case involving physical acts and resultant injuries, in the sense of a blow or a stabbing, the jury are expected and, it would seem, are readily able to reason intuitively from their common sense as to the seriousness of the injury. However, when analogies are drawn between physical acts and resultant injuries in a tangible sense, and the interface between actions and consequences which are intangible, it is not at all clear that juries can as easily or readily reason between the actions and consequences, particularly where the consequences for an individual in the context of disease transmission are so dependent on the effect on a given individual. This is perhaps all the more so when there appear to be very few criteria of assistance in determining the relevant threshold to reach ABH or GBH. While this is a valid criticism, and indeed recent case law shows the heavy reliance on conflicting expert evidence as to the nature of harm, it might also be said that the overall effect of the infection will be as easy to appreciate as any other injury based on the evidence presented. However, I think the essential point is that it is the inherent fear of disease and related conceptions of those who are infected with diseases, which may lead to a potential readiness to convict in cases of transmission without a clear conception of relative seriousness. This is not to mention the potential effects of criminalisation in terms of the populations effected and the impact on public health endeavours.

A second development is the role of prosecutorial discretion in the absence of any particular guidance from the legislature or the judiciary. At present, the range of potential harms is quite vast, and it is possible, as has occurred in other jurisdictions, that a divergence of approach may emerge between prosecutors and courts as to the appropriate charge or the level of harm necessary to attract liability. As I will consider in due course, there is significant potential for liability for the transmission of pathogens during sexual

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126 Laird, note 98, at 209.
127 Laird, note 98, at 209.
intercourse based on current recorded convictions; equally, there is extensive potential for additionally liability for other STIs not yet prosecuted; and, moreover, there is no reason why the harm of transmission of a pathogen should be or will be confined to sexual as opposed to social intercourse. The limitation of prosecutions thus far to sexual intercourse is likely the result of a mix of factors, however, one of the key determining factors in any system of prosecutions is prosecutorial discretion which already plays a significant role, and the current state of the law in relation to the nature of harms and the mode of infliction leaves considerable room for further and arguably inappropriate prosecutorial discretion, which when matched with the potential for divergent judicial approaches, creates significant difficulty in relation to the predictably of potential criminal liability and associated rule of law concerns.130

Turning to the mode of causation, over a number of years, the courts had cause to consider the nature of infliction in the context of section 20 of the Act and ultimately the courts arrived at the position of the minority in Clarence, that the term infliction does not require an assault, and the focus is now on the result, as opposed to the mode of causation. At the outset, and as found in Clarence, it was thought that the infliction of GBH required an assault, however, there was a competing line of case law which seemed to ignore this requirement and find that infliction arose where no assault occurred.131 The matter was considered by the House of Lords in R v Wilson (Clarence), where Lord Roskill held that the infliction of GBH did not require proof of an assault in all cases, however, there remained in the eyes of the Court, relying on an Australian case of R v Salisbury, a distinction between ‘inflict’ in section 20 of the Act and ‘cause’ in section 18 in the sense that inflict required the application of violent force.132

The definitive change in position arose in R v Ireland; Burstow when the House of Lords determined that the infliction of GBH could take place, in the context of infliction of psychiatric injury, without the need for an assault.133 The Court was considering whether psychiatric injury could result from a series of phone calls and in so doing considered

130 Laird, note 128; On the role of prosecutorial discretion generally see: Celia Wells, Oliver Quick, and Nicola Lacey, Lacey, wells and quick reconstructing criminal law: Text and materials (4th edn, Cambridge University Press 2010), Ch 2, and 31 – 33; Andrew Ashworth and Jeremy Horder, Principles of criminal law (7th edn, Oxford University Press 2013), at 9 – 15.
131 Ormerod and Laird, note 5, at 742 – 743, where they discuss six cases from 1889 to 1973 where no such requirement was found.
Clarence and found it to be ‘troublesome authority’ which had never been overruled, but
which at the same time had not considered the infliction of psychiatric injury.\textsuperscript{134} Lord
Steyn held that in light of the contemporary understanding of the relationship between
bodily and psychiatric injury that Clarence was no longer of assistance in interpreting the
Act, and that ‘without straining’ the language of the Act the term ‘inflict’ could be
understood as embracing the infliction of psychiatric injury.\textsuperscript{135} Lord Steyn, in reaching
this conclusion, indicated that the terms ‘inflict’ and ‘cause’ were not synonymous;
however, he offered no sign as to what the distinction was, whereas Lord Hope, in
delivering a concurring judgment, held that the terms were interchangeable and indicated
that in principle there was no difference save that where ‘inflict’ is used, there are
unpleasant consequences or detriment flowing from the actions in question from the
perspective of the victim, whereas with cause the term may embrace pleasure or pain.\textsuperscript{136}

This finding removed the final obstacle to the determination that the transmission of a
pathogen during sexual intercourse could amount to the infliction of GBH, as Clarence
was found to be no longer authoritative in terms of the requirement for an assault to make
out the offence and of doubtful assistance in interpreting the Act, thus all that would be
required was the conception that the pathogen transmitted resulted in GBH and the
developments in the nature of harms comprehended by the offence had at that stage
referenced the transmission of a pathogen, and so the door potentially stood open.
However, two troubling matters which remained were first that case law questioning the
authority of Clarence, in terms of the necessity for an assault, had considered the
infliction of psychiatric harm only, and not the transmission of pathogens during normal
day-to-day conduct such as sexual intercourse; second, Clarence has specifically
adverted to the conduct in question falling within the public health as opposed to criminal
law arena. The first was neatly disposed of by subsequent decisions, however, the second
remains to this day unresolved and unattended.

\textsuperscript{134} [1998] AC 147, at 160 per Lord Steyn.
\textsuperscript{135} [1998] AC 147, at 160 – 161 per Lord Steyn.
\textsuperscript{136} [1998] AC 147, at 161 per Lord Steyn, at 164 per Lord Hope; See also the discussion of Ormerod and Laird, note 5, at 743 where they take issue with the remaining distinction between inflict and cause identified by Lord Hope is so far as that distinction, if valid, would have prevented the conviction of the defendants in \textit{R v Brown} [1994] 1 AC 212, as the consequences flowing from the sadomasochistic activities
were regarded by the participants as pleasurable as opposed harmful or unpleasant.
The potential for criminalisation was realised in *Dica*, where Judge LJ relied on changes in the law in relation to the requirement for an assault to make out the section 20 offence in reaching a conclusion that one can be liable for reckless infliction of a STI, HIV in this case, during sexual intercourse. The Court considered *R v Wilson (Clarence)*, where the court held that the infliction of harm in the context of such offences could occur in the absence of an assault, and held that this amounted to a major erosion of the authority of *Clarence*. The Court also considered *R v Chan-Fook* and *R v Ireland; Burstow*, leading the Court to conclude that in the light of more contemporary jurisprudence to the effect that “inflict” in the context of s.20 no longer required an assault, that no force is required for GBH to be inflicted, and if psychiatric injury can occur without an assault so too can physical injury arise in similar circumstances.

The nature of the harm associated with STIs receives relatively little attention by the courts in England, and while the Court in *Clarence* did foresee an element of harm associated with infectious organisms, the majority were clear that such harm was to be conceptualised as a community and public health matter as opposed to individual responsibility in the context of offences against the person. The changes in the law post *Clarence* with regard to infliction and associated assault left a space for the Court to overcome the objection in *Clarence* which had found that infection with a STI lacked the necessary and immediate connection between violence and the ensuing injury to amount to the type of harm involved in this offence. While obviously the erosion of the authority of *Clarence* is inextricably linked to the removal of the requirement for an assault to make out an offence under s.20, it is also possible to the discern that the court in *Dica* perceived that developments in recent case law which permitted bodily harm to include, *inter alia*, psychiatric injury reflected contemporary ideas.

As such, and with no further analysis, the Court determined that transmission of HIV represented a serious physical injury capable of amounting to GBH. The judgment

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140 (1889) 22 QB 23.
142 (1889) 22 QB 23, at 41 per Stephen J.
143 *R v Dica* [2004] EWCA Crim 1103, at 27 – 31
144 *R v Dica* [2004] EWCA Crim 1103, at 27 – 31

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includes a number of references to “serious” in terms of HIV, and indeed a reference to “some other serious sexual disease”, however, the court at no stage engages with how or why the transmission of a serious infection represents a serious injury.\textsuperscript{145} The case of \textit{Konzani} does not analyse in any detail the nature of the harm concerned save that reference is made to “the risk of and actual transmission of a potentially fatal disease”.\textsuperscript{146} In \textit{Golding} the Court did engage at some length with the nature of HSV, and considering the definition of GBH, they ultimately concluded that the evidence of painful symptoms, their effect at the time, their recurrence and the prospect of future recurrence without effective cure for an indefinite period of time was sufficient to allow a jury find that the harm of HSV amounted to ‘really serious harm’, and thus GBH.\textsuperscript{147} 

These elements of the judgments may be seen in some senses as unremarkable in the context of the transmission of HIV and other STIs given their characterisation as a genus of serious physical harm, and as referred to the potentially fatal consequences of the infection with HIV. However, the progression in \textit{Golding} to HSV, a recurrent, incurable yet not life threatening infection shows the potential scope of liability in relation to the transmission of STIs, and perhaps much wider potential in relation to the transmission of pathogens outside a sexual context. Additionally, and notwithstanding the discussed potential difficulties with the determination of harm based on contemporary social standards, the difficulties in the determination of thresholds of harm when considering intangible harms, the troubling role of prosecutorial discretion, the absence of any sufficient judicial or parliamentary guidance and the potential effect of views on contagion on the reasoning of any jury, there remains a further concern. What no court has taken the time to do is analyse why this type of harm, which for over a century was to be the preserve of public health and community efforts, is now to be understood within the realm of individual responsibility in the context of offences against the person, as if by judicial fiat. Any reasoning for this significant shift in judicial thinking with regard to the transmission of pathogens is notably absent in the decided cases which is a significant omission deserving of much greater attention by the courts.

While the decided cases apply the criminal law in relation to offences against the person, as developed in the post \textit{Clarence} era, to the transmission of pathogens during sexual

\textsuperscript{145} \textit{R v Dica} [2004] EWCA Crim 1103, at 59.
\textsuperscript{146} [2005] EWCA Crim 706, at 41.
\textsuperscript{147} [2014] EWCA Crim 889, at para 62.
intercourse: it is hard not to be left with at least three significant questions: the first regarding the reasons for the change in attitudes, the second regarding the disparate focus on sexual intercourse, and the third regarding the wisdom or desirability of proceeding in this manner when governmental opposition to the implementation of liability for reckless transmission had been expressed. The answer to the first two questions will be addressed through a combined analysis of the conditions of liability in this chapter and others, and the interrelationship between the criminal law and public health. However, on the last question, that is the imposition of liability in the presence of governmental opposition, Judge LJ did advert to the position of the Home Office as expressed in their consultation paper considering this matter, wherein they had conceived liability as remaining within the realm of intentional transmission of a pathogen only.148 Having considered that matter, and in addition material offered to the attention of the court in relation to the realism of disclosure in complex sexual relations alongside the potential public health effects of criminalisation, the Court determined that it was their function to determine the state of the law as it then stood, and it was for Parliament then to change the law if it wished.149 With respect to the Court, in reaching this determination, they had engaged in a relatively impoverished analysis which only partly addresses the aversion to criminalisation espoused by the majority in Clarence, and in so doing created an incredibly vast range of potential liability without any effective regard to countervailing and consequential factors.

These comments do not serve to detract from the seriousness of HIV infection, and some other STIs, and indeed it might be said that the effects of HIV are so serious that no further comment is required,150 however, the criminalisation of the transmission of an infection has consequences beyond the realm of the sexual transmission of HIV and other STIs.151 Indeed this was recognised in Clarence where Stephen J, in rejecting the concept that transmission of a ‘venereal disease’ amounted to a bodily harm, remarked that...

151 Matthew Weait (c), 'Knowledge, autonomy and consent: R v Konzani' [2005] Criminal Law Review 763–772, at 770; Laird, 98; David Gurnham and Andrew Ashworth, 'Revisiting the criminal law on the transmission of disease' in Catherine Stanton, Sarah Devaney, and Anne-Maree Farrell (eds), Pioneering healthcare law: Essays in honour of Margaret brazier (Routledge 2015); Mawhinney, note 94.
without some distinction an affirmative finding would effectively amount to all infections which can be communicated by an act on that part of the infected person potentially amounting to criminal liability, which he felt was contrary to all authority, and would criminalise certain day-to-day conduct.\textsuperscript{152} It cannot of course be denied that much of the logic in \textit{Clarence} was tied up in the misogynistic notions of presumed consent of a wife to sexual intercourse in marriage, and the aforementioned assault requirements, this notwithstanding, the foregoing remark, does advert to an important point in terms of the development of the law in this area.\textsuperscript{153}

As such it would have been welcome had the courts in more recent cases taken the opportunity to express their understanding of the nature of the harm in general, or to express the nature of the harm in the context of the cases in front of them. In particular, and aside from the change in the conduct which could amount to infliction, it seems that the courts should have addressed the distinction between public health efforts and criminal liability, and how a determination has been reached in relation to individual criminal responsibility. In failing to make any distinction between the harm of the transmission of infection generally, and that which occurs in the context of sexual intercourse, it is clearly the case, all other things being equal, that the scene is set for the possible prosecution of any person who transmits a serious infection when they have agential control over the circumstances in which that transmission takes place.\textsuperscript{154}

\textit{What is the reach of the criminal law now?}

In terms of the current position in relation to potential prosecutions, there can be no question that the transmission of a wide range of STIs carry with them potential criminal liability. The previous discussion makes clear that HIV, Hepatitis B, Gonorrhoea and HSV have already attracted liability. In terms of other STIs, taking into consideration the case law and the definition of GBH, it is undoubtable, all other things being equal, that Syphilis and Chlamydia for instance carry potential liability. Syphilis, at any stage of the infection, can enter the nervous system causing Neurosyphilis which can lead to

\textsuperscript{152} (1889) 22 QB 23, at 38 – 39.
\textsuperscript{153} Weait (a), at note 6, at 96.
debilitating effect, and can also cause rashes and lesions. While Syphilis may now be curable with the administration of antibiotics, there are emerging strains displaying resistance to antimicrobial treatment. Furthermore, Chlamydia, if untreated, can lead to Pelvic Inflammatory Disease and in turn infertility in women. These are but examples of a range of sexually transmitted infections, however, there were 205,000 diagnoses of Syphilis and Chlamydia alone in the UK in 2014. While it might be suggested that the two additional examples are curable, subject to the resistant forms of Syphilis, so too is Gonorrhoea, subject again to it not being a resistant strain, yet a conviction for transmission of Gonorrhoea has been sustained. Therefore it would seem that once symptoms are evident to a sufficient degree so as to reach the wide threshold of GBH that liability can be fixed, again all other things being equal.

Moving beyond the realm of STIs, as mentioned, there is no reason in principle that the transmission of other infections cannot amount to GBH. Additionally, there is the potential for the offence contrary to section 47 of the Act, of assault occasioning actual bodily harm, to emerge, and the threshold of harm for that offence is very low and amounts to any harm, read as injury including injury to health, which is not so trivial as to be wholly insignificant, expanding the range of potential liability quite significantly. While the offence under section 47 of the Act would require a battery to be made out prior to criminal liability, there are examples within the case law of indirect battery which in turn could result in a finding that transmission of a disease amounted to an indirect form of harm. Whether liability would attach would relate of course to the totality of the circumstances, and all the elements of the offence would have to be satisfied, which I will examine in relation to broader liability in each of the parts that follow. However, for the purposes of the harm element of the offence, it would certainly seem in the context of the section 47 offence that transmission of Influenza in a wide range of circumstances

158 Public Health England, note 16.
161 Laird, note 98, at 211 discusses this point and refers to the analogy which might be drawn between sneezing and the mode of causation in DPP v K (a minor) [1990] 1 WLR 1067.
would meet the threshold so long as it not be so trivial as to be wholly insignificant.\textsuperscript{162} Whether of course the effect of Influenza was wholly trivial would depend on the circumstances of the person infected, which at one end of the spectrum might be a robust adult, and at the other the very young or frail elderly.\textsuperscript{163} Indeed, there is no reason why Influenza would not reach the level of GBH in circumstances where the person who becomes infected suffers from a vulnerability such that the infection has serious consequences, and if a transient treatable infection such as Gonorrhoea can constitute GBH, there is no reason that Influenza would not. The sheer range of potential infections which could amount to either ABH or GBH cannot be mentioned here, however, it has been argued that Tuberculosis is but one such infection and there are potentially many more.\textsuperscript{164}

The findings of \textit{Dica} and later cases have extended the potential range of criminalisation substantially. At no stage has there been any consideration of the implications of this change by the courts in terms of the effect on public health endeavours, nor indeed regarding the ramifications outside the sexual context. There are a number of reasons why criminalisation may have been confined to the sexual context, those may include: the belief of those infected as to the role of the criminal law, issues concerning causation and evidential difficulties, matters of recklessness and potential implied consent in the social context.\textsuperscript{165} Thus, to date, there may not have been complainants in relation to transmission outside of sexual intercourse, and, if there had, then prosecutorial discretion or concern may have militated against any known prosecutions or convictions. However, the fact that the potential exists for such wide-scale criminalisation both within and without the sexual context is deserving of particular scrutiny in terms of the public health effects of criminalisation and in terms of a principled objection to the potential for widespread and relative indeterminate criminalisation.\textsuperscript{166}

\textsuperscript{162} \textit{R v Chan-Fook} [1994] 99 CAR 147, at 694 per Hobhouse LJ; Mawhinney, note 94; Laird, note 98, at 212–213.

\textsuperscript{163} The effect on the individual is cognisable by the jury per \textit{R v Bollom} [003] EWCA Crim 2846.


\textsuperscript{165} Laird, note 98, at 213 – 220.

\textsuperscript{166} Gurnham and Ashworth, note 151, at 274 – 275.
In stating that there is potential for widespread criminalisation, I do not wish to overstate the case, bearing in mind the very small number of cases which have been prosecuted to date relative to the number of STI infections per annum, and aggregated from the time of the first conviction. However, small numbers of prosecutions do not negate a genuine concern regarding the extension of the criminal law into the sexual transmission sphere, and the potential extension into the more general social sphere. The English Law Commission has considered this very issue in considerable detail in a recent consultation paper and law reform report.167

An entire chapter of the report is devoted to ‘disease transmission’, and the conclusion is, in short, that criminalisation of ‘disease transmission’ is part of the law, and that decriminalisation is not favoured as a result of contrasting views regarding the public health effects of the criminal law’s intervention in this area.168 The Commission’s position on public health issues are instructive, and will be addressed when looking at such issues later in the thesis. On the broader issue of criminalisation of the transmission of infections and the harm associated therewith, the net conclusion of the Commission is that ‘disease’ is a form of physical harm and should be treated like any other.169 The Commission are clearly applying a biomedical construction to harm, which is logical, however, what the Commission do not do is explain why this is a form of harm with which the criminal law should be concerned in light of the long-standing legal position prior to Dica in relation to the role of the criminal law in relation to the transmission of infections.

The position taken in the most recent report is hardly surprising, given that in 1993 the Law Commission had recommended that ‘disease’ be included as a form of injury which should be included in a reform of the 1861 Act, a position again rejected by the Home Office save as to the intentional transmission.170 The position taken in 1993 is instructive as it predates Dica, and engages to a limited extent with Clarence. The Law Commission

167 The Law Commission (a), note 154; The Law Commission (b), note 154.
168 The Law Commission (b), note 154, at 144 – 153.
169 The Law Commission (b), note 154, at 148 – 149.
focused on the so called ‘technical bar’ to conviction arising from *Clarence*, referring to
the meaning of inflict, and felt that this should be removed. In particular, they were
concerned with the potential intentional or reckless transmission of life threatening
conditions such as HIV, and accordingly they recommended that the criminal law should
comprehend the transmission of pathogens as a form of harm in the context of offences
against the person. I think that the focus on HIV is key as in 1992 there had been a
media outcry regarding the alleged deliberate transmission of an HIV by a male to his
female sexual partner, and it was contended that no criminal law remedy was available
to respond to such behaviour. While HIV was the driving force behind this
recommendation, the Law Commission also recognised that the criminal law was neither
the principal or most obvious means of containing the spread of disease, however, they
felt that disease should not fall outside the remit of the criminal law in the context of
offences against the person. While the Law Commission was clearly focused on HIV,
and the focus was seemingly on the use of the criminal law as a means to control the
spread of disease, they at the same time made a recommendation that would expand the
range to the criminal law very substantially and failed entirely to engage with the
arguments in *Clarence* in relation to public health and the extension of the criminal law
into wide ranging and uncertain areas.

The Law Commission in its most recent review is reasoning from two important
perspectives. First from the perspective of current criminalisation, where the burden is
clearly seen to lie with those seeking decriminalisation to prove their case. Secondly,
and most importantly in this area, they proceed from the basis that infections are a form
of harm like any other, thus are comprehended by offences against the person, and as
such, they are not asking whether there should be an offence of recklessly transmitting

\[^{171}\text{The Law Commission, note 170, at 15.16.}\]
\[^{172}\text{The Law Commission, note 170, at 15.17.}\]
\[^{173}\text{NAM, note 19.}\]
\[^{174}\text{The Law Commission, note 170, at 15.17.}\]
\[^{175}\text{The report does address the issue of exclusion of ‘trivial cases’ and determines that prosecutorial
discretion, evidential difficulties regarding causation, the requirement for subjective recklessness and the
objective limb of the recklessness test would limit the range of the criminal law to serious offences: The
Law Commission, note 170, at 15.18 – 15.19. While there are serious issues with these proposed limiting
factors, even if they are accepted the report does not address any principled issues surrounding the wide
ranging extension of the criminal law and the myriad of circumstances which might be embraced by this
new paradigm.}\]
\[^{176}\text{The Law Commission (b), note 154, at 148 – 150.}\]
an infection, instead there is an offence of recklessly causing injury and consequently are there reasons to treat infections any differently.\(^\text{177}\)

The implications of both perspectives are realised in that the recent attention of the Law Commission does recognise the role of public health concerns, though, as mentioned, they do not find them determinative of matters. Additionally, they recognise the necessity to exclude non-serious infections, though they believe that prosecutorial discretion and the conditions of liability will have this effect. However, while I have accepted, and it is clear, that infections are *prima facie* a form of physical harm, and as such may be the concern of the criminal law, what the Law Commission and courts have continually failed to do is explain the transition from a communitarian and public health approach, which subsisted for over a century, in the presence of many dangerous and fatal infections, to an individuated criminal responsibility for infection in the context of offences against the person. There remains to my mind no satisfactory answer on the part of either the courts or the Law Commission, and this raises particular concerns regarding the principle of minimum criminalisation in the context of a wide and uncertain extension of the criminal law, in the absence of any consideration of the reasons for which the public health perspective was abandoned.

These are issues to which I will return when considering potential alternative constructions of the harm of infection, however, I think that the only satisfactory, but not the only, answer relates to HIV exceptionalism, the fear associated with that then fatal condition, a perception of failed public health efforts, and the ‘Otherness’ of those infected from which the criminal law was required to provide protection so as to maintain the security of the community and individuals. In one sense this is understandable, however, as I will conclude in the context of jurisdictions which have yet to prosecute, we are reasoning from an alternative perspective, that of no criminalisation, and from the foregoing analysis it is possible to see the wide-ranging and potentially indeterminate results of criminalisation which can be rejected on the principled basis of minimum criminalisation, even if the potential involvement if the criminal law is acknowledged, and as such the preferred position should be that of public health endeavours and controls to achieve the ultimate goals of the community, which should be the minimisation of

\(^{177}\) The Law Commission (b), note 154, at 149; A similar point is made by Chalmers in: James Chalmers, *Legal Responses to HIV and AIDS* (Hart Publishing 2008), at 149 – 150.
transmission and effect of infectious agents without at the same time engaging in wide-ranging, indeterminate and exceptional criminal law interventions.

**Endangerment of Life in Canadian Law**
The major prosecutorial dynamic in Canada involves prosecution using offences of aggravated assaults contrary to either sections 268 or 273 of the Code, which envisage an assault or sexual assault, and an aggravated element involving endangerment of life, and which are concerned as equally with exposure to the risk of transmission without attendant transmission as they are with transmission itself.\(^{178}\) Prosecutions have almost entirely been focussed on exposure to the risk of HIV transmission, or transmission itself, however, the seminal case of *Cuerrier* establishes that the judgment and principles flowing therefrom are equally applicable to any STI capable of amounting to a significant risk of serious harm.\(^{179}\) While a relatively large number of prosecutions in the context of HIV have been recorded there are limited reported instances of prosecutions related to other STIs, e.g., Herpes, Hepatitis B and Hepatitis C, and no information is available on any prosecution outside of the context of sexual intercourse.\(^{180}\) The Hepatitis C prosecution resulted in an acquittal as the significant risk test was not satisfied in the context of oral sex or sexual intercourse.\(^{181}\) The prosecution in respect of Hepatitis B is reported to have arisen in the context of a man having sexual intercourse with two women while knowing he was infected, without disclosing that fact, one of whom later became infected, and following a guilty plea he was convicted of sexual assault and sexual assault causing bodily harm.\(^{182}\) Three prosecutions have been reported in respect of Herpes in Ontario, with each defendant pleading guilty, respectively, to assault, sexual assault, and

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\(^{178}\) [1998] 2 S.C.R. 371; Merimond, note 70, at 6 – 7; Cornett, note 94, at 75; Grant, note 70, at 254.  
criminal negligence causing harm.183 These small number of prosecutions outside of HIV are indicative of the potential for a wider application of the offences prosecuted in Canada

Although Cuerrier was a case of aggravated assault involving endangerment of life contrary to section 268 of the Code, the Supreme Court in essence viewed the case of as a form of sexual assault, and a high number of prosecutions have also proceeded on the basis of aggravated sexual assault.184 Moreover the matter has come full circle and the Supreme Court have now determined that the appropriate charge in all such cases is aggravated sexual assault contrary to section 273 of the Code.185 This does not change the attendant proofs, but does have additional consequences such as the convicted person being registered as a sex offender, a potential penalty of life imprisonment for aggravated sexual assault as opposed to maximum sentence of fourteen years for aggravated assault, and moreover the labelling of the offence as one of the most serious available, that of the sexual violation and objectification of another.186 The principle of labelling of the offence in Canada and the potential breadth of criminalisation are important aspects of the choices which are available when addressing this area of human behaviour and the consequences flowing from those choices which have much to say in informing the perspective that might be adopted in jurisdictions which have not prosecuted as yet.187

The Harms of the Offence

To establish the actus reus of this offence both the elements of the basic assault offence and the aggravated offence must be established, this has been described as an act and consequence dynamic, or a conduct and result offence as it might be referred to here.188

The actus reus of the basic offence is established through the non-consensual, and thus unlawful, direct or indirect application of force to another person, in this context this is

183 R v H(J) [2012] ONCJ 753 dealt with a guilty plea to charge of sexual assault arising from a man failing to disclose that he was infected with Herpes, and his partner later contracted Herpes; R. v. Sherman, 2010 ONCA 462 also dealt with a guilty plea to an assault charge in respect of Herpes; See additionally: Canadian HIV/AIDS Legal Network, note 180. The aforementioned authorities only deal with sentencing, however, it is clear that in each case consent to intercourse was found to be vitiated through the non-disclosure by the defendant of his Herpes status. This causes significant confusion as to the frauds sufficient to vitiate consent to the sexual act, and the consequent potential extension of the law beyond the parameters originally conceived, which will be addressed later in the thesis.
184 Grant, note 71, at 48 – 49; Cornett, note 43, at 74 – 75.
185 R v Mabior [2012] 2 S.C.R. 584, at para 1 per McLachlin C.J.
186 Grant, note 71, at 44.
187 The issue of labelling will be addressed when discussing the vitiation of consent in Canadian law, and the consequent labelling of the offence as one of rape, or sexual assault in the language of the Code. On the issues associated with fair labelling see: James Chalmers and Fiona Leverick, 'Fair Labelling in criminal law' (2008) 71(2) Modern Law Review 217–246; Ashworth and Horder, note 130, at 77 – 78.
188 Grant, note 71, at 45.
satisfied by the sexual act. Consent to the sexual act is vitiated as a result of: dishonesty in terms of failure to disclose HIV status or deceit as to that matter, accompanied by deprivation in the form of a significant risk of serious harm or occasioning of serious harm, and finally a determination that the dishonest act induced the giving of consent where it otherwise would have been withheld. The test to establish the aggravated element of the offence involves a determination that life was endangered, which will be satisfied where the complainant was exposed to a significant risk of serious harm or actual serious harm has been caused. The significant risk of serious harm test, in making out the endangerment of life element of the aggravated offence, has been the subject of revision by the Supreme Court and while maintained is now to be understood as involving a realistic possibility of or actual transmission of a pathogen, which amounts to serious harm, that harm being understood as an infection which seriously alters a person’s life or life expectancy. Thus, in essence, the tests are conflated; in all cases where the basic offence is made out the more aggravated offence will likewise be established.

However, there is a complexity as regards a number of potential harms in relation to the Canadian offence. Most evident, and the focus of the discussion in this part, is the serious harm associated with exposure to or the transmission of a serious STI. However, the interrelationship between that element of the offence and the vitiation of consent also raises the issue of the harm associated with assault and sexual assault, or rape, flowing as that does from the vitiation of consent to the sexual act arising from deprivation in the form of the serious harm discussed, and the dishonesty in failing to disclose the presence of a serious STI which in turn induced the complainants to have sexual intercourse. For the purposes of coherence and analysis, I will address the perspective of harm flowing from the conception of the offence as one of sexual offence in the part of this chapter dealing with consent, additionally the element of significant risk will be substantially addressed in the context of risk in a later part.

192 R v Mabior [2012] 2 S.C.R. 584, at para 92 per McLachlin C.J.
193 Grant, note 71, at 49.
For the moment we are concerned with the serious harm element required to satisfy elements of both the test in relation to whether consent will be vitiated by non-disclosure giving rise to an assault, and whether the *actus reus* of the aggravated offence is established. In establishing the seriousness of the harm, the Canadian Supreme Court has adopted, similar to England, a bio-medical construction of the harm of HIV infection, with Cory J in *Cuerrier* finding that the no difficulty arose with the endangerment of life element of the offence, referring on a number of occasions to the potentially lethal consequences of infection, and the exposure of a complainant to serious harm to their health, concluding that it was ‘hard to imagine a more significant risk or more grievous bodily harm’.\(^{194}\) In *Williams* the Court referred to the harm of infection with a serious STI as the ‘stuff of nightmares’, but in addition emphasised that there must be proof that the result of the action did endanger the life of the complainant.\(^{195}\)

*Mabior* considered medical developments in relation to the treatment of HIV, and the potential for criminalisation in relation to other STIs which may be treatable, and observed that it was indisputable that HIV was serious and life-endangering and, notwithstanding medical advancements, it remained an ‘incurable chronic infection that, if untreated, can lead to death’.\(^{196}\) On the matter of other STIs, the Court did not consider any specific pathogen, but adverted to other treatable infections which may not seriously alter a person’s life or life expectancy, which in turn were described as potentially not amounting to serious bodily harm which is the necessary component of endangering life.\(^{197}\) This test of harm has an inverse relationship with the level of permissible risk, and as such the more serious the potential or actual harm the less significant, in numerical terms, the risk needed for it to be so serious as to attract criminal liability.\(^{198}\)

The concept of serious harm is rarely if ever contested, however, emphasising the requirement for serious harm, and thus endangerment of life, the second case in this area to be considered by the Supreme Court resulted in the acquittal of the defendant in relation to aggravated result, with a substituted conviction of attempted aggravated assault, being upheld.\(^{199}\) As outlined above in this case it was possible that the


\(^{195}\) [2003] 2 S.C.R. 134, at paras 19, 47.

\(^{196}\) *R v Mabior* [2012] 2 S.C.R. 584, at para 92 per McLachlin C.J.

\(^{197}\) *R v Mabior* [2012] 2 S.C.R. 584, at para 92 per McLachlin C.J.

\(^{198}\) *R v Mabior* [2012] 2 S.C.R. 584, at para 92 per McLachlin C.J.

\(^{199}\) *R v Williams* [2003] 2 S.C.R. 134.
complainant may have already been infected with HIV prior to sexual intercourse occurring where the defendant knew he was HIV positive and thus the Court reasoned that the complainant’s life could not be endangered by the defendant.\(^{200}\) The analysis in this case proceeds on the basis that the complainant was already harmed, and as such it was not possible to endanger their life further; however, this does not address the possibility of cross infection with another drug resistant form of the virus which could in turn limit the treatments available to the complainant.\(^{201}\) While the so called ‘re-infection theory’ was not pursued by the Crown in this case, the Court did take time to analyse the evidence of a physician with regard to the possibility of such cross infection.\(^{202}\) The Court was conscious that no such theory had been pursued in the case, that there was uncertain science surrounding this matter, and that no testing had been carried out to substantiate the strains of infection and the possibility of cross infection. While the Court makes these observations, they do not discount the possibility of a prosecution on this basis in the future, and moreover the position of the Court is perhaps instructive in relation to the view taken of HIV as a harm instantiated, and not capable of repetition. In many respects, this is linked to the requirement of endangerment of life to make out the offence and as such vitiate the consent of the complainant to intercourse, however, it also belies the lived experience of a person suffering from HIV and seems to suggest that their sexual autonomy is deserving of lesser protection than those who are HIV negative.

However, one of the major criticisms of the Cuerrier test of significant risk of serious harm was the vagueness of the test itself, the differing interpretations of the test by lower courts and the consequent lack of predictability for persons as to when they would risk criminal liability in the absence of disclosure.\(^{203}\) The mainstay of that criticism is focused on the element of risk, and the consequent behaviours which may or may not give rise to criminal liability; however, in at least one case that issue of serious harm associated with

\(^{200}\) R v Williams [2003] 2 S.C.R. 134; Cornett, note 94, at 94.

\(^{201}\) Cornett, note 94, at 94, regarding the possibility of cross infection with a resistant strain of the virus.


HIV in the era of ART has been raised. In *R v JAT* the Court at least questioned whether in light of modern day treatments and the possibility of comparable life spans, exposure to the risk of infection with HIV amounted to the level of serious harm required by the test laid down in *Cuerrier*. Although the case was not decided on this point, it did appear to open a space for a debate on the characterisation of HIV as a serious harm in light of the lived experience of those infected with it now. However, this case was preceded *Mabior* and as such it would seem that, notwithstanding the current treatments which are available, HIV continues to meet the threshold of serious harm.

A final point to discuss in this context is the decision of the Canadian criminal justice system to address this issue in the realm of offences against the person, and the choice in their case of assault and sexual assault and the aggravated varieties of those offences. In the first instance, an offence similar to that of section 20 of the 1861 Act in England is available in the Code. Section 269 of the Code provides for the unlawful causing of bodily harm which is not an assault based offence and requires an underlying unlawful act which is objectively dangerous and results in injury, and the defendant must have the mental state necessary to prosecute the underlying act. This would have involved transmission-based liability and would have avoided vitiation of consent to the act of sexual intercourse, which would have been a preferable route if criminalisation were to be pursued both on the basis of limitation of effect and the fair labelling of the offence.

Additionally, Canada, like England, had for many years regarded the management of infections as falling within the realm of public health endeavours. While the decisions in *Cuerrier* and *Mabior* have considered the public health impacts of criminalisation and have dismissed these as insufficiently concrete to warrant any deviation from criminalisation, what they have not done is explain the shift in position from public health endeavours to the criminal law. As discussed earlier, in reaching a conclusion that the criminal law was an appropriate method of social control or response in this area, the courts have conducted an extensive review of common law, including pre- and post-*Clarence*, and statutory reforms, with a view to ascertaining parliamentary intent with regard to frauds sufficient to vitiate consent in the context of an amendment to the Code.

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204 *R v JAT* [2010] BCSC 766.
However, that analysis was notably selective and ignored entirely the concerns expressed in *Clarence* regarding wide ranging and uncertain extensions of the law and the role of public health in dealing with infections. It is also important to reflect, in the context of the shift in policy in *Cuerrier* and the stated rationale, that an historical provision of the Canadian Criminal Code, not in being at the time of *Cuerrier*, contained a specific offence which criminalised the knowing transmission of certain venereal diseases or sexually transmitted infections.\(^{207}\) However, this was repealed in 1985, on the basis that such matters were deemed a public health rather than criminal law concern, and the offence was deemed to be counterproductive in terms of facilitating proper monitoring and testing for such infections.\(^{208}\) The legislature had thus determined that the one offence that did exist in this area should be repealed, and did so as a revision to the Code in being at the time *Cuerrier* was decided, however, no mention is made of this in any of the decided cases. Akin to England, there remains no satisfactory answer to this question in the available case law, and it is notable and regrettable that the Supreme Court has never engaged with this shift in focus and in doing so has paved the way for exceptionally stringent criminal sanctions.

Prior to considering the current state of the law, it is possible to synopsise the position in relation to the harm associated with certain STIs. HIV, based on the current state of medical science, will always amount to serious bodily harm as it is life-endangering and, notwithstanding the treatments available, may lead to death if untreated. Whether other infections meet this threshold will depend on whether they are life-changing or interfere with life expectancy, and it is clear from decided cases that criminalisation is not limited to HIV, however, whether it may be limited to sexual as opposed to social intercourse has not been addressed to date.

*The Current State of the Law*

The requirement to establish the significant risk of serious harm was purported to be a limiting factor which prevents the net of the sexual assault or assault provisions being cast too wide, and prevents trivialisation of the criminal law by avoiding prosecutions in relation to acts which lack the necessary reprehensible character for criminal prosecution.\(^{209}\)

\(^{207}\) Grant, note 70, at 477 – 478.  
\(^{208}\) Grant, note 70, at 477 – 478; Elliott, note 73.  
The Canadian Supreme Court was concerned in *Cuerrier* that criminalisation be approached with caution, particularly in light of the questionable effectiveness of broad criminal sanctions, and the possible negative effect such a regime might have on public health efforts to eradicate HIV or reduce its transmission rate.\(^\text{210}\) One might say paradoxically in this context, Canada has pursued a relatively aggressive prosecution policy, which sits in contrast to the increasing ability to treat and manage HIV to the extent now that it may well amount to a lifelong condition requiring treatment, which in turn may not reduce life span.\(^\text{211}\) Following the decision in *Cuerrier*, the criminal law was relatively inactive; however since 2004 there has been a significant increase in prosecutions.\(^\text{212}\) It has also been noted that the sentencing pattern in such cases shows enhanced sentences when compared with comparable high risk behaviour where no harm is actually occasioned e.g. impaired driving, with seventy three days as the average sentence for the former, and one to eighteen years for the latter depending on whether the victim was infected.\(^\text{213}\) This sentencing pattern has not been explained by the court but it is believed this may result from a belief that harsher sentences may have an increased deterrent effect in relation to the offender before the court and in respect of potential offenders, the cogency of which remains highly contestable.\(^\text{214}\)

Notwithstanding the concerns expressed in *Cuerrier*, and indeed the expressed wishes of the Court in *Mabior* to clarify the law and restrict its reach to only that which was appropriate, the most recent position of the Court has in fact broadened the reach of criminalisation.\(^\text{215}\) While the Court in *Mabior* observed that ‘condemning people for conduct that they could not have reasonably known was criminal is Kafkaesque and anathema to our notions of justice’, and aside from the relative prevalence of prosecutions when compared with England, which at the same time are very low when compared with


\(^\text{213}\) Merimond, note 70, at 9 – 10.

\(^\text{214}\) Merimond, note 70, at 9 – 10., and also generally re a discussion on the efficacy of the deterrent effect of the law.

the overall incidences of HIV in the community, there is a lingering question as to how limited the test of harm in *Cuerrier* and later cases actually is.\textsuperscript{216}

There have been recorded convictions in relation to much less serious, and clearly not life threatening STIs which call into question the appropriateness of use of the aggravated offence which requires endangerment of life. These convictions, outside the context of HIV, were recorded prior to *Mabior*: however, it remains that the Court proffered as sufficient not only infections which if untreated would be fatal, but also those which are life-changing.\textsuperscript{217} This is a significant development, and while there remains the requirement that those infections which are not life-limiting should be serious that is, based on the experience in both Canada and England, a labile standard. On this basis, it appears that there is significant potential for criminal liability in relation to the transmission of a number of STIs, and whether or not a given case will reach court will depend on prosecutorial discretion, and whether it will meet the standard of serious harm will depend on the views of a jury in a given case. As to whether the law has potential to advance into exposure or transmission in the non-sexual context there is in Canada the limiting factor of the requirement for an assault. However, given the approach of the courts to consent and risk which will become apparent, once any bodily contact occurs, consent to which may be vitiated through exposure to the significant risk of serious harm which is a realistic possibility of transmitting an infection, this is a somewhat, but not very, limiting factor.\textsuperscript{218} Thus the test of harm while designed to limit the reach of the law has not done so either in terms of the range of STIs nor indeed I argue does it offer any reason to presume that the reach of the law is limited to sexual conduct. There is thus a significant level of indeterminacy in relation to harm which creates difficulty as to the potential breadth of criminalisation which is unwelcome in terms of the necessity of predictability and in relation to associated rule of law concerns.

Further issues arise in relation to the breadth of liability and it is clear that, in comparison to England, the range of liability is considerably broader as the offence extends to the harm of exposure to a STI as well as infection. Exposure liability in the form of an

\begin{itemize}
\item \textsuperscript{216} [2012] 2 S.C.R. 584, at para 14 per McLachlin C.J.
\item \textsuperscript{217} [2012] 2 S.C.R. 584, at para 92 per McLachlin C.J.
\item \textsuperscript{218} Additionally, see the comments of Laird, note 98, at 211 to the effect that it would seem that indirect forms of battery would be sufficient, alongside an apprehension of the application of any force to the body which is also comprehended by the offence of assault per section 265(1)(b), which provides that an attempt or threat to apply force, by word or gesture, which causes the other person to believe on reasonable ground that they have the present capacity to do so will satisfy the offence.
\end{itemize}
endangerment offence essentially involves the criminalisation of the risk of harm as opposed to the harm itself. In an earlier chapter, I have discussed the criminalisation of risk of harm as opposed to harm, and it is clear that there is a basis to argue in favour of this form of criminalisation.

The Canadian offence is one of explicit or direct endangerment in that it identifies the creation of a particular risk, through the definitions now provided in case law, in defining the offence and such a risk is sufficiently serious as to create reasons to act differently or to take precautions, a failure of which amounts to the wrong of insufficient regard for others. Such offences require probabilistic assessments of the degree of risk and the nature of harm prior to considering criminalisation, and, in addition, in individual cases. There are many factors which may be considered, these include: gravity of the potential harm, probability of its occurrence, the social utility of the conduct, context of the activity and the responsibility to take precautions. Supporters of this type of offence cite the inappropriate role of luck in the determination of liability, were this would be restricted to transmission only, in particular given the absence of control by the infected person in the determination of whether transmission will occur.219

However, while there is a justification for this type of offence, there are a number of principled objections which should militate against its deployment. First, and as will be addressed in greater substance in a later part, the effect of the reliance on the assault-based endangerment offence creates an offence of sexual assault which results in unfair labelling and mistakes the wrong of rape. Second, while definitions are provided, they are relatively indeterminate, when compared for instance to driving offences which require one to remain with a certain speed limit, and thus create inconsistencies in liability and the potential for extensive breadth of liability. Third, while the gravity of the potential harm may be seen to justify the criminalisation of the risk of that harm, this is related to a deterrence rationale as regards the role of the state in managing risk, and there is no evidence to support a deterrent effect, and evidence is available to the contrary. In this context, the English Law Commission have convincingly argued against such offences on the basis that they create a victimless offence by focusing not on the harm done, but the behaviour of a person, which extends unnecessarily and inappropriately the

reach of the criminal law into the private lives of individuals in circumstances where no actual harm has been occasioned. Finally, and with reference additionally to the breadth of the offence, the range of liability offends against the principle of minimum criminalisation and fails to have regard to equally efficacious methods and relevant countervailing factors which should militate against criminalisation in this context.

