Living in a Negative Relation to the Law: Legal Violence and the Lives of People Criminally Charged Due to HIV in Canada

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Abstract

Living in a negative relation to the law: legal violence and the lives of people criminally charged in relation to HIV in Canada

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This dissertation examines the lived experiences of people in Canada who have been criminalized due to allegedly not telling their sex partners that they were HIV-positive. Canada is known as a leading country in the world for punitively criminalizing alleged HIV non-disclosure, exposure, and transmission. This dissertation is the first known qualitative study to centrally focus on the lives of HIV-positive criminalized people and is based on 27 interviews with 16 different people from across Canada who have been charged, prosecuted or threatened with charges for alleged HIV non-disclosure. I mobilize a critical ethnographic approach, or what I call a *criminology of the criminalized*, one focused from the perspectives of criminalized people, that is grounded in the trajectories of critical social science and institutional ethnography. This approach to research becomes focused on denaturalizing the violence faced by criminalized people and calling attention towards forms of avoidable suffering that they face. When someone is criminalized, their legally safeguarded personhood is deconstituted under the law, they become socially and civilly dead, and can then become subject to forms of intense violence and surveillance. This is a life lived in a negative relation to the law. The outcome of this unique critical ethnography details how a complex intersecting array of legal tools (criminal laws and public health laws), as well as a range of institutions (police, public health, criminal justice, and the media) work to circumscribe the lives of the criminalized. People also come to be the subject of intense forms of violence by state institutions or various actors in their communities. This research moves beyond mere description and addresses the ethical function of such research to act as a form of bearing witness to these forms of violence, suffering, and surveillance faced by criminalized people. The results help render these experiences of violence unacceptable, acknowledging that society is open to change. This critical ethnography is one that seeks justice where no justice had been done, and contributes towards helping realize a life of flourishing for people subject to unjust forms of criminalization.

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What does it mean to protest suffering, as distinct from acknowledging it?

—Susan Sontag, *Regarding the pain of others*, 2003, p. 40

What does it mean to live in a negative relation to the law?

—Colin Dayan, *The law is a white dog: How legal rituals make and unmake persons*, 2005, p. xii

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Introduction

In 1987, activist-researcher George Smith, a founding member of the Toronto-based AIDS ACTION NOW!, wrote an article that appeared in the queer Canadian periodical *Rites*, stating, "it looks as though the police in Toronto will continue to shape the politics of AIDS in the city for some time to come" (Smith, 1987, p. 4). Smith was referring to an incident during which Toronto Police Services officers were publicly criticized for the use of excessive force after they shot canisters of tear gas into the home of an unarmed man living with HIV. The police stated that he had resisted arrest when they attempted to detain him. The man lived alone on the east end of the city and had reportedly experienced dementia and caused public disturbances, including destroying property in the area around his home. The police sent in an Emergency Task Force, used two canisters of tear gas, and removed him from his home strapped to a stretcher. The *Toronto Star* (1987) reported the story with the headline, "Tear gas used to overpower AIDS victim", and the police actions drew harsh public criticism. A psychiatrist from Toronto General Hospital stated in the *Toronto Star*, "I believe the excessive response by the police was the result of uninformed fear of AIDS contagion, combined with the irrational fear of mental illness" (Buckingham, 1987). The AIDS Committee of Toronto also decried the police's use of excessive force (Shaw, 1987).

The police responded, stating that they would work on HIV education programmes for their officers (Smith, 1987). Despite training, however, as Smith (1987) noted, "the police have produced more AIDS hysteria and at the same time have created a new stereotype of people with AIDS as diseased, violent, and dangerous" (p. 4). Smith was right: the tear gas incident set the stage for police actions against people living with HIV for years to come. Two years after the tear gas incident, in 1989, cases began to simultaneously emerge across the country wherein criminal charges were laid against individuals for allegedly exposing people to the virus or for not telling their sexual partners that they were HIV-positive. Since then, upwards of 200 criminal law cases relating to non-disclosure, exposure, or the transmission of HIV have been filed, allowing Canada to gain the dubious distinction as a global

leader for criminalizing people living with HIV (Hastings et al., 2017).

While the tear gas case remains unique, HIV-related exposure (conceived as possible through actions such as spitting, needle punctures, or biting), non-disclosure (not telling a sexual partner one's HIV-positive status), or transmission (non-disclosure leading to transmission of the virus) all subsequently emerged. Among these, HIV non-disclosure has become the most frequently criminalized, whereby Canada is known as the only country globally to successfully prosecute someone on charges of first-degree murder for a case involving HIV non-disclosure (R. v. Aziga 2008). More commonly, however, the primary criminal charge applied to cases of HIV non-disclosure consists of aggravated sexual assault. This charge represents one of the most severe in the Canadian *Criminal Code*, carrying a prison sentence of up to 25 years. Charges do not require HIV transmission to occur, and in most cases the accuser remains HIV-negative. Those individuals prosecuted face very long sentences, are mandatorily registered as sex offenders for life, and when incarcerated can be held in administrative segregation—that is, confined for 23.5 hours each day in a cell alone under protective custody.

This dissertation centrally situates the experiences of those who have been targeted by the police and public health authorities, specifically individuals who have been arrested, detained, and incapacitated under criminal and public health laws in Canada. I do so by examining the experiences of people living with HIV who were charged, prosecuted, or threatened criminally in relation to an alleged HIV non-disclosure or exposure. To my knowledge, this is the first qualitative research study globally to focus specifically on HIV criminalization from the perspective of the people who have lived it. I argue that in order to understand the criminalization of HIV – or any type of criminalization for that matter – social inquiry must attend to the ways in which people targeted by various punitive laws live and embody the experiences of criminalization.

As I explore throughout this dissertation, this project is situated within the real worlds of specific people. My research question focuses on the lived experiences of HIV-positive people and the material consequences in relation to engagement with the Canadian criminal justice system because they allegedly did not tell their sexual partner(s) that they were HIV-positive or because they allegedly exposed someone to a potential HIV transmission. By addressing this issue, I provide new knowledge of criminalizing HIV non-disclosure and exposure from the perspectives of those facing it first-hand. This new knowledge aims to counter the material violence perpetrated by criminalizing institutions and fill the epistemological gap created by actors producing knowledge on this issue, actors who often exclude the experiences and lives of those directly impacted by such criminalization processes.

As I explore later in this introductory chapter, social science research on the issue of criminalizing HIV non-disclosure, exposure, and transmission has often used the HIV response and public health imperatives as its analytical framework. This has resulted in social research helping to explain how punitive laws can create a chilling effect in the context of healthcare interactions, including the possible deterrence from HIV testing, ultimately impacting broader public health objectives. While such research has proved highly valuable and helpful for advocacy, it was organized in ways that did not or could not center those who faced criminalization first hand.

Without centering work on the experiences of those who have faced criminalization, the result is a lack of attention on the suffering that people have experienced under punitive laws. Thus, with a focus on the suffering of criminalized people my dissertation research provides an original contribution aimed at remedying this lacuna.

The analysis in this dissertation takes place from the ground up, starting at the level of social relationships, from the perspectives of criminalized people and the worlds they inhabit. Focusing on criminalized people's personal perspectives related to the experience of criminalization includes the things people say and do to each other, and how actors from institutions socially enact and activate various processes.

In essence, this dissertation is about the lived experiences of people who became the targets of criminalization and, as a result, the subjects of violence. The outcomes of this project address fundamental questions about the role of punishment in society, and examine the relationship between punitive legal tools and the people they target, regulate, and control with the aim of asking how certain groups of people become understood as needing criminal legal intervention. This results in an exploration of how the process of criminalization acts to deconstitute legally safeguarded personhood, rendering criminalized people as legal non-persons subject to extreme forms of violence with impunity.

In the following section, I provide an overview of the field of HIV-related crime control, examining the legal tools and processes developed over time and mobilized in the service of regulating, controlling, and incapacitating people living with HIV. But first, I provide a brief note on how I engaged with criminalized people's personal information throughout this study.

A note on privacy

When shifting the analytical framework to the experiences of people who have lived through criminalization, some issues that typically remain unquestioned when writing about criminality come

into question. For example, it is common when examining legal cases to use individuals' last names to refer to a precedent or to well-known cases. This practice is typically unquestioned, and something I have regularly followed when discussing the 2012 Supreme Court decisions described in the next section. However, once you speak directly with the people whose names are attached to legal cases, and whose names can then be reproduced over and over again, it emerges that this can represent an unjust practice. Doing so repeatedly discloses someone's HIV-positive status and criminal charge without their consent. Using an individual's last name goes unquestioned, since people with histories of criminalization are denied autonomy over their own life history in multiple ways. While this might seem relatively insignificant, understanding these small practices that result in an injustice can help us view things from the perspectives of those who have lived through it. Recognizing this, throughout this dissertation, I avoid the unnecessary reproduction of people's names without their consent. Additionally, I also only use pseudonyms or initials when discussing the experiences of living people who have been criminalized.

HIV criminalization in Canada

In this section, I provide a brief sketch of the Canadian criminal justice system and the country's approach to criminalizing HIV non-disclosure, transmission, and exposure. Canada has become a well-known hot spot for criminalizing people who have allegedly not revealed their HIV-positive status to their sexual partners or who have allegedly exposed someone to a potential HIV transmission through other means. The expansion of legal governance of HIV represents an ongoing trend in Canada for many years—outpaced only by the USA and the Russian Federation. In the vast majority of these cases, HIV is not transmitted and the legally regulated harm remains ideological, rooted in historical understandings of AIDS that are wildly out of date with current realities. As of 2015, over 65,000 people were living with HIV in Canada, with approximately 2500 new infections occurring each year (PHAC, 2015). Canada is characterized by concentrated HIV epidemics among subsets of the population, specifically among gay and bisexual men, Black people, Indigenous people, and people who inject drugs. Surprisingly, while many countries globally have witnessed a trend towards fewer new HIV infections, Canada's rates continue to rise (PHAC, 2015).

As a relatively new form of criminalization, the way in which HIV-related crimes are understood has emerged within an active and ongoing site of contestation. Approaches to criminalizing HIV remained largely negotiated, controversial, and in flux. No group of people are inherently criminal;

rather, criminalization represents a shifting process targeting certain people at certain times for certain purposes. The shifting nature of the criminalization of HIV aligns with a constructivist understanding of "the law", as described by Nikolas Rose and Mariana Valverde (1998). That is, this shifting nature is understood not as a "unified phenomenon governed by certain principles" (pp. 569, 545), but rather as a social, political, and economic discursive construction applied to regulate aspects of society at specific moments in time. Thus, the criminalization of HIV emerged not from an ahistorical vacuum. Instead, the approach to criminalizing HIV non-disclosure, exposure, and transmission we see today was actively negotiated and organized historically by a wide range of actors and institutions, all driven by a wide range of competing and complimentary factors.

Canada has one federal *Criminal Code*, put into force in 1893. The criminal legal system in place today resulted from Canada's status as a settler colony. With passage of the Constitution Act in 1867, Canada was established as a new settler dominion of the United Kingdom. Section 91 of that act states that the Parliament of Canada has jurisdiction over what constitutes criminal law in the new dominion. In Anglophone Canada, British settler colonialists put common law into place, while in Quebec the French system of civil law was adopted. This was negotiated in the 1774 Quebec Act and the Civil Code of Lower Canada in 1866. While the *Criminal Code* is defined and regulated federally, it is administered provincially—with oversight from the Supreme Court of Canada. This means that each province interprets the federal *Code* in its provincial courts.

Most new criminal legal developments take place through the common law process, also known as case law or precedent law, developed over time by judges through court proceedings, decisions, and tribunals. An underlying assumption guiding common law is that treating people differently when they are charged with a similar offence is unfair. Thus, legal decisions are based on precedents used as a measure of how to equally treat people charged with an offence. In today's settler colonial context, then, legal decisions can rest on precedents made, in some cases, well over 100 years ago in the United Kingdom, before Canada was established as a country. Thus, our notions of how to treat criminality remain deeply grounded in ongoing persistent colonial legacy.

On the rare occasion when a new social problem emerges that requires state intervention, such as managing fears related to HIV transmission, Crown Prosecutors are tasked with working through the common law process, applying various sections of the existing Code to a situation, to determine if a judge agrees. In other cases, working within the courts may prove ineffective, such that new legislation or legal tools and processes need to be drafted and passed through the House of Commons.

Early criminal charges

In 1989, one of the earliest known cases of HIV-related criminal charges, which I encountered in my archival research, a 24-year-old man named G.S. from Calgary, Alberta, who was living with an HIV diagnosis. In the years previous, various complaints to police about HIV-positive people began to emerge simultaneously across the country. For example, in 1988 in Quebec City, a woman working as a sex worker had been banned from part of the city through an ordinance where she was known to work (Mensah, 2003). Later, one her clients complained to police that he believed to have contracted HIV from her. She had been ignoring the ordinance, and the police arrested her. She was subsequently charged with disobeying the ordinance and incarcerated for 5 months. The media reported "La prostituée side demeurera en prison" (Mensah, 2003, p. 125). The criminal law was not mobilized in that case, however, due to social panic surrounding AIDS, criminal charges were shortly to come.

In the 1989 criminal case, G.S., pleaded guilty to the charge of being a common nuisance, he was sentenced to one-year imprisonment, and three-years probation. Initially, according to media reports, he was charged with aggravated assault and attempting to cause bodily harm, but those charges were dropped when two women he was accused of infecting with HIV refused to testify against him (Star-Phoenix, 1989). Both women tested positive for HIV, but the media reported that they had forgiven G.S. The Crown Prosecutor, however, stated that there were likely hundreds of potential "victims" (Star-Phoenix, 1989). G.S. then went public intending to clear his name, stating that there were only 10 people likely at risk, many of whom he had disclosed his HIV-positive status to prior to sex. G.S. stated in court that the reason he originally chose not to disclose his HIV status resulted from his own denial (because he wanted to live a normal life), and based on his understanding that he was healthy because he was asymptomatic (Star-Phoenix, 1989). Provincial court Judge Robert Dinkel noted during the trial, "I am satisfied the accused's actions were promiscuous and that it constitutes endangering the safety of the public, the accused's chances of reform are, in my view, small" (Wilhelm, 1989, Star-Phoenix, 1989). Judge Dinkel also condemned the women for not coming forward to testify against G.S. In addition, media outlets reported G.S.'s bisexuality and featured titles labelling him an "AIDS spreader" (Star-Phoenix, 1989; Wilhelm, 1989).

In 1991, another case emerged, that of N.G.M., a 20-year-old woman arrested in Nanaimo, British Columbia, for allegedly having condomless sex with two men without first disclosing she was HIV-positive. At the time, this was reported in the media as the third case of someone targeted by police due to the alleged non-disclosure of their HIV-positive status, and the first case targeting a woman. Royal Canadian Mounted Police (RCMP) Inspector Dennis Brown addressed the media,

stating that charges of aggravated sexual assault would be applied. This was the first instance of a Crown prosecutor seeking this particular charge, although no evidence existed that the complainants contracted the virus. "It sets new grounds; in our research we can't find a precedent," Inspector Dennis Brown told the media (Vancouver Sun 1991, A4). The provincial Attorney General Colin Gabelmann noted that N.G.M. was carrying a deadly virus and she was under a public health order to not engage in condomless sex, further stating: "What may be new is the laying of an aggravated sexual assault [charge] in this type of case. That may be ground-breaking" (Vancouver Sun 1991, A4).

N.G.M. was originally denied bail. However, after a review in Vancouver by the British Columbia Supreme Court judge, she was released on the condition that she stay at a Nanaimo transition house for women, abide by a curfew, report to a probation officer, report to public health officers, and refrain from having unprotected sex. Because the case represented a first of its kind and was highly contentious, it generated a wide range of media attention in various local and national newspapers.

AIDS Vancouver, an organization providing care and support for people living with HIV, along with the activist group ACT UP Vancouver, held a public demonstration and started financing N.G.M.'s legal defence. They were angered that the newspaper *The Province* named N.G.M. in a front-page article. ACT UP Vancouver members held a "die-in" in front of *The Pacific Press* building in response to that newspaper's coverage of the story. ACT UP said N.G.M. was being persecuted: "Women do not wear condoms, men do," became a slogan at a rally where ACT UP members chalked outlines of their bodies on sidewalks to represent the people who had died from AIDS (*Vancouver Sun*, 1991). Not long after being mandated to stay at a transition house, N.W.M. escaped, and one headline stated, "HUNT ON FOR HIV WOMAN: Vanishes from shelter as sex-assault trial nears" (Colebourn, 1992, A1).

A coalition of women's groups across Canada spoke out against N.G.M.'s charge: "To us it is unconscionable that laws designed to protect women from sexual violence would be used in this manner to jail a woman," a representative from the AIDS Committee of Ottawa declared (O'Neil 1991, 4). "The charge of aggravated sexual assault is an insult to any woman who has ever been sexually assaulted," added a representative of the Canadian Association of Sexual Assault Centres (O'Neil 1991, 4). The coalition mobilized some members of Parliament from the federal New Democratic Party (NDP), also putting pressure on British Columbia's provincial government.

In the end, N.G.M. was found by the authorities, but the Ministry of Justice decided to drop the charges against her. It was reported that ultimately the Crown felt the case should be dealt with via provincial public health legislation rather than the federal *Criminal Code*. A spokesperson for the

Ministry of Justice told the press that criminal charges would only apply if a person exhibited a criminal intent to harm others. This policy only lasted so long, since British Columbia was the province in which the first landmark Supreme Court of Canada case emerged in 1998, setting the standard that HIV non-disclosure of an accused person, regardless of intent, constituted a fraud and vitiated the complainant's consent to sex—that is, the standard that became the law of the land for many years.

Through this new standard, the charge of aggravated sexual assault was most often applied to criminal cases where HIV non-disclosure was alleged. Typically, however, aggravated sexual assault is reserved for the most violent of non-consensual sex acts, during which a weapon is used, and the complainant's life is endangered, or the complainant is wounded, maimed, or disfigured. Multiple other charges can also be applied to instances of alleged HIV non-disclosure, exposure, or transmission, such as attempted murder, administering a noxious substance, assault causing bodily harm, and first-degree murder.

Exposure

Along with cases of non-disclosure, people can be charged due to exposure, which occurs when someone alleges to have been exposed to HIV whereby transmission was possible. Most often this occurs in cases of spitting, during which someone who comes into conflict with the police spits, typically in the context of an arrest. A number of such cases have occurred in Canada, the latest in 2013 near Gatineau, Quebec, during which a 50-year-old HIV-positive Indigenous woman was arrested in her own home by police. She was charged with assault and sentenced to 10 months in prison for allegedly spitting at police officers during an altercation in her home (Ebacher 2013). Initially, she called the police when her partner became violent towards her. She was known to the police, who then escalated the situation. Despite a 0% chance of HIV transmission occurring via saliva (Barré-Sinoussi et al. 2018), the judge at the time stated that he wanted to send a message to people living with HIV through that conviction. The two police officers involved remained HIV-negative, were given post-exposure prophylaxis, and took a number of months paid leave. Such mobilization of fears associated with infection through impossible means such as spitting underscores the discriminatory ways in which the law has been used.

Public health legislation

In addition to criminal law, provincial public health laws can also apply. One example lies in Ontario, Canada's most populous province, which also features the highest concentration of people living with HIV, and the highest number of prosecutions for HIV non-disclosure and exposure. Historically, the province has been known for its coercive public health legislative framework, enabling powers quite similar to that of the criminal law. This framework is the *Ontario Health Promotion and Protection Act*. Under *Section 22* of the act, which relates to the management of communicable diseases, the Medical Officer of Health can issue a written order that may require a person to take or to refrain from taking specific actions—such as requiring condom use and mandating adherence to medication. The orders are often delivered in person by a public health nurse, who also provides a form of counselling around the contents of the order, enforced along with a $5000 Canadian Dollars per day fine for failure to comply. A person who receives such an order has 15 days to request a hearing with the *Health Protection Appeal Board* to contest. No general rule guides how and when such orders work in concert with criminal laws, although public health law and criminal law often intersect. For example, a person is likely subject to a public health order before any formal criminal charge is applied. A criminal charge coupled with a public health order in a person's past can increase the intensity of the criminal law when applied, by labelling a person as an increased risk to the public, such as with the case of J.A. who was labelled a dangerous offender, and incarcerated indefinitely in part due to a psychiatric assessment accounting for his failure to live up to the requirements of past public health orders (R. v. Aziga 2011, Gale 2011).

Supreme Court decisions

After multiple cases began to emerge in lower courts, one made it all the way to the Supreme Court after a number of appeals. In 1998, the Supreme Court of Canada handed down a major decision (SCC 1998), which was considered by many advocates in the HIV movement to be overly broad and vague. That decision required that someone living with HIV must disclose their status if the sexual behaviour they engaged in posed a "significant risk" of transmitting HIV to their partner(s) (SCC 1998). The court, however, did not define "significant risk", leading to years of uncertainty for people living with HIV along with many inconsistent charges and prosecutions. In 2012, in keeping with the common law tradition, two significant cases – one from Alberta and one from Quebec – were appealed all the way to the Supreme Court of Canada. The Supreme Court responded to the cases in a landmark

decision, which now guides the current application of the *Criminal Code* to all cases involving HIV non-disclosure. That decision states that people are obliged to tell a partner that they are HIV-positive before they engage in sex that poses a "realistic possibility" of transmission (SCC 2012). The 2012 decision aimed to remedy the confusion created by the 1998 decision, and, in doing so, further underlined the criminalizing approach. The legal test emerging from the 2012 decision requires sex with a condom, and that the person with HIV must have a low viral load (SCC 2012). In the absence of *both* using a condom *and* having a low viral load, or disclosing one's serostatus, a consensual sex act is re-interpreted as non-consensual sex. The Court presumes consent under these conditions is vitiated, whereby sex then becomes constituted as fraudulent and equivalent to an assault, and HIV represents the aggravating factor. A viral load measurement is a routine diagnostic taken for people who are HIV-positive. It is an abstracted measurement of the amount of virus in a someone's bloodstream. The higher someone's viral load, the more virally infectious they are considered. When on anti-HIV medications people often become virally undetectable, meaning that there are fewer copies of the virus in the bloodstream than the diagnostic test can measure. When virally undetectable, people are no longer infectious and cannot transmit the virus (Barré-Sinoussi et al. 2018).

To underline the ongoing colonial legacy woven into Canada's criminal justice system, the 2012 decision relies on a number of precedents in which fraud is understood to vitiate consent derived from cases in the United Kingdom, including *R. v. Bennett* (1866) and *R. v. Sinclair* (1867), which predate Canada having a *Criminal Code* of its own.

Under the 2012 application of the *Code*, people have been imprisoned when they were non-infectious due to effective anti-HIV medications and when no transmission of HIV occurred (Hastings et al. 2017). Furthermore, an unsettling flip side to the increased use of viral undetectability as a marker of criminality has resulted in an emerging viral underclass: those who cannot achieve viral suppression (due to limited treatment access, adherence, and compliance, or due to biological factors), and are thus understood to need increased medical and state surveillance and control.

A wide range of social science research has demonstrated the harmful social outcomes resulting from these two Supreme Court decisions and the application of the criminal law. Since its initial manifestations, the criminalization process in relation to HIV was, and continues to be, a highly racialized and gendered phenomenon, with a disproportionate number of Black and Indigenous people of colour targeted, and with an extreme burden placed on women living with HIV, as well as impacting people working in the sex trade, and people living in poverty (Hastings et al. 2017). A disproportionate number of those charged and prosecuted have consisted of Black men who have had sex with women

(Mykhalovskiy & Betteridge 2012; Hastings et al. 2017). A very high rate of conviction also exists for those prosecuted, which is higher than the rate for people prosecuted of actual sexual assaults involving non-consensual sex coupled with violence (Mykhalovskiy & Betteridge 2012). This means that people charged with aggravated sexual assault, in relation to violent non-consensual coercive sex, are convicted at a lower rate than those who face the same charge in relation to HIV non-disclosure. Laws also further disproportionately impact women living with HIV, putting them at a heightened risk for gender-based violence due to the power differentials in relationships (Patterson et al., 2015). Moreover, in such cases, people's privacy is often widely breeched, with photographs plastered across media outlets prior to conviction via police press releases. In addition, the media often acts as an extended arm of the state in such cases, with sensationalized headlines condemning the person with HIV – often a person already racialized – as a criminal, a vector of disease, and as dangerous, reckless, and irresponsible (Mykhalovskiy et al. 2016).

In 2016, a group of Canadian activists formed a coalition to address the social harms of HIV, known as the Canadian Coalition to Reform HIV Criminalization. Previously, a wide range of activism and advocacy efforts countered criminalization in Canada, but worked piecemeal and were driven primarily by lawyers intervening in active legal cases. Through the Coalition, a more coordinated and collaborative response now exists, led by people living with HIV, including those who have experienced criminalization.

Recent reforms

After many years of dedicated advocacy, activism, and expert engagement from the Coalition and many others calling for change, in 2016, Jody Wilson-Raybould, Attorney General of Canada announced on World AIDS Day that the government found that Canada's "over-criminalization of HIV" needed reform (Department of Justice Canada, 2016). The minister noted that the current application of the law was out of touch with existing science and the realities of disease, whereby HIV now represents a long-term manageable chronic infection no longer transmissible when someone is virally suppressed through the ongoing use of anti-HIV medications. Through this announcement, the Ministry of Justice implemented a consultation related to reform, seeking guidance on how to undo some of the harms past approaches had put into place. During the reform process, activists from the Canadian Coalition to Reform HIV Criminalization called for a moratorium on all new criminal cases,

placing existing cases on hold. In Ontario, over 800 people reached out to the Provincial Attorney General calling for a moratorium, and in Quebec activists held protests calling for the same.

The Department of Justice Canada report outlined a way forward, calling for limiting the scope of the criminal law's application only to instances where transmission could be proven. Simultaneously, in Ontario, the provincial Attorney General and Minister of Justice announced that the province would stop prosecuting cases where someone had a suppressed viral load for longer than six months and was under the regular care of a doctor. Following this progress, in 2018, Jody Wilson-Raybould, Attorney General of Canada announced a new federal directive, implementing guidance from their report. This involved a decision to bypass the common law precedent legal process, since changing the problem internally within the courts proved challenging. The directive specifically governs federal prosecutors who handle criminal prosecutions only in Canada's three territories. Under the new directive, federal prosecutors will no longer be able to pursue charges in cases of HIV non-disclosure in which a person has maintained a suppressed viral load (under 200 copies of the virus per millilitre of blood) for more than six months (Department of Justice Canada, 2018). The directive also dictates that charges of non-disclosure "generally" will not be pursued when a person engages only in oral sex or when condoms were used during sex, or when a person was taking treatment prescribed by their doctor (Department of Justice Canada, 2018).

Activists continue to call for greater reforms, and the directive represented one step in an ongoing reform effort called for by the Canadian Coalition to Reform HIV Criminalization. After a Canada-wide consultation, the group outlined a set of recommendations, including reforms to the *Criminal Code* to ensure that laws on sexual assault are no longer applied to cases of HIV non-disclosure, and calling for provinces to adopt similar directives (CCRHC 2019)

In the next section, I address the state and organization of knowledge on the issue of HIV criminalization, and outline why and how this dissertation is both unique and crucial. As I further explain below, much of the existing knowledge has been organized around demonstrating the negative public health impacts associated with the application of legal tools. The object of analysis is the HIV response or public health imperatives, in which researchers have examined criminalization as a barrier to HIV testing. The research that I examined, while highly valuable and helpful for advocacy, has been organized in ways that marginalized the perspectives of those facing criminalization first-hand while leaving unexamined the violence directed at individuals criminalized resulting from legal tools. Such gaps in knowledge resulted in unintentionally marginalizing the lives of criminalized people from

research on this issue, thus impacting what is possible to know about people living with HIV and the organization of punishment within society.

Epistemological limits

Let me state explicitly that my goal in this section lies not in providing the reader with a detailed review of past and current literature on the criminalization of HIV non-disclosure, transmission, and exposure. Nor do I aim in this section to construct a normative critique of the corpus of literature on this issue or the valuable research contributions of scholars working in this area. Others have already completed such work, and done so rather well (Mykhalovskiy 2015). Instead, I briefly outline the existing literature on the criminalization of HIV, to provide an understanding of how this dissertation developed, and how it is situated. In what follows, I describe how this literature has been socially organized. Looking at the existing research on HIV criminalization in its totality helps to better understand general assumptions and gaps that emerge. Analyzing the literature in this way assists with understanding what remains missing, calling to attention the need for a broader analysis that moves beyond current knowledge production frameworks allowed by the HIV and public health sectors. In this manner, my dissertation aims to address this existing gap stemming from examining knowledge on HIV criminalization.

Knowledge as evidence

Based on the growing imperative to underscore all public health interventions with forms of evidence, various legal scholars, public health researchers, and social scientists have developed original empirical research to provide an "evidence-informed" approach to address the application of criminal laws regulating HIV exposure and non-disclosure (Mykhalovskiy 2015). Specifically, in Canada, the social science literature on the criminalization of HIV has been carefully crafted to intervene in legal knowledge (Mykhalovskiy 2016). Such literature has been strategically developed to assist advocacy efforts and to help lawyers win cases. With the imperative for evidence that underscores public health interventions, this research has aimed to impact court outcomes in favour of those who counter the criminal law regulation of HIV non-disclosure, transmission, and exposure, with a clear majority of the literature resulting in an overwhelming counterargument to the broad practices of criminalization (Mykhalovskiy 2015). Based on the landmark 1998 Supreme Court decision, an HIV-positive individual was required to disclose if the sexual behaviour they engaged in posed a "significant risk"

of transmitting HIV to their partner(s). But, as mentioned previously, the Court did not define "significant risk", leading to years of uncertainty among people living with HIV as well as many inconsistent charges and prosecutions (Mykhalovskiy 2011). Thus, social scientists worked to develop forms of evidence to counter the punitive approach to responding to HIV non-disclosure, exposure, and transmission. The subsequent 2012 Supreme Court further underlined the use of the criminal law in cases of HIV non-disclosure, which many felt remained out of touch with current scientific realities surrounding HIV (SCC 2012; Mykhalovskiy 2011; Mykhalovskiy 2016). One result has led to the development of a range of scientific evidence that productively informs judicial decisions. These important efforts resulted in addressing how the science of HIV has been applied in criminal legal contexts in relation to notions of "harm", aiming to ensure greater consistency and restraint within the courts. Mykhalovskiy described this approach as "science-based criminal law reform", where the ambiguities surrounding legal notions and interpretations of risk "have been a central feature not only of the discursive organization of criminal law regulation of HIV non-disclosure, but of activist efforts to intervene in that governance" (Mykhalovskiy 2016, p. 1).

A taxonomy of HIV criminalization research

In a 2015 special issue of the journal *Critical Public Health*, sociologist Eric Mykhalovskiy (2015, p. 376) proposed a taxonomy for the growing corpus of literature on HIV criminalization, which he organized into four types of analysis. These four types of analysis serve to organize the discussion of the public health implications of HIV non-disclosure and exposure criminalization. As the corpus of literature on HIV criminalization grows, I have added additional newer citations into this taxonomy where I believe they land accordingly. The four types of analysis are as follows:

1) Human participant research examining the impact the criminal law has on efforts to prevent HIV transmission (Burris et al. 2007; Adam 2008; O'Byrne, et al. 2013; Adam et al. 2014; Adam et al. 2015; Dodds et al. 2009; Mykhalovskiy 2011, 2015, 2016; Patterson et al. 2015; French 2015; Kilty & Orsini 2019);
2) In-depth doctrinal analyses of the range of legal instruments and specific laws that act to criminalize HIV non-disclosure, exposure, and transmission in specific jurisdictions, including the details of the legal tool's content, such as prohibited activities, defences, and punishments (Galletly & Pinkerton 2006; Mykhalovskiy et al. 2010; Lehman et al. 2014; Grant 2008, 2011; Grace 2013, 2015; Lehman et al. 2014; Hastings et al. 2017; Sweeney et al. 2018);

3) In-depth analysis of electronic legal and media databases, which explore how, why, and under what conditions criminal laws were mobilized in specific jurisdictions (Larcher & Symington 2010; Mykhalovskiy & Betteridge 2012; Hoppe 2015; Mykhalovskiy et al. 2016); and
4) Cultural studies focused on the popular representation of HIV criminal cases using a range of theoretical insights to explore how HIV, criminality, gender, racialization, and sexual orientation were rhetorically mobilized in the popular imagination (Worth et al. 2005; Miller 2005; Patton 2005; Persson & Newman 2008; Kilty 2014; McKay et al. 2011; Kirkup 2015; Hoppe 2013, 2014, 2015).

My reading of the first type of research organized in Mykhalovskiy's taxonomy raises a number of general assumptions and subsequent realizations. This category encompasses the most popular form of analysis in the broader literature, using as its object of analysis the response to HIV and public health imperatives. A common thread of analysis here focuses on examining the negative impact criminal law had on preventing HIV transmission. In these analyses, researchers examined the perspectives of HIV social service workers, clients, experts, community members, and clinicians, highlighting a range of perceived negative impacts associated with the criminalization of HIV exposure and non-disclosure (Burris et al. 2007; Adam 2008; O'Byrne, et al. 2013; Adam et al. 2014; Adam et al. 2015; Dodds et al. 2009; Mykhalovskiy 2011, 2015, 2016; Patterson et al. 2015; Kilty & Orsini 2019). Quite generally, this type of analysis understands that the regulation of communicable diseases is best handled through the logic and intervention techniques of public health institutions and community-based HIV organizations. Underpinning these studies lies the idea that by explicating the negative consequences of applying the criminal law to public health and HIV prevention projects, researchers can demonstrate why criminal laws should not be applied broadly in cases of non-disclosure and exposure. Yet, public health legislation itself is rarely held accountable. Occasionally, when public health law is discussed, it is described as offering a distinct option abating the overuse of the criminal law. Moreover, such a perspective relies on the assumption that public health institutions operate through benevolent intentions, distinct from institutions comprising policing and the criminal justice system. Furthermore, these various institutions operate using different forms of knowledge, such as public health institutions operating with the use of biomedical knowledge, or the criminal justice system operating using knowledge of legal risk. What we also miss in these analyses is an elaboration of how the daily lives of people living with HIV are organized through institutions comprising the

criminal justice system along with the various forms of violence enacted against people who represent the targets of criminal and public health laws.

The second type of research focuses on the doctrinal analysis of the content of specific legal tools or cases. Studies in this area of the taxonomy examine how scholars believe the criminal law should be interpreted to produce the most beneficial and just outcomes (Galletly & Pinkerton 2006; Mykhalovskiy et al. 2010; Lehman et al. 2014; Grant 2008, 2011; Grace 2013, 2015; Lehman et al. 2014; Hastings et al. 2017; Sweeney et al. 2018). The specifics of the legal tools are analyzed and critiqued, with an understanding that when fixed the legal tools will produce outcomes that weigh issues of the harm caused, responsibility, the public interest, the sentence length, retribution, and deterrence from future crimes. Such research can also be organized by underpinning the assumptions that HIV criminal laws are rationally intended to prevent transmission of the virus and that legislators can and will simply accept scientific or public health knowledge to remedy legal approaches. With a focus attuned towards doctrinal analysis, a common theme in legal studies emerges wherein the back-end of the criminal justice system remains unexplored. Thus, the administration of punishment is not attended to nor can it be taken for granted. In general, an assumption that arises from these forms of doctrinal analysis stems from the notion that if legal instruments are correctly organized they would then result in justice. Here, the application of criminal laws towards HIV non-disclosure and exposure is understood as an unjust blip or a misdirection requiring realignment, thus requiring correction. This correction allows the criminal law to return to targeting actual criminals, and, in turn, the broader apparatus of criminal justice and punishment remain underexamined.

The third type of analysis involves knowledge developed to produce a geographic comparison across jurisdictions and allowing for an environmental scan of the phenomenon of criminalization across various spaces and at different times (Mykhalovskiy & Betteridge 2012; Hoppe 2015; Mykhalovskiy et al. 2016). Such research has proved helpful in answering questions such as what the enumerated scope of the issue is and which populations are impacted most.

Finally, in the fourth type of analysis, scholars have examined specific legal cases of HIV non-disclosure, transmission, or exposure in ways that help elaborate academic theoretical concepts (Worth et al. 2005; Miller 2005; Patton 2005; Persson & Newman 2008; Kilty 2014; McKay et al. 2011). In doing so, this type of analysis asks questions such as: "what does the application of a theoretical concept to such a case tell us about both the case and the concept?". I address this approach in further detail in *Chapter 1, Bearing witness to violence*.

Collectively, these areas of research have been highly valuable for scholars, activists, policy makers, people living with HIV, and people working in community-based organizations that address HIV and public health. More specifically, these areas of research allow us to understand the impact of criminalization on HIV interventions. Yet, as discussed, such work may fail to adequately capture a major analytical framework through which to understand the outcomes of criminalizing HIV non-disclosure, exposure, and transmission on people living with HIV.

While the primary focus of social science literature on the criminalization of HIV exposure, transmission, and non-disclosure has generally focused on the public health impact of the criminal justice response, we are left asking how does this literature account for the suffering of those identified as the targets of criminal and public health laws criminalizing HIV non-disclosure, exposure, and transmission? Furthermore, how does that myopia account for how institutions comprising the criminal justice system as well as public health organize the lives of people living with HIV? And, are we missing potentially important critical perspectives on this relatively new criminalized issue? Without addressing these questions, are we leaving open an epistemological gap in our understanding of what it means to live with HIV at this particular moment?

As it stands, the lives of people prosecuted in these cases may be marginalized by the development of knowledge on HIV non-disclosure and exposure, potentially impacting what can possibly be known about people living with HIV in this context. In my view, a key failing of the current state of knowledge – with its focus on legal doctrine and the impact of criminalization on public health imperatives and the HIV response – is that it does not adequately account for suffering and the threat of suffering imposed by criminalization. This failure is rendered increasingly important when, at the time of publishing this dissertation, and despite Canada representing a global leader in the number of criminal cases related to HIV non-disclosure, no social science research has yet documented the actual experiences of people living with HIV charged or prosecuted in relation to HIV non-disclosure or exposure from their own perspective.

In summary, this section provided a brief overview of the organization of the social science literature on the issue of HIV criminalization. In the next section, I address another foundational component of this research project: the mobilization of an interdisciplinary approach. Because I am situated within an interdisciplinary doctoral research programme, it is imperative that I address the nature and role of interdisciplinarity within my project.

Interdisciplinarity

In this dissertation, I draw from the following fields of social science and humanities research:

1) *The social organization of knowledge on HIV* as the primary field; and
2) *Critical socio-legal studies* and
3) *Surveillance studies* as the two secondary fields.

Commonly, within the university (and within my own doctoral programme), we use the term *interdisciplinary*. Within my work, however, I do not view these areas of study as formalized disciplines, whereby each unto itself comprises a range of disciplinary, and multidisciplinary forms of knowledge creation practices. Additionally, my areas of study are all generally understood as subfields, or alternative forms of sociology. Currently, surveillance studies and socio-legal studies have developed into their own diverse fields of study. Thus, while I do apply an interdisciplinary approach to my work – in part due to the requirements of my programme and in part due to what my project necessitates – I am aware that generally my work fits within a sociological milieu. From my perspective, situating my work within a study of society is crucial, since my work seeks to examine the role of social relationships in developing knowledge and implementing regimes to determine forms of action to address the social pathologies of 'criminality' and containing the HIV epidemic. HIV itself is a profoundly social disease, with its causes and consequences deeply embedded in social, economic, cultural, and political processes. Research that attends to complex social relationships can provide a social and political context through which to understand the epidemic and open up different ways of seeing the world.

As I outline throughout this dissertation, my approach to social research is interdisciplinary, similar to the issue of HIV criminalization itself. On the epistemological plane, this project is situated within a hotly contested interdisciplinary knowledge space comprised of forms of biomedical knowledge, public health knowledge, and legal and criminal justice knowledge. These discursive fields (the biomedical, the public health, and the legal) can rely on divergent logics, where what constitutes truth is developed via differing regimes of what is knowable. The varied sets of rules and frameworks for establishing what is understood as *true* or *false* under a legal paradigm can be constituted entirely differently than within a biomedical paradigm of thought; the same applies to public health, which often represents a hybrid of the former fields. Furthermore, within each of these respective discursive fields, I also understand that a plurality exists in the construction of knowledge, since these fields

themselves comprise a range of contradictory and heterogeneous social, political, and economic relations.

Medico-legal borderland

To connect the fields, concepts, and objects of knowledge with which I engage, I situate my work within a hybrid research analytic Timmermans and Gabe (2003) coined, the *medico-legal borderland,* a thought space conceptualized to assist in the interdisciplinary sociological analysis of criminality as well as health and illness situated between criminology and medical sociology. Mykhalovskiy (2011) notes that Timmermans and Gabe "use the term [medico-legal borderland] to decry the absence of dialogue between criminology and medical sociology and to encourage critical analyses of sites in which health care and criminal-legal practices intersect" (2011, p. 647). While the overarching framework within which this approach fits is sociology, I believe the medico-legal borderland itself constitutes a hybrid interdisciplinary analytic, useful for examining how and why institutions mobilize medical knowledge for legal governance purposes or vice versa.

A contemporary example of a contested truth emerging when the discursive fields of biomedical science and legal knowledge intersect lies in the notion of what constitutes "harm" when HIV non-disclosure becomes a crime (SCC 2012). Under certain circumstances, due to prevailing biomedical evidence outlining that people on anti-HIV treatments can no longer transmit the virus to others, exposure to HIV does not necessarily meet the legal threshold of the risk of imminent threat of serious bodily harm (Barré-Sinoussi 2018). However, the prevailing Canadian legal discourse on the issue, has for years understood both exposure and non-disclosure in the context of consensual sex as a harm evaluated using the same legal tests as a violent rape involving a weapon in which the life of the "victim" is endangered (SCC 2012). The massive epistemological disjuncture existing on this issue is currently widely debated, resulting in a sense of ongoing uncertainty among many people. Yet, while these debates take place, the legal discourse continues to carry the most weight. This system of knowledge underscores the practices of the institutional apparatus of the criminal justice system and public health legislation, both of which wield forms of coercive power capable of suspending rights and freedoms through a range of punishments applied to individuals. Using the interdisciplinary and hybrid research analytic of the medico-legal borderland, we can examine the competing and contested discourses of the biomedical and the legal, which developed diverging understandings of the notion of harm in the context of HIV non-disclosure.

Through my interdisciplinary focus, I understand my role as critically interrogating how the fields of knowledge within which I work are constituted and how each understands the objects of knowledge. Employing a form of study that transcends traditional disciplines represents a modality that ensures rigour through this interrogation of knowledge creation. Continuing to work with hybrid and interdisciplinary research analytics – such as the medico-legal borderland – can further help me as a social scientist to explicate how the biomedical perspective becomes intertwined with other mechanisms of power – both legal and extra-legal. This also allows us to understand how the sick, infectious, and the criminal are classified and reclassified in relational contexts across a range of institutions, and deemed in need of care, control, retribution, containment, inclusion, or exclusion (Valverde, Levi, & Moore, 2005). In her book, *Illness and its metaphors*, Susan Sontag, stated:

> Everyone who is born holds dual citizenship, in the kingdom of the well and in the kingdom of the sick. Although we all prefer to use the good passport, sooner or later each of us is obliged, at least for a spell, to identify ourselves as citizens of that other place (1978, p. 3).

That "other place" (1978, p. 3), the place of the sick, is a place where people's autonomy is constrained, where people are managed externally, or incapacitated; it is a place of non-persons. People living with HIV live their lives on the threshold of becoming a non-person. If our viral loads become detectable, making us virally infectious, or we become sick, we can lose control of our personhood and autonomy. That other place of non-persons exists for those rendered criminal as well; while it is not an inevitable place of the sick, to which all mortal people will succumb, each of us also holds a passport to the place of criminality, each of us also holds a passport to the place of criminality, where, in the absence of a privileged social position that can protect us, we may be rendered non-persons through institutional categorization as a criminal. As this dissertation outlines, both illness and criminality are sites where liberal notions of personhood can be reconstituted. People who are sick and people who are criminal may no longer be considered persons with access to claims of subjectivity, or to the means to protect themselves. These hybrid spaces can be explored through the analytic of the medico-legal borderland, an ongoing thread that will emerge throughout this dissertation.

To better understand and account for the complex convergence of hybrid and interdisciplinary processes, practices, and forms of information at play, and how punishment and forms of violence are amplified in the context of managing crimes related to HIV, the following two concepts are helpful: *interlegality* and *interinstitutionality*. In the context of HIV criminalization, multiple legal and institutional

processes and practices aimed at managing risks intersect, overlap, and begin to work in concert or in opposition to one another. As I outline in what follows, multiple practices, processes, and forms of information converge at their intersection to amplify the level of conceived risk and result in heightened forms of social control, sanction, and violence. I continue this chapter by briefly discussing each of these concepts – interlegality and interinstitutionality – because they are addressed throughout the analysis as I explore the materiality of violence facing criminalized people.

Interlegality

The concept of interlegality, developed by the Portuguese legal, economics, and human rights scholar Boaventura de Sousa Santos, allows us to understand the ongoing productive interaction and cross-over between heterogeneous legal systems (Santos 1987). Legal tools operate along various scales, from locally in cities and towns, to regionally in provinces or states, to nationally in specific countries, to globally at the international level. Each of these systems features a different jurisdiction and operates with its own logic applying various rules to what is governed (Valverde, 2009). Within some jurisdictions and scales, multiple legal systems operate simultaneously, including, for example, civil laws, by-laws, public health laws, and child protection laws, whereby all potentially operate at the local or regional levels. At each scale and within each jurisdiction, multiple other scales and jurisdictions of law operate simultaneously—that is, in addition to local or regional legal tools, national and international legal tools also operate. Santos aimed to account for the integrated outcomes of varied legal systems, operating at different scales and within distinct jurisdictions, using a range of governing logics and rationalities (sometimes complementary or contradictory) that would be impossible through one legal system operating in a silo. As Santos noted:

> …[S]ocio-legal life is constituted by different legal spaces operating simultaneously on different scales and from different interpretive standpoints. So much so that in phenomenological terms and as a result of interaction and intersection among legal spaces one cannot properly speak of law and legality but of interlaw and interlegality (Santos, 1987, p. 288).

Santos's work has been adopted in a range of ways by diverse legal scholars. For example, Indigenous scholar Craig Proulx mobilized the concept to explore how the Canadian legal system has been influenced by Indigenous legal traditions to produce more just outcomes for First Nations peoples in the context of ongoing colonization (Proulx, 2015). Specifically, Proulx examined the

development of the Gladue sentencing principles for Indigenous people. Based on a Supreme Court of Canada case from 1998, a new approach to restorative justice for sentencing Indigenous people was outlined, taking into account the harmful impact of incarceration (SCC 1998, 2). In criminal legal sentencing in the common law system, the standard application of common rules, treatments, and standards towards people who are not all the same resulted in racialized discrimination. In a context of ongoing settler colonization, Indigenous people remain overrepresented in Canadian prisons. Gladue sentencing aimed to remedy this problem of inequality in the distribution of punishment. When Gladue sentencing takes place, a self-identified Indigenous person is voluntarily transferred to the Gladue Court, where the outcome may result in no jail time – thereby reducing overrepresentation in corrections institutions – and as a form of healing restorative justice, in line with traditional Indigenous forms of justice. As Proulx explained, this served as an example of the dynamic interaction between colonial and Indigenous legal systems, where the Gladue decision is *"*…notable for its refusal to uncritically accept the exclusive use of Western notions of formal equality, or equality as sameness, within judicial discretion" (Proulx, 2015, p. 87). Proulx argues that this change exemplifies a form of interlegality and the porous nature of legal systems.

Interlegality outlines how within different jurisdictions and scales, multiple legal tools create "different legal objects on the same social objects" (Proulx, 2015, p. 80). When plural legal systems interact, in some cases, they can shape new productive legal rationalities and objects, such as Gladue sentencing, even if only incrementally. In the context of criminalizing HIV, the plural legal systems at play consist of the federal *Criminal Code*, different provincial public health acts, and civil suits. As mentioned above in this chapter, Canada adheres to one *Criminal Code* that each province is tasked with autonomously administering. Through this *Code*, general criminal laws apply to cases of HIV non-disclosure, transmission, and exposure. The *Code* is applied in each province under the purview of the provincial Attorney General, who tasks Crown Prosecutors with taking forward cases for the good of the public. As previously mentioned, the 2012 and 1998 Supreme Court of Canada decisions, aggravated sexual assault stands as the criminal charge most often applied in relation to the non-disclosure of HIV. The resulting form of legal violence enacted for such a charge is a maximum 25-year prison sentence of incarceration in a federal prison and mandatory registration as a sex offender. As a registered sex offender, a person's DNA is collected through a blood test, along with their biometric details (race, height, eye colour, weight, hair colour, tattoos, etc.), their place of residence is recorded (and updated yearly), and any other identifying information is noted, all of which is listed in a national database accessible to all accredited police agencies.

Operating at the local and regional levels below the federal *Code*, and depending on the province, provincial public health laws may also apply. Ontario serves as one example. As Canada's most populous province, Ontario features the highest concentration of people living with HIV, and the highest number of prosecutions for HIV non-disclosure and exposure (Mykhalovskiy & Betteridge 2012; PHAC 2015). Historically, the province is known for having a coercive public health legislative framework, which under extreme circumstances enables powers quite similar to the criminal law, such as detention in quarantine, fines, curfews, and house arrest (HPPA 1990). Such legislation was developed historically, as venereal disease and other health laws were updated and reformed over the years. The current framework, the *Ontario Health Promotion and Protection Act*, stems from 1990. Under Section 22 of the act, which mandates the management of communicable disease outbreaks, a regional Medical Officer of Health can issue a written order requiring a person to take or refrain from taking specific disease prevention actions. Such an order could require condom use and mandate adherence to medication.

In the early 1990s, during the height of AIDS hysteria, many viewed this legal framework as insufficient. One Ontario Medical Officer of Health serving the Toronto area, Dr. Richard Schabas, lobbied for the classification of AIDS as a virulent disease rather than a communicable disease, resulting in sexually active people living with HIV being quarantined (Silversides 2003). This arose from a specifically contentious case of HIV criminalization, where C. Ssenyonga, an immigrant from Uganda and one of the first people criminally charged in relation to HIV non-disclosure and transmission, made headlines, perpetuating the myth of hyped-up Black male sexuality as a threat to the white Canadian body politic (Miller 2005). Dr. Iain Mackie, the director of St. Joseph's Health Centre, the main HIV clinic in London, Ontario, the town in which the man was charged, wanted something similar (Miller 2005). Dr. Mackie thought people who did not take precautions to protect against the transmission of HIV presented a life-long risk to the public. As such, he was quoted in the local paper, stating: "There is no easy answer to this type of problem, but in cases where people can't be educated and still pose a public health threat, then society may have no option but to look at long-term confinement or incarceration" (The Gazette 1991). Furthermore, Ian Gemmill, an associate medical officer for another region of Ontario, also supported this proposition. Agreeing with Dr. Schabas, he commented to the media, "And, in my view, we need the power to order some kind of coercive confinement, combined with education and rehabilitative counselling" (The Gazette 1991). Due to a wide-ranging public outcry, the idea of reclassifying the disease as virulent did not take hold. Yet, this history underscores the coercive potential lying beneath the surface of public health

legislation. Public health authorities, however, continue to deploy and increase the use of Section 22 orders in the province.

As I noted above, once filed against someone, the orders are often delivered in-person by a public health nurse, who provides a form of counselling around the contents of the order, enforceable with a fine of up to $5000 a day for failure to comply. Since they were initially designed to handle treatable infections or untreatable deadly diseases, these orders feature no sunset clause, since either the person would receive treatment and thus no longer have the disease or they would die. People living with HIV now provide a unique scenario, since today, for certain people, HIV represents a chronic, manageable, and treatable condition. Thus, once presented with a public health order, the person can be held to its conditions for the duration of their life.

Furthermore, civil suits may also apply, whereby someone may sue someone else for harm, demanding compensation, for example, because HIV was transmitted to them without their knowledge. The case of C. Ssenyonga provides another example here. Ssenyonga died in 1993, just two weeks before a verdict was to be delivered by Ontario Court Justice Douglas McDermid – Ssenyonga died in hospital of AIDS-related causes at 36 years of age and out on bail at the time. After his death, four of his past sex partners sued the state for compensation and won, arguing that public health officials were negligent in their responsibility to protect the community from contagion. Mike Sauer, spokesperson for the AIDS Committee of London, who supported criminalizing Ssenyonga, stated to the media that, "if there's not a decision, there will be all kinds of people who get nothing" (Toronto Star, 1993). The case went to the Criminal Injuries Compensation Board, which, through the *Compensation for Victims of a Crime Act*, found that the "victims' injuries were a result of 'contributory behaviour'", with each of his former sexual partners receiving $25,000.00 (Toronto Star 1993). This case illustrates how a range of legal tools intersect at different moments in time, acting to govern the specific case of criminalization in relation to HIV.

The interlegal landscape via which the criminalization of HIV non-disclosure and exposure exists, illustrates how criminal laws, public health laws, and civil laws all come into play. My focus, however, lies not on the specificity of those legal tools, but rather, how, through their intersection, the material outcomes for people can be intensified. Mobilizing an interlegal analysis, I examine what happens when the different legal objects created under various scales and legal jurisdictions interact to reinforce and amplify each other. I, therefore, examine the following question: How and when do varied legal tools intersect in a person's daily life to characterize them as a heightened risk to the public? To address this question, I mobilize the concept of interlegality as not centred on a doctrinal or

procedural examination of plural legal tools. Instead, my analysis examines which social processes, forms of knowledge, or practices predicate the enactment of different legal tools and processes. By examining the embodiment of converging legal tools and forms of institutional and expert knowledge, I seek to better understand how objects of law constitute criminal and public health risks. That is, I am less interested in what legal tools say, and more interested in how laws are socially activated, embodied, and lived. Thus, interlegality in the context of this study allows me to explore how individuals who become the object of multiple intersecting legal tools live and embody interlegality.

In the following section, I examine how to study institutions, along with the role of multiple intersecting institutions, institutional processes, and practices aimed at managing risks through criminalization. In this context, similar to various legal tools in the analysis of interlegality, institutions also intersect, overlap, and begin to work in concert or in opposition.

Interinstitutionality

While multiple legal tools play a role in the criminalization of HIV, multiple institutions are also at play. These institutions consist of those working in fields such as criminal law and corrections, public health, HIV-specific non-governmental organizations, policing, hospitals, clinics and healthcare providers, immigration, universities, and the media. Each of these institutions features varied practices and processes, which can interact with one another to produce a wide array of effects on people's lives.

As I explore in more detail in Chapter 1: *Bearing witness to violence*, and Chapter 3: *Methods*, *or how to study HIV criminalization*, I mobilized aspects of the alternative form of feminist sociology developed by Dorothy Smith. Her work presents a paradigm shift toward how to understand and examine the "social", and how relations between people are "coordinated" externally (Smith 1987, 1990, 1999, 2005). Smith's analyses examine how people's daily lives and interactions are organized, mediated, regulated, and constrained externally through a variety of institutional and textual formations. Through the broad concept of *institution*, institutional ethnography outlines a new form of analysis for how to study the way people interact with the institutional realm (Smith, 2005). Smith boils her analysis down to relations between people, and from there looks towards relations between institutions, where the micrological- and macrological-levels link to one another since relations are organized and coordinated by what she calls *ruling relations* (Smith 1987, 1990, 1999, 2005). The term institution within institutional ethnography thus refers to the complex of ruling relations under examination (Smith 1987, 2005). Mykhalovskiy and McCoy (2002) note that this term might at first seem counterintuitive, since within

this form of inquiry it does not "designate a bounded organizational space as might be suggested by doing 'hospital' or 'school' ethnography" (p. 19). For example, if healthcare were considered an institution, the researcher could focus their attention on a range of coordinated activities and work processes across various intersecting sites, such as doctors' offices, clinics, government ministries, pharmacies, pharmaceutical companies, mass media, insurance companies, workplaces, and schools among others (DeVault & McCoy 2006, p. 17). Using this understanding, a specific institutional ethnography will never explore in totality this wide array of sites and processes; instead, the researcher will "explore particular corners or strands within a specific institutional complex, in ways that make visible their points of connection with other sites and courses of action" (DeVault & McCoy 2006, p. 17).

Adhering to this approach throughout this dissertation, I examine the interplay of heterogeneous institutional formations, comprised of criminal justice, punishment administration, policing, public health, medical, and community-based organizations. Understanding that knowledge of criminalization must originate from the lives and experiences of criminalized people, an approach that examines the range of institutional formations highlights the disjuncture between how people know themselves and their social worlds and the institutional ways of knowing that are extra-locally conceived. A primary focus further elaborated upon in what follows is that, through their convergence, the intersection of institutions amplifies the punitive aspects of criminalization, leading to intensified forms of violence. In this study, I examine how institutional texts and sequences of actions interact and come into contact with one another to heighten the vulnerabilities of criminalized people. This form of analysis – which I call interinstitutionality – enables me to focus on how various institutions intersect with one another, where processes overlap to produce new outcomes as well as ontologies for criminalized people. Such a focus also allows me to challenge the assumption that singular institutions, such as public health, policing, and criminal justice, act distinctly from one another, and that they operate using distinct, siloed forms of knowledge.

Within the criminalization of HIV, people become conceptually known through the intersection between legal and medical institutions, and not solely through one or the other. Through their union, knowledge from the biomedical and the juridical realms work with each other, overlapping and leveraging in ways not originally conceived of nor understood within their respective domains. Together they come to constitute another altogether different layer of knowledge, producing hybrid juridico-biological subjects regulated through forms of surveillance and discipline, as well as through normative knowledge on health and illness (Mykhalovskiy 2011). In the medico-legal borderland,

intimate knowledge of one's health can be mobilized as a rationale for forms of state surveillance and control. By focusing on how people living with HIV engage with the range of institutional complexes that act to regulate their lives, institutional ethnography can enable an understanding of this problematic perspective as crossing various boundaries (both medical and legal, among others). Furthermore, this enables a comprehensive and nuanced understanding of how people living with HIV actually live and embody the experiences of criminalization, lives which come to represent sites of intensified physical and psychological violence.

While much of this dissertation focuses on the subjective accounts of individuals who have been criminalized, I shift the focus towards institutions ensuring that, although I honour the lives and experiences of people, we simultaneously move away from talking solely about individuals. Instead, I also talk about systems and networks of governance. Bringing the institution into focus makes possible a form of analysis that is not individuated. With a focus on the violence criminalized people face, examining institutions allows for an analysis that not only situates violence as determined by individuals or merely the result of individuals, but rather enabled through the processes and actions of institutions and actors within them.

In this section, I explored how I examine the ways in which legal tools and various institutions intersect to produce new possibilities in the lives of criminalized people. By mobilizing notions of interinstitutionality and interlegality throughout this dissertation, I outline how I will explore the multiple ways in which criminalized people come to be governed, regulated, surveilled, and incapacitated by a range of institutions and legal tools simultaneously. I now provide an overview of each chapter of this dissertation, outlining how my study has been organized for the reader.

Overview of chapters

This dissertation is organized as follows. In *Chapter 1: Bearing witness to violence*, I explore my conception of how knowledge is developed and I outline the form of critical ethnographic inquiry that I deployed throughout this project, one situated in the actual lives of criminalized people and attuned towards denaturalizing forms of avoidable suffering. I applied this conception of social inquiry to undertake this project. In Chapter 1, I explain how I understand my role as a social science researcher, as bearing witness, with an ethical obligation to mobilize new knowledge to help form the political basis of a life worth living – one of flourishing - for people subjected to criminalization in relation to alleged HIV non-disclosure, exposure, and transmission. Here, I also I engage with theoretical

concepts, cautiously attending to the ways in which theory can be disconnected from the actual worlds of people or can instrumentalize lived experiences to advance certain ideas. Instead, I seek to mobilize theory in a transposed manner, where the experiences of criminalized people remain central and come first, and where theories are only mobilized in the service of advancing the needs of criminalized people. In doing so, I provide an in-depth exploration of notions of *violence*, and *legal violence*, as well as the analytical concept of *living in negative relation to the law*. These concepts ensure that this dissertation's inquiry is situated within the social worlds of people living with HIV who have been criminally charged and on the violence of criminalization, as well as the avoidable suffering of those who come to live their lives in negative relation to the law.

In *Chapter 2: Histories of legal violence: Venereal disease control in the Dominion of Canada*, I situate the study of the criminalization of HIV in the Canadian historical context of colonization, and the regulation of venereal disease in the early 1900s. Part of critically investigating the practices of criminalizing HIV means understanding the historical constitution of how policing, public health, and the criminal justice system interinstitutionally interacted to construct certain people living with various stigmatized diseases-of-vice became understood as criminal. Thus, *Chapter 2* focuses on my analysis of archival research, which involved examining past legal tools, media articles, grey literature, and correspondence conducted online and at the National Archives of Canada, to examine the lives of a number of women incarcerated for having venereal diseases, held in prison under punitive conditions with no criminal charge as part of the emerging social project of public health. Here, I engage briefly with notions of *surveillance medicine*, *biopolitics*, and *governmentality*, concepts which can prove productive in understanding the material conditions of violence faced by these women.

Chapter 3: Methods, or how to study HIV criminalization, provides an overview of the specific methods, practices, and tactics I employed to undertake a critical ethnographic inquiry. For this project, I conducted a series of qualitative interviews with criminalized people living with HIV. In this chapter, I outline how the various methods I applied aligned with the epistemological objectives elaborated in *Chapter 1*. In addition, I detail how, as an interdisciplinary project, my methods draw from a range of social science and qualitative research traditions, all primarily organized around critical criminology. Critical criminology, an inherently interdisciplinary field, comprises a range of qualitative research traditions, including (but not limited to) socio-legal studies, feminist ethnography, and critical social science. Furthermore, *Chapter 3* primarily focuses on the importance of protecting the confidentiality of the participants in this project. In doing so, I examine the various considerations and strategies I applied to ensure that the protection of confidentiality remained paramount.

Chapter 4: The amplification of penality, provides an overview of the findings from the qualitative interviews I conducted. As I explicate a series of stories of criminalized people, the focus lies on forms of suffering and violence. In doing so, this chapter is organized around three sections. The first looks at how criminalized people become constructed as cases through a range of institutional logics, processes, and sequences of actions. Using a series of first-hand accounts, this section outlines how people's experiences become constructed as cases – as criminal and health risks – by institutions of public health and the criminal justice system, ultimately heightening notions of risk. The outcome of this heightened conceptual risk means criminalized people face intensified forms of surveillance, incapacitation, and violence. In the second section of *Chapter 4*, I outline a typology of violence as a way to help disentangle the various forms of violence faced by the criminalized people I interviewed. In addition, grounded in the first-hand accounts of criminalized people, I take on the task of denaturalizing the forms of violence enacted against them. Mobilizing the typology, I examine the forms of direct, structural, legal, and extra-legal forms of violence that begin to emerge as a constructed case moves through the various processes of the criminal justice system. I outline this as a process of deconstituting legal personhood. In the last section of *Chapter 4*, I elaborate upon the notion of social and civil death. Once criminalized people's legally safeguarded personhood is deconstituted, they are relegated to live a life in negative relation to the law and as a non-person. Non-persons become subjected to a range of extra-legal forms of violent discrimination, surveillance, and incapacitation. Such individuals are denied the means to access subjectivity, and the means to guarantee their own safety and security, and further marginalized from participating in society. A primary objective of this chapter lies in following through on the objectives in *Chapter 1*, that is, to denaturalize the violence and suffering of criminalized people, to bear witness to the experiences of those who live in negative relation to the law, to help better disarticulate people from their supposed crimes, and instead to interrogate how punishment operates in society.

Finally, I conclude in the final chapter by summarizing the primary outcomes of this critical ethnographic inquiry, and by outlining my conception of a *criminology of the criminalized*. A criminology of the criminalized represents one which I have undertaken in this project, where the lives of criminalized people become the sites of social inquiry, where research is organized in ways to help denaturalize forms of state and social violence, and where the researcher has an ethical obligation to ensure the project of inquiry serves those who live in negative relation to the law. This serves to contribute towards the formation of a flourishing life.

I have also included a series of appendices providing further context on how my project was implemented, including the interview participant consent form, interview questions, project poster, and a transcript of the testimony that I provided to the House of Commons Standing Committee on Justice and Human Rights.

Conclusion

In this introduction, I provided a brief overview of the orientation of this dissertation, including its organization and the overarching concepts and approaches I employed in my research. I also outlined the originality of this project—to my knowledge, the first qualitative research study examining the lives of people in Canada criminalized in relation to HIV. I also detailed how research on the issue of HIV criminalization has been organized, primarily marginalizing the voices and experiences of people living with HIV who have been criminally charged, prosecuted, or threatened with charges.

While I do not know the fate of the man the police tear gassed in the late 1980s, such experiences involving police violence often remain unexamined or unconsidered when conducting a social inquiry on HIV, a reality I will explore in this dissertation. People living with HIV, especially those who have been criminalized, are often not granted a voice, thereby denying their ability to claim a nuanced and complex subjectivity. As a result, the violence enacted against criminalized people living with HIV in such circumstances remains undocumented, misunderstood, or unaccounted for. What were the consequences experienced by the tear-gassed man as a result of having his home broken into, blasted with tear gas, arrested by multiple police officers, tied to a gurney, and detained, all because he was identified as HIV-positive? I do not have answers in this specific instance. However, the content of this dissertation addresses this question more broadly. This project was organized so as to address the marginalization of criminalized people from existing knowledge on the issue, to enable their voices and to bear witness to violence.

Chapter 1: Bearing witness to violence

In this chapter, I focus on epistemology, by grounding the analysis in the perspectives of people subject to criminalization processes. Toward this aim, here I outline an approach to developing new knowledge by mobilizing a form of critical ethnographic inquiry. This critical ethnographic inquiry functions as an act of bearing witness to suffering from violence—both institutional and interpersonal, and enabled and activated through a complex range of processes that construct social interactions as activities deemed criminal. An approach to inquiry oriented toward documenting violence and suffering is not new (Garland, 2011; Razack, 2015; Kerr, 2015; Guenther, 2013). As I elaborated in the introductory chapter, within the growing corpus of social research attending to the criminalization of HIV non-disclosure, transmission, and exposure, few works have addressed the violence of criminalization and the suffering of social actors who represent its targets. I hope to address this lacuna by extending my approach to include developing new knowledge through a critical ethnographic inquiry. In doing so, I aim to assist in denaturalizing the forms of violence activated through criminalization processes and to outline a series of methodological tools for future inquiry into forms of criminalization. Through an explanation of my epistemological thinking within the context of research on people whose lives are criminalized, I reflect on notions of violence, bearing witness, and the meaning of the term *critical*. Within this process, I also contribute to the fields of critical social science, critical criminology, surveillance studies, and feminist forms of ethnographic inquiry. Broadly, I aim to chart new epistemological directions by elaborating a nuanced and critical understanding of how people, specifically people living with HIV, live and embody the experience of criminalization in actual terms.

My dissertation research begins by exploring a rather minimalist question: What are the experiences of HIV-positive people who have been engaged with the Canadian criminal justice system

because they allegedly did not tell their sexual partner(s) that they are HIV-positive? Stepping back from the specifics of this question, I argue that the question itself is minimalistic, since I aim to examine the lived experiences of a specific group of people who interact with specific state institutions. The question operates on a micrological level in an actor's daily social interactions with a range of social actors and institutions. Those institutions themselves are also comprised of and represented by actors. At its core, the question focuses on interactions between disparate social actors, as well as the actions, reactions, and interactions between people instigated due to an allegation of legally regulated wrongdoing. Thus, I aim to examine people's experiences from their own perspectives: of being charged and prosecuted with a crime, or in some cases, solely of being threatened with a criminal charge, or charged with offences against public health laws.

Starting on a minimalist plane of micrological social relations and interactions between people—people acting on behalf of themselves, or on behalf of institutions that constitute the criminal justice system—is connected to two primary epistemological objectives. These objectives comprise the foundation of the critical ethnographic inquiry I employed in my project:

a) to align my work with a form of critical social science that seeks to explicate the suffering of social actors, to denaturalize forms of violence that are the source of suffering, and to render violence as avoidable and suffering as unacceptable; and

b) to undertake an institutional ethnographic inquiry from the location of the experience of social actors as they see and understand the world around them. As I discuss in this chapter, both of these objectives result in research outcomes oriented around violence. Speaking with people about suffering leads to discussions of the origins of suffering—that is, forms of violence.

In addition, speaking with people about their daily lived experience of criminalization leads to a discussion of the myriad forms of violence that result from being labelled a criminal. Attention to this form of inquiry, then, attunes to violence. German philosopher Hannah Arendt, in *On violence* (1970), noted that despite how common violence is in human life and the social world, it is not often singled out as an area of study:

> No one engaged in thought about history and politics can remain unaware of the enormous role violence has always played in human affairs, and it is at first glance rather surprising that violence has been singled out so seldom for special consideration … anyone looking for some kind of sense in the records of the past was almost bound to see violence as a marginal phenomenon (1970, p. 8).

To address this lack of attention on violence, Arendt laid out a series of theoretical foundations, which I explore later in this chapter. Since Arendt's assertion, a multitude of works have addressed forms of violence and the relationship between violence and legal processes (Cover, 1986; Dayan, 2015; Razack, 2015). Yet, in the context of the literature addressing the criminalization of HIV non-disclosure, transmission, and exposure, attention towards the relationship between violence and legal processes remains lacking. By addressing this gap through my project, I hope to advance existing theoretical thinking about violence enacted on individuals and communities: the violence of criminalization, violence enabled through legal processes, legally rendered violence, and violence that extends into the extralegal. I also hope to chart a path towards talking about violence in the actual and material worlds of people. As I explain further, a critical ethnographic inquiry can contend with the daily lives and experiences of people. To engage ethically in conducting research in this manner, I must first draw attention to the lived world of people before moving to the realm of the theoretical.

There are a number of scholarly traditions which employ the use of critical ethnographies, such as anthropology (Elliott 2019). It should be noted however, that I mobilize use of critical ethnography following the tradition and ethos of institutional ethnography (Smith 2005), which is further elaborated throughout this chapter. To explain my formation of a critical ethnographic inquiry, in this chapter I first explore my two primary epistemological objectives: to examine the connection between critiques and notions of suffering, and to explore a form of institutional ethnographic inquiry that locates the analysis in the social world of actors who are the targets of criminalization. I then describe how other scholars have explored notions of violence, which I use as a foundation to discuss how violence is explored and mobilized as an analytical framework throughout my work. I conclude with some reflections on the notion of bearing witness, which I discuss as a methodological approach to realizing the ethical aims of a critical ethnographic inquiry mobilized to examine the suffering and avoidable forms of violence in the context of criminalizing processes. Through my analysis, I argue that truly understanding what it means to live with HIV in this contemporary moment requires thinking about the forms of violence enacted through the law resulting from processes of criminalization.

Suffering and critique

My work aligns with critical realist philosopher Andrew Sayer's argument: to be critical, the central orientation to the development of new social science knowledge must be ethically attuned to the suffering of social actors (Sayer, 2009). Sayer constructed this argument out of concern for a range of shortfalls he saw in critical social science scholarship, including a too-timid assertion of an ethical orientation in existing works, and a lack of deep theoretical attention and engagement with the notion of the critical itself—a term Sayer regards as often overused and under-theorized. Although Sayer noted that the critique and the analysis of suffering are intertwined, he also stated that the "connection between critique and suffering (and by implication, flourishing) is inadequately addressed in CSS's [Critical Social Science] self-understandings" (p. 775). To help ethically reorient critical work and reframe this self-understanding, Sayer wanted to make explicit the links between suffering and critique, which he elaborated in the article "Who's afraid of critical social science?" (2009). At its core, Sayer's argument outlines that critical social science aims to examine and contend with suffering so as to render it contestable and unacceptable. For Sayer, critical social science work should, therefore, aim to present a critique against forms of social organization that result in the suffering of social actors. Thus, such work aims to denaturalize the violence that is the source of suffering, so that violence and suffering are understood not as matters of fate, but as social processes that do not need to be as they are and are subject to change.

Denaturalization, however, is not about revealing some formerly hidden or deliberately concealed truth. Thus, the critical social science researcher's job is not to pull back the wool from over our eyes, as the bearer of the truest form of truth. Critique is often perceived as a process of reducing illusion, of revealing the truth. This conception of a critique features an embedded normative judgement, whereby knowing the truth is better than knowing what is false. Understanding critique as the reduction of illusion aims to establish an "epistemic gain" often oriented toward predominant ways of thinking about the world and ideas (Sayer, 2009, p. 770). But, this form of critique can become mired in conversations about the ultimate truth—one truth that is truer than others. A form of critique centred on the reduction of illusion and organized around the notion of truth can be mobilized by anyone from leftists to white supremacists and fascists. Claims around reducing illusion and revelations of truth are not inherently progressive. Denaturalization, however, represents an alternate approach that avoids falling into the trap of revealing truth and dealing only with ideas. This approach moves

the scope of social research away from solely contending with concepts and theoretical ideas. For Sayer, critical social science is not just about the denaturalization of ideas, but also about a critique attuned to forms of avoidable suffering and injustice in the actual world inhabited by social actors. Here, attention focuses not on reducing illusion, but towards an understanding of how social phenomena can change. The critical aspect of such work lies in an ethical view that another world is possible. As such, Sayer defines critical work as undertaking research that acts in the service of denaturalizing suffering and the violence which causes it. Therefore, analyses centred on the denaturalization of the avoidable suffering of social actors become the central organizing feature of critical social science.

But, how do we define suffering, and its inverse, flourishing? To address this question, Sayer looks to the work of human rights philosopher and economist Amaryta Sen and legal and human rights philosopher Martha Nussbaum. These two scholars developed a conceptual approach to understand people's access to capabilities that support human development (Sen, 2003; Nussbaum, 2013). The capabilities approach has been widely adopted, including by the United Nations, and is mobilized by human rights and international development practitioners to help track human development around the world. The contention is that people's well-being depends on access to a minimal range of "beings and doings" that appeal to the value of a human life, dignity, and autonomy, and constitute the basic requirements of flourishing (Sayer, 2009, p. 776). Examples of these beings and doings can be understood in a "thick," "vague" manner, Nussbaum argued (2009, p. 776), so as not to flatten cultural difference and overly universalize them: being healthy, being able to live free of violence, participating in one's life and community without shame, and being able to live a life that is economically secure. Sayer mobilizes the capabilities approach, which he views as possibly helping to critically address varied assumptions across different systems of value and logic underpinning societies and cultures, thus, informing what constitutes flourishing and suffering. Sayer uses the example of how a patriarchal conception of flourishing might be that women will flourish once they accept the supremacy of men and subordinate themselves to male domination. Another example describes how a capitalist conception might explain how someone will flourish as they accumulate more capital and commodities. To avoid this trap, the logic of Sayer's argument continues, the critical social scientist must analyze what constitutes good and bad, so that a normative evaluative framework allows us to understand what constitutes both suffering and flourishing. Furthermore, regardless of the critiques of the capabilities approach (Hartley, 2009; Clark, 2005), one thing this analysis makes explicit is the ethical orientation of flourishing and of suffering.

For Sayer, the critical social scientist must no longer timidly take an ethical stance, since a value judgement must inform definitions of how society can change to avoid suffering and injustice. He notes that "even when social scientific critiques were bolder, they rarely set out their normative standpoints, their conceptions of the good' (2009, p. 768). Outlining such an ethical orientation of the good and bad does not mean taking dogmatic partisan political positions, or taking a stock leftist stance. Instead, this asserts an ethical orientation that includes a normative evaluation of what is right and wrong in the social world, and what constitutes human suffering and human flourishing. For Sayer, ethics must be connected to the critical social science project of denaturalization, and an ethical orientation must be made explicit in such works (p. 772).

Sayer also asks the critical social scientist to contend with the issue of emancipation. In doing so, Sayer wanted to develop a framework for a critical approach to social science inquiry that moves beyond vague platitudes about how documenting the suffering of social actors will lead to some form of ultimate libertarian emancipation. Sayer is cautious to ensure that defining flourishing is not conflated with blanket notions of emancipation and freedom. The conditions that make flourishing possible are not understood as freedom from all constraints, as Sayer distinguishes:

> Yet while freedom is fundamental, it is not sufficient. In one-sidedly emphasizing freedom and seeing constraint as necessarily problematic, such critiques have a libertarian, individualist, and masculinist character, and fail to acknowledge that we are dependent social beings, only able to live through others, and dependent on the care of others for significant parts of our lives (p. 773).

Thus, emancipation from suffering in the context of critical social science is about encouraging the forms of constraint that promote flourishing, while also understanding the importance of human interdependence. A social science critique, therefore, rests on the assumption that society is always open to change—as it has done throughout history—and seeks to move toward a realm of human existence free from oppressive forms of avoidable violence and suffering.

Moving forward with Sayer's evaluative framework for ethically reorienting critical social science research in mind, where the act of being critical is attuned to the unavoidable suffering of social actors, I now turn toward the literature that could be read as critical within the milieus of criminology and studies of law and society. Some of the scholars I discuss in what follows may not label themselves as critical scholars—the term can be meaningless for some, while quite meaningful for others. Furthermore, my aim is not to classify these scholars as critical, but, rather, to explore those who

mobilize an approach attuned to the suffering of social actors. I argue that their approach to scholarship aligns with what Sayer proposed for critical social science. That is, to explore the suffering of social actors under regimes of criminal justice and incarceration. Additionally, these works follow a critical trajectory and aiming to address gaps in how ways of thinking, conducting research, developing knowledge, and acting have neglected to centre the avoidable suffering of social actors. As well as focusing on the suffering of social actors, the literature I explore in the following section addresses the limits of theoretical projects on subjectivity, as well as analyses of punishment that concentrate on depriving liberty, while ignoring the administration of punishment as an outcome of criminal legal processes. Instead, these critical scholars from the milieus of criminology and studies on law and society illustrate what a reorientation towards suffering can achieve, namely, the denaturalization of forms of violence that stem from the criminal justice system. In doing so, they call for social change and justice for social actors who are the targets of myriad forms of legally sanctioned and extralegal forms of violence.