As a final point, the debate within the reviewed Canadian literature centres, in the main, on the appropriateness of the level or method, rather than the fact of criminalisation in this context, which is unsurprising given the embedded nature of criminalisation. In common with all arguments is the necessity to base prosecutions on sound epidemiological data, whilst also adopting a sensitive approach to persons suffering from HIV who are as a matter of common experience already stigmatised notwithstanding the criminal law’s involvement in their lives. The debate diverges, however, on whether it remains appropriate to continue to apply the aggravated (sexual) assault offence in all cases, with appropriately attuned tests as espoused in Cuerrier, or limit this level of serious criminalisation to actual infection, or persistent exposure cases, and deal with single instances either in the realm of public health or through the prism of criminal nuisance. The arguments are here, as in other places, diametrically opposed.

On the one hand, it is argued that criminalisation in the form of a very severe offence, even where transmission does not occur, contradicts a public health message regarding shared responsibility and harm reduction and further risks increasing general stigmatisation of those affected by HIV thus driving the matter underground and rendering it harder to deal with from a public health perspective. On the other hand, it

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220 The Law Commission (b), note 154, at 175 – 176; In saying this it is recognised that the endangerment offence is also used to prosecute instances of actual harm, however, this offence formulation is in itself inappropriate with reference to the consequences of vitiation of consent to the act of sexual intercourse, notwithstanding more general arguments regarding the intervention of the criminal law more generally.

221 Mykhalovskiy (a), note 203.

222 Grant, note 71, at 56 – 59; Cornett, note 94, at 101 – 102; Hughes, note 203; Mykhalovskiy (a), note 203, Mykhalovskiy (b), note 203.


224 Grant, note 71, 59; Merimond, note 70, at 29; Klein, note 203; Grant, note 70; Mykhalovskiy (a), note 203, Mykhalovskiy (b), note 203.
is argued that public health efforts will continue unaffected by the operation of the criminal law, which remains an effective and appropriate adjunct to public health efforts to eradicate, or reduce the prevalence of HIV. Further it is argued strongly that this form of criminalisation represents a true concern to deal with this issue, as it addresses the true harm, which is exposure to risk, and advocates rely heavily on the overall deterrent effect of this method—an effect which is highly contested.

There remains one additional line of argument, again prevalent throughout the literature, but more common to NGOs, HIV/AIDS organisations, and academics with a specific interest in this area, that criminalisation of any behaviour below that of intentional transmission of HIV or other STIs represents too great a hazard to public health initiatives and the community at large in terms of those infected with HIV, and as such public health efforts should be the only justifiable approach. In due course, I will argue that this is the correct approach. However, I turn now to the final part of this section which seeks to examine whether there are any satisfactory alternatives to the paradigmatic theoretical arguments in support of criminalisation in relation to offences against the person addressed in the theoretical chapter.

The Wrong and Harm of Transmission

When addressing theoretical perspectives on the criminalisation of conduct, and in particular offences against the person prosecuted in this area, I reached a conclusion that there is a justification for such offences, but presented the outline of an argument against their use. The perspective outlined in that part of the thesis is well accepted, and it relies on the conception of infectious organisms as physically harmful, and as a physical harm which can be visited upon others in the context of agential control which gives rise to the potential for criminal liability. However, there are alternative perspectives on this topic which emerge from the literature which I will now consider relatively briefly, as although they clearly make an important and insightful contribution which goes a significant way to explaining the exceptional approach of the law in relation to STIs thus far, which in turn has created a broader and unwelcome space for more general liability, they are not in my view determinative of the issue of criminalisation. While many of the perspectives

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227 Examples of such an approach are evident in, but by no means limited to: UNAIDS (a), note 226; Merimond, note 70; Weait (a), note 6.
emanate from the criminalisation of HIV, they too have the potential to offer perspective in relation to the broader question of criminalisation of the transmission of infections, and in turn to assist in understanding how the law has come to intervene in this area and whether it should.

**Autonomy, Integrity and the Harm of Infection**

Weait has offered a number of important perspectives in relation to the wrongs and harms which may be associated with the transmission of an infection, and HIV in particular.\(^{228}\)

In one perspective, he questions the concepts of autonomy and integrity and their place in the framing discussion for the harm and wrong of such offences.

To place this issue in context, we observe that the root of the criminal law’s approach to harm lies in the realm of assault which abhors even the slightest apprehension of the application of non-consensual physical force to the body.\(^{229}\)

As such the law places a particular emphasis on the protection of personal autonomy and bodily integrity, as observed by Blackstone:

> …the law cannot draw the line between different degrees of violence and therefore prohibits the first and lowest stage of it; every man’s person being sacred, and no other having a right to meddle with it, in any the slightest manner.\(^{230}\)

The law thus in protecting the person, their integrity and autonomy, has proceeded to protect not only their body but also their immediate surroundings as well, in essence then their sense of personal security. In keeping with this desire for protection more remote, or less immediate, forms or means of harm have been comprehended by the reach of the criminal law.\(^{231}\)

Advances in behaviour which may amount to an assault, which may be termed liberalisations, have also been mirrored in developments in battery offences which are now taken to include the indirect application of force, and more diverse forms of

\(^{228}\) Weait (a), note 6, at 81 – 114, and in particular in relation to alternative constructions of the concept of infection at 107 – 114; Matthew Weait (d), ‘HIV and the Meaning of Harm’ in Catherine Stanton and Hannah Quirk (eds), *Criminalising contagion: Legal and ethical challenges of disease transmission and the criminal law* (Cambridge University Press 2016), at 18 – 34.

\(^{229}\) Weait (a), note 6, at 89; Ormerod and Laird, note 5, at 582.

\(^{230}\) Cited in: *Collins v Willock* [1984] 3 All ER 274, at 378; Ormerod and Laird, note 2, at 708.

\(^{231}\) Weait (a), note 6, at 89; Ormerod and Laird, note 5, at 711 – 712.
These developments have permitted the law to respond to not only the direct application of force, or the immediate apprehension of its application, but also to fear of the unknown, an important point in the analysis of the harm of HIV infection.

In this sense, the development of the law to embrace the transmission of HIV as a form of physical harm might be explained solely on the basis of a natural progression of the criminal law in adapting to changed social circumstances. This bio-medical explanation is indeed plausible, and intuitively attractive: a physical harm to the body perpetrated and complete at the moment of infection, causing irreparable damage to the immune system, leading eventually to death at the time judicial decisions were delivered, and capable of dissection within the generally legally positivist characteristics of the law, which in turn avoids HIV exceptionalism.

This indeed is the approach adopted in *Dica, Konzani, Golding, Cuerrier and Mabior.* In this analysis infection with HIV, or indeed another STI, is no different from any other form of violence or action causing an injury. The development of the law to embrace infection as a form of harm might be placed in a broader context where liberalisations in the conduct or result which may amount to harm are grounded in a dominant risk discourse in our society which sees the law as a provider of physical and ontological security.

However, in analysing the harm of infection, Weait rejects the legal conception of autonomy as a basis for the analysis of harm and responsibility. To his mind, while autonomous will underpins the ‘orthodox subjectivism’ of criminal liability, it also fails to address the relational, embodied and affective dimensions of human life and, as such, it fails to do justice. This analysis is linked to the deterministic perspectives discussed in an earlier chapter.

Reasoning from

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232 For example, *DPP v K* [1990] 1 All ER 331, permitting indirect battery; *R v Lewis* [1970] Crim LR 647, where force was applied to the victim not directly by the defendant, but as a result of his actions she fell; *R v Ireland; Burstow* [1998] AC 147, in terms of serious psychiatric injury amounting to bodily harm.

233 Weait (a), note 6. "Fear of the unknown relates to the lived experience of a particular harm, as opposed to the fact of the harm itself, which we will argue should be the touchstone in determining whether HIV infection is actually a harm in and of itself."

234 Weait (a), note 6, at 93.

235 Weait (a), note 6, at 113; Cornett, note 94, at 87; Warburton, note, 150; Schuklenk, note 94, at 284; Mawhinney, note 94, at 207 – 209.


237 Weait (a), note 6, at 112.

238 Weait (a), note 6, at 108 – 119.

the failure of the concept of autonomy, he believes that a ‘politically’ astute change in direction is evident by a shifting of focus to integrity.\textsuperscript{240}

The law currently views the fact of infection as a harm which violates our integrity, most specifically our bodily integrity. This analysis relies on a concept of a human being as being possessed of an innate integrity, which indeed may be conceived immunologically, and as such HIV infection amounts to a violation of our immunity and thus our integrity, and as such warrants criminalisation.\textsuperscript{241} The question is, however, whether we are possessed of this type of integrity, and it is argued that our integrity is not \textit{a priori} but contingent on our management of our integrity through the management of risk and the management of our relationships with others.\textsuperscript{242} Thus, Weait concludes, just as it makes no sense descriptively to describe ourselves as autonomous, so to it makes no sense to claim that our integrity is given. To his mind the claims of autonomy and integrity are linked to the physical and ontological security we crave, but they fail to address the reality of sexual relations and the nature of the transmission of HIV.

In assailing this position, which is specifically directed at the fact of infection, Weait contends that it is necessary to ask the question whether an infection passed is actually no different than acts of violence which occasion harm, or other actions which bring about harm. He argues that the law in the sense that it describes the harm of infection fails to advert to the real harm, which in reality results not from the moment of infection, but really from the meaning of infection and the context in which it occurs, that is HIV is not a harm \textit{in se}, it is a social fact, and its transmission and attendant liability for its infliction is dependent on meaning and context.\textsuperscript{243} Thus when we conceive the harm of the offence as a moment of differentiation, that moment where one was uninfected, and then became infected, was immune and then was not, this is the point, all other things considered, when liability may arise, we must think then of the harm of the infection. In the context of HIV, one’s immune system is not immediately affected, this may take some years, and indeed with the development of ART it might be argued that we will, notwithstanding some physical symptoms, and an accompanying medical regime, live a comparable life to others who are not infected.\textsuperscript{244} Is it then the possible psychological trauma of the

\begin{footnotesize}
\textsuperscript{240} Weait (a), note 6, at 109.
\textsuperscript{241} Weait (a), at 108.
\textsuperscript{242} Weait (a), at 110.
\textsuperscript{243} Weait (a), note 6, at 113
\textsuperscript{244} Hogg and others, note 211.
\end{footnotesize}
infection, fear and anxiety will no doubt play a large part in the process, thus then the harm of the infection may be the lived experience of infection, yet the criminal law makes no reference to the lived experience of a person with HIV, and simply classifies the fact of infection as a harm, and, as a consequence, all those who carry the infection as essentially harmful.245

He reasons that a different approach is required in the case of the transmission of a pathogen; this new approach resists the traditional criminal legal imperative of reducing an offence into its constituent technical elements, which in turn reduces a crime to simply the sum of its parts.246 It is possible to conclude from his analysis, that integrity is not a given in all circumstances, it is dependent on our management of our integrity, and further that the harm of HIV infection is not infection itself; rather, it is the lived experience and social reality of infection. This might be termed a theoretical distinction, but it is an important one: take for example a blow from a hand, or a stabbing with a syringe. Neither the hand nor the syringe are classified by the law as innately harmful; only their usage in context, and the meaning of that usage to the victim, may be give rise to criminal liability. Although criminal liability for the transmission of a STI relies on context, the law as it stands, characterises the HIV, or other STIs, as essentially in and of themselves harmful, and as such sends a powerful message that those infected are harmful, which may in turn lead to a significant stigmatising effect on those who live with HIV and other STIs, and may overall cause a net loss to society through impeding public health efforts.247 It is stressed that this is not to say that infection with HIV can never result in criminal liability, context and meaning may facilitate this transition, and we will examine those circumstances in due course.

The lived experience discussion requires in some senses a leap of imagination, particularly if we seek to integrate the idea of infection within what one might refer to as the classical formulation of criminal offences. However, if one takes a step back, and considers that very many infections are capable of causing ‘physical harm’, in the immediate sense of that phrase, yet we have to date seen no movement towards

245 Weait (a), note 6, at 110; A critique of Weait’s in-depth analysis of this may be seen in: Cornett, note 94, 84 – 87; and to a lesser extent in: Schüklken and Philpott, note 94, these critiques point to the medical “fact” of harm, and the fact that stigmatisation arises from irresponsible behaviour and is not inherent to ones infected status.

246 Weait (a), note 6, at 110.

247 Weait(a), note 6, at 204 – 206.
criminalisation outside of the sexual context. The question then emerges whether in reality we are concerned, in prosecuting these offences, with the physical harm of infection, or instead with the context in which infection occurs, that is a different kind of harm. If the latter is the case, then a cogent argument can be advanced that the law only came to regard HIV as harmful, in the physical sense, as a result of the context in which it is transmitted, and as such are the general non-fatal offences against the person the appropriate vehicle for criminalisation of transmission, and is HIV really a physical harm like any other. The related question arises as to whether the criminalisation of the transmission of pathogens generally, if the law were to develop in this area, would enhance or inhibit the interests of society.

This is a powerful critique which assails the fact of infection as a criminal harm. The rejection of autonomy and integrity as an effective basis for analysis, and the alternative perspective recognising the potential for criminalisation based on the experience rather than fact of infection creates a worthwhile critique particularly in terms of the classification of HIV as a harm, and those infected with HIV as harmful, where context has been paramount in the development of the criminal law thus far. However, the rejection of autonomy is related to determinism, and neither free will nor determinism may be proved; however, autonomous decision making does underpin very many social practices and as such most philosophers reconcile these competing conceptions by recognising that all behaviour is not so pre-determined that blame is generally unfair, while at the same time recognising that in certain circumstances there may be behaviour which is the subject to strong determining factors such that free will may be displaced. The position in relation to integrity and the management of that integrity speaks as to a shared responsibility model in relation to the transmission of infections and there is much to commend in such an approach, however, shared responsibility must be understood within the power dynamics of a given relationship, such that again we return to the context and potential criminal liability.

Weait has made a further recent contribution in this area again focusing on the harm of infection, specifically HIV, and which differs in some respects to the one just described. In this perspective, Weait calls on us to question what is considered normal in relation to the body and HIV, that is the absence of HIV, that such conceived normality

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248 Weait (d), note 228.
should not be taken for granted, and specifically that HIV is an immanent characteristic of all our environments which should both cease to be treated as affecting some people only and as a form of impairment for the purposes of criminal liability. In advancing his theory, he refers us to the changing conception of the human body over time, which at one level can involve what he refers to as the legal body which is empirically observable as a physical entity and also one which may have conceived rights such as autonomy and integrity. Additionally, there is the physical body which in medieval terms was porous and uncontrolled, and the coming of what may be termed Modernity which resulted in the distinction of mind and body giving rise to a conception of self and others which engendered as sense of control over chaotic physicality and its replacement with a bounded and individuated self which is capable of self-control through the exercise of autonomous will. We are then referred to the process of individuation and responsibilisation which alongside the development of ‘bio-political technologies’ such as the statistical measurement of mortality and morbidity, and medical advancements, which allowed a conception of one’s self as molar and imbued with integrity and autonomy, to which HIV represents a significant threat. It is necessary to his mind to deconstruct this conception of self and the relationship with the world and how we analyse action and human subjectivity, and in particular the paradigm of agency and responsibility.

It is not possible to give a full account of all the arguments here, however, I will endeavour to summarise the position as follows. Weait suggests that we reimagine agency such that we are all part, but only one part, of an agency network which may either be distributive or composite. This is not to deny human agency but to recognise it as one part of a diverse network of actors and actants in which the will of a person is but one part, and which may be conceived as part of an assemblage where the productive power of effects is always as a result of collectivity, and Weait recognises this as an unsettling perspective from the viewpoint of the criminal law, where human beings are the centre of action. Turning to the transmission of HIV, the moment of infection with HIV should thus be recognised not as moment solely related to the will of the human actor but

249 Weait (d), note 228, at 21.
250 Weait (d), note 228, at 23.
251 Weait (d), note 228, at 23.
252 Weait (d), note 228, at 23 – 25.
253 Weait (d), note 228, at 27 – 29.
254 Weait (d), note 228, at 28.
the productive effect of a wide range of actors and actants, which includes the person, the
virus, state actors who may influence treatment and testing, stigma in the community and
many other factors representing the assemblage of agency. However, as Weait
observes, there remains the issue of the role of human agency within this composite
assemblage which leaves room for criminal culpability on the part of this moral agent.

Weait contends that it is possible to counter this, to his mind, lingering moral agency
point with reference to social theories relating to trans and posthumanity. In this
paradigm, we are all posthuman in the sense that our lives are punctuated by the
environment in which we live, and the world is to be properly understood as both human
and non-human giving rise to a more holistic conception of existence and action. This
posthumanist perspective recognises an increasing elision between the human being and
technology, thus we are posthuman in the sense that we are products of ourselves and the
effects of technology and medical intervention, without which many of us would have
died. Considering this perspective on the nature of our existence and our relationship with
each other and the environment, allied to the actor network assemblage of agency, Weait
then concludes that what the law regards as ‘natural’ or ‘normal’ in the human body and
the associated concepts of integrity, is not so as our bodies are both composite and
contingent. With this in mind, he turns to whether human agency has a continuing role
in criminal liability for the transmission of HIV; he concludes that human agents continue
to have a role but their role is no more or no less than the other actors and actants in the
assemblage of agency and the other punctuating factors which contribute to the existence
and transmission of HIV in a community. As such, HIV itself is seen as an actant and all
existing and new infections are the product of a wide range of factors. As all human life
and each person is the product of the composite effect of agency, then the bodies of
persons carrying HIV are composite in a merely different way than those who do not
carry the virus, and as such the virus should be regarded as a normal facet of human life
and should not give rise to criminal liability merely from the fact of its transmission
arising from its conception as a corporeal harm.

255 Weait (d), note 228, at 28 – 30.
256 Weait (d), note 228, at 29 – 31.
257 Weait (d), note 228, at 31.
258 Weait (d), note 228, at 31.
In this context, Weait forcefully, and compellingly, argues that HIV is an ecological phenomenon which in itself should not be regarded as criminally harmful. However, he does recognise that some may contend that this line of argument would decriminalise all forms of physical interference; however, he qualitatively distinguishes the transmission of a virus in normal day to day conduct from other acts of physical interference.\(^{259}\) The former is a naturally occurring ecological phenomena, whereas interference with the body of another using a fist or weapon causing injury is not. Arising from this approach, there is a recognised latent point about the introduction of HIV to the body of another through other means, for example by injection. Here, Weait contends that the focus should be on the method of occasioning and the mind of the actor, not on the virus itself; per his example, if the injection took place without knowledge of the presence of HIV, the infection would still occur, what should be the focus of the law is the puncture wound inflicted in terms of the harm of such an offence, and the mind of the actor in acting.\(^{260}\) Ultimately Weait’s conclusion is that the transmission of pathogens is not \textit{per se} a criminal harm as such infectious organisms are naturally occurring ecological phenomena, the transmission of which in day to day conduct is the inevitable consequence of our interaction with each other and in itself is an innate value-free act. He does recognise that context and human behaviour can give the value-free act of transmission a meaning which is cognisable by the criminal law, but that this would be related to perhaps to non-disclosure of the presence of infection.\(^{261}\)

This perspective is illuminating from the standpoint of understanding the harm of infection and there is merit in the perspective of network of agency, such that there are factors other than human will which impinge upon any particular instance of infection. While such a conception of agency is challenging from the perspective of the law as it is currently expressed and understood, it is not in any sense determinative of the matter of criminalisation, and nor does Weait claim that it is. Indeed, while factors other than the will of the person who transmits the infection are not considered in the context of human agency currently, they may be considered to some extent in issues such as in the determination of the objective elements of recklessness and, in this sense, are not alien to the law, though they are not conceptualised in the same manner or to the same effect. The

\(^{259}\) Weait (d), note 228, at 32 – 33.
\(^{260}\) Weait (d), note 228, at 33.
\(^{261}\) Weait (d), note 228, at 34.
remaining spectre of human agency and its role in the transmission of infections remains, though, at the same time, is denied as amounting to a criminal wrong as this perspective refutes the contention, taken for fact, that the virus is in itself harmful in a criminal sense. Thus, one could start with the premise that the virus is not harmful, and then say there is nothing for which to impose agential liability. The entire perspective is framed by the normalisation of infectious pathogens and the journey through alternative conceptions of agency when combined with the posthumanist conception of self and our punctuated reality assist Weait in conceptualising the normality of pathogens and their transmission as an ecological reality.

This point of view leaves intact the role of human agency, and the potential for criminalisation based on deceit or other grounds, but not based on the harm of infection but other wrongs and harms, such as a breach of trust, and as such I will not engage in a sustained critique of the agency issues. As the gravamen of the issue is the normalisation of pathogens, I suggest that there is much to be drawn from this analysis and the deconstruction and reconstruction of our conception of self, others and the environment as such the alternative construction of the normalcy of infection. This exercise challenges the paradigm that infection represents a harm in the context of a setback of interests in the conception of Feinberg, or the alternative related constructions. 262 Others, and many, will and have rejected any conception that there is any normality to the state of infection, where normality is understood as rejecting the harmfulness of such pathogens in a criminal sense. 263 These perspectives look at the medical consequences of infection, and elide these with the definitional parameters of harm in the context of considering criminalisation. Critics of Weait's position do not deny the reality of infection, however, as they consider pathogens which are capable of infecting our bodies as harmful they too regard human beings as harmful where they exercise insufficient caution to prevent transmission of the pathogen. 264 They regard such alternative conceptions in relation to autonomy, integrity and normalcy as denying the competency and thus responsibility of those who are infected, and as such they evidence in the minds of some an inappropriate

263 Mawhinney, note 94; Schuklenk, note 94; Schuklenk and Philpott, note 94.
264 Mawhinney, note 94; Schuklenk, note 94; Schuklenk and Philpott, note 94.
culture of sympathy towards those who have acted in an irresponsible and dangerous way.

These two positions are irreconcilable and it is clear that the bio-medical construction of harm is the one adopted in all jurisdictions in which the criminal law has a role and what I will term Weait’s ecological construction is unlikely to achieve prominence unless there were a major societal shift away from the conception of pathogens in this context. In terms of whether such a shift were possible, it is important to recall that there is a long standing interrelationship between disease and crime at a societal level and both may be regarded as forms deviance which interrupt normal social functioning, with former a sanctioned form of deviance, the latter not. Additionally there is a considerable crossover between disease and crime at the level of metaphor both in terms of the disease of crime, and the crime of disease, with the latter seen as an attack on the boundedness of our society and our individuality. I make these points to observe that, while there is much to commend in this particular perspective, to be effective in the reality of criminal justice systems it would require a major societal shift both in the conceptions of individual responsibility and the conception of harm related to disease, neither of which, I submit, are likely.

Both of Weait’s critiques, while not determinative of the matter of criminalisation, do point towards an important scepticism of the nature of the harm of infection, pointing to the fact that the transmission of pathogens in normal day-to-day activities is a facet of our humanity. As such, we should question where liability has arisen in the context of sexual intercourse, whether we are primarily concerned with the physical harm of infection or whether in fact we are concerned with the management of risk in society, which may not in this context best be achieved through resort to the criminal law, or with a breach of trust in personal relationships, which is not addressed to any extent in the offences prosecuted.

A Breach of Trust
Although not overtly addressed as a determinant of criminal liability, the issue of trust and relationships is important in the context of the transmission of pathogens. The issue

266 Hanne, note 265, at 38 – 54, 52 – 54 in particular.
of trust is related to the ethical duties we hold towards others in a community, and Brazier has observed those who are ill do not lose their normal moral or legal duties and thus those who voluntarily expose others to the risk of serious harm through the risk of infection commit a wrong which is morally indistinguishable from assault. In recognising such a duty, Brazier reasons from the autonomous rights of patients which in turn carry reciprocal duties, while at the same time recognising that the these duties, when converted into legal harms and wrongs, carry innumerable consequences. However, particularly noteworthy from Brazier’s contribution is the recognition, which most would accept, of a duty to do what one can to minimise transmission risks or disclose those risks when one is infected with a serious pathogen. Whether these convert to legal duties, and the myriad of intervening and consequential factors which impinge on the exercise of the duty, is the subject matter of the entire thesis, however, for the moment, such duties do interact with the trust we place in each other in a community.

A preliminary point relates to the definitions of trust, and Baier has observed;

Some important variants of trust do take the form of alliances and other forms of willingness to let others close enough to us to be able easily to invade our “space,” to “violate” us, in the trusting confidence that they will not in fact do this. There are of course many types of trusting relationships and breaches of trust do not always, nor should they always, give rise to criminal liability. However, there are instances where breaches of trust are criminalised and such criminalisation may be justified where there is a breach of trust which either violates the vulnerability networks which make social existence necessary or in general engenders a reduction in trust within society, with opinions varying as to whether such violations should be confined to arm’s length relationships or more intimate circumstances. Slater has examined the area of trust and the criminalisation of HIV transmission and proposed that a trust based offence be created such that those outside a relationship of trust, for example a one night stand, 

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267 Brazier, note 94, at 406.
would not be comprehended by the offence. In reaching this conclusion, he sees no social utility or social good in sexual expression outside of loving relationships, which are trust relationships, and as such posits that only those in trusting relationships should be protected by the law, which in turn is linked to the requirement of those outside of trusting relationships to take responsibility for self-protection as they have no legitimate basis to trust their partner. In proposing an offence which would deal with intimate trust relationships, he differs from Hoekema who believes that the criminal law should only intervene in arm’s length relationships which are in essence involuntary. However, Slater makes the distinction that it is not the involuntariness of the relationships which matters, but instead the involuntariness of the trust, which in the context of loving relationships is to his mind involuntary, as suspicion would be inimical to the flourishing and social good of such relationships.

The purpose here is not to consider all the elements of trust as they are related to criminalisation, nor to engage with impoverished views in relation to the relative worth of sexual intercourse depending on the nature of the relationship; however, it is clear that there is a basis upon which, even if not criminalised in this fashion, trust plays a role and may offer a penitential justification for criminalisation. As Laird has observed, all prosecutions in England in this area have taken place in the context of relationships and it may be that it is not solely a matter of physical harm which causes complainants to have recourse to the criminal law in response to the transmission of infections, or indeed exposure to the risk of transmission, during sexual intercourse, and the issue may have been the harm of a breach of trust. I believe this to be a crucial observation in explaining not only recourse to the criminal law by complainants, but in addition the willingness of the criminal justice system to respond. Sexual intimacy is a particular facet of our lives and one which involves various elements of trust and confidence, deserved or not, and in particular the instances of transmission or exposure which have been prosecuted are generally only transmitted through the exchange of bodily fluids or intimate sexual contact. In admitting ourselves to sexual intercourse, be it for passionate or perfunctory reasons, we open ourselves to an element of vulnerability, and even those

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270 Slater, note 269, at 325 – 328.
271 Slater, note 269, at 324, 325 – 328.
273 Slater, note 269, at 324, 325 – 328.
among us who are aware of the risks often chose not to have regard to them or trust that others will alert us.

Finally, if the breach of trust is a factor which may have caused the law to limit its attention thus far to sexual transmission, one must question whether the same factor will continue to have its limiting effect. It is clear that if trust does have a role, then this will not be the case, and there are many examples of trusting relationships outside of the sexual context, where pathogens may be transmitted and thus recourse to a criminal law remedy may be sought arising from a perceived breach of trust. For example, Brazier refers to the lecturer who exposes their students to Tuberculosis, and, as far back as 1993, the example of a nurse entering a nursing home for duty while infected with a transmissible pathogen was raised. While there are degrees to which any person might regard the transmission of an infection to be a breach of trust and this can arise where it occurs in a sexual or another context, the two relationships just described would be regarded as trusting and there is no reason why a person exposed would not feel wronged by a breach of trust. What is clear is that trust can have a role to play, may well have had a role to play in the criminal law’s advancement in this area, and, at the same, time will have a very limited role to play in limiting the further progression of the law.

_Causation_

A final issue which must be examined, in the context of the _actus reus_ of offences which comprehend transmission, is the requirement to show that the defendant caused the result which forms part of the _actus reus_ of the offence. The question of causation may be vexed for many reasons, such as whether in a factual sense ‘but for’ the defendant’s conduct the result would not have occurred, and even if this is the case, there may exist other factors such as contributory causes or intervening acts which militate against the defendant’s conduct being the legal cause.

In the case of Canadian law, which is predominantly concerned with exposure liability, causation does not feature to any great extent, and is not dealt with in any detail, in the leading judgments, save that the defendant must have engaged in the conduct, and

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275 Brazier, note 94, at 406; Law Commission, note 170.
276 Ormerod, note 5, at 90 – 95.
277 Ormerod, note 5, at 90 – 95.
thereafter the gravamen of the offence refers to a serious risk of significant harm, and not the causing of harm itself, hence causation is not a central issue.  

Causation has not arisen in the earlier reported judgments in England even though it remains necessary to prove that the defendant caused the HIV infection. It has been argued that the failure of causation to arise results from one of a number of causes: a misunderstanding as to the import of scientific evidence available, a failure to challenge scientific evidence on the basis that the case is proceeding on a consent defence, or finally as a consequence of a broader evidential narrative which compellingly points towards the defendant being the cause of the infection.

This remains an important issue however, as may be seen from the case of Michael Collins, who was defendant of inflicting GBH through the transmission of HIV in the course of sexual intercourse with his male partner. Collins sought to challenge the scientific evidence tending to support that he was the cause of his partner’s infection on the basis that his partner was sexually active with other men who were HIV positive. The judge directed an acquittal on the basis that, on the evidence presented, they could not be sure he was the source of the complainant’s infection.

The prosecution had presented scientific evidence in this case, as has occurred in many other cases, and this takes the form of phylogenetic analysis. To understand this type of analysis we must note that the HIV virus manifests in a number of strains, and the purpose of the analysis, in short, is to ascertain whether the strain of the virus the complainant has contracted is genetically related to the strain with which the defendant is infected. The ultimate utility of this type of evidence is that it can rule out the defendant as a source of infection, but can never indicate that the defendant was the source of the infection. The manifestations of the virus are not person specific, and moreover the virus mutates within its host, thus the most that such scientific evidence

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279 Weait (a), note 6, at 97 – 98.
280 This is not a reported case, what follows is taken from an account in; Weait (a), note 6, at 104.
281 Weait (a), note 6, at 97 – 98;
283 UNAIDS (b), note 282; Bernard and others, note 282.
may state is the degree of relatedness between the samples, but this is never evidence of causation on its own, given the possibility of infection with the same strain from another source.\textsuperscript{284} Another test has recently emerged which seeks to establish how recently a person was infected which may in turn lead to a complainant believing that the defendant was the source of infection, however, these tests are not a reliable basis upon which a prosecution can proceed, though that does not discount their use in evidence alongside other compelling evidence.\textsuperscript{285}

The issue of causation received somewhat greater attention in \textit{Golding}, where there was some dispute as to whether the source of the infection was Golding.\textsuperscript{286} Notably in this case, the Crown Prosecution Service (CPS), in its guidelines, states that a prosecution should never proceed unless there is scientific/medical and factual evidence showing the defendant as the source of transmission. However, in this particular case, the medical evidence procured by the CPS actually noted an absence of such evidence yet the prosecution proceeded, a point the Court said was in no way determinative in light of its own consideration of matters.\textsuperscript{287} This is a concerning development, as this case and a number of others have proceeded on the basis of a plea, and in this particular case Golding’s advocate had not obtained independent medical evidence and resultantly much of the case turned on the informed nature of the plea. The particular point being that prosecutorial guidance is by no means a bar to unfair or unsound prosecutions, and there is a need to take a cautious approach where medical evidence is available as to the import of that evidence.

The matter of causation in \textit{Golding}, as in other cases, rested on circumstantial evidence as there was no evidence of the variant of HSV with which Golding was infected. Although not addressed by the Court, even if there were, this would not have been to a degree conclusive as to identify him as the source, were he found to be infected with the same variant, as it would still be necessary to discount the possibility that the complainant was infected by another partner.\textsuperscript{288} Therefore, given that the defendant was infected

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\item \textsuperscript{284} UNAIDS (b), note 282; Bernard and others, note 282.
\item \textsuperscript{285} UNAIDS (b), note 282, at 28
\item \textsuperscript{286} [2014] EWCA Crim 889, at paras 9, 17 – 19, 57 – 59, 62, 65, 76.
\item \textsuperscript{288} The CPS acknowledges the limitations of scientific analysis as to the variant of virus, recognising that if there is a difference in variant this is exculpatory, but whereas there is the presence of the same variant this is not enough to show that the defendant caused the infection: Crown Prosecution Service, note 287.
\end{thebibliography}
before the relevant time, the Court having accepted the evidence of the complainant that their relationship was monogamous from her perspective and having considered the relevant incubation period for symptoms to become evident, the Court was satisfied that the defendant was the source of the infection. Golding, as with other cases in this area, are what Laird refers to as easy cases from an evidential point of view: there is a relationship, evidence of monogamy by the complainant, and an account of sexual history on the part of the complainant which suggests that the defendant is the source. Thus, the court is free to conclude that the defendant is the source.\textsuperscript{289} Scientific evidence may be of assistance, but in reality it is more likely to be so where it has an exculpatory effect for the defendant, otherwise it merely becomes part of broader evidential narrative which, though in no way conclusive, allows the jury to draw an inference from the available facts that the defendant was the source of the infection.

These points do not in any way discount the possibility that liability can be established through a broader evidential narrative of the sexual history between the complainant and the defendant, the defendant’s medical history, the complainant’s medical history; however, most regrettably, this will inevitably also involve an intense enquiry into the sexual history of the complainant also, to discount possible alternative sources of the infection.\textsuperscript{290} The CPS guidelines also recognise the importance of sexual history on the part of the complainant in discounting other sources of infection, and I believe that this is one of the very concerning aspects of such prosecutions, as while in other areas of crime related to sexuality there has been a drive to move away from sexual history as a determinant of current issues here the focus must remain.\textsuperscript{291}

Finally, the point emerges as to whether causation would present an insurmountable challenge such that it has prevented the extension of the law beyond the realms of sexual intercourse. No doubt causation would be an issue in some cases, however, it is also in an issue in STI cases and, just as it has been overcome in those instances, there is no reason why it would not similarly do so outside of the sexual context.\textsuperscript{292} If a person were to enter public transport while infected with a common infection, which as discussed above could have the required effect such as to potentially give rise to criminal liability,
then it would seem that issues of causation could prevent liability attaching, as it would be difficult to prove beyond a reasonable doubt that they were the source of the infection. However, where the context was more confined even where the infection was common then such difficulties would lessen, such as nurse in a nursing home, furthermore the less common the infection then the wider the circumstances in which it would likely be possible to prove causation to a sufficient degree, such as a person entering public transport with a very rare infection. Therefore, causation offers no definitive bar to prosecution, all other things being equal, in relation to the transmission of pathogens outside of the sexual context.

**Concluding remarks**

It is clear that the courts have come to recognise STIs as a form of harm with which the law can and should be concerned, even in circumstances where they were faced with many years of contrary authority which recognised the public health implications of such interventions. The courts in neither jurisdiction have engaged in any meaningful way with why those public health concerns should be abandoned, save to refer to some current viewpoints for and against criminalisation. Courts in both jurisdictions utilised both judicial or legislative developments to ascertain the permissibility of imposing liability, but have singularly failed to offer any reasoning as to why liability should be imposed in contradistinction to a public health approach, and why it came to be imposed in the context of sexual intercourse.

Chalmers has identified a common question of ‘why now?’ by those concerned with this area, and offers the simple solution in the context of England – there must be prosecutors willing to take a case, and a law which allows them to do so, the first being present and the second arising with judicial developments. However, he additionally says that the wrong question is ‘why now?’, and the better question is ‘why not earlier?’ when considering the comparative ability to prosecute in other jurisdictions. This may be so, however, this still fails to address the question as to why this response arose in the context of sexual intercourse. As I have argued, and will continue to argue as I proceed, neither the definition of harm nor issues of recklessness or consent represent any reason why the law first intervened in the context of sexual intercourse, nor why it has continued to

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intervene in that realm only. In this regard I agree with the conclusion of Laird that the only restraint thus far has arisen from prosecutorial discretion, and the advent of criminalisation is associated with the Otherness of those who became infected, and can infect, through sexual intercourse – persons who are regarded as deviant and thus a legitimate target of the criminal law.\(^{294}\)

The criminal law in both jurisdictions now embraces a wider range of STIs than HIV, however, the critiques of the concept of harm related to infection are compelling and worthy of consideration. They point us to the relational nature of our existence, the tensions in what we conceive of ourselves, how we manage ourselves and our interaction with our environment. Additionally, they question the conception of abnormality associated with pathogens which are so immanent to our lives, and how we construct them as a harm to be inflicted as opposed to a presence to be managed. These critiques add significant weight to the arguments against criminalisation, although I proceed on an alternative path to rationalise my opposition to criminalisation.

**III – Recklessness and Risk**

*Introduction*

In the preceding part I, considered external elements: those actions and consequences which make up the offences charged in this area. In this section, I will consider the *mens rea*, or the mental elements, the blameworthy state of mind which a defendant must have in order to incur criminal liability. I will consider recklessness in the main, as this is the required fault element to establish liability in English law. In the course of doing this, I will analyse the required state of mind of the defendant in terms of their state of knowledge and advertence, and additionally consider the objective elements which bear on the assessment of the justifiability of a risk taken. I will then consider the position in Canada in terms of the intent of the defendant to commit a sexual act, the state of mind of a defendant with reference to whether he has, or may have, an infectious disease capable of transmission during sexual intercourse and the interrelationship this has to bringing the complainant’s consent into question. Finally, I will examine the factors involved in the determination of the significant risk element of the Canadian test, as, although these form part of the *actus reus* of the offence, the analysis provides important perspective in relation to the approach of the criminal law to risk in this area.

\(^{294}\) Laird, note 98, at 227 – 227.
**Fault and Mens Rea**

As discussed previously, the competing concerns of autonomy and welfare loom large in any discussion of criminalisation and they presuppose the determination of individual and collective interests, the deployment of the criminal law to protect those interests, and a restraint on the law against undue interference with personal interests. Just as these concerns weigh in the process of deliberating on the criminalisation of conduct, so too do they have relevance in determining the conditions of liability associated with offences. Relying on autonomy, there is a conception of an individual as a rational and deliberative with agential responsibility for actions which have prohibited consequences which were knowingly brought about or knowingly risked, and this is the essence of subjectivism expressed in the concepts of *mens rea* known as intention and subjective recklessness.\(^\text{295}\)

However, welfare concerns call on us to act collectively and cooperatively and as such create arguments for extension of the conditions of liability beyond subjective awareness and into the realm of duties to take care, and as such the creation of negligence, strict or absolute criminal liability in certain circumstances, which are perhaps better represented as a state of fault as opposed to a state of mind.\(^\text{296}\)

This thesis is predominantly concerned with the subjective states of liability, and in this context to some regard intention and recklessness as occupying points on a scale of blameworthiness, with intention occupying a higher scale than that of recklessness.\(^\text{297}\)

This is an important consideration as a multitude of civil society organisations, international organisations and some interested academics call for the limitation of liability in this area to those who act intentionally. This limitation may be potentially justified on the basis of differing levels of blameworthiness with reference to the state of mind of the actor, alternatively with regard to concerns pertaining to the operation of the test of recklessness in practice, or a narrowing of the reach of the criminal law and thus its potential negative consequences through a narrower prism of criminal liability.

Whether those who act recklessly, as opposed to intentionally, are regarded as equally blameworthy or less blameworthy will very much depend on the circumstances, and

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\(^{295}\) Subjective recklessness will be referred to as ‘recklessness’ as I proceed; Ashworth and Horder, note 130, at 155 – 156; In expressing the subjective states as those of intention or recklessness it is necessary to acknowledge the variations of meaning within those terms and it is not merely a distinction between intention and recklessness, and the borders between the two states and the terminology used to describe them are contested.

\(^{296}\) Ashworth and Horder, note 130, at 160 – 168.

\(^{297}\) Ormerod and Laird, note 5, at 113.
perspective, and in particular the gravity of the harm risked where one acts recklessly.\textsuperscript{298} In particular where the gravity of the harm risked is quite significant, and the actor adverts to that risk, there is an argument to be made that they are as blameworthy as a person who set out to cause the harm in question.\textsuperscript{299} However, it is equally the case that context proves paramount to an analysis and differing states of mind in different circumstances may bear on the blameworthiness, \textit{vel non}, of the actor.

Duff makes the point that intentionality is an important facet of moral blameworthiness in the context of criminal liability, and he conceives those who intend to set back the interests of others as exemplifying hostility towards those interests and thus as being in a normatively different position to those who are reckless. However, he additionally regards those who are subjectively reckless or indeed those who are indifferent, that is do not advert to the creation of a sufficient risk of harm to others, to be potentially culpable by demonstrating insufficient concern for the interests of others.\textsuperscript{300} This position moves closer to recognising a normatively different position, depending on a state of intention or recklessness, but this position does not in Duff’s view, at least in relation to offences of endangerment with which we are concerned, militate against criminal liability. However, in Duff’s analysis the state of mind of the actor does bear on the determination of criminal responsibility in that where a person does not act intentionally there are a range of factors to be considered in the imposition of criminal liability, such as: the gravity of the harm, probability of occurrence and the worth of the conduct, which all influence whether or not criminal responsibility should be ascribed.

Alexander and Ferzan go further, arguing that recklessness epitomises the essence, and should be the singular determinant, of culpability in that it evidences an insufficient concern for others manifest in the taking of risks in relation to the legally protected interests of others for insufficient reasons.\textsuperscript{301} They argue that the central concern is acting for insufficient reasons, and the focus is a doxastic assessment of the level of risk thought to be imposed and the reason for acting from, both singularly from the perspective of the

\textsuperscript{298} Victor Tadros, \textit{Criminal responsibility} (Oxford University Press 2007), at 235 – 236.
\textsuperscript{299} Tadros, 298.
\textsuperscript{300} R. A. Duff, ‘Criminalizing Endangerment’ in R. A. Duff and Stuart Green (eds), \textit{Defining crimes: Essays on the special part of the criminal law} (Oxford University Press 2005), at 43 – 64.
actor. This entirely subjective focus rejects objective probability assessments in the determination of reckless liability as the determination of probabilities is viewed as an epistemic exercise relative always to one’s perspective, and the authors argue that the only perspective which is relevant to the determination of liability is that of the actor relative to their reasons for acting.

These perspectives in relation to states of mens rea and the issues surrounding reckless liability establish some of the important thematic points which emerge in this part, such as: the advertence of the defendant, the role of objective assessments of risk and their interrelationship with liability and the potential conceptions of varying states of blameworthiness depending on the relevant mens rea sufficient to establish liability. I will address each of these themes as I examine the establishment of liability under the offences charged.

Recklessness and Transmission Offences
Subjective Awareness of a Risk
As discussed previously, all cases thus far in England have proceeded on the basis of section 20 of the 1861 Act. The establishment of liability requires that the defendant have maliciously inflicted GBH, making the offence one of result, and in such offences a defendant may not intend that the result come about, yet they may still be held criminally liable if the result occurs and is caused by their conduct, and they consciously took an unjustifiable risk of causing the result – where they have been subjectively reckless. The justifiability of the risk taken is assessed using an objective standard, and thus not from the perspective of the defendant, and I will return to the objective portion of the test in due course.

Here, my focus is on the maliciousness element of the offence. While the term malicious is used in the context of section 20 the meaning of that term has been explained over time by a number of cases. R v Cunningham, establishes the meaning of the term “malice” does not connote any ill will, but instead either intention or recklessness, with

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303 Alexander and Ferzan, note 301, at 28 – 31.
304 R v G [2003] 1 AC 1034; Ormerod and Laird, note 5, at 129.
recklessness connoting actual foresight of risk on the part of the defendant. Foresight of risk is an essential element of the test, and it is not that the one ought to have foreseen a risk, but instead that one did foresee it. While the Court in Cunningham referred to foresight of a risk in the context of ‘malice’, they did not address whether it also connotes that the risk run was unjustifiable, and a number of cases approving Cunningham have not squarely addressed this point. However, later cases have approved the interpretation of recklessness provided in R v G in the context of the section 20 offence. The test for recklessness established by the House of Lords in R v G, establishes that a person acts recklessly with respect to a result when they are aware of a risk that it will occur, and it is in the circumstances known to the defendant, unjustifiable to take the risk. Thus, we see that malice in the definition of an offence can mean recklessness, and in turn recklessness involves foresight of the risk of a result by the defendant, and nevertheless the taking of an unjustified risk which causes the result to occur.