Michel Foucault remains a leading thinker in the milieus of criminology and studies on law and society, whereby his works have shaped critical approaches to examining legal forms of governance and the pathologization of those labelled as criminal. However, Foucault's legendary assertion in *Discipline and punish: The birth of the prison* (1977), that punishment transformed from "an art of unbearable sensations" into "an economy of suspended rights" (Garland, 2011, p. 767; Foucault, 1977), presented a problem for humanities scholarship. Foucault's historical analysis addresses the shift from sovereign power generated through extreme public displays of violence to a form of governmental power generated through strict forms of discipline and bureaucracy, where the target of punishment is now the mind of the prisoner and no longer the body. This assertion led to a wave of humanities scholarship that understood the prison as a site and object of study through which to examine the production of modern subjectivity (Bové, 1980; Preziosi, 1985; Murray, 1983; Dumm, 1991; Rothman, 1980; Spierenberg, 1991).

Critical legal scholar Jonathon Simon claims that this popular revelation from Foucault emerged as an epistemological block in humanities scholarship, resulting in a crisis that needed to be addressed by critical forms of scholarship (2010). In his article "Beyond the panopticon: Mass imprisonment and the humanities", Simon outlines how the production of the subject became a theoretical obsession, for which Foucault's analysis served as the foundation of this conceptual framework. The individualizing and penetrating forces of discipline externally and internally exerted onto the prisoner in modern penal institutions, which Foucault theorized could be mobilized to examine the production

of a wide range of subjectivities, emerged as an ongoing thread of analysis for many in the humanities. Simon, however, noted that this obsession with Foucault's analysis resulted in limits on humanities scholars' theoretical conceptualizations of current practices of mass incarceration, particularly in America, which he labelled the "crisis of the self" (2010). Simon notes that humanities scholars have largely failed to come to grips with contemporary practices of incarceration, because they remain "enthralled with the genealogy of the modern soul" (2010, p. 330).

That focus on the individual and subjective production resulted in scholars in the humanities empirically and theoretically neglecting to analyze the rise of new approaches to incarceration. Within such approaches, the governance of prisons has become increasingly intertwined with the organization of society, and entire segments of the population, particularly people of colour and poor people, are now the targets of incarceration within the carceral state (Simon, 2010, p. 339). Unlike Foucault's conception, current practices of incarceration no longer concern themselves with a rehabilitative ideal, producing self-improvement and docility. Instead, they focus on the mass warehousing of bodies, where individual subjectivities are minimized to the level of a "thin risk calculus," which Simon indicates, "annihilates the self that remains the primary interest of the humanities" (Simon, 2010, p. 339). Simon notes that if humanities scholarship continues to play the role of the "repository for critical theory" in the "parrehesiatic" tradition, current realities and the violence of incarceration must not remain ignored (Simon, 2010, p. 339). Simon notes (2004), referencing the work of Foucault, that parrhesia stands as an activity where the speaker expresses their personal understanding and relationship to truth, and risks their life and reputation, recognizing truth-telling as a duty to improve or help other people (p. 1419). In short, the theoretical and conceptual interests of some humanities scholars have resulted in a form of scholarship that discusses the prison as a site for the production of theory, but disregards the actual current and material forms of violence and suffering enacted on the bodies of prisoners in the contemporary moment.

Returning to Andrew Sayer's analysis of the critical, it is clear that, although Simon makes a claim about theoretical concepts, he aims not to reduce illusion and produce truth, but rather to shift attention towards the suffering of incarcerated peoples under current regimes of incarceration and criminal justice. Simon sees promise in critical scholarship that calls attention to the injustices of incarceration practices, which currently incapacitate people's capabilities rather than supporting them to flourish. This approach to inquiry directly and indirectly led to a range of productive analyses from critical criminology and law and society scholars seeking to bring the body back into discussions of

punishment, and to denaturalize the violence, suffering, and bodily pains produced under new regimes of incarceration.

As well as conceiving of punishment as solely targeting the prisoner's mind, as Foucault theorized, scholars working on criminal justice and punishment today often understand punishment solely as depriving liberty (Garland, 2011). Concentrating on the individual right to liberty means that scholarship has widely proliferated on the topic of sentencing, such as in addressing what represents the just and, thus, appropriate amount of time to incarcerate someone for a specific crime. As a result of this focus, sentencing theory has dominated conversations of punishment among many legal scholars (Garland, 2011, p. 790). But, historical criminologist David Garland (2011) argued that "the human body is the unavoidable *object* of state punishment even when it is avowedly not punishment's *target*" (p. 768). Garland called attention to how the law's narrow understanding (or acknowledgement) of punishment as the suspension of individual rights—rather than a "regime of bodily containment and physical deprivations" (p. 768)—enabled the courts to neglect the qualitative conditions of imprisonment and exclusively ask questions about the duration of sentencing. Based on this contemporary denial of the corporal in punishment practices, Garland argues that the disappearing body is one way that modern state punishment, both carceral and capital, can maintain its legitimacy and control.

To reorient attention towards the suffering of incarcerated social actors, Garland analyzed instances when the body was revealed in punishment practices in America. In the article "The problem of the body in modern state punishment", Garland cites the 2011 *Brown v. Plata* case, upheld by the Supreme Court of the United States, resulting in California having to reduce the number of incarcerated individuals (Garland 2011). During that trial, the decision included photographic evidence of double bunking, where up to 50 inmates were held in a 12-by-20–foot cage awaiting medical treatment, as well as incarcerated people held in telephone booth–sized cages for long periods of time without access to toilets. For scholars such as criminologists and those studying law and society, this exposure to the suffering of an incarcerated body helped to denaturalize the suffering of individuals and reorient attention towards violent conditions instead of the duration of sentencing.

Garland further went on to discuss the "problem of the body in capital punishment"—noting that modern capital punishment aims to terminate life without implicating the body (2011, p. 772). Specifically, Garland examined the practice of lethal injection and the use of the drug pancuronium bromide, which had no therapeutic purpose, but "merely suppressed muscle movements to ensure that witnesses to executions would not be made uncomfortable by the sight of convulsions, spasms,

and involuntary movements they might perceive as signs of life" (p. 787). Here, the suffering of the social actor is suppressed for the benefit of those conducting a state-sanctioned execution. Addressing the range of bodily "pains of imprisonment" (p. 769), Garland hoped to make the body visible, as undeniably present, and something with which society and those working in the current criminal justice system and institutions tasked with administering punishment must contend. But legal practitioners and courts often understand these pains as beneath their station, since punishment is delegated to prison administration, an area somewhat unregulated by law and under-theorized by legal scholars working primarily on issues of doctrine. Because the law and courts do not consider the bodily impacts of imprisoning people as within their scope—because they are theoretically administering justice, and thus only setting sentencing limits—they do not then need to acknowledge the often messy, violent, and brutal consequences of warehousing people (p. 769). In contrast, Garland contends, institutions that administer punishments deal intimately with the body, including counting bodies, containing bodies, moving bodies, feeding bodies, watching bodies, restraining bodies, cleaning bodies, exercising bodies, and releasing bodies—as well as providing medical and mental health care for those bodies.

Because, as Garland (2011) notes, those tasked with applying and studying the law and legal processes can often avoid administering punishment (since such attention would mean addressing suffering), formal and legally mandated punishments can occur in unregulated, arbitrary, and discretionary ways. This disconnect results in a range of disparate and violent bodily impacts across penal institutions with little accountability or oversight. Delegation represents an essential mechanism within systems managing incarceration, and within these systems a tenuous relationship can exist between the exercise of penal administrative power and the rules and principles of the wider legal order—a problem critical scholars have explored (see, e.g., Kerr, 2015; Dayan, 2011; Razack, 2015) as a way to deny accountability for the suffering of incarcerated people. This tenuous relationship between penal administrative power and the principles of the legal order means that the actual practices of incarceration in the warehousing of bodies can exist in legal grey areas, resulting in the destruction and death of persons through forms of casual administrative violence (Kerr, 2015; Dayan, 2007, 2011). For example, legal scholar and historian Colin Dayan (2007, 2011) explored the semantics in the punishment administration that renamed "solitary confinement" to "administrative segregation" in the United States in the 1990s. That semantic blur effectively removed the practice of solitary confinement from judicial oversight and placed it in the legal grey area of prison administration. Punitive isolation requires legal justification and court due process. As a practice, punitive isolation has also received increasing scrutiny in Canadian jurisdictions, as well as being deemed a form of torture by the United

Nations (United Nations, 2016; Independent Review of Corrections, 2017). Renaming the practice blurred distinctions between an administrative function and a punitive function, effectively rendering the illegal legal (Dayan, 2011, p. 79). Changing the term meant administrators could bypass due process and become the singular arbiters of solitary confinement beyond court oversight.

In terms of prison management, legal scholar Lisa Kerr (2015) noted that, specifically in Canada, administrators of incarceration are granted unrestrained discretionary powers to manage institutions and pursue policy mandates, which can exist in a grey area situated outside legal frameworks. Examining the Correctional Service Canada's 2003 program for the long-term solitary confinement of women prisoners, Kerr outlines how the practice of solitary confinement for 23 hours a day, the denial of engagement in prison programs, and enhanced security and surveillance for years at a time bypassed Canadian prison law and human rights norms (p. 91). Furthermore, Kerr notes that the program "serves as an example of a policy that was developed within and by the prison service and whose terms departed from the governing law" (p. 91).

Critical race and decolonization scholar Sherene Razack (2015) further examined these legal grey areas in her book *Dying from improvement: Inquests and inquiries into Indigenous deaths in custody*. Razack explored how criminal justice and policing institutions have rendered the illegal legal through inquest proceedings into the deaths and deliberate police killings of Indigenous people in state custody in Canada. In her detailed examination of the deaths of Indigenous people held in custody for arrest, as well as in pretrial detention and remand, Razack argued that legal inquest proceedings were mobilized to obscure illegal state violence against people in custody. Examining one specific case, the death of Paul Alphonse, an Indigenous man who died in hospital while in police custody, Razack aims to denaturalize the violence that police subjected him to, violence that likely resulted in his death (p. 3). Alphonse was 67 years old and a survivor of Canada's settler-colonial residential school system. At the time of his death, a large bruise in the shape of a boot was found on Alphonse's chest, evidence of police abuse (p. 3). But, the inquest into the death of Alphonse focused on his alcoholism and his lack of cooperation with police and healthcare workers. Ultimately, police were let off the hook and Alphonse was blamed for his own death (p. 4). By focussing attention on his assumed problematic use of alcohol and deflecting attention away from the police violence that Alphonse endured, the inquest operated to erase colonial police relations with Indigenous communities. The inquest itself intimately connects to the role of settler-colonial politics in Canada, where Indigenous people have historically been denied the rights due to them through legal personhood. Razack's project denaturalizes police

violence in these cases, ultimately revealing the actual causes of death, and the continuing and ongoing legacy of settler-colonial genocide.

Documenting the systematic dehumanization of people deemed unworthy of personhood and rendered civilly and physically dead by the state continues to crucially orient critical approaches to social science knowledge on law and society. By bringing the body forward, such scholarship aims to counter epistemological and ontological gaps, disarticulates people's treatment from narratives of guilt, innocence, and redemption, and denaturalizes forms of violence and the resulting suffering. Such work aligns with a broader critical project proposed by Andrew Sayer, and the goal of moving towards accountability and change in how society treats those labelled as criminal.

The works I described in this section highlight a critical social science that concentrates on denaturalizing harmful systems of oppression, and the resulting suffering of social actors. An ethical reorientation towards examining injustice and unavoidable suffering forms a part of the broader critical project of denaturalizing the suffering resulting from legally sanctioned and extralegal forms of violence. The intended outcome of this broader project is not to make vague platitudes about emancipation and freedom, but instead to chart tangible ways forward. A critical project is vital in a context where the response to HIV intersects with criminal justice responses. In the HIV response, the focus on public health imperatives, which addresses prisons, punishment, retribution, and incapacitation, only emerges when concern focuses on preventing HIV transmission. A broader critique of institutional violence resulting through incarceration is rarely conceptualized in analyses where the locus is HIV-prevention imperatives. My project, then, aims to chart territory enabling a wider range of critiques, including those ensuring that actors in the HIV response have the tools necessary to critique the criminal justice system beyond the analytical framework of public health.

In the next section, I address my second epistemological objective: to mobilize a form of institutional ethnographic inquiry that locates the analysis in the social world of actors who are the targets of criminalization. In doing so, I outline how institutional ethnography, as a form of alternative feminist sociological inquiry, orients the lived experiences of social actors as the frame of analysis, thus decentring the role of grand macrological theory that often functions to objectify and reify human social experience. This results in a form of inquiry that places the lives of social actors who have experienced criminalization first-hand at the centre of developing new knowledge on criminalizing HIV non-disclosure, transmission, and exposure.

Institutional ethnographic inquiry

As I outlined in the introductory chapter, the growing corpus of literature on the criminalization of HIV exposure, non-disclosure, and transmission has used public health imperatives as an analytical framework or mobilized the ways in which HIV is criminalized as cases to instrumentally test and elaborate academic theories. My project aims to shift the frame of analysis towards people with lived experiences of punitive criminal and public health laws. To achieve this, I explore what the experiences of being rendered a criminal and a risk to public safety mean for those who live it. I call this approach a *criminology of the criminalized*—an approach I will further explore and elaborate upon throughout this dissertation. An outcome of this orientation is a shift in attention towards the suffering of people subjected to criminalization, the forms of violence that they face, the criminal justice system itself, and the role of punishment in Canadian society. This frame of analysis is methodologically rooted in critical feminist forms of ethnographic sociological research, inspired specifically by the work of feminist sociologist Dorothy Smith (1987, 1990a, 1990b, 1999, 2005). Smith developed what she called *institutional ethnography* due to a rupture she uncovered between what she knew about the world through her lived and embodied experience as a woman, and what "mainstream sociology" claimed to know about the world through universalizing macrological theoretical frameworks. Smith repeatedly witnessed mainstream sociology objectify people and groups of people as the objects of study. From her perspective, feminist sociology was rooted in her own lived experience as a woman, mother, and emerging scholar in the late 1970s and early 1980s. At the time, the conceptual practices in her job as a university professor and sociologist were often at odds with what she knew about the social world through her family life and obligations (Smith, 1987). As such, the concepts she was trained to use professionally to describe society were developed in a theoretical and androcentric context disconnected from and out of sync with her lived daily reality (Smith, 1987). Detailing her personal relationship with her work represented a strategic and political move to ground the development of institutional ethnography within the lived experiences of women.

To orient the development of a feminist sociology, Smith called mainstream sociology a form of expert knowledge capable of reproducing dominant forms of oppression (2005, p. 49). Within Smith's methodological project and critique of official forms of academic expert knowledge, institutional ethnography at its foundation is "a project of inquiry and discovery [that] rejects the dominance of theory" (Smith, 2005, p. 49). Rejecting the dominance of theory, however, does not mean that this form of inquiry dismisses theory altogether; rather, the approach to engagement with theoretical traditions is somewhat reversed, or transposed. By grounding the study of society within the "real-

world" experiences of people instead of relying on the theoretical, Smith claims that researchers can counter the ideological processes of institutions and experts who define people's lives externally to address their actual contexts (Smith, 1987). That is, grounding social inquiry in the experiences and perspectives of people can assist in critiquing a "method of reasoning about society and history that treats concepts as if they were agents" (Smith, 2005, p. 54).

Smith further noted that the problem of mainstream sociology is that the conceptual becomes the dominant mode of reasoning, and the "actual becomes selectively represented as it conforms to the conceptual" (Smith, 2005, p. 54). As an analytic approach, Smith proposed the definition of *ideology practices*, which she suggests "convert what people experience directly in their everyday/everynight world into forms of knowledge in which people as subjects disappear and in which their perspectives on their own experience are transposed and subdued by magisterial forms of objectifying discourse" (Smith, 1990, p. 4).

The systems of knowledge that mainstream sociology reproduces are also those which have ontologically and epistemologically excluded, marginalized, silenced, and erased the experiences of women (Smith, 1987). The substance of Smith's critique of sociology also follows a feminist critique of how a range of institutions act to alienate women from their own lived experiences. Feminist approaches, such as those Smith proposed (see, also, Harding, 1987; Reinharz, 1992), sparked a paradigm shift in how social research was undertaken, involving a wide-ranging critique of dominant positivist, biomedical, and quantitative androcentric approaches. This resulted in the mobilization of qualitative methods aimed at empirically reorienting knowledge development from the lives and experiences of women. A number of strong epistemological arguments from feminist researchers exist regarding the call for the use of qualitative methods, including enabling women to relationally define *from below*, in their own words, and from their own worldview, the problematics they face (Smith, 1987, 1990; Harding, 1987; Reinharz, 1992). Along with this methodological shift to reframe how reality and knowledge were constituted from the perceptive of women, *standpoint feminism* emerged. Smith employed the concept of *standpoint* from feminist theorist Sandra Harding (1988), who used it in *The science question in Feminism*. In this and other works, she undertook a discursive analysis of masculinist scientific knowledge to reveal forms of male domination through new knowledge formation and development. Harding argued that the standpoint of men was presented as a universal throughout all aspects of society, while women's standpoint was systematically excluded through the reproduction of knowledge and reality. Through this view, objective knowledge is "no longer 'the truth,' but a form of

knowing used to rule society that contingently, but inextricably, incorporates the standpoint of men" (Smith, p. 21–22, in Campbell & Manicom, 1995).

This paradigm shift in perspective was also a response to how social science, and traditional sociology in particular, objectified people and groups of people as the sites of study. In Smith's paradigm of research, "people become the objects of investigation and explanation; we are not its subjects, its knowers" (Smith, p. 22, 2005). Thus, as both a political and analytical strategy, standpoint feminism aimed to reframe the production of knowledge from the perspective of women's lives. For some scholars interested in the politics of identity, standpoint feminism can potentially result in forms of essentialism, although Smith is quick to note that standpoint is not a "given and finalized form of knowledge" (Smith, p. 8, 2005). Rather, that standpoint represents a place of experience from which research can take place. For Smith, standpoint opens up the site of the knower to anyone—a subjective position, but with this term she does not intend to identify a socially determined category or position in society such as race, class, or gender. Rather, this concept for Smith denotes an analytical frame that can act as an entry point into discovering the social that does not "subordinate the knowing subject to objectified forms of knowledge of society or political economy" (Smith, 2005, p. 10). Thus, the notion of standpoint dispenses any claims for objectivity, situating a research project in the world of the active subject, from which various forms of oppression can be explicated from the perspective of those impacted (Mykhalovskiy & McCoy, 2002).

Further analyzing how women's lives have been systemically excluded from official ways of knowing, Smith investigated Foucault's (1982) notion of discourse. Foucault developed the notion of discourse to describe a way of thinking about ideas that displaced past notions of knowledge as related to individual perception, locating it as external to the individual. Discourse refers primarily to complex historically constituted systems of knowledge and the production of ways of knowing independent of specific people. Certain discourses can be institutionally located, such as that of the criminal justice system. In addition, Foucault describes various discourses as coordinating people's subjectivities—through what is allowed as knowable and what is not, what is excluded and what is included (Smith, 2005). The study of discourse, then, works to trace linked textual continuities, whereby an author's work cannot be understood independent of the discursive tradition within which it is located, and events can be traced discursively throughout a temporal period. This concept of how text and language historically mediate the production of reality and knowledge was interesting to Dorothy Smith, as a feminist who worked to uncover how the lives of women are excluded from the official discourses of various institutions (Foucault, 1982; Smith, 2005). Although Dorothy Smith was inspired by the work

of Foucault in some regards, she articulated a specific notion of discourse, extending it to her "commitment of grounding inquiry in the activities of actual individuals" (DeVault & McCoy, 2004, p. 44). Discourse thus encompasses a wide variety of relations that include texts, how texts relate to each other, and the activities of people in actual sites who produce and activate texts through courses of action (Smith, 1990). Through this expanded notion of discourse, attention to text, language, and action came to occupy a central aspect of the institutional ethnographic form of inquiry.

Institutional ethnography & criminalization

To further explore the alternative feminist sociology of institutional ethnography, I now turn to a brief discussion of how this approach to inquiry has been mobilized by other researchers examining the lives and experiences of criminalized and marginalized people's engagement with the criminal justice system. A variety of researchers and activists have used institutional ethnography to examine how legal and criminal justice institutions organize people's daily lives (McKendy, 1992; Kinsman 1995; Cunliffe & Cameron, 2007; Welsh & Rajah, 2014; Tang & Wang, 2014). Additionally, a range of researchers and activists examining the lives of people living with HIV across Canada have also historically taken up this form of inquiry (Mykhalovsky & Smith, 1994; G. Smith 1995; Campbell & Manicomb, 1995; Kinsman 1997; Bisaillon, 2011). In these institutional ethnographic research projects, attention focused on how texts mediate people's lives, the lives of people in conflict with the law or people working to access healthcare. As Mykalovskiy and McCoy noted (2002),

> There is a clear distinction between the conceptual core of IE (Institutional Ethnography)—its focus on the active subject and the social relations shaping everyday experience—and the forms of political engagement emerging out of social movements structured around the problems faced by people occupying historically specific subject positions—gays, people of colour, lesbians, people living with HIV/AIDS, etc. (p. 20).

One area of inquiry within institutional ethnography has examined how the institutional logic of criminal justice institutions remains out of sync with people's actual lives and how their experiences come to be constructed into legal cases. For example, feminist legal scholars Emma Cunliffe and Angela Cameron (2007) mobilized an institutional ethnography inspired by Dorothy Smith to examine how sentencing circles in Northern reserve communities in Canada organized through the criminal justice system excluded the actual experiences of Indigenous women. Instead, such circles presented

the ideological notion of "restorative justice." Broader structural issues at the core of violence in the women's lives were ignored, such as poverty and the ongoing legacy of colonization, while the notion of restorative justice, disconnected from the needs of the women, was hailed in groups. When describing their methodology, Cunliffe and Cameron noted the importance of examining texts, specifically legal texts, which act to construct lived experiences within legal cases:

> In the face of an occasionally overwhelming emphasis on discursive constructions of subject identity within criminal law, we retain a sense that the people who participate in criminal cases have a life outside the textual record of their time in court. Our goal is to find traces of this life within the textual record, to think about how the textual record is incomplete, and to explore what this incompleteness reflects about criminal courts' priorities (2007, p. 3).

In this instance, researchers conducting the institutional ethnographic inquiry examined the disjuncture between the lives of women and the criminal justice system. The study aimed to highlight how the institutional logic of legal institutions, which can be revealed through examining texts, is self-serving and out of sync with the realities of the lives of people it purports to protect. As will be further discussed in *Chapter 4: The amplification of penality*, legal scholars using institutional ethnography have also helped to reveal the construction of people into legal cases and how lived experiences are translated into a legal logic. This transformation objectifies marginalized people and erases the complexity and social context for the benefit of conceptual legal discourse (Beaman-Hall, 1996; Pence, 2001).

In terms of HIV activists' work with institutional ethnography, activist-researcher George Smith mobilized the standpoint of people living with HIV in Ontario as an analytical framework to examine access to anti-HIV treatment in the 1990s. George Smith used his experiences, his conversations with other activists, and his engagement with bureaucrats as forms of data (G. Smith, p. 29, in Campbell & Manicom, 1995). He conducted no formal interviews; instead, conversations served as a method for collecting data, and social relationships represented a way in which to analyze them. He approached people as experts in their own experience, and through people's knowledge and action Smith examined how various state institutions were not working together to adequately roll out desperately needed experimental anti-HIV medications. Activists assumed that public health institutions were not responding due to homophobia or AIDS-related stigma. Through this analysis, however, Smith found that the *politico-administrative regime* ideologically drove notions of HIV as a death sentence, meaning that no official government body was identified to fast-track treatment access and research for those who

needed it for survival. Rather, funding was solely allocated for palliative care (G. Smith, in Campbell & Manicom, 1995). His results outlined how ruling ideologies can result in forms of administrative violence. Thus, counter to what activists at the time assumed, inaction was not necessarily due to discrimination. This knowledge helped reframe activist strategies at the time to assist in developing the needed infrastructure.

In exploring the lives of people who are the targets of criminal law, researchers have mobilized institutional ethnography to understand how people's lives become framed, constrained, regulated, and organized through the external logic of the criminal justice system. For example, feminist social researcher Viviane Namaste (2005) mobilized institutional ethnography to examine the lives of transsexuals, a population highly targeted by the police and criminal justice institutions. Namaste's work demonstrates the productive role of institutional ethnography in helping to explore the lives of criminalized peoples:

> A focus on the criminalization of transsexuality is useful to better understand what transsexuals lived. But it is also productive in the development of a broader and institutional analysis of social life for transsexuals. What I mean by this is simple: through examining the criminalization of transsexuality, we can better comprehend how different institutions work to organize everyday life for transsexuals (p. 16).

The social organization of the everyday is a central focus of institutional ethnography, including how the everyday for certain people comes to be socially organized through the extralocal logic of institutions, such as criminal justice. Following a similar thread of analysis, feminist criminologists Megan Welsh and Valli Rajah (2014) examined the discharge practices for women incarcerated in California, following a federal mandate to the state to reduce the size of its prison population. By examining the ideological working of the criminal justice system, Welsh and Rajah revealed how conceptual practices were at odds with actual practices, and how the lives and needs of "crime-processed" women became organized and managed by extralocal institutions (p. 323). Upon discharge from prison, women had a range of needs and supports. But, through an institutional ethnographic approach, Welsh and Rajah brought into view the "conceptual practices of power" (Welsh & Rajah, p. 336) that systematically marginalized criminalized women from needed supports, resources, and services.

In terms of how the lives of criminalized people are organized by extralocal institutions, I turn to one particular inspirational project described in the article "Ideological practices and the management of emotions: The case of 'wife abusers'", by sociologist John McKendy (1992). Here, McKendy examines "ideological practices" he observed manifesting in a group treatment program for men who assaulted their spouses (p. 61). Using an institutional ethnographic approach, McKendy examined how men in the group were counselled by a psychologist and social work student to "stop externalizing blame" and "take responsibility for their actions" (p. 61). The group was run under feminist ideals but resulted in reinforcing sexist attitudes. According to McKendy's analysis, which he garnered through participating in the group, this process of "taking responsibility" meant excluding any social relational context, such as poverty, which could be interpreted as grounds for excusing, justifying, or minimizing their abuse. Within the group, the men were strongly encouraged to take on this official responsibilized discourse by the "expert" facilitators. As a result, the men had to "block out their emotion-laden experiences of constraint and powerlessness, and recognize themselves as fully rational, autonomous, and self-possessed agents" (p. 61). The experts who led the group constructed the men as "wife abusers" and, through an imposed ideological process, encouraged the men to evacuate the social and relational context of their experiences, thus leaving them with a reified sense of their "abusive behaviours" (p. 77). This project reveals how the practices of "experts" can shape conceptual knowledge about criminalized peoples, who must engage with a range of experts on a daily basis. Such research can aid an understanding for how criminalized people have been pathologized and responsibilized by criminal justice mental health experts in broader projects of mandated treatment, therapy, and "rehabilitation."

In undertaking an alternative criminology, a form of inquiry stemming from the analytical framework of marginalized and criminalized people's lives, the research projects I have briefly described were designed to reframe sociological inquiry towards an understanding of people's everyday experiences of the worlds they inhabit as a form of empirical knowledge. This methodology acts as an ontological and epistemological critique—a form of resistance to dominant ways of understanding, ways of knowing, and methods of conducting research (Smith, 1987, 1990, 1999, 2005). To do so, it operates by examining the disjuncture between the official conceptual forms of knowledge of institutions, texts, and experts—which act to regulate people's lives—and the unofficial and marginalized knowledge lived and embodied by people. Institutional ethnography aims to counter the reproduction of ongoing forms of imperial, epistemological, administrative, and material violence that certain people face daily. In institutional ethnography, people's disjuncture between their own

experiences and the ways in which they are conceptually known by institutions becomes the research question and the site of research (G. Smith, 1995). Thus, positioning Dorothy Smith's conception of "the everyday world as a problematic," and as George Smith further notes, such an approach forms a method of inquiry that examines external and ideological determinations about the internal (Smith, 1987; G. Smith, 1995, p. 24).

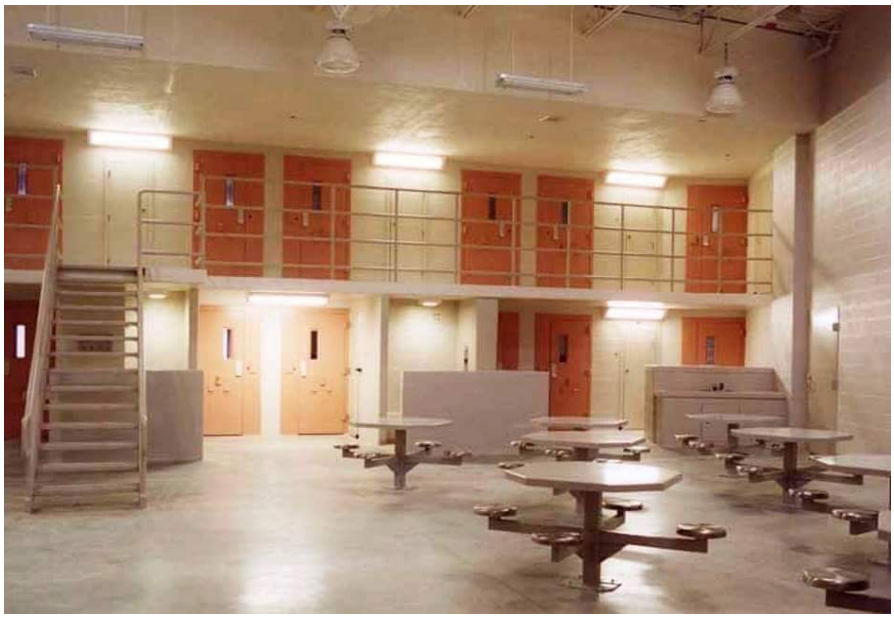


Figure I: Interior Photograph of a Correctional Facility Provided by a Research Participant.

Before moving forward, I include a photograph of the interior of a Canadian correctional facility a study participant shared with me (Figure 1). This interior was his daily lived reality for over four years. Those of us who are not incarcerated do not often see the inside of prisons. Inside this prison, the man who gave me these photos witnessed multiple violent beatings. He was routinely denied access to healthcare as a form of punishment by his guards. This facility is where his multiple requests to see a doctor were ripped up in his face because he was labelled as a violent rapist who had HIV. This is where he was denied access to his HIV medications. This is where he was when he missed important life events in his family on the outside, such as the birth of his grandson. Sharing these pictures is part of elaborating upon an ethos of inquiry and analysis attuned to the perspectives of people and their everyday lives. Developing an analysis from the perspectives of criminalized people in this way also helps to focus attention on their treatment. It also disarticulates people from their supposed crimes and the subsequent knowledge of institutions that frame them as risks and as criminals.

Although the details of my approach to inquiry are described in further detail in *Chapter 3: How to study the criminalization of HIV*, which outlines the specific methods, tactics and practices I employed in this research, I have mobilized an institutional ethnographic inquiry in order to resist approaches in which living subjects with agency are constructed into objects of analysis on paper. In doing so, I have resisted approaches where people's experiences become "cases" to be studied and where the most current and in vogue theories are tacked onto them as academic explanations. I have resisted approaches that render the experiences of people into an academic knowledge commodity from which researchers build forms of exclusive expertise and capital. I have resisted approaches where local knowledge becomes removed from its original location and disconnected from the lived reality of the people involved. I have also resisted approaches that force the framing of complex nuanced phenomena into abstractions disconnected from the social world. Conducting social inquiry as an act of resistance to these common approaches of mainstream sociology is rendered a promising possibility through institutional ethnography. Moving forward with my approach to developing knowledge, I employ a form of institutional ethnography that integrates the critical in the emancipatory ethos of critical social science. The results of this approach form a social inquiry that places the experiences of social actors at the centre of developing new knowledge: in this case, those who have experienced suffering due to being criminalized first-hand for HIV non-disclosure, transmission, and exposure.

In this section, I briefly described how the alternative form of feminist sociology, institutional ethnography, can productively allow social research to develop from the perspective of those who have lived the experience of criminalization. In doing so, I explored how Dorothy Smith's form of critical feminist sociology aspires to develop forms of knowledge that can help decentre dominant ways of knowing, thinking about, documenting, and remembering people. An institutional ethnography tracks the discourses of non-governmental organizations, as well as public health, psychiatric, media, legal, and criminalizing institutions to help develop a framework for understanding how people's daily lives are organized extralocally. Activists and researchers have historically mobilized this form of inquiry to critically interrogate the inner workings of criminal justice institutions as they act to organize the lives of marginalized peoples. Central to this approach is exploring the disjuncture between people's lived experiences and how they come to be known institutionally. Examining texts, such as legal documents, that construct people into cases represents one approach employed by institutional ethnographers. Because activists often also employ this approach, institutional ethnography is also concerned with actual forms of justice (distinct from administrative forms

produced via the criminal justice system), action, and emancipation from oppression, similar to the work of critical social scientists also described in this section.

In the next section, I explore how examining various forms of violence is intimately connected to my overall approach to developing new knowledge from the perspective of people who have been criminalized.

On violence 2.0

Violence is not an explanatory concept, but rather a material reality faced by people. In this section, I explore violence, how a range of philosophers and scholars have historically conceived of its role in society, and how—through various sociolegal processes—it has been rendered legal and illegal. In the first section below, I caution against a form of inquiry that mobilizes concepts solely for the sake of theory, and constructs cases to be studied as objects. I then discuss the concept of legal violence, and how it has been historically conceptualized by a range of philosophers and legal theorists. Looking at these conceptions, I propose an approach to exploring violence, both legal and extralegal, to achieve my epistemological objectives of examining the connection between the critique and notions of suffering, and to explore a form of institutional ethnographic inquiry that locates analysis in the social world of actors who are the targets of criminalization. Examining violence—the violence of criminalization—renders the suffering of social actors visible and something to contend with, ethically orienting this dissertation in the service of emancipation from the avoidable suffering of criminalized people.

Violence and the conceptual

To understand how I came to explore suffering and violence, I would like to first briefly turn to an analysis of social scientists' use of concepts as explanatory mechanisms in the examination of criminalizing HIV non-disclosure and exposure. Throughout my research, I engaged with and explored myriad concepts that elaborate upon the impact of criminalization processes on people's lives. Part of my job as an academic involves engaging with concepts. But one must be wary of exploring the conceptual only for the sake of the conceptual, as forms of epistemological violence could be inadvertently deployed. In my exploration of processes of inquiry, I examined many theories that I could have employed, which could have served to guide my project. For example, I could have oriented

my analysis around the notion of *moral panics* as developed by British sociologist Stanley Cohen, whose work *Folk devils and moral panics: The creation of mods and rockers* (1972) first presented the moral panic line of inquiry to explain how crimes are constructed out of social fears. Sociologists and criminologists have mobilized the notion of a moral panic to examine the criminalization of HIV exposure and non-disclosure, as well as the criminalization of similar socially taboo issues. For example, American social scientist Thomas Shevory (2004) discussed moral panics as a theoretical framework for analyzing a specific HIV non-disclosure case in New York State that was sensationalised in the media in the book *Notorious H.I.V.* Shevory, in what is likely the first sociological book on the criminalization of HIV, noted that he specifically aimed to build upon the work of Stanley Cohen. The case Shevory explored was widely publicized in the media, and constructed the man who was criminally charged as a monster and violent perpetrator who intentionally sought to infect women with HIV. The primary orientation of the text, building upon Cohen, is Shevory's promotion of the idea of "media panic"—arguing that the role of the media is central to driving moral panic (p. 3). Cindy Patton, the American sociologist who wrote one of the first books on AIDS, also mobilized Stanley Cohen's moral panic theory. She utilized the theory in the article "Outlaw territory: Criminality, neighborhoods, and the Edward Savitz case", for a special issue of the journal *Sexuality Research & Social Policy* (2005), which she coedited, titled "Reckless vectors: the infecting 'other' in HIV/AIDS law". In her article describing a high-profile criminal case of HIV exposure, Patton also sought to advance Cohen's theory by describing the flaws in its common application revealed through a post-structuralist analysis. Patton noted that the master narrative of society as a monolith that can be disrupted runs counter to postmodern theories, which view society as highly "fragmented" and "illusory" (p. 66). In her article, which specifically discusses the case of a man alleged to have exposed a teenager to HIV, Patton calls for a nuanced use of moral panic theory that understands local realties, both geographically and culturally, and accounts for specificity, not universalism. Canadian criminologist Jennifer M. Kilty, in her article "Dangerous liaisons, a tale of two cases: Constructing women accused of HIV/AIDS nondisclosure as threats to the (inter)national body politic", from her edited collection *Within the confines: Women and the law in Canada* (2014), also engages the moral panic theory. In this article, Kilty, using media reports and legal case documents, examined two cases in Canada in which women were criminally charged with aggravated sexual assault for allegedly not disclosing their HIV-positive status. Kilty's analysis aimed to "examine the ways in which these individuals are constituted as contemporary HIV-positive *folk devils* by both the courts and media discourse" (p. 278). She further notes, "Typical of moral panics, cases involving HIV non-disclosure and their adjunct 'folk devils' erupt suddenly in the news media

and are increasingly making national and international news headlines, which only further entrenches public fear of people living with HIV" (p. 287).

Kilty mobilizes the language of Stanley Cohen to assist in a sociological explanation of the social problem of criminalizing HIV non-disclosure and exposure. She explores and challenges details of the women's lives and histories, including allegations against them and problematic media and legal narratives constructed about their lives—all of which were steeped in HIV stigma. Ultimately, her work aimed to advance theoretical objectives. The real women, women who live and inhabit the world, are discussed as cases to be explored and the objects of analysis on paper. In each of these instances, Patton, Shevory, and Kilty employ theory developed on an external plane, disconnected from the lived realities of the people whose cases are discussed, and applied in a top-down fashion to explain the social problem at hand.

Furthermore, Roger Lancaster moves moral panic theory beyond the application to one specific case towards a broader social critique in the book *Sex panic and the punitive state* (2011), in which he discusses "sex panics." Different from the moral panic directed towards strictly sexual situations deemed socially taboo—such as sex crimes, pedophilia, child rape, underage sex, and other such variations—sex panics have become emblematic of the American "politics of fear," all the more special because they represent the kind of panic left untouched by liberals, since sex crimes are a particular type of crime that must be universally condemned (p. 14). Lancaster describes how these modern crime panics regarding sex often remain uncriticized by liberals and civil libertarians, further highlighting a risk-obsessed culture "addicted to panic," a result of a society with a current ruling system of punitive governance (p. 15).

In these applications of moral panic theory, specifically those conducted by Kilty, Patton, and Shevory involving traditional moral panic, media panic, or sex panic, a specific legal case based on a person's life experiences is mobilized as the object of knowledge. Moral panic theory as a conceptual tool is mobilized as an explanatory mechanism to explore what these cases can say about society. These cases, in turn, are based on the life of someone who experienced arrest, harassment by police and neighbours, wide privacy breaches by the media, and, then, incarceration. Each person's experiences were constructed into a legal case to help prosecute them, and then further constructed into an analytic case for academics to examine and to further develop a theoretical project, thereby advancing the notion of moral panic theory. Applying moral panic theory, while an interesting intellectual exercise and highly productive for theoretical endeavours, can potentially operate more in service of academic thought itself. There may be instances where advocacy and activist efforts have been informed but

such theoretical exercises, or where such theoretical endeavours are well connected to community or individual concerns. With this analysis, I do not intend to create or reinforce a false dichotomy between the aims of academia and criminalized people. However, while a sole application in the realm of the theoretical serves the construction and development of new conceptual tools, such work may risk disregarding a visceral connection to the actual and lived experiences by those who face criminalization first-hand. Scholars might overlook the material realities of criminalization when theory is the sole objective.

Moral panic theory is one of many I could have explored in my analysis. Following the trajectory of other scholars producing knowledge on the criminalization of HIV non-disclosure, exposure, and transmission, I could have discussed the criminalization of HIV in relation to the grand totalizing theory of the *risk society*, as elaborated by Ulrich Beck (1992) and applied to HIV criminalization by British sociologist Matthew Weait (2007). Alternatively, I could have analyzed this issue using the concept of *securitization* as developed by Buzan, Weaver, and de Wilde (1998), which Stephan Elbe (2006) applied to discuss the geopolitics of HIV, risk management, and national security in the context of the War on Terror, and which Jennifer M. Kilty (2015) also employed to address nation-states responding to HIV criminalization. But, as I explained in reference to those working to develop moral panic theory, simply addressing theoretical objectives would run counter to the goals of my project. Beyond the range of other theories or concepts I could have examined, the notion of violence emerged as the central organizing feature of my epistemological framework. As I previously mentioned, violence is not an explanatory concept, but, rather, a material reality people face. Explaining forms of violence serves those who are the targets of the processes of criminalization. While advancing theory is important for the development of philosophy and deep reflection on social problems, being attuned solely to theory is out of sync with my critical ethnographic approach. People face daily violence in the material world due to being institutionally marked as a criminal, as a violent perpetuator, and as a threat to the health of the public. The forms this violence takes are what this dissertation aims to explicate and to denaturalize.

Legal violence

I will now briefly examine how legal scholars, historians, and philosophers have empirically and theoretically sought to explore and understand violence. Violence is a material reality in human social life, enacted for a range of complex purposes that can be systematized and highly organized, or random

and arbitrary. In examining the complexities and nuances in enactments of violence, scholars have sought to explicate violence more broadly than simply a single blow from one individual person to another, and instead as a system intertwined with nation-states and state institutional forms of power and authority. Understanding the role of violence in the context of nation-states has helped explain how violence is used as an instrument serving to maintain forms of power and authority. In this section, I discuss the literature that explores this line of thought. As I outline, a diverse range of scholars have explored the relationship between state legal processes and violence. My exploration in this section is not intended to be exhaustive, but rather to bring forth the primary lines of analysis required when examining the relationship between the violence of law and how the nation-state functions. I seek to transpose my engagement with theory and resist engaging with theory for theory's sake. However, understanding how others have contended with violence in an academic context, in the realm of the theoretical, helps position my work historically and contextually as well as mobilize theories of violence into inquiries of the material and social worlds of people.

As I noted previously, political philosopher Hannah Arendt, in *On violence* (1969), stated that despite how common violence is in human life and the social world, it is not often singled out as an area of study (p. 8). In her analysis, Arendt aimed to generally account for violence on the plane of international relations and nation-state functions. The text then addresses how theorists across the political spectrum from left to right and everyone in between theoretically conceived of violence. Wanting to clarify an understanding of violence, Arendt referenced French political theorist Claude Sorel's claim in *Reflections on violence* (1961), whereby "the problems of violence still remain very obscure" (p. 60). While agreeing with that claim in many ways, Arendt clarified that a consensus among theorists exists such that in the context of nation-states violence is "the most flagrant manifestation of power" (1969, p. 35). Arendt also relied on sociologist Max Weber, who stated that "the rule of men over men [is] based on the means of legitimate, that is allegedly legitimate, violence" (p. 171), sociologist C. Wright Mills, who echoed that "all politics is a struggle for power, [and] the ultimate kind of power is violence" (p. 35), and Marxist revolutionary Leon Trotsky, who stated, "every state is based on violence" (p. 35). But, how are violence and power related? Is one constitutive of the other? In her analysis regarding the lacuna of theoretical engagement on the notion of violence, Arendt outlines a framework for understanding the nature of violence as distinct from power, authority, strength, and force in the context of disputes, uprisings, and wars.

To develop her framework, Arendt also relied upon the work of Frederick Engels. In *The origin of the family, private property and the state* (1884), Engels examined how the development of the modern

state intertwined with slavery and class oppression, and, to function, the state required violent institutions such as the police and the military to act as instruments to maintain a hold on power. Arendt extended this analysis; for her, although it is understood as an instrument, a tool of the political power of the state, violence also requires implements to be enacted. Arendt argued that the implement of violence only "appears when power is in jeopardy" (p. 56). The necessity of implements makes violence distinct from authority, strength, force, and power (p. 9). For Arendt, non-violence and violence are not opposites, as one might think; rather, she posited that power and violence are opposites. If power is absolute, there is no need for violence. Violence is enacted when power is under threat. Violence as an instrument needs justification, which stems from forms of authoritative power. Power alone needs no justification; but, according to Arendt, violence does, and power and violence rely on one another and are employed when their opposite is threatened (p. 54). Arendt's analysis demonstrates how violence is intimately and instrumentally connected to maintaining the power of the state. The state is the sole entity sanctioned with the role to enact legitimate forms of violence—justified through the maintenance of state power, as an instrument enacted when state power is threatened.

Anti-colonial philosopher Frantz Fanon extended this understanding of violence further in his book *The wretched of the earth* (1963). In the section of that book also titled "On violence" (p. 1), Fanon explored how state forms of legitimated violence are integral to the project of colonization. In the colonial process, Fanon outlined, the world is compartmentalized, and dichotomous ways of thinking and being are ontologically and epistemologically produced: such as the colonizer/colonized, the civilized/barbarian, the respectable/degenerate, the human/subhuman, and also to humanize/racialize (p. 3). Colonization creates dividing lines across these dichotomies, and people are divided into two different species: one that represents the white ruling class and the other representing the Indigenous underclass. Understanding one species as human and dominant and one as subhuman and subservient allows for the enactment of legitimated state violence against Indigenous people of colour. The classification process that constructs the categories of human and subhuman removes any moral or ethical dilemmas or problems for the colonizer. This classification is completed through legal processes, which constitute certain groups as legal persons, guarantee the rights of personhood, and position others as beyond legally safeguarded personhood. Violence can be enacted against those deemed subhuman, since they remain unprotected by the law. The colonized peoples become the object of violence rendered less than human so that those rendered legal persons can take hold of power in colonial states.

For Fanon, violence is also used by the white ruling class to dislocate Indigenous people of colour from their social and cultural frames of reference, and to destroy what they have known traditionally and historically, so as to produce a new means of falling under colonial rule aligned with the norms and customs of the colonizer. Here, the police and the military act as official agents of the colonizer, and law acts as the tools to legitimate colonial violence. This arrangement ensures that violence remains solely held by the colonial state administration. The rule of law is mobilized and enforced to uphold colonial order ensuring that the colonized are "kept under close scrutiny, and contained by rifle butts and napalm" (p. 4). The destruction of the colonized body becomes understood as a normal and legally justifiable process of colonization. Fanon further explained,

> We have seen how the government's agent uses the language of pure violence. The agent does not alleviate oppression or mask domination. He displays and demonstrates them with clear conscience of the law enforcer, and brings violence into the homes and minds of the colonized subject (p. 4).

The justification for violence partially relies on the colonizer classifying the subjects of violence as less than human, as objects. As philosopher Susan Sontag noted in *Regarding the pain of others* (2003), "violence turns anybody subjected to it into a thing" (p. 12). This statement emerged from her analysis of the role and function of violent photographic images of suffering in culture and society, including images of colonial violence. Fanon's analysis demonstrates that state-sanctioned violence is intimately connected to the colonial project, where the colonizer uses brute force, made legal to wield violence in the name of nation-building and empire.

One of the first to initiate this thread of analysis exploring the relationship between the law and violence was German Jewish philosopher Walter Benjamin. In *Critique of violence* (1921), Benjamin examined the relationship between how certain forms of violence are legally justified and made legal by the state, while others are not. Benjamin developed his critique post-World War One in Germany, where there had been a parliamentary breakdown, and where political turbulence was rife across Europe (Swiffen, 2018). Benjamin sought to understand how certain forms of violence are deemed legitimate by the state, while others are deemed illegitimate, as well as how lines are drawn between the two. To develop his critique, Benjamin noticed that previous justifications or evaluations of violence had been associated with the idea of violence as a means to an end, where violence may have been deemed just if the end was deemed just. Benjamin wanted to step outside of this way of looking at violence, as using a means/ends evaluation meant that it became impossible to evaluate violence in

principle, as though violence were some sort of raw material that defied interrogation (Swiffen, 2018).

As a result of moving beyond the means/ends evaluation of violence, Benjamin looked to the conditions of possibility for legal violence, and how violence functioned in relation to legal processes of the state. By legal violence, Benjamin meant sanctioned violence, and when talking about law, he was referring to European legal frameworks and tools (Swiffen, 2018). Benjamin elaborated that legal forms of violence served two functions: lawmaking and law-preserving (p. 241). Lawmaking violence represents the means resulting in new laws or a new legal system being put into place, whereas law-preserving violence is that harnessed to preserve the existence of the current legal system. In Benjamin's analysis, the state is the only official bearer of legitimate violence and the arbiter of forms of violence deemed legitimate and illegitimate. Violence enacted by individuals, such as vigilante forms of justice, could threaten the authority and operations of the legal system. Extrastate enactments of violence, such as forms of revolutionary violence, could undermine the authority of the state. In order to maintain the exclusivity of power and the legal system, individual and extrastate forms of violence are deemed illegitimate or are highly legally regulated (Benjamin, 1921, p. 238). Incarcerating someone prosecuted for a crime could be understood as law-preserving violence, where violence is enacted against an individual as a warning to others so as to preserve the current legal order. A settler-colonial power enacting violence on Indigenous peoples could be understood as law-making violence, where violent oppression is mobilized to institute a new colonial legal order, violently replacing Indigenous ways of knowing and practice.

However, in examine the relationship between lawmaking and law-preserving violence there can be revealed a historical decay of the legal order that is inherent within to European law's relationship to violence (Swiffen, 2018). When violence that was interpreted as lawmaking or law-persevering loses its legitimacy and specificity, the state must work to ward off unsanctioned violence that threatens the existing legal order (Swiffen, 2018). In such a context, the state must extinguish violence that threatens to be lawmaking in order to preserve the state's monopoly on law and sanctioned violence. To further understand this historical breakdown, Benjamin looked to the police, an institution that is present in every modern state, which operates with both means of lawmaking and law-preserving violence, as well as outside the two, noting, "It is lawmaking because its characteristic function is not the promulgation of laws, but the assertion of legal claims for any decree, and law-preserving, because it is at the disposal of these ends" (Benjamin, 1921, p. 243). Where no such legal tools or no clear legal situation exists, police intervention for "security reasons" is justified (p. 243). Here forms of legal violence continually work to their expand scope in a continual attempt to pre-empt the lawmaking

capacity of unsanctioned violence (Swiffen, 2018). Benjamin noted that the power held by the police is "formless, like its nowhere-tangible, all-pervasive, ghostly presence in the life of civilized states" (Benjamin, 1921, p. 243). This formless power can take place when legal order is threatened, when lawmaking and law-preserving violence come into close proximity (Swiffen, 2018). The formless power of police is deliberate and provides the police with the flexibility to intervene in the social life of people in a wide array of circumstances, including outside of the law itself. Such violent intervention is aimed at upholding existing legal frameworks it can reveal how such a system is rotten to the core. In such a context, law and brutal violence can become one, and an end unto itself. Such a system presents a trap, where violence is inventible, and where the monopoly on legal order relies on forms of violence that exists that very order.

Returning to Fanon and Arendt shows that these theories of violence are complementary. For example, in colonial nations, the empire exerts violence onto the colonized to take hold of power, where power is not yet held. Violence is mobilized when power has yet to be held. Violence is also mobilized to implement a new colonial legal system; here, violence serves a lawmaking function, and once that legal system is in place, violence is mobilized to sustain that system, thus carrying a law-preserving function.

But, in this history of legal violence, Arendt's and Benjamin's engagement is situated at a macrological theoretical scale. What about the material consequences of legal violence? Punishment serves as an example of a form of law-preserving violence that materially impacts the person and the body. Punishment is linked to the retributive and deterrent elements of the criminal justice system. The suspension of rights through incarceration and incapacitation represent forms of law-preserving violence through punishment aimed at deterring crime. Removal of such rights functions as a form of retribution for wrongdoing. These forms of law-preserving violence are enacted through the specifics of legal interpretation and judicial decision-making.

Legal scholar Robert Cover (1986) examined the material outcomes of legal violence in the article "Violence and the word", and, in doing so, famously noted, "legal interpretation takes place in a field of pain and death" (p. 1601). He further stated:

> A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur (p. 1601).

Accounting for legal processes, Cover contended, includes accounting for the violence enabled and enacted as a result. Cover further expanded upon the relationship between legal decisions and violence and on how legal processes make possible forms of violence through acts of legal interpretation and the sentencing of people deemed criminal offenders. The decisions of judges, such as sentencing a person to a period of incarceration, are decisions that enact legally sanctioned violence against the person classified as a criminal. Through judicial decisions, the criminal is not rendered a legally safeguarded person. Removing someone's autonomy; taking their life; limiting their right to liberty; taking away their children, family, or property; marking them a risk to the safety of others, as people under heightened surveillance—these are forms of legal violence that comprise the unmaking of a legally constituted person via the decisions of a judge. Those legal decisions are inseparable from the acts of violence that they enable—legal forms of violence—and they are targeted at deconstituting legal forms of personhood. Cover calls for a transparent understanding of violence as one of the outcomes of legal processes. In so doing, Cover's analysis results in positioning the legal processes of the criminal justice system as intimately connected to the violence they produce (Cover 1986).

Engaging with the notion of legal violence helps describe the relationship between law and violence, and the consequences of legal frameworks faced by people classified as criminals or as not legal persons. From Arendt (1970) to Fanon (1963), from Benjamin (1921) to Cover (1986), theorists demonstrate how state-sanctioned legal processes and violence are intimately linked. State violence becomes legal to sustain the authority of the legal system. The forms of violence in question aim to deconstitute legal forms of personhood so that violence can be justified and authority maintained. These varied analyses can create forms of violence that are legally sanctioned products of legal processes. But, what about forms of violence that are not necessarily legally sanctioned, and brought about as a product of legal processes, such as forms of violence enacted on people in legal grey areas? Or as violence faced by people classified as non-persons?

Legal forms of violence might bring about an entire array of other forms of violence—interpersonal, casual, informal, and institutional violence that is not necessarily legal, but is still justified, or enabled, through legal processes. How can we understand these forms of violence, as well as their constitutive relation to legal processes? In the section that follows, I address these questions by expanding upon the analytical framework and the standpoint of living in a negative relation to the law (Dayan, 2011). Understanding negative forms of personhood, and further expanding upon what Fanon helps set in motion through exploring colonial dichotomies serves to clarify what it means to be a subject of legal violence, and what legal violence means for the daily lives of people.

Living in a negative relation to the law

In this final section examining violence and the law, I look back to both my methodological approach of conducting a form of critical ethnographic inquiry and the work of Colin Dayan to outline an approach to examine violence from the perspectives of criminalized people. To explore the experiences of the civilly dead, Dayan posed the question, "What does it mean to live in a negative relation to the law?' (p. xii). In her book *The law is a white dog: How legal rituals make and unmake persons* (2011), Dayan explored a genealogy of what she calls negative forms of personhood, such as criminals, slaves, detainees, and animals. Negative forms of personhood are historically constituted through an array of legal processes. As such, some people are rendered civilly and socially dead under legal regimes. Some are considered a form of property, a subhuman category, one toward whom it is legal to perform types of violence. In particular, she examined how legal processes can constitute the civil and social death of the non-persons mentioned above. Dayan undertook an historical genealogy of the non-person created in law. Looking back to ancient common law, Dayan noted that three principal results of treason or felony exist: 1) the forfeiture of property to the sovereign; 2) the corruption of blood, which blocked the descent of property, cutting off inheritance and blood ties; and 3) the extinction of civil rights, resulting in an incapacity to perform any legal function (p. 44). Blood and property were regarded as metaphors constituting persons in civil society, and thus the corruption of blood and forfeiture of property came to represent "operative components of divestment" in personhood (p. 45). The legal process that classified a person as a criminal also resulted in deconstituting attributes of their personhood.

To robustly explore negative personhood, it is helpful to step back and first understand the concept of *person*. What exactly constitutes a person? For philosophers, this question is not one of biology (Esposito, 2012). Being alive in a biological sense does not solely constitute a person; rather, a person is composed of a series of attributes. For example, freedom of will and desire to act in certain ways—to be different, to work, to be an individual who makes choices, to make moral judgements, to speak for oneself—constitute personhood. In nation-states founded on liberal ideals, some of these attributes are enabled through legal frameworks, such as through a national constitution that guarantees the freedom of expression, speech, or mobility to its citizens. The person in this sense represents a liberal invention, and legal frameworks form part of what enable access to the mechanisms that facilitate and protect civil life for persons. In the legal context, claims for personhood are often

framed as claims for civilly enabled human rights. Thus, the language of human rights can be understood as the language of personhood. This language comprises a wide array of social processes, systems, ideas, and tools, including the law and legal frameworks. Many of these things that enable personhood are invisible to the eye, such as the legal frameworks guaranteeing the rights to live a life free from harm. They operate on an invisible theoretical plane above and around the natural biological attributes of the body. A lack of legal protections that enable personhood can mean a person is reduced solely to the biology of the human body, resembling the subhuman, an animal. Italian philosopher Roberto Esposito (2012) called this infrastructure that enables the attributes of personhood to be realized the "*dispositif* of the person", stating:

> Constituted in the intersection and productive tension between theatrical language, juridical weight, and theological dogma, the concept of person seems to incorporate a potentiality of meaning so dense and varied as to appear as something we cannot do without; this despite its various transformations in meaning (p. 18).

Esposito aimed to decode the dense and varied meanings that compose the person, and to do this he provided a philosophical and historical genealogy of the concept of personhood. Through this process, Esposito mobilized the notion of *dispositif* as a productive term to elaborate and understand the infrastructure of personhood. Esposito took the term *dispositif* from the work of philosophers Michel Foucault, Georgio Agamben, and Gilles Deleuze, who delved deeply into the philosophical discussion of the notion of the *dispositif*. My interest lies not in engaging with those discussions. For the purposes of this dissertation, it is important to only briefly touch upon Esposito's conclusions. For Esposito, the *dispositif* represents the complex invisible arrangement of ideas, social processes, and tools that separate the human from the animal. Liberalism understands persons as those with free will and determination, features of subjectivity denied to animals. This conception actively rejects the human body as solely viewed as an object or thing. The *dispositif* of the person is what enables human beings to become embodied subjects and dispose their animal selves. The process of "de-animalization" is what produces subjectivity and the range of social processes, systems, ideas, and tools enabling the subject to assert forms of freedom, individuality, and self-determination, which thus constitute them as a person (p. 22). The logical outcome of Esposito's argument is that a person, when rendered civilly dead without the legal infrastructure of personhood, can be treated as a non-person, as an animal.

For Esposito, the *dispositif* of the person presents a trap, one inherent in liberal forms of politics. The production of personhood also produces the negative: the non-person or animal. Legal tools, by

defining positive personhood, also result in defining the opposite. In defining the human rights of certain subjects, rights language continually negatively constitutes non-rights. As Esposito noted, "the person not only includes its own proper negative within it, but constantly reproduces the negative" (p. 24). Inherent in the notion of a person is the non-person, when a subject becomes less of a person and their access to self-determination and autonomy are taken away. Forms of liberal politics that emerge from this process include, for example, the safeguarding of rights of certain persons predicated on the suspension of the rights of others. The suspension of rights to personhood for the risky, guilty, and criminal are justified as upholding the rights and protections of the innocent and victimized. The citizen, then, has access to civil life as a protected person, while the non-citizen lives in precarity and is civilly dead. Esposito presents this as an unresolvable conflict and inherent problem within liberalism.

I now return to Colin Dayan's question: What does it mean to live in a negative relation to the law, to live life as a non-person? Living in a negative relation to the law can render one less of a legal person with codified rights, less of a person who is in need of protection from the law, and instead an object of risk, one that legally constituted persons are to be protected from—through forms of control, surveillance, coercion, and incapacitation. Living in a negative relation to the law can be an experience of violence. The notion of living in a negative relation to the law is productive for understanding violence in the context of the legal processes and for developing knowledge from the standpoint of life in this negative relation. Answering Colin Dayan's question represents my primary objective in this dissertation. Returning to the notion of standpoint developed by feminist qualitative researchers, I conducted my project from the standpoint of people who live their lives in a negative relation to the law. As I noted previously, the notion of standpoint dispenses any claims for objectivity, placing the researcher in a position to robustly recognize the subject's world, from which forms of oppression can be explicated from the perspective of those who have lived it. I employ living in a negative relation to the law as the standpoint for examining the criminalization of HIV non-disclosure, transmission, and exposure.

Examining the process of criminalization from the perspective of those who are criminalized moves the analysis beyond a simple theoretical object of inquiry, instead attending to the material, violent impact of criminalization. Through the analytical framework of living in a negative relation to the law, I can explore the experiences of those classified as criminals and deconstituted as legally safeguarded persons. From this perspective, I can disarticulate people from their labelled narrative of criminality, and speak to the microphysics and material consequences of legal violence, as well as to

the informal and interpersonal forms of daily violence resulting from being subjected to legal violence. Through this analytical framework, I can develop an understanding of how legal violence orders the lives of people made criminal by certain laws. Furthermore, I can examine what forms of extralegal violence, or violence that exists within legal grey areas, these people must also contend with as a result of being the subjects of legal violence. In the context of criminalization, a focus on forms of violence ensures a ground-up social inquiry from the location of the experience of social actors whose personhood was deconstituted under a legal regime.

To summarize, I have explored in this section why a focus on violence is necessary when conducting a critical ethnographic inquiry on developing knowledge from the perspective of criminalized people. I also considered how legal scholars, historians, and philosophers have empirically and theoretically examined and understood violence in relation to legal practices and processes. To do so, I discussed how forms of state violence are rendered legal in order to maintain the legal system, while individualized forms of violence, beyond those of the state, are rendered illegal. Violence is an inherent component of legal processes, which can constitute and deconstitute persons, since the decisions of legal actors can enact forms of violence aimed at deconstituting personhood. The person as we know it is a concept composed partially of legal instruments that enable the realization of an individual liberal subjectivity. Those rendered non-persons can be subjected to legal forms of violence, because their non-personhood means their liberal subjectivity is deconstituted and they are no longer civilly protected. Forms of violence made legal by the state may enable an entire array of other forms of violence that exist in a grey area, or are extralegal, but which have been constituted through legal violence. Furthermore, I outlined how I mobilize Colin Dayan's conception of living in a negative relation to the law as the standpoint from which to conduct a critical ethnographic inquiry of the criminalized. This standpoint enables an analysis that comes from the perspective of criminalized people and explores the material ways in which criminalized people's lives are organized in relation to legal violence. This approach aligns with my critical ethnographic approach, aiming to ensure an orientation towards the suffering of social actors, and towards a form of ethnography conducted from the social worlds of people who have experienced criminalization.

In the next section, I outline the notion of *bearing witness* as the last element of this chapter's focus on developing knowledge from the perspective of the lives of people subjected to the processes of criminalization. What does it mean to bear witness to the personal accounts of violence and suffering of criminalized people? The following section elaborates this subjective position and the duty of bearing witness as a critical ethnographic researcher.

Bearing witness

In this final section, I address the notion of bearing witness, and what it can productively make possible for those undertaking inquiries from the position of personal accounts of violence and the suffering of criminalized people. I aim here to underline the notion of bearing witness as central to the critical ethnographic project I elaborated in this chapter. I understand the critical researcher's role as bearing witness to suffering as an active subject with ethical duties. If I deem the results of criminalizing people living with HIV in relation to non-disclosure, transmission, and exposure as unjust, I must move beyond the role of observer, documenter, and mere collector of data. Aligned with Sayer's call for a critical social science that is ethically assertive, I situate my work and my position in the construction of knowledge in this context. Here, the notion of bearing witness becomes productive, orienting attention towards the ethical duties of the critical ethnographic researcher. In this section, I first outline how some theorists contend with the notion of bearing witness, including some conceptual gaps presented by the notion of bearing witness. Then, I outline my conception of critical social science research as an act of bearing witness relevant to the project of a critical ethnographic inquiry of criminalized people.

Bearing witness is a relational concept, where witness is defined in relation to a social experience, often one of violence. The act of bearing witness is commonly understood as leading to testimony provided by those who witnessed first-hand accounts of heinous acts of extreme violence and political injustice and abuse. Providing testimony is the act of sharing a personal account of past acts of violence, suffering, and tyranny in a forum where the speech is understood as a form of historical memory. Providing testimony through a personal account of surviving violence aims to prevent future tyranny, functioning as cultural memory, and to engage in a politics of atonement (Krämer & Weigel, 2017). Testimony then aims to make known what others could not know, so as to prevent past violence from happening again. The act of testimonial rhetoric is intended to communicate more than just the literal meaning of the words, to participate as a conscious action, to share a memory of a past experience of extreme violence or political injustice in order to prevent future instances from ever taking place again.

Italian philosopher Giorgio Agamben (1998) examined the notion of bearing witness through his work on the Holocaust, entitled *Remnants of Auschwitz: the witness and the archive*. In that work, Agamben looks at bearing witness as an ethical reaction to "biopolitical subjection" (Mills, 2003, p. 1),

where former legal persons were deconstituted and reduced to mere human bodies. Agamben argues for a form of testimony based on witness accounts, where the human and inhuman collapse into one another through forms of systemic state violence. This represents a portion of Agamben's ongoing project to examine "bare life", where human subjects are reduced merely to their biological status through political processes (1995). In *Remnants of Auschwitz: the witness and the archive*, Agamben extends his research beyond examining conceptions of bare life and aims to reconsider "ethics in light of the political determination of life worth living" (Mills, 2003, p. 1). Thus, Agamben contends that testimony represents the act that can bring the human status back to those rendered non-human. The act of speaking testimony becomes an act of claiming one's humanity in the face of the inhumane.

But, Agabem sees a problematic paradox and impossibility in bearing witness. The true witnesses of the concentration camps during the Holocaust are dead. The dead cannot speak, they cannot provide testimony, and any witnesses that survived can only act as stand-ins or proxies (Agamben, 1998, p. 34). The paradox here is that the dead have no voice with which to speak and, therefore, can only provide a missing form of testimony, while surviving witnesses cannot speak to the actual experiences of the dead. As Agamben states:

> …it is impossible to bear witness from the inside of death, and there is no voice for the disappearance of voice—and from the outside—since the "outsider" is by definition excluded from the event (p. 35).

Bearing witness then becomes a task of speaking for those who cannot speak and acknowledging the impossibility of witnessing. Similar to the logic of Agamben's paradox, when asked about the future of prison ethnography at the recent 2017 International Law and Society Conference in Mexico City, feminist and critical criminologist Dawn Moore contended: "one can't truly do a prison ethnography unless one was a prisoner" (Moore, 2017). While not speaking specifically to the role of bearing witness, Moore, similar to Agamben, highlights a tension in the impossibility of knowing an experience from the position of an outsider. Can an ethnographic researcher truly speak to conditions inside a prison unless one has lived those conditions?[1] Can a witness to extreme deadly violence speak for the experiences of the dead? These two disparate questions hold within them a similar assumption: unless one has lived experiences first-hand, experiences that may render speaking impossible, because people

[1] I describe in greater the impossibility of knowing the prison setting as a social science researcher in *Chapter 3: Methods, or how to study HIV criminalization*, where I discuss my research methods and engagement with Correction Service Canada.

who lived those experiences can be denied voice through death or incarceration, it then becomes impossible to witness and speak testimony. No neat resolutions to these questions or the paradox Agamben proposes exist. But, this paradox helps us understand that bearing witness, and the voicing of testimony, must accompany an acknowledgment of the impossibility of ever truly knowing.

Furthermore, in terms of knowing and the notion of truth, post-structuralist theorists examining bearing witness have considered its impossibility. Due to a broad-based critique of epistemology and knowledge, post-structuralist analysis sees an endless trap in trying to speak to or claim a truth. As such, concern has emerged for the "unsayability" of bearing witness in the larger post-structuralist project of deconstructing regimes of truth (Krämer & Weigel, 2017, p. ix). While these conversations remain vital to the study of epistemology, they also remain difficult to resolve when attempting to present first-person narrative accounts of experiences in a qualitative form. To address this, it is helpful to return to Andrew Sayer, where instead of aiming to reveal a truth that is the truest, as a critical researcher one should instead aim to denaturalize forms of avoidable suffering. The work related to bearing witness and speaking testimony then focuses not on claiming a certain truth, but instead aims at speaking of experiences of violence and how that violence came about, so as to denaturalize the source of suffering. That is, bearing witness aims at rendering past experiences of avoidable violence and suffering as unnatural and unacceptable, such that the source of the violence becomes understood as contestable and open to change. However, questions contesting truth may still emerge. One could ask how we can trust accounts of violence and suffering as true. More specifically, how true are the accounts of violence presented in the chapters that follow in this dissertation? Mobilizing the analytical framework of the standpoint as discussed previously helps to engage with such questions. Developing knowledge from the standpoint of criminalized people is not an exercise in claiming an objective or universal truth. Conducting research from the place of the experience of criminalized people means trusting social actors who have lived those experiences to speak about their lives for themselves. The experiences presented in this dissertation, then, are based on specific people's knowledge of the world around them; those experiences represent one form of subjective truth, but do not claim to be the only truth. The experiences analyzed here in this dissertation, then, represent a form of testimony to help intervene in official and institutional ways of knowing, which served to marginalize and erase the knowledge of criminalized persons.

Additionally, given the impossibility of ever truly bearing witness, we must often rely on an outside observer to participate as a witness. But, with an outsider perspective, could a problem emerge related to exploitation, voyeurism, and objectification? Philosopher Susan Sontag addresses this

problem while asking a series of ethical questions regarding visual eyewitness testimony of suffering in her book *Regarding the pain of others* (2003). Sontag asks if bearing witness when viewing photography represents a form of exploitation if one is external to the experiences of violence. Sontag notes that photographic eyewitness accounts of war, atrocities, and state violence can render experiences of suffering into something that can be possessed, where the photographs become objects, which can act to objectify and become commodities (p. 81). Sontag further notes that there should be no assumption of a universal "we" as the viewer of such photographs who holds the same values, same understandings, or critiques of violence. With this assumption, Sontag asks what purpose these images serve or what the point of such images is. Do these pictures simply make us feel bad? Do they immobilize and desensitize us? Does viewing them make us better people (p. 92)? Or can viewing such images act as an initial spark to mobilize us into action (p. 102)? Sontag argues that we should not take for granted any assumption about the function of images of suffering and violence. Rather, how such images are presented and engaged with can help frame our ethical engagement with them.

Finally, Sontag asks, "What does it mean to protest suffering, as distinct from acknowledging it?" (2003, p. 40). This question implicates an ethical role for the observer who bears witness to objects of knowledge related to the suffering of social actors. Sontag's questions are vital for a project of critical ethnographic inquiry. When the source of knowledge we seek to capture as researchers relates to the trauma, pain, and suffering of social actors, a delicate balance exists between exploitation by turning people's experiences into objects of consumable knowledge and capturing experiences so as to assist in changing the conditions that produced that violence in the first place.

As a critical ethnographic researcher, the notion of bearing witness asserts and acknowledges my role as an active observer with ethical obligations. I take care in how I handle the complexity of the information I collect. The people with whom I worked engaged in this project because they wanted others to bear witness to what happened to them as a form of healing and justice. In many cases, when I interviewed people who had been criminalized for this project, I was the first person to whom many spoke about their experiences. I acted as a witness to their memory, as someone they could speak to about the injustices done to them. I do not wish to make any didactic illusions to the research process as emancipatory, as so often happens with forms of community-based and participatory research (Campbell & Gregor, 2008). But, in the context of critical research attuned to suffering, it is important to engage the ethics of bearing witness in order to bring an ethical dimension into this work—to acknowledge the social justice issues at hand and the potential use of the stories people shared with me for a broader social purpose other than simply for completing my doctorate. The only

claim I make in this section is that the process of collecting data can be understood as constituting an act of bearing witness to injustice, violence, and suffering.

I conclude this discussion with a focus on the experiences of violence faced by two people of colour living with HIV criminalized due to their alleged actions of not disclosing their HIV status. These represent the experiences of people who can no longer speak of their experiences; these people were deconstituted as legally safeguarded persons, living their lives in a negative relation to the law. These are experiences where the violence is marked by race. Many people living with HIV, especially those who are racialized, today in Canada often live in a negative relation to the law simply because they are HIV-positive. They can quite easily be placed in a tenuous relationship with the legally regarded notion of liberal personhood. Violence in these instances can be often obfuscated via forms of bureaucracy. At its most severe, living with HIV in a negative relation to the law means one's body can be disappeared by the state with impunity. Here, I refer specifically to the lives of H. Matthews and I. Williams.

Matthews, a 26-year-old Black man and newcomer to Canada, was convicted of two counts of aggravated sexual assault, one count of assault, and two other minor charges for not telling four women his HIV status before having sex with them. None of those women contracted HIV. He was sentenced to 40 months in prison. When he entered prison, his CD4 count was 560. While in prison, he reported a series of health issues to the staff and in less than a year his CD4 count fell to 160 and he lost 36 pounds. Despite seeing a number of medical experts, at no time over the course of his engagement with the criminal justice system was he put on any anti-HIV treatments despite being incarcerated because he potentially exposed others to HIV (Office of the Chief Coroner Ontario, 2008).

Matthews died of AIDS on 12 August 2007 in Central North Correctional Centre in Penetanguishene, Ontario, at 27 years old in an era and country where, due to the theoretical access to life-saving medications, dying of AIDS has been increasingly rendered a rare occurrence. Yet, he also died in a country known as a leading hot spot for criminalizing HIV non-disclosure. There was an inquest into Matthews' death. But in the Coroner's inquests into prison deaths in Canada, no one individual can be found culpable and, therefore, no specific individuals were held accountable for his death (Office of the Chief Coroner Ontario, 2008). The only reason information was released about his cause of death was because corrections staff were subpoenaed to testify at the inquest. Otherwise the Ministry of Corrections would not release any information about his death, despite repeated requests from Matthews's family and community organizations. Nine recommendations were made from the inquest intended to prevent future deaths, none of which have been implemented by the

Ministry of Corrections. The Coroner's report indicated that he died of "natural causes" (Office of the Chief Coroner Ontario, 2008).

Another life disappeared was that of I. Williams, who at 49 years old, was the first person sentenced after the 2012 Supreme Court's decision. This was the second conviction for the Black father, who was sentenced to four years and nine months, which he served in Warkworth Institution in Ontario. As a Trinidad-born permanent resident, he would be deported after completing his sentence. He pled guilty to charges of aggravated sexual assault, and HIV was not transmitted to any of the women involved in this case. At trial, Williams stated he was diagnosed with HIV in 1996, and had since been lonely and was shunned by his family and strangers alike as soon as they learned of his status. As reported by the *Toronto Sun*, he stated, "I feel very sorry for them people that I put that fear in them because I'm afraid, I'm afraid to be rejected. It is inhumane," he wept. "It's very cruel," he said to the judge (Mandel, 2012). He also told the court that convicting him and deporting him to Trinidad would be akin to a death sentence, because there he would not receive the healthcare he needed.

On 1 October 2013, Williams died while in custody. Informal reports from people close to Williams indicated that he had been trying to get medical care for an injury for more than six days before he was found dead due to an untreated abscess on his leg (my research notes, 2013). No details were released from Corrections, and there was no inquest into his death.

I present knowledge of their suffering, of legal and extralegal violence, and the everyday violence experienced by Matthews and Williams to denaturalize this violence, to not accept violence as a normal state, and to render it as something we must contend with and not view simply as fate. I do not claim to know what these men lived. That is the impossibility of ever truly knowing, of ever truly bearing witness. Rather, I seek to make it known that the suffering of these Black men and their subsequent deaths were neither natural nor normal occurrences. Their racialized bodies were rendered disposable due to being Black, HIV-positive, and having been prosecuted as criminals. I did not know these men, and I did not interview them for this dissertation. They are not able to speak for themselves, and I do not see my role as speaking on their behalf. But, also, I do not aim to mobilize their experiences into a case to be analyzed in relation to academic theory. In answering Andrew Sayer's call to move beyond a too-timid assertion of an ethical orientation in social inquiry, the critical ethnographic inquiry that I embarked upon means that the researcher is placed in the position of an active subject with ethical duties. Through an exploration that mobilizes a critical ethnography, I hope I am better positioned to deem the experiences faced by men such as Matthews and Williams as unacceptable. Thus, I hope to

contribute to critiques challenging the administration of punishment in Canadian society, to bear witness and call for action, and to form the political basis of a life worth living—one flourishing—for people who have been subject to criminalization in relation to an alleged HIV non-disclosure, exposure, or transmission.

Chapter 2: Histories of legal violence venereal disease control in the Dominion of Canada

When and how does coercion turn punitive in public health practice?

—Trevor Hoppe, *Punishing disease: HIV and the criminalization of sickness*, p. 20

To begin this chapter, I would like to reflect on a letter written in 1920 by a young Eleanor Pattison, who at 18-years-old, had been incarcerated indefinitely at the Fort Saskatchewan Gaol, the local prison, known for its violence and harsh conditions, on the outskirts of Edmonton, which is today known as the Fort Saskatchewan Correctional Centre. The letter was written to Police Magistrate, Mrs. Emily Ferguson Murphy, who had sentenced Pattison to incarceration a few months prior. Murphy had the letter copied letter and on the top right-hand corner is written "Copy of letter from ~~Eleanor Pattison~~" Fort Saskatchewan. Her name is crossed out by hand with black and handwritten in red it states "Committed for syphilis and gonorrhea" (Murphy 1920).

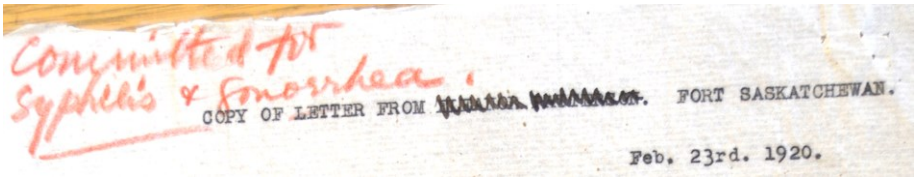


Figure II: Copy of Letter From Eleanor Pattison to Emily Murphy (1920).

In the letter Pattison asks Murphy to ask the Red Cross to send her yarn to help in the sewing of her crocheted quilt, she discusses the pain and suffering of her treatment, as well as the ostracization of her family due to social stigma surrounding venereal disease:

> "Mrs. Murphy, when are you coming to see us? When you see me I think you will not think that I am the same girl for I am getting fat and healthy. My voice is back and the spots are dying off, but I still keep to my promise about taking my treatments. They are painful, but as long as I can get better I do not care for the pain I have to go through. I wonder if you would look my sister again for me as I have written to her twice and I do not get any answer from her and it is worrying me about her, for it seems hard to see the other girls getting mail from their people and me not get any. It does not take too much time to write, and if I heard from her once a week it would not be so lonely. But no, they all know that I am here so they don't care what happens to me now that I am down and out; but they find out that I am not the same girl as when I was out, for I have turned over a new leaf and when I am ready to go out I would like you if you would get me a nice place to go to so that I will not have to go back to my old ways, as I am trying to forget all my old friends and when I get out get new ones and good ones." (Pattison 1920).