The question arises as to what type of risk should be adverted to and if a subjectivist position is taken, which is concerned with autonomy and choice, then the risk adverted to should be a risk that the result with which the offence is concerned would occur. This position is exemplified in the correspondence principle, where one expects that the defendant would have the necessary correspondence between the mens rea and all elements of the actus reus, and that these would coincide in time. This is not always the case, and an alternative position is that of moderate constructivism, which envisages that one foresees a risk of a lesser, but illegal, harm and as a result there is a change of normative position such that unexpected or unforeseen consequences are now within the realm of liability. The Law Commission has recently recommended the elimination of

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306 [1957] 2 All ER 412.
307 Where juries have been charged that the defendant should have foreseen a risk convictions have been vacated on the basis that the jury might equate ‘should’ with ‘ought’ to have foreseen, whereas what one ought to have foreseen is no more than evidence of what may or may not have foreseen; R v Savage and Parmenter [1991] 4 All ER.
309 R v Brady [2006] EWCA Crim 2413; R v G [2003] 1 AC 1034; The Law Commission have recently discussed the operation of recklessness in the context of the section 20 Offence: The Law Commission (b), note 154, at 8; at 18.
310 [2003] 1 AC 1034, at 41 per Lord Bingham.
311 The Law Commission have recently adopted this definition of recklessness in the context of ‘disease transmission’: The Law Commission (b), note 154, at 124 – 125.
constructive liability in the context of offences against the person as a person does not have fair warning that they may commit a particular offence where advertence to a lower risk will suffice and they contend that the moderately constructive position is akin to a reversion to the vague Victorian principle of malice in the sense of wickedness in general.\textsuperscript{314} These points are of importance in establishing what has been termed the ‘referential point of fault’, that in regard of which one must be reckless so as to establish liability.\textsuperscript{315} In the context of the section 20 offence, it is sufficient that the defendant foresee some type of bodily harm might occur, this need not be foresight of the type of harm actually caused.\textsuperscript{316} Offences of this nature are described as a constructive crime, where the \textit{mens rea} of a lesser offence will suffice for the \textit{actus reus} of a more serious one.\textsuperscript{317}

In the present context, the prosecution must establish that at the time transmission occurred the defendant was aware of the risk of transmitting HIV or another STI to their partner.\textsuperscript{318} As to the role of constructive liability in these circumstances, it would seem to be of limited relevance in the context of decisions which have determined that non-disclosure of the presence of an infection does not vitiate consent to the intercourse, thus the act which caused the injury is lawful but for the transmission of the pathogen which, all other things being equal, results in liability for infliction of the harm. However, it is at least conceivable with more recent developments in relation to consent and sexual offences that in certain circumstances non-disclosure could amount to a fraud sufficient to vitiate consent such that the act would be unlawful, and in those circumstances if concomitant prosecution were pursued for the infliction of GBH contrary to section 20, then foresight of any harm, in the absence of foresight of the risk of transmitting the pathogen, would seem to the satisfy the offence, it being one of constructive liability.

Proceeding on the basis of awareness of the risk of transmission, this arises in two ways: first the defendant’s knowledge in relation to the presence of infection in the sense of whether there has been a test and a positive diagnosis and additionally knowledge of the risk of transmission arising from sexual contact.\textsuperscript{319} Second, where there has not been a

\begin{footnotesize}
\item[314] The Law Commission (b), note 154, at 69 – 70.
\item[315] Ashworth and Horder, note 130, at 187.
\item[316] R v Mowatt [1968] 1 QB 421; R v Savage and Parmenter [1991] 4 All ER.
\item[317] Ormerod and Laird, note 5, at 740 – 741.
\item[318] Weait and Azad, note 305, at 5; Ryan (b), note 98, at 982 – 984.
\item[319] Weait and Azad, note 305, at 5; Ryan (b), note 98, at 982 – 984; Ryan (a), note 97, at 219 – 220.
\end{footnotesize}
test there still may be sufficient knowledge such that the jury would be satisfied that the defendant was aware of the presence of the pathogen and additionally had awareness of the risk of transmission during sexual contact.\textsuperscript{320}

Focusing first on awareness of the presence of an infection, the standard of actual knowledge presents little conceptual difficulty: one must have had a test, which was positive, and one must have been informed of the results, and understood them; to this point, I will consider knowledge of the of the risk of transmission below. The second standard presents more difficulties: according to this model one has an awareness of a risk where one is aware that one may be infected. It has been argued that this is the correct interpretation, and that to infect a person with a grave disease that you know you have, or may have, in the course of activities that you know carry a risk of transmission, and in circumstances where you can easily modify that behaviour, correctly attracts criminal liability.\textsuperscript{321} Others argue that the only state of knowledge that will suffice is actual knowledge.\textsuperscript{322} The available case law unfortunately is not of particular assistance to us in determining which state of awareness will suffice.\textsuperscript{323}

In \textit{Dica}, the Court seems to assent to the conclusion of Spencer, that liability may attach where there is actual knowledge, or where one is aware that one may be infected, and concluded that s.20 may be charged where a defendant acts ‘…knowing that they are suffering from HIV…’.\textsuperscript{324} The use of the term ‘knowing’ in this decision has been interpreted as both referring to an actual knowledge standard,\textsuperscript{325} and as confirming that awareness of the possibility of infection, meets the \textit{mens rea} requirement; thus it is unclear following \textit{Dica} what is the required standard of awareness on the part of the defendant.\textsuperscript{326} In \textit{R v Barnes}, the Court referred to awareness of one’s condition,\textsuperscript{327} and in \textit{Konzani}, the Court referred to the defendant who ‘knew’ he was infected.\textsuperscript{328} Finally,

\textsuperscript{320} Weait and Azad, note 305, at 5; Ryan (b), note 98, at 982 – 984; Ryan (a), note 97, at 219 – 220.
\textsuperscript{323} Ryan (b), note 98, at 982.
\textsuperscript{324} [2004] Q.B. 1257, at 1273.
\textsuperscript{325} Weait and Azad, note 305, at 5 – 6; Weait (e), note 322, at 129 – 131.
\textsuperscript{327} [2005] 1 WLR 910, at 913.
\textsuperscript{328} [2005] 2 Cr App R 14; A notable element of this case is that the court appears to combine non-disclosure of HIV status as an element of recklessness, at para 41.
in *Golding*, the issue of the standard of awareness as to infection received relatively little attention in light of the diagnosis received.\(^{329}\)

None of the cases have explored to what extent awareness of a risk that one might be infected would amount to sufficient knowledge or sufficient awareness. The assumption by some that the lack of discussion of an alternative to actual knowledge infers that this is the required standard, is open to question as: in all reported cases the courts were dealing with cases of actual knowledge, and the terms ‘knew’ or ‘knowing’ can be interpreted to mean either was diagnosed or was aware of a risk of being infected, and the certified question for the Court of Appeal in *Dica* actually referred to transmission where one ‘knows or believes one is infected’.\(^{330}\) A further reason to doubt an actual knowledge standard arises from the case of *R v Adaye*, where the defendant, who had entered a guilty plea, was sentenced in the absence of a diagnosis of HIV, and it is reported that on the basis of the evidence available at sentencing the judge asserted that Adaye should have recognised the likelihood of his own infection.\(^{331}\) The reports indicate that Adaye had been diagnosed with other STIs and had been warned that he was at high risk of being HIV positive but did not elect to be tested.

As a result, it appears that awareness of a risk that one may be infected will be sufficient on the part of the defendant, however, it remains elusive as what level of awareness will suffice. It may be that the courts will confine cases of awareness of a risk of being infected, to those who are wilfully blind to the possibility of infection, that is those who deliberately shut their eyes to the possibility of infection even though they actually suspected they were infected and, wilfully refrain from having this confirmed.\(^{332}\) This then retains the element of subjectivity: the defendant must advert to the risk of infection, and then turn a blind eye, engendering culpability arising from the blameworthy, conscious refusal to enlighten oneself.\(^{333}\) Notwithstanding, it remains unclear as to the degree of awareness necessary to make out this standard; how suspicious must one be,

\(^{329}\) [2014] EWCA Crim 889.

\(^{330}\) Ryan (b), note 56, at 983 – 984.


\(^{332}\) Such a standard of wilful blindness or knowledge in the second degree is evident from: *Taylor’s Central Garage v Roper* [1951] 2 TLR 284, at 288 – 289; The House of Lords have also adopted this standard in *Westminster city Council v Croyalgrange Ltd* (1986) 83 Cr App R 155, at 164 per Lord Bridge.

\(^{333}\) Ryan (b), note 98, at 985.
how readily should one be able to confirm the suspicions and what effect should this have.\textsuperscript{334} A related and unresolved debate surrounds whether this level of wilful blindness will amount to knowledge, or is merely evidence from which knowledge may be inferred, which is related to whether a finding of wilful blindness provides evidence from which an inference may be drawn allowing a finding of recklessness, or in itself involves a different and narrower category of \textit{mens rea}.\textsuperscript{335}

The CPS, in considering the standard of awareness required, focuses firstly on actual knowledge, and then adverts to ‘rare’ and ‘exceptional’ cases where a person can ‘know’ they are infected without a test to that effect.\textsuperscript{336} This reference to knowledge is unhelpful and is not instructive in this context, however, the guidance goes on to identify a number of circumstances where such awareness might arise in the absence of a diagnosis and where a person may as such have deliberately closed their mind by not being tested. These include being symptomatic to such an extent that it is reasonable to infer that they must have known they were infected, or knowledge of the status of a previous partner such that the defendant knows they are the likely source of the infection. The Law Commission, when recently considering this issue, referred to the CPS guidance and contend that where liability is extended to those who are not subject to a diagnosis this should only arise where the defendant is aware of specific information indicating a high probability that they are infected, and that it should not be sufficient that the defendant belongs to a high risk group.\textsuperscript{337}

Despite controversy as to whether the courts have adopted an actual knowledge standard, or one that also incorporates wilful blindness, I believe that wilful blindness is a standard that can and may be employed in a given case, such as that of \textit{Adaye}. In favour of this standard it is argued that those who wilfully ignore the possibility or probability of infection are equally blameworthy as those who actually know they are infected. Further the argument that subjective recklessness, which required a standard of actual knowledge, reduces rates of testing, such that one cannot be held criminally liable if one does not ‘know’, is significantly reduced if one may be held liable even where a test is not

\textsuperscript{334} Ormerod and Laird, note 5, at 143 – 145.
\textsuperscript{335} Ryan (b), note 98, at 986; Ormerod and Laird, note 5, at 143 – 145.
\textsuperscript{336} Crown Prosecution Service, note 287.
\textsuperscript{337} The Law Commission (b), note 154, at 124.
performed, on the basis that knowledge can be taken to have existed, or at least be inferred, from the circumstances.\textsuperscript{338}

Certain consequences flow from the inclusion of states of mind wider than actual knowledge, and it has been contended that anyone who has ever had unprotected sex with a person whose STI status they were unsure of, may be aware of the possibility that they may have been infected with a pathogen.\textsuperscript{339} While the CPS and the Law Commission are averse to this conclusion in itself, additionally the courts have never considered the circumstances and it would be unwise to overstate the case, it remains that the concept of wilful blindness remains poorly defined in general, and is explicitly adverted to in this context. If an expansive approach were adopted in this area, this would represent a significant extension of criminal liability which ventures dangerously close to establishing liability by virtue of membership of a high risk group.\textsuperscript{340} Additionally, and equally available for argument, while some may contend that such awareness, in the absence of a diagnosis, should only arise where there is advertence to a serious risk that one might be infected, serious risks may be present where there has been a one-off encounter and in the absence of symptoms. While the ability of prosecutors and courts to discount liability based on these principles is theoretically manifest, there are equally examples in England of failures by prosecutors to follow their own guidelines and international examples of courts taking an expansive approach to liability.\textsuperscript{341}

Turning to the defendant’s knowledge of the modes of transmission, given that there must be foresight of the risk of causing bodily harm this requires, and should require, knowledge as to the modes of transmission in addition to awareness of the presence of infection.\textsuperscript{342} This is an area which was not focused on in the earlier case law to any great extent with no reference being made to the issue in \textit{Dica}, although in \textit{Konzani} the court did briefly refer to both knowledge of infection and knowledge of risks of transmission.

\textsuperscript{338} Ryan (b), note 98, at 987; See \textit{R v Parker} [1977] 2 All ER 37, regarding wilful blindness as equivalent to knowledge sufficient to establish recklessness.

\textsuperscript{339} Mawhinney, note 94, at 204.


\textsuperscript{341} Ryan (b), note 98, at 988; On the failure to follow prosecutorial guidelines see \textit{R v Golding} [2014] EWCA Crim 889, at 49 – 55 per Treacy LJ.

\textsuperscript{342} \textit{R v Golding} [2014] EWCA Crim 889; Ryan (b), note 98, at 989; UNAIDS (b), note 282, at 22; UNAIDS (c), note 340, at 37 – 38.
when considering recklessness.\textsuperscript{343} The matter received greater attention in \textit{Golding}, where there were questions as to the nature of the advice that he had been, or may have been, given about such risks by professionals at the time of diagnosis.\textsuperscript{344} There was no consensus as to the advice he had received when diagnosed nor regarding the nature of the advice that might be given as a matter of best practice depending on the forum in which the counselling would be offered.\textsuperscript{345} The Court acknowledged the absence of any definitive evidence regarding the actual advice given and the discordant views on the advice which may be given, but were satisfied to dispense with this issue on the basis of alternative evidence as to the defendant’s state of mind. Ultimately the Court concluded based on the plea entered, where Golding had admitted he was aware of the risk of transmission, and a statement as to his state of mind made to the probation service where he stated that he should have been open and honest, that he knew of the risk of transmission and was thus reckless.\textsuperscript{346}

While the plea entered by Golding does refer explicitly to knowledge of the risk of transmission, the greater focus of the Court was on his disposition as evidenced in a pre-sentence report which referred to his feeling that he should have been ‘open and honest’ with the complainant.\textsuperscript{347} There appears to be a conflation of a sense of needing or wishing to be honest with an awareness of the risk of transmission during intercourse, which are not one in the same.\textsuperscript{348} While the admission on plea would seem to have been determinative on its own in this case, the issue with the plea was the contention that it was ill-informed and given in the presence of inadequate assistance, and as such the approach of the Court in conflating the moral sense of knowing one should say something with an awareness of a risk of a particular state of affairs is unsatisfactory in the presence of clearly equivocal evidence in relation to both the actual advice given and the potential advice which may be given in relation to the modes of transmission.

That there should be knowledge of the risks of transmission from the conduct in question is the correct conclusion given the subjective requirements of liability in such cases. However, caution must be exercised so as not to elide a diagnosis with an automatic

\textsuperscript{343} [2005] 2 Cr App R 14, at para 41.
\textsuperscript{344} [2014] EWCA Crim 889, at paras 21 – 23.
\textsuperscript{345} [2014] EWCA Crim 889
\textsuperscript{347} [2014] EWCA Crim 889, at 78.
\textsuperscript{348} Roebuck, note 129, at 298.
assumption that a person will understand the risks of transmission or that appreciation of such risks is common knowledge.\textsuperscript{349} The actual advice given to the person, their ability to understand that advice and their actual level of comprehension should be interrogated prior to recklessness being established. It is clear from those who provide counselling services to persons who are newly diagnosed with HIV or other STIs that the ability of the person to comprehend the diagnosis and to retain the information given at that time can vary greatly from person to person. In addition, depending on the patient, the circumstances, and the locations where diagnosis takes place, there can be significant differences in whether issues relating to transmission risks were raised and the quality of the information provided was assured.\textsuperscript{350}

\textit{When is a Risk Unjustifiable?}

In order to be found to have been reckless, apart from the defendant’s state of advertence to existence of a risk, they must also take an objectively unjustifiable risk. That the issue of the objective limb of the test has not been attended to by the courts in England in the context of STI transmission is perhaps not surprising, first because transmission has occurred in each case thus relative to the perceived gravity of the harm the, for instance, per act risk of transmission simply has not arisen for discussion. Additionally, this area is not alone in the context of a lack of analysis of the objective limb of the test and this arises with frequency in marginal cases not being pursued by prosecutors.\textsuperscript{351}

The reasons for a lack of attention to this area in this context may be that it was simply assumed in both \textit{Dica} and \textit{Konzani}, and indeed generally, that taking any risk with HIV is, without more, unjustifiable, which arises from the risk-harm relationship in legal discourse.\textsuperscript{352} In this context the gravity of the perceived harm generally has an inverse relationship with the degree of risk which is regarded as justifiable, and even the slightest risk of a very significant harm is likely to be regarded as unacceptable.\textsuperscript{353} This is perhaps

\textsuperscript{349} Ryan (b), note 98, at 990; UNAIDS (c), note 340, at 37.
\textsuperscript{350} Ryan (b), note 98, at 990; UNAIDS (c), note 340, at 37; Catherine Dodds and others, ‘Keeping confidence: HIV and the criminal law from HIV service providers’ perspectives’ (2015) 25(4) Critical Public Health 410–426; Ceri Evans, \textit{The Impact of Criminalising Disease Transmission on the Healthcare Professional-Patient Relationship} in Catherine Stanton and Hannah Quirk (eds), \textit{Criminalising contagion: Legal and ethical challenges of disease transmission and the criminal law} (Cambridge University Press 2016), at 82 – 83, 88 – 89.
\textsuperscript{352} Weait and Azad, note 305, at 5; Ryan (a), note 97, at 219 – 220, 224 – 225; UNAIDS (b), note 282, at 12 – 13.
\textsuperscript{353} Such a relationship is evidenced in the work of Feinberg when addressing the probabilistic assessment of harm relative to their gravity in determining whether to criminalise conduct: Feinberg, note 262, at 216;
one of the most significant difficulties with the recklessness test in practice in this context, in that the objective limb of the test presupposes a collective set of standards and values in relation to acceptable risks, a common way of looking at the world, and this world view is then applied to a given case.\textsuperscript{354} There is then a potential, particularly in the context of sexual behaviour, for a given jury to be ignorant of, or fail to identify with, the lived experience of those who are living with infection and a potential then to regard them as deviant or abnormal, and ultimately reckless in all instances.\textsuperscript{355} Opponents of such arguments will simply state that the gravity of the harm is such that the lived experience of those infected with such pathogens is not relevant, unless there is some excusatory factor such as violence in relationship which caused a person not to disclose or demand condom use, and as such they should conform to generally held social views as to what risk it is acceptable to take with regard to transmission.\textsuperscript{356}

These arguments cannot be deposed effectively on the basis of either being true of false, however, there are mediating factors which touch upon the acceptability of one over the other. In particular, the overarching societal goal of reducing the transmission of pathogens can inform what risks should be regarded as acceptable within a sexual community with reference to successful public health efforts to reduce transmission. Additionally, proceeding on the primary societal goal of transmission reduction, the safer sex messages of public health are the most cogent means to achieve such a reduction, and safer sex in this context is a learned behaviour.\textsuperscript{357} In assimilating any new behavioural pattern, it is important to recognise that relapses will occur and the primary effort should be to provide counselling and assistance in achieving and sustaining such behavioural change, and, I would argue, the criminal law is a blunt, ineffective and potentially detrimental intervention in this cycle of behavioural change.

While appreciating the position of those who would say that any risk is too great, there is a potential, where the criminal law is regarded as an appropriate intervention, to examine the justifiability of the taking of a risk which comprehends a mature understanding of the

\textsuperscript{355} Dalton, note 354; Matthew Weait, ‘On Being Responsible’ in Vanessa Munro and Carl F. Stychin (eds), Sexuality and the law(Routledge Cavendish 2007), 19 – 50.
\textsuperscript{356} Mawhinney, note 94; Schuklenk, Philpott, note 94.
\textsuperscript{357} Klein, note 203, at 255 – 256.
nature of the risks, and potential avenues to reduce risk. This potential if realised could track public health efforts and thus resist criminalising behaviour which occurs in the context of availing of the most efficient methods of reducing transmission and also allow for a fairer approach to criminalisation which realises the reality of difficulties with disclosure in many circumstances and at the same time sets a societal acceptably level of risk which a sexual community accepts as inherent to all sexual intercourse. In addition, and as shall be discussed shortly, when criminalisation moves outside of the sexual sphere, those who have discussed the issue believe that the test of recklessness, and inherently then the objective limb of that test, will be the limiting factor militating against criminalisation of trivial matters. Therefore, while under-emphasised at present, there is significant worth in considering the potential factors which touch on the acceptability of running a particular risk. 358

Factors which may be considered in determining the justifiability of the risk taken might include: the gravity of the harm, likelihood of the risk occurring, the social utility of the conduct involved, precautions available to avoid the risk, and whether the potential victim was aware of the risk and willing to accept it. 359 In engaging with gravity of the harm, one might assess the impact of a STI in light of available treatments and any life limiting effects, however, an impediment to such an assessment is that the threshold harm will have to be reached such as to render the matter within the realm of GBH; where that particular threshold is reached, there may be an inversely, particularly low or absent level of risk which will be tolerable. 360 That said, a universal standard of particularly low or absent risk sits uneasily with the very wide range of harm which can amount to GBH and as such there is room to assess the level of acceptable risk with reference to the gravity of harm associated with particular infections, or the effect of particular infections on particular complainants.

The social utility of the conduct in question is an important consideration and the oft-cited example is the surgeon who conducts an operation while advertizing to the risk, but the risk is regarded as justifiable given the social utility of the conduct. 361 Sexual

358 The Law Commission in accepting that the transmission of pathogens can amount to a criminal offence have recommended that a reform of the 1861 Act not overtly exclude minor infections on the basis that the tests associated with recklessness will exclude such prosecutions.
359 Ryan (a), note 97, at 223 – 224; UNAIDS (b), note 282, at 12 – 23.
361 Ashworth and Horder, note 130, at 177.
expression is a key facet of human identity, it involves complex, intimate, passionate, and often than less than rational interactions between two human beings. Additionally, sexual expression should be regarded as having a high social value and consequently some degree of risk should be acceptable, which may in turn reflect upon the justifiability of a risk taken when assessed objectively. Further while it has been argued that it is never justifiable for a person who is uninfected to have unprotected sex with an infected person, this would verge on outlawing categorically sexual relations which is unrealistic and inhuman. What the law has done thus far is to strike a balance in the form of permitting the express consensual taking of the risks inherent to unprotected sex. Crucial then is that sexual expression is not rendered irrelevant, or worse considered as deviant, in the context of a person infected with a pathogen, as this is both impractical and unacceptable in my view.

The likelihood of the risk occurring is a key consideration as it bears directly upon the type of sexual activity which will amount to recklessness. Different sexual activities carry significantly different risks of infection, though indeed in any probabilistic assessment of the likelihood of the harm occurring we are, by the constricts of the English position, reasoning from a situation where it has occurred, which is likely to eschew an analysis in this as in other areas.

The following chart shows the range of risk associated with different types of exposure routes in the context of HIV:

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362 Ryan (a), note 97, at 227 – 228;
364 The impracticality of outlawing consensual risk taking was identified in: R v Dica [2004] EWCA Crim 1103, at para 51; Warburton, note 150, at 65, argues that it seems that unprotected sex between an infected and uninfected person is never justifiable; Schuklenk, Philpott, note 94, at 310, refer to the controversial nature of the laws interference in competent adults decisions to engage in behaviour which represents a risk to one’s self.
365 Ryan (a), note 97, at 228 – 229.
367 Cornett, note 94, at 95; This is merely one example of the classification of risk associated with per act exposure to HIV; an alternative and similar analysis of risk may also be found in: UNAIDS (b), note 282, at 15 – 17.
In light of the varying risks, criminalisation, if it is to take place, must be confined to those activities carrying a high risk. Otherwise safer sex messages which seek to divert infected persons away from high risk conduct and form part of public health campaigns, may be impeded or, at the very least, the law sends a contradictory message.\textsuperscript{368} Impediment of public health campaigns arises from the stigmatising effect of the criminal law in so far as it drives those who are infected away from institutional services promoting treatment and counselling and there is a concern that criminalisation of low risk behaviour creates confusion as to what is safe, safer, or clearly not safe. Additionally, and relevant to this point and our discussion as a whole, where criminalisation is an issue

\textsuperscript{368} Cornett, note 94, at 96, UNAIDS (c), note 340, at 33, Grant, note 71, at 25 – 26.
the discussion between professionals and patients becomes about avoidance of criminal liability, which in the absence of an appreciation of the per act risk focuses on the issues of disclosure and consent, and potentially other protective measures. While these are important discussions, there is a significant potential for service users to communicate in a less fulsome fashion where the spectre of criminalisation, and access to medical or counselling records, looms, and which in turn impedes the ability of professionals to engage with service users in terms of the behavioural changes which are necessary, why they are not occurring and what can be done to improve the situation. These techniques are those that carry the potential to maximise the reduction of the pathogen within the community and impediment presents too high a societal cost in the interest of individual prosecution. Where the criminal law is deployed, there is a strong argument in favour of establishing the acceptable level of risk with our community, and coordinating messages between different actors within the societal structures so as to maximise the potential for public health efforts to reduce the spread of pathogens.

In the context of HIV, the use of a condom and the more recently the advent of low or undetectable viral loads following compliance with ART, raise two interesting issues: initially the question of whether these reduce the risk sufficiently to negate a finding of recklessness or operate as a safe sex defence, and finally whether a duty of disclosure must still exist in either scenario.

On the first issue, it is argued that the consistent use of a condom should negate a finding of recklessness, given that it is in keeping with the shared responsibility message of all public health campaigns in this area, and further as the risk is reduced to an extent that it should no longer be the concern of the criminal law, striking the correct balance between allowing sexual expression and avoiding harm. This position was adverted to in Dica, where the court referred to the use of a condom as a factor to be taken into account in the determination of whether a defendant was reckless. In Golding, in the context of HSV, condom use was mentioned in the context of medical advice which would likely be given

370 French, note 369.
372 Ryan (a), note 97, at 234 – 235; Grant, note 71, 14 – 19, UNAIDS (b), note 282, at 17; Hughes, note 203, at 138 – 141, 143 – 147.
373 [2004] QB 1257. at 1262.
as to intercourse when lesions are present, but the Court did not remark on the relevance or otherwise of potential condom use in HSV cases.\textsuperscript{374} The CPS in their guidance do refer to the use of safeguards against transmission and feel that such use will negate a finding of recklessness; however, the caveat surfaces that medical experts must be satisfied that the precautions taken were appropriate in the circumstances.\textsuperscript{375} While this is a welcome development in one sense, the reliance on individual experts and their professional view as to whether condom use would be ‘appropriate’ allows for differing opinions, differing judicial pronouncements and overall a lack of certainty as was evidenced in the Canadian jurisprudence post \textit{Cuerrier}.\textsuperscript{376} This is counterproductive in the context of a safeguard, which while by no means a failsafe, the use of which evidences responsibility in a sexual relationship and which has the potential to significantly reduce the spread of pathogens within the community.

As to a low or undetectable viral load, this engages what is referred to as the treatment as prevention (TasP) paradigm, which sees treatment and its reduction in viral load as the primary method of reducing transmission rates.\textsuperscript{377} The viral load of a person is the most significant determinant of their infectivity and the effective reduction of viral load is critical to the interruption of transmission.\textsuperscript{378} Viral load is generally reduced through the consistent adherence to a medication regime and in addition the avoidance of other STIs. There is debate as to the effect of the reduction of viral load: whether this is an appropriate consideration given that the load is a varying construct which can spike over time, and in regarding the varying levels of viral load so as to qualify as low or undetectable, whether this might lead to self-regulation of risk and avoidance of condoms, and in addition whether there is a sufficient reduction in infectivity such as to reduce the risk to such an extent as to not be the concern of the criminal law.\textsuperscript{379} Notwithstanding this debate, the scientific evidence available has shown an incredible reduction in transmission arising

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\textsuperscript{374} [2014] EWCA Crim 889, at 22.
\textsuperscript{375} Crown Prosecution Service, note 287.
\textsuperscript{376} Mykhalovskiy (a), note 203, at 156 – 159.
\textsuperscript{378} World Health Organisation, note 377, at 6.
\textsuperscript{379} A useful summary of these perspectives is referred to in \textit{R v Mabior} [2012] 2 S.C.R. 584, at 93 – 103 per McLachlin J; see also Isabel Grant, ‘Rethinking risk: The relevance of condoms and viral load in HIV Nondisclosure prosecutions’ (2009) 54(2) McGill Law Journal 389, at 401.
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from a reduced viral load, with the most recent study showing zero transmissions between sero-discordant couples, heterosexuals and MSM, in circumstances of unprotected intercourse where the HIV positive partner’s viral load was less than 200 copies/ml. Therefore there is increasing evidence of a negligible risk, and perhaps virtual impossibility, of transmission once a low viral load has been established for a period of time; the one caveat is that the evidence would have to involve testing with sufficient frequency to support this finding. In such circumstances, and additionally bearing in mind the importance of such treatment to the interruption of transmission, where evidence establishes that there has been a consistently low viral load this should reduce the level of risk to the extent that recklessness is not established.

The issue of whether disclosure must take place in conjunction with these methods of risk reduction is more complex. While I will discuss disclosure in the next section, it suffices to say at present that while it might be seen as morally praiseworthy or necessary to disclose in these circumstances, this belies the reality of the very significant personal and societal factors which may militate against disclosure, and ignores the largely complicit, complex, and non-verbal nature of behaviour surrounding sexual intercourse; thus it is argued that disclosure should not be required where significant risk reduction measures are in place.

Again, while these issues have not arisen to date, a full appreciation of all the elements of recklessness should occur prior to any prosecution being instituted, in the course of the trial and in the charge of the judge to the jury. It is a significant omission that this limb of the test has been absent from decided cases thus far, and as the law extends into the

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381 Schuklenk, Philpott, note 94, at 311; Grant, note 71, 20 – 24; See also regarding the current state of scientific debate in this area: UNAIDS (b), note 282, at 17 – 18; Hughes, note 203, at 140 – 141, 145 – 147; Concerning arguments against permitting viral load to negate an element of the offence see: Cornett, note 94, at 97 – 98.
382 An area not explored in this thesis is the relevance of a relatively new medication regime known as Pre Exposure Prophylaxis, which involves taking antiretroviral medication prior to exposure to HIV in an attempt to prevent infection, the science of this technique is explored in: UNAIDS (b), note 282, at 19 – 20. This would clearly raise very interesting questions regarding the consent of a partner to the risk of infection, whether or not they were aware of the HIV status of their current sexual partner, and additionally could also impinge on the probability of the harm occurring.
383 Ryan(a), note 97, at 239; Grant, note 71, at 20; Schuklenk, Philpott, note 94, at 311 – 312; UNAIDS (a), note 226, at 12 – 14.
realm of other STIs and in particular given the potential for a broader extension of the law, this is an area which must receive greater attention.

**The Role of Risk in Exposure Liability**

**The Mens Rea of Exposure Liability**

Canadian decisions have not focused at any great length on the required *mens rea* on the part of the defendant and in some respects it is difficult to discern the relevant *mens rea* with reference to the elements of the *actus reus*.

The offences with which we are concerned require that the defendant must through non-disclosure have acted dishonestly, which is to be assessed objectively, and as a result of which the complainant was exposed to deprivation in the form of significant risk of serious harm, the dishonesty having induced the complainant to engage in intercourse where they otherwise would not have.

In *Cuerrier* the relevant *mens rea* for the offence was stated simply as intention to apply force to the body of the complainant contrary to section (265)(1)(a) of the Code dealing with assault. There is no mention of any advertence with respect to the aggravated element of the offence comprehended by section 268. A further element of the *actus reus* is that the defendant must have acted dishonestly, in the form of non-disclosure or deceit with reference to HIV status; whether or not there has been dishonesty is to be assessed objectively, such that a reasonable person would regard the defendant’s behaviour as dishonest. There is no specific finding in relation to the mental element associated with this part of the offence, however, Cory J when analysing frauds sufficient to vitiate consent, and referring to the commercial context, cited with seeming approval the approaches adopted in *R v Olan* and *R v Theroux*. In *Theroux* McLachlin J established that the relevant *mens rea* in relation to fraud is proof that the defendant ‘knowingly’ undertook the dishonest act, further that there was an awareness that deprivation could result, and this phraseology was summarised as meaning intentional or deliberate deception coupled with an awareness that deprivation may result. None of the judgments in *Cuerrier* apply these principles in relation to dishonesty, to the offence in

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384 Grant, note 71, at 25.
question. However, given that Cory J drew the approach to frauds sufficient to vitiate consent from *Theroux*, then it would seem, but remains unclear, that attendant proofs should be an objective assessment that there was a dishonest act coupled with both an intention to deceive, and additionally an awareness of potential deprivation, which would in turn require an awareness of being infected with HIV and an awareness of the modes of transmission.

The requisite *mens rea* received further attention in *Williams* where Binnie J, referring to the basic and aggravated offences, held that the defendant’s mental state will be assessed with reference to not only to the application of force which must occur intentionally, but also with reference to the consent of the complainant, with regard to which there must be intentional, reckless or wilful blindness to the fact that they do not consent, coupled with an objective foresight of the risk of bodily harm.\(^{390}\) In this analysis, the mental elements of both the basic and aggravated offences are identical, and are made out by the defendant voluntarily engaging in a sexual act. In essence then, the intent to apply force for the basic assault must be augmented with further *mens rea* requisite in relation to the fraud in the form of non-disclosure, operating to vitiate consent, which in turn must expose the complainant to significant risk of serious harm.

In *Williams*, the Court affirmed that the critical time for establishing whether there was fraud sufficient to vitiate consent is when there was sufficient awareness of the HIV positive status that a person could be said to have acted intentionally or recklessly, with knowledge of the facts constituting the offence or with wilful blindness towards them.\(^{391}\) The Court specifically adverts to the potential importance of wilful blindness in this context, and approved the finding in *Sansregret v. The Queen*,\(^{392}\) to the effect that wilful blindness is a distinct state of mind, and not a form of recklessness, and ‘arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant’.\(^{393}\) While the Court did not reason further on the issue of wilful blindness, it would appear that the standard of awareness required is quite broad as court concluded that once a defendant becomes aware of the risk that he may be infected, the consent of his partner

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\(^{392}\) [1985] 1 S.C.R. 570, at 584, *per* McIntyre J.

becomes an issue, and to continue to have unprotected sex, which creates a significant risk of serious harm, establishes recklessness.\footnote{[2003] 2 S.C.R. 134, at para 27 – 28.} We see that the additional mental element comprises the defendant’s knowledge of his actual HIV positive status, or awareness that he might be HIV positive, and the risk posed by that awareness is in the context of Williams to be assessed objectively; it therefore seems that the defendant only need to be aware of a risk that they are infected and need not know the risks of transmission associated with sexual conduct, an issue not explored by the courts in the context of protected sex, unprotected sex, or sex with a reduced viral load.\footnote{Grant, note 71, at 25.}

The most recent Supreme Court authority, Mabior, recognises that the parameters of both the actus reus and mens rea should be clearly delineated in relation to such offences, however, while considerable attention is paid to the significant risk test in making out the actus reus, regrettably no attention is paid to the attendant mens rea.\footnote{[2012] 2 S.C.R. 584, at para 19 with reference to the importance of particularising the parameters of the elements of the offence; Grant, note 70, at 480.}

In summary, the corresponding mental state for the elements of the actus reus are complex, it would appear at times inconsistent and is patently under-explored. It is clear that the physical act involved, that is the sexual act, must be intentional. In relation to the fraud, in the form of dishonesty which calls into question the consent of the defendant, on one reading, per Theroux as cited with approval in Cuerrier, there should be proof of intent to deceive and subjective awareness of the risk of deprivation. Intention to deceive requires something to be deceitful about, and thus awareness of, one’s HIV status is necessary, though the level of awareness is not specified. Given that deprivation is associated with the aggravated element of the offence, that is significant risk of serious harm to satisfy endangerment of life, then on this reading the defendant should subjectively advert to the risks both in terms of his own HIV status and the risk of transmission associated with the conduct. However, Williams proffers an alternative formulation which reasons from the perspective of consent, which in turn is related to the fraud such that both formulations are approaching the same subject matter but from different perspectives. In referring to the state of mind of the defendant in relation to consent one must have acted intentionally, recklessly or with wilful blindness with reference to the consent of the complainant, which will arise once the defendant is aware
that they may be HIV positive, and they do not need to have awareness of a risk of transmission.

The second analysis shares with the first an awareness as to HIV status, now pitched at the very wide level of mere awareness of a risk of HIV positive status, with the attendant difficulties already discussed. Notably, this version of awareness is potentially wider than wilful blindness, in the sense that it does not require a deliberately closing one’s mind to the risk. However, the two analyses diverge in relation to the issue of fraud and consent. The first requires an intention to deceive and subjective advertence to risks which in turn provides a *mens rea* for the aggravated element of the offence, whereas the second requires only awareness of HIV status, no *mens rea* in relation to the act of deception and no subjective awareness of the risks posed, thus no *mens rea* as to the aggravated element. It is hard to reconcile these positions, however, given that my analysis of *Cuerrier* relies on proceeding by analogy from Cory J’s approval of cases in determining the type of frauds sufficient to vitiate consent; as *Williams* deals with the matter explicitly, it would seem that *Williams* is the more authoritative source, thus demonstrating an appreciably indefinite mental state to make out the offence, which, in essence, will be satisfied where a person engages in a voluntary, thus intentional, sexual act at a time when they were aware of a risk that they may be infected with HIV, without any attendant requirement that they be aware of the risks of transmission.\(^397\) This level of constructive liability is concerning and casts the potential net of liability extremely wide, and renders potentially criminal those who engage in sexual intercourse without understanding the nature of the risks.

*Risk as an element of the Actus Reus*

The preceding analysis with reference to the justifiability of the taking of a risk applies equally whether the element of risk is assessed with reference to the *mens rea* of the offence or the *actus reus* and as such is of relevance to the assessment of risk in the Canadian context. As previously discussed, risk arises in a different manner in Canadian law; here, we are concerned with whether the complainant was exposed to a significant

\(^{397}\) This reading of the offence is also consonant with *R v De Sousa* [1992] 2 S.C.R. 944, at 2 – 5, where Sopinka J in Supreme Court analysed the requisite *mens rea* for the offence of causing bodily harm per section 269 of the Code, and identified the necessity for an underlying unlawful act causing the harm, for which there must be a subjective mental state, and then an objectively dangerous element to that act, the combined subjective and objective elements then satisfying the mental state for the offence, thus there is no requirement that the defendant foresee that their actions will cause harm; Mewett and Manning, note 206, at 758 – 759.
risk of serious harm as an element of the *actus reus* of the offence of endangering life. The risk element of the test has led to contradictory results when applied by lower courts, which have been attributed either to the judicial interpretation of the test itself or the impact of varying scientific evidence.398 This lack of certainty was significantly criticised and led to extensive activism, seeking not only prosecutorial guidelines but ultimately clarification of the test by the Supreme Court.399

Courts have debated whether the requisite level of risk has been attained under three main headings: the use of condoms, viral load of the defendant, and the type of sexual activity involved.400 Cory J in *Cuerrier* recognised that the significant risk of serious harm would not be present in all circumstances and specifically adverted, albeit in an obiter fashion, to the careful use of condoms as factor which might reduce the risk of harm below the required threshold.401 Subsequently, differing views have been taken in relation to condom use, with some courts finding that their use is inconsistent with a finding of significant risk, others stating their use might amount to a negation of risk, and still others apparently ignoring their relevance.402 The more attuned position was that condom use may be relevant but would depend on the circumstances of the case.403 Evidence regarding the viral load of the defendant has arisen before the courts on a number of occasions, with findings that viral load can be relevant in determining whether the requisite level of significant risk has been attained; additionally, when viral load was undetectable that significant risk will not be evident.404

Types of sexual activity are also of relevance in two respects: first, as to whether the disease in question carries a high risk of transmission during sexual intercourse, and, secondly, as to whether the risk inherent in the type of sexual intercourse reaches the required threshold. In a case concerning the risk of infection with Hepatitis C during

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398 Grant, note 71, at 14 – 30; Cornett, note 94, at 94 – 98; Hughes, note 203, at 143 – 148; Mykhalovskiy (a), note 203, at 156 – 159; Mykhalovskiy (b), note 203, at 670 – 671.
399 Mykhalovskiy (a), note 203.
400 Grant, note 71, at 12 – 27; Hughes, note 203, at 143 – 148; Mykhalovskiy (a), note 203, at 156 – 159; Mykhalovskiy (b), note 203, at 670 – 671.
402 R v Agnatuk-Mercier [2001] OJ No 4729, on the requirement for sex to be unprotected; R v JT [2008] BCCA 463, on a case by case analysis as to whether risk was negated by condom use; R v Mekonnen [2009] OJ No 2766, where the use of condoms was not regarded as a relevant factor.
404 Regarding the relevance of viral load: R v Wright [2009] BCCA 514, at 32; Regarding significant risk not being evident when a period of undetectable viral load is evident: R v DC [2010] MBCA 93; R v Mabior [2010] MBCA 93, at 129 – 133.
sexual intercourse, it was found the risk of transmission during intercourse was insufficient to reach the threshold of a serious risk as required by the test.\textsuperscript{405} In terms of the type of sexual activity, there is an example of a conviction for aggravated assault for a singular instance of oral sex, which is regarded as a low risk activity, and it has been argued that if the courts are willing to engage with both condom use and viral load they must also engage with the type of activity, and the risks inherent to it, in determining whether the necessary level of risk has been reached as a failure to do so results in over-criminalisation, and contradicts public health safer sex messages.\textsuperscript{406} In this regard one decision took the view that in vaginal intercourse where the receptive partner was HIV negative, and the insertive partner positive, failed to reach the required threshold of risk.\textsuperscript{407}

Cory J in \textit{Cuerrier} referred to the necessity for flexibility in a test dealing with human relations of a sexual nature; the difficulty which emerges is that the individualised approach to liability is in many respects a numbers game.\textsuperscript{408} Cases have revealed that much depended on the inconsistent presentation and interpretation of scientific evidence, particularly in relation to risks associated with particular sexual activities, condom use, and viral load, and as such much is lost in terms of certainty, which constitutes a necessary inquiry in light of the espoused purpose of the law in deterring what is regarded as unlawful and dangerous conduct.\textsuperscript{409} It was in this context that the matter came to be revisited in \textit{Mabior}, where McLachlin J rearticulated the test of significant risk of serious harm, and clarified the significant limb of the test as representing a realistic possibility test.\textsuperscript{410}

In these circumstances, and referring specifically to vaginal intercourse where the insertive partner was HIV positive, such a realistic possibility will not be present where the defendant has both a low viral load count and there is use of a condom.\textsuperscript{411} In reaching this conclusion the Court observed that the level of risk necessary to amount to a significant risk is inversely related to the gravity of harm threatened, or which has

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\item \textsuperscript{405} \textit{R v Jones} [2002] N.B.J. 375; CATIE, note 181; Canadian HIV/AIDS Legal Network, note 180.
\item \textsuperscript{406} Grant, note 71, at 25 – 26; UNAIDS (a), note 226, at 14.
\item \textsuperscript{407} \textit{R v JAT} [2010] BCSC 766, at 56 where it was stated that ‘…a significant risk means a risk that is of a magnitude great enough to be considered important’.
\item \textsuperscript{408} [1998] 2 S.C.R. 371, at para 139; Grant, note 41, at 27.
\item \textsuperscript{409} Grant, note 71, at 50 – 52.
\item \textsuperscript{410} [2012] 2 S.C.R. 584, at 84, 92 – 103.
\item \textsuperscript{411} [2012] 2 S.C.R. 584, at 94.
\end{itemize}
occurred, such that the greater the harm, the less risk which shall be acceptable.\textsuperscript{412} While there is clarity in respect to this decision, it acts to heighten the burden of demonstrating an insignificant amount of risk by requiring disclosure in all cases except where there is a low viral load and careful condom use, thus negating the requirement to prove endangerment where both are not present.\textsuperscript{413}

The Court was not satisfied that the reduction in risk associated with condom use was sufficient to militate against a finding of significant risk in light of the harm involved, and while recognising the developing science in relation to viral load, at the same time was not convinced on this front by either.\textsuperscript{414} The Court expressed that it was necessary to provide certainty, and purported to elect for a middle ground position between no risk, the absolute disclosure standard, and high risk, however, in reality what they appear to have done is select a no risk standard such that ‘significant risk’ element of the test is eliminated.\textsuperscript{415} In adopting this purported middle ground, the Court has turned its face on the available science, increased the potential for criminalisation and created an unwelcome message in terms of public health efforts to curb transmission.\textsuperscript{416}

Furthermore, the Court recognised that further scientific developments might change the position, thus leaving the position open to be revisited as science and evidence in relation to viral count advances. Finally, while the Court aimed to give certainty, though in doing so increased the burden, they have only clarified the position in relation to vaginal intercourse, where the insertive partner is HIV positive; all other varieties of sexual intercourse and sex acts short of full intercourse remain indeterminate.