The copy of the letter was made so that Murphy could forward it to a Dr. Gordon Bates, a renowned champion of the nascent project of public health across Canada. Murphy used the letter to highlight her professed success of their collaborative project to control venereal disease in the province of Alberta. Appended to Pattison's personal letter, Murphy wrote to Dr. Bates that due to Pattison's diagnosis and incarceration, her mother and sister had disowned her because of the social stigma of having venereal disease. She further notes the plan of incarcerating young women was a great success, "I thought you might be interested to know that the girls are appreciating what are being done for them. I have committed five already" (Murphy 1920).

How did Pattison come to be incarcerated indefinitely solely for having these two sexually transmitted infections? What led to this practice of incarcerating young women in this manner? How many others were there similar to Pattison? And why was it regarded as a success by Police Magistrate Emily Murphy? Finally, how did what happen in the past relate to what is happening at this particular time with the criminalization of people living with HIV? These questions will be addressed throughout this chapter.

I study this past of Eleanor Pattison as an approach to provide insight into the social organization of criminalizing HIV non-disclosure and exposure in the contemporary moment. To do

so, I will elaborate a specific history of certain coercive and punitive venereal disease[2] control practices in the early days of the Dominion of Canada—practices that resulted in myriad forms of violence targeting, criminalizing, and classifying certain people. As I will explore in this chapter, I employ the *history of the present* as a methodological approach, which acts as a contextual component within my broader critical ethnographic research project. The latter, as introduced in the previous chapter, examines forms of violence experienced by people in Canada who have been criminalized due to allegedly not disclosing their HIV status to their sex partners. This chapter comprises methodological considerations on the study of history, findings from archival research that I conducted in examining my research questions, and engagement with conceptual notions surrounding the governance of life for political means. This analysis here is based on archival research which involved examining past legal tools and literature, media articles, grey literature, and personal correspondence. Archival research was conducted at multiple libraries, online, and at the National Archives of Canada. While not always possible, I strived to ground this chapter in primary sources, specifically those related to first-hand experiences of criminalization or coercion. Through the history of the present approach outlined in this chapter, I aim to elaborate how people with communicable diseases, specifically those related to sex and sexuality, have historically come to be understood in relation to the law and have been subject to coercive and punitive forms of legal and extralegal violence. It becomes apparent throughout this analysis that the criminal justice system and public health institutions were deeply intertwined in developing responses to venereal disease. Mobilizing history is one tool, among many, that critical ethnographic researchers can use to help interrogate and denaturalize certain social practices. There is no one prescriptive way to mobilize a history of the present, and so I gesture toward the ethos of the approach to explore history, while not wanting to present "the" history but instead presenting specific small, discrete, microhistories. This approach can help, through reflecting back to look toward the present, to analytically examine the practices of criminalization in the contemporary moment.

Knowledge about who is socially understood as criminal, and how we as a society respond to certain types of criminals with forms of coercion and punishment, is reified over time, dislocated or obscured from its origins and context. This reification is visible when certain violent practices, such as incarceration, come to be widely understood as natural or normal actions. Through interrogating the historical construction of current practices of crime and disease control, a history of the present

[2] I employ the term "venereal disease" throughout this chapter, that was commonplace at the beginning of the 20th century to describe a range of sexually transmitted infections, most often gonorrhoea, syphilis, and herpes. While language has shifted today, the use of the term is intended to help situate this analysis in the past.

approach can help reverse the temporal process of reification. In this chapter that looks to the past, I aim to ensure that criminalizing HIV non-disclosure and exposure must not be understood as a normal or natural practice, nor examined in a vacuum or silo. It is not to be regarded as an issue that arose from nowhere in particular or as some kind of blip, anomaly, or backfiring of the workings of the criminal justice system. Nor is the approach to criminalizing people with a disease a distinct issue that emerged solely during the AIDS epidemic. Rather, as a consequence of the history of the present approach that I employ in this chapter, I am able to outline how criminalizing certain diseases in Canada is a practice that was constituted historically. Specifically, it was created through the deliberate actions of early institutions and actors within the newly formed white settler-colonial nation of the Dominion of Canada.

As I employ a history of the present approach in this chapter, I explore the historical constitution of conceptions of illegality and criminality—including how, over the course of history, the lives of people with certain stigmatized diseases came to be understood as in need of regulation to protect the health of the public. This analysis presented here helps to develop an understanding of how the liberal legal architecture of personhood in Canadian society was historically constituted in part through the criminalization of sex work, people of colour, and people with venereal disease. A key aspect outlined in this chapter is the gendered dimension of coercive and punitive legal practices aimed at controlling venereal disease, which often disproportionately targeted women. In the historical context of the Dominion of Canada, this disproportionate gendered targeting was directed toward women deemed vagrant, a classification used to target those who were engaged in the sex trade— a class of settler society understood by their very nature as risks to the health of the colonial project and thus as criminal. In this context, women from the upper classes were often leaders in the campaigns for the criminalization of poor, Indigenous, and non-white immigrant women. In this historical context, criminality and disease were often linked, and it was not a specific moral wrong that a woman had done that rendered her a criminal but, rather, who she was, what colour her skin was, or what she had within her body, that turned her into a risk to the respectable general public.

Furthermore, to explore what violence means I must examine the specific historical practices that led to enabling enactments of formal and informal violence both in the criminal justice system and also from public health institutions. Since public health's inception as a form of population medicine, coercive—and sometimes punitive—legislation or practices have been central components in its toolbox. As will be elaborated, these legal authoritarian approaches emerge when other forms of liberal governance come to be ineffective. Over time, public health actors and institutions have relied

heavily on authoritarian coercive and punitive interventions, legislation, and measures. They have used the latter to surveil, classify, report, quarantine, and incarcerate populations deemed deviant, diseased, and risky. But in discussing these varied approaches it will be important to distance coercion from punishment, as they are not one and the same. As noted by sociologist Trevor Hoppe in *Punishing disease: HIV and the criminalization of sickness* (2018), as a social response to a person's alleged moral wrongdoing, punishment is linked to the redemptive aspect of criminal law. To be punished by the state, a person must have committed some form of offence against established laws. Coercion, in the context of laws targeting public health, is aimed at restricting a person or group of people's liberties for the sake of the wider public. But as noted by Hoppe, although "on paper this distinction between coercion and punishment appears straightforward, in practice it can be muddied" (2018, p. 19). In the case of coercive legislation, detention is based not on a person's criminal intent or liability, but rather, on their mental capacity or present disorder in their body, such as the presence of a communicable venereal disease. But the experience of detention can be socially understood as punitive based on how diseases have been socially and morally signified, despite the intentions of public health actors. Coercive measures intended to control the movement of people with communicable diseases in some cases may also become a form of punishment, especially when people with a specific disease are thought to be morally repugnant. In his sociological account of the historical development of laws criminalizing HIV in the United States, Hoppe (2018) asked the questions, "When and how does coercion turn punitive in public health practice?" (p. 20). I will explore this question throughout this chapter as I look at the historical development of venereal disease regulation in the relatively newly formed settler-colonial Dominion of Canada.

In the early days of the response to venereal disease, the Canadian criminal justice system and the nascent project of public health and hygiene were intimately linked with each other and with the project of colonization. The two systems—criminal justice and public health—and the collection of institutions that composed the two relied on each other. They were integrated for specific purposes, and operated using simultaneously different and similar logics and practices. The distinction between coercive practices and punishment practices in public health could easily become rendered a grey area. When the line between coercion and punishment is blurred, forms of violence emerge, as punishment is intended as a form of violence against criminalized people. Studying the violence faced by criminalized people means paying attention to the grey areas between coercion and punishment. As this chapter elaborates, public health actors and criminal justice actors operated separately and also in

tandem to get a hold of the growing social problem of venereal disease epidemics attacking the population of the Dominion.

This chapter will flow in the following fashion: First, I will introduce a series of methodological considerations for the practice of undertaking a history of the present. Second, I will briefly trace findings from my archival research on the emergence of certain coercive and punitive public health measures to control venereal disease—disproportionately targeting women—that emerged in the early days of the Dominion of Canada. This will include outlining some conceptual tools such as *biopolitics*, *governmentality*, and *surveillance medicine*, which can be of service in the critical study of criminalized people. I conclude the chapter by coming back to engage once again with the methodological considerations, and I will mobilize these to critically reflect on the findings from the archival research. The primary concern regarding a history of the present is analytical. In this chapter, I outline my approach to a history of the present not to didactically assert the truths of grand history, but instead to examine past moments in history as an analytic: one that helps to understand and explore governance practices in the contemporary moment. Thus, what follows is not aimed to develop a comprehensive historical narrative or chronological record. Rather, the histories that follow provide an analytical frame through which to critically understand and examine the present practices surrounding the criminalization of HIV non-disclosure, exposure, and transmission. Specifically, this examination aims to centre the experiences of and consequences for those who are classified, surveilled, detained, and punished under legal practices—people who must live their lives in a negative relation to the law.

Histories of the present

A history of the present method has been widely mobilized by scholars studying the social organization of punishment, social control, health issues, and crime governance (Foucault, 1995; Garland, 2001; Simon, 2007; Valverde, 2008). Inspired by Nietzsche's genealogical approach, Michel Foucault elaborated on this ethos of inquiry, where he did not seek to establish a true and accurate account of exactly how things were, or what took place in the past. Genealogy for Foucault was a process of mobilizing history in the service of critical analysis and philosophy through a detailed empirical examination of microhistories examining how certain truths come to be known as true. The project at hand becomes one of proposing not grand histories or master narratives, but rather a series of "philosophical fragments put to work in a historical field of problems" (Foucault, 1991, p. 74).

Nietzsche opposed monumental forms of history, which primarily aimed to reveal and uncover so-called truths, teleologies, or origins (Foucault, 2006, p. 370). In the late 1960s and into the mid-1970s, some actors in the academy turned away from all-encompassing, global, and totalizing theories, and shifted instead toward the "proliferating criticizability of things, institutions, practices and discourses" (Foucault, 2003, p. 6). Today this shift is noted as the time of the post-structuralist turn. Offering what was a paradigm shift for some, Foucault, following Nietzsche, recognized that the process of documenting history had posed problems politically, such as sovereign powers mobilizing "truths" and notions of progress as political strategies to maintain power (Foucault, 2003). Foucault was motivated to counter the instrumentalization of history for the maintenance of political regimes. Foucault further borrowed from Nietzsche and turned his focus toward power struggles: struggles for the control of truth, struggles over knowledge, and also violent struggles including various forms of war (Foucault, 2003; Valverde, 2007). Sociolegal scholar Mariana Valverde (2007), who has written widely on the work of Foucault, has noted that he took seriously Nietzsche's call to trace history through studying power struggles, which consequently had radical impacts on the outcomes of his work. For example, most historians tended to believe that wars were what needed examination and explanation, seeing legality and peace as normal, and thus not in need of any interrogation. Foucault, on the other hand, saw war and struggle as a default normal condition throughout history, with the established regimes of legality as what needed explanation and interrogation (Valverde, 2007). With this aim to decentre power and known truths, historians of the present can assert an ethical orientation, and the method can assist in the broader project of denaturalizing forms of violence that are historically rendered legal by the state.

Examining what have come to be unquestioned truths today, such as the knowledge used to establish how and why certain groups of people are punished in contemporary society, is what can be achieved through a detailed and empirical analysis of the history of the present. A history of the present is not focussed on general or common knowledge, but turns its focus toward a specific range of specific practices. As noted by sociologist Lorna Weir, a history of the present "constructs its theoretical object as the analysis of rare, truthful discourses imbricated in power relations" and examines the "powers that elicit, support and extend truthful statements" (2006, p. 10). Another historian of the present, Nikolas Rose (1999), has noted that the approach "encourages an attention to the humble, the mundane, the little shifts in our ways of thinking and understanding, the small and contingent struggles, tensions and negotiations that give rise to something new and unexpected" (1999, p. 11). Rather than viewing any particular moment as an epoch or total history of sorts, a historian of the present should understand both past and present as "an array of problems and questions" (Rose, 1999, p. 11). The

project of examining a history of the present is opposed to talking about the past in ways that create connections between monolithic periods that are neatly joined together. Rather, in this form of archival analysis, I can understand how history is shaped through power relations and is negotiated and organized politically, economically, socially, and culturally. This objective follows a similar approach to Andrew Sayer's (2009) call for critical social science research to denaturalize forms of avoidable suffering faced by social actors, as it aims to denaturalize truths that are mobilized for legal forms of population control. The approach to studying such histories is a modest one that does not make grand didactic assertions, but rather that can assist in analytically and philosophically interrogating how and why we have come to be where we are today.

As I mentioned previously, there is no one prescribed approach to undertaking a history of the present. However, there are common threads of analysis and themes that can be traced through the work of historians of the present, such as mobilizing history as a form of critique, and analysing the governance of life processes. In the following section, I briefly introduce two themes: *history as critique* and the *government of the living*, as they will also be engaged and discussed throughout the rest of the chapter, along with a brief discussion on the role of texts and an analysis of institutions.

History as critique

A primary function of the history of the present is for the microhistories presented to act as analytical tools mobilized to question contemporary practices that are organized in relation to certain truths. In doing so, the researcher can come to understand that what is known as truth is not natural, or something left up to fate, but rather contingent on historical and social processes. The outcome of this understanding is that all truths can be subject to change, contestation, and critique. In a context of scholars working on issues related to law and society, the object at hand for critical scholars mobilizing a history of the present approach has been to step outside of the predetermined categories provided through mainstream sociology and its *regime of veridiction* to critically interrogate how truths about law, crime, justice, and punishment come to be known and how they can be subject to contestation and change (Foucault, 2008). Foucault has defined the term regime of veridiction as "the set of rules enabling one to establish which statements in a given discourse can be described as true or false" (2008, p. 35). Acknowledging that all truths are contingent, relational, and produced through forms of power, Foucault advocated for a critical and reflective practice that would examine how certain truths came to be knowable and privileged. With an approach to examining the system of truths, which enables what is possible to be known at specific points in time, Foucault aimed to move

beyond the merely descriptive to a deeper plane of analysis. To this end, he called for the researcher to step outside of the regime of truth altogether, so as to examine the architecture propping it up as a veridiction and to understand *how* and *why* systems of truth came to be in the first place. This process is also one of denaturalization, where the role of critical research becomes one of not competing for the truest form of truth, but rather of examining the conditions that produced truths in the first place. At a fundamental level, through aiming to open up regimes of truth to interrogation, Foucault's genealogical work was a project of political resistance and social critique:

> Critique doesn't have to have a premise of a deduction which concludes: this is then what needs to be done. It should be an instrument for those who fight, those who resist and refuse what is. Its use should be in processes of conflict and confrontation, essays in refusal. It doesn't have to lay down the law for the law. It isn't a stage in a programming. It is a challenge directed to what is. (Foucault, 1991, p. 84)

Critical sociolegal studies scholars have adopted this ethos toward interrogating how legal truths are social, political, and economic discursive constructions that can be applied to regulate aspects of social life at specific moments in time so as to denaturalize the processes of crime governance and control (Garland, 2001; Rose & Valverde, 2008; Simon, 2007). In criminologist David Garland's (2001) book *Culture of control: Crime and social order in contemporary society*, in which he examines the practices of punishment and social order in contemporary Western society, the author has used a history of the present approach, as it helped him to "understand the historical conditions of existence upon which contemporary practices depend, particularly those that seem puzzling and unsettling" (p. 2). In the book, Garland has provided a history of the welfare and criminal justice state, theories of penal and social change, and a detailed account of shifts in criminal justice governance and punishment administration in late modern Western societies. The histories in his text aim to provide an analytical frame through which to critically understand and examine the contemporary practices of crime control and punishment.

My work follows the critical trajectory of historians of the present by questioning the commonly unquestioned. A historical examination of how and why systems of truth come to enact forms of violence against people—marking them as criminalized or diseased and in need of regulation or punishment—is how a history of the present approach can assist in contributing toward my approach to a critical ethnographic inquiry. This historical approach can also put into question legal reform approaches, which can regard the criminalization of HIV non-disclosure as a doctrinal anomaly

that, if remedied in specific legal texts, would swiftly be resolved. A history of the present approach, instead, can help critically put into question the entire criminal justice and public health enterprise.

In this section, I have outlined the role that historians of the present play as critical scholars. This critical approach of historians of the present is aligned with a critical ethnographic inquiry, which I previously explored in *Chapter 1*, where I aim to ensure that the research process is an act of bearing witness to criminalized people's suffering from violence. In the following section, I will address historians of the present's pursuit to better understand processes of liberal forms of governance over human life to better help understand how the lives of people living with venereal diseases were historically controlled, regulated, and criminalized.

Government of the living

Historians of the present in general have focussed on life and death practices of governance. Weir, in her work *Pregnancy risk and biopolitics: On the threshold of the living subject* (2006), further elaborated how for historians of the present, "governance has come to be understood as a truthful form of reasoning associated with know-how for optimizing populations in terms of strategic goals such as wealth or health" (p. 10). Historians of the present such as Weir have mobilized governance in the *governmentality* sense—or the conduct of conducts. Foucault addressed governmentality as a "new mechanism of power" that was incompatible with relations of sovereignty as previously conceived, where power had been understood to be held and enacted unilaterally (2003, p. 35). This new mechanism of power emerged with the end of feudalism and with the rise of the notion of the *reason of the state* under modern neoliberal nation-state regimes. After feudalism, all political subjects in a particular area could be regarded in the same manner, as subjects with the same particular characteristics, such as birth, age, and death. The state reasoned that all political subjects within the territory with the same characteristics could be managed, enhanced, regulated, and maximized (Weir, 2006, p. 10). This arrangement of new governmental powers, which can no longer be understood in terms of sovereignty, was multifaceted and held by no one person in particular; rather, power circulated within the newly conceived population. Governmentality was a power attuned to "the complex of men and things" (Foucault, 1991, p. 208), and in seeking to elaborate a range of philosophies of power, governmentality for Foucault meant that individual and collective conduct were orchestrated through ideologies and discourses that secured particular conceptions of social order in neoliberal societies. In this arrangement, power has its own procedures, instruments, and different equipment aimed at and applied to bodies and what they do, to extract time and labour rather than commodities or wealth, and

it is exercised through constant surveillance. Foucault believed governmental power was "one of bourgeois society's great inventions" (2003, p. 36), as it is the basic tool for establishing a liberal capitalist society focussed on managing risk to maximize capital. This sort of power was a distinct art of government that historically emerged with liberal forms of social regulation and risk management.

For Weir, through a history of the present approach, studies of governance aim to "trace the replies given by expertise to questions they have posed regarding whom/what they govern, how to govern (including limits of governance), to what ends, and who they take themselves to be" (2006, p. 10). This process privileges questions of how the process of inquiry to studying the past could involve examining specific events, moments of contention, ideas, or theories that were overlooked, marginalized, or considered minor. The process also centralizes examining the day-to-day, as well as specific practices, detailed regulations, policies, or proceedings of how things were, or how they were prescribed. This approach also examines how governance practices targeting the population emerged and interrogates what constitutes truth within said practices. With this framework, one can examine historical events and practices in order to reveal how things came to be the way they are in the present moment.

However, there are a number of areas within the analyses that historians of the present may not explicitly address. Some areas have not been discussed explicitly in the literature. While historians of the present rely heavily on archival texts, it can be a challenge to find places where the role, function, and method of mobilizing texts is described by those conducting histories of the present. Additionally, historians of the present do not often focus on more than one type of institution in their analyses. Such a focus on more than one specific institution and critical reflection on the role of archival texts in the writing of history may be missing or overlooked. I draw on the two gaps from these methodological categories as areas I will specifically attend to within my work on the history of the present. These are by no means the only themes and gaps that historians of the present have addressed or to which they have mobilized in their methodological approaches. I will expand on these below, as they are aligned with specificities of my project, and they are areas to which I am able to make a contribution toward the practice of analysis on the history of the present.

Institutions

Generally, histories of the present have tended to examine a single institution, such as the school or prison or hospital, and to focus on one form of power—disciplinary, governance, or pastoral (Weir, 2006, p. 12). There are exceptions to this generalization. A notable one is from the work of Weir

(2006), who mobilized a history of the present across a range of institutions to examine what constitutes the threshold of life in the context of birth. In her work, Weir (2006) has traced how in Western cultures, historically the status of human life was granted at birth, but since the 1950s the threshold of when the living subject is constituted has changed. Weir examined an array of medical, legal, expert, and community power formations targeting the population, which began to regulate pregnant women when the newly constituted life of the fetus emerged with the notion of "perinatal mortality" (2006). In her work, Weir stepped beyond one specific institution to examine a complex array of powers, including forms of risk governance targeting the population as a whole. This interinstitutional approach examines a range of actors and practices including prenatal care practitioners, clinicians, midwives, child welfare agencies, lawyers, and legislators.

To continue my interinstitutionality analysis, I mobilize Weir's history of the present approach, which is attuned to an analytical inquiry focussed on interinstitutional forms of governance. Through examining the interplay of heterogeneous institutional formations—comprised of the criminal justice, the administration of punishment, policing, public health, medical, and community-based organizations—I can explore the complexity of forms of governance at play and can challenge the assumption that singular institutions, such as public health, policing, and criminal justice, act distinctly from one another, and that they operate using siloed, distinct forms of knowledge. The criminalization of HIV exposure and non-disclosure, similar to Weir's work on pregnancy and the threshold of the living subject, is an issue that operates in a hybrid space constituted by forms of knowledge on biomedical science, public health, and legal and criminal justice knowledge. These bodies of knowledge and practice (the biomedical, public health, and the legal) can be underpinned by an arrangement of both similar and divergent logics, where what constitutes truth is developed via differing regimes of what is knowable. The varied sets of rules and frameworks for establishing what is understood as true or false under a legal morality paradigm can be constituted altogether differently than within a biomedical paradigm of thought. This is also true of public health—which often becomes a hybrid of the former fields. Within each of these respective discursive fields, I also understand that there is a plurality to the construction of knowledge, as these fields themselves are composed by a range of sometimes similar and sometimes contradictory and heterogeneous social, political, and economic relations. With this approach, I can further work to explain how the biomedical becomes intertwined with other mechanisms of power—both legal and extralegal. Further, the approach may help me understand how the sick, infectious, and criminal come to be classified and reclassified in relational

contexts across a range of institutions, and deemed in need of care, control, retribution, containment, inclusion, or exclusion (Valverde, Levi, & Moore, 2005).

In this chapter, I examine how emergent practices of health relied on the punitive institutions of the police, criminal justice, and corrections systems in order to achieve public health imperatives. In this context, an interinstitutional history of the present is necessitated, as focussing solely on the public health, police, criminal justice system, or corrections system would miss how and why all of these institutions have operated in intersecting ways to enact forms of legal and extralegal violence against people with venereal diseases.

Texts

Historians of the present are not well known for discussing the specifics of their archival research methods. Reflections on the use of archival documents are assumed more than they are critically examined. But what comes to be understood as "history" is often solely reliant on what was recorded textually over time. This reliance on texts brings about many limitations for the study of the past. Textual documentation is a form that privileges certain ways of knowing and types of knowledge, such as legal texts developed and mobilized by state institutions with the power to constitute people as criminal and as risks to public safety. For criminalized people, certain texts can serve a violent social function ontologically in their material world, as these texts have a part in socially organizing and governing people's lives. These may be the same texts that historians of the present mobilize as a focus of study. Additionally, if a scholar were only to look at outcome documents from legal cases to study crime, this would mean that knowledge of criminality would be solely reliant on hose who had been captured for wrongdoing, and who had been processed through the system.

To assist in critically reflecting on the role of texts in the study of a history of the present, I draw on the work of alternative feminist sociologist Dorothy Smith. Smith was not a historian of the present, but her work critically reflecting on the role of texts can assist in helping to develop greater critical reflection on forming studies of the past while looking to the present.

But first, in a history of the present, what constitutes a text? Smith has used the term text very broadly to incorporate "stretches of talk as well as … what is inscribed in some more or less permanent form" (2005, p. 166). Institutional ethnographers Marjorie DeVault and Liza McCoy (2004) noted that any kind of material, replicable document or representation "that can be stored, copied, produced in bulk, and distributed widely" should be regarded as a text (p. 34). For institutional ethnographers, texts

are understood as actively constituting social relations, acting to iterate aspects of their "particular configuration of their organization in different places and different times, thereby conceptually coordinating and temporally concerting a general form of social action," according to Smith (as cited in Campbell & Manicom, 1995, p. 24). Understanding how governance plays out in the lives of social actors or how it is coordinated can be facilitated through a careful study of texts, as sequences of action within institutional complexes are organized through documents and texts of varying sorts (Smith, 1990, 2005). Texts are an important part of how people's lives are organized, and study of them allows scholars to uncover textually coordinated and simultaneous events, practices, and activities across a range of sites. Texts are also where the actual is translated into the conceptual through the form of institutional documents. This location can be where people's diverse and nuanced experiences get documented and framed according to a conceptual logic that is disconnected from the local and that objectifies experience for institutional priorities (Smith, 2005). Smith has noted that textual materials have been previously understood by sociologists as sources of information about something else and somewhere else, which would be examined to piece together accounts. In contrast, with institutional ethnography, texts constitute a phenomenon of study in their own right (Smith, 1990, p. 120).

This governance factor of texts means we need to understand the power that texts have to frame people—and the power they have had, or may continue to have, in the social world. Attending to a frame of analysis situated in the daily lives of criminalized people does not need to be lost once a researcher enters the archive to do historical research. In examining textual records of the past related to the lives of criminalized people, the critical researcher can continue to work to reveal the voices and experiences of those people through archival analysis.

In this chapter, I engage with texts in two primary ways. First, I examine them as a source of data through which I have come to understand the history of venereal disease control in Canada, including through detailed correspondence, legal documents, and media archives. Second, I analyze how a range of texts have acted to govern the lives of people with venereal disease, including legal, media, political, and social discourse. Although my focus on texts may be more traditional than the broad conception proposed by Smith, all of the texts I engage with serve simultaneously as both a source of data and a social function in the actual world to organize the lives of criminalized people in the past. Reflecting on the function of these texts ensures the frame of analysis is grounded in the social world of those who have faced myriad forms of violence resulting from the practices of intersecting institutions—which relied on texts to circumscribe people's possible lives and to enact practices of violence, both legal and extralegal.

In the following section, I provide a brief historical overview of the emergence of public health and venereal disease control in the Dominion of Canada. The development of public health responses to venereal disease came about during World War One, when statistical measurement of the Canadian military troops, as led by Dr. Gordon Bates, a leading figure in the early days of public health, revealed a massive epidemic of multiple venereal diseases. In this section, along with tracing history, I also briefly outline the emergence of the population as a site of intervention for nation-states, where a range of new sciences developed that were focused on aggregates of the population. To engage with this history, I also mobilize the conceptual tools of *biopolitics*, *governmentality*, and *surveillance medicine*, which can be subsumed within a critical ethnographic analysis to assist in examining the violence faced in the daily lives of criminalized people.

World War One and sciences of the state

World War One was a watershed moment for action from Canadian settler-colonial social actors to address the newly understood epidemics of venereal disease. For years, white settlers from a range of European countries imported venereal diseases into the newly formed Dominion of Canada. Like much of the industrializing world, Canada did not begin to address the exploding venereal disease epidemics until the turn of the 20th century when the rise of statistical measurement, population medicine, and the development of new diagnostics and treatments made response efforts possible to conceptualize (McGinnis, 1988; Cassel, 1987). Measuring the prevalence of venereal disease among the troops during the Great War was the first time a discreet subset of Canadian society had undergone systematic screening for disease at a population level (Cassel, 1987). Dr. Bates was a central and leading figure in the early days of venereal disease regulation. During the course of World War One, he was responsible for conducting a project to document venereal disease prevalence using statistics in the military. The results were staggering. Overseas, the Canadian army had documented 66,083 cases of venereal disease—defined as syphilis, gonorrhoea, and herpes—by 1916 (Cassel, 1987). Twelve percent of all illness in the military could be attributed to venereal disease (Buckley & McGinnis, 1982). Because those in favour of action to address the diseases—such as Dr. Bates—initially mobilized military statistics, many people understood the problem to be located solely in the military (Mawani, 2006). But subsequent studies outlined this high prevalence of infection was consistent with the general population at home (Cassel, 1987). In 1917, Toronto General Hospital documented a rate of syphilis alone at 13% among all patients (Hodgins, 1918). Along with the surprisingly high rate of infection,

Canadian settlers who were invested in the colonial project had further cause for concern. The country had lost approximately 50,000 people during the influenza epidemic and another 50,000 to tuberculosis over the preceding four years. Additionally, during the war, approximately 50,000 Canadian lives had been lost. Canada also had the distinction of having the highest infant mortality rate in the newly industrialized world at the time (Cassel, 1987).

As a prominent public health physician, Dr. Bates travelled the country aiming to destigmatize venereal disease, giving speeches, promoting campaigns, films, and plays targeting the general public, and speaking publicly about what had previously been unspeakable. He widely mobilized newly collected statistics on the prevalence of syphilis, gonorrhoea, and herpes in Canada to get his message across that the health of the population was a central factor in securing the safety and future of the young Dominion for settlers. According to his obituary in *The Globe and Mail* (1975), "Dr. Bates was the first Canadian physician to use the words syphilis and gonorrhoea in public speeches. He nagged newspaper editors until they admitted the words to their news and editorial columns." To advance his efforts, Dr. Bates collaborated with politicians and government officials to raise the profile of his campaigns and to garner collaboration from governments to secure funds and pass legislation. In 1918, the Honourable Frank Egerton Hodgins, a former court justice and politician in Ontario, worked with Dr. Bates to help launch the first provincial legislation in Canada aimed at venereal disease control. In the report announcing the legislation, Hodgins noted that

> [I]n order to understand the problem of controlling venereal disease it must be remembered that owing to its very nature it has heretofore been regarded as something to be mentioned with bated breath, disgraceful to the individual, and nauseating to the public. (1918)

Hodgins's comments exemplify popular white middle-class settler sentiments regarding venereal disease at the time, which were prevalent in the social context within which Dr. Bates worked. Dr. Bates's efforts also signalled a new form of emerging medicine attending to the *population* of nations that had been slowly developing for centuries across the entire Western world. For settler colonies such as Canada, the health and security of the population was equivalent with the success of the colonial project and of the nation itself. The development of a range of *sciences of the state* (Foucault, 1991, p. 100) emerged to help manage and secure population concerns, of which health was central. Statistics helped shape a new realm of advancements in the area of the sciences of the state, a broad project that began in the 16th and 17th centuries and that over the many years since had begun to

reveal the population as a significant area of study. The population came to be conceived of as having its own regularities, cycles, and patterns—of life, illness, death, scarcity, migration, labour, wealth distribution, and so on. Demographers became more advanced in the 18th and 19th centuries and were actively measuring the world around them in statistical terms, such as the ratio of births to deaths, as well as the rate of reproduction and fertility. Statistics on vital events allowed for the development of a new form of knowledge that could be mobilized toward various aims by institutions of the state that were centred on humans as a species. They worked to enable the mechanics of biological life through propagating births, managing and measuring health, and calculating life expectancy. The objects of the emergent sciences of the state were not individuals *per se*, or singular human beings, but rather, biological features that were aggregated and measured at the level of the population. From here, these biological features of the population could be used as a normative value to make it possible to determine averages and establish standards. The result is that "life" itself became an independent and objective measurable factor that was removed epistemologically and separated ontologically from the singular human experience (Lemke, 2008, p. 5).

As the population as a concept emerged, so did new ways of managing its health and well-being. These new approaches gave rise to new techniques and practices of governance. As Rose et al. have noted, the population had "a reality of its own, with its own regularities of birth, illness, and death, and its own internal processes that were independent of government and yet required the intervention of government" (2006, p. 87). Because power was now placed in the strength, vitality, and health of the population, this had consequences for past notions of power as being "held" by the sovereign heads of state (Foucault, 1991). As a result, states reoriented their relations to the population. Individual people who lived within a specified territory were no longer just legal subjects who must follow the laws of a sovereign authority or individuals whose conduct was to be shaped through the unidirectional power of disciplinary mechanisms of institutions such as schools, prisons, and the military. The governance of the population, rather, came to be imagined as a complex array of intersecting powers "existing within a dense field of relations between people and people, people and things, people and events" (Rose et al., 2006, p. 87). The government of the living—or governmentality—thus had to act on these relations, which could be subject to external pressure, intervention, or natural processes. Governmental processes came to be conceived of and administered as a vast range of strategies and tactics aimed at the security of each individual and of the whole population (Foucault, 1991). Targeting the troops as a site of intervention in Canada is an example of this approach of targeting a population for security purposes. Managing the health of the military

meant that Canada could ensure its success as a newly formed settler colony—the health of the population meant the health of the nation.

From a medical perspective, this new governmental direction of the sciences of the state developed into a form of medicine whose main function was now external and public via a focus on population hygiene, with its own institutions to coordinate the delivery of care and education, centralize information, and normalize knowledge. Consequently, a medical focus developed on the form, nature, duration, and intensity of such illnesses prevalent in the population of nation-states, as well as on promotion of population approaches to prevent contagion. Dr. Bates was an early editor of what is now known as the Canadian Journal of Public Health and went on to lead a regional and national mobilization effort to implement legislation as the president of the Canadian National Council for Combating Venereal Disease. Bates published a special issue of the journal documenting his findings from the military study in 1916. Following his statistical work with the military, Bates worked with the National Council leading the introduction of the overarching framework for addressing public health across the country, including much of what we see today, such as establishing a national public health body, a nation-wide system for funding regional clinics that provided free testing and treatment, and public education and awareness campaigns, as well as promoting community and self-surveillance to manage disease prevention. The framework that Dr. Bates helped to implement in Canada for the development of infrastructure and interventions for addressing venereal disease originated with the British Royal Commission on Venereal Diseases, constituted in 1913. The commissioners "held eighty-five meetings, and heard 22,296 questions put and answered," reported the *Spectator* newspaper on April 1, 1916, when the final report was launched. It outlined a path forward to create the infrastructure and expertise to control growing epidemics across the Commonwealth. The *Spectator* further reported that

> [T]he diminution of the best manhood of the nation, due to the losses of the War, must tell heavily upon the birthrate—already declining—and upon the numbers of efficient workers. The reasons for combating, by every possible means, diseases which in normal times operate with disastrous effects alike upon the birth-rate and upon working efficiency are, therefore, far more urgent than ever before. (1916)

Facing similar population health challenges as Canada, as well as ensuring a swift transition toward the advancement of efficient industrialization, the United Kingdom took on addressing

venereal disease as a central project to secure its hold on imperial power. I will be discussing more of this history throughout the chapter, specifically the Contagious Disease Acts. To address the urgent situation facing the strength of the nation and the Commonwealth, the *Spectator* went on, "commissioners explain[ed] to [the population] what sort of superstructure [they] ought to build" (1916). The superstructure consisted of creating a national governance body to undertake state surveillance and statistics; expanding training for doctors to develop increased expertise; securing funding to open specialized clinics where free testing and treatment could be provided; and expanding support for research, public education grounded in moral and spiritual principles, and coercive legislation targeting specific populations thought to be at risk for transmission. Providing a wide continuum of measures and interventions—some voluntary and some coercive and punitive—was a balancing act that the project of public health has grappled with since its inception. This multifaceted approach to intervention was in part due to advances in diagnostics and treatment, making medical intervention more viable than it had been previously (McGinnis, 1988).

Surveillance medicine and biopolitics

The approach to health and medicine focused on the population was organized around forms of surveillance and risk management. Medical sociologist David Armstrong named this new development *surveillance medicine*, which emerged at the end of the nineteenth century and beginning of the twentieth, where the focus of the medical gaze is no longer inside the bodies of the sick, but rather on entire populations, where "surveillance begins to focus more on the grid of interactions between people in the community" (1995, p. 402). Surveillance medicine came after what Armstrong labelled as *hospital medicine* which emerged in the late eighteenth century, the popular conception of medicine that was concerned with ill patients within whom various pathologies could be identified. Armstrong noted that surveillance medicine was no longer only concerned with the ill patient, but was rather aimed at the "targeting of everyone" (p. 395). Targeting everyone with a medical gaze was a way to organize medicine that mitigated potential future health risks, such as the epidemics of venereal disease. Management of risk constituted a new kind of clinical judgement that diverged from earlier forms of medical reasoning, which now attempted to distinguish the normal from the pathological—as Weir has noted, "bodies at risk are neither sick nor healthy" (2006, p. 19). Armstrong further elaborated his conception of surveillance medicine, noting that

> [T]he blurring of the distinction between health and illness, between the normal and the pathological, meant that health care intervention could no longer focus almost exclusively on the body of the patient in the hospital bed. Medical surveillance would have to leave the hospital and penetrate into the wider population. (1995, p. 398)

So, whereas medical diagnosis focused on the internal body in the current moment, surveillance medicine operated as a form of risk calculation focused on the temporal future, the potential of infection outside of the body, the environment, as well as actions and lifestyle (Armstrong, 1995, p. 400–401). The identification, containment, and treatment of people with venereal disease came to concentrate not on the needs of the individual patient, but rather on the protection of the broader population. Under surveillance medicine, people become subjects of surveillance when deemed risky under surveillance medicine practices.

This rise of surveillance medicine and sciences of the state, such as the collection and mobilization of knowledge on vital events for political purposes, are processes of *biopower* and *biopolitics*. Etymologically, biopower and biopolitics are combinations of the Latin prefix *bios* (life), with "power" and "politics." Combined, as biopolitics and biopower, they create lexical and conceptual formations that have garnered much attention from an array of multidisciplinary scholars. Almost certainly, the rise in interest in biopower and biopolitics is due to the historical and philosophical contributions of Foucault. Foucault's work methodologically and conceptually is unavoidable when examining issues of crime, disease, power, and history. According to Foucault in his earliest conception of these ideas in *The history of sexuality, volume.1: An introduction*, the term biopower comes in two formations that constitute two poles across a cluster of corporeal power relations: (a) *anatomo-politics*, centred on the body as a machine, a disciplinary power aiming to optimize productive forces, build capabilities, and increase usefulness and skills; and (b) *biopolitics*, which emerged later and is centred on human bodies as a species, working to enable the mechanics of biological life through propagating births, managing and measuring health, and calculating life expectancy (1990, p. 139). Foucault specifically elaborated these concepts as being a productive power over life, and he provided an analysis of the circulating macro- and microphysics of power—including a conception of productive and positive forms of power, meaning that power is not always negative or repressive. Foucault cautioned that these two forms of power centred on life should not be understood as independent entities; rather, these powers operate to define each other along the pole by which they are linked (Lemke, 2008, p. 37).