In light of the most recent pronouncement, the Supreme Court retains the significant risk of serious harm test, however, at the same time advances the test of realistic possibility, which in the circumstances and in light of available evidence appears to impose a standard which might more aptly be read as ‘a low or negligible risk of serious harm’. While I recognise that the level of risk is regarded as intimately related to the gravity of the harm, the significant risk test was conceived as a limiting factor which would negate an overreach of the criminal law and to use the words of the Court there is no realistic possibility of this any longer. Furthermore, if we combine this position with the

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\textsuperscript{412}[2012] 2 S.C.R. 584, at 92.
\textsuperscript{413}Hughes, note 203, at 145 – 147; Mykhalovskiy (a), note 203, at 170 – 174; Grant, note 70, at 480.
\textsuperscript{415}Grant, note 70, at 482.
\textsuperscript{416}Hughes, note 203, at 145 – 147; Mykhalovskiy (a), note 203, at 170 – 174; Grant, note 70, at 480.
\end{flushleft}
requirement for merely advertence to the possibility of infection so as to satisfy the *mens rea*, the scope of liability is cast very wide indeed, and this is so in circumstances where no actual harm has occurred and only a small or negligible possibility of harm may have existed. This has lead one academic to question why it is only in the case of HIV that the slightest possibility of endangerment may result in the triggering of the most serious sexual assault offence with attendant punishment of up to life imprisonment.\(^{417}\)

The exceptionalism of the criminal law’s approach to HIV in Canada, once borne out of fear of death, has now progressed to an institutionalised medico-legal construct, currently confined to STIs, which has reached a stage of considerable breadth of liability, maximum potential sentencing and all in circumstances where there may be no harm occasioned, no evidence or investigation as to any positive effect arising from the laws intervention and finally mounting evidence of detrimental effect on public health efforts to control the spread of pathogens in the community.

**Current State of the Law**

In keeping with the previous section, it is important to assess whether recklessness might be the basis upon which the criminal law has not strayed outside the realm of sexual conduct in the criminalisation of transmission or exposure, and whether it has the potential to maintain this separation in the future.

In Canada, as discussed previously, the requirement for an assault would at least seem to limit matters to circumstances where there has been bodily contact. However, this contact could, in theory, be as banal as a handshake, which once undertaken voluntarily would amount to the necessary intentionality. Thereafter, once the threshold of harm is reached with reference to the pathogen in question, the only remaining matters are whether the person knew they were infected, and was there a realistic possibility of transmitting. It is clear therefore that no principled reason, as the law stands, will prevent that liability extending to a wider range of circumstances, though not as wide as in England, given the requirement for an assault.

In England, the Law Commission has expressly recognised the potential for liability beyond the sexual context, and has recommended that there be no legislative exception for minor infections in their proposals for reform of the 1861 Act, contending that the objective limb of the recklessness test will have the effect of excluding such matters. I

\(^{417}\) Grant, note 70, at 479.
have already assessed the wide range of pathogens potentially comprehended by an extension in this area. In terms of the mens rea of the offence, it seems that one must be aware of the presence of the pathogen and the risk of it being transmitted. There remains the potential that the objective limb of the test may have a limiting effect based on the social utility of the conduct and with reference to the seriousness of the infection, and thus the acceptability of running the risk. Laird discussed the scenario of the man on a bus with a cold. Perhaps the gravity of the harm associated with the tacit acceptance by most of us that catching colds is a natural incidence of communal life would militate against a finding that it was objectively reasonable to run the risk, even if a particularly susceptible individual suffered GBH as a result of catching the virus.\textsuperscript{418} However, while this would, in that instance, be a limiting factor, it is easy to foresee circumstances where the context is different or the harm more severe, and where the social utility of the conduct, the probability of it occurring, nor any presumed tacit acceptance of the incidences of life would have any limiting effect.\textsuperscript{419} As such, neither the requirement for recklessness, nor the requirement for the requisite level of harm, provide an effective explanation as to why criminalisation has been confined to the sexual context and offer no basis to presume that it will remain so.

\textbf{Concluding Remarks}

The operation of recklessness has presented a number of difficulties in both jurisdictions. In England, while advertence to the risk and modes of transmission is a requirement, there are potential difficulties with a wilful blindness standard which could extend liability substantially and leaves open the possibility of a discriminatory approach associated with high risk groups. The unjustifiability limb of the test has potential to allow a number of welcome considerations which could limit liability and also track public health campaigns, however, it remains generally and specifically under-attended to with the potential for continued neglect or a jaundiced perspective regarding acceptable levels of risk, which only appreciates the position of a person who is not infected. The Canadian position raises significant difficulties, first the mens rea for the offence is not clear; however, it would appear that the only fault element is awareness of the risk of the

\textsuperscript{418} Laird, note 98, at 218 – 219.

\textsuperscript{419} Laird, note 98, at 219 discussed a scenario where a nurse attends for duty in a nursing home while infected with influenza, the level of harm threshold would be satisfied, presuming then that they knew of the presence of the virus and how it is transmitted, the nursing home residents would not have tacitly accepted the risk of contracting infections from staff and it is likely that are no reasons related to social utility which would justify taking such a risk.
presence of a pathogen; no necessity is recognised for awareness of the risks of transmission and consequently no subjective awareness with regard to the aggravated element of the offence. This must be coupled with the revised understanding of significant risk, which is in effect a low or negligible risk, resulting in potential constructive liability for an offence involving low-risk conduct which is one of the most serious offences in the Code and carries the most severe sentence. The Canadian position is challenging, and concerning, from the perspective of individual liberty, rule of law concerns, fair labelling of offences and the potential for very significant impact on public health initiatives. It is further the case that while recklessness in England may have some limited effect on criminalisation in the future in different contexts, this will by no means be definitive, and in Canada, aside from the requirement for an assault, the relevant mens rea and risk factors pose no bar to more extensive criminalisation.

It has been argued that the management and control functions of the criminal law exemplify a state contribution to the amelioration of risk in a society perturbed at each turn by risk, and seeking physical and ontological security, which in many respects is manifested by our drive for autonomy and integrity, concepts which are relational, contingent and fragile.\textsuperscript{420} Further, in a “risk society”, a person infected with HIV represents the paradigmatic “Other” in our society who is demonised with each prosecution and represents a threat to our security.\textsuperscript{421} This argument coupled with the objective element of the test of recklessness, which presumes a common set of concerns, and a common psychology, and can place a defendant in a particularly invidious position when attempting to rationalise the justifiability of his conduct by virtue of his lived experience.\textsuperscript{422} The risks inherent in the criminalisation of recklessness are that the allocation of risk can come to be viewed as slanted entirely towards the infected persons, resulting in a lack of shared responsibility, resulting impediment of public health efforts, and an ever-increasing difficulty for a person with HIV to argue that transmission was not their responsibility, whatever the circumstances.\textsuperscript{423}

\textsuperscript{420} Weait (a), note 6, at 155.
\textsuperscript{421} Weait (a), note 6, at 161 – 164. The paradigmatic “Other” in society, that is persons who come to be regarded as outside the norm and therefore a threat to the norm, and as such are exposed to increased stigma which has the potential to inhibit public health efforts in this area.
\textsuperscript{422} Weait (a), note 6, at 161 – 164; UNAIDS (a), note 226, at 15 – 16.
\textsuperscript{423} Weait (a), note 6, at 155; Weait and Azad, note 305, at 6; UNAIDS (a), note 226, at 15.
IV - Consent, Knowledge and Disclosure

Introduction
In both jurisdictions, where a partner consents to having sexual intercourse, with the knowledge that the other person is HIV positive, criminal liability will not arise. We will consider the following in the context of England and Wales: the ability of the complainant to consent to bodily harm, the premise that consent to intercourse does not amount to consent to the risk of infection with a STI, what state of knowledge the complainant must have in order to consent, and the relevance of disclosure on the part of a defendant. Finally, we will examine the situation in Canada where fraud vitiates consent to the sexual act itself.424

Consent and the Infliction of Grievous Bodily Harm
The first issue to address is the ability of a sexual partner to consent to the risk of transmission of a STI during sexual intercourse. Consent in this context is intimately related to autonomy in both its positive and negative respects: positive in the sense of liberty from attack, and negative in the sense of freedom to do as one wishes with one’s body.425 An approach reasoning from a positive liberty perspective would recognise consent as an element of the offence in all circumstances, such that conduct involving consensual harming would not be criminalised, unless there was a public interest or good reason to criminalise. However, the approach of the courts in England has focused more on the negative aspect, rendering all conduct which amounts to the infliction of harm as unlawful, save where there is both a public interest and a good reason to create an exception, which then recognises consent as an element of the offence. Welfare considerations may also play a role and are evidenced in the denial of the ability to consent in the interests of the wider community.

During the trial in *Dica*, the first person prosecuted under section 20 of the Act for the transmission of HIV in England, a defence was raised that the complainant had consented to the harm which had occurred on the basis of having consented to unprotected sex.426 The trial judge refused to allow this defence go before the jury as he felt bound by the decision in *R v Brown*.427

References to a “defence of consent” in this section mirrors the language of the courts, it is acknowledged that two schools of thought exist as to whether consent negates an element of the offence or represents a defence, and this will be discussed fully in due course.428 Ashworth and Horder, note 130, at 320. 429 [2004] EWCA Crim 1103, at para 13. 430 [1994] 1 AC 212 (Hereinafter referred to as *Brown*).
sadomasochistic (S&M) activities, to the effect that a person may not legally consent to the infliction of ABH, and by default GBH, save where consent is permitted in accordance with a legally recognised exception, and the risk of infection with HIV during sexual intercourse was not such an exception.\footnote{\[2004\] EWCA Crim 1103, at para 13; The finding in Brown was preceded by Attorney Generals Reference (No. 1 of 1980) [1981] QB715 wherein the Court held that it was not in the public interest that people should cause or try to cause bodily harm for no good reason, this rendering consent an element of the offence for assault and battery but not for any offence resulting in bodily harm. In Brown, the distinction was maintained.}

The Court of Appeal in Dica, which is the only case to consider this point in any detail, took a different view, and created a legal distinction, indicating that the authority of Brown and other such cases was apt to be misunderstood, in so far as while they referred to cases involving sexual overtones, they were in fact referring to the deliberate infliction of physical harm in a violent manner.\footnote{\[2004\] EWCA Crim 1103, at para 47.} The Court proceeded to distinguish cases involving the transmission of HIV in the course of sexual intercourse relying on the absence of indulgence in serious violence for the purposes of sexual gratification, and moreover these cases, in the mind of the Court, involved a risk, not certainty, of harm.\footnote{\[2004\] EWCA Crim 1103, at para 47.}

Further Judge LJ recognised that all intercourse carries risks, and that neither the courts nor parliament had seen fit to criminalise the consensual taking of risks in this context, or others, and for the court to do so would represent an unacceptable diminution of personal autonomy which should be reserved for parliament alone.\footnote{\[2004\] EWCA Crim 1103, at para 52.}

In the analysis of the consensual taking of risks in the context of sexual relations, Judge LJ cites the position of a Roman Catholic couple where one partner is infected with HIV but on the grounds of religious conscience they refuse to use condoms, and additionally a couple who are so intent on having children notwithstanding a known risk to the mother’s life or health from child birth, they refuse to use contraception.\footnote{\[2004\] EWCA Crim 1103, at para 49.} In light of these examples, the Court questions whether in the first example the law should intervene and require the couple to choose between termination of their sexual relationship, or violation of their conscience to use protection, in the latter they question whether the male partner should be criminally liable should harm materialise to the mother, and if so was the mother not also a party to the risk taking?\footnote{\[2004\] EWCA Crim 1103, at para 49.} Having reflected on these examples Judge
LJ concludes that modern society has not seen fit to criminalise such consensual risk
taking, and moreover criminalisation in this context would be impractical and haphazard,
and would undermine the general understanding of the essentially private nature of sexual
relations.434 Further he asserts that if one was to criminalise the knowing taking of risks
it would ‘seem odd’ to confine criminalisation to the sexual sphere, and not extend
criminalisation to other day to day interactions carrying a risk of harm, such as a risk of
‘disease’ transmission arising from a parent infected with a contagious disease holding
their child’s hand.435 Ultimately, the Court settles on a position that an invasion of
personal autonomy of this extent may only be made by parliament, and the ruling of the
trial judge that consent was not available as a defence was found to be wrong in law.436
Finally, the intentional versus incidental dichotomy developed by the Court denies the
defence of consent if a prosecution were to be brought for intentional infliction of GBH
pursuant to s.18 of the 1861 Act.437

Prior to considering the distinction between Brown and Dica, which both have sexual and
desire overtones, it is apt to note that the approach of the courts in recognising or
maintaining a number of exceptional categories is less than coherent with varying
reliance on the degree of harm, the mode of perpetration, the state of mind of the
perpetrator, the social status of the activity, the social utility of the conduct and the status
of those involved – all encapsulated in the vague concepts of public interest and good
reasons.438

While it is welcome that the Court has recognised the ability to consent from the
perspective of sexual autonomy, there remain valid concerns as to the logic and legal
reasoning applied by the Court in reaching its conclusion given that the threshold of harm
involved or reached in Brown and other such cases, legally matched that in Dica and
subsequent cases.439 The difference might be explained on the basis of the intentional
injury in S&M cases versus incidental injury in HIV transmission, however, the denial of
the ability to consent in Brown was based on the degree of injury, and not intent, which

437 Weait (e), note 322, at 125, R v Dica [2004] EWCA Crim 1103, at para 58.
438 Ashworth and Horder, note 130, at 320 – 328.
439 See generally: Weait (e), note 322; Cherkassky, note 150; Sharon Cowan, 'The Pain of Pleasure:
Consent and the Criminalisation of Sado-Masochistic ‘Assaults’ in James Chalmers, Fiona Leverick, and
Lindsay Farmer (eds), Essays in criminal law in honour of sir Gerald Gordon (Edinburgh University Press
2010), at 126 – 140; Cowan, note 4, at 144.
calls into question this distinction. A further reason might be the temporal and physical immediacy between the act and resulting injury in S&M cases, whereas in HIV cases there is obviously a significant time lag, this too raises particular problems as liability would be contingent on the felt experience of the injury rather than its representation as a physical fact before the law which as I have discussed is not the approach of the courts who regard the moment of infection as the legally relevant moment.

Furthermore, Brown is in itself the subject of substantial debate, which is outside the scope of this analysis, however, one critique which perhaps points to the difference in approach between S&M and HIV cases, and even within S&M cases, is the aversion of the law not only to the activities of S&M but also to the context in which it arose. As such the courts may be seen to conceptualise desire in the case of MSM S&M activities as deviant, infectious and harmful, elided with the menace of contagion, while at the same time adopting a heteronormative paradigm to conceptualise acceptable opposite sex desire, including some instances of S&M which escaped criminal liability. In this context although HIV is transmitted through both heterosexual and homosexual relations, the possibility of outlawing consensual heterosexual conduct might be seen to offend against the normality of such relations such that an exception was justified, which is represented by the references to religiously-minded opposite sex couples and the consequences of pregnancy.

On whether the reasoning in Dica should prevail, it is suggested that the arguments relating to the autonomy of the persons involved are not sustainable post Brown as in


441 Weait (e), note 322, at 126; In saying this there is at least space to consider the experience of infection in cases other than HIV in terms of the effect of the pathogen on a particular person, such as in R v Golding [2014] EWCA Crim 889, however, even in such circumstances the relevant legal moment is the moment of infection, and the subsequent experience is only relevant in so far as it touches on the threshold of harm to make out the offence.


443 R v Brown [1994] 1 AC 212, at 255 refers to the satisfaction of perverted and depraved sexual desires; R v Wilson [1996] 2 Cr App R 241 involved a branding by a husband of his wife, which the Court regarded as akin to tattooing, and found there was no public interest in penalising consensual activities between husband and wife, seeming to move away from the paradigm of unlawfulness unless coming within a recognised exception: However, the courts have not been consistent here as in R v Emmett [1999] EWCA Crim 1710 an evidently consensual encounter between a husband and wife was regarded as not admitting an exception, contrary to Wilson, on the basis that the gravity of harm was greater.
reality the harm is no different, and as such public policy in the interest of reducing transmission of harmful pathogens should deny the ability to consent, save in the most extreme of circumstances, say within a marriage, though even this exception does not arise in the minds of some.\(^{444}\) It has further been suggested that there should be a good reason to create an exception which allows consent to the infliction of such harms and that sexual gratification is not a good reason where S&M is concerned, and so too it is not a good reason in the context of the transmission of harmful pathogens in the sexual context, and indeed there should be no exception in a social context either.\(^{445}\)

Notwithstanding criticisms of the reasoning, the distinction drawn would seem to lie in a public policy decision that risk of harm is not the same as certainty and as such demands a different legal response, allied with a concern for the potential breadth of the laws reach into private relationships.\(^{446}\) If this were not so the implications would be quite extraordinary with a ban on sexual intercourse for all persons infected with HIV, and now certainly many STIs which will reach the threshold of harm, and further the inability to consent to many day to day contacts carrying the risk of the transmission of a pathogen. Additionally, were a distinction not made then this would call into question the risk of harm which may well result from sexual intercourse per se and the risk of harm resulting from sex leading to procreation. Indeed, the Court in \textit{Dica} recognised that criminalisation of consensual risk taking in the context of sexual intercourse is impractical, unenforceable, undermines the understanding of the community of the private nature of such relationships, and would be incapable of restriction to risks taken in the course of sexual intercourse.\(^{447}\)

While the distinction between \textit{Brown} and cases of HIV or STI remain troubling at certain levels, including whether the approach to S&M activities is acceptable, the approach of denial of consent in such cases would be quite inhuman from the perspective of persons infected with pathogens and their significant others, and indeed would increase the reach of the criminal law unacceptably. Such suggestions rely on two related and equally unacceptable principles, first that the criminal law has the potential to make a significant contribution in curbing the spread of pathogens which it manifestly has not done, and

\(^{445}\) Mawhinney, note 94, at 205 – 207, 211.
\(^{446}\) Weait (e), note 322, at 126
second that the those who are infected are to be categorised in a manner which ascribes them a particular form of medico-legal subjectivism which makes them a valid target of the criminal law.\textsuperscript{448}

\textit{Consent to the Risk of Infection or Consent to Intercourse}

We have previously traced in some detail the erosion of the authority of \textit{Clarence} in England, to the effect that an assault was required to make out an offence of unlawfully and maliciously inflicting GBH contrary to section 20 of the 1861 Act, by decisions which preceded \textit{Dica}, and by \textit{Dica} itself.\textsuperscript{449} A further step taken in \textit{Dica} was to remove any purported effect of \textit{Clarence} that consent to sexual intercourse amounted to consent to the risk of a consequent infection with a STI, and also to distinguish consent to the sexual act from consent to the risk of infection.\textsuperscript{450} Judge LJ held that the key question was whether;

\begin{quote}
‘…the victims’ consent to sexual intercourse, which as a result of his alleged concealment was given in ignorance of the facts of the appellant’s condition, necessarily amounted to consent to the risk of being infected by him’.\textsuperscript{451}
\end{quote}

The Court reasoned, having considered relevant authorities in relation to consent, that there was a distinction to be drawn between consent to sexual intercourse, and consent to the transmission of an infection in the course of intercourse, and as such held that there was consent to the former, but not to the latter; given that the complainant had no reason to suspect that there was a risk of transmission and thus could not have consented to it.\textsuperscript{452}

Here, the Court creates two crucial distinctions: first consent to sexual intercourse is not affected by non-disclosure of HIV status, which is the subject matter of this section; second consent to sexual intercourse is not the same as consent to all risks associated with sex, which I will later address in the context of the knowledge of the complainant. The first conclusion sets the law apart from that in Canada in so far as, in England where there

\textsuperscript{448} Mykhalovskiy (a), note 203, at 172 – 174 where the author discusses how the approach of the courts to issues related to transmission and exposure creates a new form of medico-legal subjectivism which renders persons infected as capable of committing a crime which no one else can, thus creating a new and more stigmatising form of biological citizenship. In essence this relates to the normality/abnormality of both the pathogen, and the state of being infected, such that regarding those who are infected as abnormal may reinforce structural inequalities which in turn makes public health efforts to curb transmission more difficult.


\textsuperscript{450} \textit{R v Dica} [2004] EWCA Crim 1103, at para 59.

\textsuperscript{451} [2004] EWCA Crim 1103, at para 37.

\textsuperscript{452} [2004] EWCA Crim 1103, at paras 33 – 39.
is concealment of HIV status, or the presence of another STI, this will not amount to a fraud sufficient to vitiate consent to a sexual act. In reaching the conclusion that consent to intercourse was unaffected by non-disclosure, Judge LJ cited with approval the findings of Rose LJ in R v Tobassum.\textsuperscript{453} In Tobassum, when considering the frauds capable of vitiating consent to sexual intercourse Rose LJ reasoned from previous authorities, Clarence\textsuperscript{454} and R v Linekar,\textsuperscript{455} that; ‘…each consented to sexual intercourse knowing both the nature and the quality of that act. The additional unexpected consequences, of infection in the one case and non-payment in the other, were irrelevant to and did not detract from the women's consent to sexual intercourse’, thus the formulation of frauds capable of vitiating consent were the nature or quality of the act or the identity of the perpetrator.\textsuperscript{456} This formulation was then applied by Judge LJ in Dica, to the effect that the consequence of infection was not relevant to consent to intercourse, and he concluded; ‘These victims consented to sexual intercourse. Accordingly, the appellant was not guilty of rape’.\textsuperscript{457}

The fact that HIV status is irrelevant to consent to sexual intercourse, including in the context of a rape charge pursuant to the Sexual Offences Act 2003 (the 2003 Act), was confirmed in R v B.\textsuperscript{458} Here the appellant had been convicted of rape, the trial judge had allowed evidence to be adduced in relation to his HIV status and in so doing held that the definition of consent provided in section 74 of the 2003 Act requires a reasoned choice, such a choice could only be made one was in possession of all relevant facts, and that the prospect of becoming infected with HIV was such a fact, notably there was reliance on the definition of consent as opposed to the frauds vitiating consent per section 76(2) of the 2003 Act.\textsuperscript{459} On appeal Latham LJ for the Court relied on the findings in Dica to the

\textsuperscript{453} R v Dica [2004] EWCA Crim 1103, at para 37; R v Tobassum [2000] 2 Cr. App. R. 328 (Hereinafter referred to as Tobassum)
\textsuperscript{454} (1889) 22 QB 23.
\textsuperscript{455} [1995] Q.B. 250.
\textsuperscript{457} [2004] EWCA Crim 1103, at paras 33 – 39; Notably that the formulation in Tobassum referring to the nature and quality of an act has not been replicated, and has been replaced by the purpose of the act, in the context of s. 76(2)(a) of the Sexual Offences Act 2003. Thus the factors capable of vitiating consent to sexual intercourse in English law are nature and purpose of the act, and the identity of the perpetrator.
\textsuperscript{458} [2006] EWCA Crim 2945. Notably that the formulation in Tobassum referring to the nature and quality of an act has been set aside, and has been replaced by section 76(2) of the Sexual Offences Act 2003, such that factors capable of vitiating consent to sexual intercourse in English law are now the nature and purpose of the act, and the identity of the perpetrator. Furthermore, a definition of consent is given in section 74 of the 2003 Act which states; ‘a person consents if he agrees by choice, and has the freedom and capacity to make that choice’.
effect that prior to the 2003 Act non-disclosure of HIV status did not affect consent to intercourse, and the 2003 Act did not change that.\textsuperscript{460} The Court reasoned that the sexual act remained consensual but at the same time recognised debate in this area, including with regard to personal autonomy in intimate relationships, which they felt should be resolved as a matter of public policy and public debate, as opposed to a judicial change in the law with regard to deceptions and consent in the context of sexual intercourse.\textsuperscript{461} Finally the Court concluded that; ‘…the fact that the appellant may not have disclosed his HIV status is not a matter which could in any way be relevant to the issue of consent…’\textsuperscript{462}

It had appeared that this resolved the matter conclusively. However, it may now be that the reasoning in \textit{B} is only authoritative in circumstances where there has been a failure to disclose, as opposed to active deceit.\textsuperscript{463} In \textit{R v McNally} the Court of Appeal considered active deception in the context of deception as to gender in the context of sexual intercourse.\textsuperscript{464} Levenson LJ on behalf of the Court held that active deception is to be distinguished from non-disclosure, and distinguished \textit{B} to the extent that it only referred to non-disclosure and expressly left open the question of deceit.\textsuperscript{465} In holding that choice was an essential element of consent in light of section 74, it was further held that deception as to gender could amount to a violation of choice, and thus consent.\textsuperscript{466} While the Court expressly identified that the \textit{B} had left open the question of deceit, what they did not engage with was the concerns expressed in \textit{B} that the law relating to deception and consent as related to HIV should not be the subject of judicial change, but instead a public debate as to all the issues and consequences. While \textit{McNally} in itself does not determine the issue specifically with reference to HIV, or other STIs, the specific reference to \textit{B} and HIV alongside the enlargement of deceptions with reference to the definition of consent, and not the deceptions specifically comprehended by the 2003 Act, leaves the door ajar for prosecutors to take a different approach and perhaps enlarge the scope of potential liability quite significantly.\textsuperscript{467}

\textsuperscript{460} [2006] EWCA Crim 2945, at 392.\textsuperscript{461} [2006] EWCA Crim 2945, at 392 – 393.\textsuperscript{462} [2006] EWCA Crim 2945, at 393.\textsuperscript{463} \textit{R v McNally} [2013] EWCA Crim 1051; Ormerod and Laird, note 5, at 823 – 824.\textsuperscript{464} [2013] EWCA Crim 1051.\textsuperscript{465} [2013] EWCA Crim 1051, at 24.\textsuperscript{466} [2013] EWCA Crim 1051, at 25 – 27.\textsuperscript{467} The Crown Prosecution Service guidelines have not adverted to the \textit{McNally} development, and simply refer to the \textit{B} decision to the effect that a person who does not disclose does not commit a rape: Crown
While it remains to be seen how subsequent courts will approach the non-disclosure deceit dichotomy if prosecutions for rape are pursued, the scope of liability would now seem to include: reckless and intentional failure to disclose resulting in infection dealt with pursuant to the 1861 Act, deception not resulting in infection as rape contrary to the 2003 Act, and deception leading to infection which may be dealt with as both rape and an offence contrary to the 1861 Act. The potential to realise the scope for expansion of liability will in reality have to await further developments, however, I turn now to the position in Canada which from the outset has approached the area from the position of consent to the sexual act.

The approach to consent in Canadian case law is on one reading merely referable to the composition of the offence of aggravated assault, which requires vitiation of consent to make out the offence. However, the availability of alternative offences which would not require this, and the express choice of the archetypal charge of aggravated sexual assault, provides an important contrast to the approach adopted in England, and underscores a choice which calls for explanation and critique. The offences prosecuted in Canada require the non-consensual application of force to make out the basic assault element of the offence, and the mainstay of the courts’ analysis has been to particularise the circumstances in which fraud will vitiate consent, additionally the courts have recognised the ability to consent to exposure to a STI, without discussion, and the absence of consent forms part of the actus reus of the offence.

I will revisit briefly the reasoning of the courts to contextualise the discussion of the vitiation of consent, and in Cuerrier the judgements differed as to the approach to be taken to frauds sufficient to vitiate consent following statutory reform which replaced historical connotations of fraud with the term ‘fraud’ simpliciter. The three judgments

Prosecution Service, note 287; It might also be noted that while the Canadian jurisprudence adopts the approach of vitiation of consent, they have rejected all frauds in inducement in favour of a test, criticised as it is, which recognises a concomitant requirement of significant risk of serious harm and inducement. No such limitation is evident in the revised English position, with the Court in McNally adopting a rather vague position that: ‘...“the evidence relating to ‘choice’ and the ‘freedom’ to make any particular choice must be approached in a broad commonsense way”...’, [2013] EWCA Crim 1051, at 25.

Ormerod and Laird, note 5, at 824.

R v Cuerrier [1998] 2 S.C.R. 371, at para 126 – 139; R v Mabior [2012] 2 S.C.R. 584 where the vast majority of the judgement is devoted to an analysis of the interpretation of fraud: See supra notes 77 to 87 and associated text for a full account of the approach of the Court to issues relevant to consent; It should be noted that Canadian jurisprudence contains principle analogous to Brown, evidenced in R v Jobidon [1991] 2 S.C.R. 714, however, no discussion has taken place in the decided cases as to the reasons why a person can consent to significant risk of serious harm in the context of the transmission of a pathogen during a sex act.
reached the conclusion that the non-disclosure of HIV status or deception as to that matter was a fraud sufficient to vitiate consent, with L’Heureux-Dube J adopting an approach, related to maximisation of autonomous control over physical integrity, of any fraud in inducement such that there was dishonesty absent which the complainant would not have consented. McLachlin J preferred a narrower incremental approach to the understanding of fraud, such that the law should revert to the position pre-Clarence in that deceptions as to the sexual character of the act, the identity of the perpetrator and a deception as to the presence of a ‘sexually transmitted disease’ are sufficient to vitiate consent. Cory J for the majority, focused on the process of legislative reform and the change in the definition of fraud and endeavoured to discern parliamentary intent as to the meaning of the term in modern times. The Court rejected the historical Clarence formulation in relation to frauds, those being as to identity or the nature and quality of the sexual act, and articulated a broader alternative. In so doing, they rejected a formulation that all frauds may do so, preferring instead a commercial law fraud test, requiring dishonesty, deprivation, and that the dishonesty induced participation in the sexual act. This formulation relies on an objective determination of the defendant’s dishonesty; there are coterminous references to both non-disclosure and deceit, so nothing turns on this point, save that positive disclosure on the part of a defendant is required. The majority, in rejecting a conclusion that all frauds in inducement are sufficient, were concerned to limit the breadth of extension of the law so as to properly formulate the offence without ‘trivialising’ the conduct which could give rise to such serious criminal liability.

Mabior developed matters further, with an extensive consideration of the nature of frauds sufficient to vitiate consent with reference to the purposes of the criminal law, the common law and statutory reform of fraud, values in the Canadian charter and the experience of other common law jurisdictions. McLachlin J for the court concluded that an understanding of consent, and frauds sufficient to vitiate it, consonant with the Charter values of equality and autonomy required an understanding of such frauds as

474 Weait (a), note 6, at 186.
475 [2012] 2 S.C.R. 584; A full account of the approach of the Court is addressed above at note 76 on, and associated text.
broader than those related to the nature and quality of the act and the identity of the perpetrator. They also concluded that the same Charter values resulted in a recognition of sexual assault not only as a crime associated with physical and emotional harm, but as a crime associated with the wrongful exploitation of another human being; the law should thus act to preserve the human dignity of persons engaged in sexual relations as autonomous, equal and free persons.\footnote{476} 

Preferring an evolving common law approach to the issue of fraud the Court settled on a test of dishonesty associated with deprivation in the form of significant risk of serious harm, understood as the realistic possibility of HIV transmission. The \textit{realistic possibility} test was seen to strike the appropriate balance in terms of both under- and over-criminalisation, and to be consonant with the statutory and common law reforms in relation to frauds sufficient to vitiate consent which should be limited to serious deceptions with serious consequences, with \textit{realistic possibility} striking the balance in the context of infection with a disease with life-altering consequences.\footnote{477} 

On the issue of Charter values, the Court felt that a \textit{realistic possibility} test was in keeping with the equality and autonomy of individuals which gives them a right to choose whether to have intercourse, and struck the correct balance between respect for that concept and the need to confine the criminal law only to serious wrongs and serious harms.\footnote{478} 

The operation and potential breadth of these tests has been considered previously, however, here I am concerned with the type of frauds which are sufficient to vitiate consent to sexual intercourse. A thorough review of all the issues and perspectives in addressing this question is outside the scope of our discussion, and what I aim to do is address a number of perspectives which critically analyse the approach of the courts and to identify why I think this is not the correct one in dealing with cases of sexual transmission of pathogens.

The preliminary observation to be made is that Canada is, on one reading, all about consent, and this is true at a superficial level; however, if the issue were all about consent and the related non-disclosure of HIV status which in turn denies a person the right to choose, then all non-disclosures as to HIV status would vitiate consent. Yet, this is not the case, and consent will only be vitiated where the significant risk of serious harm test is satisfied, thus we see the reprisal of the issue of harm. The issue is not so simple as to

\footnote{476}{2012} 2 S.C.R. 584, at paras 44 – 54.  
\footnote{477}{2012} 2 S.C.R. 584, at paras 81 – 92.  
\footnote{478}{2012} 2 S.C.R. 584, at paras 81 – 92.
be about either consent or harm, however, consent centres on the autonomy of the complainant in a particular way, in sexual offences, which is unrelated to physical harm, whereas the test in Canada relates to the autonomy of a person in a sexual context in a limited way, which also includes elements of physical harm, or risk thereof, which sits ill-at-ease with an autonomy based justification for the vitiation of consent.

While the historical formulation of frauds as relating to identity or the nature and quality of the act were certain, they have been the subject of substantial criticism from a feminist perspective. Chief among these critiques is that such formulations of consent do not maximise the autonomy of a woman by allowing her to choose when, with whom and under what circumstances to engage in sexual activity.\textsuperscript{479} The drive to take women’s autonomy seriously has been represented in activism which sought reform of the substantive and procedural legal rules relating to sexual assault leading to a number of reforms, including the change in the historical definition of fraud which referred to the nature and quality of the act, and its replacement simply with the term ‘fraud’.\textsuperscript{480} Whether the change in terminology resulted in a broadening of the categories of fraud sufficient to vitiate, consent was the subject matter of both the \textit{Cuerrier} and \textit{Mabior} judgements, and ultimately that conclusion was that it did, though not to the extent that all frauds were sufficient. The historical categories persist, and are supplemented with those relating to significant risk of serious harm. Other reforms also flowed from activism in this area, including reforms relating to a purported honestly held belief in consent, and evidentiary rules in relation to sexual history of a complainant and the necessity for corroboration warning.

The question of how to approach the issue of fraud is linked to the definition of consent, and a further reform was the change in the definition of consent, represented in section 273.1 of the Code which refers to consent in sexual assault cases, and provides that consent is the voluntary agreement of the complainant to engage in the sexual activity in question, which was interpreted in \textit{R v Ewanchuk} as providing that consent must be interpreted from the perspective of the complainant.\textsuperscript{481} The definition of consent is also linked to the wrong and harm of rape, although referred to as sexual assault in Canada, and I will use the term rape as I proceed in light of the labelling of the offence in the

\textsuperscript{479} Shaffer, note 70, at 469.
\textsuperscript{480} Shaffer, note 70, at 469.
\textsuperscript{481} [1999] 1 S.C.R. 330.
exemplar jurisdiction which I have chosen – Ireland. The wrong and harm of rape is not related to physical harm, or an experience by the person who has been penetrated, it relates to a violation of sexual autonomy and the sheer use of another person.\footnote{Gardner, note 5, at 1 – 32.} It is a process by which a person wrongfully objectifies another, and consent to the act legitimises this through a process of ‘rehumanising’ which recognises the sexual autonomy and thus moral agency of the person.\footnote{Gardner, note 5, at 20 – 21.} The definition of rape is also particularly related to sexual penetration of another, and the act of penetration carries with it a particular social meaning related to the special, if perhaps romanticised, social conception of the sexual act, and a non-consensual act of this type is regarded as an egregious subversion.\footnote{Gardner, note 5, at 21 – 25.} These perspectives expose both the potential relevance of non-disclosure to the autonomy of the complainant and also the contradiction referred to earlier in relation to the continued focus on harm. From the point of view of some, it is just these principles, sheer use of another and a violation of their sexual autonomy, which make non-disclosure cases an archetypal example, which matches the label of the offence as one of sexual violation, and which provides a greater protection to women than offences of assault or causing harm as no physical harm is required.\footnote{Mathen and Plaxton, note 223.} However, it remains that, if consent is an expression of sexual autonomy, there will be circumstances in which an active or passive deception will amount to a violation of that autonomy: whether this be any deceit but for which the complainant would not have engaged in the sexual act, or a more limited formulation.

An answer to this question requires identification of two methodologies in Canada by which consent may be found to have been absent in circumstances where there was in fact agreement to the physical act. First, consent may be regarded as having been void \textit{ab initio} through a negation of the voluntary agreement of the parties, or second through the vitiation of otherwise valid consent through the recognition of a fraud sufficient to do so. The former approach is adopted in Canada in relation to frauds as to the nature or purpose of the act or the identity of the perpetrator, the latter in relation to other frauds.\footnote{\textit{R v Hutchinson} [2014] 1 S.C.R. 346 considered consent to sexual intercourse with the use of a condom, where the man had pierced the condom to avoid birth control. The Nova Scotia appellate court, [2011] NSSC 361, approached the matter as one which negated voluntary agreement to intercourse as the agreement to condom use was an inseparable part of the agreement to intercourse. However, the majority of the Supreme Court interpreted voluntary agreement as relating to subjectively agreeing to the specific physical act itself, its sexual nature and the specific identity of the partner, whereas the matter}
approach to frauds relating to the nature of the act, that is consenting to an act thought to be non-sexual which it turns out to be, is not contentious and may be referred to as ‘frauds in the factum’, as related to the fact of sexual intercourse itself. Furthermore, frauds relating to the purpose of an act can also be regarded as relatively uncontentious in that they refer to cases where it was known what was being consented to, that is penetration, but the purpose of the act was thought to be non-sexual, and turned out to be sexual, thus in essence it relates to consent to a sexual act. Other frauds within the concept of frauds in inducement, they do not relate to the sexual act itself which is understood both in terms of its physicality and sexual purpose, but which relate to matters that if known would have resulted in a refusal of consent. A longstanding example of such a fraud is as to the identity of the perpetrator, and this is reasoned as a valid instance of a sufficient fraud as the autonomous will of the person should be respected in relation to their freedom to choose whether to engage in a sexual act and with whom to do so. The major question is as to other frauds in inducement and the extent to which these should be regarded as capable of vitiating consent to intercourse.

The extent to which all frauds, by which I mean frauds in inducement outside of the historical categories, will be sufficient to vitiate consent to intercourse depends on the perspective one has on the act of intercourse itself. One perspective is that of dominance feminism which regards sexual intercourse as a site of danger where sex is equated with the domination of men, who are already, always the authors of meaning in this domain, and submission to male desire. In this approach, frauds in inducement are representative of such domination, and a failure to regard the necessary facets of sexual autonomy of the woman which in turn is related to a denial of the key personal and social good of intercourse. From this perspective it has been reasoned that to proceed to have intercourse where one has not disclosed HIV status is to presume that a woman is sexually available despite the risks and in doing so to presume that she has no regard for her health

of piercing the condom was addressed as a fraud vitiating consent which applied the dishonesty and deprivation tests of Cuerrier and Mabior. Notably the Canadian courts have now taken a different approach to that of McNally in England with regard to the nature of voluntary agreement and choice.

487 Slater, note 269, at 313; R v Hutchinson [2014] 1 S.C.R. 346
489 Slater, note 269, at 314.
490 MacKinnon and Crompton, note 223, at 408;
which denies her autonomy. Mabior clearly draws from this approach in advancing an overtly feminist perspective to the recognition of non-disclosure as a fraud capable of vitiating consent, referring to the wrongful exploitation of another human being and the necessity to rid the law of ‘crabbed views’ of consent and fraud. That success of feminist driven reforms related to the purging of gender stereotypes, consent as arising from the perspective of the complainant and the removal of outdated and misogynistic evidential and procedural rules is welcome, however, whether the extension of these reforms such that exposure to the risk of transmission of an infection should always be seen as the wrongful sexual exploitation of another is a contested point.

The feminist view addressed above has been termed an essentialist view of the role of women and sex in society, which, in turn, has been the subject of critique from feminist scholars who argue from an anti-essentialist viewpoint, which recognises multiple forms of oppression and which criticises the essentialist position as one which conceptualises the issues affecting women as those affecting a prototypical woman, which in turn ignores the position of marginalised women within society. Additionally, it has been argued that an alternative to the dominance model should recognise the key social and personal good of sexual expression which should in turn mean that the autonomous decision to engage in sexual intercourse should only be set aside for good reason.

Taking into account these alternative constructions, it is possible to look differently at frauds in inducement, firstly by recognising the value of sexual activity to all, including women, and the autonomous right of a person to engage in risky activities. The issue of consent to risky sex is related to the issue of agency as an element of sexual autonomy on the part of the HIV negative person, and why then should the law deny the agency of that person to choose to engage in a high risk activity. The denial of this agency is premised on the notion that a rational person will not engage in sexual activity with a HIV positive person, and thus non-disclosure has robbed the complainant of their agency and thus autonomy. However, many people can and do engage in high risk activities, including sexual activities, yet the law has only intervened thus far in the sexual

492 Mathen and Plaxton, note 223, at 464.
494 Klein, note 223, at 184.
495 Klein, note 223, at 178 – 180.
496 MacKinnon and Crompton, note 223, at 409.
497 MacKinnon and Crompton, note 223, at 438.
498 Rawluk, note 223, at 29.
Furthermore, a substantial number of people do engage in high risk sex where their partners may not know their HIV status and as such this conception is undermined to the extent that many people are happy to run the risk of contracting HIV. This is an expression of their sexual autonomy and agency, which was desirous of an encounter which carried risk, and as such their interest in the activity in question remained, it was an interest with the person in question and the risks in question existed.

In a dominance feminist model, the agency of a woman to choose is denied due to the oppressive circumstances in which she makes that choice, which in turn is related to the power dynamic between men and women. Aside from the point that HIV, and other STIs, affect both genders and are transmitted between both genders, the characterisation of the HIV negative person as the victim casts the positive person into the position of power, a position seen to justify the traditional categories of frauds arising from the systematic abuse of women through the years and the myths which were perpetrated about women in the sexual context. This characterisation of power is related to the power of information, the power held by the HIV positive person to disclose, and the abuse of that power by failing to disclose. However, this characterisation ignores the disempowered position of persons who are HIV positive and who suffer extraordinary stigma arising from their infection and where there a multitude of reasons not to disclose which in themselves often turn on issues such as gender and marginalised status.

Furthermore, from a feminist perspective, this entire focus on the HIV negative person may actually damage the interests of women who are infected with HIV and as such contribute to the oppression of women where the objective is the eradication of male dominated oppressive forces in society and as expressed by the law. In so doing the law ignores competing anti-subordination principles and does so based on an essentialist view of the position of HIV negative women only. Therefore, the position of power thesis,

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503 MacKinnon and Crompton, note 223, at 423 – 432

504 Klein, note 223, at 188, 190 – 195.
and the requirement thus to support such a fraud as capable of vitiating consent is not supported by the actual position of people infected with HIV, and indeed further exacerbates the disempowered basis upon which most feel unable to disclose.