However, the historian and philosopher often used the terms biopolitics and biopower interchangeably and with conceptual imprecision (Lemke, 2008; Rose & Rabinow, 2006). This usage

was due to the fact that his work in this area remained unfinished, in part because of his untimely death in 1984 due to AIDS-related complications, and in part due to him moving on to issues of ethics and the self near the end of his life. Generally, in his work on biopower and biopolitics, Foucault wanted to understand then how this focus on the population, and thus on life and bodies, was mobilized as a political strategy, and what this meant for past notions of politics and forms of power and governance. For Foucault, biopolitics did not present a new domain of politics, but rather transformed the core of politics itself, in that it reformulated conceptions of political sovereignty. As mentioned previously in this chapter, this new form of politics subjugated to role of sovereignty to a new political knowledge based on the life of human bodies comprised in the population. Many scholars have sought further clarity on the notion of biopolitics and have built on Foucault's unfinished project (Lemke, 2008; Rose & Rabinow, 2006; Valverde, 2007). One of the most productive elaborations for those studying criminalized people is Weir's (2006). In her work on biopolitics, Weir elaborated a robust conception of biopolitics that helps to clear up some of Foucault's conceptual imprecision. I discussed her work previously in this chapter, and I will elaborate on it briefly in the next section, as she continues to provide valuable insights into my overall project.

Following Foucault, Weir (2006) made a "sharp distinction" between powers over the population and powers over individual human bodies (p. 9). To do this, Weir labelled the powers that Foucault variously referred to as biopower and biopolitics as *population power*, and she mobilized biopolitics in a broader sense to encompass population power, discipline of individual bodies, and other powers such as sovereignty (p. 9). Weir outlined then that there are four areas of power that concern biopolitics: (a) population power, (b) the discipline of individual bodies, (c) the sovereign power of law, and (d) a liberal or authoritarian stylization of governance (p. 15). Seeking to explain how these various conceptions of powers of life work to govern the lives of pregnant women, Weir further outlined that they can work in conjunction and can be reliant on one another to manage risks during pregnancy—to the welfare of the fetus, or child, often at the expense of the welfare of the mother. To further clarify this conception of biopolitics, she organized the four vital powers into two configurations, or two alternating strategies: *security-law-liberal governance* and *discipline-law-authoritarian governance* (p. 15). Weir noted that "law, security and liberal governance are constantly thrown into and out of alignment in biopolitics" so there will come times when "legally mandated discipline [is] used as a secondary technique in liberal regimes" (p. 16). When a subject failed to comply with the incitements for the security of health, then disciplinary confinement and correction could be activated. For such authoritarian forms of discipline to be invoked, security must be appealed to via life and

death significance. Weir noted that such an instance could "include infectious disease outbreak and epidemic" where "liberal freedoms may [have been] suspended" (p. 15). This analysis brings me back to Hoppe's question: "When and how does coercion turn punitive in public health practice?" (2018, p. 20). Public health practice can become punitive when the health of the entire population is perceived to be at threat and when more liberal approaches have been exhausted. In the context of certain forms of communicable disease management—such as venereal diseases—liberal forms of coercion can be justified to become more authoritarian and punitive along a continuum of acceptable interventions. For example, looking back to the wide range of population-focussed interventions that Dr. Bates and the Canadian National Council for Combating Venereal Disease helped to establish, there was also a range of coercive and punitive measures including provincial legislation, as well as national legislation criminally regulating the transmission of venereal diseases. In 1919, Canadian Parliament enacted a section of the *Criminal Code* making it an offence, punishable on summary conviction, to communicate a venereal disease, knowingly or by culpable negligence, to another person, with a punishable fine up to $500 or a sentence of six months imprisonment (McGinnis, 1988). Where there was no longer a role for solely coercive practices, punitive practices targeting individuals were deployed. The authoritarian discipline and punishment of individuals became a justifiable approach when other, more liberal, measures such as education, treatment, and self-management had become no longer effective.

In this chapter I have engaged with a range of concepts. However, due to the orientation of my project, I am careful when engaging with the conceptual so as to ensure the task does not merely result in outcomes that benefit conceptual endeavors. Specifically, I bring forth the notion of biopolitics with a caution. As a theoretical concept, it has been fetishized conceptually solely for academic gain *ad nauseam*. As noted by biopolitics scholar Thomas Lemke (2008), defining the terms is not a value-free process that follows some universal logic. Instead, definitions of biopower and biopolitics take place across a constantly shifting political, theoretical, and discursive field. Today it seems the term biopolitics has a greater level of currency than biopower and has come to be established as a theoretical and empirical interdisciplinary field unto itself—as evidenced by Weir, who dispensed with the term biopower for conceptual clarity (Lemke, 2008). But the term has been mobilized by a diverse range of actors encompassing all aspects of the political spectrum, including unapologetic white supremacist racists, the left, environmentalists, anarchists, neoliberal conservatives, and social scientists. Lemke has stressed that the structures, rationalities and technologies, and historical events that are understood and constituted as biopolitical come to be so through a selective process. As such, scholars using definitions of biopolitics and biopower should also strive to ensure that they are critically

interrogating the concepts to uncover blind spots and weak points among the competing notions that exist (Lemke, 2008). In this vein, I aim to bring forth biopolitics not in the service of the concept itself, but as a concept that is subsumed within the broader project of examining how the lives of criminalized people become objects of politics and how the process of criminalization—a political project unto itself—results in myriad forms of deliberate violence against people. Understanding biopolitics in this context becomes helpful for critical aims, when life and politics become intertwined, where the autonomy of certain individuals labelled as risky is sacrificed for the notion of the population. Here I continue my critical approach from Chapter 1, where theory is to be mobilized not for the sake of theory but for the sake of the critical objectives of the research and to denaturalize violence. Attuned to this trajectory, I must understand when life becomes intertwined with the political apparatus of the state, and where the bodies of criminalized people become perceived as risks to be incapacitated and threats to be contained. The concept of biopolitics can assist in this project, but it must not become the object of the project itself.

In this section, I briefly elaborated the historical context at the end of World War One that led to a public health response to venereal diseases in Canada. This included the advancement of statistics and diagnostics, as well as the dire straits the new country was in regarding the multiple health challenges threatening the population of the Dominion. At the time, the nascent project of public health began to emerge. However, this project was not benign, and was underwritten by colonial attitudes of classifying the other through coercive means. In this context, there was the global advancement of a new form of medicine focused on surveillance. This surveillance medicine moved from targeting individual symptoms and pathologies within ill bodies, to instead targeting the entire population as a way to manage the risk of epidemics. I also briefly outlined the notion of biopolitics, a range of political powers centered on the life of human bodies, and how these diverse forms of vital power can result in authoritarian and violent outcomes for people classified according to particular characteristics. The focus on biopolitics in this work is attuned to understanding when the lives of people become the objects of politics and are thus incapacitated through authoritarian means.

I now return to the letter and experience presented at the start of this chapter from Eleanor Pattison, who in 1919, was detained in jail without any criminal charge under recently enacted Alberta provincial venereal disease legislation for public health purposes. In this section, I examine the role of texts, including legal documents, archival records, and (from her own perspective) personal correspondence, as a woman who lived in a negative relation to laws targeting venereal diseases. With this emerging approach to venereal disease control, it becomes evident that the criminal justice system

and public health institutions were historically intertwined in developing responses to venereal disease. As I address Pattison's experience, I will also trace the social, political, and historical conditions that led to her arrest and detention via a range of detailed archival research including looking back to the War Measures Act and also the *Contagious Disease Acts* engaged in the United Kingdom many years earlier. What follows in the next section is not intended to be an exact comprehensive historical narrative or chronological record. Rather, it aims to outline how what happened in the past can help inform how and why current practices have come to be the way they are today. I do so in order to avoid speaking to the criminalization of HIV in Canada as an issue that has emerged out of some sort of vacuum.

The cases of Pattison, Cyr, and Tippens

Eleanor Pattison, 18-years-old, from Edmonton, Alberta, in 1919, was one of the first people in the province to be remanded for venereal disease examination under newly enacted provincial public health legislation. The muddiness between coercion and punishment in emerging public health practice becomes apparent in the Pattison case. Under the new provincial legislation, the detained person was not eligible for bail and was held without any criminal charge. Under the rules of newly enacted provincial public health legislation, a police-designated Magistrate could detain any suspicious person so an examination by a doctor could be conducted. If the person was found to have a venereal disease, the legislation outlined the following: "the person shall be committed to the nearest provincial jail to be held there until the Provincial Board of Health shall certify that such person is free from venereal disease or is non-infective" (Alberta Venereal Disease Prevention Act, 1919). The legislation further outlined that Police Magistrates could discretionarily mobilize the law to detain anyone whom they "believe[d] or [were] credibly informed that he [was] or may [have been] or ha[d] been infected with or exposed to Venereal Disease" (Alberta Venereal Disease Prevention Act, 1919).

As a result, the legislation walked a contentious line, as it betrayed the rules of *habeas corpus*—which ensure that every person has the right to due process before a judge and that there are lawful grounds for their detention. Under remand in a criminal justice sense means a person is detained prior to criminal trial before being found guilty or innocent; a person is usually held in remand if they are denied bail. The aim of this approach, in Pattison's case, was to use the court as a site of intervention for venereal disease containment, to target a range of suspicious people coming into the courts under other charges against the *Criminal Code*. At the time, the same institutional infrastructure designed to

punish those crimes was also mobilized to regulate, control, and confine people with venereal disease. The coercive practices mobilized by public health campaigners relied on the existing infrastructure of the criminal justice system; they have been intertwined since the inception of public health practice. Pattison was housed in prison with people who had committed offences against the *Code*—the institution had not been built to handle and house people with communicable diseases.

Pattison went to Edmonton's Women's Court, where she was seen by designated Police Magistrate Emily Ferguson Murphy. In her role as Police Magistrate, Murphy acted as a lower court judge who heard cases of women brought before her for minor or preliminary matters such as prostitution, public drunkenness, theft, and vagrancy, which was often code for sex work. When applied to women. At the time of Pattison's incarceration, Murphy was tasked with applying the criminal law as it was elaborated in the *Criminal Code*. As a Police Magistrate, Murphy would not normally be tasked with handling matters related to health, although she had taken it upon herself to become a champion of moral reform and hygiene. Under the new legislation to control venereal disease, Murphy could use her position to forcibly confine women, such as Pattison. When Pattison was presented in her courtroom, likely under a charge of vagrancy, under new the regulations of the *Alberta Venereal Disease Prevention Act* Murphy, could then demand a medical examination, mobilizing existing criminal justice infrastructure repurposed to achieve new emergent public health imperatives.

Pattison was one of a number of test cases put forward to the court to see if legislation developed by public health campaigners to use criminal courts as a site of venereal disease control was viable. However, people with venereal diseases had technically done no criminal wrong, and under the new legislation there was no trial or actual charge, so their forced detention was potentially deemed to be counter to the rights guaranteed under the federal constitution. After a court-appointed doctor conducted a test for syphilis and gonorrhoea, Pattison was subsequently found to be infectious for both the diseases. There was no trial, and no criminal charge was applied. After the examination, she was sent to the Fort Saskatchewan Correctional Centre on the outskirts of Edmonton for an indefinite period to prevent the risk of onward transmission of her infections.

The passing of the Alberta legislation was part of a coordinated campaign across the country. Ontario passed similar venereal disease acts the year prior in 1918, and British Columbia passed its own iteration in 1919, with other provinces all following suit.

In her letter to Murphy from the Fort Saskatchewan Gaol, Pattison tells a sad tale of social isolation, as well as physical and emotional pain, where Pattison was being held in a prison as both a form of punishment for her behaviour and also as a coercive public health measure. Pattison detailed

her isolation, and how her sister, who would not respond to her letters, had disowned her, likely resulting from the stigma associated with being incarcerated for having morally signified diseases. Pattison also told Murphy about how brutally painful the injections of arsenic were, but that she would continue to take them for her own betterment. She hinted at her past way of life that led to her infection and incarceration, one from which she has stated wanting to move on. This narrative of reform is similar to what many prisoners take on to make sense of their experience of punishment and incarceration. Pattison understood not only that she was incarcerated for syphilis and gonorrhoea treatment, but also that she must reform her ways. This understanding speaks to the muddying of the lines between punishment and coercion. Pattison understood her past behaviour as something that must be reformed, so she could be bettered as a person and lead a new life. Her incarceration was not solely about curing her of venereal disease; it was also about remedying the morally repugnant behaviour that led to her infection in the first place.

Pattison came to be caught up in a web of biopolitical forms of governance over life, aimed at strengthening population power—of respectable middle-class settlers in the Dominion of Canada, and also the sovereign power mobilizing the power of law that employs forms of authoritarian discipline over individual bodies—and forced incarceration of people deemed vagrants infected with venereal disease. Through a hybrid of liberal and authoritarian styles of governance, this convergence of vital powers, outlined by Weir as discipline-law-authoritarian governance, was employed in a deliberate fashion, enacting legal violence toward criminalized people (2006, p. 15).

Before the advent of penicillin, the treatment for syphilis was long and painful, with a limited success rate and many deaths. It could take up to five years to be clear of the infection, and it involved three injections of arsenic a week, called arsenicals, as well as the topical application of mercury. The mercury treatment cleared the skin, but it did not kill the underlying ailment. This combined arsenic and mercury chemotherapy approach aimed to kill the syphilis virus before killing the host, but was a delicate and imperfect balance. The combination treatment was intense and many would die of shock immediately, while others died slowly of arsenic and mercury poisoning. The sites of injection were excruciatingly painful and caused exhaustion and general malaise as the body coped with being slowly and methodically poisoned.

The campaign to use courts as a site of venereal disease intervention was devised in partnership with Murphy and Dr. Bates. Murphy worked closely with Dr. Bates—as both were central figures in emergent moral reform and hygiene movements—and they maintained regular correspondence as they planned to implement the use of coercive and punitive measures as part of the emerging venereal

disease control program in Alberta. To confine infected people, Murphy had to complete a standardized form for each offender in her courtroom. The Information and Complaint form (the document used to detail a criminal offence against the *Criminal Code* with which a person was charged) that was used to confine Pattison indefinitely is housed in the National Library and Archives Canada, and a copy was appended to a letter in ongoing correspondence between Murphy and Dr. Bates. On the form related to Pattison's case, Murphy crossed out the verb "did" with an "xx," and instead wrote, "was infected with venereal disease" (Murphy, 1920). Murphy signed the bottom of the document as Police Magistrate for the province of Alberta.

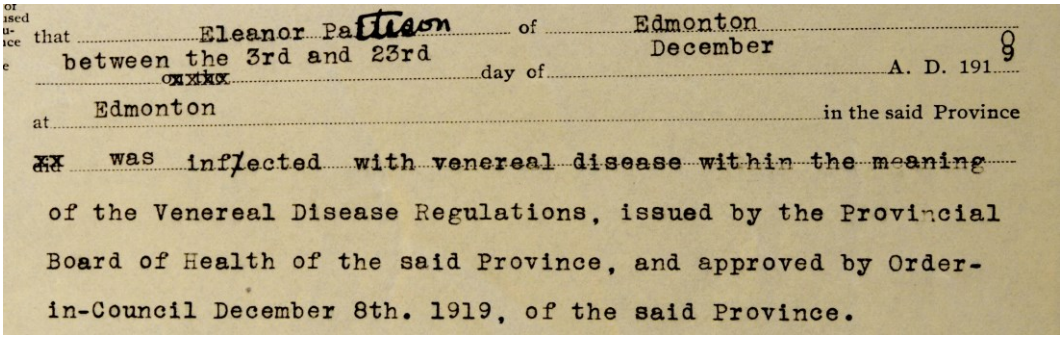

that Eleanor Pattison of Edmonton
between the 3rd and 23rd December
day of A. D. 191
at Edmonton in the said Province
~~did~~ was infected with venereal disease within the meaning
of the Venereal Disease Regulations, issued by the Provincial
Board of Health of the said Province, and approved by Order-
in-Council December 8th. 1919, of the said Province.

Figure III: Information and Complaint Form for Eleanor Pattison (December 24, 1919).

In moving from what an offender *did*, to what an offender *was* (or *had*), this document makes visible a shift in the role of punitive courts toward managing the health of the public. It was not what Pattison did that led to her detention (I do not know the original charge that led her to come before Murphy's court in the first place); rather, it was her infection with syphilis and gonorrhoea that landed her in prison. It was not a specific moral wrong that rendered her to be treated as a criminal; it was what she had within her body. This juridical text is a key to organizing the life of Pattison, as it assisted in rendering her less a person and more an object of risk to be contained and incapacitated through incarceration. Activated in the social world, it led to violent actions against her, limiting Pattison's access to freedom, self-determination, and autonomy. Further outlining her approach, Murphy wrote a letter to Dr. Bates sent on January 8, 1920, to which the Pattison's Information and Complaint form is appended, stating,

> Already we have sent one case to the jail hospital at Fort Saskatchewan, and I understand one has been sent from Calgary. I am enclosing a copy of the "Information and Complaint" under which the woman

> was charged, as it seemed rather difficult to frame the first complaint. This has not yet been appealed, but I think it should stand the test. (Murphy, 1920)

The letter notes that Murphy indicated that she was aware of the contentious nature of their new legislation, aiming to make arguments in support of detention despite defying the rules of *habeas corpus*. This approach follows a historical trajectory that emerged in the United Kingdom nearing the end of the 19th century and dispersed throughout the Commonwealth and other rapidly industrializing nations (Walkowitz, 2009; Cassel, 1987). The approach was contentious and met with widespread opposition across the Commonwealth, but interestingly, little opposition occurred in Canada, as a newly formed settler colony that was aiming to secure a respectable, white middle-class future for the nation (Kubla, 2008; Wajtczak, 2009).

"Lizzie Cyr, I sentence you to six months hard labour at MacLeod"

Two years prior to the arrest and indefinite detention of Pattison, and prior to the new provincial venereal disease legislation, was a similar case before the courts. In 1917, Lizzie Cyr, a Metis woman of Calgary, was charged with vagrancy, which was often code for sex work at the time (Sharpe & McMahon, 2008; Bright, 1995). One of her clients complained to the police that he had paid for sex with Cyr and she has transmitted gonorrhoea to him. The police subsequently arrested her in her own home, which was odd due to the vagrancy charge (Bright, 1998). The criminal charge of vagrancy was vague and multipurpose, which enabled it to be mobilized easily as a precursor to codified venereal disease legislation to incarcerate women perceived socially to be vectors of transmission. In the *Criminal Code* at the time, vagrancy was defined as "a loose, idle, or disorderly person or vagrant [without] any visible means of subsistence… not giving a good account of himself, or, who not having any means of maintaining himself, lives without employment" (Criminal Code s. 238). The provision also indicated that a vagrant was someone without a stable place of residence, "lodging in a barn or outhouse." Vagrancy—repealed from the *Criminal Code* as a criminal act in 1972—is no longer the crime of social significance that it was at the turn of the century. Vagrancy was a marker in the early days of the Dominion of Canada that conflated notions of poverty, sex work, and racialization, with criminality. The control of vagrants was part of a project of social control for those who did not internalize middle-class values of respectable forms of settler-colonial citizenship. As noted by historian David Bright (1995), vagrancy in early Calgary was a "crime of status rather than a crime of action" (p. 58). Kulba wrote, of Murphy's work to target vagrant women, often Indigenous women,

that it "marks not only an example of the empowered female citizen, but also the degree to which that citizen participated in the production and policing of women according to codes of gender, race and class" (2008, p. 22). Cyr's vagrancy case came to a Women's Court overseen by the Police Magistrate Alice Jamieson, who had been appointed a few months after Emily Murphy's landmark appointment.

Cyr's trial took place the day after her arrest, and her lawyer, J. McKinley Cameron, was known to take on pro bono cases of socially disadvantaged groups in society, including Chinese migrant workers, sex workers, miners and gamblers. Cameron believed that Cyr's client John James Ryan, was equally as responsible for the infection as Cyr, and that the burden should not rest solely on her, noting in court: 'It takes two to have sexual intercourse. Are you a decent man?" (Burton 2017, np.).

Cameron, made a series of arguments in Jamison's court challenging Cyr's charge, two of which were oriented around gender, and one claiming that the vagrancy provision was too vague. In terms of challenging gender, Cameron stated that Cyr could not be considered a vagrant, as the law only applied to men, since the vagrancy provision in the *Criminal Code* used only the pronoun "him." The second argument was that Jamieson, was a woman, and women were not qualified to hold judicial office because they were not considered persons under the law. This second line of defence was common for many of the defendants who came before the courts of the new women Police Magistrates. Emily Murphy later noted in correspondence, "On my initial appearance as Police Magistrate in and for Alberta… my jurisdiction was sharply challenged by counsel for defence… It was then argued in almost every case upon which I sat that women were not eligible to hold this office" (Sharpe & McMahon 2008, p. 60). Finally, Cameron, stated that the vagrancy provision was too vague and did not specify anything related to prostitution, noting that Cyr had a home and, as a result the law could essentially be applied to any women or man anywhere (Sharpe & McMahon, 2008).

The issue of women not being legally regarded as vagrants was one that moral reform movement of women, such as Murphy, were well aware of, and had been working to remedy. After her appointment to her position as Police Magistrate, Murphy began lobbying the Alberta Attorney General to reform the *Criminal Code* so that women practicing sex work could be explicitly charged with vagrancy. She argued that the word "herself" could be added to the provision, as she was eager to be able to adequately criminalize the problem she regarded as a social scourge (Sharpe & McMahon, 2008).

The second female Police Magistrate Alice Jamieson appointed in the Commonwealth, however, did not share the same level of concern that the vagrancy provision may not be applicable to women. Jamieson disagreed with all of Cameron's defence arguments, stating in court, "Lizzie Cyr, I

sentence you to six months hard labour at MacLeod" (Burton, 2017). This was the maximum sentence available in the *Criminal Code* for the offence of vagrancy. Cyr was sent to the MacLeod Common Gaol run by the North West Mounted Police, well known for its poor conditions, disease outbreaks, and as a site of capital punishment (Burton, 2017).

Cyr's lawyer, Cameron complained that his arguments had not been fully heard by Jamieson, who, he argued, had prejudged the case out of her concern for wanting to protect the public from venereal disease (Bright, 1998). Cameron stated in court, "I shall see that your decision is overruled!" (Burton, 2017, np.), further noting that Jamieson did not express concern for protecting the public from Cyr's male client.

Cameron followed through on his statement to Police Magistrate Jamieson, taking Cyr's case to the Alberta Supreme Court. Justice David Lynch Scott heard the case, and also disagreed with all of Cameron's arguments. He did not find compelling the argument that the vagrancy law was too vague, and he followed that wording in the *Criminal Code* implying masculine gender, also applied to women. Thus, the superior court upheld Cyr's conviction. There was one point of tension however, as Justice Scott refused to apply the same principle of gender parity to the issue of female Police Magistrates. In fact, Justice Scott was lukewarm on the matter of women presiding over judiciaries. He noted in this decision, "While I entertain serious doubt whether a woman is qualified to be appointed to that office, I am of the opinion that the legality of such an appointment cannot be questioned or inquired into on this application" (Burton, 2017). However, in the end, Justice Scott let the issue go on common law procedural grounds, noting that the correctness of a decision cannot be undermined by challenging the propriety of the person who made the decision (Sharpe & McMahon, 2008). But this ambivalence on behalf of Justice Scott opened a door for Cyr's lawyer, who kept going forward with his defence of Cyr, taking her case to the Appellate Court.

A further precursor to the approach to incarcerating women with venereal disease come from the colonial mother land in the form of the *Contagious Disease Acts*.

Contagious Disease Acts

The social conditions that produced the context in Canada enabling the detention of Eleanor Pattison and Lizzie Cyr were historically rooted in a range of legal processes first enacted in the imperial motherland. The approach to providing a diverse range of interventions by the British Royal Commission on Venereal Diseases and implemented by Dr. Bates came shortly after a national

controversy that arose due to a decidedly more punitive approach asymmetrically targeting women with the *Contagious Diseases Acts*. Near the end of the 19th century, the United Kingdom faced a massive social movement response to the controversial legislation that was a preliminary foray into mobilizing coercive measures to control venereal disease. The *Contagious Diseases Acts*, initiated in 1864 and amended in both 1866 and 1869, gave the authority to the police to arrest any woman thought to be a "common prostitute" in various districts close to military depots in southern England and Ireland (Walkowitz, 1980). Women found to be working as prostitutes were registered with authorities. These women were detained and then examined by specialized naval and military medical officers or appointed doctors for venereal diseases—defined as both syphilis and gonorrhoea. When women were found to have symptoms, they were confined to venereal disease wards in hospitals called Lock Hospitals until they were cured. The Lock Hospital was a hybrid institution providing both care and control, where the confined women did not have the freedom to leave until they were cured. Women who were registered and found to be free of symptoms or ultimately cured were given a certificate of health.

By the 1870s, the *Contagious Diseases Acts* were some of the most controversial legislation the country had known. A massive mobilization and social movement arose to counter the acts, which was led primarily by the Ladies National Association for the Repeal of the *Contagious Diseases Acts*, a widespread women's rights movement. John Stuart Mill joined the cause, as did Florence Nightingale. However, the social movement was mainly led by a group of outspoken high society women, including Josephine Butler, head of the Ladies National Association. Arguments against the legislation were that with removal of *habeas corpus* the laws fundamentally changed the legal protections afforded to women; the laws promoted, sanctioned, and regulated prostitution; the laws punished only women for vice and not men; and the implementation of the laws was cruel and degrading (Smith, 1990; Walkowitz, 1980). Although the women campaigners were often middle class, the women who were targeted by the laws were from the lower classes. According to an account of this contentious moment in British society by historian Judith Walkowitz (1980), the class differentiation across the social movement's reaction to the laws caused some tension between the campaigners and the women the law targeted, as the campaigners often positioned themselves as saviours of women who were engaged in sex work. At the same time, the registration process for prostitutes and state-supported health care was viewed by some prostitutes as beneficial, as in some cases the certificates of health were utilized to charge clients higher rates (Walkowitz, 1980). Despite some tensions, there are other cases of the two camps working together. In most cases, the women charged under the acts were British citizens and white women,

and the campaigners for repeal promoted a strong message of women's citizenship solidarity. Over the course of many national and local campaigns, an unprecedented 17,300 petitions against the acts bearing over 2.5 million signatures called for their repeal (Walkowitz, 1980). In 1886, the laws were repealed. But the approach to coercive legislation, targeting, in particular, women of lower classes and those deemed vagrants or prostitutes, continued to proliferate across the Commonwealth and beyond.

Margaret Tippens, race, and Canada's Contagious Disease Act

Following the *Contagious Diseases Acts*, the first such legislation of this nature to be seen in Canada was named *Regulation 40D*, enacted during World War One, as part of the *War Measures Act* in early 1918. This legislation followed the same logic of the *Contagious Diseases Acts* of the United Kingdom, and was also specifically aimed at women. Under *Regulation 40D*, it stated, "No woman who is suffering from a venereal disease in a communicable form shall have sexual intercourse with any member of His Majesty's forces or solicit or invite any member of said forces to have sexual intercourse with her" (Boudreau, 1918).

Due to the similarities to the previous *Contagious Diseases Acts*, the legislation immediately caused discomfort among British politicians, who were aware of the public backlash such legislation could provoke (Wojczak, 2009). When the new legislation was enacted and implemented across the Commonwealth it quickly provoked the same national social movement that had organized around the Contagious Disease Acts, angered again at the government's asymmetrical treatment of women. The well-organized women's movement that in the United Kingdom led a response to *Regulation 40D* and was successful in getting the new legislation repealed within a year. This meant the law no longer applied to the United Kingdom proper, but other Commonwealth countries were undeterred. Ultimately, pressure from the colonies, specifically the Dominions of Canada, Australia, and New Zealand, caused *Regulation 40D* to be amended into the *Defence of the Realm Act* in 1918 so that they could initiate it themselves, despite the United Kingdom's swift repeal of the legalisation (Cassel, 1987).

In contrast to counterparts in the United Kingdom, women's rights campaigners in Canada supported this sort of coercive legal measure. Leaders in the Canadian women's movement, such as Emily Murphy, regarded this new legislation as a central part of nation-building, security, and the assertion of a respectable form of white settler citizenship in the Dominion (Kubla 2008; Cassel 1987). For social reformers such as Murphy, race was a central factor underpinning the project of moral reform and nation-building. With the settler population of the new Dominion under threat, Anglo-

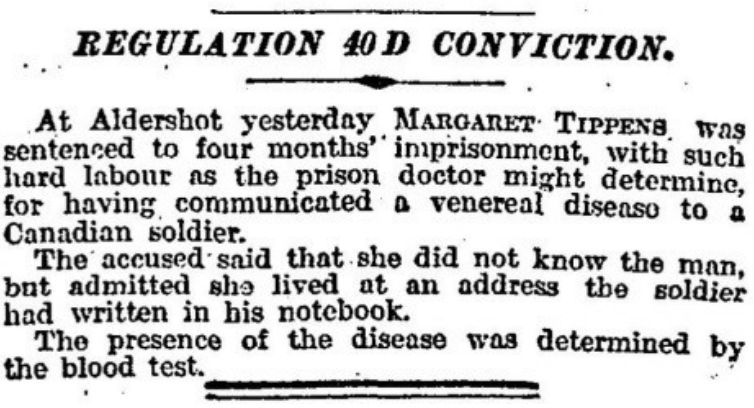
Saxon elites worked to preserve and regain racial predominance. Feminist scholar Carol Bacchi (1978), examined how much of the work of Anglo-Saxon, middle-class women social reformers at the time was centred on maintaining the purity and supremacy of whiteness. While campaigns for moral reform were focused on raising the status of the traditional female role, with minor social and civic reforms, such as campaigning for female suffrage, and containing social ills, Bacchi argued that a main objective of these campaigns was on race regeneration. Due to an influx of non-Anglo-Saxon immigration and various public health crises, there was a fear at the time of Anglo-Saxon numbers declining. This decline was imagined as a threat to the new settler nation and its elite population, where the notion of "race-suicide" emerged (p. 460). To respond to this threat to the white race, moral reformers worked to regenerate the race, protecting middle-class Anglo-Saxons from the perceived social scourge of racialized, poor, and non-Anglo-Saxon immigrants, as well as Indigenous people. As further noted in her work, "[t]he crusade for purity, an attempt by the Protestant elite to reimpose its values on a deviant society" (p. 460). Furthermore, "[m]uch of the reform programme aimed at finding ways to improve the calibre of tomorrow's citizens. A commitment to race-regeneration and nation-building dominated the movement" (Bacchi, 1978, p. 461). A central part of this racialized moral reform and race regeneration campaign was focused on the problems of prostitution and venereal disease, both seen as vital threats to Christian morality, and the strength of the respectable elite white settler population. As a result, there came to be a reliance on coercive legislation such as the *Defence of the Realm Act* and subsequent venereal disease acts. Moral reformers and civic leaders campaigned tirelessly about the social vices that threatened the regeneration of Anglo-Saxon's in the Dominion (Bacchi, 1978, p. 468). The campaigns were underwritten with a focus on racial purity, where protecting white Anglo-Saxon elites from the racialized other through various means such as legally and socially controlling and regulating venereal disease. The work of Bacchi helps illustrate how the work of moral reform campaigners to address social ills, such as Emily Murphy, was underpinned and deeply intertwined with notions of race and white supremacy.

Canadian officials and moral reformers were heavily invested in backing the *Defence of the Realm Act*, and in addition, the military in concert with government enacted the Canadian-specific iteration of the legislation. The United Kingdom would not back down on their repeal, and as a result Canada led the other Dominions—Australia and New Zealand—in campaigns to control venereal disease through punitive legislation targeting women on their own.

Examining the formation and implementation of Canadian iteration of the legislation reveals a historical fissure between Canadian settlers and the colonial motherland. While, in its nascent state,

Canada was brought into World War One due to the *Constitution Act* of 1867 that stipulated British control over Canada's foreign policy and affairs, the country was asserting its own approach to managing the epidemic of venereal disease. With the assertion of a different, more coercive, approach to venereal disease control, some Canadians took a controversial stand that was specific to their location as an emergent settler colony with a growing white middle class facing an influx of new immigrants. The logic underpinning this legislation seems both obvious and brutal: ensure the maintenance of wartime forces by identifying, classifying, targeting, and containing a specified population deemed a risk to the nation—in this case prostitutes, Indigenous women, non-white immigrants, and those surviving on transactional sex who had a venereal disease. The legislation allowed for the detainment, remand, mandatory medical examination, and subsequent treatment of any woman deemed such a risk at the discretion of court-mandated doctors. The ethos of this legislation was central to the way that the vagrancy law was used to target Cyr, and extended in the venereal disease legislation that targeted women including Pattison.

One such woman specifically targeted by this wartime Canadian iteration of the Contagious Disease Acts was one Margaret Tippens. In 1918, on August 15, in Aldershot, England, *The Times* in London reported that a Margaret Tippens was found guilty and sentenced to four months imprisonment. The race of Tippens was not disclosed in the media. However, Tippens faced a similar sentence as Cyr, hard labour, for her offence against this new iteration of the *Contagious Disease Acts* applying to Canadian soilders, due to allegedly communicating a venereal disease to a Canadian solider. Just outside the town of Aldershot, England, was a military training facility that housed numerous Canadian troops. At the time, a military base such as Aldershot's produced a multiplicity of microeconomies of brothels and bars run for the purposes of prostitution (Walkowitz, 1980).



REGULATION 40D CONVICTION.

At Aldershot yesterday MARGARET TIPPENS was sentenced to four months' imprisonment, with such hard labour as the prison doctor might determine, for having communicated a venereal disease to a Canadian soldier.

The accused said that she did not know the man, but admitted she lived at an address the soldier had written in his notebook.

The presence of the disease was determined by the blood test.

Figure IV: The Times (August 15, 1918).

According to the report, the soldier did not know Tippens well, and police located her because he had written down her address in a notebook. Only details about communication of venereal disease and her punishment were publicized. No information on Tippens's job or relationship with the solider were included in the brief article, however, due to how these laws were applied it is not unlikely that sex work was involved. This type of media article highlighting Tippens charges and venereal disease infection can be seen as a precursor and prototype to the myriad sensationalized media coverage that people experience in cases of HIV non-disclosure, transmission, and exposure seen today.

Emily Ferguson Murphy, race, and women as persons

Emily Ferguson Murphy, the Police Magistrate who incarcerated Eleanor Pattison, was an eager supporter of Canada's iteration of the *Contagious Disease Acts*, as she believed in the criminal law's ability to resolve what she regarded as social ills weakening the Dominion. Murphy regarded coercive legislation targeting women of lower classes as a central part of the project of securing nationhood through controlling venereal disease (Kulba, 2008; McGinnis, 1990). It was partially through these processes of inclusion and exclusion that the emerging Canadian nation defined forms of respectable and normalized settler citizenship. The keen interest taken by Murphy was part of a larger project of hygiene and moral reform that was taking shape across the country as a component of the larger nation building project to secure a future for the respectable form of white settler citizenship (Kubla 2008). Murphy was a central figure of the white middle-class moral reformers and public health campaigners. She became the first Police Magistrate in the British Empire in 1916, and sat on her bench of the Women's Court in Edmonton until 1931.

In her ongoing efforts, Murphy was also well known for her eugenics work, where she campaigned for birth control, sterilization, selective breeding, and compulsory sterilization to combat the social problems of alcohol, drug use, and crime, which she understood resulted from mental deficiencies and vagrancy. A specific example of Murphy's work, which manifested as a particularly coercive racialized moral reform was uncovered by the work of gender studies scholar Karen Stote (2012). Stote examined how the forced and coerced sterilization of Indigenous women came to be framed as a public health measure by moral reformers such as Murphy in the earlier part of the 20th century in Canada. In Alberta, Indigenous women in particular were disproportionately targeted by formally enacted legislation in the province, as well as unsanctioned sterilizations (p. 117). Stote provides an analysis of coercive sterilization, that allows for "the practice to be understood within the

larger relations of colonialism, the oppression of women, and the denial of indigenous sovereignty" (p. 117). Two provinces enacted formal sterilization legislation, Alberta had a *Sexual Sterilization Act* in effect from 1928 to 1972, and British Columbia, from 1933 to 1973. In Alberta, Murphy was a strong supporter of the act. The evidence reviewed by Stote confirms that Indigenous women were indeed subject to sterilizations both under enacted legislation and in areas where no formal legislation was in existence. Before formal legislation was enacted in Alberta, Indigenous women would still widely be sterilized, especially those with venereal diseases, and those charged with crimes.

Stote argues that the control of Indigenous women's bodies was a central part of the project of settler colonization. Sexual sterilization gained prominence as a result of its support by the eugenics movement in the early 1900s (p. 118). Eugenicists, such as leading moral reformers, were interested in the costs of implementing public health measures across the new settler Dominion (measures such as sanitation, nutrition, as well as working and housing conditions). Rather than understanding these emergent social problems as a result of new nation-building as broad systemic structural issues, moral reformers instead understood and explained problems stemming from the innate traits of the poor, disadvantaged or marginalized. Social ills were seen as a problem inherent to the poor and Indigenous, not as a consequence of the way the new society was being organized (p. 118).

The project of sterilization was widely supported by many medical, philanthropic, and women's organizations as a solution to these problems, who lobbied the government to adopt positive and negative eugenic measures in the interest of the economy of the new Dominion. As Stote noted, "[f]or the colonizing process to be successful, it has been central to impose western institutions and to subjugate Aboriginal women through their separation from the land, the control of their bodies and those of their children" (p. 119). Groups such as the Women's Christian Temperance Union, the Salvation Army, and the National Council of Women lobbied for eugenic arguments, naming Indigenous women as "savages," "depraved," or of "loose moral character", so that their sexualities could be policed (p. 119). As further noted by Stote:

> By grounding coercive sterilization within its larger historical and material context, I allow for it to be understood, not as an isolated instance of abuse, but as one of many policies employed to separate Aboriginal peoples from their lands and resources while reducing the numbers of those to whom the federal government has obligations. Policies like coercive sterilization have undermined Aboriginal women's ability to reproduce and have allowed the federal government to avoid effective and far-reaching solutions to public health problems in Aboriginal communities (Stote, 2012, p. 141)

Stote's analysis helps to further underline how settler colonial practices of public health were underwritten by white supremacy working to regenerate and strengthen the vital powers of Anglo-Saxon elites such as Murphy and other moral reform campaigners. Murphy also wrote the book *The Black candle*, published in 1922, which is best known for promoting the early mentality of the racialized war on drugs. The book linked the influx of Chinese immigration with heroin use and called for greater legislative oversight and social control of drugs in Canada.

Others were not as happy with Emily Murphy and Alice Jamieson's new judicial role. The approach taken by Cameron, Cyr's lawyer, to challenge the new Police Magistrates right in the judiciary, was common. After numerous defense lawyers kept challenging Murphy and Jamieson's right to hear criminal cases, Murphy collaborated with a group of other lawyers to address the situation. Outside of their challenges to her authority, Murphy had disdain for many of the defence lawyers who presented before her, regarding many as little more than pimps. It was common practice at the time for a defence lawyer to charge the same amount as a sex worker was owed by her client (Sharpe & McMahon 2008)). Murphy, noted in correspondence "Personally, I cannot feel that these high fees charged to the frightened girls…. Is just the same offence as what was described by the *Criminal Code* as "living off the avails of prostitution… there are quite a few who only need fur and hoofs to make them beasts" (Sharpe & McMahon, 2008, p. 60).

Facing an ongoing onslaught of resistance to her judicial authority, Murphy mobilized to remedy the situation. Murphy saw a chance when Lizzie Cyr's case came forward, along with the persistence of her lawyer, Cameron, who kept appealing the case to higher courts. The group of women who mobilized with Murphy came to be known as The Famous Five, and were comprised of Murphy, alongside Henrietta Muir Edwards, Nellie McClung, Louise Crummy McKinney, and Irene Parlby. As feminist scholar Tracey Kulba elaborated in her article "Citizen crusaders: Social hygiene and the production of the female citizen in post–World War One Canada," this moment marked the rise of white liberal feminism in the Canadian Dominion as linked to the project of securing settler-colonial power (Kulba, 2008; Mawani, 2006; McGinnis, 1990). Kulba is among a range of feminist historians and scholars who have documented how the coercive aspects of venereal disease management asymmetrically impacted sex workers, vagrants, new immigrants, people of colour, and people in poverty (Kulba, 2008; Mawani, 2006; McGinnis, 1990).

The five prominent middle-class activists instrumentalized Lizzie Cyr's case to try and win the right for women in Canada to be legally recognized as legal persons under the law. With such a right

they would therefore be able to hold judicial office. The group agreed with Cyr's prosecution, as they sought to use the criminal law to as a key tool to incarcerate sex workers, Indigenous women, and women with venereal disease as part of the project of moral reform in the Dominion. Alberta's highest court agreed with the Famous Five, and in the Calgary Herald it was announced on November 26, 1917, "Judges find that Mrs. Jamieson is legally appointed" (Burton, 2017, np.). The decision meant that Alberta was the first province to recognize this right for women. Historian David Bright (1998) reflecting on the decision of the Alberta court in his article "The other woman: Lizzie Cyr and the origins of the 'Persons Case'", noted:

> [T]he Alberta court was not simply affirming an abstract principle when it ruled in favour of Alice Jamieson in 1917, but instead was upholding the concrete conviction of a woman accused of prostitution. By doing so, the legal system not only confirmed the right of Jamieson to hold high public office, but—and just as importantly—it reinforced the social assumptions and prejudices on which she had based her conviction of Cyr in the first place. (p. 101)

However, the Alberta victory did not extend far enough for the Famous Five. The law was not consistent across Canada, so the women took their argument to the Supreme Court of Canada, which on April 24, 1928, ruled against the Famous Five, underlining that women were still not legal persons. As Canada was still under the dominion of the United Kingdom, there was still one higher authority to attempt their argument, the British Privy Council. The Council overruled the Supreme Court's decision on October 18, 1929, and women in Canada were deemed legal persons, meaning they could hold forms of public office (Sharpe & McMahon 2008).

Whilst Lizzie Cyr still did six months of hard labour, women with access to wealth and status were able to continue to prosecute other women such as Pattison, Cyr and Tippins. The liberal notion of personhood in law, that is still understood today, rests on the back of Cyr, who was prosecuted as a sex worker, and Métis woman, with a venereal disease. In this project to expand the definition of legal personhood for some, Murphy and the others fought to deliberately exclude and criminalize others, such as Indigenous women. The liberal legal architecture of personhood in Canadian society, is thus constituted in part through the criminalization of sex work, people of colour, and people with venereal disease.

Murphy was recorded charging 75 cases in 1921 and 66 cases in 1922 (McGinnis, 1988). In the 1921 Annual Report from the newly instituted provincial program on venereal disease, it was reported

that "seventy-five police court cases were examined for venereal diseases. These examinations were made largely at the instance of the lady Magistrates, who have taken a keen interest in venereal disease prevention work" (Department of Public Health, 1921, p. 60). At the time, specific institutions for the care of people with venereal disease were extremely limited or non-existent. In a local Edmonton newspaper, Murphy lamented, a few years after incarcerating Pattison, "there is no place of refuge for girls over sixteen who have made the fatal mistake, except the jail" (Edmonton Bulletin, 1923). After years of incarcerating young women in the local jail, Murphy began calling for a specific institution to support young women with venereal disease. Incarcerating young women in jail was not providing the outcome she desired. Despite having led the charge to use her court as a site of intervention, Murphy, a few years earlier, in 1921, also mentioned to Bates that women were overrepresented in enforcement of venereal disease legislation. Her comments at the time highlight the complexities of mobilizing criminal justice and correctional system infrastructure to coercively control venereal disease. This hybrid approach was aimed primarily at women and mobilized existing criminal justice infrastructure including police, courts, and jails, but underpinned their use with the emergent logic of public health.

Bodily and racialized surveillance

The gendered and racialized dimensions of the early venereal disease control project also manifested in gender and race-based surveillance of the bodies of those who were incarcerated. In an examination of the Fort Saskatchewan Goal prison ledger, social reform historian Mélanie Méthot outlined not only how women were incarcerated longer than men, but also that women faced heightened forms of surveillance (2016). In the prison, according to the ledger from 1914 to 1919, men were generally sentenced to one to three months, whereas women were often detained for three months or more. There was also a higher proportion of women in the prison with venereal disease than men, despite much higher numbers of incarcerated men. For example, in 1921, according to the *Annual report of the division of venereal disease*, 47 men and 63 women in the prison had syphilis and/or gonorrhoea (1921). The prison's ledger indicated that two years earlier, in 1919, there were 360 men and only 28 women incarcerated (Méthot, 2016, pp. 29–30). Looking across these two documents—accounts of the prison's ledger and the annual report from the venereal disease division—it becomes a viable possibility that the increase in the number of incarcerated women is due to the enactment of the new venereal disease legislation. The extended length of women's sentences could also be due to

women being the primary targets and being incarcerated for longer times to undergo lengthy and painful treatment.

Méthot's research also outlines how women in the prison were subject to more detailed physical examinations than men. Incarcerated male vagrant's biometric markers were collected, including eye colour, weight, height (to the quarter inch), hair colour, skin colour, as well as any visible scars and tattoos visible on the arms and face, and documented in the ledger so they could be identified in the future in case of recidivism. Women incarcerated at the jail, on the other hand, had full-body examinations, and the ledger included all the same biometrics as men but also details about body scars that could indicate pregnancy, abortions, or attempted abortions. Eleanor Pattison, when incarcerated, was listed in the ledger as having had "operation marks on her right side" (Méthot, 2006 p. 38), indicating that the 18-year-old had likely had an abortion. The examinations of women did not follow the same logic as those of men, where women's examinations sought to develop a record of their moral standing and virtue (Méthot, 2006). Such a response further blurred the notion of punishment and coercion. Additionally, women who had been incarcerated for crimes of vice would have also been subject for consideration to be coercively sterilized, specifically those who were Indigenous (Stote, 2012).

In this section, I have detailed findings from archival research looking at how the incarceration of Eleanor Pattison, Lizzie Cyr and Margaret Tippins came to be organized socially through texts and a convergence of vital powers. The practice of incarcerating women like Pattison was a contested one, and was deliberately and persistently negotiated in law by a range of leading figures in the public health and moral reform and hygiene movement in Canada. The criminalization of Cyr led to the expanded liberal notion of personhood as we know it today, which rests on the deconstitution of the personhood of others. Additionally, despite being considered counter to citizenship rights provided by the constitution, and opposed by the imperial motherland, Canadian moral reformers adopted a contentious approach. They mobilized the infrastructure of the criminal justice system to incapacitate people with venereal diseases, blurring the line between coercion and punishment due to how venereal diseases, and specifically women with venereal diseases, had come to be socially signified as morally repugnant and a threat to the respectable and pure project of white settler colonization in the Dominion.

Conclusion

The aim of this chapter was to provide a history of the present on coercive and punitive public health practice to control venereal disease in the early days of the Dominion of Canada. As I indicated

previously in the chapter, I have not conducted this exploration of the past to make any grand didactic assertions. Rather, what becomes visible is that the muddiness between coercion and punishment in public health practice is historical, as the nascent project of public health was one that was underwritten by notions of white supremacy and relied on the criminal justice system to achieve its aims. Through an interlegal and interinstitutional lens, the use of the infrastructure of the criminal justice system to advance the goals of public health becomes analytically significant for understanding the inherent interconnectedness of the two seemingly distinct institutions. The criminalization of people with venereal diseases, specifically Indigenous women, and poor people of colour, has been around since the early days of Canadian confederation, and practices of criminalization disproportionately targeted socially marginalized people deemed a threat to the well-being of the elite settlers of the Dominion. The notion of personhood that exists today emerged during this time, resting on the criminalization of women, many Indigenous, poor, deemed vagrants living with venereal disease. This was a time where the practices of medicine had shifted from a focus in the hospital, to a new focus on the population as a whole. Classifying the diseased other was a project aimed at helping the vitality of the white elite settler population in the new Dominion of Canada. This new form of surveillance medicine targeted everyone, and resulted in the criminalization of a certain few, such as Tippens, Cyr and Pattison.

In conclusion, I would like to briefly reflect on the methodological considerations I brought forth at the beginning of this chapter related to conducting a history of the present as part of an approach to critical ethnography. With this history of the present, I have aimed to focus on questions of "how" in the process of inquiry examining specific events, moments of contention, ideas, or theories that were overlooked, marginalized, or considered minor. I have also examined the day-to-day and specific practices, detailed regulations, policies, and proceedings of how things were, or how they were prescribed. This approach seeks to examine how governance practices targeting the population emerged and aims to interrogate what constitutes truth within them. The approach here is to examine how conduct is governed, and how practices of governance come to be via certain legal process. Who comes to be known as criminal or a risk to public safety is negotiated through the deliberate processes and actions of actors, in this case experts and those who have access to enacting and enforcing laws. Through this approach, it becomes clear that the criminalization of people with venereal diseases in Canada has existed since the early days of the Dominion. The governance of risky populations at the time was an interinstitutional process, which relied on criminal justice infrastructure, courts, police, the

military, and prisons. Looking solely to one institution would miss the hybrid and intersecting ways in which a range of institutions becomes intertwined.

Furthermore, as texts are the source of history, they are also what come to be activated in the lives of people in the past to enact forms of violence, coercion, and punishment. Texts can also give voice, or deny voice. The only way I have come to know the names Margaret Tippens, Lizzie Cyr, and Eleanor Pattison is because they became subject to detention and subsequent constitution as delinquents, criminals, and vagrants in the eyes of actors of criminal justice and nascent public health institutions via contentious venereal disease legislation. In order to gain a sense of Tippens, Cyr and Pattison's pasts and experiences, as a researcher, I must rely on institutional texts that were mobilized to enact state-sanctioned forms of legal violence against these women. In this work, I engaged with these texts fully aware that they had been mobilized in the past to constitute living subjects into objects to be surveilled, incapacitated, controlled, and biopolitically subjugated by the state.

One final reflection is regarding coercion and punishment as they relate to treatment for venereal disease becoming more effective—penicillin was discovered in 1928—and a larger and more capable public health infrastructure having been developed. Under changing conditions, authoritarian measures that blurred the line between coercion and punishment might have become less in vogue for controlling venereal disease. Regarding the *Criminal Code*, for example, the provision included back in 1919 to make it a crime to communicate a venereal disease, knowingly or by culpable negligence, to another person was repealed in 1985. The law was only applied in one known instance in the case against a man who had been alleged to communicate gonorrhoea to a woman with whom he had slept. The woman died, and the charge of knowingly communicating venereal disease was only used to buttress a charge of manslaughter (Elliott, 1996). The man was prosecuted, and the charges were upheld on appeal. However, in 1985, Parliament repealed the provision, citing two reasons:

1. The transmission of venereal disease was considered to be a matter of public health rather than criminal law.

2. There had been no prosecution under this provision for over half a century. Two federal committees concluded that the provision was ineffective and counterproductive in that it drove underground those who engaged in the prohibited activity, and hindered epidemiological efforts. (Elliott, 1996)

The turn toward viewing public health institutions as the actors who were best capable to respond is aligned with much of what AIDS activists and human rights advocates have called for as arguments

to counter the criminalization of HIV non-disclosure and exposure. The timing of the 1985 repeal is uncanny, as it occurred around the emergence of AIDS, The first case was documented in 1982 in *Canadian Diseases Weekly*, which outlines the case of a gay man living in Windsor, Ontario, who had died of a rare form of pneumonia (Robertson, p. 315). At the time, interestingly, even hysteria surrounding AIDS did not result in coercive public health measures immediately, despite numerous calls for such approaches. In 1990, Dr. Richard Schabas, chief medical officer of health in Ontario, made public calls for the quarantine of people living with HIV. The results of his statements ignited the largest rally to date organized by the direct-action activist group AIDS ACTION NOW! The rally had over 500 demonstrators who marched on the provincial legislature at Queen's Park demanding Schabas's resignation (Silversides, 2003, p. 219). The proposal to enact quarantine never materialized for myriad reasons, including the massive activist mobilization. In the context of AIDS, for a time it seemed that coercive and punitive forms of detention for reasons of public health were no longer considered viable. That is not to say that the actors within the police and criminal justice system were not mobilized to respond to AIDS.

Despite the decreased presence of overt coercive practices by public health actors, in the late 1980s AIDS ACTION NOW! member George Smith's prediction, that police would shape the politics of AIDS for years to come, began to be realized. In 1989, the case of G.S. in Alberta emerged, with N.G.M. and the case of C. Ssenyonga a few years following. These cases, and the now over 200 that followed, signaled a turn toward the role of police and courts working to intervene in violent, coercive, and punitive ways in the lives of people with HIV, chipping away at their personhood. These cases signal a move toward the role of again mobilizing the criminal justice system, police, and corrections institutions in the service of managing the epidemic, a turn which developed slowly over time from 1989 onward and led to Canada becoming one of the leading countries in the world to criminalize HIV non-disclosure and exposure. Looking to the past to better understand the present helps provide insight into how coercive and punitive responses to communicable disease have been organized over time. Through the analysis in the chapter, it is apparent how interconnected criminal legal and public health responses have been, and how such responses have been underwritten by the settler colonial project aimed at controlling and surveilling the bodies of Indigenous women.

In the following chapter, I explore the methods, tactics, and practices I employed to undertake this critical ethnographic inquiry. For this project, I conducted a series of qualitative interviews with criminalized people living with HIV. In the chapter, I detail how, as an interdisciplinary project, my

work draws from a range of social science and feminist qualitative research traditions, all primarily organized around critical criminology.

Chapter 3: Methods, or how to study HIV criminalization

This chapter outlines the specific practices, tactics, and methods I employed in order to realize a critical ethnographic inquiry. To do so, I focused on the location and experiences of people living in negative relation to the law as individuals criminally charged or threatened with charges for alleged HIV non-disclosure, exposure, and transmission. In *Chapter 1: Bearing witness to violence,* I outlined the approach of a critical ethnographic inquiry, one aligned with the trajectory of critical social science research, feminist alternative sociology, and institutional ethnography. This approach calls into question contemporary practices of punishment within society by orienting the analysis towards the avoidable suffering of criminalized people. By analyzing the social world through the perspective and experiences of criminalized people, my research aims to understand how people's lives are externally organized from a plane disconnected from their actual lives. Such an approach aims to move beyond mere description to a critical interrogation of punishment practices. Furthermore, such an inquiry aims to move away from discussions on the contestation of truths, to rather aim to denaturalize forms of violence activated through criminalization processes. In doing so, I introduce a series of methodological tools to undertake a critical inquiry into the forms of criminalization, including the analysis of *living in negative relation to the law*, and notions of *legal violence* and *bearing witness*. Thus, my inquiry allows me to bear witness to the violence of HIV criminalization, as well as chart new epistemological directions aimed at understanding how people live and embody, in actual terms, the experiences of HIV criminalization.

In *Chapter 2, Histories of legal violence: Venereal disease control in the Dominion of Canada*, I employed another methodological tool available to critical social science researchers, a *history of the present* approach, aimed at interrogating the ways in which the criminalization of diseases associated with deviance in Canada has been historically constructed. To do so, I employed the methodological tool of history to look at the past, in order to examine whom becomes known as a criminal or a risk to public safety and how this negotiated process is enacted through a series of deliberate actions and processes amongst actors and institutions. The outcome of that analysis supports the overarching

critical objectives of this ethnographic inquiry, calling into question the practices of interinstitutional and interlegal criminalization in the contemporary moment.

In this chapter, I outline in detail the specific practices, tactics, and methods I employed enabling me to realize the methodological objectives underpinning this critical ethnographic inquiry. As an interdisciplinary project, my methods draw from a range of social science and qualitative research traditions, all primarily organized around critical criminology. Critical criminology, an inherently interdisciplinary field, comprises a range of qualitative research traditions, including (but not limited to) socio-legal studies, feminist ethnography, and critical social science. As I outlined in *Chapter 1: Bearing witness to violence*, the critical social science and socio-legal research traditions provide a constructivist analysis of the social world and legal instruments that support forms of emancipation from oppression. I also explored how feminist methodologies – namely, institutional ethnography – position the voices and experiences of research participants as people with agency and as central actors in the construction of knowledge related to their lives. Each of these methodological traditions and approaches brings with it a range of tactics, practices, and methods from which I have designed this interdisciplinary criminological critical ethnographic inquiry. My task in this chapter lies in describing the varied tactics, practices, and methods I employed to render them clear, transparent, and perhaps replicable. In doing so, I aim to ensure that the varied approaches employed epistemologically align in a coherent fashion with my understanding and aspirations regarding the production of knowledge.

The results of this interdisciplinary critical ethnographic inquiry offer a framework for analyzing the daily lives of criminalized people. As such, the researcher must centrally place people's first-hand lived experiences within a study. As feminist qualitative researcher Shulamit Reinharz, who undertook a breadth of work exploring feminist research methods, and outlined, "ethnography is an important feminist method as it makes women's *lives* visible, just as interviewing is an important feminist method as it makes women's *voices* audible" (Reinharz, 1992, p. 48). In her elaboration of feminist research methods, Reinharz recalled a quotation from Dorothy Smith, who stated that such feminist ethnography should seek to understand "what women are for themselves" (Reinharz, 1992, p. 52). Reinharz further stated, "contemporary ethnography is multimethod research. Ethnography usually includes observation, participation, archival analysis, and interviewing" (Reinharz, 1992, p. 46).

My work extends this ethos of ethnography to the lives of criminalized people living with HIV, aiming to make their lives and voices visible and audible through the application of a range of ethnographic methods. To do so, I examine the actions of social actors through interviews, as well as

through archival research of artefacts and documents including legal texts and media articles related to the construction of criminal cases of alleged HIV exposure, transmission, and non-disclosure.

In what follows, I outline the range of methods, practices, and tactics I employed throughout this project. I also provide a rationale for my approaches, grounding them in the practices of previous scholars. I begin by discussing how I developed my research question, as well as how the project came to be understood as a form of sensitive research requiring rigorous protections to ensure confidentiality. I then explore various aspects of my ethnographic project, including how I recruited individuals for in-depth interviews, and the process by which I conducted the interviews. Next, I outline the criteria I applied to the archival research. Finally, I explain how I analyzed the data and I describe the complexities of summarizing my research findings attuned towards describing experiences of violence.

Development of the research question

In this section, I briefly outline how I focused my inquiry on the following question:

> What are the experiences of HIV-positive people who have engaged with the Canadian criminal justice system because they allegedly did not disclose to their sex partner(s) that they are HIV-positive?

This specific research question is grounded in the traditions of institutional ethnography and critical social science. The question arose from an epistemological analysis aimed at examining how we know what we know about the issue of HIV criminalization in Canada, attending to the relevant literature, the circulating discourse, institutional practices, and my own experience as an activist. Through this epistemological analysis and examination of these various factors, it became apparent that the lives of criminalized people were not adequately accounted for in our existing knowledge of the issue, and thus the daily experiences of people required further attention.

To develop and refine my research question, I first turned to the work of critical realist philosopher Andrew Sayer, who states that the basis of social science research is to examine the nature of relations between subjects (such as people, social actors, and the various subjectivities formed) and objects (such as social structures, practices, and discourses). Sayer states, "knowledge – whether adequate or not – never develops in a vacuum, but is always embedded in social practices and we can

more fully understand the former if we know the latter" (Sayer, 1992, p. 43). Therefore, to understand knowledge of HIV and the criminalization of non-disclosure, exposure, and transmission, I examine the social and discursive contexts within which such knowledge developed, thereby leading to an understanding of what we know about HIV criminalization.

In terms of grounding the development of my research questions in the relevant literature, in the *Introduction*, I outlined how epistemological limits within social research on the criminalization of HIV, or looking at how we know what we know about HIV criminalization. The analysis came to the conclusion that generally much of the literature is oriented toward the public health impact of the criminal justice response. Such literature has inadequately accounted for the suffering of those targeted by criminal and public health laws that criminalize HIV. Furthermore, amongst institutional practices, knowledge on the criminalization of HIV is primarily defined using institutional language and the actions of public health and criminal justice institutions – that is, those who first codified specific behaviours by people living with HIV into criminal and regulated behaviours. The practices of public health and criminal justice institutions informed how we have come to believe that not disclosing one's HIV-positive status is a punishable criminal act. This criminalizing understanding of the actions of people living with HIV then leads to institutional sequences of action, taken up by other institutional actors representing the state such as the police, who then go out into the world to pursue people living with HIV as criminals.

Meanwhile, knowledge about those people living with HIV criminally charged is often publicly defined through hyped-up discourses from media outlets via sensationalized reports (Persson & Newman, 2008; Mykhalovskiy et al., 2016; Speakman 2017). The work of media to frame cases in particular ways is further discussed in the following chapter. As Persson and Newman (2008), Mykhalovskiy et al. (2016), and Speakman (2017, 2019) found, media reports inform the public's understanding of HIV-positive people as vectors of disease. HIV-positive individuals are then regarded as actively aiming to spread the virus to unsuspecting innocent people. Here, Sayer's work is again relevant, particularly his observation that knowledge is quite largely linguistically dependent (Sayer, 1992, p. 6). In his work, Sayer outlined how what we come to know is constrained by the available descriptive words that exist to explain social phenomenon. Thus, the language of the criminal justice system, which deploys dichotomies such as victimhood vs. criminal, innocent vs. guilty, and complainant vs. offender, along with concepts such as punishment, disease, and protection, contains the registers available to explain HIV non-disclosure, exposure, and transmission. This language is then

adopted by the police, the courts, and the media, and informs how the experience of HIV criminalization is socially constructed and understood.

In order to counter the institutional practices of the criminal justice system, the police, and the media, including understandings of people living with HIV as dangerous and criminal, I turn to expert legal advocates, human rights activists, HIV movement actors, and community-based organizations. These individuals and organizations work to advance alternative understandings of people living with HIV. Such organizations produce documents, fact sheets, documentaries, and other resources as forms of a counter discourse to the dichotomies employed by the criminal justice system, as well as the fear and sensationalism of the media. By aiming to counter the dominance of the state and the media, expert activists privilege certain cases and narratives. This serves to instrumentally mobilize certain lived experiences in order to align with advocacy goals. One example of this lies in the focus on Quebec's case of *R. vs. D.C.* (Supreme Court of Canada, 2012; Butler-McPhee, J., Symington, A., Kazatchkine, C. & Duke, A., 2012). This important case helped establish a 2012 Supreme Court precedent, further entrenching a criminal law response across Canada. The white, middle-class woman (known as D.C.) charged in this case was herself a victim of sexual abuse perpetrated by her former partner. Through this case, expert activists rather easily demonstrated how criminalizing HIV non-disclosure represents an injustice to D.C., and rightly so. However, the case is not emblematic of cases across the country, where the people involved are racialized, live in poverty, are socially marginalized, have histories as sex workers, and are street involved. By privileging the case of D.C., certain types of people living with HIV charged for non-disclosure are understood as potentially less "guilty" than others, and thus more worthy of expert activist support. In the service of advocacy objectives, activists may have a vested interest in promoting the most sympathetic stories of people charged with HIV non-disclosure. Whilst aiming to present a counter discourse to the mainstream institutional narratives of people living with HIV as violent criminals, activist and advocate framings of experience continue to result in an understanding of HIV criminalization not aligned with the actual experiences of all people, and could inadvertently reinforce the dichotomies imposed by the criminal justice system.

Along with institutional knowledge production practices and ways of knowing, my own experience as an activist living with HIV in Canada has informed this research. I have friends who were criminalized, friends who have served as witnesses in criminalization trials, and I myself was asked to serve as a defence witness in one specific case. I can say with certainty that I have never known a time in my life when my sexual desires, decisions, and practices were not marked by the power dynamics dictated by the police and the criminal justice system, and the pervasive fear that stems from

living in a country known globally as a leader for criminalizing people like myself who are living with HIV. Yet, in my experience, the voices of those criminalized have not been supported, enabled or heard. As someone who has lived in this context and reality, I have also never heard the voices of people who were actually criminalized speak for themselves, except in short snippets in media articles in which they were already framed as violent perpetrators. This disjuncture separates what was known about the criminalization of HIV and the actual experiences of those living it.

Thus, the dominant language and practices of state institutions, the media, and community-based organizations, as well as advocates and activists, drive what can be known and what is knowable in relation to criminalizing HIV non-disclosure, exposure, and transmission. In posing my research question as focused on the lives and experiences of HIV-positive criminalized people, I aim to decentralize dominant knowledge and practices. Within institutional ethnography, people's disjuncture between their own experience and the ways in which they are conceptually understood by institutions becomes the research question and site of research (Smith, 1987). Thus, "the everyday world as problematic", which Dorothy Smith notes, forms a method of inquiry focused on examining external as well as ideological determinations about the internal, where people are treated as experts regarding their own experience (Smith, 1987). My research question, therefore, intends to frame my critical inquiry towards understanding people's everyday experience of the worlds they inhabit as a form of empirical knowledge, aligned with institutional ethnography and critical social science approaches. This work seeks to act as an ontological and epistemological critique. That is, my research question represents a form of resistance to the dominant ways of understanding, dominant ways of knowing, and dominant methods of conducting research (Smith, 1987, 1990, 1999, 2005). Through examining the disjuncture between the official conceptual forms of knowledge based on institutions, texts, and experts, and the experiences lived and embodied by people, my simple research question aims to undertake a project that counters the reproduction of ongoing forms of epistemological, administrative, and material violence certain people living with HIV face as a result of the criminalization of HIV non-disclosure, exposure, and transmission.

By focusing on the lived realities and the material, I extend my argument that in order to adequately understand the issue of criminalizing HIV non-disclosure, transmission, and exposure, we must attend to the material conditions and corporeal violence enacted as outcomes of administering punishment through the criminal justice system, the media, public health institutions, and the police.

To summarize, I briefly outlined how I came to ask my specific research question, one grounded in the traditions of critical social science and institutional ethnography. In the next section,

I address the notion of sensitive research, a term often applied to criminological or health-related research focused on socially contentious issues.

Sensitive research

Qualitative researchers typically label research trained on contentious social problems that intersect with criminal law or disease or both as *sensitive research* (Lee, 1993; Liamputtong, 2007). Research on sensitive, stigmatized, or illegal activities may be critically important to advancing new knowledge within society. Such research may potentially reduce existing social stigmas, challenging forms of injustice or oppression. Yet, whilst such research can lead to certain emancipatory effects, it may also unintentionally reproduce other forms of harm.

Initially, I was reluctant to adopt the term sensitive research to label my research, since I thought it might imply that the people with whom I worked – that is, the research participants – were fragile or vulnerable. My project seeks to avoid this kind of implication, one that views people as vulnerable and in need of protection. Instead, I sought to facilitate the agency and knowledge of the participants in my project, acknowledging them as experts in their own lives. However, I was keenly aware that the intersectional combination of HIV, racialization, gender, sexual assault, sexual orientation, and criminality this research project addresses could result in participants being externally understood as vulnerable. This external assumption might result in furthering existing stigmatization within the context of multiple existing intersecting forms of stigmatization, or the denial of people's agency. This could result in research that frames people as vulnerable subjects needing a saviour. Thus, when attempting to avoid the denial of participants' agency in this project, allowing them to define their own lives using their own terms, I looked to the *Tri-council policy statement on ethical conduct for research involving humans 2 (TCPS-2)*, which states:

> Individuals or groups whose circumstances may make them vulnerable in the context of research should not be inappropriately included or automatically excluded from participation in research on the basis of their circumstances… individuals should not automatically be considered vulnerable simply because of assumptions made about the vulnerability of the group to which they belong (CIHR, NSERC & SSHRC, 2010, Article 4.7).

This conception proved helpful in reframing an understanding of the project itself as potentially sensitive, rather than framing the participants as vulnerable. Furthermore, British-based criminologist

Raymond M. Lee (1993) defines sensitive research as a form of inquiry, where the study of relationships between objects and subjects is one that could present a risk of harm to research participants (e.g., emotional burden, legal consequences) or a risk of harm to the researchers (e.g., legal costs, career consequences). Lee led discussions in the field of criminology on methodological considerations for researchers carrying out such studies, noting that research can become sensitive when one of the following three events occurs:

1. "poses an intrusive threat" dealing with privacy or sacredness;
2. studies deviance and social control in ways that could reveal "stigmatizing or incriminating" evidence; and/or
3. when it challenges "vested interests" and aims to reveal the coercive power of the state and institutions (R. Lee, 1993, p. 4).

Social research on crime and disease, which focuses on the intersection between them, can entail collecting sensitive personal information about attitudes, practices, and behaviours that can be difficult for participants to share and that may carry consequences if revealed (Lee, 1993). In the context of this project, research participants understood that because their practices and behaviours at times conflict with established legal norms, the information I obtained from them may include discussions that might put them at risk of harm if our conversations were disclosed. This is the understanding of sensitive research I adopted and which guided my methods, practices, and tactics whilst conducting this critical ethnographic inquiry.

Conceiving this project as one which fits into the category of sensitive research required deep reflection on the practices and tactics required to ensure that any data I collected were protected from disclosure in ways that could harm the people I interviewed. In the following section, I outline in detail these ethical considerations, including an analysis of the current legal and ethical context for researchers conducting sensitive research.

Research ethics

Understanding that my project fits within the category of sensitive research, research ethics emerged as a central organizing feature. In this section, I outline the vital role of research ethics orienting my project and its methods. In what follows, I review the role of research ethics for criminological researchers such as myself, as well as considerations specifically regarding ensuring the

confidentiality of participants as a paramount concern. I also explore the issue of legal privilege and the history of courts subpoenaing or seizing research, experiences which guided specific practices and tactics I employed throughout my project allowing me to realize my ethical obligations.

During the first year of my doctoral studies, and guided by my PhD supervisor, I wrote a paper on the role of ethics in the conceptualization of my research project. That paper was titled, somewhat jokingly, "Methodological considerations for an 'ethics bomb'" (McClelland, 2012), in which I laid the foundation for a key and ongoing argument within my work. That argument related to the protection of confidentiality as paramount to the success of criminological and sociolegal research focused on contentious social issues, specifically when focused on the lives and experiences of people deemed deviant or criminal. Since, in Canada, communications are not guaranteed legal privilege, the logical conclusion regarding the paramount importance of protecting confidentiality is that a researcher's ethical obligation to protect participants' confidentiality supersedes any obligations to the law of the land. The joke in that manuscript title about my project representing an "ethics bomb" relates to how we understood my project would be perceived by others, and how the Concordia Office of Research, University Human Research Ethics Committee might respond. That is, it is not every day that doctoral students submit ethics protocol applications seeking to interview registered sex offenders on issues related to the supposed criminal transmission of HIV. A sense of humour regarding this project was crucial and helped me also to think through the complexities and nuances of ethics. Furthermore, thinking through those complexities helped ensure that I managed external assumptions and expectations, as well as thoughtfully engaging with some tough issues and decisions. In fact, during my doctoral work, I learned via speaking with many students and faculty that the fear of potential data seizure or the lack of institutional support leads graduate students to avoid developing research projects on issues related to criminalized or socially sanctioned people altogether.

Given the focus of my research, garnering consent to participate in the project was highly contingent upon my ability to ethically uphold the privileged contract of confidentially with participants. For this study, I conducted semi-structured interviews with people who faced criminal prosecution in Canada for allegedly not revealing their HIV status to their sex partner(s). The charge most often applied in such cases is aggravated sexual assault, which can result in a life sentence of up to 25-years incarceration and mandatory lifetime sex offender registration. A number of participants in this study were in the process of defending themselves in criminal court, were released on bail, or had a range of conditions related to their parole. The threat of a potential breach of confidentiality was very real, since a number of cases were extremely high profile and widely scrutinized in the press. In

order for these participants to feel that they could safely participate in the project, I had to guarantee that their identities and all data collected would be anonymized and protected. Participants advised me that, absent any such protection, they would not have taken part.

In 1998, the first iteration of the *TCPS* was launched (CIHR, NSERC & SSHRC 1998). At the time, the statement lacked specific information on qualitative research, instead prescribing a regulatory framework for establishing Research Ethics Boards. Thus, a number of social researchers conducting empirical qualitative work reacted, voicing concerns that the *TCPS* prescribed values and practices from the biomedical sciences onto their work (Van Den Hoonaard, 2001; Haggerty, 2004). Futhermore, Kevin Haggerty (2004) called the establishment of these prescribed codes of ethics a form of "ethics creep", or an institutional process not particularly concerned with ethical issues arising through research. Haggerty argued that this code instead increased the formalized bureaucratic and regulatory systems managing the risks associated with university research (p. 393). Through this process, Haggerty described the dual process of ethics creep characterized by the expansion of an outward "regulatory system" that incorporates a range of activities and institutions, "while at the same time intensifying the regulation of activities deemed to fall within its ambit" (p. 391). Alongside this, the concern is that codes of ethics prescribe a rigid framework not allowing researchers to think ethically for themselves. As noted by Van Den Hoonaard (2001), "long before research-ethics review became *de rigueur*, qualitative researchers were concious of the ethcial implications of their work" (p. 21). The *TCPS* was revised into its second iteraton as the *TCPS-2* and now inculdes a specific section for qulatiaitve researchers (CIHR, NSERC & SSHRC, 2010).

Along with the *TCSP-2*, as Van Den Hoonaard noted, there have been a range of disciplinary codes of ethics guiding the work of qualitative researchers. Criminologists have developed a critical stance towards the perceived obligation to report instances of disclosing criminal activity or witnessing a crime during the research process (Forgel, 2007; Wolfgang, 1981). During the process of examining legal and criminalizing processes, researchers employing a critical understanding of "the law" should not take the juridical as static or constant, but instead interrogate the underlying assumptions and processes upon which the legal process is organized. This critical framing of the law is held by many criminologists, potentially enabling a more flexible engagement with legal regulations. Instead of a default position requiring a *duty to report* to mitigate perceived risks, some criminologists instead acknowledge the need for developing a "defensible ethical stance" (Yeats, 2004, p. 3). This stance is flexible in terms of a common morality, and aims to appreciate the circumstances and experiences of a contentious area of study. Such a stance does not aim to ignore the risks associated with researching

sensitive topics, but rather understands that negotiated risk is a relational and dynamic process. Moreover, those who take a critical stance on the law and criminal justice system also understand that potential risks and dangers associated with researching crime and criminality often derive not from the areas of study per se, but rather from law enforcement and the criminal justice system themselves (Yeats, 2004). As a result of this critical position in relation to the law and ethics, the British Society of Criminology developed the *Code of ethics for researchers in the field of criminology* in 2006 (British Society for Criminology 2006). The ethos of this code is not intended as prescriptive, stating:

> The guidelines do not provide a prescription for the resolution of choices or dilemmas surrounding professional conduct in specific circumstances. They provide a framework of principles to assist the choices and decisions which have to be made also with regard to the principles, values, and interests of all those involved in a particular situation (2006).

Yet, this code is similar to the Canadian *TCPS-2* in that it does not take a solid stance regarding safeguarding confidentiality, further stating:

> …[O]ffers of confidentiality may sometimes be overridden by law: researchers should therefore consider the circumstances in which they might be required to divulge information to legal or other authorities, and make such circumstances clear to participants when seeking their informed consent (2006).

Given the focus of my research, I conducted qualitative interviews with people who have criminal records, who have been charged and/or prosecuted with criminal offences (including the most severe charges in the *Criminal Code*, such as attempted murder, and aggravated sexual assault), and some of who are registered as sex offenders. All of the participants in this study are, of course, living with HIV, and some of them have active or past experiences with illegal substance use and/or sex work. Therefore, despite my research intentions to engage with these people *as people* – to hear about their lives, histories, perspectives, and experiences – I must also contend with complex questions of ethics and bureaucratic demands – both from the university, as well as my own understanding of ethical research.

My work follows from other social researchers who argued that without guarantees of confidentiality, conducting research on contentious deviant or illegal phenomenon would be impossible (Palys & Lowman 2000, 2010; Parent c. R 2014, Maillé 2018). The potential of a subpoena

or the seizure of confidential research data might represent a specific threat to researchers working with communities who are subject to social and criminal sanction, a specific threat I faced (Palys & Lowman 2000, 2010; Drake 2017). The possibility of subpoena or seizure may undermine the trust that researchers painstakingly establish with their participants, possibly creating a profoundly chilling effect on research more broadly (Palys & Lowman 2000, 2010; Liamputtong 2007; Parent c. R. 2014). Breaching confidentially could violate the research participant's agreed upon consent to engage in the project. Moreover, the consequences of a breach of confidentiality can devastatingly impact individuals, including ostracism from family and friends; the loss of employment, social assistance, and housing; having children apprehended by the state; harassment, bullying, and violence; and social exclusion and marginalization (Bostock 2002; Guta et al. 2014). It follows, then, that if members of various criminalized communities or groups who may serve as prospective research participants believe that their communication with researchers might be shared with the police, the courts, or other state apparatus, deep epistemological consequences may limit what comes to be known about the social world. For example, research on prostitution that informed legal reforms may have remained unavailable. Research into the behaviours of drug users and fentanyl shaping responses to the opioid overdose crisis may have remained impossible. Research into medical misconduct in healthcare settings might never have been conducted. Similarly, this project might never have been realized.

To navigate these complexities, researchers-in-training, such as myself, receive precious little detailed training on how to protect their participants. For guidance on ethics, despite initial tensions, researchers in Canada primarily only look to the *TCPS-2,* which governs all aspects of university research involving humans. Whilst allowing for flexibility, guidance on the statement can be vague, lacking specificity on how to engage with the complex tensions between ethics and the law. For example, in one section, the statement asks researchers to comply with the law whilst also seeking to apply ethical principles:

> The law affects and regulates the standards and conduct of research involving humans in a variety of areas, including, but not limited to, privacy, confidentiality, intellectual property, and the capacity of participants… Researchers may face situations where they experience a tension between the requirements of the law and the guidance of the ethical principles in this Policy. In such situations, **researchers should strive to comply with the law in the application of ethical principles** (emphasis added, CIHR, NSERC & SSHRC, 2010, p. 18).

Yet, in another section, it asks researchers to comply with their ethical principles, even when this means opposing legal orders to disclose information:

> **Researchers shall maintain their promise of confidentiality to participants within the extent permitted by ethical principles and/or law**. **This may involve resisting requests for access, such as opposing court applications seeking disclosure**. Researchers' conduct in such situations should be assessed on a case-by-case basis and guided by consultation with colleagues, any relevant professional body, the REB and/or legal counsel (emphasis added, CIHR, NSERC & SSHRC, 2010, p. 58).

However, here, the text rather confusingly almost conflates the "law" and "ethical principles" into one. Conflating the two may result in an understanding that views the law and ethics as one and the same. This could be read as contradicting the previous example, which asks for researchers to comply with the law. However, opposing a legal order is not counter to the law per say, in fact it might mean following the law through mobilizing legal mechanisms to oppose a certain legal claim for disclosure. But the lack of specificity between ethical principles and the law could result in a lack of guidance for researchers. The *TCPS-2* statement also provides no guidance or information on how a researcher should make decisions related to tensions between their ethical obligations and the law. Despite this lack of specificity, the seeming contradictions, and the limited detailed guidance, the vagueness of the *TCPS-2* statement allows for flexibility and autonomy when making complex ethical decisions as a researcher, where a policy guidance document relying on a cookie cutter template may not always work. Underlining the careful reading of the *TCPS-2* statement, particularly as a doctoral student working on contentious and criminalized subject matter, we are left to our own devices. Hence, I did just that. In the remainder of this section, I more fully describe what I learned and how I implemented that newly gained knowledge across the research methods I employed to conduct my research.