This analysis does not aim to address all the circumstances where frauds in inducement may vitiate consent, or whether any are appropriate, however, I believe that an approach which reasons from the perspective of the autonomy of a complainant where they have elected to engage in high risk sex is wanting. It denies the agency of the person, and as such denies their autonomy based on a consequence which has followed on from the sexual act, where they knew the act they were engaging in, knew the person and knew the risks. Furthermore, to deny the agency of the person on the basis of the power of the HIV positive person, in the nature of their possession of information, is to deny the disempowered position of that person and to mistake the position of power in the actual relationship. Additionally, the focus on the autonomy of the person who is HIV negative is to ignore the position of women who are HIV positive and the competing anti-subordination goals of feminism which should operate in a manner which does not further marginalise women in society. Finally, the approach in Canada is to say that not all frauds in inducement shall be sufficient to vitiate consent, only those carrying a significant risk of serious harm, this in an effort to avoid the trivialisation of the law through comprehension of mere lies associated with the sexual relationship. However, if the goal is the maximisation of autonomy then harm is not the issue, and as such any fraud, but for which the complainant would not have engaged in intercourse, should be a fraud sufficient to vitiate consent—a conclusion to which the courts have been continually averse. What has been sufficiently serious started with HIV, now comprehends other STIs and has advanced to the piercing of a condom leading to pregnancy. The pregnancy case aside, which I find difficult to reconcile, the law operated for some years with no examples of such frauds and a new form of crime was created to deal with HIV, and which could only be committed by a HIV positive person, an exceptionalism of a very serious magnitude which both tracks and enhances the stigma associated with the pathogen.

The breadth of criminalisation is of significant concern in relation to the impact upon public health efforts to control the spread of disease. Furthermore, there is a labelling issue with this approach: those who are deceitful in terms which can have devastating psychological consequences for a person are to be labelled as morally wrongful one
would presume, but not to have engaged in any legal wrong. However, those who carry a pathogen, where sexual intercourse is a mere vector, are labelled as sex offenders and rapists; this seems to me to miss the point entirely. It regards all persons infected with STIs as powerful agents preying on the autonomy of others unless they disclose the presence of the pathogen, when in reality most who fail to disclose either have done so arising from the societal conception of them and the effect that has had on them, or for fear of the consequences arising from the societal conception of them which will flow from disclosure. To brand such individuals as sex offenders and rapists, bearing in mind the communities conception of the term, mistakes the wrong and harm of exposure or infection, fails to have regard to the reality of living with such infections, and has created a new and deeply disturbing category of sex offender based on the misfortune to have become infected with a pathogen. Finally, the overreliance on individual autonomy and its individuated disposition ignores the social dimension of pathogen control which creates the circumstances where the pathogen can thrive through stigmatising populations and interfering with methods of disease control.

The State of Knowledge of the Complainant
Having determined that the consent of the complainant may amount to a defence available to the defendant, we must now examine how that consent may be established, and in particular consider the relevance of disclosure on the part of the defendant, and the state of knowledge of the complainant.

In Dica, where the defendant was claiming that he had informed the complainants of his HIV status, and that they had consented nevertheless to intercourse, the Court referred to the effect of the judgment as permitting a prosecution under section 20 where HIV status was concealed. Judge LJ held that while the complainant’s state of knowledge and their consent were linked, the ultimate question is whether there was consent, and unless one was willing to accept all consequences of unprotected sex, including major disease, it is unlikely that one would consent to the risk of major illness if one was ignorant of it. It has been argued that the implicit meaning of this finding is that the only relevant source of knowledge is disclosure on the part of the defendant.

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505 Cowan, note 4, at 154 – 155; Francis and Francis, note 164.
In *Konzani*, the matter was addressed in greater detail, the defendant had admitted that he was reckless at trial and as such the appellate decision focused almost exclusively on consent.\(^{509}\) During his charge to the jury the trial judge, on his reading of *Dica*, directed that the jury must be satisfied that the consent of the complainant was given consciously, this direction was challenged on the basis that it failed to explain that the jury were entitled to acquit if the defendant had an honest belief in complainant’s consent.\(^{510}\) The Court of Appeal reemphasised the import of *Dica*,\(^{511}\) they then continued by reinforcing the relationship between recklessness, consent and disclosure, to the effect, crucially, that in the event of non-disclosure by the defendant, the defence of consent would not be available.\(^{512}\) The court justifies this conclusion on the basis that a defendant who conceals his status diminishes the personal autonomy of the complainant, is deceitful, and prevents informed consent from arising.\(^{513}\) The Court also reasoned that *Dica* recognised a defence of consent based on, and limited by, conflicting public policy criteria.\(^{514}\) In this regard, the public interest requires the avoidance or prevention of the spread of ‘catastrophic disease’, which in turn is balanced with upholding personal autonomy in the context of non-violent adult sexual relationships.\(^{515}\) Crucially, disclosure by, and thus information from, the defendant becomes the central concern.

In rejecting a defence of honest belief in consent in this case, the Court reasoned that the autonomy of the complainant is once again not enhanced where the defendant is permitted to rely on an honest belief in consent where they have concealed their HIV status, stating that silence on the part of the defendant is incongruous with an honestly held belief.\(^{516}\) Thus, while recognising that generally where a defence of consent was available to a defendant, equally the defence of honest belief as to consent would be available, the

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\(^{509}\) *R v Konzani* [2005] EWCA Crim 706, at 4; For a discussion of the consent elements of this case in context see: Weait and Azad, note 305; Weait (c), note 151; Weait (a), note 6, at 164 – 207, Ryan (a), note 97, at 244 – 246, Cooper and Reed, note 5; Cherkassky, note 150.


\(^{511}\) *R v Konzani* [2005] EWCA Crim 706, at 41, They did this by stating that there is a distinct difference between running the general risks inherent to unprotected sexual intercourse, and giving an informed consent to risk of infection with a potentially fatal disease, thus reemphasising that the complainant’s consent must be informed.

\(^{512}\) [2005] EWCA Crim 706, at paras 41 – 42

\(^{513}\) [2005] EWCA Crim 706, at para 42.

\(^{514}\) [2005] EWCA Crim 706, at paras 42 – 43.

\(^{515}\) [2005] EWCA Crim 706, at paras 42 – 43.

\(^{516}\) [2005] EWCA Crim 706, at para 42.
caveat is that where a defendant does not disclose his status the defence of consent is not available, and neither is a defence of honest belief.517

At this stage it would appear that the only knowledge relevant to the presence or absence of informed consent is that provided by the defendant; however, the Court did recognise that cases which were ‘not too remote to be fanciful’ could arise where the complainant did not in fact give an informed consent, but where evidence was available which could satisfy a court that the defendant honestly believed that they had.518 For such a circumstance to arise there must be some evidence that the defendant actually believed that the complainant had information about the defendants HIV status, and two examples offered were the complainant obtaining knowledge as to a partner’s HIV status through the context in which they met, for example, if they met while the defendant was receiving treatment for his condition, or secondly the defendant may honestly believe a mutual friend had disclosed the HIV positive status, giving rise to a possible honest belief in consent. I shall refer to this as the Konzani proviso.

The proviso might seem like a significant concession in favour of a defendant, however, the construction of knowledge in the examples only involve actual knowledge or honestly held belief as to actual knowledge of infection, whether that is from the defendant, the context, or from another party, and this denies the possibility of general knowledge as to the risks associated with unprotected sex.519 It seems illogical that where a complainant is aware of the risk of contracting a STI, adverts to that risk, decides to run the risk, and the risk then materialises, they are not in the language of the Court consenting to running that risk as they have not been specifically informed as to the status of their partner, yet were aware of the risk, a point I shall return to later in this part.520 Furthermore there is an elision of non-disclosure with fault on the part of the HIV positive person and an absence of knowledge of risk on the part of the complainant.521

It remains that the proviso does permit a defendant to advance evidence supporting an honest belief in consent, such as a belief that a friend had disclosed the presence of HIV, even if the complainant was not in fact aware and thus consenting; this is a relevant and

517 [2005] EWCA Crim 706, at paras 42, 45.
518 [2005] EWCA Crim 706, at para 44.
519 Weait and Azad, note 305, at 8, Weait (c), note 151, at 767.
520 Weait and Azad, note 305, at 8
521 Weait and Azad, note 305, at 8, Weait (c), note 151, at 767.
welcome concession, which may assist a defendant given the availability of some evidential narrative to support his honestly held belief. However, the position here, given the exceptional circumstances related to the honestly held belief, seems analogous to an honest yet mistaken belief held on reasonable grounds, which has been introduced in the context of sexual offences by parliament, thus an honestly held belief is not sufficient in itself, it is only one based on reasonable grounds for believing that the complainant may have obtained actual knowledge of the presence of the pathogen, and if such a change was to be affected in this context parliament it would seem was the appropriate vehicle for doing so.\footnote{522}

Finally, in Canada, the issue of the type and source of knowledge on the part of the complainant was addressed in \textit{Cuerrier}, where Cory J, in the same vein as the courts in England, rejected a standard that knowledge of the risk of transmission amounts to consent to that risk, save where the complainant has actual knowledge of the presence of HIV arising from a disclosure on the part of the defendant.\footnote{523} The entire focus is on disclosure on the part of the defendant, related to their dishonesty which is a necessary proof to vitiate consent, and there is no specific advertence to circumstances where the complainant would have obtained actual knowledge from another source. However, as the failure to disclose must have induced the complainant to engage in the sex act it is reasonable to assume that evidence of actual knowledge by the complainant, from an alternative source, would negate a finding of inducement, such that knowledge from alternative sources is a relevant factor though the Court does emphasise repeatedly the duty of disclosure on the part of the defendant.

\textbf{The Meaning of Consent in Transmission Liability}

Whether or not consent, in these circumstances, forms an element of the offence or a defence available to the defendant can have some practical consequences in the trial of an offence and exhibit important messages about the views of the criminal law, and thus society, in relation to the conduct and status of persons infected with pathogens. There exists no unanimity as to whether the absence of consent is an element of the \textit{actus reus} of the offence or a defence available to the defendant.\footnote{524} If it is regarded as the former it is generally regarded as a justification which renders what would otherwise be unlawful,
lawful, if it is the latter the conduct remains unlawful but is excused and while this remains an important distinction, in practice, the dichotomy is not sufficiently developed or expressed to allow any principled consideration of the operation of the defence of consent on this basis save as to where the initial burden of proof lies.\textsuperscript{525}

A survey of relevant authorities displays varying perspectives, and in \textit{Brown}, two of the Lords regarded consent as an element of the \textit{actus reus} and three regarded it as a defence.\textsuperscript{526} Whereas in \textit{R v Barnes}, the court regarded the absence of consent as an element of the \textit{actus reus}, with a similar view taken in \textit{R v K}.\textsuperscript{527} Further the reference to the term unlawful in the text of the section 20 offence has led to some judicial and academic views that consent fails to be considered as an element of the \textit{actus reus} in this context.\textsuperscript{528} In practical terms, the distinction affects the burden of proof, if consent is an element of the \textit{actus reus}, it falls to the prosecution to prove the absence of consent; if it is a defence, the defendant must advance evidence of it, and then the prosecution must disprove consent.\textsuperscript{529}

\textbf{The Moral Message}
Although the practical significance of consent as either a justification or excuse may be limited, it remains an important theoretical distinction in terms of the moral differentiation of conduct.\textsuperscript{530} Much of the debate in this area arises from the work of Fletcher and his distinction between justification and excuse.\textsuperscript{531} According to Fletcher’s view a justification is an exception to a prohibitory norm; it concedes that the offence is made out, but at the same time is not wrongful given the recognised exception, these exceptions are universalised and create precedent as to the permissibility of conduct.\textsuperscript{532} This being so, excuses recognise that conduct is unlawful and wrong, but the existence of an excuse peculiar to the individual permits the avoidance of liability.\textsuperscript{533} In the case of a justification, such as where consent is an element of the offence, the conduct of a defendant is not morally wrongful, others recognise the conduct as correct and positive.

\textsuperscript{525} Ormerod and Laird, note 5, at 716 – 717.
\textsuperscript{526} \textit{R v Brown} [1994] 1 AC 212; Ormerod and Laird, note 5, at 716; Card, note 54, at 54.
\textsuperscript{527} \textit{R v Barnes} [2005] EWCA Crim 3246, at para 16; \textit{R v K} [2001] UKHL 41.
\textsuperscript{528} \textit{R v Barnes}, [2005] EWCA Crim 3246, Card, note 54, at 216 – 217; See also Cooper and Reed, note 5 in relation to the operation of consent in relation to the section 20 offence in this context.
\textsuperscript{529} Ormerod and Laird, note 5, at 717.
\textsuperscript{530} Gardner, note 5, at 142.
\textsuperscript{531} George Fletcher, \textit{Rethinking the Criminal Law} (Boston, Little, Brown & Co, 1978), at 810 – 812.
\textsuperscript{532} Fletcher, note 531.
\textsuperscript{533} Fletcher, note 531.
inferences may be drawn regarding the defendant’s moral character.\textsuperscript{534} Conversely where conduct is merely excused, that is where consent operates as a defence, this denotes that the conduct involved was in and of itself wrongful, but merely excused based on the point of view of the defendant.\textsuperscript{535} As to why this moral distinction emerges, it is argued that in the case of justifications the conduct involved is regarded as morally acceptable \textit{per se}, and where it is excused, it is not.\textsuperscript{536} Thus, on this analysis, and for our purposes, if consent is recognised as an element of the offence the consensual participation of two people in sexual intercourse may represent a morally acceptable act, whereas if consent is a defence, the message is that the act of intercourse itself is morally unacceptable, however, may be excused on the basis that the people involved consented. The latter view carries implicit negative moral messages regarding both parties and represents an unacceptable view of the consensual private expression of sexuality, thus if the distinction is to be sustained, the former view should prevail.

A more restrictive view critiques the foregoing categorisation of justifications, which is termed the closure view, and sees them as a denial of wrongdoing, which is morally unjustifiable.\textsuperscript{537} Contrary to the closure view, an act is wrong or it is not, and rationality, leading to responsibility, demands that we acknowledge that an act is wrong in and of itself and either justify the act, that is state the reason we had for doing it, or seek to have the act excused, state the reason we had for believing we had a reason to do it, both of which lead to the avoidance of criminal liability, but at the same time recognise our responsibility in a moral sense for the act.\textsuperscript{538} Thus upon this view there exists a prohibitory norm which renders an act wrongful, the existence of a justification is a permissive exception to the prohibitory norm allowing action for specific reasons, but is not a conflicting norm, i.e. is not a reason to act, the act in and of itself remains wrong, but may be justified or excused in the eyes of the law.\textsuperscript{539} An alternative construction, related to that of Gardner, conceptualises what might be termed justified conduct, as conduct which is permissible, and thus what have been termed justifications are actually permissions.\textsuperscript{540} In this conception consent is a permission to act, in that one may choose

\textsuperscript{534} Fletcher, note 531, at 799. 
\textsuperscript{535} Fletcher, note 531, at 799. 
\textsuperscript{536} Gardner, note 5, at 144 – 145. 
\textsuperscript{537} Gardner, note 5, at 77 – 89. 
\textsuperscript{538} Gardner, note 5, at 77 – 89. 
\textsuperscript{539} Gardner, note 5, at 146 – 149. 
to act in this way, however, in the law respecting such a right to choose this does not indicate that it is always morally the right thing to do in choosing to act, albeit that it is permissible to do so. In the case of consent respect for autonomy of the complainant permits harmful conduct, even if there is no benefit arising, and therefore representing that ‘respect for individual autonomy is right, not that the conduct which takes place is right’. 541

Taking either Gardner’s or Fletcher’s view the sexual act leading to transmission requires moral justification; either it constitutes a prohibitory norm which is morally acceptable on the basis of a justification, or morally wrong but excusable, alternatively and more worryingly; it is simply morally wrong, but possibly justifiable or capable of being excused. Either view it seems denotes an unwelcome societal view that sexual expression on the part of persons infected with a STI, which carries a risk of transmission, constitutes a prohibitory norm, merely either justifiable or capable of being excused. This is of course related to the conception of the transmission of a pathogen as potentially criminally harmful as discussed in detail earlier, though between the competing views the position of Fletcher provides a less morally stigmatic approach. While the position of Uniacke might be seen to provide a potential for a more morally neutral position, which recognises that consent is a permission to act, and acting may or may not be morally justified, this too relies on the contention that there is a result, which without permission would be criminally wrongful. It is not possible to deconstruct these positions without assailing the definition of the transmission of a pathogen as a harm cognisable by the criminal law, however, these perspectives do show the moral connotations associated with sexual expression by a person infected with a pathogen, and the associated connotations for many more should the criminal law continue its progression into the social sphere.

The Unknown Justification
A number of potential consequences flow from the recognition of consent as a justification or excuse in this context. Some take the view that the court in Konzani categorised the consent of the complainant as an element of the actus reus of the offence, and an issue thus arises that the findings in Konzani, such that the knowledge of the complainant as to the defendant’s HIV status is paramount in the context of informed consent, creates an exception in favour of the defendant which permits an unknown

541 Ashworth and Horder, note 130, at 320 – 321.
justification to relieve of liability; which is contrary to the Dadson principle. On this view where the defendant is to be permitted to rely on consent, this should only occur where they know that the complainant is aware of the presence of HIV, and that they should not, in contradistinction to the findings of the Konzani, be permitted to rely on the complaint’s knowledge of which they were unaware. A further critique of these findings in Konzani, from the perspective of the complainant, is that it in effect negates the requirement to disclose, which should always be present, and indeed the defendant’s state of mind and not the complainant’s should be the enquiry in all instances, a view which is reliant on an antecedent construction of the defendant’s conduct as morally, and legally, wrongful, and as such permitting consent to exculpate in these circumstances is seen as overly generous.

A number of points may be made in response to this: first there exists a contrary view that the defendant’s knowledge is only relevant where the circumstances are regarded as an excuse and not justification. Additionally, the justification/excuse dichotomy in this context may be overly simplistic, and while the Dadson principle may be generally applicable, it is open to the courts to vary this on a public policy basis. Given that a complainant who adverts to the risk of infection with a STI, but is not actually told of the status of the defendant, may still have a valid complaint, it seems an appropriate, albeit inadequate, concession in favour of a defendant that where the complainant is categorically aware that the defendant is infected and elects to have intercourse, that the defendant should not be held liable. Were consent not to available as a defence, where the defendant is unaware of the state of knowledge of the complainant, then the law would be operating on a paternalistic basis in relation to the complainant, related to a welfare paradigm of denying the prospect of consent, and it would be inappropriate to confine this to circumstances where the knowledge of the defendant is the relevant consideration, and thus a wider denial of consent as a defence would be required, a concept which I have critiqued previously. Further if it is, as the court suggests, the law’s role to protect and enhance the autonomy of the complainant, a suggestion I shall critique, it also seems

542 Cooper and Reed, note 5; See also Ormerod and Laird, note 5, at 58 – 59 in relation to R v Dadson (1850) 2 Den 35.
543 Cooper and Reed, note 5, at 464 – 467.
544 Cherkassky, note 150, at 252 – 255; Cooper and Reed, note 5, at 464 – 467.
545 Ormerod and Laird, note 5, at 448 – 449.
546 Ormerod and Laird, note 5, at 448 – 449.
appropriate that their actual consent should be paramount. Finally, any suggestion to the contrary ignores any notion of a shared responsibility for sexual health.

**Consent and Autonomy**

A further relevant point, which turns on the distinction between consent as a justification or excuse in this context, relates to the justification for denying the defence of honest belief in consent, in the context of non-disclosure, which was related to the protection of the autonomy of the complainant.\(^{547}\) One perspective on this position refers to the distinction between rape and non-fatal offences against the person, and the operation of consent, arguing that in the case of rape the autonomy of the complainant is paramount, whereas in other non-fatal offences against the person it is that of the defendant, when considering the ‘defence of consent’.\(^{548}\) If consent were viewed as a defence in this context, then it exists not to protect the autonomy of the complainant but to excuse the conduct of the defendant and protect his autonomy in the sense of avoiding state censure, however, the courts have not adverted to this distinction.\(^{549}\) It is further argued that if the enhancement of the autonomy of the complainant is the singular goal, no defence of mistaken yet honest belief in consent would be permitted for non-fatal offences against the person; however this is clearly not the case.\(^{550}\) This distinction, in a practical sense, very much limits the available defences in cases such as this, and the critical reflections do expose contradictions in the reasoning of the court which do not support that contention of an autonomy based denial from the perspective of the complainant in non-fatal offences against the person.

**Consent and Knowledge of Risks**

A final observation arising from the approach of the courts to consent relates to the denial that a person who has unprotected sex with a person about whose STI status they are unsure amounts to consent to the risk of transmission. This has been described as faulty logic, and it is at least arguable that based on a model of shared responsibility for sexual

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\(^{547}\) *R v Konzani* [2005] EWCA Crim 706, at para 41; In this sense I am referring to the denial of the honestly held belief defence, and its replacement by the Court, without parliamentary intervention, with the defence of an honestly held belief on reasonable grounds.

\(^{548}\) *Weait* (c), note 151, at 768 – 770.

\(^{549}\) *Weait* (c), note 151, at 768 – 770; *Weait* (a), note 6, at 182 – 185.

\(^{550}\) See *R v Aitken* (1992) 95 Cr App R 304 where the Court Martial Appeals Court found as wrong in law a jury direction which failed to advert to a mistaken belief in consent as representing a defence to a charge pursuant to section 20 of the Act; Also *R v Richardson and Irwin* [1998] EWCA Crim J1116-16 where the Court of Appeal in a case of ‘horseplay’ held that in terms of consent it was the defendant’s belief as to consent which was material.
health a person should take responsibility for the risks inherent to intercourse.\textsuperscript{551} If this were the case then it would seem that such a person should be aware of the risks of transmission, and indeed such a position could be seen as maximising the autonomy of that person in recognising their ability to consciously and consensually take risks.\textsuperscript{552}

However, this position is countered on the basis that the risk is so great that it is reprehensible not to disclose.\textsuperscript{553} There is merit in that argument, but only I believe in circumstances where the complainant was not aware of the risks inherent to unprotected sex; any alternative position denies the roles played by all in a sexual community in controlling the spread of pathogens. However, I do believe that the actions of the complainant in such circumstances are blameworthy.\textsuperscript{554} What emerges from a discussion of this area, as referred to by Spencer and the Law Commission, is that the responsibility to take care of one’s sexual health is a responsibility, disregard of which is ill advised but not blameworthy, however, the failure to disclose is a blameworthy act which causes harm and as such places the person infected with a STI in a normatively different position.\textsuperscript{555}

I believe that this misidentifies the relevance of knowledge of risk on the part of a complainant; it is not as Spencer has suggested a contended blameworthy act which is sought to be used to excuse the blameworthy act of a defendant, it is instead relevant to the consent of the complainant to a risk. As such, I can see no reasonable basis upon which a complainant who adverts to a risk, consents to the activity carrying the risk, the risk then materialises and their consent, and thus autonomy, is then denied and the matter therefore becomes solely an issue for the person who was infected originally. Additionally, in Dica the Court was unwilling to deny consent as a defence to the known risk of pregnancy and the physical harms which may flow therefrom.\textsuperscript{556} How then is the known risk from pregnancy arising from unprotected intercourse different to the known risk of contracting a STI from the same act? The only reasonable conception of the distinction relates to the classification of the pathogen as being qualitatively different to

\textsuperscript{551} Weait and Azad, note 305, at 7 – 8; Weait (c), note 151, at 765.
\textsuperscript{552} Ashworth and Horder, note 130, at 321 – 322.
\textsuperscript{553} Spencer, note 321; Warburton, note 150.
\textsuperscript{554} See also the remarks of: Weait and Azad, note 305, at 7 – 8.
\textsuperscript{555} The Law Commission (b), note 154, at 147.
\textsuperscript{556} [2004] EWCA Crim 1103, at para 49.
pregnancy—however—the transmission of an infection is no more or less a natural consequence of intercourse than pregnancy

A final point on this issue, which I will return to in the final section of this part, relates to knowledge of risk and the relationship context, I accept that in certain relationships, while one may be aware of the risk of the transmission of an infection in general terms, there is no expectation that a pathogen will be present in a particular context. The answer to this point relates firstly to whether criminalisation should arise, and then if it does how such concepts might be embraced in the criminal law as it stands or in a reformed system.

**Current State of the Law**

In the context of STIs, and focusing on criminal liability as opposed to the nature of the offences, it is clear that in both jurisdictions informed consent as to the presence of the STI on the part of the complainant will negate criminal liability. Consent to the sex act with knowledge of the risk of transmission, even if specifically adverted to, will be insufficient unless the complainant has actual knowledge of the presence of the specific risk. The only identified exception to this arises in England where in the absence of specific knowledge of the part of the complainant, an honestly held belief on reasonable grounds may offer a defence.

Turning to whether consent, or implied consent, might represent a limiting factor containing criminalisation to the sexual sphere; it would appear not as the only defence would be informed consent to the potential transmission of a pathogen in other circumstances. Although not addressed in substance earlier there is also the potential for so called implied consent to day to day contact, recognised in both England and Canada, however, one can only impliedly consent to that which one can actually consent, and this must be resolved with reference to the ability to consent to the infliction of harm, which in turn is related to a recognised exception. 557 The law only recognises such an exception in both jurisdictions, in the context of pathogens, with reference to informed consent, in the sexual context. The concept of implied consent is unlikely to be extending to circumstances where the harm in question reaches the requisite threshold.

557 Although potentially addressed with reference to implied consent such circumstances are more readily identified as mere exceptions to assault or battery arising from the vicissitudes of daily life: Ormerod and Laird, note 5, at 717 – 718; Additionally, *R v Dica* [2004] EWCA Crim 1103 and other authorities specifically deny the possibility of implied consent to the transmission of a pathogen arising from consent to something other than that specific matter.
Working on the presumption that informed consent would amount to a defence in a broader context, there is no principled basis upon which this argument should be confined to sexual transmission cases, and as such transmission and exposure liability, all other things being equal, may extend to all circumstances where a defendant has agential control, understands the risk, takes an objectively unjustifiable risk, fails to disclose and which results in harm.\textsuperscript{558}

This seems a radical interpretation, though as reasoned throughout this chapter, and referred to by the Law Commission in England, it is actually reasonable given how the law has developed. Finally, a necessary consequence of the combined positions in relation to harm, recklessness and consent is a developed requirement to either isolate oneself or announce one’s private medical information to those one comes into contact to obtain their consent. That this could have been the intention of the courts seems doubtful, though there is no reason to doubt that this is the case.

**Disclosure, Relationships and Consent**

In many respects the issue of disclosure, and related consent, is at the heart of the entire issue and the findings in relation to knowledge in both jurisdictions create an effective requirement for a person to disclose that they are infected with a STI.\textsuperscript{559} The current approach of the law to disclosure is premised on the notion that in the event of disclosure there will be a reduced incidence of transmission, given the refusal of a partner to consent to intercourse, thus an agential cause and effect relationship is foreseen; this is nowhere evidenced yet it is presumed.\textsuperscript{560} An alternative ethical conclusion is that disclosure is required as the person who fails to disclose denies the moral personhood of the complainant, and as such violates the Kantian categorical imperative by using the complainant solely as a means to an end.\textsuperscript{561} However, such an analysis is impoverished in my view, as it denies the reality of sexual relations, they are not always negotiated like contracts in the cold light of day, and indeed much of behaviour surrounding the sex act

\textsuperscript{558} Weait (c), note 151, at 768 – 770; Weait (a), note 6, at 182 – 185; In addition, and as mentioned previously, there is an additional limiting factor in Canada in that there must be an assault in the sense of bodily contact, though the shaking of a hand would seem quite sufficient.

\textsuperscript{559} Weait (a), note 6, at 186; Weait (c), note 151, at 770; However others argue that proviso in Konzani creates an unwelcome exception to disclosure, see: Cherkassky, note 150, at 253 – 254, and Cooper and Reed, note 5; This statement must take into consideration the honestly held belief in consent on reasonable grounds defence in England, the potential for actual information form alternative sources in England, and in addition and although not addressed in the literature it would seem that knowledge from an alternative source would negate a finding of inducement in Canada.

\textsuperscript{560} Weait (a), note 6, at 187 – 188.

\textsuperscript{561} Weait (a), note 6, at 187 – 188.
may be non-verbal, such that it is not merely about a person using another as end towards sexual gratification.\textsuperscript{562}

The question of disclosure is vexed and may be approached from an absolutist standard, one referable to the risks inherent in the act or as one dependant on the relationship context.\textsuperscript{563} Where protection is not used, and there is no disclosure, obviously the natural inclination is to view such behaviour as reckless and callous.\textsuperscript{564} However there are many reasons why a person may find it difficult to disclose; stigma, fear of violence, fear of rejection, concerns regarding confidentiality, a fear of not being able to ever have sex, and a sense that responsibility should be shared, to name but a few.\textsuperscript{565} The question which arises is should the law comprehend these difficulties, or should it require disclosure in all circumstances.\textsuperscript{566} The relationship between disclosure and risk, in the context of the use of protection and viral load, has been discussed previously. Whether the law should comprehend the range of factors which may impinge upon a decision to disclose in the presence of the risk of infection can only be reconciled on the basis of recourse to the fundamental principles underpinning criminalisation and justifying punishment and the perspective one takes on those.\textsuperscript{567} Some have argued that at the very least the law should recognise a defence in cases of non-disclosure where there is a fear of violence, others believe that the requirement to disclose, and attendant liability through the denial on consent in its absence represents an unacceptable message that responsibility is that of the infected person only, and others feel that such factors might only be capable of comprehension in the context of sentencing.\textsuperscript{568}

Arguments about disclosure relate directly to whether criminal liability should arise in this context, and it is arguable that the general public health message of shared

\begin{footnotesize}
\begin{enumerate}
\item Schuklenk, Philpott, note 94, at 311; Ryan (a), note 97, at 247
\item See: Cooper and Reed, note 5; Charkassky, note 150, who argue that the duty to disclose is paramount; Also \textit{R v Cuerrier} [1998] 2 S.C.R. 371, established a duty to disclose where there is a significant risk of serious harm; \textit{R v Mabior} [2012] 2 S.C.R. 584 establishes a duty to disclose where there is a significant risk of serious harm understood as a realistic possibility of transmission, which will not be present in the context of vaginal intercourse where the insertive partner is HIV positive and has a low viral load and a condom is used.
\item Ryan (a), note 97, at 240; See also: Weait (a), note 6, at 185 – 193, for a comprehensive discussion of the role of disclosure in this context and in general.
\item Ryan (a), note 97, at 238;
\item Weait (a), note 6, at 185 – 193, Ryan (a), note 97, at 240 – 243.
\item See additionally: James Chalmers, 'The criminalisation of HIV transmission' (2002) 28(3) Journal of Medical Ethics 160–163, where it is argued that disclosure should not be necessary where condoms are used.
\item Ryan (a), note 97, at 240 – 243; Cherkassky, note 150, at 253 – 254; Spencer, note 321.
\end{enumerate}
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responsibility, and the requirement of a precautionary approach to the imposition of criminal liability should preclude a requirement to disclose, and instead place a responsibility on all parties to enquire about, or demand on protection, and as such protect their own health.\textsuperscript{569} This leads me to the distinction between concealment in the form of non-disclosure versus active deceit. It is difficult to argue on the grounds of shared responsibility that where a person takes steps to discern the STI status of their partner, and is actively deceived, that the law should allow the defendant to deny responsibility, that is if the criminal law should in fact have any involvement; however, if there is to be liability active deceit would seem to be a justifiable foundation.\textsuperscript{570} This would accord better to the experience of infection, rather than the fact itself, as would an approach which recognised an inability on the part of a partner to enquire or demand protection due to a fear of violence.

Deceit versus non-disclosure is complicated by the nature of the relationship between the parties. Reasoning from the perspective that matters related to harm and recklessness have been resolved, and criminal liability turns on the issue of consent I think there is merit in the position that if a complainant adverts to a risk and runs that risk, they should be taken to have consented to the conduct in question, and my reasons have been set out in full earlier. However, I find the situation of a person in what has been termed a ‘trusting relationship’ more difficult to resolve. While it remains the case that such a person, if they have adverted to the risk and decide to run it, can be said to consent to that risk, it seems counter intuitive to reason that such relationships, in their multitude of forms and durations, should be premised on the basis of distrust.\textsuperscript{571} This is a profoundly exercising point, for if the law comprehends this distinction, then the uninfected partner in the context of a marital relationship is protected to a greater extent than the partner who participated in a random dalliance following an inebriated evening.\textsuperscript{572}

Should this be so, two answers emerge. The first is that the universal principles of the criminal law in the area of non-fatal offences are ill-suited to application in this area of intimate human relationships, and the risks inherent to them, and should thus leave this

\textsuperscript{569} Weait (a), note 6, at 192 – 193;
\textsuperscript{570} Ryan (a), note 97, at 246.
\textsuperscript{571} See the earlier reference to Slater’s discussion of a new offence which specifically recognises the distinction between transmission in the context of different types of relationships: Slater, note 269.
\textsuperscript{572} See: Weait and Azad, note 305, at 9 – 10, in relation to different types of relationships and an example of a married couple versus two men having intercourse in a gay sauna; also Weait (e), note 322, at 132 – 133.
to the arena of public health.\textsuperscript{573} I believe this to be the correct answer based on the principle of minimum criminalisation, and the consequential effects of the intervention of the criminal law in this area. The second answer, is that if the law is to intervene, it seems that the distinction, however distasteful it may sound, is justifiable on the basis of the promotion of an overall public health strategy, and the correct allocation of responsibility between consenting parties, who in one circumstance have no reason to act for the protection of their health, and in the latter have every reason to do so.\textsuperscript{574} To give effect to this latter position the courts could, as they have done in this area already, make incremental changes in the law such that the context and relationship would be comprehended in an assessment of whether knowledge of general risks were sufficient such as to amount to consent, or alternatively a specific statute could be introduced, which in ultimate terms is the incorrect approach given the experience of such statutes in operation. What they purport to provide in certainty, they lose in their stagnation when compared to advancing science, but moreover they create an exceptionalism which is even further stigmatising which in turn effects level of high risk behaviours and represents an impediment to public health efforts.

As mentioned, ultimately the matter of disclosure revolves around the issue of criminalisation. Presuming that the wrong and harm is related to transmission or exposure, then from a retributivist perspective the use of protection, TasP (treatment as prevention), shared responsibility, public health messages, stigma and fear are unlikely to warrant a move away from criminalisation based on the harms and wrongs discussed. A mixed, consequentialist, or minimum criminalisation approach would have regard to public health messages and the effect of the criminal law on the overall health, or potential health, of the population which would militate against criminalisation in the context of many of the issues arising for disclosure, or indeed more generally. The conclusion here, as will be developed with reference to public health issues in due course, is that disclosure, while undoubtedly an ethical duty, is one that when converted to a legal duty has a multitude of consequences, which are not in the best interests of society at large.

\textsuperscript{573} Weait (a), note 6, at 185 – 193. 
\textsuperscript{574} Slater, note 269.
4. The United States, Public Health and the Criminal Law

Introduction

A variety of legal, social and political responses to HIV are evident within and across the United States of America (USA). The diversity of responses highlights not only the various criminal law approaches available in this area, but importantly also the potential variation in public health responses. This variation in approach is of interest in itself as an exposition of the choices which are available in responding to the spread of infectious pathogens and what may influence those choices. Additionally, the use of specific statutes and the variation within those statutes provides an important perspective not evident in the jurisdictions considered thus far. These interventions, their specificity, and thus presumed utility are deserving of consideration and critique as they could form the basis of an intuitively attractive alternative to the operation of general criminal law offences as they are seen as holding potential to avoid some of the pitfalls associated with the operation of general offences. Furthermore, the availability of coercive public health methodologies has been studied in the USA, in the context of HIV, to an extent not evident in other jurisdictions which allows an assessment of an alternative to the criminal law which in itself carries worrying connotations if inappropriately deployed. Arising from this use of general criminal law offences, specific statutes and a variety of public health approaches all in one country, albeit with a diversity of state legislatures, I have additionally chosen this chapter to elucidate the theoretical and empirical arguments relating to the interface between the criminal law and public health endeavours. This final part will provide crucial material to allow a full consideration both of the justification for and reasons against the criminalisation of the transmission of pathogens both within and outside sexual relations.

Section one will consider the current trends in relation to the prevalence and transmission of HIV in the USA, the emergence of criminal law responses, and the influences which led to criminalisation as a response to this disease. The law has responded in a number of ways and depending on the state a person may be prosecuted for infecting another with HIV or exposing them to the risk of infection with HIV. Five main approaches are evident; general public health statutes which use criminal sanctions as an adjunct to public health initiatives, enhancement statutes, coercive public health statutes, general or
traditional criminal laws, and HIV specific statutes.¹ In section two, I will consider the operation of the criminal law in relation to criminal law public health adjuncts, enhancements statutes and traditional offences, focusing on how the law approaches criminal liability, how this compares with other areas of legal intervention, and where relevant how these approaches compare with actual or potential legal intervention in other jurisdictions. Section three will consider the use of specific statutes concerning either exposure to the risk of contracting, or infection with, HIV. Here we will situate on the approach of a number of states along a spectrum spanning from wide-ranging and vague criminal provisions, to those which are more circumscribed and specific. We will also compare the operation of these statutes with the operation of general criminal offences in England and Wales and Canada. I will also consider academic debate surrounding the operation of specific statutes, as well as their suitability, necessity, utility, and potential costs arising from their operation. Section four will consider voluntary and coercive public health measures as an alternative to the intervention of the criminal law, how this has been approached in the USA and why such an approach should be an alternative to criminalisation. Throughout the preceding parts, and indeed this one, I refer to the potential public health impacts of criminalisation and in the final section of this chapter, section five, I will consider the theoretical and empirical arguments in relation to the effect of criminalisation on these public health efforts concluding that such efforts have the potential to effectively control the spread of pathogens and that the costs of criminalisation to society outweigh any purported benefits.

I – HIV in the USA – A Legal Response
Over 1.2 million people over the age of 13 are living with HIV currently in the United States of America, representing 0.38% of the population, with an estimated 1 in 8 persons undiagnosed.² Gay, bisexual and other men who have sex with men (MSM) comprise the most affected category of the population; by race, African Americans exhibit the highest rates of infection.³ Overall, the new infection rate has declined by 19% between 2005 and

³ Centers for Disease Control and Prevention, note 2.
2014, with approximately 45,000 new infections in 2014, this compares with a new infection rate for viral hepatitis of approximately 52,200 in the same year. Among new diagnoses in 2014, 24% arose from heterosexual contact, 67% arising in MSM and a further 6% from injection drug use. Since the start of the epidemic in the 1980s, an estimated 1,210,835 people have been diagnosed with Acquired Immunodeficiency Syndrome (AIDS), of which 636,000 have died. These statistics demonstrate that HIV is a significant public health problem, particularly given that the rate of prevalence also includes an estimate that 12% of the infected population who are unaware of their HIV positive status, rising to 44% among 13 to 24 year olds.

The nature of the public health difficulties posed by HIV has changed. At the outset, the disease was predominantly terminal, and as such generated significant and influential fear among the public, policy advocates, and legislators. Although at present HIV remains incurable, and an effective vaccine is not available, the prevalent medical opinion holds that with the advent of anti-retroviral drugs (ART), the condition is not predominantly fatal, and HIV can be regarded as a chronic manageable disease. These observations do not serve to minimise the impact of a diagnosis as being infected with HIV and one cannot ignore the possibility of infection with a multi-drug resistant form of the virus, which despite treatment with ART might still lead to death. However, the changing nature of the pathogen’s effect on the body is relevant in assessing the original justifications for criminalisation, their continued relevance and the capacity of the criminal law to comprehend the new reality of HIV infection. Finally, while this chapter focuses on HIV in the main, which is the main focus of specific statutes, it is worth noting that the status

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5 Centers for Disease Control and Prevention, note 2.
6 Centers for Disease Control and Prevention, note 2.
7 Centers for Disease Control, at note 3.
of HIV as a chronic condition is similar to that of hepatitis which is not the focus of criminal sanction to any appreciable extent.\footnote{In referring to specific statutes and their main focus being HIV I recognise that some statutes do comprehend other pathogens, for example the revised IOWA statute also incorporates Hepatitis, Meningococcal Disease and Tuberculosis, though this is far from the norm: IOWA. CODE § 709 D.2(1): Iowa Legislative Services Agency, 'Iowa legislature - Iowa code' (20 January 2011) <https://www.legis.iowa.gov/law/iowaCode> accessed 1 March 2016.}

Having considered matters relating to prevalence and the burdens carried by different sections of society, I turn now to the emergence of criminal law sanctions. The 1980s witnessed the emergence of a new form of human illness, one which initially emerged in MSM, and later spread to other sections of the population.\footnote{McArthur, note 10, at 712 – 713; Wolf, note 8, at 120 – 121; AIDS.gov, 'A Timeline of HIV/AIDS' (AIDS.gov - U.S. Department of Health and Human Services 2016) <https://www.aids.gov/pdf/aidsgov-timeline.pdf> accessed 1 June 2016, at 1 – 5.} It was discovered that the disease was caused by a retrovirus which led to the devastation of the human immune system; ultimately most patients progressed to develop AIDS and eventually succumbed to opportunistic infections which led to their death. The mode of transmission was identified as early as 1983 as involving the sharing of bodily fluids – blood and semen, and at this stage the disease was identified as having spread through sexual intercourse, sharing needles, and blood transfusions.\footnote{McArthur, note 10, at 712 – 713; AIDS.gov, note 12, at 2.} In tandem with these developments, policy makers became particularly concerned with two particular scenarios which led to the spread of the disease, namely: blood transfusion services and sexual intercourse.\footnote{McArthur, note 10, at 712 – 713.}

The concern regarding transmission during sexual intercourse arose, at least in part, from the reported sexual activities of a man named Gaetan Douglas.\footnote{McArthur, note 10, at 712 – 713.} Douglas was a French-Canadian flight attendant whose story was related by an author who himself had become infected with HIV. It was alleged that Douglas was frequenting gay bathhouses in San Francisco, where he was having sexual intercourse with other men, and afterwards turning up the lights and pointing to lesions he had resulting from his own infection with HIV and the consequent development of AIDS, and saying; ‘I’m going to die and so are you’. This led to claims that Douglas was ‘patient zero’ and that the criminal justice system was powerless to deal with people like him. Reported circumstances such as these, alongside widespread fear among the population, led to misapprehension regarding the
modes of transmission, discrimination against those suffering from AIDS and pressure on legislatures to take action to protect the public.\textsuperscript{16}

This general alarm led to HIV becoming a legal preoccupation and manifested in action under a number of headings, including: public health statutes, general criminal laws, and HIV specific statutes. While the other jurisdictions considered responded using existing criminal law or public health methodologies, the advent of specific statutes is a notable and exceptional development. There is no consensus concerning the reasons behind the introduction of these statutes, which initially focused solely on HIV, however, a range of causative factors are discussed in the literature.\textsuperscript{17} These include: perceived difficulties in the application of general criminal laws in terms of causation and proving intent for murder or attempted murder charges, perceived inadequate penalties associated with assault based charges, a wish to assist in the control of the spread of an emerging epidemic, safety of the blood supply, a symbolic legislative response to high profile multiple exposure/infection cases, a desire to provide clear rules regarding acceptable conduct, a desire to avoid biased prosecutorial discretion, the rehabilitation of offenders, a response to public fear regarding the risk of infection, ineffective public health management, individual protection in the form of deterrence/incapacitation in relation to high risk behaviour and the retributive function of the law in reflecting acceptable norms and punishing those who deviate from them.

In addition to these factors, a potentially significant influence was exerted by the Federal Government in the form of the 1988 Presidential Commission on the Human Immunodeficiency Virus Epidemic Report (Commission) and the Congressional Ryan White Comprehensive AIDS Resources Emergency Act 1990 (CARE Act).\textsuperscript{18} The Commission was established by President Reagan in 1987 with the remit of evaluating existing efforts to combat HIV and to make recommendations for future government action. The report of the Commission dealt with the issue of criminalisation in a short, |

\textsuperscript{16} Wolf, note 8, at 122 – 123.
\textsuperscript{18} Wolf and Vazina, note 1, at 840 – 844; McArthur, note 10, 713 – 715; Newman, note 8, at 1411 – 1417.
two-page section; however, despite its brevity, this section did influence the development of specific criminal statutes albeit that other factors were also influential. The Commission recommended that states consider the use of the criminal law as a last resort, and as an adjunct to public health measures in the face of the epidemic. Reflecting on the potential use of existing criminal offences, they felt that the operation of these could be problematic on a number of fronts. First, they had concerns in terms of prosecutor’s ability to prove mens rea and causation for murder and attempted murder charges; in addition, they felt that the penalties available for the lesser, assault-based, offences were insufficient to deal with cases of intentional transmission.

In contrast to the application of general criminal offences, the Commission felt that the HIV specific statutes would provide clear standards for the regulation of unacceptable conduct, which could be tailored to the characteristics of the epidemic the country was facing. In addition, these specific penalties would, they believed, deter high risk behaviour. The Commission acknowledged certain risks associated with the intervention of the criminal law in this area, including: the diversion of resources from public health initiatives, the perception of sanctions as a merely punitive measure and the potential for intrusive policing. To combat these, they made recommendations regarding the focus specific statutes should adopt, including that offences should only apply to those who had actual knowledge of their HIV status and that only behaviour which was scientifically proven to lead to transmission should be criminalised. Therefore, statutes were to be specific as to what behaviours were prohibited and should provide for affirmative duties to: disclose one’s HIV status, obtain the consent of a partner and to use protection. Finally, prosecutions should have only been undertaken in the absence of alternatives and following consultation with public health officials.

The recommendations of the Commission are the subject of criticism, as although they recommended limitation of criminalisation to behaviours scientifically proven to lead to transmission, there was no specification of any threshold for the possibility of transmission. This approach is mirrored in the statutes of many states which criminalise conduct which theoretically can lead to transmission, but which carries an exceptionally

low probability of doing so. In addition, from a pro-criminalisation point of view, confining criminal liability to only those who have actual knowledge of their infection prizes ignorance and renders more vulnerable to prosecution those who follow public health recommendations and have had a HIV test.

Although a small number of states had introduced specific statutes prior to the Commission’s report, it provided the impetus for the subsequent introduction of HIV specific statutes in the legislatures of many states. In addition to the momentum generated by the Commission, the Ryan White Federal CARE Act provided further incentive for the criminalisation drive. This Act aimed to provide federal funding for HIV/AIDS prevention and treatment, and as a condition for receipt of such funding each state had to certify that their criminal laws were adequate to prosecute knowing exposure to HIV. This could be achieved through the implementation of a HIV specific statute, the use of existing criminal laws, or by providing for HIV in a list of communicable diseases comprehended by existing public health statutes. The CARE Act differed from the Commission in that it was much less specific in terms of its recommendations relating to criminalisation. The Act identified three modes of transmission which were to be included in any state-level measure: donation of blood, semen, or breast milk; sexual activity and intravenous drug use. The definition of sexual activity contained no reference to specific behaviours, and, unlike the Commission, there was no recommendation that criminalised behaviour be representative of scientifically proven methods of the transmission of HIV. Thus, the Act required only that the law be capable of prosecuting a person who, knowing their HIV positive status, engaged in sexual activity with another, with the intent to expose the other to HIV. In addition, the only defences at law which were required related to disclosure and informed consent, and—contrary to the recommendations of the Commission—the use of protection was omitted, as was any reference to the use of the criminal law as a last resort following consultation with public health officials.

22 Newman, note 8, at 1415.
23 Newman, note 8, at 1415.
26 Care Act, at note 25, at section 2647(a).
27 Newman, note 8, at 1411 – 1417.
It is unclear exactly how influential federal guidelines and statutes were, however, between the time of the first state level specific statute in 1986 and up to the federal CARE Act in 1990, twenty-two states had introduced specific statutes; by 2000 when the federal certification in relation to criminalisation was removed, an additional nine states had introduced laws and eleven had amended existing laws. The drive to introduce and strengthen laws is, as discussed, the result of a complex mix of societal and political factors, however, a notable influence was the response of legislatures to highly publicised multiple exposure cases which have been referred to overtly in the introduction of certain statutes. Following the removal in 2000 of the federal certification requirement, a further four states have introduced new specific statutes and five have amended existing laws. This represents a slowing of the trend towards the use of specific statutes, when compared with previous decades, which in turn may be explained in part by an apparent waning of federal support for the use of such statutes, and certainly a support for their reform. As the position now stands there are thirty three states and two US territories with specific statutes, representative of sixty seven different enactments dealing with transmission, exposure or non-disclosure and with potential sentences ranging up to thirty years imprisonment. In addition, all states have the ability to criminalise such behaviour in the absence of such statutes by virtue of either their general criminal laws or by means of public health statutes.

Having traced the development of criminalisation as a response to the emergence of HIV, I turn now to consider some of the methods utilised by states to criminalise behaviour related to exposure to or infection with HIV, namely: general STI statutes, enhancement statutes and general or traditional criminal laws.

II – A General rather than a Specific Response

General Public Health Statutes
For many years, a large number of states have operated, and continue to operate, general public health statutes which create a typically misdemeanour offence of wilfully exposing

29 Lee, note 28; Wolf, note 8, at 125.
30 Lenham and others, note 28.
31 Wolf, note 8, at 143 – 145.
a person to a STI and/or other communicable disease.\textsuperscript{33} In this sense the criminal law is used as an adjunct to the operation of general public health efforts, which are rarely enforced, and operate as a threat where there is non-cooperation with traditional and voluntary public health initiatives.\textsuperscript{34}

Earlier studies of the range of such laws identified twenty-five states and territories with statutes comprehending exposure to a communicable disease or a STI, most of these were enacted pre 1930, and nine covered other communicable pathogens displaying an origin related to past serious epidemics such as cholera, smallpox and yellow fever.\textsuperscript{35} Although the statutes comprehend exposure to a STI, it remains unclear the number of those which comprehend HIV within the definition of a STI as a matter of statutory construction.\textsuperscript{36} In their analysis of the available statutes, Lazzarini and others concluded that the statutes in nine states comprehended HIV, and of those in three states there was no HIV specific statute.\textsuperscript{37}

Such an approach is evident in Montana where, ‘A person infected with a sexually transmitted disease may not knowingly expose another person to infection’, with HIV being included within the definition and a violation is classed as a misdemeanor.\textsuperscript{38} None of these statutes are HIV specific, they all carry minor penalties and require that the offended person know of their HIV positive status. In addition, the range of prohibited behaviour spans a spectrum from mere exposure to infection. It is also worth noting the range of behaviour in comparison with the minor nature of the sanctions imposed, especially as we proceed to consider the application of general criminal laws and HIV specific statutes.

There are preferable elements to this approach—HIV is regarded in the same manner as all other sexually transmitted infections—thus potentially avoiding exceptionalism and

\textsuperscript{33} Lazzarini and others, note 17, at 241.
\textsuperscript{35} Lazzarini and others, note 17, at 241.
\textsuperscript{36} Lazzarini and others, note 17, at 241; Wolf, note 8, at 125 – 126; In Plaza v Estate of Wisser 211 A.D.2d 111 (1995), at 119, Sullivan, J. P. held for the Supreme Court of New York that the public health statute dealing with STI exposure excluded HIV; Similarly an earlier decision in New York Society of Surgeons v Axelrod 572 N.E.2d 605 (N.Y. 1991) had confirmed a decision of the Commissioner of Health for New York not to add HIV to a list of pathogens comprehended by the Act.
\textsuperscript{37} Wolf and Vazina, note 1, at 857 – 858; Lazzarini and others, note 17, at 241.
undue stigmatisation, and where the provision comprehends a wide range of communicable pathogens, the emphasis moves away from sexual conduct. However, the statutes are quite broad and as such, similar to many other criminal prohibitions, they do not provide specific guidance in relation to prohibited behaviour. Also there is no mention of the use of protection as a defence, and the broad definitions of prohibited acts risks criminalising behaviour which carries little or no risk of transmission of HIV. These aspects, in concert, create the risk of communicating erroneous messages regarding the relative dangers of types of behaviour in relation to HIV/STI transmission and thus operating contrary to public health messages regarding safer sex. Additionally, many of these statutes were enacted in a time when gonorrhea and syphilis were incurable and there remain, in this and other contexts, questions as to the effectiveness, usefulness and potential detriment flowing from the intervention of the criminal law.39

**General Criminal Law Offences**

For some time, seventeen states continued to utilise pre-existing or general criminal laws in this area, now four states do so, and this indicates that they have neither a specific statute nor a general STI statute which is applicable.40 Offences such as homicide, assault, aggravated assault, attempts in relation to these offences, reckless endangerment, and rape have been successful prosecuted.41 A general criticism of the use of these offences is the requirement of, and possible difficulty in, proving the *mens rea* of intent, and issues which may also arise in relation to proving causation.42 To overcome one of these difficulties, a number of states have prosecuted the inchoate offences of attempted homicide or assault which removes the requirement to prove causation with exposure being sufficient, but leaves the *mens rea* of intent to commit the ultimate offence to be proved.43 In attempted murder cases, the remaining requirement of proving intent to kill is more problematic in the absence of a threat to kill or some statement which shows intent to kill; however, such offences can be successfully prosecuted. In Iowa, a person will be guilty of an attempt to commit murder where:

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39 Wolf, note 8, at 126.
40 Wolf and Vazina, note 1, at 858; Lehman and others, note 28, at 999; Wolf, note 8, at 124.
41 Jedrychowski, note 17, at 31-32; Wolf and Vazina, note 1, at 858.
…with the intent to cause the death of another person...the person does any act by which the person expects to set in motion a force or chain of events which will cause or result in the death of the other person. It is not a defense … that the acts proved could not have caused the death of any person, provided that the actor intended to cause the death of some person by so acting, and the actor’s expectations were not unreasonable in the light of facts known to the actor.\textsuperscript{44}

This provision, as an example of similar provisions available in other states, would permit the conviction of persons who intend to kill another by transmitting HIV, it does not matter whether death is actually caused, as long as the actor sets in motion events which he/she intends to cause death.\textsuperscript{45} Allied to this approach, a number of states have removed impossibility as a defence to an attempt charge, which has had the paradoxical effect of allowing the prosecution of cases where the person intended to infect even though there was little or no possibility of infection from the actions in which they engaged.\textsuperscript{46} Such prosecutions have been approached with varying degrees of specificity with regard to the intent required to make out the offence with courts in some states requiring specific intent to murder,\textsuperscript{47} and others conflating mere knowledge of HIV status with the requisite intent.\textsuperscript{48}

While a number of criminal offences are successfully prosecuted in this area, aggravated assault offences are most often used. These offences generally require that the prosecution show that the defendant’s actions were of a type likely to cause grievous bodily harm or death. In the prosecution of these offences, two significant errors emerge: first courts have conflated that which is likely with that which is theoretically possible, and second courts use a rule of thumb to decide the issue of possibility, that is data regarding the average HIV positive person is applied to the specific HIV positive person before the court as proof of the effect of their behaviour.\textsuperscript{49} These are described as due process errors which erode the legitimacy of prosecutions generally, in relation to eliding

\textsuperscript{44}IOWA CODE § 707.11; Iowa Legislative Services Agency, note 44.


\textsuperscript{46}Closen and others, note 43221, at 929-931; Turner, note 42, at 183 – 185.


\textsuperscript{48}The Center for HIV Law and Policy, note 47, at 186 referring to the position in Oklahoma.

\textsuperscript{49}Closen and others, note 43, at 929-931; Turner, note 42, at 183 – 185.
the concepts of likelihood and theoretical possibility, and specifically when general rules are applied to persons who for instance pose little risk through having a medically-managed undetectable viral load who are in any event convicted of an assault type offence.\textsuperscript{50} Furthermore, and similar to the criticisms levelled in relation to overly broad specific HIV statutes, prosecutions using the general criminal law have been criticised for misinforming the public as to the possible routes of infection, causing uncertainty in relation to the types of conduct which are prohibited, and creating an unwelcome stigma associated with persons who are infected with a STI.\textsuperscript{51}

The alleged misapplication of general criminal laws led some to call for specific statutes as an alternative in this area; these statutes were promoted on the basis that they would avoid inappropriate prosecutions and provide appropriate guidance in relation to the type of conduct which was unacceptable.\textsuperscript{52} The extent to which these statutes have achieved these objectives is questionable as we shall see. Finally, while criticisms of the application or applicability of general criminal laws resulted, in part, in the proliferation of specific HIV statutes, the majority of academic opinion would now seem to favour the application of general criminal laws in this area, if the criminal law is to be applied at all, as a result of the developed critique of HIV specific statutes.\textsuperscript{53}

Given the amount of attention already paid to the operation of general criminal law offences in England and Canada, I do not intend to cover the ground again, save to offer some remarks around the similarities differences in approach. The law in England is similar to that of some states in the United States in that an assault or harm offence which is not specific to HIV is used to criminalise certain behaviour in this area. Similar concerns do emerge in England in relation to causation; however, these have been overcome through the use of circumstantial evidence pointing towards causation. In addition, intent is the not the requisite \textit{mens rea} and recklessness will suffice, thus removing one of the key objections to the operation of some general offences in the United States. Notably, if prosecutions were initiated in this jurisdiction pursuant to the broadly analogous provisions in section 4 of the Non-Fatal Offences Against the Person

\textsuperscript{50} Closen and others, note 43, at 929–931; Turner, note 42, at 183 – 185.
\textsuperscript{51} Closen and others, note 43, at 929–931; Turner, note 42, at 183 – 185.
\textsuperscript{52} Closen and others, note 43, at 935–936; See also supra note 17, and subsequent notes, and their associated text in relation to the factors leading to the proliferation of specific statutes in this area.
Act 1997, then the requisite *mens rea* would be either intention or recklessness, and similar to the position in England actual infection would be required, mere exposure would not be sufficient. The predominant method of prosecution in Canada mirrors the operation of the general criminal law in the United States to some extent, in that exposure to, and not infection with, HIV is the concern of the law. Causation as a result does not arise as an issue in exposure cases. However, there is significant divergence in that the relevant offence is one of sexual assault, rape, and the requisite *mens rea* is intention to apply physical force, and recklessness as to consent arising from knowledge of one’s HIV status.

While there are similarities and differences in the approaches in the use of general criminal law offences in the three jurisdictions, it is notable that England and Canada, whatever the view as to their approaches, have not encountered such difficulty in the use of existing offences that it has necessitated the enactment of specific statutes.

*Enhancement Statutes*

Enhancement statutes are also utilised by a number of states, either as the only intervention of the criminal law in this area, or in addition to existing HIV specific statutes.\(^{54}\) In one sense, these may be regarded as a form of specific statute in that they are directed specifically at HIV, however, I deal with them here as they elide with existing criminal law offences and provide for an enhanced penalty where a person commits a sexual crime such as rape, sexual assault and prostitution, when a person knew at the time that they were HIV positive.\(^{55}\) Colorado state law provides that any person convicted of a sexual offence, that being an offence involving sexual penetration of the anus or the vagina, including cunnilingus, fellatio, and analingus,\(^{56}\) if it is proven beyond a reasonable doubt that a person had notice of his or her HIV infection prior to the date that he or she committed the offence, the judge shall sentence the person to a mandatory term of incarceration of at least three times the upper limit of the presumptive range for the level of offence committed, up to the remainder of the person's life.\(^{57}\) In addition, and of


\(^{55}\) Jedrychowski, at note 1717, at 42; Lazzarini and others, note 17, at 244; Wolf and Vazina, note 1, at 855-856.


\(^{57}\) Colo. Rev. Stat. § 18-3-415.5: Colorado Revised Statutes, note 56.
note in the context of this sentence enhancement provision, any person tried in relation to such a sexual offence will be mandatorily tested for HIV by order of the court before which they first appear. Moreover, where a person tests positive for HIV, the prosecutor may obtain information from the public health department in relation to any previous tests which may have been carried out and, if this discloses antecedent knowledge of HIV positive status, then the prosecutor may seek the mandatory sentence enhancement.

Those who support this approach do so as it avoids the difficulties perceived to exist when applying general criminal statutes, as the prosecution must already prove beyond a reasonable doubt the elements of the sexual crime charged, and thereafter the matter of knowledge of the perpetrator in relation HIV status is a matter for sentencing only. However, there are a range of issues arising from this approach and one such difficulty presents in the discriminatory application of such enhancement provisions, particularly in relation to criminal offences associated with those who are prostituted. Notwithstanding other objections, the provisions seem particularly harsh when prosecuting a prostituted person, as there is often a power-imbalanced relationship between the seller and buyer of a person’s body for sexual purposes, alongside the varied and sometimes insurmountable reasons for engaging in sex work, and furthermore such provisions when deployed in the context of prostitution often include low-risk behaviours.

Such enhancements also give rise to a mismatch between the severity of penalties related to exposure to HIV and relatively lower penalties relating to conduct carrying a similar risk-of-harm profile such as driving offences carrying a risk of harm, thus conveying a negative moral message regarding sexual activities in this context. Moreover, they are an exceptional measure deployed in relation to HIV which is not evident in relation to any other infectious pathogen, which feeds into the stigmatised position of those infected with HIV and in turn as I shall explore how such exceptional and stigmatising interventions damage the ability of a community to effectively counter the pathogen.
Conclusion
The use of general criminal law offences in the USA encounters the same issues as the use of such offences in England and Canada; however, any purported difficulty with the use of such offences such that specific offences may have been necessary in the USA is not supported by the successful prosecutions which have taken place both within the USA and in England and Canada. Enhancement statutes carry with them the difficulty of exceptionalism in and of itself, as well as the harshness of approach which bears an uncomfortable and unjustifiable relationship with other similar conduct which causes or risks harm. The ultimate conclusion is that neither general criminal laws nor enhancement statutes are appropriate in the context of public health efforts which will be explored shortly. However, on the use of general public health statutes as an adjunct to voluntary public health efforts the matter is less clear in that they apply on a general rather than exceptional basis, and in so doing may have a contribution to make. However, ultimately, the use of such statutes must also be judged with reference to the success of voluntary public health efforts and whether such statutes would enhance or operate to the detriment of such endeavours. There is little research on this specific point, however, I conclude that they have limited usefulness and, proceeding by analogy, it would seem that such approaches may give rise to conflict in the professional-patient relationship which may impede efforts which genuinely have the potential to curb the spread of pathogens.

III - HIV Specific Statutes
Of particular interest is the approach of thirty three states that have adopted HIV specific statutes dealing with, inter alia, exposure of a person to the risk of infection with HIV during sexual relations. While there are numerous statutes, and many formulations of the offence, some essential features do emerge: exposure and not infection is characteristic of the actus reus; mens rea is generally associated with the physical act engaged in and is not referable to infection; disclosure/non-disclosure of HIV status may be an element of the offence or a defence and is associated with consent; and condom use

64 Jedrychowski, note 17, at 42; Wolf and Vazina, note 1, at 845.; It should be noted that these statutes often comprehend other areas relevant to the transmission of HIV such as general transfer of bodily fluids, donation of bodily fluids or organs, transfer in the context of prostitution offences, transfer in the context of incarceration or law enforcement activities, perinatal transfer, and enhancement of penalties for other criminal acts where the perpetrator knew that they were HIV positive, and where there was a risk of transmission involved in the criminal act for example in the course of a sexual assault.
is commonly neither an element of the offence nor a defence.\textsuperscript{65} I have already discussed the potential drivers behind such offences, however, whatever the reasons, they continue to enjoy considerable public support, although it might be argued that continuing public support arises from the absence of any serious universal enforcement, which must also be judged in the context of ongoing calls for and actual reform of the content of these laws.\textsuperscript{66}

Specificity on a Spectrum
As mentioned, the statutes vary considerably, and I will consider the historical position in both Illinois and Iowa as these statutes were among the broadest and have been subjected to critical analysis. Although these have now been reformed, similar statutes remain in place in other states. I will further consider the position in California, which is regarded as occupying the narrow end of the spectrum, prior to examining critical reflections on the operation of such statutes more generally.

The Illinois law was introduced in 1989 and has been described as one of the most controversial statutes of its type.\textsuperscript{67} The relevant section provided that;

(a) A person commits criminal transmission of HIV when he or she, knowing that he or she is infected with HIV:

(1) engages in intimate contact with another;

...

(b) For purposes of this Section:

"Intimate contact with another" means the exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of HIV.

(c) Nothing in this Section shall be construed to require that an infection with HIV has occurred in order for a person to have committed criminal transmission of HIV.

(d) It shall be an affirmative defense that the person exposed knew that the infected person was infected with HIV, knew that the action could result in infection with HIV, and consented to the action with that knowledge.

\textsuperscript{65} Wolf and Vazina, note 1, at 847-855; Lazzarini and others, note 1, 241-244; Shriver, note 17, at 321-323; Wolf note 8, at 128.

\textsuperscript{66} Wolf and Vazina, note 1, at 860, 873; Burris and others, note 17, at 506; Wolf note 8, at 143 – 146.

\textsuperscript{67} Shriver, note 17, at 332; Closen and others, note 43, at 593.
(e) A person who commits criminal transmission of HIV commits a Class 2 felony.\textsuperscript{68}

This law, like a number of other so called broad statutes, has been the subject of substantial criticism in terms of the breadth of its application and vagueness of its language; a synopsis of these criticisms follows.\textsuperscript{69} It has been described as overly broad in that it only requires that a person intended to engage in a physical act, and the act must be performed, not that they intended that the virus be transmitted; further the nature of the acts comprehended are not clearly defined and the definition of intimate contact lacks specificity. The knowledge requirement is not defined leaving the question open as to whether actual knowledge is required, or whether constructive knowledge would suffice, and as such it is accused of being vague. Also found wanting is the reference to “could” in terms of exposure to bodily fluids capable of transmitting HIV, and questions arise as to whether prosecutions should be limited to recognised modes of transmission or all theoretically possible modes. Finally, while the statute does provide for the defence of consent in the form of disclosure, it fails to provide for other defences such as the use of a condom or the provision of an erroneous negative HIV diagnosis by a medical practitioner.\textsuperscript{70} Criticism was not universal, and positive aspects have been noted in that it referred to specific conduct which was prohibited, removed the requirement for the mens rea of intent as to infection, and also avoided the problems of causation, both of which are viewed as impediments to prosecutions using the general criminal law.\textsuperscript{71}

In light of the sustained criticism of this provision the Illinois Code was amended and a new offence inserted, which provides that:

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…

(b) For purposes of this Section:

"Sexual activity" means the insertive vaginal or anal intercourse on the part of an infected male, receptive consensual vaginal intercourse on the part of an infected woman with a male partner, or receptive consensual


\textsuperscript{69} Jedrychowski, note 17, at 36; Closen and others, note 43, at 942-943; Shriver, note 17, at 332-334; Turner, note 42, at 185 – 186.

\textsuperscript{70} Jedrychowski, note 17, at 37.

\textsuperscript{71} Closen and others, note 43, at 943.
anal intercourse on the part of an infected man or woman with a male partner…

(c) Nothing in this Section shall be construed to require that an infection with HIV has occurred in order for a person to have committed criminal transmission of HIV.

(d) It shall be an affirmative defense that the person exposed knew that the infected person was infected with HIV, knew that the action could result in infection with HIV, and consented to the action with that knowledge.72

This amendment was welcome in that the statute now requires specific intent to transmit HIV, includes the failure to use a condom as an element of the offence, particularises the type of prohibited behaviour, and it only includes behaviour which carries a relatively high likelihood of transmission. Remaining criticisms would include that exposure not transmission is the relevant actus reus, considerably widening the scope of liability. Further, the broad construction of knowledge as to HIV status as an element of the offence is problematic in that liability may attach where there is actual knowledge, or where one is aware that one may be infected, which creates a space for discriminatory application. Finally, in making consent a defence, the statute signals a controversial message that sexual activity on the part of a HIV positive person is a wrong capable of justification.

Another particularly broad statute was the provision of the Iowa Code which provided that:

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…

2. For the purposes of this section:

   … 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…

3. Criminal transmission of the human immunodeficiency virus is a class “B” felony.

4. This section shall not be construed to require that an infection with the human immunodeficiency virus has occurred for a person to have committed criminal transmission of the human immunodeficiency virus.

72 ILL. CODE § 720 - 5/12-5.01: Illinois General Assembly, note 68.
5. It is an affirmative defense that the person exposed to the human immunodeficiency virus knew that the infected person had a positive human immunodeficiency virus status at the time of the action of exposure, knew that the action of exposure could result in transmission of the human immunodeficiency virus, and consented to the action of exposure with that knowledge.\textsuperscript{73}

This provision remained in force until 2014, and was similarly drafted to the Illinois statute and as such was regarded as one of the broadest offences.\textsuperscript{74} This statute was equally vague in terms of the conduct which was prohibited: it failed to define “exposure”, “bodily fluid” or “could result”. In a constitutional challenge to the validity of this law, with the applicant arguing that the term “could result” was unconstitutionally vague when applied to his case, the Supreme Court of Iowa determined that the term was not constitutionally suspect and that a person of reasonable intelligence could discern that the term meant that the transmission of HIV was possible considering the circumstances.\textsuperscript{75} In addition, the court held that the applicant did not have standing to claim that the statute was facially vague as the statute does not implicate First Amendment rights.\textsuperscript{76} The finding that “could result” involves any conduct that could possibly transmit HIV elided the concepts of possibility and probability, and in so doing criminalised an indefinite array of behaviour when one considers that in the same case, the court determined that all that was required was to expose another to the virus.\textsuperscript{77}

Thus, any exposure of the body of another to bodily fluid which can transmit HIV could amount to liability, including intimate moments such as kissing, or mutual masturbation, which while carrying a theoretical possibility of transmission where there are open sores or blood products involved, goes far beyond conduct, which from a public health point of view, would be recommended to be avoided.\textsuperscript{78} Furthermore, such a wide definition fails to instruct persons as what conduct exactly they should avoid, and as such one is left to conclude that the only safe courses of action are disclosure or a sexless life, the former seems simple but as previously discussed disclosure is a complex psychosocial process when considered in relation to the totality of experience of a person infected with HIV.


\textsuperscript{74} Schmitt Hermes, note 45, at 486 – 487.

\textsuperscript{75} State of Iowa v Keene 629 N.W.2d 360 (2001), at 365.

\textsuperscript{76} 629 N.W.2d 360 (2001), at 364.

\textsuperscript{77} 629 N.W.2d 360 (2001), at 366.

\textsuperscript{78} Schmitt Hermes, note 45, at 480 – 481.
In addition to the allegation of vagueness, the statute was also discriminatory on two grounds: first it targeted HIV exclusively, a criticism justifiably levelled at all specific statutes.\(^{79}\) In addition the statute discriminates against those who have been tested and know their HIV status, thus countering the strong public health message that testing is crucial to the management of the epidemic.\(^{80}\) While this is a valid criticism, the available literature fails to engage with whether an expanded construction of knowledge, to include constructive knowledge, could be applied thus negating this concern, a situation which has found favour in the English jurisprudence.\(^{81}\) Finally, this provision created a Class B Felony which carries a maximum sentence of twenty five years imprisonment.\(^{82}\) Similar felonies include murder, and robbery, burglary, and arson in the first degree, all of which require the state to prove intent to do harm to an interest of another, whereas the HIV statute merely requires intent to engage in the intimate physical contact.\(^{83}\) It is interesting to note further that the similarly worded original Illinois statute, now amended, mandated a maximum term of imprisonment of seven years displaying a significant disparity in penalties between states in relation to similar behaviour.\(^{84}\)

In light of sustained criticism, similar to the position in Illinois, the Iowa statute was reformed in 2014 and the revised statute comprehends, but differentiates between, for the purpose of penalty, exposure and transmission and reckless and intentional actions in both regards.\(^{85}\) The pathogens involved are expanded to include HIV, Meningococcal disease, Tuberculosis and Hepatitis, and in exposure only behaviour carrying a substantial risk of transmission is comprehended.\(^{86}\) Furthermore, it is expressly provided that exposure with knowledge of HIV status is in itself insufficient to evidence intent, and moreover a person who takes practical means to prevent transmission will not be found to have acted intentionally or recklessly.\(^{87}\) These reforms narrow the scope of liability to a significant degree, and do offer a potential to at least allow the law keep relative pace with scientific developments and public health recommendations.\(^{88}\)

\(^{79}\) Schmitt Hermes, note 45, at 483 – 484.
\(^{80}\) Schmitt Hermes, note 45 at 484 – 485.
\(^{81}\) 1 R v Dica [2004] EWCA Crim 1103
\(^{82}\) IOWA. CODE § 709 C.1.(3), 909.9(2): Iowa Legislative Services Agency, note 7344.
\(^{83}\) Schmitt Hermes, note 45, at 486 – 487.
\(^{84}\) Schmitt Hermes, note 45, at 485 – 486.
\(^{85}\) IOWA. CODE § 709 D.3.
\(^{86}\) IOWA. CODE § 709 D.2.
\(^{87}\) IOWA. CODE § 709 D.7.
\(^{88}\) Wolf, note 8, at 146 – 148.
While such reforms are clearly welcome, there still remains significant latitude for criminalisation even within the context of the reformed offences, and, as mentioned previously, other statutes which are similarly broad when compared with the original formulation of these offences remain in place in some states.89

At the narrow end of the spectrum is the Californian statute which was introduced in 1998. The statute provides 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. Evidence that the person had knowledge of his or her HIV-positive status, without additional evidence, shall not be sufficient to prove specific intent.

(b) As used in this section, the following definitions shall apply:

(1) "Sexual activity" means insertive vaginal or anal intercourse on the part of an infected male, receptive consensual vaginal intercourse on the part of an infected woman with a male partner, or receptive consensual anal intercourse on the part of an infected man or woman with a male partner.

(2) "Unprotected sexual activity" means sexual activity without the use of a condom.90

This statute has been criticised as excessively narrow, and it is specifically criticised for narrowing areas in which other state’s statutes have been described as, and criticised for being, overly broad.91 Notably, in this statute, a number of elements of the offence are described as defences in other statutes, which impinges on the burden of proof but additionally speaks as to a societal view of sexual expression on the part of HIV positive persons.92 The prosecution must thus prove that a condom was not used, that the victim was not aware of the existence of the infection, and that the perpetrator has acted with

89 For example, the Tennessee Code criminalises exposure through intimate contact in a similar manner to the original Illinois statute, albeit that the exposure to fluids must carry a significant risk of transmission; TENN. CODE ANN. § 39-13-109; Tennessee Courts System, 'Tennessee code - Lexis law link' (2016) <http://www.tsc.state.tn.us/Tennessee%20Code> accessed 1 March 2016.
81 Jedrychowski, note 301, at 39; Shriver, note 17, at 326-328
82 Matthew Weait, Intimacy and responsibility: The criminalisation of HIV transmission (Routledge-Cavendish 2007), at 166.
specific intent to infect the victim. The latter element is peculiar to this law, and removes from the ambit of the offence reckless behaviour, accordingly it has been claimed that this makes the offence difficult to prosecute.

The term specific intent is vexed as a matter of law in the USA, and the exemplar Model Penal Code has moved away from the terms specific or general intent, preferring instead four levels of mental culpability; purposely, knowingly, recklessly, and negligently. A definition of specific intent has proved elusive, and the courts have been highly critical of the use of the term for some years. Notwithstanding the controversy, it can be said that intent to commit a crime, and as such specific intent as mentioned in this statute, can be taken to mean conduct directed toward a definite end. Another interpretation of such intent, albeit in the context of considering the defence of intoxication to crimes of specific intent, elides the concept of knowledge with intention, so that where a crime imports a requirement for intention one considers whether a defendant entertains such an intent; or, in another way of putting it, whether he knew what the crime required him to know. If the former construction is adopted, then the statute will require a person to have directed their mind toward actually infecting the other party, whether or not they are ultimately infected. If the latter construction were to prevail, it is unclear what exact knowledge the defendant must have; however, considering the terms of the statute mere knowledge of HIV positive status without additional evidence is insufficient to make out the offence, thus it seems likely that the terms of the statute itself would require proof that the defendant actually intended to infect the person, i.e. they acted subjectively with a view to bringing about infection, not merely regarded infection as a possibility.

93 Jedrychowski, note 17, at 39-40; Shriver, note 17, at 327.
94 Jedrychowski, note 17, at 39-40; Shriver, note 17, at 327.
96 Brody and others, note 95, at 76 – 82.
99 While the HIV statute requires specific intent there also exists an offence of wilful exposure to a communicable disease, which is not HIV specific, but which has been applied where specific intent has not been proven in circumstances of exposure to HIV; CAL. HEALTH & SAFETY CODE § 120290; Katie Lucia, ‘Man gets 6 months for spreading HIV’ (Desert Dispatch, 2013) <http://www.desertdispatch.com/article/20120726/NEWS/307269992> accessed 1 April 2016; The Center for HIV Law and Policy, note 47, at 23.
Finally the definition of sexual activity is limited to proven modes of transmission, though it has been described as under inclusive at the same time, in that it does not include oral-genital sex which has been proven as a method of transmission of HIV. Concerning the omission of oral-genital sex, such an omission may have been deliberate given the much lower risk profile from this type of sexual activity, and indeed conduct which carries a similar risk profile should not give rise to liability as such activities provide at least some sphere of sexual activity which a HIV-positive person may feel safe to engage in without the risk of criminalisation, as well as matching safer sex messages.

This representative sample of specific statutes allows some comparisons with the operation of the law in other jurisdictions. In terms of the type of conduct criminalised by the specific statutes, i.e. exposure to the risk of infection, these differ from the law in England in that infection is required prior to establishing liability. They are in keeping with the law in Canada which also criminalises exposure to, not only infection with, HIV. The law in England has not considered in any detail the range of prohibited conduct which could lead to criminal prosecution, however, there is no logical reason, taking into account the statute concerned and its interpretation by the courts, why all forms of contact leading to infection would not be cognisable. In Canada, the seminal case involved penetrative sexual intercourse. While the contours of conduct which is prohibited remains vague, the courts have shown themselves willing to engage in a substantive analysis of the risk profile of particular conduct in determining whether the defendant has created a significant risk of serious harm to the other party. Notably, and in contradistinction to some states in the United States, England appears to recognise the use of a condom as a defence to a charge in this area, whereas Canada would additionally require a low viral load, and in addition both jurisdictions share with the outlined specific statutes a defence of disclosure of HIV status and subsequent consent to sexual intercourse.

Intent to infect is not required to make out the offence in England, and while in Canada the sexual act must be intentional, intent is not required in relation to exposure to a significant risk of serious harm. The Canadian situation compares to that which applied in states which had broader statutes such as those historically in Iowa and Illinois, and

100 Lafave and Scott, note 98
101 Jedrychowski, note 17, at 40; Wolf and Vazina, note 1, at 879.
102 R. v. Edwards, 2001 NSSC 80, wherein the state conceded that unprotected oral sex would not amount to the significant risk required to underpin a prosecution.
currently in Tennessee for example, but it is in sharp contrast to the specific intent required by the Californian statute. Finally, in relation to knowledge of HIV status, none of the specific statutes delineate whether knowledge as to HIV status must flow from a positive test, or whether constructive knowledge will be sufficient, while in both England and Canada, it appears that constructive knowledge may be sufficient as a touchstone for liability.  

As previously discussed, the general criminal law in both England and Canada has not suffered from the prosecution difficulties purported to necessitate the introduction of specific statutes. Also, the general offences suffer from many of the same failings which have led to criticism of specific statutes including: a failure to specify the range of conduct which is prohibited, lower mens rea requirements, a failure to specify the type of knowledge required by the defendant, the potential to damage genuine public health efforts, issues relating to consent as defence, discriminatory application in that only HIV/STI cases are prosecuted, disproportionate sentencing, and the potential to create fear and stigma which in turn impede efforts to manage pathogens. I will engage further with specific issues raised in relation to specific statutes, however, it should be noted that the operation of the general law has been lauded as superior to specific statutes in that it avoids, to an extent, HIV exceptionalism, and, if applied appropriately, should be applicable only to the most exceptional and egregious cases. In noting this position, it is also important to observe the perspective evidenced by many writers in England, Canada and the USA, in that where criminalisation is entrenched as a concept, there are those who persistently argue against criminalisation, and those who see little space to do so and instead reason from the perspective of reducing rather than eliminating the harm of the criminal law.

**Reflections on the Operation of Specific Statutes**
The specific laws referred to are a mere example of the range of offences which are proscribed in the thirty-three states, and, in this context, the variety of laws have been subjected to substantial criticism in arguing that they fail to offer a uniform message as to what is acceptable conduct, are either overly broad or too specific, and fail to link culpability with actual risk. What follows is an analysis of a number of issues arising

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105 Shriver, note 17, at 322; Burris and others, note 17, at 486.
from the use of specific statutes, however, many, if not all, of the criticisms apply with equal vigour to the use of the criminal law in whatever form, and additionally these will be supplemented by further arguments relating to public health in a later section.

The laws show judgements as to a hierarchy of conduct. Some laws require an absence of consent on the part of the victim as an element of the actus reus of the offence, others allow this an affirmative defence, while still others permit no defence of consent, and I have previously considered the important messages flowing from the articulation of consent as an element of the offence as opposed to a defence. Where consent is neither an element of the crime, nor a defence, and this is coupled with the absence of the use of a condom as a defence, the latter being the case in the majority of states, this shows a moral judgement that certain categories of persons should be resigned to a sexless life, an unrealistic proposition when the history of the law in relation to regulating other high risk, and sexual, conduct is concerned. Moreover such a position rejects sexual expression as a human good which should be guarded and, as one commentator has observed, this evidences a distinction where plastic surgery is a dangerous act privileged to such an extent that consent may be given, whereas sexual intercourse has insufficient value to permit consent. Further this promotes a morally, or societally, stigmatising view of persons who are infected with HIV as being perpetually armed with the intent to harm, which is in itself unacceptable and impacts on self-perception and behaviours which are important to public health efforts.

The issue of consent also engages the ability to make autonomous decisions relating to one’s sexual conduct and the risks inherent to same. Should then, the requirement to disclose HIV status, and consequent consent to sexual intercourse, remove the activities carrying a risk of transmission from the ambit of the criminal law? The balance to be struck is between the promotion of personal autonomy on the part of the individual on a matter which is essentially private to them, and of intimate concern, and the interest of the state in protecting people from their own decisions in the interest of the common good.

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106 Closen and others, note 43, at 944-948.
107 Closen and others, note 43, at 948; Wolf and Vazina, note 1, at 873; Lazzarini and others, note 1, at 247.
108 Closen and others, note 43, at 948.
109 Galletly and Pinkerton, note 17, at 457 – 458.
110 We note here that throughout the reviewed literature from the USA consent is generally treated as consequent to disclosure of HIV status. Galletly and Pinkerton, note 17, at 457, observe that 12 states require something like informed consent in that disclosure must be sufficient to allow a partner to make an informed choice, 7 states require simply disclosure, and all statutes are silent as to whether the partner needs to understand the consequences of consent.
– an essentially paternalistic concern.\footnote{Closen and others, note 43, at 973.} One perspective points to the autonomy increasing function of allowing such decisions, while recognising at the same time the illusory nature of consent in power imbalanced relationships where women may be powerless to either refuse or enforce the use of protection.\footnote{Closen and others, note 43, at 974.} On this argument, if the law chooses to allow the defence of consent, it may permit injury to those who are powerless, however, if the defence is denied the law perpetuates a view that all women are powerless, and need to be protected from their own decisions.\footnote{Closen and others, note 43, at 974.}

As mentioned, an inability to consent is akin to mandating a sexless life for persons infected with HIV and this also implies a moral judgement as to the status of the individuals involved and any moral judgment in this regard runs into the immediate quandary of moral diversity in the determination of societal norms.\footnote{Burris and others, note 17, at 510; Wolf and Vezina, note 1, at 859.} Important constitutional and policy issues are also raised in relation to statutes which do not permit either protected sex, or consent, as a defence. No constitutional challenge to a HIV specific law has been determined on these points; that said, the scope of state authority should not be such as to debar all sexual relationships, and, as such, likewise criminalise acts necessary for procreation. Additionally, consent to risky sex, is different to unwitting exposure, and as such should be permitted to promote privacy, autonomy, and to recognise the complexity and diversity of moral values in society.\footnote{Burris and others, note 17, at 510-511; Closen and others, note 43, at 959-961.}

A related and previously discussed argument relates to implied consent to the risk of infection accompanying all acts of unprotected sexual intercourse.\footnote{Closen and others, note 43, at 972 – 974.} The essence of this argument asserts that given the common knowledge of the risk of HIV infection arising from unprotected sex, any persons consentingly engaging in such conduct must impliedly consent to running such a risk, although this is not a feature of any of the statutes in the USA.\footnote{Closen and others, note 43, at 972 – 974.} This viewpoint has been termed indefensible from a policy standpoint in so far as it forces suspicion over a duty of care in personal relationships. In reality personal relationships are not generally conducted on the basis of suspicion, and such a concept would be injurious to the common societal conception of trust in the context of personal
Alternatively a duty of care dynamic recognises people’s genuine expectations from relationships, and increases, rather than reduces, what many people value from relations involving sexual intimacy. Any such perspective must be viewed through a prism of reality which recognises that all sex acts are not negotiated like contracts, and consideration must be given to the qualitative difference between the intentional infecting of another, and recklessly engaging in unprotected sex, which should be mediated with an appropriate consideration of the actual risks involved, the situational factors which apply in a given case, and the potential effect of criminalisation on infected persons individually and on public health initiatives generally. This latter approach is similar to one discussed previously and offers a contextual analysis which recognises qualitative difference in action and at the same time moves away from an individuated perspective and in so doing allows for a public health assessment of the harms of criminalisation.

The area of privacy in terms of HIV related information has also arisen in this context. Most statutes require that a person knew that they were HIV positive as an element of the crime, consequently the question arises as to whether a prosecutor may obtain medical records and similar information. Some statutes specifically allow access by prosecutors to public health records, and even in the absence of such a provision, and in the presence of HIV related confidentiality laws, the courts have shown some sympathy to prosecutors in permitting disclosure of medical records. The normal justification for this invasion of privacy is the overriding interest in protecting public health; this however is a suspect argument as it has been observed that the overriding concern, and indeed effect, of the involvement of the criminal law in this sphere is not the control of the spread of disease but rather due to the aims of retributive justice. It is also important to recall that the criminal law should never be seen as a primary, or even significant, means to reducing transmission rates. Furthermore, where medical records are accessible, this impinges

120 Galletly and Pinkerton, note 17, at 461, 453 – 459; Lazzarini and others, note 1, at 247; Gary Marks, Scott Burris, and Thomas A. Peterman, ‘Reducing sexual transmission of HIV from those who know they are infected: the need for personal and collective responsibility.’ (1999) 13(3) AIDS 297–306; Burris and others, note 17, 506 – 511.
121 Closen and others, note 43, at 959-961, at 959-960; Lazzarini and others, note 1, at 250-251.
122 Closen and others, note 43, at 959-961, at 959-960; Lazzarini and others, note 1, 250-251.
123 Closen and others, note 43, at 935, 958 -960; Lazzarini and others, note 1, at 249 – 251; Burris and others, note 17, at 506 – 511; Wolf and Vazina, note 1, at 843.
124 Closen and others, note 43, at 935; Shriver, note 17, at 353;
upon a clinical relationship of confidentiality that is necessary to ensure effective treatment of a person and to ensure the proper management of the HIV epidemic generally, a point to which I shall return.

In terms of the rationale for, and effectiveness of, specific statutes, three main arguments emerge: disease control or deterrence, incapacitation, and normative or retributive views. Firstly, concerning disease control or deterrence, deterrence theory understands that a rational actor appreciates that an act is illegal, carries with it a likelihood of detection and punishment, and this causes a modification of individual behaviour. Specific statutes, which are designed to be structural interventions influencing population behaviour, do not fulfil this function as the law has little effect in general on what is presumed to be otherwise consensual sexual behaviour, from which most infection arises. Also the laws are not well enough known to influence, and are too infrequently enforced to modify, sexual behaviour generally. Turning then to incapacitation, the law does incapacitate through incarceration where it is applied, but this will only ever be in a minority of cases, and will not reduce transmission overall. As a result, any benefit in incapacitating high profile offenders must be offset against the risks associated with stigmatisation of HIV sufferers generally, alongside the potential negative effects on public health campaigns, particularly in light of the alternative of civil committal, thus on balance given the minimal societal effect of this rationale it is seen as insufficient to warrant specific statute criminalisation.

Finally we must consider the normative or retributive justification, which in some commentators’ eyes is the only achievable goal. The principles underpinning this rationale have been described earlier and include the validation of a social norm, alongside the condemning and punishment of transgressors, specifically that this conduct is morally blameworthy and deserving of criminal punishment.

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125 Lazzarini and others, note 1, at 249 -250; Burris and others, note 17, at 506 – 511; Turner, note 42, at 187 – 189.
126 Lazzarini and others, note 1, at 250; Turner, note 42, at 187 – 189.
127 Lazzarini and others, note 1, at 250; Turner, note 42, at 187 – 189.
130 Lazzarini and others, note 1, at 249; Turner, note 42, at 187 – 189.
131 Wolf and Vezina, note 1, at 843; Turner, note 42, at 187 – 189.
argument is that the criminal law can promote a norm of a duty of care between partners and in so doing establish that there is a moral duty to disclose one’s HIV status, and/or to use a condom. 133 Those in favour of this approach take the view that the criminal law is an appropriate vehicle to manage the transmission of such pathogens and to achieve this the ultimate moral duty is that of abstinence, but in light of the virtual impossibility of imposing this, a legitimate state imposed duty to warn arises. 134 On this point, this norm may already exist in society absent the intervention of the law, and indeed many specific statutes are written in such a broad fashion as to negate any realistic norm setting function. 135 A further difficulty with this reasoning arises from the setting of a moral norm beyond that which recognises intentional infection as criminal, in so doing the law traverses many different social, cultural, and ethnic divides, and seeks to establish a uniform, sweeping approach in relation to sexual behaviour which does not match the reality of the myriad of situations within which sex occurs. 136 Further, the moral judgement relating to both disclosure or consent, and the use of condoms, is inextricably linked to the risk of harm associated with the conduct in question; however, many statutes result from an erroneous perception of the actual risk associated with conduct, and indeed low risk behaviour is often criminalised, thus undermining the overall legitimacy of the law. 137 

Additionally, when the concept of reckless exposure enters, a moral value judgement is made which may criminalise sexual behaviour of a subset of the population which is regarded as normal by that group, leading to discriminatory conviction. 138 Also the moral diversity of society, particularly when matters of sexual conduct are concerned, may undermine the normative rationale of the law. Indeed, given the low level of disclosure which exists in some areas, the law runs the risk of criminalising conduct which is the social norm, rather than that which violates a social norm, and this mandates people to achieve that which most cannot. 139 

133 Closen and others, note 43, at 972 – 974.
135 Burris and others, note 17, at 508; Wolf and Vazina, note 1, 860.
136 Burris and others, note 17, at 508 – 510.
137 Burris and others, note 17, at 508 – 510.
138 Burris and others, note 17, at 508 – 510.
139 Wolf and Vazina, note 1, 874; Lazzarini and others, note 1, at 249.
A further critique arises in relation to normative compliance theory, whereby for a person to comply with the law they should view same as emanating from a legitimate source of authority, or it should match their own sense of morality, and as such warrant obedience. In this context, it is reasoned that laws in this area may suffer from a legitimacy deficit as a result of low knowledge of the law and a significant proportion of those to whom the law is directed may view the law’s intervention in the realm of sexual conduct as illegitimate. Further, some significant sets of the population may distrust the law’s intervention, generally or specifically, in their sexual conduct due to past experiences, for instance gay men who recall the prohibition of sodomy, or ethnic minorities who perceive they are discriminated against by law enforcement officials, any of which may serve to undermine the normative rationale for compliance.

**Conclusion**

In summary, on the spectrum of laws, narrowly drafted and thus specific statutes have the benefit of being just that: specific; thus, they are less liable to be applied in a prejudicial fashion and also provide specific guidance in relation to acceptable conduct in society. Although, depending on the specific law, they may also be criticised for omitting acts which warrant punishment, or including acts which do not, and in so doing creating again hierarchies of conduct which focus on sexual behaviour and associated moral conclusions. Conversely, broad statutes have the significant drawback of being indeterminate, over broad in their effect, and vague in their terminology.

Originally the application of specific statutes was heralded as an intervention which would provide clear guidance in relation to conduct, avoid difficulties associated with prosecutions under general criminal laws and avoid biased prosecutions. In effect, they are largely vague, provide conflicting advice, and may actually facilitate biased prosecutions of certain groups in society such as sex workers, MSM and ethnic

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140 Lazzarini and others, note 1, at 249.
141 Lazzarini and others, note 1, at 249.
142 Lazzarini and others, note 1, at 249 – 250.
144 Jedrychowski, note 17, at 44 – 46; Wolf and Vazina, note 1, at 859 – 860; Closen and others, note 219, 950-951;
145 Closen and others, note 43, 951, 952
146 Closen and others, note 219, 951, 952
minorities. One potential point of origin for these laws not previously discussed is the role of first instance bias in that supporters of many HIV specific statutes were also supporters of the Supreme Court’s decision in Bowers which condemned homosexual acts of sodomy. Reinforcing this view, a number of court decisions have advanced the argument that existing sodomy laws are related to the legitimate public health interest in controlling the spread of HIV. Indeed it may be argued that the entire debate in favour of, and opposing, criminalisation is influenced by opposing views of the social acceptability of homosexuality and drug use. This may suggest that these laws were passed at best for symbolic reasons, and at worst that the alternative rationales mask the reality behind criminalisation in this area.

It is undeniable that many specific statutes were generally not well thought out, have effects that were not expected, and have created a situation which is worse than that which existed, or exists, where general criminal laws apply. They may also in some instances criminalise behaviour that has no actual risk of infection, and as such they may do little to deter the type of risky behaviour they are designed to combat, or worse create confusion regarding modes of transmission, spheres of acceptable conduct, and increase the stigma associated with HIV infection. Such laws create moral messages which reflect poorly on persons infected with sexually communicable pathogens and have the potential to create significant stigma or at worst consign them to a theoretically sexless life. An additional negative moral message arises from the penalties applied where persons are convicted under specific statutes, and far harsher penalties are often employed in convictions under these statutes, when compared with prosecutions in other spheres carrying a comparable risk of harm.

There are strong principled arguments in favour of reversal of specific statutes in favour of the limited application of the general criminal law, or their significant revision, alongside on-going public health initiatives. One is left to ultimately conclude that any

147 Wolf and Vazina, note 1, at 871; Closen and others, note 219, 981.
148 Closen and others, note 43, 982.
149 Closen and others, note 43, 982.
150 Lazzarini and others, note 1, at 251.
151 Shriver, note 17, at 349; Closen and others, note 43, at 983.
152 Shriver, note 17, at 349; Galletly and Pinkerton, note 17, at 453 – 458.
153 Closen and others, note 43, at 948; Wolf and Vezina, note 1, at 873.
154 Wolf and Vazina, note 1, at 859.
155 Burris and others, note 17, 515 – 516; Wolf and Vazina, note 1, at 877 – 883; Jedrychowski, note 17, at 44 – 46;
revision will be unacceptable given the HIV exceptionalism which accompanies such statutes, and this is particularly so when one considers the changing nature of the disease.\textsuperscript{156} As to the matter of when the general criminal law should be employed, this should be limited to cases of intentional infection i.e. where HIV is used as a weapon. A further refinement of this position is that the criminal law should only be deployed in the type of intentional cases just described and recalcitrant individuals should be dealt with through the deployment of an alternative incapacitation option, as a last resort, i.e. a substantively and procedurally sound civil incapacitation statute.\textsuperscript{157}

\textbf{IV– Voluntary and Coercive Public Health Interventions}

Throughout the thesis, I have referred extensively to public health efforts to curb the spread of pathogens, and in this section I will consider the theoretical discussions relevant to public health efforts, voluntary efforts to the control the spread of pathogens and finally coercive methodologies focussing specifically on quarantine. The discussion draws primarily from statutes and critical commentary from the USA but also draws on experiences in other jurisdictions; this will in turn inform a more general discussion of the public health effects of criminalisation in the final section. In examining this area, my focus is not only on HIV but also other STIs and tangentially infectious pathogens more generally given the discussed potential for greater advancement of the criminal law in this area.

\textit{Public Health and Voluntary Methodologies}

When referring to public health efforts, I am referring to the efforts of actors within our public health system which include state public health departments, individual and institutional providers of healthcare and community structures and service providers.\textsuperscript{158} In bringing these actors together under one definition, it is important that I acknowledge that not all of the actors carry the same mandate: some may be focused solely on the health of an individual, others have solely a population focus, however, many have both. In bringing them together under one heading, I am referring to the activities of some or all with a view to curbing the spread of a pathogen.

\textsuperscript{156} McArthur, note 10, at 737 – 740.
\textsuperscript{157} Wolf and Vazina, note 1, at 876.
\textsuperscript{158} Actors relevant to public health in a given society are not limited to those described and may additionally include the media, business and academe; Lawrence O. Gostin, ‘A Theory and Definition of Public Health Law’ (2007) 10 Journal of Healthcare Law and Policy 1–12, at 5 – 7.
The crux of a public health approach to any issue is a focus on the collective as opposed to the individual and ultimately a focus on population health with the abiding interest represented as the wellbeing of the community.\textsuperscript{159} The reach of the term public health is potentially endless covering issues such as sanitation, water, food safety, vaccinations, smoking, drug use and many others, however, my focus is on public health efforts in relation to infectious pathogens. As I will discuss, public health efforts can operate through both voluntary and coercive means, and both means, but especially the latter, presume some basis for the pursuit of public health – that being health. Public health theorists and actors, and I for the purposes of this work, take a position that health is foundationally important within our society and is something of intrinsic value which carries benefit for the individual and the community.\textsuperscript{160} In taking this position in the context of the maintenance and improvement of the health of the population, in the context of infectious pathogens, I have argued that the health of the population is an overriding goal, and as such other competing political or moral imperatives, such as retribution, should be subordinate where one competes with the other, as occurs where the criminal law is utilised in this area, and I will develop this argument further in this and the following section.

There are a range of voluntary initiatives which are used to control the spread of infectious pathogens and I will provide but an outline of how these operate with reference to HIV, however, the methodologies have a wider application. The various methodologies used seek to identify sources of infection, encourage partner notification/contact tracing, interrupt transmission, influence behaviours that increase risk, ensure treatment and case management and monitor trends of infection within the population.\textsuperscript{161}


\textsuperscript{160} Gostin, note 158, at 2 – 3; Gostin and Wiley, note 159, at 4 – 8

These goals are interdependent and rely on a range of methodologies, with case finding and surveillance relying heavily on testing, which is essential within the community to determine the level of infection, to allow individual interventions given that persons are most infectious when newly infected, to allow treatment to reduce infectivity and improve health and to allow effective behavioural interventions to reduce risk. High levels of the population continue not to have been tested for HIV and there continue to be a high number of late diagnoses, both of which inhibit public health efforts.\textsuperscript{162} Partner notification/contact tracing is an essential methodology which allows for the early detection of potential cases.\textsuperscript{163} Participants in a seminar in which I participated indicated that in Ireland efforts are made to elicit partner information at the time of diagnosis and on an ongoing basis, however, others have identified that in some cases less than half of those newly diagnosed were interviewed with a view to obtaining partner information.\textsuperscript{164} Reducing behaviours that present a risk is an important intervention which assists a person to reduce the risk of transmission through changed sexual practices and the use of protection, which are essential and effective in reducing the spread of HIV.\textsuperscript{165} Such processes are complex and ongoing, and people require continuing support both to achieve and maintain behavioural changes. Finally, treatment is an essential component both in relation to the maintenance of health on the part of the infected person, but also as a means of reducing infectivity and reducing the transmission of HIV where the viral load of a person is the most significant determinant of their infectivity and the effective reduction of viral load is critical to the interruption of transmission.\textsuperscript{166}

These methods have been shown as effective in controlling the spread of HIV. Indeed the principles with certain modifications, for example in relation to treatment, are equally

\textsuperscript{162} Frieden, Foti and Mermin, note 161, at 2283.
\textsuperscript{163} Frieden and others, note 161, at 2399; Frieden, Foti and Mermin, note 161, at 2283 – 2284; Centers for Disease Control and Prevention, note 161, at section 8.
\textsuperscript{164} Frieden, Foti and Mermin, note 161, at 2284.

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applicable to all infectious pathogens. These form the best hope for the community to reduce the presence and transmission of pathogens which can and do cause physical and emotional hardship within the populations. However, the communitarian focus of public health endeavours has not been, and indeed is not, limited to voluntary means of pathogen detection and control and there is a long history of more coercive methodologies to which I now turn.

The Coercive Approach

The state may also respond, subject to constitutional limits, to the perceived risks posed by persons infected with HIV and other communicable pathogens by engaging public health statutes and exercising the police power of the state; this is often referred to as a traditional, or coercive, public health approach. This permits, amongst other things, the civil committal or quarantine of a person where there is convincing evidence that they pose a risk to others. While focusing on quarantine, I recognise that there are a range of coercive methodologies including: enforced partner notification, enforced testing, enforced treatment, and behavioural orders among others. Each of these is deserving of analysis, however, it is not possible to analyse them all in this context, and the theoretical discussion will provide a foundation for analysing each potential intervention and my overall conclusion will speak as to the appropriateness of coercive interventions.

Coercive public health practices have existed for many years, most notable among them quarantine measures, and the call to ostracise those bearing contagion is a facet of humanity of an ancient vintage, with the Book of Leviticus saying of the ‘Leper’: ‘All the days wherein the plague shall be in him he shall be defiled; he is unclean: he shall dwell alone; without the camp shall his habitation be’. As such, it was not surprising that alongside the emergence of the HIV epidemic came proposals for state intervention including the enforced segregation of persons infected with HIV, an approach that has

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167 See Frieden and others, note 161, at 2398 for a comparison of the Public Health approach to HIV as compared with other infectious diseases.
168 Wolf and Vazina, note 1, at 828-830. Note – General STI Statutes addressed above are also regarded generally as public health interventions. However, given that they impose a criminal sanction they are addressed separately from the involuntary coercive methodologies addressed here.
been deployed infrequently in the USA but has enjoyed some greater support in other countries such as Cuba and Sweden.\textsuperscript{171}

Many states in the USA have laws inherited from previous public health emergencies, these have the potential to impose both reporting requirements in relation to, and restrictions on, persons and were previously invoked in response to diseases such as tuberculosis, smallpox, scarlet fever, leprosy, cholera, bubonic plague, and ‘venereal disease’.\textsuperscript{172} One example of the use of quarantine in this context was that of ‘Typhoid Mary’, Mary Mallon an Irish immigrant to the USA, who became synonymous with the spread of typhoid, spent twenty-six years of her life in quarantine and died alone while detained.\textsuperscript{173} Another account of the use of quarantine is to be found in Inglis’s study of the use of quarantine to control the spread of Leprosy, or Hansen’s disease, in Hawaii from 1865 to 1969.\textsuperscript{174} In her analysis of the operation of this regime, she displays how it commenced on a medical basis, developed an overt racial dimension, increased fear and stigma, developed into an abusive regime leading to the objectification and abuse of those infected who were treated as socially deviant and controlled like prisoners instead of those who were ill. The advent of antibiotics saw these statutes fall into disuse, however, a revival in their interest accompanied new epidemics facing society, ones which involved an incurable disease, and which generated significant concern among the public.


\textsuperscript{172} Sullivan and Field, note 169, at 143.


\textsuperscript{174} Kerri A. Inglis, ‘Leprosy and the Law: The ‘Criminalisation’ of Hansen’s Disease in Hawai’i’ in Catherine Stanton and Hannah Quirk (eds), Criminalising contagion: Legal and ethical challenges of disease transmission and the criminal law (Cambridge University Press 2016), at 55 – 76.
and policy makers, and such a revival is not limited to HIV with more recent incarnations emerging in response to SARS and Ebola.¹⁷⁵

Such measures amount to the exercise of a police power by the state which includes powers granted to govern, establish and adopt as well as enforce laws that are designed for the protection as well as preservation of the public health.¹⁷⁶ Public health law operating in this way has the potential to significantly impact on the lives of persons and can result in a significant impediment to their civil liberties and human rights. When acting in this manner, there is a considerable comparison with the tensions in a criminal law analysis between autonomy and welfare, and from a public health perspective between individual liberties and community interests.¹⁷⁷ Given the population approach of public health, such approaches are essentially instrumental in their outlook and as such carry with them the potential for poorly constrained invasion of individual liberties. The counterpoint for this instrumentalist perspective is either a respect for individual liberty or an overriding concern for social justice.¹⁷⁸

Various proposals have been developed to analyse decision making in this area to assist in determining whether the correct balance has been struck, which focus mainly on the ethics of public health.¹⁷⁹ These proposals are of assistance as they address issues such as necessity, effectiveness, assessment of harm to individuals, minimalist intervention, discriminatory application and whether the benefits outweigh the burden. However, on their own they are potentially insufficient without recourse to a broader social justice and human rights analysis which allows a fuller consideration of both the effects and burdens of public health interventions not only on a quantifiable but also qualitative basis, reflecting on the individual and society, the place of particular groups within society and essentially ensuring that interventions are for the interest of the population and not driven


¹⁷⁶ Kenney, note 34., at 253.

¹⁷⁷ Faden and Shebaya, note 159; Gostin, note 158.

¹⁷⁸ Gostin, note 158, at 10 – 11; Faden and Shebaya, note 159.

by the ethics of individual responsibility or a drive for an alternative non-criminal
condemnatory response.\textsuperscript{180}

These principles inform decision making in relation to the deployment of the police
power of the state, and quarantine remains one of the coercive methodologies available,
and perhaps the ultimate option where other public health measures to control the spread
of a pathogen have failed.\textsuperscript{181}

\textit{Constitutional Protections and Coercive Methodologies}

The constitutional validity of such civil committal procedures has been upheld by the US
courts on number of occasions and the formative case is \textit{Jacobson v Massachusetts} where
the United States Supreme Court considered the standard which should apply in analysing
the exercise of a state’s police power.\textsuperscript{182} Considering mandatory smallpox vaccination,
the Court held that it was within the competence of state legislatures to enact reasonable
laws which protect the public health and safety.\textsuperscript{183} It was held that a court would only
intervene to protect individuals where the application of such enactments in particular
circumstances and to particular persons was so arbitrary or unreasonable, or went so far
beyond what was reasonably required for the safety of the public as to justify
intervention.\textsuperscript{184} This finding was interpreted as providing for broad deference to state
legislatures in relation to what was necessary for public health purposes, even in the face
of conflicting public health evidence, and, as such, virtually all public health enactments
subject to challenge have been upheld by the courts, such as those relating to quarantine,
mandatory vaccinations, and mandatory physical examinations.\textsuperscript{185} Indeed it is apposite
to note that quarantine provisions resulted in the committal of an individual suffering
from gonorrhoea were upheld in 1922 in the case of \textit{Ex parte Caselli}.\textsuperscript{186}

Given the largely deferential approach evidenced in \textit{Jacobson v Massachusetts}, the
question may be posed as to what extent other constitutional protections arise where these

\textsuperscript{180} Faden and Shebaya, note 159; Jonathan M. Mann, ‘Medicine and public health, ethics and human rights’
\textsuperscript{181} Gostin and Wiley, note 159, at 416.
\textsuperscript{182} 197 U.S. 11 (1905).
\textsuperscript{183} 197 U.S. 11 (1905), at 25.
\textsuperscript{184} 197 U.S. 11 (1905), at 28.
\textsuperscript{185} Kenney, note 34, at 253 – 254.
\textsuperscript{186} Kenney, note 34, at 253 – 254; Padraig O’Malley, \textit{AIDS: A special issue of the ‘new England journal of
public policy’} (University of Massachusetts Press 1988), at 228; \textit{Ex parte Caselli} 204 P. 364 (Mont. 1922).
statutes are operative. It has been held that the protections of the Eighth Amendment’s ban on cruel and unusual punishment and excessive bail do not apply, as such interventions are regarded as regulatory rather than punitive. The seminal case in this area, Robinson v California, considered this position with regard to the criminalisation of drug addiction, finding that the criminalisation of illness was not permitted, however, the civil committal of a person did not invoke the same concerns, and as the Court observed; ‘The addict is a sick person. He may, of course, be confined for treatment or for the protection of society. Cruel and unusual punishment results not from confinement, but from convicting the addict of a crime.’ While it is true that civil committal carries with it a potentially different motivation to criminalisation, it may have an equal or more severe effect on liberty, and as observed in Powell v Texas, which upheld a conviction for public intoxication on the basis that the conviction was for behaviour related to intoxication not for being an alcoholic; ‘…we run the grave risk that nothing will be accomplished beyond the hanging of a new sign -- reading "hospital" -- over one wing of the jailhouse… One virtue of the criminal process is, at least, that the duration of penal incarceration typically has some outside statutory limit’. Such a virtue may not be said of the civil committal procedure as a cure may not be available and significant concerns emerge as to how long and for what reasons a person may be held in such circumstances.

Other constitutional protections do apply in terms of civil committal, such as the constraints of Due Process and Equal Protection. In Youngberg v Romeo, the Supreme Court considered the position of an involuntarily detained person with an intellectual disability, in essence a person who was civilly committed, and with regard to his conditions of detention he enjoyed rights pursuant to the Due Process Clause of the Fourteenth Amendment. These rights included safe conditions of detention, freedom from bodily restraint during detention, and a right to minimally adequate habitation – interpreted as a right, in this context, to minimally adequate and reasonable habitation. As to whether such rights were breached, the Court did recognise the necessity for a balancing exercise between state interests and the liberty interests of the individual, and

188 Sullivan and Field, note 169, at 146.
189 370 U.S. 660 (1962), at 676.
190 392 U.S. 514 (1968), at 529.
191 Sullivan and Field, note 169, at 146.
this is to be determined through an analysis as to whether professional judgement was exercised in a valid manner.\textsuperscript{194} In \textit{O'Connor v Donaldson}, the Supreme Court considered the position of a person with a mental illness who was civilly detained.\textsuperscript{195} Here the respondent had been confined for fifteen years in an institution and at the trial of his action for damages it had been determined that he was neither a danger to himself or others. In this context the Supreme Court, determined that it was constitutionally impermissible to involuntarily detain a person who represented no danger to himself or others, even if a state statute authorised indefinite custodial confinement of the "sick", in so doing it observed:

> A finding of "mental illness" alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that that term can be given a reasonably precise content and that the "mentally ill" can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.\textsuperscript{196}

In addition, the Court observed that; ‘Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty’.\textsuperscript{197} These are important observations not least because they delimit the power of civil committal to circumstances where harm is a factor. They hold importance in addition as there are a number of bases upon which civil committal may be advocated in the context of HIV, one of which is status based quarantine: in this context, could a person infected with HIV be regarded as essentially harmful without any more being said, or must there exist behavioural patterns which render them harmful?

\textit{Civil Committal and HIV in the USA}

In considering how a system of committal might operate, there are two main options available: one based on status and the other behaviour.\textsuperscript{198} Status based quarantine relies on a diagnosis with a particular disease as the trigger for detention, in effect a mass roundup which would carry with it legal and practical difficulties. Such an approach, in the USA, would involve providing 1.3 million detention places and from a public health

\begin{footnotes}
\footnotetext{194}{457 U.S. 307 (1982), at 314 – 325.}
\footnotetext{195}{422 U.S. 563 (1975).}
\footnotetext{196}{422 U.S. 563 (1975), at 575.}
\footnotetext{197}{422 U.S. 563 (1975), at 575.}
\footnotetext{198}{Sullivan and Field, note 169, at 146.}
\end{footnotes}
point of view such an approach would be generally ineffective as a significant proportion of the infected population are undiagnosed. Mandatory testing, if associated with such a model, would be of some assistance in that a greater number of infected persons would be identified, however, those more recently infected would not, and therefore this scenario would require repeated mandatory national testing. The concept of such a detention regime raises serious constitutional questions given that HIV is not transmissible through casual contact and requires behaviour which is subject to conscious control to transmit the virus. As such any attempt at mass detention in the United States would be invalid pursuant to the Due Process and Equal Protection clauses of the Fourteenth Amendment, which requires not only fair procedures in any civil detention process but also strong substantive justifications underpinning a deprivation of liberty. In addition, given the incurable nature of HIV, such a mass detention regime would amount to a type of ‘civil life sentence’ justified not on the basis of the harm prevention or reduction but on majoritarian fear in relation to a minority of the population.

The second basis upon which quarantine may be justified, and a more relevant basis, is with reference to specific behaviours which are judged to endanger others. To justify such an infringement of a person’s individual rights, the state must show: that there is a significant risk to others, the proposed action is necessary and likely to be effective, is the least restrictive option available, and that it is generally proportionate to the goal sought (strict scrutiny). State interventions in this, and other, circumstances can also include mandatory vaccination, enforced medicating of patients, and monitoring of compliance with medication regimes. These types of interventions might arise where a sex worker fails to use condoms following counselling, or where a person, despite having been advised to the contrary, continues to have unprotected sex which may or may not lead to the transmission of HIV.

This model of detention straddles the line between a public health detention dynamic and the criminal law in that it relies both on a status (infectious status) and behaviour. In this model, the over inclusiveness of the mass roundup is avoided: only a subset of a particular

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200 Larry Gostin, ‘Traditional Public Health Strategies’ in Harlon L. Dalton and Scott C. Burris (eds), AIDS and the law: A guide for the public (Yale University Press 1987), at 60; Sullivan and Field, note 169, at 149.
201 Sullivan and Field, note 169, at 152;
202 Wolf and Vazina, note 1, at 828 – 830.
population is targeted, and this subset is seen as justifiably targeted in light of both their recalcitrant behaviour and the potential for, or actual, harm to others. There is some support for this type of quarantine measure as it is seen as politically justifiable and in addition it is contended that it may have some element of a deterrent effect. The difficulty which arises is that such a model, even if it were to be effective, could not be limited to those who actually had spread the disease, as such detention would have to be based on an amalgam of factors such as actual transmission, reported recalcitrant behaviour, and predictive analysis of potential future behaviour. The later construct requires professionals, or state officials, to predict behaviour based on previous behaviour, which creates a concern that status based factors would re-emerge as a factor justifying detention for example that gay men are more promiscuous and careless, thus more gay men should be isolated, and potentially to the same effect those who are prostituted.

There is evidence of such a selective implementation of committal regimes historically in the context of STIs when 30,000 persons who were prostituted were detained in federal institutions, notwithstanding that this did nothing to stem the spread of the pathogen. It is likely though that any such application of the law would now fall afoul of constitutional protections discussed earlier, namely the requirement for strong substantive justifications underpinning detention and the requirement for sufficient procedural guarantees; however, there still remains a potential for subtler discriminatory application cloaked in the veneer of professional judgement or mathematical predictive analysis. That said, a more circumscribed system which did focus on those who had infected others, or who displayed clear behavioural signals of placing others at risk, in whatever manner that might be determined, would likely pass constitutional muster.

In responding to HIV the deployment of large scale, status based quarantine has been rejected as impractical and unduly oppressive; however, this is not so with a more selective approach directed at recalcitrant individuals who have infected others, or who fail to follow public health advice, where coercive public health initiatives have gained more traction. Such an approach was evident in In re Renz where a Minnesota Court

204 Sullivan and Field, note 169, at 152 – 153.
207 Bayer and Fairchild-Carrino, note 169, at 1471.
of Appeal upheld the civil committal of a male who had engaged in unprotected sex without disclosure of his HIV status. These acts were found to meet the statutory dangerousness test justifying confinement, and statutes were introduced, or amended, in twenty five states permitting this type of confinement in the case of HIV.208 Opponents of these regimes have, since they were first suggested in the 1980’s, objected on the basis of both their ineffectiveness in controlling the overall epidemic, and the potential for them to do harm to broader public health initiatives which have the potential to stem the spread of the disease.209

Though available in 25 states, the deployment of coercive strategies has been piecemeal, with some states showing a marked reluctance to initiate the process, others adopting a staged approach, and still others adopting a more aggressive approach. Despite the large number of persons infected with HIV, in 20 of the states where such measures are available, a very low number of counselling, cease and desist, or confinement orders had been issued in the first ten or so years of their operation.210 Where used, the majority of confinement orders resulted in detention within mental health facilities where there was a suggestion of a co-morbid mental health problem as the ‘real’ issue in the cases considered. Five states are reported to have adopted a more aggressive approach to coercive methodologies, whereby the states involved accounted, at the time of the study, for 4% of the HIV/AIDS population, yet reported the vast majority of such interventions.211 In four of these states, there is proactive involvement on the part of public health officials upon receipt of complaints of recalcitrant behaviour, and interventions ranged from mandatory counselling, cease and desist orders, and referrals of the cases to state attorneys general for potential prosecutions pursuant to general STI statutes. Despite the availability of quarantine measures in these states, none had ever gone so far as to civilly detain a person.

One state, Indiana, used quarantine provisions more frequently than others, although still quite infrequently, in that they detained five persons over four years. This state utilises a mental health approach to recalcitrant behaviours and, in an appropriate case, a person may be detained for a period of seventy-two hours. Thereafter a judge reviews the

211 Bayer and Fairchild-Carrino, note 169, at 1472 – 1474.
legitimacy of their detention on the basis of psychiatric evidence and the person may be
detained for such a period as is necessary, i.e. indefinitely, until psychiatrically assessed
as fit for discharge into the community.\textsuperscript{212} Detention periods have tended to be brief, and
less than those mandated following criminal prosecution in similar circumstances. The
basis for detention has raised concerns in Indiana in that a confidential informant may
provide the requisite information, and as such a person to be detained is denied the
opportunity to cross examine the person alleging the behaviour which may ultimately
justify their detention; whereas the Confrontation Clause of the Sixth Amendment to the
United States Constitution would ensure, that in a criminal proceeding, the defendant
would have the right to cross examine their accuser. It is also suggested that the
prevalence of this approach in Indiana related to the dominant conservative political
climate which empowered public health officials to use their power of detention more
frequently.

Aside from HIV, coercive public health strategies were also applied historically when the
United States was faced with an outbreak of Syphilis, which at that time was incurable.
The emergence of this epidemic generated significant fear among the population, and
resulted in the stigmatisation of those infected.\textsuperscript{213} The primary response at that time was
the deployment of public health laws under the police power of the state which utilised
either involuntary detention or public health offences.\textsuperscript{214} The major driver of this
coercive public health response was a large scale infection of military personnel at the
time of World War I and the deployment of state powers saw the closure of places
offering the sale of sex, the quarantine and isolation of prostitutes and the punitive
treatment of military personnel, however, despite these substantial initiatives, the rate of
new infections remained stable.\textsuperscript{215} The conclusion reached was that the deployment of
coercive systems of public health were ineffective in the absence of widespread
programmes focusing on education, and as such a multi-faceted public health response
was initiated which did not focus on coercive methods but instead utilised education,
access to healthcare, confidential testing, and contact tracing.\textsuperscript{216} This was a coordinated
and massive public health campaign in the 1930’s and it resulted in a substantial reduction

\textsuperscript{212} Bayer and Fairchild-Carrino, note 169, at 1472 – 1474.
\textsuperscript{213} Kenney, note 34, at 252.
\textsuperscript{214} Kenney, note 34, at 252.
\textsuperscript{215} Kenney, note 34, at 254 – 255.
\textsuperscript{216} Kenney, note 34, at 256 – 257.
in the rate of Syphilis over the next decade. While it is not possible to draw wide ranging conclusions from the experience of the United States when managing an epidemic so many years ago, it is evident that the deployment of large scale coercive and punitive measures when regulating sexual conduct which leads to the transmission of pathogens was an ineffective method for dealing with such a problem. Furthermore, the experience of the United States is suggestive of the utility of a multi-faceted approach which emphasises education and access to effective and confidential healthcare as a major driver in the efficient management of such an epidemic.

**Conclusion**

While coercive approaches have been available in many states, they have been deployed infrequently. There are a number of potential explanations for this, including a perception that the concomitant availability of criminal law represents a more effective method of social control in dealing with behaviours which are seen to present a public health risk, or that the deployment of these coercive methods are counterproductive in terms of the overall public health effort in the area. Significant difficulties do emerge with such approaches, and in relation to committal proceedings, the state must satisfy a comparatively lower burden of proof when compared to criminal proceedings; additionally, periods of confinement may be indeterminate, and this is so in circumstances where the has been a failure to invest in public health infrastructures. Additionally, such measures have an extremely limited effect in controlling the spread of the disease and have the potential to interfere with healthcare relationships and other voluntary public health methodologies. Furthermore, such initiatives have the potential to amount to nothing more than a denunciatory exercise, in a non-criminal format, and represent a crude intervention in highly engrained and personal behaviour which have not been shown to be more successful that voluntary efforts to control the spread of pathogens. However, in the context of arguments relating to the detrimental effect of the criminal law, particularly specific HIV statutes, on voluntary public health efforts to control the spread of HIV, some do argue for application of this type of measure to those who are unable, or refuse to cooperate with voluntary public health initiatives. However,

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217 Kenney, note 34, at 256 – 257. Of note the success was relatively short lived as with the advances in treatment, i.e. the advent of penicillin, rates began to increase leading to a conclusion that the control of this sexual disease was a social issue rather than one amenable simply to a medical solution.


219 Closen and others, note 43, at 968-970.

220 Gostin, note 180.
as observed previously, such arguments proceed on the basis of reducing the harm of the criminal law as opposed to the legitimacy of coercive methodologies.\textsuperscript{221}

In general, such coercive approaches are no longer to the fore in the public health approach to control the transmission of STIs. Rather, approaches by state public health departments are now characterised by voluntary testing, screening for high risk behaviours, education and training of those infected and professionals, conveying messages of universal susceptibility, promoting condom use, and cooperative initiatives such as notification and tracing of partners.\textsuperscript{222} This evidences a subtler understanding of the personal nature of sexual and social relations and a move away from the command and control perspective of public health legislation in favour of a ‘softer touch’ which recognises the necessity for voluntary public health initiatives alongside a social-ecological approach looking at a broader range of determinants of health and wellbeing.\textsuperscript{223} Such an approach, in the context of HIV and STIs, understands that coercive measures stigmatise those who are subjected to them, and that a destigmatising approach recognises the rights of infected persons with a view to maximising voluntary cooperation and the maximum conditions for behavioural change, both of which contribute more significantly to a reduction in transmission.\textsuperscript{224} The primary method through which transmission can be reduced is by destigmatising the status of being infected, empowering those who are infected and ensuring access to ongoing treatment and counselling which is respectful of the rights of the person.\textsuperscript{225} Coercive methodologies, whether that be in the area of testing, notification, treatment or detention run contrary to these objectives and thus contrary to the achievement of the goals of the population. Moreover, at a principled level, the success of voluntary initiatives provides a powerful argument against criminalisation in that they offer an equally efficacious method to control the spread of pathogens.

A final point to consider is whether there is any place for coercive methodologies in the management of STI transmission, or more generally for communicable pathogens. It

\begin{itemize}
\item \textsuperscript{221} Closen and others, note 43; Lazzarini and others, note 17, at 244, 249.
\item \textsuperscript{222} Wolf and Vazina, note 1, at 831-835; Galletly and Pinkerton, note 17, at 451 - 452.
\item \textsuperscript{223} Gostin and Wiley, note 159, at 346, 381 – 383.
\item \textsuperscript{224} Gostin and Wiley, note 159, at 383.
\end{itemize}
would seem that in circumstances of emergency where casual contact is the method of transmission then there may be a necessity for such interventions for the preservation of public safety in the short term, though a full analysis of this area is outside the scope of this thesis. However, in the context of STIs, I am of the view that coercive methodologies are counterproductive. This is additionally so in relation to criminal law adjuncts to public health efforts which carry the same risks as criminal law interventions generally in relation to public health efforts, and as discussed previously provide an opportunity for a civilly determined range to conduct to amount to a criminal offence, thus circumventing the full protections normally associated with the criminal process.

There is one respect in which I regard coercive measure as having a place, in making this controversial suggestion I am conscious of the ‘slippery slope’ which advocacy of coercive measures can represent. There are though notable cases where an individual has infected multiple individuals with a serious pathogen, and despite advice has continued to behave in a manner which has caused infection. I believe in those circumstances there is at least a justification for a considering a coercive public health response.

In saying this, I additionally recognise that I cross over my own argument regarding the counterproductive nature of such interventions; however, taking the widest possible perspective on the matter I believe that society will demand that a response be mounted or available, and on the lesser of harms basis, I believe that as an absolute last resort, and following all other possible interventions, a procedurally and substantively sound detention regime offers a better alternative than criminalisation in circumstances where a person has infected multiple individuals and has not done so with the intent to infect, which on my analysis would bring the person within the sphere of criminalisation. The contours of such an approach, which I do not examine fully, require that it be utilised as a demonstrated last resort, there be no avoidance of the protections that would be afforded a person in a criminal process thus a judicial, or judicial like, hearing should be available, a person should be legally represented in the process, have the right to appeal such a decision, and have the decision to continue detention measured against substantive

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227 Weait, note 92, at 19.
criteria by an independent statutory tribunal.\textsuperscript{228} Although I remain cautious regarding such an approach I believe, once properly controlled and operated, it offers the potential to provide actual protection from the spectre of criminalisation and the negative effects which flow therefrom from both an individual and societal perspective, a point to which I now turn.

\section*{V – Public Health Implications of Criminalisation}

\textit{Introduction}

A matter referred to throughout this section is the tension between the activities of the criminal law and applicable public health activities. In this regard, HIV specific laws, and criminal laws more generally, are regarded as structural interventions designed to reduce levels of unsafe behaviour among the general population, and as such debate centres on the extent to which the law achieves this objective, worsens the situation, or has no appreciable effect but a potential negative effect.\textsuperscript{229}

This area has been the subject of significant debate and the outcomes of such debates are at times related to the perspective of the jurisdiction in which the debate occurs. Where criminalisation is embedded, the burden of proof so to speak rests on those advocating decriminalisation where they are required to positively demonstrate the detrimental effects of criminalisation to such an extent that the law should be changed. Such an approach is evident in the English Law Commission’s recent and detailed consideration of the criminalisation of ‘disease’ transmission.\textsuperscript{230} Notably the Commission recognises some areas of public health concern as having merit, thus necessitating a broader review, but at the same time found that the evidence was insufficient to warrant decriminalisation in that jurisdiction.\textsuperscript{231} While various judicial pronouncements, as discussed, have considered the health effects of criminalisation, again these were not determinative, albeit that there was less quantitative and qualitative data available in earlier cases, and in more recent cases the matter has received lesser attention. Further, as Chalmers has observed,

\textsuperscript{228} In \textit{Enhorn v Sweden}, Application no. 56529/00, decided on 25 January 2005, the ECtHR found the civil detention of a man who transmitted HIV through behaviour which breached a public health directive to be in breach of Article 5 of the ECHR, in so far as the state failed to demonstrate that the detention regime was a last resort following consideration and deployment of less coercive methodologies.

\textsuperscript{229} Lazzarini and others, note 1, at 239; I additionally recognise that such laws may be regarded as having nothing to do with controlling pathogen transmission, and operate instead on a singularly retributive basis.


\textsuperscript{231} The Law Commission, note 230, at 152.
where a pathogen is characterised as physical harm like any other the question becomes not whether we should criminalise the transmission, or exposure to, a pathogen, but instead whether we should create an exception in relation to the criminal offences of causing harm, or causing a risk thereof, relating to pathogens.\textsuperscript{232}

While, as a matter of principle, the ex-ante situation does not undermine a theoretical or philosophically reasoned position as to the acceptability of criminalisation, as matter of practice the context remains crucial as where criminalisation is embedded the support required to reverse the law would appear particularly strong. Further, in practical terms, there is an opportunity where criminalisation is not embedded, and where there may be a deliberative process prior to criminalisation, or an opportunity to advance evidence in a judicial process, to have available and presentable in an accessible format arguments relating to the public health effects of criminalisation which can influence such a process for the betterment of society as a whole. Influencing legislative and judicial processes with scientific information is not without its difficulty and there is a myriad of complex, intersecting and conflicting factors in any criminalisation discussion with the science of public health interfacing with other normative considerations.\textsuperscript{233} In light of these conflicting considerations, it is important not to overestimate the value of science to law or law reform, or to represent science as a panacea, as the presentation of presumptively compelling evidence has led to contradictory results in other jurisdictions.\textsuperscript{234}

The earlier theoretical discussion enunciates the importance of public health arguments to the overall discussion and these remarks highlight both the opportunities and challenges in the deployment of such arguments. Prior to addressing the substance of the research and opinions, I want to say something about the relationship between public health efforts and the criminal law. There are essentially two perspectives which I will address: the effect of the criminal law on the behaviours of persons infected with a pathogen and the effect on professionals working with persons infected with a

\textsuperscript{232} James Chalmers, 'Disease transmission, liability and criminal law' in A. M. Viens, John Coggon, and Anthony S. Kessel (eds), Criminal law, philosophy and public health practice (Cambridge University Press 2013) 124–141, at 138 – 139.


\textsuperscript{234} Mykhalovskiy, note 233.
pathogen. Earlier research focused extensively on the persons living with HIV, noting of course that such research has broader implications in relation to other STIs, and potentially in relation to pathogens more generally. More recent research has made an important contribution in relation to the effects on professionals and these actors play an important role in public health efforts and their perspectives and behaviours in response to criminalisation has an important role to play in the overall discussion of the effects of criminalisation and the consequent impact on public health efforts.

As I proceed to account for the interface between the criminal law and public health, it is important to recognise the necessity to move beyond, and a difficult in discerning, a linear cause and effect relationship between criminalisation and public health effects. The behaviour of persons infected with a pathogen and the behaviour of those who work with them are influenced in a complex and interrelated manner representative of institutional and social practices. Within this complex maelstrom, many actors play a role, and each actor is influenced by popular representations, internal deliberations, work activities and policies and the behaviour of others. These complimentary and often competing forces influence behaviour in a complex manner in what has been described as the ‘medico-legal borderland’. This borderland recognises the criminal law as a socially embedded phenomenon and in addition a site of intersection between two paradigms with differing knowledge structures and processes in relation matters such as risk and governance. These paradigms influence each other, however, they also cause tensions which may impede effective measures to reduce the spread of pathogens.

In considering the existing quantitative and qualitative research on the effects of criminalisation it is crucial to bear in mind this relational understanding of the effect of one on the other and all those involved in the process. In adopting this position it is also necessary to both focus on the available and creditable literature with a research

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235 When referring to ‘professionals’ I am referring to public health officials, health care providers, counsellors and service providers associated with community and voluntary organisations which offer support.
237 Mykhalovskiy, note 236.
238 Stefan Timmermans and Jonathan Gabe (eds), Partners in health, partners in crime: Exploring the boundaries of criminology and sociology of health and illness (Blackwell Publishing 2003), at 6.
239 Mykhalovskiy, note 236, at 674.
240 Mykhalovskiy, note 236, at 674.
foundation rather than mere opinion in support of the negative effects of criminalisation and to challenge the bald opinions and assertions of those who argue that the negative health effects are overstated and uninfluential.  

**The Research**

It is possible to address the available research under a number of headings and I will consider: awareness of laws, testing, sexual behaviours and disclosure, and the therapeutic relationship.

**Awareness of Criminal Laws**

To presuppose a deterrent effect of the criminal law on persons infected with a pathogen, or indeed an influence on their behaviour in other respects, is to presuppose an awareness of such laws. A number of studies have demonstrated a high level of awareness, but with questionable levels of comprehension of that which is actually criminalised. Studies in Canada have identified an awareness of the potential for prosecution of between 87% and 97% among those infected with HIV, in the UK an awareness level of between one third and 77% has been identified in two different studies, and in the USA levels of awareness have varied between 51% and 76%. The results are mixed in terms of the level of awareness, and while of insufficient scale to generalise, the instances of low knowledge are of concern. Of those who were aware of the possibility for prosecution,
there were quite low levels of comprehension of exactly what is criminalised. In the UK, studies have evidenced poor levels of understanding in relation to the nature of the conduct which is criminalised, steps which might be taken to avoid prosecution and the relevant mental state. As O’Byrne identifies it is not clear whether the level of awareness of HIV laws differs from an awareness of other laws and there is little in the way of evidence of how an absence of knowledge or imprecise knowledge influences behaviour. However, if the presumption of those in favour of criminalisation is that criminal laws will deter behaviour, there would seem to be low levels of understanding which corresponds poorly with rational decision making in accordance with legal proscriptions. While there are gaps in the accuracy of knowledge, it would seem that there is a high awareness of such laws, with notable exceptions, and in turn I will examine how such an awareness may influence behaviour in a counterproductive fashion.

Testing for HIV
I have previously described the voluntary methods of controlling pathogen spread and their importance, and one of the earliest concerns regarding the intervention of the criminal law was the potential for the spectre of criminal prosecution to deter persons from learning their status in the fear that a diagnosis could result in a later criminal prosecution. There are those who hold this viewpoint, those who say a wilful blindness standard will negate any such contention, and those who say that today with the availability of ART such behaviour would demonstrate inconceivable disregard for personal health. Whatever the perspective, early diagnosis and treatment is essential both for reducing infectivity through reduced viral load and behaviour change, and also to ensuring the health of person infected.

The research evidence in relation to testing is mixed, and a recent population level quantitative study in the USA found no statistically significant impact on testing rates arising from the existence of criminal laws in particular states, but a negative correlation.

246 O’Byrne (a), note 243, at 85 – 86; Wolf, note 8, at 139.
247 Dodds and others, note 244, at 139 – 140; Weatherburn and others, note 244, at 38.
248 O’Byrne (a), note 243, at 86.
251 Law Commission, note 230, at 145 – 146; Wolf, note 8, at 145.
252 Weait, note 249, at 543.
between media reporting of prosecutions and the level of testing, with further research being recommended. This study, while guarded in its conclusions, does offer support for the proposition that media coverage of prosecutions negatively impacts on an important element of pathogen control in the community. Qualitative studies in Canada have demonstrated that 17% of participants who were negatively influenced in terms of testing were more likely to; be HIV positive, to have engaged in higher levels of high risk behaviour and to have shunned public health services. However, those whose behaviour was influenced by the criminal law may in turn have accessed, or had a preference for, anonymous HIV testing which presents difficulty as those who are tested anonymously are not linked into therapeutic services which impedes the ability of public health efforts to reduce transmission. The position identified in the USA in relation to the role of the media was not found to exist in a Canadian study, which found no correlation between media reporting or prosecutions and testing levels, however, given that 83% of participants in that study indicated that their behaviour was not affected by the law and the remaining 17% were either influenced not to be tested or preferred anonymous testing, the results are not surprising.

This presents a complex picture which suggests that the existence of the criminal law may influence testing levels, or may not on its own but may in conjunction with media reporting of prosecutions. The issue is intricate and it is difficult to discern a direct cause and effect relationship, however, focusing on a more relational perspective one of the factors to bear in mind is the stigma associated with infection and the potential for this among other factors to either cause persons not to be tested or to delay testing, both of which are of concern. Overt stigma at a personal, professional and societal level was rife earlier in the epidemic, however, there may be a tendency to regard stigma levels to have dropped to an extent where it may not be a relevant, or as relevant, a factor as previously thought, though this is not the case. Stigma is an important concept and one which has

253 Lee, note 28, at 215
254 O’Byrne (a), note 243, at 86 – 87.
255 O’Byrne (a), note 243, at 86 – 87; O’Byrne (c), note 243, at 233.
256 Patrick O’Byrne and others, ‘Nondisclosure prosecutions and population health outcomes: Examining HIV testing, HIV diagnoses, and the attitudes of men who have sex with men following nondisclosure prosecution media releases in Ottawa, Canada’ (2013) 13(1) BMC Public Health 94–108, at 94; O’Byrne (a), note 243, at 86 – 87.
been identified as having a negative influence on testing levels, behaviour patterns and public health efforts generally and it involves being labelled, having stereotypes associated with a condition, being separated from others, losing one’s status and being discriminated against.\textsuperscript{258} There is a long association between illness and stigma, and indeed blame, and illness has been regarded as form of deviance, albeit a sanctioned form.\textsuperscript{259} That stigma is associated with HIV is reported throughout the literature and in addressing the relationship between stigma and testing levels, or the timing of testing, Weait identifies that stigma and consequent fears regarding reactions or consequences on a multitude of levels has been identified to contribute to either lower rates of or delayed testing.\textsuperscript{260} There is clear evidence to show that there is at least a negative relationship between stigma and testing levels or timing, and stigma both drives and is driven by legal intervention in this area.\textsuperscript{261} That this relationship exists is manifest, and while the data available does not point towards an aggregate effect on testing levels, that does not militate against a conclusion that criminalisation does not make a positive contribution in the area of testing, and may directly and indirectly represent an impediment.

To facilitate testing various confidentiality measures have been put in place in many areas which preclude disclosure of information which is related to the privacy of the person infected.\textsuperscript{262} On the other hand, despite this public health imperative, and the existence of


\textsuperscript{259} Michael Hanne, 'Crime and Disease: Contagion by Metaphor' in Catherine Stanton and Hannah Quirk (eds), Criminalising contagion: Legal and ethical challenges of disease transmission and the criminal law (Cambridge University Press 2016), at 35 – 38.

\textsuperscript{260} Weait, note 249, at 543 – 544; Weait refers to a number of qualitative studies supporting this conclusion, one was which is: Jose Nanin and others, ‘“HIV is still real”: Perceptions of HIV testing and HIV prevention among black men who have sex with men in New York city’ (2008) 3(2) American Journal of Men’s Health 150–164, who at 154 – 156 identify that stigma and consequent fears represent a burden and impediment; Earlier studies have also identified a negative correlation between personal feelings arising from stigma and levels of testing, and fears regarding the perceptions of health professionals and the levels of testing: Ronald O. Valdiserri, David R. Holtgrave, and Gary R. West, 'Promoting early HIV diagnosis and entry into care' (1999) 13(17) AIDS 2317–2330, at 2321; Henry J. Kaiser Family Foundation, 'Hearing Their Voices: A qualitative research study on HIV testing and higher risk teens in the United States of America' (Henry J. Kaiser Family Foundation 1999) <http://hivhealthcleainghouse.unesco.org/sites/default/files/resources/HearingVoices2.pdf> accessed 1 March 2016, at 20.


\textsuperscript{262} Wolf and Vazina, note 1, at 831 – 836.
such confidentiality provisions, courts have shown a willingness to permit the disclosure of such information for the purposes of criminal prosecution. Such an approach was a serious concern identified by Nanin and others and O’Byrne and others in relation to access to healthcare and testing arising from a belief, erroneous or not depending on the context, that healthcare professionals would report to the police or that healthcare records and testing results would be available to the police.

While the evidence in relation to testing does not display a clear or universal picture in relation to the relationship between testing and criminalisation, there is no evidence of a positive impact. However, there exists evidence from both qualitative and quantitative studies which does show a negative correlation between testing levels and criminalisation, or criminal prosecutions. While the evidence does not support a conclusion that criminalisation causes large amounts of people avoid or delay testing, it does influence the behaviour of some either in terms of avoiding, delaying, or accessing anonymous testing, all of which impede effective public health efforts to control the spread of a pathogen.

**Sexual Behaviours and Disclosure**
Where criminal laws are contended to contribute to an effort to control the spread of pathogens, it is on the basis that they will cause people to avoid behaviours which carry the risk, or a high risk, of transmission, or drive people to disclose the presence of the pathogen prior to sexual activities.

In terms of high risk behaviours, particularly sexual practices, a range of studies have not demonstrated a correlation between criminalisation and reductions in such behaviours, with most participants reporting no or very limited effect. In the UK a study identified that 50% of the participants were not influenced by the criminal law in any way, though those persons were already taking risk reduction measures, however, a minority also reported an increase in high risk behaviours arising from a strategic decision in relation to the management of the risk of criminalisation including increasing casual partners and

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263 Closen and others, note 43, at 964 -966, Shriver, note 17, at 322.
264 Nanin and others, note 260; O’Byrne and others, note 256.
contextual encounters carrying the presumption of HIV positive status.\textsuperscript{266} The same study identified a substantial link between the stigma experienced by participants and resort to high risk activities which provided a means to navigate the stigmatised environment while at the same time finding an outlet for sexual expression.\textsuperscript{267} Furthermore, the stigmatizing environment impacted on persons perception of self, identity and partner choices such that those who were HIV positive shunned others who were positive as a means to avoid ‘reinscribing themselves’ with the same stigma which in turn challenges perceptions that serosorting plays a major role in risk management.\textsuperscript{268} 

While some studies have identified a positive correlation between awareness of criminalisation and disclosure of HIV status,\textsuperscript{269} others have displayed a more nuanced picture showed a mixed response involving those already having a disclosure practice, a minority increasing disclosure, and others increasing practices which avoid disclosure through increasing anonymisation of sexual contact or a type of contextual disclosure or presumption which in turn increases risk.\textsuperscript{270} Disclosure may also be taken to have occurred in circumstances where non-verbal cues are to the fore creating potentially erroneous presumptions.\textsuperscript{271} Studies do demonstrate that people wish to disclose and that decisions around disclosure are not motivated by callousness but arise from a complex mix of relational factors where a person does what they think they can or must do to mediate risk and allocate responsibilities, which in turn is context driven in circumstances of a stigmatizing environment where fear and vulnerability looms large in the taking of decisions which in turn results in large numbers not disclosing.\textsuperscript{272} 

Disclosure is an extremely complicated matter which arises in the context of highly personal moments, influenced significantly by context and a wide range of factors. There remains a substantial amount of persons who do not disclose, negating the presumption

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\item \textsuperscript{266} Dodds, note 244, at 140 – 142.
\item \textsuperscript{267} Bourne and others, note 244, at 30 – 31.
\item \textsuperscript{268} Bourne and others, note 244, at 31.
\item \textsuperscript{269} Galletly, note 265; Pamina M Gorbach and others, ‘Don’t ask, don’t tell: Patterns of HIV disclosure among HIV positive men who have sex with men with recent STI practising high risk behaviour in Los Angeles and Seattle’ (2004) 80(6) Sexually Transmitted Infections 512–517, at 515 -516.
\item \textsuperscript{270} Dodds and others, note 244, at 142; Bourne and others, note 244, at 30 – 32.
\item \textsuperscript{271} Dodds and others, note 244, at 139; Burris and others, note 17, at 480.
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of any norm of disclosure. While the available studies do show a minority may be positively affected by criminal law intervention in terms of disclosure, from a public health perspective the studies also display a worrying avoidance of disclosure using methodologies which actually increase risk alongside placing people in a double bind of exposure to personal harm versus the threat of prosecution which forms a poor basis for the development of a consistent practice of disclosure. While a norm of voluntary disclosure may be the desire, criminalisation has not driven the development of this norm and the continued role of stigma associated with infection, compounded by criminalisation, represents an impediment to the development of that norm.

The emphasis of the law on disclosure, and consequent consent, also runs the risk of creating a “moral hazard” scenario whereby uninfected persons fail to either inquire regarding HIV status, or insist on protection, in reliance on the duty to disclose. This danger is widely reported, but studies display little or no effect of the criminal law on the sexual conduct of both infected and uninfected participants.

That the evidence in relation to behaviours is complex is in no way surprising as the behaviour in question is complex, and arises in the context of a complex area of human behaviour, that is sexuality, and the law has not shown itself capable in the past of regulating such behaviour in the manner desired and has caused more harm than good by driving behaviours underground and it is no more suited to its task now. Consequently while the position in relation to a small increase in disclosure in some cases may be seen to justify the criminal law’s intervention, this must be matched with the lack of utility in deterring high risk behaviours, and other study participants who either reduced disclosure, or increased their participation in high risk activities which in turn impedes public health efforts to control the spread of the pathogen. A final word is necessary on disclosure: while the conception is that disclosure will lead to a reduction in the spread

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273 Wolf, note 8, at 141 – 142; Burris and others, note 17, at 496; Gorbach and others, note 269, at 512 – 513.
274 O’Byrne (a), note 243, at 84; Adam and others, note 272.
275 Horvath, note 265, at 1225; Wolf, note 8, at 138;
276 Galletly and Pinkerton, note 17, at 455; Horvath, note 265, at 1225.
277 Burris and others, note 17, at 494 – 505.
of the pathogen through either a reduction in high risk behaviours or high risk sexual encounters, the evidence shows that disclosure is a poor predictor of such outcomes, which must be considered in the context of the significant pool of undiagnosed infection in the community, which in turn means that disclosure is a poor public health method of reducing the spread of the pathogen.  

**The Healthcare Relationship**

An important aspect of HIV prevention and care, and equally applicable to other pathogens, is the engagement of those infected with healthcare services, the maintenance of that engagement and the quality of the relationship.

The nature of this relationship is capable of analysis from both the perspective of the infected person and of the professional, and from a professional’s perspective studies have demonstrated how the intervention of the criminal law has caused a change in the manner in which the relationship develops and is maintained and what occurs within it. In the first instance, just as those infected are largely aware of the law, but largely confused as to its impact, so too professionals were challenged by the vagueness of provisions and their operation leading to mix of responses such as advice being given on a personal moral understanding of responsibility rather than legal basis, or on a legal basis which prized disclosure, which in turn avoids use of the range of public health measures to effectively manage spread of the pathogen. This has been termed counselling with an eye on the law, where criminalisation creeps into the consciousness of professionals and affects their practice and these professionals attempt to cope in a dynamic which evidences conflict and tension between the competing value systems of public health, individual autonomy, criminalisation and personal values in circumstances where professionals do not identify with a benefit from criminalisation.

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281 Mykhalovskiy, note 236, at 672; Dodds and others, note 280 at 414 – 415, 420 – 421.
The criminal law has also been identified as having unintended consequences in relation to the practice of some professionals who have changed their style of inscription of notes with response styles including: hypervigilance with a view to self-protection from liability or professional challenge, charting influenced by perspectives as to responsibility on the part of the infected person, charting with a view to protection of the person infected and charting to avoid being called to court.\(^{282}\) These practices are concerning as they impede professional communication and can ultimately impede patient care and the changes are representative of the relational understanding of the interface at the medico-legal borderland where subtle forces engender changes in practice.

Moreover, some studies have identified an effect on the relationship between the professional and the service user in the form of a ‘chill’ where there was an impediment to open dialogue and disclosure and the building of a relationship of trust, arising from concerns regarding the confidentiality of the relationship and records arising therefrom which clients were aware could be disclosed in a criminal process, with others perceiving that professionals would make reports to the police.\(^{283}\) French has described this phenomenon as ‘counselling anomie’ arising from clashing governmentalities in the counselling relationship, a clash between public health and criminalisation, which engenders anomie, an uncertainty in the counselling space, resulting in mistrust and an encumbrance of public health initiatives.\(^{284}\) The reported impediment to the counselling relationship is not universal and in a UK study professionals did not report a perception of self-censoring on the part of service users such that would impede the effectiveness of the relationship, which in part might be explained through the differing foci of criminalisation between Canada and the UK.\(^{285}\)

Openness and disclosure within the healthcare relationship is essential both to maintain the health of those affected by a pathogen and to provide opportunities for discussion and support to engender and maintain behavioural change. The studies considered show that the intervention of criminalisation is a concern for professionals, and has led to a conflict

\(^{282}\) Chris Sanders, 'Examining public health nurses’ documentary practices: The impact of criminalizing HIV non-disclosure on inscription styles' (2015) 25(4) Critical Public Health 398–409, at 406 – 408; Mykhalovskiy, note 236, at 672; O’Byrne and Gagnon, note 280; O’Byrne (a), note 243, at 83; Dodds and others, note 280 at 421 also identify implications for note taking practice in the form of systematisation to avoid liability.

\(^{283}\) Mykhalovskiy, note 236, at 672 – 673; O’Byrne and Gagnon, note 280; O’Byrne (a), note 243, at 83.


\(^{285}\) Dodds and others, note 280 at 421 – 422.
within their professional lives which can change the way in which they practice which is
to the detriment to public health initiatives. Moreover, the spectre of criminalisation has
been shown in a number of studies to impact upon the behaviour of those availing of
services to the extent that openness and trust is impeded. These are not direct cause and
effect relationships but speak instead of a more relational understanding which looks at
the perspectives and understanding of those involved, in light of criminalisation and
competing demands, and explains a subtle shift in behaviours. Given that such
relationships provide a foundational and ongoing forum for prevention, disturbance of
this nature is worrying and counterproductive.

**Conclusion**
The public health implications of criminalisation present one of the most cogent
arguments against the deployment of the criminal law to combat the spread of pathogens.
Moving beyond a mere cause and effect relationship, research exploring the relational
nature of the effect of the criminal law on persons infected with pathogens and those who
provide care for them has facilitated an enhanced understanding of changed behaviours
and why they have changed. There is no study available which speaks of the positive
effect of criminalisation and there is a body of both quantitative and qualitative literature,
continually developing, displaying a detrimental effect.

It is clear that while there is a reasonable quantum of knowledge in relation to the law,
the quality of that information is poor and this is so even in jurisdictions with specific
statutes which particularise matters to an extent not evident where general offences are
prosecuted. Furthermore, the law is not shown to have an appreciable deterrent effect in
relation to high risk behaviour and has been shown to cause paradoxical reactions which
actually increase the risk of pathogen spread. The arguments in relation to testing are
more nuanced and it is difficult to reach firm conclusions in relation to whether the overall
level of testing is reduced, however, the evidence is compelling in relation to a delay in
testing which in turn is of concern, as early testing and treatment are effective means to
combat transmission.

One of the most potent points relates to the role of criminalisation in driving and
reinforcing stigma which in turn carries implications in relation to behaviours and testing
and is a significant impediment in the normalisation of infection, which in turn assists
with disclosure and the management of one’s personal and sexual life in a manner which
can reduce transmission. The studies also point to a changed relationship between service
providers and users with modified behaviours evident on both fronts, neither of which contribute to stemming the spread of pathogens.

Ultimately, taking health as an overriding goal in relation to the control of infectious pathogens, the criminal law appears ill-calculated to assist in their control, does harm to relationships which can assist, and negatively affects people living with a pathogen such as to make it more difficult for them to control the spread. The law is dangerous in this regard and as such criminalisation should cease, and where not applicable should not be introduced, save to the extent that a party acts with the intent to bring about infection and thus uses the pathogen as a weapon.

A final comment relates to the judicial pronouncements and reports which find that the medical evidence is insufficiently compelling. In this regard, such positions are notable for the dearth of material considered. Moreover, where rejected, the medical and scientific evidence is rejected on the basis that it does not overwhelm the retributive justifications for criminalisation. I reject such positions in that they operate from a pro as opposed to minimum criminalisation perspective, and moreover evidence a willingness to increase the spread of pathogens in furtherance of supposed just deserts while at the same time countenancing damage to the health of the population.
5. The Potential for Criminalisation in Other Jurisdictions

Introduction
In this final chapter, I will consider what possible routes towards criminalisation might be adopted in jurisdictions which have yet to prosecute in this area using the situation in Ireland as an example. As I proceed I will examine whether it is appropriate for the Irish courts, or the legislature, to recognise transmission of or exposure to a pathogen as an offence, which in turn speaks as to how other jurisdictions should approach the area. I will conclude that non-fatal offences against the person represent the most obvious route toward criminalisation, and if liability were to be recognised then a more nuanced approach to the determination of recklessness and consent should be adopted. However, the culminating effect of the preceding analysis leads me to conclude that criminalisation is inappropriate, save where a pathogen is used as a weapon. Instead voluntary public health efforts should be the recognised mode of societal response to control the transmission of all pathogens, with the cautionary availability of coercive methodologies as a last resort.

Ireland has not taken a decision to overtly criminalise through the introduction of a specific statute, nor have the courts been called upon to adjudicate whether transmission or exposure fall within available offences. That there has been no overt criminalisation is noteworthy and places Ireland in a distinct position compared to the majority of states in the USA, the reasons for which have not been explored in the literature. However, as a preliminary point of all the available methods of criminalisation such statutes are among the most damaging given their overt exceptionalism, stigmatic effect, potential for discriminatory application, inability to maintain pace with scientific developments, inability to communicate messages effectively and their effect on public health endeavours. Therefore, that Ireland has not adopted this approach is welcome, and it should be avoided there as in other jurisdictions.

Furthermore, that the courts in Ireland have not been called upon to adjudicate on this area in the context of existing offences is welcome, though this should not be taken as an indication of a lack of concern or potential within the community or forces of the state
with regard to the utility of a criminal law response.\(^1\) Were Ireland to consider this approach, presuming as I shall that an offence of harm was used, this would require, akin to England and Canada, a judicial analysis of the development of the law such that it would comprehend the harm of infection, where it has not done so to date. In this regard, Irish courts, as well as those in other jurisdictions, would be in a positive position to address fully the issue with reference to the hybrid and minimum criminalisation approach I have advocated earlier. In so doing they should, unlike some jurisdictions, take into consideration not only the facts before them and the definition of harm, but also the effects of criminalisation and the competing aims of our society in reaching a conclusion that criminalisation is not a positive influence on the health of the populace and in fact is injurious and should be avoided. In what follows, I shall address some of these points, however, the focus will mainly be on the potential for criminalisation using existing offences and what the experience of other jurisdictions counsels us about how such offences should be approached if criminalisation were to be adopted.

**Possible Routes Towards Criminalisation:**
Prior to examining the potential routes towards criminalisation it is apt to note that HIV, other STIs and communicable pathogens more generally affect Ireland as much as they do other jurisdictions. In 2015 there were 491 new diagnoses of HIV, 76.2% among men and 23.8% among women, representing a rate of 10.7 per 100,000 of the population.\(^2\) 49.7% arose from MSM and 23.8% from heterosexual contact, with the remaining cases arising from mother to child transmission and injecting drug use, with notable increases in diagnoses year on year among MSM alongside high late diagnoses rates among both heterosexual men and women.\(^3\) Since the commencement of reporting of HIV diagnoses in the 1980s, there have been approximately 7844 persons diagnosed, though no data is available on the number of persons living with HIV in Ireland currently. Similarly, other STI’s remain problematic with 12,626 notifications in 2014.\(^4\) Comparing the populations of the other jurisdictions considered and the population of Ireland, the figures show that

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1. During a seminar in which I participated HIV activists and counsellors specifically adverted to the potential for prosecution, their concern regarding this topic, the discussion of this topic among the Gardaí and the potential for prosecutions in the future.

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HIV and STIs present an equivalent public health challenge, albeit responded to in a different manner.

The range of offences which seem capable of being prosecuted in Ireland include: assault,5 assault causing harm,6 causing serious harm,7 poisoning,8 endangerment,9 rape,10 “rape” under section 4,11 murder,12 the common law offence of manslaughter, and attempted murder. It is not possible in the current context to analyse each of these offences in detail, however, potential issues which may arise, in light of our earlier discussion of the experience in other jurisdictions, will be identified.

Turning to the homicide offences, these have not been a significant feature of prosecutions in other jurisdictions, but it remains theoretically possible to prosecute on this basis. Both manslaughter and murder are result offences, and as such causation must be proven and as discussed issues may arise in proving factual causation even in the presence of phylogenetic analysis, with the attendant necessity to inquire into the sexual history of the complainant an issue which also besets the assault and harm offences which follow. The temporal lag between the act and death would potentially pose evidential difficulties for a prosecution in terms of discounting a novus actus interveniens and indeed causation in relation to the ultimate cause of death.13 Were murder charged the accused must have intended to kill or cause serious injury, this it is argued represents a significant evidential hurdle.14 On the offence of attempted murder, this may only be established where there was intent to kill, intent to cause serious injury would not be sufficient.15 Prosecutions for manslaughter would require proof of an unlawful and dangerous act causing death, dangerousness being judged objectively,16 or a grossly negligent act, which need not be unlawful, but must involve negligence above ordinary

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5 Non-Fatal Offences Against the Person Act 1997, section 2.
6 Non-Fatal Offences Against the Person Act 1997, section 3.
7 Non-Fatal Offences Against the Person Act 1997, section 4.
8 Non-Fatal Offences Against the Person Act 1997, section 12.
9 Non-Fatal Offences Against the Person Act 1997, section 13.
10 Criminal Law (Rape) Act 1981, as amended by the Criminal Law (Rape) (Amendment) Act 1990, section 2.
13 See: Liz Campbell, Shane Kilcommins, and Catherine O’Sullivan, Criminal law in Ireland: Cases and commentary (Clarus Press 2010), at 103 – 115, regarding principles of causation.
14 Section 4 Criminal Justice Act 1964
carelessness, and a high degree of risk of substantial personal injury.\textsuperscript{17} It would seem that the evidential difficulties associated with these offences make them impractical to prosecute, further bearing in mind that we are dealing with risks associated with sexual relations, and given that infection may often not affect life span at all, it seems that such offences are ill suited to the transmission of a pathogen, save when they are used as a weapon, and cause death.

Regarding rape, and rape under Section 4, whether this would be a viable route will depend on the approach of an Irish court to frauds capable of vitiating consent. The availability of both offences reduces the gender specific argument against the use of the offence of rape. On the definition of consent in Ireland in \textit{The People (DPP) v C} the Court of Criminal Appeal, dealing with an identity case, gave a wide definition of consent, referring to a necessity for knowledge or understanding of facts material to the act being consented to for consent to be valid.\textsuperscript{18} This definition is analogous to the definition of consent contained in the Sexual Offences Act 2003 in England, and mirrors the voluntary agreement approach adopted in Canada. However, notwithstanding this broader approach in the definition, there are no reported cases dealing with the current area, nor any which evidence an extension of principles beyond the traditional categories of fraud. That said, the potential exists either for the Canadian approach which would recognise frauds in this area as sufficient to vitiate consent, or the English approach which definitively holds that non-disclosure will not vitiate consent to intercourse, though at the same time it appears active deceit may now do so through a denial of knowledge known to be material to the act, albeit that this position has not been confirmed as yet.

However, this is not an appropriate basis on which to proceed for a number of reasons and, if it were contemplated, the approach of the courts in England to date is to be preferred, as to do otherwise mistakes the true wrong of rape, which is a wrong related to a deception as to the physical act, specifically penetration which carries with it a significant social meaning, and non-consent to that act as properly understood, thus objectifying the complainant. In STI cases, there is no deception as to the act or the identity of the person and thus the interest in the activity remains and what is in issue are

\textsuperscript{17} \textit{People (Attorney General) v Dunleavy} [1948] IR 95.

\textsuperscript{18} [2001] 3 I.R. 345, at 360; See also \textit{People (DPP) v O’R} [2016] IESC 64 where the Supreme Court recently affirmed the position in \textit{The People (DPP) v C} [2001] 3 I.R. 345 in terms of the meaning of consent.
consequences flowing from it. Furthermore, to deny the existence of consent is to reason from the perspective that the infected person is in a position of power and domination which is not the experience or reality of the situation. Additionally, such an approach denies the agency of the person who becomes infected or is exposed who chose to have risky sex, and it further denies the ‘good of sex’ and regards this merely as a site of danger. Finally, criminalisation under this heading is problematic in terms of the labelling of the offence, and as evidenced by the Canadian jurisprudence, commentary and studies such an approach causes indeterminacy and a wide scope for criminalisation impeding public health efforts to control the spread of pathogens.

Assault, assault causing harm, and causing serious harm seem like the most obvious offences were transmission to occur and criminalisation were to be considered. The basic offence of assault requires the absence of consent; as discussed previously, the approach to such an offence would require that consent be vitiated, which would in turn implicate the issue of consent in the case of rape and rape contrary to section 4 which should be avoided on the principled bases advanced.

Considering the extensive discussion of the operation of such offences in England and Wales, I wish to make some relatively brief observations on the potential operation of the other offences in Ireland if criminalisation were to be adopted to both speak as to the position in Ireland and other such jurisdictions. First and foremost, it must be understood that if an assault or causing harm approach were adopted, then criminalisation would not be confined to HIV in the context of STIs, nor could it be confined to STIs among the many pathogens which may be transmitted. This in itself is significant, and while a general pro-criminalisation approach to pathogens would see this as a necessary and welcome development, a pro-health approach should not.

On the remaining assault or harm based offences, the question arises as to the type of harm required; provided the harm of infection is regarded as a corporeal harm as it has been in other jurisdictions, then the definition of harm referable to section 3, harm to body or mind including pain and unconsciousness, would comprehend virtually all STIs and other pathogens. The section 4 offence is somewhat more specific than the section 20 offence in England, and serious harm consists of an; ‘injury which creates a substantial risk of death or which causes serious disfigurement or substantial loss or impairment of

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19 Section 1 Non-Fatal Offences Against the Person Act 1997.
the mobility of the body as a whole or of the function of any particular bodily member or organ.\textsuperscript{20} The mode of causation is referred to as causing, thus bringing the Irish offence in line with the meaning of inflict in England which is now effectively co-terminus with cause.

On the threshold of harm, whether infection with a STI would amount to the type of harm comprehended in section 4, is at least debateable. Firstly, it would depend on the STI concerned and whether this would cause a risk of death or substantial loss or impairment. Considering HIV, there is no longer a substantial risk of death arising from infection with the virus once treated, and similarly other STIs either carry no such risk arising from infection, or infection with treatment, however, it is noteworthy that the Court of Appeal has rejected as ‘absurd’ any suggestion that remedial medical treatment should detract from the assessment of the gravity of the original injury.\textsuperscript{21} This presents a complex issue, and it is far from clear in the case of any infection, which could be devastating without treatment, whether treatment and the prognosis arising from same should be borne in mind in the assessment of harm. However, the question will more likely turn on whether there has been substantial impairment of bodily functioning, on this point permanence of dysfunction is not required, thus any substantial impairment would suffice, however in light of the time lag between infection and impairment, say for instance in HIV infection, it is at least questionable whether the definition of the offence could be made out though I believe that it would.\textsuperscript{22} Regarding causation there is an inability to definitively prove factual causation which is not determinative, and would be resolved arising from a detailed inquiry into the sexual history of both the complainant and accused.

The determination of recklessness creates potential difficulties with a wilful blindness standard which could extend liability substantially and leaves open the possibility of a discriminatory approach associated with high risk groups. The unjustifiability limb of the test has potential to allow a number of welcome considerations which could limit liability and also track public health campaigns, however, it remains generally and specifically under-attended to with the potential for continued neglect or a skewed view of acceptable levels of risk which only appreciates the position of a person who is not infected.

\textsuperscript{20} Section 1 Non-Fatal Offences Against the Person Act 1997.
\textsuperscript{21} People (DPP) v Kirwan [2005] IECCA 136.
\textsuperscript{22} People (DPP) v Kirwan [2005] IECCA 136: regarding the factors to be considered when assessing whether serious harm has been caused.
Consequently, were this avenue to be considered, then an actual diagnosis should be required. There is also a necessity for a consideration of risk at both prosecutorial level and by the judge directing a jury, bearing in mind the relative risks associated with differing circumstances, particularly in relation to sex acts, condom use and viral load. However, it remains a significant concern that the objective limb of the recklessness test, allied to the fear and prejudice which surround infection with such pathogens, is apt to create a situation where an accused will rarely if ever be able to deny being reckless which will in many cases, such as those in Canada where the realistic possibility standard now applies, contradict prevailing public health messages in terms of risk reduction behaviour as an effective method of curbing the spread of infection. This is the significant difficulty with reckless liability in general in that the breadth of criminalisation is significantly expanded.

Consent is not an element of the section 4 offence; thus the courts would first have to consider whether they would permit a defence of consent in these circumstances. In the context of section 3 it has been found that assault does not form an element of the offence, though this finding remains highly questionable based on the statutory construction of the offences within the 1997 Act; however, were such a position to stand, then similarly if consent were to operate it would do so on the basis of a defence.23 I have previously discussed the moral connotations where consent operates as a defence rather than an element of the offence and as such the operation of the offence in this manner conceptualises all sexual expression on the part of a person infected with a pathogen as wrongful and capable of justification and excuse, which adds kindle to a stigmatised view of those infected, where stigma is a major driver of infection through inhibition of disclosure and the adoption of safer sex practices. Moreover were consent to be denied as an available defence, such as occurs in a number of specific offences in the USA, this would preclude sexual expression on the part of a person infected with a pathogen and would, akin to the position rejected in England, preclude all risk taking in the context of sexual intercourse, with the potential of causing harm, which the court rightly discerned should be a role for legislators and not the courts.24 Though even were legislators to adopt such an approach, it is unrealistic and would amount to an unwarranted invasion of

personal autonomy, and were it to be argued that a public health basis existed for such an interference, this would fall afoul of research which shows that existing laws have little effect on behaviour.

Were a defence of consent found to exist, then disclosure and the state of knowledge of the complainant become paramount. Based on the preceding analysis, consent to intercourse should amount to consent to risk of transmission where the complainant had knowledge of such risks associated with the intercourse. This accords to the public health effort in this area which promotes shared responsibility and the necessity for a presumption that all persons are infected. However, such a position becomes more tenuous where fear forms part of a relationship, such that a partner cannot insist on protection or seek disclosure, in those circumstances I reason that consent to intercourse may not in all circumstances amount to consent to the risk. Where questions are asked and information is not forthcoming, then this in itself should not negate consent as there is not a reasonable basis in many relationships, bearing in mind their variety, to repose trust in the other persons. However, where relationships are longer term and trust develops, then an uninfected partner may no longer have legitimate reasons to act for their own protection, such that consent to what would normally be risky intercourse is no longer regarded as risky. However, I reach these conclusions specifically in the context of criminalisation being adopted.

Whether it would be possible to make out the offence of poisoning contrary to section 12 of the 1997 Act, in this context, would depend on the definition of administers likely to be adopted by a court.\(^{25}\) If administer were taken to include the emission of bodily fluids during intercourse, it seems that the message given is that the fluid of a person is a poisonous substance, and harmful in and of itself, which creates an unwelcome and stigmatising message regarding the status of persons infected with a pathogen which impedes the normalisation of the situation, which in turn impedes public health efforts.\(^{26}\)

\(^{25}\) The offence of poisoning at section 12 of the 1997 Act provides that: ‘A person shall be guilty of an offence if, knowing that the other does not consent to what is being done, he or she intentionally or recklessly administers to or causes to be taken by another a substance which he or she knows to be capable of interfering substantially with the other's bodily functions’.

\(^{26}\) The definition of administer in English law is found in \textit{R v Gillard} (1988) 87 Cr App R 189: where it was seen to include “contact which not being the application of force to the victim nevertheless beings the noxious thing into contact with his body”. Whether this could be taken to include sexual intercourse is a question which remains to be determined, however it seems reasonable that this definition could be taken to include emissions during sexual intercourse which are brought into contact with a complainant’s body. In \textit{R v Kennedy} (No 2) [2007] UKHL 38, at paras 9 – 10, the court referred to direct administration, i.e.
Otherwise, it would appear that certain STIs would be capable of interfering substantially with bodily functions. The issues surrounding the *mens rea* elements, and consent, which have just been addressed would apply equally here.

The final offence is that of endangerment which is similar in some respects to the Canadian offence, and in many respects to a number of the specific statutes in the USA. The previous commentary in relation to recklessness, risk of death and serious harm applies equally to this offence. While the offence is similar to the Canadian offence in terms of endangerment, the distinction arises because in the Irish offence no assault need be established. The Irish Supreme Court, per Hardiman J, in its consideration of this offence pointed to many challenging aspects of a such a general and unspecific offence, and correctly they identified the importance of specificity and certainty in the criminal law which are notably absent. Further they referred to the possibility of the offence being used to comprehend activities which were not intended by the legislature when enacting the offence—a prescient observation in this context—for it is unlikely its extension to the transmission of infection generally or in the context of sexual intercourse was a foreseen scenario when the legislature enacted the offence. A further difficulty is whether consent represents a defence, which would be key in this context, if all sexual conduct involving a risk of transmission of a STI were not to be criminalised, and indeed all sexual conduct carrying a substantial risk of serious harm, such as procreation in some circumstances. The difficulties which arose, and persist, in Canada, in establishing the relationship between risk and harm are apt to be repeated if this offence were prosecuted, which have been shown to cause significant uncertainty and difficulties. Furthermore, the generality of the offence and the potential scope for criminalisation would likely lead to over criminalisation and operate in distinct contrast to public health messages of shared responsibility and risk reduction as the primary vehicles for curbing the spread of STIs.

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27 The offence of endangerment arises in section 13(1) of the Offences Against the Person Act 1997 and provides; ‘A person shall be guilty of an offence who intentionally or recklessly engages in conduct which creates a substantial risk of death or serious harm to another’.

28 *The People (DPP) v Cagney and Mcgrath* [2008] 2 IR 111, at 122.

29 *The People (DPP) v Cagney and Mcgrath* [2008] 2 IR 111, at 121.

30 *The People (DPP) v Cagney and Mcgrath* [2008] 2 IR 111, at 121: the court specifically adverted to the question of whether the defence of consent would be available, although the question was not resolved.
Conclusion
Currently there is certainly scope for criminalisation in Ireland using traditional criminal law offences, as would be the case in other similar jurisdictions, albeit that some questions remain on the issue of harm and which STIs would meet that definition. However, the same concerns in relation to the operation of the criminal law and the conditions of liability would arise in Ireland as elsewhere, as would the inevitable spread of criminalisation beyond HIV, which drove criminalisation in other jurisdictions, and indeed there is no reason why criminalisation would be confined to STIs.

Furthermore, while Ireland has no specific statutes in this area, the introduction of such measures there as elsewhere would be maladaptive to the maintenance and improvement of public health given the stigmatisation associated with their use, and the consequent impediment of public health efforts. Moreover, the public health system in Ireland is as capable as those in other jurisdictions in addressing STIs and other pathogens using voluntary public health strategies, and would be affected in the same way by the intervention of the criminal law, which impedes such efforts at both the level of the individual infected with the pathogen and the those providing care to them.

The question remains, notwithstanding the references to difficulties thus far, whether Ireland and other jurisdictions should proceed to criminalise the spread of pathogens during sexual activities. I conclude at the level of principle that they should not given the availability of equally efficacious voluntary public health efforts which offer the best avenue to serve the ultimate aim of society in this context, that is the minimisation of the presence of pathogens in our communities. I acknowledge that certain justifications for criminalisation, most notably retribution, are not equally served. However, in this regard, the costs of criminalisation must also be considered. It is suggested that the impact on public health efforts, and as such the health of the community, should subordinate remaining justifications for criminalisation to the interest of furthering the health of the community in the context of controlling infectious pathogens.
6. Conclusion – Reconceptualising Pathogen Transmission

The ultimate question this thesis sought to address was whether exposure to, or transmission of, a pathogen during sexual activities should be the subject of criminal sanction in jurisdictions which have not yet prosecuted in this area. The foregoing discussion draws a conclusion that it should not, save in the limited circumstances of intentional use of a pathogen as a weapon, and the related question as to whether criminalisation should be utilised outside the sexual context must also be answered in the negative based on the same reasoning.

To address this question, in part 2, I considered the philosophical and theoretical perspectives relating to criminalisation and punishment, concluding that criminalisation may be justified on a standard harm analysis but that the decision as to criminalisation should be approached from the perspective of a hybrid philosophical model underpinning a minimum criminalisation approach. Part 3 then examined the operation of the criminal law in England and Wales and Canada, discussing the nature of the harm associated with criminalisation, the role of risk and recklessness and the issue of consent. This discussion exposed a number of issues and tensions in the operation of offences, but also spoke as to the underlying messages associated with criminalisation, the potential breadth of criminalisation in the sexual sphere, the exceptionalism associated with prosecution in the sexual sphere and the potential for broader criminalisation outside that sphere. Part 4 interrogated the position in the USA, analysing the influences which drove criminalisation, the range of responses, the exceptional response of specific statutes and the considerable difficulties associated with their use. I then analysed public health efforts, from both a voluntary and coercive perspective, which seek to manage the spread of pathogens using an alternative to the criminal law and additionally the negative effects of criminalisation on those efforts. Finally, part 5 considered, using Ireland as an example, how criminalisation might be approached in a jurisdiction which has not yet prosecuted, specifically what issues should be borne in mind if prosecutions were to take place, and finally concluded that they should not, save in very limited circumstances.

The analysis of the operation of the criminal law in the jurisdictions considered exposes numerous fault lines which speak as to shaky foundation upon which criminalisation developed and the exceptional basis upon which it operates. One of the key issues is how criminalisation emerged, or developed so significantly, in the context of pathogens transmitted during sexual intercourse, often in circumstances of many years of contrary
authority, given the availability of alternative non-coercive and coercive methodologies, and the timeless existence of communicable pathogens of an incurable nature. The extension of the law in this sphere is suspect and speaks of an exceptionalism related to the mode of transmission, as opposed to a principled basis for the operation of the law. The Otherness of those who were infected and can infect is a likely explanation for this extension and the exceptionalism evident in such an approach both derives from and drives stigma, which in turn drives epidemics.

Furthermore, the operation of such offences, while illuminating from the perspective of analysis, represents a paradigm where risk is to the fore and any risk is often too great resulting in inevitable criminalisation even in the face of contrary public health advice. While disclosure and consequent consent take centre stage in the prosecutions considered, the role of consent has, and does, play an important and often detrimental role in the casting of sexual expression on the part of persons infected with a pathogen as a wrong capable of being justified. This is representative of the paradigm of abnormality which contributes to the stigmatisation of those infected, and which in turn negatively effects behaviours which can assist in the stemming of pathogen transmission. Additionally, reliance on the criminalisation of non-disclosure, and thus the absence of consent, is a poor public health strategy given the reservoir of undiagnosed infection within the population.

In considering how to respond to infectious pathogens, the ultimate goal of our society should be a reduction in the level of transmission. The available evidence speaks of methods which have a proven track record – those being voluntary public health initiatives, and this is how our society should respond. Evidence further shows relational negative effects between criminalisation and the behaviour of those infected and those providing services to them, which actually impede proven methods of reducing pathogen spread and result in behaviours which increase the risk of pathogen transmission.

I commenced this thesis with an analysis of the justifications for criminalisation and punishment and an assessment of the potential for criminalisation based on the theoretical constructs underpinning the criminalisation of acts or behaviours in offences. I accepted that there was a justification for criminalisation based on the physical harm associated with infection, and the potential wrongful causing of an infection, based on the current construction of offences. I found merit in the challenges to this position particularly in
relation to the definition of harm, alternative conceptions of autonomy and integrity, and the ecological reality of infection in our lives; however, these challenges would require a conception of harm and wrongdoing which is not likely to find popular acceptance and moreover would require a major shift in thinking, which while welcome is unlikely. As such, I have advanced a minimum criminalisation approach which accepts that criminalisation may be justified and then reasoned as to whether it should take place.

I concluded that the limitation of human rights would not amount to a determinative reason not to criminalise, as the community’s expressed wish to criminalise in furtherance of curbing the spread of infections would be seen to justify a limitation of such rights. I have further considered the right not to be punished and accept that according to the articulation of harm and wrongfulness offered then it would appear that there is room for the state’s authority to intervene and a justifiable basis on which criminalisation may be considered.

As to whether there are equally efficacious but less intrusive or coercive methods to achieve the same object, if that object be the reduction in pathogen transmission, then public health efforts offer a clear, proven and more efficacious methodology. The evidence shows that public health efforts have a proven track record in curbing the spread of pathogens and the criminal law has not been shown to make any appreciable positive impact and has, in fact, been shown to be counterproductive. Remaining objectives of the criminal law can be achieved for the most part through non-coercive, and as a last resort, coercive public health methods. This is not so in relation to deterrence, denunciation and desert, however, if the ultimate goal of our society through the deployment of the criminal law is to control the spread of infection, then public health efforts offer a more efficacious method than the criminal law, and at less personal and societal costs.

As such, the case for criminalisation falls, however, even on the final limb of analysis – the relative costs and benefits – I believe that criminalisation’s only benefits, or outcomes, are deterrence, denunciation and desert. The evidence does not support a deterrent rationale in this context, however, the symbolic nature of the wrong may presuppose a powerful indicator towards criminalisation on denunciation and desert grounds. That said, taking again the goal of the community in relation to infectious pathogens is the control of their spread, the criminal law impedes persons infected and professionals in
the initiation and maintenance of behaviours that control the spread of pathogens and, consequently, the costs outweigh the benefits.

As such, criminalisation is a harmful intervention in this area. It may serve some retributive or symbolic purpose, but it does so at the cost of genuine and effective efforts to control the presence of pathogens in the community and should be avoided save where person acts intentionally and thus uses a pathogen as a weapon. Criminalisation emerged at a time of fear when society was faced with the unknown, and the unknown emerged in populations which were and are marginalised from the outset. The fear and stigma which drove criminalisation, and which in turn drives behaviours which maintain pathogen spread, are a poor and unprincipled basis upon which to approach the question of criminalisation. Infectious pathogens are a reality within our societies and they are best controlled through normalisation of the presence of the pathogen and a combined, as opposed to individuated, effort to change behaviours to reduce their spread. Criminalisation and its focus on the individual is anathema to such an approach and is more harmful to society than the vectors it punishes.
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