Subpoena and seizure of confidential research

The tension between ethical obligations and the law may result in a researcher coming into conflict with the law. Whilst Canadian experts on research ethics and the law caution against overemphasizing the risk of research data being seized – since it still rarely occurs – cases have increased in recent years, suggesting a potentially disturbing trend (Maillé 2018). Although no

researchers have, to the best of my knowledge, been compelled to break confidentiality thus far, a number of cases in Canada involved research data being subpoenaed or subject to a seizure warrant. These instances of subpoenaed or seized research data manifest in two ways. First, such cases arose as part of ongoing criminal investigation and, second, when researchers provided expert testimony in a civil case. I what follows I explore each of these in detail and outline the implications to my work.

In the first Canadian case of the subpoena of research evidence, a series of subpoenas were issued to Russel Ogden, the first of which occurring in 1994 when he was a student at Simon Fraser University (Ogden, 2010; Palys & Lowman, 2010). That subpoena was issued by the Vancouver Coroner, asking Ogden to testify in a coroner's inquest about his Master's research on assisted dying amongst people with AIDS. The court thought he had knowledge regarding an alleged assisted death. He refused to answer the Coroner's questions, and was threatened with charges of contempt of court. In his defence, Ogden invoked the Wigmore criteria, a legal test to decide if certain communications should be granted legal privilege. Three kinds of legal privilege are recognized in Canadian law: constitutional privilege, class privilege, and case-by-case privilege. More specifically, when establishing researcher–participant privilege, the Wigmore criteria helps on a case-by-case basis to establish "privilege against disclosure of communications between persons standing in a given relation" (Wigmore, 1905). That given relation may involve lawyer–client, healthcare provider–patient, police officer–informant or researcher–participant relations (Lowman & Palys, 2000). Furthermore, the Wigmore criteria outlines the following four points, which must be proven for a communication to be deemed privileged:

1. The communication must originate in a confidence that will not be disclosed;
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
3. The relation must be one which in the opinion of the community ought to be sedulously fostered; and
4. The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit gained for the correct disposal of litigation (Wigmore, 1905).

Ogden successfully proved that his research could not have been conducted without a guarantee of confidentiality. The coroner agreed, deciding in Ogden's favour, thus becoming the first Canadian case to recognize researcher–participant privilege. Ogden's work was also subject to two subsequent subpoenas (in 2003 & 2004), issued by prosecutors in criminal trials related to assisted dying (Ogden, 2010; Palys & Lowman, 2010). In both cases, Ogden advised prosecutors that he

intended to challenge the subpoenas, and both times the prosecutors withdrew their petitions (Ogden, 2010).

The next case occurred in Quebec in 2014. Here, police executed a search warrant for a taped interview recorded with a man for a study on sex work conducted by researchers at the University of Ottawa. The man was later accused of murder (Parent & Bruckert c. R 2014). Drs. Chris Buckert and Nicole Parent, the lead researchers, responded to the search warrant by also invoking the Wigmore criteria and challenging the admissibility of the interview. They argued that confidentiality served as a foundation to their work as criminologists. Without the protection of confidentiality, many of the participants they interviewed would not have taken part in their study. The judge, the Honourable Sophie Bourque, was tasked with balancing the public's right to suppress crime versus the public's interest in allowing the free flow of current and accurate information on social phenomenon. Ultimately, the judge agreed with the researchers, ruling that police could not access the recording. In her decision, the Honourable Bourque agreed that the researchers met all of the Wigmore criteria, stating that the "public interest in respecting the promise of confidentiality is high" (Parent & Bruckert c. R. 210, p. 36). Furthermore, she argued that the social benefits of maintaining confidentially for the public, the communities being researched, and for academics outweighed the potential benefits of disclosing information from the interview in question to an ongoing criminal investigation. But the decision made clear that no absolute privilege for research–participant communications existed, and that in each case the public interest to protect the value of social research needs to be weighed against allowing police to fully investigate criminal cases.

Rather interestingly if not disappointingly, the universities involved in both of these cases provided no legal or financial support to the researchers.

In addition to the two cases above, two recent cases, similar to Ogden, involved the subpoenaing of research data during expert testimony. In the first case, Dr. Marie-Ève Maillé had confidential identifying information subpoenaed regarding participants in her doctoral research (Maillé, 2018). Maillé conducted a survey of rural Quebec residents, asking them about the implementation of a wind farm. She offered her participants confidentiality, and the research ethics board at L'Université du Québec à Montréal (UQAM) approved that guarantee. Separately, a class action lawsuit was filed on behalf of the residents to address construction inconveniences, and Maillé was asked to testify as an expert witness. During this process, the team representing the wind farm subpoenaed her research data, requesting information that would identify her participants. Maillé challenged the subpoena, and,

in 2017, the Quebec Superior Court decided in her favour. In doing so, the court ruled that it was in the public's interest to protect the right of confidentiality during the research process (Maillé, 2018).

In addition, in 2017, Dr. Greta Bauer, an epidemiologist at Ontario's Western University, was asked to testify as an expert witness during a case before the Quebec Superior Court. The plaintiff in that case filed a motion demanding access to the raw data from Dr. Bauer's study on the health of transgender people. Those data included information that could be used to locate and identify individual participants, notably through postal codes. Bauer received immediate support from the university, and ultimately the judge blocked the release of the information (Centre for Gender Advocacy c. Québec, 2016).

Despite judgments in favour of the protection of researcher–participant communications, none of these cases established a legal precedent. In fact, judges in both the Bauer, and the Parent and Bruckert cases specifically indicated that privilege should not be automatically granted, and future filings should proceed on a case-by-case basis. Moreover, in several cases, the institutions with which researchers were affiliated refused to provide legal support and institutional backing in the face of subpoenas. To protect the integrity of their research and ensure successful results, onerous amounts of expensive legal counsel were necessary. Such support may not be provided to students, early career researchers, or to people researching contentious areas that institutions may be wary of appearing to support.[3] This is despite the fact that researchers rigorously follow the ethical guidelines and regulations in place at their institutions and, more broadly, within the field of qualitative social research.

Unfortunately, despite the positive outcomes of these cases, the current situation is that researchers such as myself must rely solely on legal decisions for guidance on ethical practices. The environment within which I work is one where researchers who enjoy institutional support and access to resources to pay their legal costs also enjoy a sense of security in their work, leaving other researchers in a precarious situation or fearful of engaging in research on issues involving potential criminal or social sanctions. Whilst the outcomes of earlier cases gave me confidence and helped inform my project methods, further support for researchers-in-training remains necessary.

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[3] The Academic Freedom Fund of the Canadian Association of University Teachers (CAUT) helped to support a number of the cases discussed in this chapter, specifically Parent c. R. As noted on the CAUT website: "CAUT Council established the Academic Freedom Fund to aid local associations and CAUT in vigorous defence of academic freedom. The Fund is a "catastrophic insurance" plan to guarantee sufficient resources for any local association or CAUT to defend academic freedom when a case requires extraordinary resources. Each member association of CAUT is a member of the Fund which relies entirely on donations from member associations and individuals interested in the defence of academic freedom." More information can be retrieved here:
https://www.caut.ca/latest/publications/academic-freedom/universities/academic-freedom-fund

Protecting confidentiality throughout my project

The decision providing the most useful guidance for my project was *Parent c. R* (2014). That decision helped to further support understandings of the ethical value of maintaining confidentiality for those researching criminalized populations by further outlining the researcher–participant relationship. Maintaining that specific relationship remains crucial. Based on the *Parent c. R.* decision, I organized my own study relying on Bruckert and Parent's approach, the legal arguments made, and how they aligned their work with the Wigmore criteria. As a result, my project was organized around rigorously establishing a basis for which communications with my research participants would be legally considered privileged. Despite not having an actual legal privilege, throughout my project I worked as though I had a legally guaranteed privilege with each participant, such as that characterizing the relationship between a lawyer and their client. Whilst operating as though legal privilege was guaranteed, I also simultaneously acted as if our communications were always under threat of disclosure. This meant deliberating interweaving defences of the Wigmore criteria into all project components and thinking through how I could defend and protect my work and its participants and their confidentiality.

Working to uphold and pre-emptively protect confidentiality required a series of approaches across all aspects of my project, from recruitment, to the informed consent process, to interviews, to analysis, and write-up of the findings. During each phase of this project, I worked to weave arguments into the text continually underscoring four primary points:

1. Disclosures from the participant to the researcher are contingent on assurance of confidentiality and data security.
2. Relationships between the researcher and participants must be carefully fostered (e.g., it is important to foster relationships with communities).
3. A vital need exists for ongoing confidentiality protections (e.g., all communications must originate in confidence, I will do everything possible to maintain confidentiality).
4. The deleterious outcomes of disclosure are not privileged (e.g., the potential for people to be recriminalized), and the harms of disclosure are greater than the perceived benefit (e.g., the importance of the work of qualitative researchers towards developing new knowledge on complex social questions).

For example, in the *Summary Ethics Protocol* form, as required by the *Concordia Office of Research*, I repeatedly underlined the need to protect confidentiality. It stated that all communications I had with participants must originate from a place of confidence, that my relationships with participants had been carefully fostered and depended upon confidentiality, and that I worked to ensure the protection of confidentiality as paramount and vital to realizing this project. Furthermore, in that form I argued that the ethical consequences of not safeguarding research participant confidentiality outweighed any duty to disclose potential information about past, present or potential future unknown instances of HIV exposure through non-disclosure to sexual partner(s), future sexual partner(s), public health authorities, or the police. As such, I included the following text in my ethics application to the Concordia Office of Research:

> Due to the focus of this project, consent to participate in this project will be highly contingent upon the researcher's ability to ethically uphold their privileged contract of confidentiality with participants. Article 5.1 of the TCPS 2 elaborates that "researchers shall safeguard information entrusted to them and not misuse or wrongfully disclose it." As further outlined in the TCPS 2, Article 5.1, in contexts where illegal activities are the focus of qualitative research, information that is garnered from research participants is highly reliant upon a privileged contract guaranteeing statements will be protected from disclosure. This practice is elaborated as the understanding that the ongoing rigorous protection of confidential data is integral to maintaining the trust agreement between the researcher and participant, mitigating harm from potential disclosures for the participant, for the reputation of the individual researcher, and for the broader research and academic communities. Criminologists have also outlined how these areas of research afford additional levels of confidentiality protection. For example, University of Ottawa criminologists Parent and Bruckert, in their 2014 study on the lives of sex workers, employed the practices of allowing participants to choose a pseudonym to use during the interview, and allowed the researcher to sign the consent form on the participant's behalf (McClelland, 2015).

In the Consent Form (in Appendix 1), I also further underscored the above points from the Wigmore criteria. Researchers typically include a statement on consent forms that confidential information and data will be protected up until and as directed by law. I opted to not include such a statement, and worked to ensure that no aspect of the informed consent process could be construed as a waiver of privilege. Rather, in the consent form text and during the informed consent process that I walked participants through prior to any interview, I underlined that confidentiality was guaranteed

and grounded within my own ethical obligations. To make this clear, I included the following text in the "What are the risks for participation?" section of the Consent Form:

> The researcher has taken all appropriate professional and ethical precautions to ensure that the potential risks of any harm are minimized. This includes the researcher respecting professional ethical obligations to maintain my full confidentiality through following best practices of data privacy, protection, and storage (McClelland, 2015, a).

When collecting data, conducting interviews, storing data, and throughout the analysis, I employed practices to ensure the rigorous safeguarding of confidentiality, including using pseudonyms, redacting all identifying information, destroying digital recordings, using encryption software, applying dual-level password protections, and ensuring that narratives constructed from interviews did not reveal any identifying details. To follow the approach of interweaving my ethical approach throughout all aspects of my work, I provide further details on some of the specifics of these practices and approaches in the sections that follow in this chapter.

To summarize, in this section I outlined the complex ethical and legal context within which my research is situated, and how the law of the land and the ethical obligations of research may lie in opposition to one another. In doing so, I described instances where researcher's ethical obligation to protect confidentiality were threatened, how researchers and courts responded, and the implications for my work. In my project, and based on these previous cases, I worked to integrate a series of protections that served to ensure that confidentiality remained paramount, including in my ethical protocol, consent form, during interviews, with data storage, analysis, and when writing up the final findings and this dissertation. In the following section, I detail the process of conducting outreach and recruiting participants to take part in this project.

Outreach & recruitment

To collect data for this project, I engaged with a diverse range of people living with HIV in Canada who had been charged, prosecuted, and/or threatened with charges in relation to the non-disclosure of their HIV-positive status. According to epidemiological data from the Public Health Agency of Canada, as of 2015, there were approximately 65,000 people living with HIV in Canada (PHAC, 2015). Since 1989, close to 200 criminal law cases related to exposure, transmission, or non-disclosure of HIV have been filed (Hastings et al., 2017). The individuals involved in those cases

consisted of a complex group of people within which to conduct a qualitative inquiry. The available sample of people to interview is quite limited and constrained, since potential participants are widely disparate from one another, not easily identified, and not situated in one location or subculture. This group – if I can call it a group – represents the quintessential "hard-to-reach population", a term used by external public health outsiders to define groups of which they are not a part, who are socially marginalized, and, as a result, to which outsiders may have trouble gaining access. People living with HIV do not form a discreet community, but rather comprise people geographically dispersed across the county and representing a range of different populations, including gay and bisexual men, or other men who have sex with men, people who inject drugs, Black people from Africa and the Caribbean, and Indigenous people, amongst others (and of course intersecting these categories). Some people who were charged and/or prosecuted were nearly impossible to reach, since they were deported back to their country of immigration origin, had died, or been killed, as with the lives of Williams and Matthews. Others are held in state custody in federal corrections institutions across the county under quite strict conditions. I initially intended to carry out this research with people who were incarcerated; but, as I explain below, that was both unnecessary and unfeasible. One additional limitation I faced was that some people were undergoing active criminal legal proceedings, whereby participating in a research project about their case may have placed them at risk. Thus, if a potential participant's legal counsel decided it was in the best interest of their current or ongoing case to not participate in this project, they were then excluded from the study.

As a result of the potential limitations, I did not employ any specific theory regarding how to recruit participants in the study. Rather, I conducted a diverse array of outreach strategies to reach as many potential participants as possible. The effectiveness of these strategies rested upon my years of experience working as an activist in the movement to honour the human rights of people living with HIV. I am well-situated within an existing network of actors involved in responding to HIV. Thus, whilst there is no easily discernible community of people living with HIV in Canada, a diverse network of individuals are linked to organizations which support people living with HIV. I mobilized my existing network and relationships as well as established trust when conducting outreach for this project. Central to this mobilization was that the research question I sought to address arose from a crucial gap in what existing researchers were asking. That is, the research question at hand was relevant to this existing network of actors and emerged from the movement in order to respond to HIV as a need, since no one had, thus far, targeted a research project to specifically speak with those living with HIV who had direct experience of being criminally charged. The relevance of this question, plus my

established trust and access, ensured that I had buy-in from a wide range of actors, including HIV community-based organizations, as well as highly respected activists and experts.

Recruitment outreach involved a number of interventions, including launching a project-specific website, a poster, social media outreach, legal outreach, and working with a variety of community-based organizations that support people living with HIV engaged with the criminal justice system, including Prisoners AIDS Support Action Network (PASAN), HIV/AIDS Legal Clinic Ontario (HALCO), and the Canadian HIV/AIDS Legal Network. The address for the website, *http://www.crimproject.ca/*, was chosen to avoid any reference to HIV in order to support engagement with it even if people feared issues around their HIV-positive status. The poster was placed in prominent locations in the offices of HALCO and PASAN, organizations frequented by people who faced criminal charges related to HIV. One participant told me that they learned about the project specifically from a poster in the HALCO office, while another told me that they discovered the project from the Twitter account of the AIDS Committee of Toronto, which promoted the project poster.

The poster (Appendix 2) and website included the following text:

Have you been charged and/or prosecuted in Canada because of not telling a sex partner your HIV-positive status?

Know someone who has been charged and/or prosecuted in Canada because of not telling a sex partner their HIV-positive status?

Contact us! Share your story! Communicate with us confidentially!

Text or call our confidential cell phone. Email us. We can use confidential email to protect your confidentiality.

I launched the poster and website and opened recruitment during the biannual, American-based, *HIV Is Not a Crime National Training Academy*, held in Alabama in May 2017. Whilst based in the US, many Canadians working to address the harms of HIV criminalization attend the academy. As such, the academy represented an ideal opportunity to leverage the event to direct attention to my study, as well as casting a wide net letting people know recruitment had begun.

The website and poster included a project-specific Google email address and project-specific cell phone number. The project website also included information on using encrypted email, as well as a confidential dialogue box, where messages could be left without requiring an individual provide any

other contact information. I decided to use a distinct and separate phone number, purchasing a burner flip phone, with as few as possible means to unwittingly collect data on potential participants compared with using a smart phone. Similar to the website, the project email address was as generic as possible, and required a two-step verification process to log in. These varied means of supporting anonymity were intended to ensure that as a researcher I collected as little information as possible and that the protection of potential participants remained paramount.

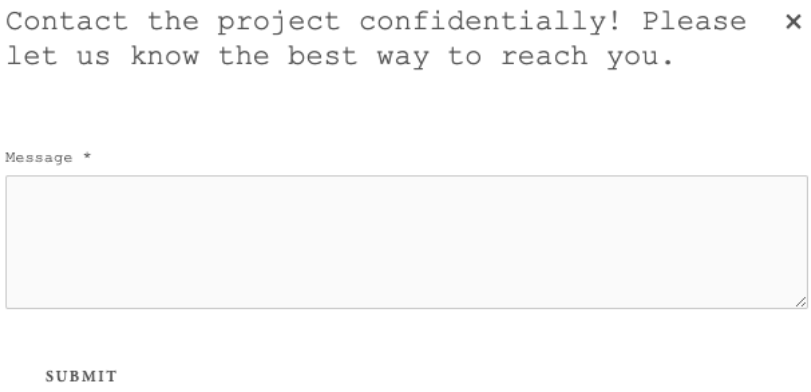

Figure V: Confidential Dialogue Box on the Project Website

During recruitment, the confidential dialogue box (see Figure V) on the website was successfully used by one participant with whom I spoke, whilst no one contacted me using encrypted email. The project-specific mobile phone and email address were used quite regularly. In addition, because information about the project was posted on Facebook and Twitter by myself and then shared widely by others, a number of participants contacted me via those media. As a general rule, I avoided as much documented communication as possible and arranged to meet individuals face-to-face or via an encrypted chat or video service as soon as possible. When engaging with people, I deleted emails and text messages frequently. I also took no notes that included the names, locations, or personal details of any participant during or after the requirement stage.

As well as relying on public outreach, I specifically approached a number of people by reaching out to their lawyers to see if they would be interested in speaking with me for this project. I also asked PASAN and HALCO to inform potential participants about this project when appropriate so that they could contact me if they were interested. This approach was often met with a statement from lawyers or social workers that it was unlikely that anyone would want to speak with me or that issues of attorney–client privilege prevented them from passing along any information. In other instances,

people's case workers at an organization with which they were affiliated as a client or member connected them directly to me, and, in one instance, someone's lawyer directly connected me to a past client of theirs. In the end, a small number of participants in this project were connected to me resulting from these efforts.

No one specific means of outreach was discernibly more successful than any other. In the end, the varied and multipronged approach to recruitment proved effective for this project as a means of reaching out to this diverse and dispersed group of individuals.

Due to the challenging nature of reaching people, I continued recruitment for just under a year, from 20 May 2016 through 31 January 2017, but conducted two interviews after this official date, as well as after most of the primarily analysis was completed. In the end, I conducted 28 interviews with 16 people from 5 different provinces. I spoke with 5 women and 11 men. Out of concern for the potential limited range of participants, I initially expanded the scope of the project to include people who had only been threatened with criminal charges. In total, only 3 of these people were threatened with charges, whilst 13 had been charged, all with aggravated sexual assault. This sample consisted of a diverse group of people, comprising a wide range of experiences across the spectrum of who faced charges in relation to HIV non-disclosure, exposure, and transmission, many of whom are socially marginalized, including Black and Indigenous people, gay men, people who live in poverty, and women with histories of street-based sex work. The youngest participant was in their mid-teens at the time of the charges. The oldest was in their mid-50s at the time of the charges.

Research inside?

Throughout the recruitment process, I also considered conducting research with people who were incarcerated. My initial research ethics protocol included multiple considerations for conducting research with people currently held in custody in Canadian federal or provincial corrections institutions. I held a meeting with a director of research at the Corrections Service Canada (CSC) early on during recruitment to discuss the feasibility of reaching out to specific people of whom I was aware who were incarcerated. However, that meeting underscored the challenges of conducting research with people in CSC custody. The director told me that CSC's ethics committee, separate and distinct from the one I had already gone through at Concordia, would not allow researchers to engage with people who had been deemed high-profile – that is, those who had been in the media and under public scrutiny. Many of those cases where people are still incarcerated meet these criteria. CSC has been

known to block research that may prove critical of the institution (Watson, 2015). Moreover, even when potential research projects have met the necessary ethical standards and obtained ethical approval from their own departments or universities, correctional research branches often deny access by citing various concerns with methodology and research questions, or claiming that sufficient resources are unavailable to meet the needs of the proposed research project (Hannah–Moffat, 2011; Martel, 2004; Yeager, 2008). In addition, I knew that if I did conduct research with people who were incarcerated, I would be unable to ask them specific questions about their treatment, the institution, and the conditions under which they were held, for fear that if an individual was critical they might be placed at further risk within the institution. This concern followed from the work of Michelle Fine and Maria Elena Torre (2006), who conducted participatory action research with women in American prisons. Despite being guided by the principles of collaboration and participatory action research, Fine and Torre noted the limits of participatory research within a prison context. In their project, they chose to author the work on their own despite collaborating with women inmates, since the outcomes of their research had the potential to place those women at risk vis-à-vis their relationships with the institutions within which they were confined. As Fine and Torre note, "[W]e write this because few can speak the truth about prisons without enormous personal vulnerability. While we may be outsiders to prison, we are all inside the prison industrial complex as it eats America" (Fine & Torre, 2006, p. 255).

Initially, I was concerned that if I did not speak to people who were currently incarcerated, the project could lose some legitimacy. However, I ended up speaking with 9 people who had been incarcerated, either in remand or as part of their sentence, with periods of confinement ranging from just under one week (although this was coupled with over 2-years under house arrest) and the longest extending to over 15 years. Ultimately, when interviewing people with histories of incarceration, I garnered a very rich, detailed, diverse, and nuanced qualitative data set. Thus, I ultimately decided to focus my efforts on interviewing people who were not in custody, whilst ensuring that I spoke with multiple people who had incarceration histories. Throughout this project, I also maintained somewhat regular contact with a number of people who were incarcerated, informing them about my progress, although not engaging with them through a formal participant interview.

In this section, I outlined the success of a multipronged approach to conducting recruitment and outreach for the interview phase of the project. Due to the challenges of reaching out to this complex subset of people, I initially thought that I would have less interview participants. But by enacting a range of diverse outreach and recruitment interventions, that initial worry proved

unfounded. In the next section, I detail my approach to conducting interviews, and highlight some of the learnings and outcomes of the process that I undertook.

Interviews

In this section, I focus on the details and specifics of the interviews I conducted during the data collection phase of this project, including the logistics, the decision to undertake multiple interviews as a means of establishing rapport and trust, the importance of flexibility when conducting interviews, and the value of discussing various documents from people's cases during the interview process. The process of conducting interviews varied depending on the needs of the individuals and their specific situations. For instance, I travelled to visit some people, and spent several days in their company, spending time in their homes, and learning about their day-to-days lives. By contrast, I spoke with other people over the phone or through Skype's encrypted video service. Ultimately, my level of engagement depended on the needs and availability of each participant as well as the logistics involved. My flexibility ensured that I was successfully able to gather a wide range of experiences from a diverse range of people. When in contact with someone who lived far away, I attempted to visit them as soon as possible after our initial point of contact to maintain momentum and their engagement. One participant whose case was ongoing and was under strict house arrest conditions during our contact; thus, it was not possible to meet them in person. Another participant I was able to visit wanted to meet me with her boyfriend. She had a long history of being abused by men, and speaking about her case and experience in front of a man she did not know posed a threat to her. We, therefore, conducted the interview as a group, which proved quite productive and beneficial, since her boyfriend reminded her of things she wanted to say, and his presence comforted her.

I provided a detailed Interview Guide (Appendix 3) to the research ethics committee of Concordia, indicating that I would employ a semi-structured interview approach. According to the Reinharz, a semi-structured interview approach allows for the "free interaction between the researcher and the interviewee" allowing "opportunities for clarification and discussion" and for the "active involvement in the construction of data about their lives" (Reinharz, 1992, p. 18). This feminist approach to interviewing aligned with my goals, to facilitate giving voice to participants and to understand the social world from their diverse perspectives. Such an approach enables an inductive understanding of the study object and allows for negotiation in knowledge creation. To facilitate the realization of this interview ethos, my approach remained highly conversational and dynamic. How

the interviews played out in real-time diverged based on each specific circumstance. Whilst I attempted to address each of the questions included in my original semi-structured interview protocol, because the research was truly open-ended, interviews resembled conversations rather than checking off an ordered list of questions. In some instances, the interview took place at various moments throughout a day, whereby I spent time with a participant, accompanying them during their daily routine, attending appointments, and eating meals. In other instances, the interview was set as a specific appointment, taking place over a 1.5- to 2-hour time period.

During semi-structured interviews, the interviewer should be mindful of minimising their contribution to the discussion, allowing the interviewee to guide the discussion – in this sense, the less an interviewer says, the better. As a result, after listening, I often repeated back statements I had heard in order to keep the conversation moving forward, whilst not seeking to guide or direct a participant's responses. Adopting an overly prescriptive approach to the interviews would run counter to qualitative research. The approach I adopted, however, also aimed to help participants shape the outcomes of the study, addressing issues of power asymmetry in relation to the creation of knowledge within the context of a research project (CIHR, NSERC, SSHRC, 2010, p. 141). Furthermore, whilst this approach proved central to the organization of the project, and in many qualitative research projects more generally, there is also a limit to what can be realized through participatory engagement in knowledge development. During the interviews themselves, I made clear to participants that straying from the limited the scope of the research questions was not possible, and redirected them back to the original questions if we strayed from the central themes and topics too far. This was specifically the case if a participant (in extremely rare instances) began discussing potentially illegal behaviours not already known to authorities. By doing so, I intervened as the interviewer if such disclosures arose, ensuring that such instances were not discussed in ways that could put either myself or the participant in a precarious situation. This negotiation around what was discussed during an interview formed a part of the dynamic, reflective, and continuous process that characterize qualitative research.

As I previously indicated, privacy is paramount to criminological research such as this. Privacy is doubly important for people who have had their trust violated many times, who have repeatedly had their HIV-positive status and criminal charges disclosed by the police, corrections officers, healthcare providers, and the media. However, many of the people I interviewed were not individuals able to access the right to privacy in their lives. Many interviews took place outdoors in parks or on the street sitting on a bench, or in a Tim Horton's coffee shop in the public seating area (sitting in front of the faux fireplace proved a highly effective interview location). Initially, the idea of conducting interviews

in public locations seemed counterintuitive to the content of the conversations. For instance, would people willingly discuss the intimate details of their arrest and incarceration whilst sitting in a public location? This concern proved unwarranted. People were often quite comfortable as long as we paid attention to our surroundings and as long as I continually, and gently, checked in to ascertain their comfort level.

Before conducting the interviews, I worked from the understanding that multiple interviews with each participant would be more productive than just one. This assumption was grounded in the work of feminist social researchers (Reinharz, 1992), as well as thinking through the process of conducting sensitive research (Liamputtong, 2007; Lee, 1990). Given that the content of interviews was, in some instances, highly sensitive and difficult for people to discuss, the notion of conducting more than one interview could help build trust and establish rapport, making the interview process more comfortable. Additionally, more than one interview was established as a way to foster corrective feedback on the preliminary analysis of information gathered during the first interview (Reinharz, 1992, p. 37). Conducting multiple interviews with each participant proved extremely successful throughout the project. During the first interview, I provided each individual with an overview of the project, thoroughly explained the ethics of the project and the informed consent process, and I told participants about myself and how the project was situated. I also told participants that at the end of the interview they would receive CAD$50.00, and another CAD$50.00 after the second interview, and so on. In the majority of instances, I conducted two interviews. In some cases, however, this proved unfeasible, whereby only one interview took place. Second interviews did not occur, for instance, after losing track of someone and not being able to locate them again. Whilst I did not define a specific number of interviews I must complete with individuals, often only two interviews took place. During the second interview, it often seemed as though people had exhausted the topics to discuss and usually that interview lasted about half of the time (30 to 45 minutes) as the initial interview.

The content of the second interviews provided greater insight, allowing people to open up to me in greater detail and allowing me to ask if I correctly understood and interpreted their experiences. In addition, the second interview proved extremely effective for building and establishing both trust and rapport. During the second interview, I was invited into people's homes, asked to share meals, and introduced to people's family members. In one instance, someone told me that they had lied to me during the first interview about some minor details of their incarceration; but, during the second interview they wanted me to know the truth and corrected the lie. Furthermore, during the second interview, people also told me about some of the more sensitive aspects of their experiences, including

moments of extreme violence they faced. Some participants noted that they felt more comfortable having previously met with me before discussing in detail the most difficult aspects of their experiences.

The time that elapsed between the first and second interview varied. If I was visiting someone in a place that required me to travel to get to, then the second interview was often a day or two after the first. However, if possible, I tried to ensure that some time elapsed between interviews, with approximately an average of one month elapsing between interviews.

During interviews, I was highly conscious of the power differentials between myself as the researcher, with access to certain means, and the people I interviewed, some of whom lived under very harsh bail or paroled release conditions, limiting their freedom and autonomy. I strived to avoid underlining or reinforcing my access to resources, which differed from theirs. As noted by qualitative researchers Glesne and Peshkin (1992), whilst researchers may strive to ensure a non-hierarchical approach, this is often unavoidable; but, in the end "hierarchical relationships are not devoid of mutual warmth and caring" (Glesne & Peshkin, 1992, p. 82). During interviews, I attempted to reorient the power dynamics by communicating through affective means, using warm and open body language, adopting a causal and familiar approach to discussions, and ensuring I was not overly formal. Additionally, I followed the guidance of Waldram (1998), who conducted qualitative research within Canadian corrections institutions and wrote about the ethical and methodological considerations related to his projects in building rapport and establishing trust with those he studied. To help ensure that the prisoners with whom he conducted research understood that he was on their side, Waldram often questioned the adoption of security protocols aimed at undermining the daily autonomy of those incarcerated. These protocols included not wearing mandated personal security devices, sitting in between the inmate and guards, or interviewing people in their cells rather than in designated areas. Whilst I did not interview people who were incarcerated, I followed this model when interviewing those who were under certain bail or parole conditions as a way to successfully build trust with them. This included acknowledging to people that I disagreed with their specific confinement conditions.

Over the course of the interviews, I asked people about their engagement with public health officials, nurses, and doctors, as well as their experiences with the police when charges were filed, including the experience of arrest and their treatment by the police. In addition, I asked about their legal representation, and their thoughts on the quality of their legal representation, experiences in the courtroom, during bail hearings, and during their trial (if applicable), as well as their perceptions regarding the fairness of proceedings. When relevant, I asked people about the media portrayals of

their cases, and their perspectives on the accuracy and fairness of any articles written about them. Furthermore, I also asked people about being incarcerated, their treatment by corrections officers and their experiences inside, including access to healthcare, as well as parole, and any ongoing surveillance post-incarceration. This included how the experience of being labelled a sex offender has impacted their lives. Finally, I spoke with people about how their situation impacted their family, relationships, goals and aspirations, and the ways in which criminalization has organized and circumscribed their daily lives. In keeping with the focus of this project, a specific probe and focus during all of the interviews involved asking about moments of violence they had faced, moments during which they felt insecure, when they experienced discrimination, or when they felt unsafe or threatened.

In general, I intentionally decided not to speak with people about the specific details leading to any criminal charges. In general, I did not collect information about past, current, or potential future instances of HIV exposure or non-disclosure not already documented by the authorities, since this could have resulted in countering the rigorous approach I adopted to manage and protect the confidentiality of study participants. Whilst a number of minor questions in the interview guide related to specific experiences leading to the criminal charges, this was not the primary object or focus of the discussions. Through those questions, I wanted participants to elaborate upon their perspectives surrounding the situation leading to their criminal charges so as to develop an important deeper contextual understanding of the participants' experiences. I did not, however, collect or examine in detail the specific past action(s) of non-disclosure and exposure, nor was I interested in recording details and specifics about past or current cases.

Asking about texts

Another specific focus of the interviews was on the role of texts, such as court files, media articles, conditions of release, or security designation documents related to people's cases which form an important part of how people's lives are organized, specifically people who are criminalized. An analysis of their documents can allow for an understanding of how people's daily lives are organized external to their actual experiences. During interviews, I asked people about their engagement with documents related to the case constructed from their experiences. I asked people to bring documents or files with them if possible when meeting me, or if we talked about a specific document during the first interview, I would ask if they could bring me a copy when we met for a second time. In a number of interviews, people showed me a list of their release conditions, and walked me through each one; in many instances, more than 20 conditions in total appeared on such lists, typically consisting of a

weapons ban, a curfew, being banned from various establishments such as bars, a ban on the consumption of alcohol and drugs, a ban on socializing with people of the sex to which they are attracted, a ban on the use of social media and any dating or hook-up apps or websites, mandatory treatment adherence, mandatory regular doctor's appointments, mandatory counselling, mandatory use of condoms, and mandatory disclosure of their HIV-positive status, among other more specific conditions related to the details of someone's case. These conditions were mandated to people who were charged who had an undetectable viral load, who had already been seeing a doctor regularly, and who had also used condoms for sex. These conditions also applied to individuals whose alleged non-disclosure took place within the context of a relationship, and to people who had no previous criminal charges or histories of violence. Together, during our discussion, we would use the release conditions document to explore how the document impacted and organized their daily lives, and how institutional understandings of their lives and experiences were disconnected from their actual daily life. Other documents that people brought to me included files from their corrections institution used to categorize their incarceration risk level, and public health orders they had received, often indicating similar responses to people's bail conditions, resulting in a sense that officials were out of touch with people's actual lives. Additionally, participants also directed me to various social media posts written about them, or newspaper articles on them and their case, noting that these texts were socially activated in discriminatory ways against them. During the interviews, we would discuss how such texts fostered physical violence against people in their communities, enabling shunning and populist retribution against people with the perceived risk they faced due to their HIV-positive status and charges being leaked to the public.

This focus on documents follows the tradition of Dorothy Smith, who built upon approaches from ethnomethodology, noting that textual materials were previously most often understood by sociologists as sources of information about something else located elsewhere, and examined in order to piece together accounts (Smith, 1990, 2005). Ethnomethodology uses a conversational analysis, examining what talk between people can tell us about how social relations are organized and also elaborates the interplay between talk and text and how speech is mediated textually. Smith used the examples of how an ethnomethodologist might study courtroom talk, boardroom meetings discussions, or talk between children on the street corner (Smith, 1990, 2005). This method reframes what was understood to be official data in qualitative research, as people's daily talk becomes a form a legitimate data to be described and analysed. Smith was inspired by a range of work from ethnomethodologists, including Lawrence Wieder (1974), who studied the convict code in his work

Language and social reality: The case of telling the Convict Code. The convict code was established in a halfway house as an official set of rules, and Weider assumed that it would shape their behaviour. But according to Smith, what Weider "came to see the code not as an external order governing inmate behaviour but as it was spoken by inmates to each other and staff" (Smith, p. 66, 2005). Through this study, Smith notes that rules, as mediated through text, emerge through local practices. In this way we can understand how rules, procedures and laws, rather than existing in a theoretical space abstracted from people's lives, but are instead locally incorporated and coordinate people's lives through various form of action (Smith, pg 67, 2005). Within her feminist alternative sociology, texts comprised an object of study in their own right. Such documents can be used to examine how people's lives are coordinated, and inform institutional sequences of actions (Smith, 1990, 2005). Smith brought about an understanding of texts as active constitutes of social relationships. Asking about texts can bring forth their "particular configuration of their organization in different places and different times, thereby conceptually coordinating and temporally concerting a general form of social action" (G. Smith, p. 24, in Campbell & Manicom, 1995). Within the interview context, a focus on texts helped establish links to the institutional forces acting to externally organize the daily lives of people, and highlighted the materiality of living in negative relation to the law.

Interview confidentiality protocols

During and after the interview, I employed a number of additional protocols to further protect people's confidentiality, inspired by the work of Bruckert (Parent c. V. 2014). After the informed consent process, I asked people to select a pseudonym to use during the digitally recorded interview. They could also sign the consent form with either an "x" or using that same pseudonym. Interviews were digitally recorded, and once completed, they were transcribed as soon as possible. I used a burner laptop computer solely for transcribing the interviews. The digital interview and transcription files were housed in encrypted cloud storage. All identifying information was redacted from the transcription file, so that they were anonymized. Once the digital files were transcribed, they were transferred to an encrypted external hard drive and deleted from the encrypted cloud storage. The burner laptop was then wiped clean. The encrypted external hard drive was given to my supervisor Dr. Viviane Namaste, and I have no knowledge of where it is located.

In this section, I outline considerations I employed when conducting the interview for this project, specifically about the use of multiple interviews and asking about texts. In the following section, I elaborate my approach to archival research.

Archival research

When a person is marked as a criminal and a threat to public safety, a wide range of information is produced from authoritative institutions involved in policing, the press, public health, and criminal justice. These institutions propagate that information about the person and their case, through items such as press releases, legal case documents, media articles and interviews, personal photographs, institutional directives, expert opinions, medical files, social media and bulletin board posts, and police communications and interviews. As is described in the next chapter, part of the public's knowledge of the criminalization of HIV stems from their understanding of these specific documents. As a result, an integral component of my critical ethnographic inquiry was sourcing and engaging with this wide range of archival material.

Throughout this project, I consulted hundreds of media articles related to specific HIV criminalization cases throughout Canada, as well as related legal case files. and other documents, such as police press releases and public health files. Additionally, in my historical work described in *Chapter 2, Histories of violence: Venereal disease control in the Dominion of Canada*, I also gathered a range of archival documents, including personal correspondence, legal tools and texts, media articles, on the history of venereal disease regulation in the early days of the colonial Dominion of Canada. These documents were collected and examined at the National Archives of Canada and through online and library research.

As I noted in that chapter, it is important that what is socially understand as history often relies on what appeared in the textual record. Thus, historians face many limitations, since the textual documentation typically privileges certain ways of knowing and certain types of knowledge, often serving to reinforce the state apparatus's existing powers (Yow, 2015). When engaging with these archival documents, I did so with care, since the ways in which they proliferate in the public sphere are rarely benign. Rather, information can be dispersed and mobilized serving to discriminate against people, to enhance their surveillance, to predict perceived future risks, and to regulate and circumscribe behaviour and opportunities. One argument I make in the following chapter of this dissertation is that the convergence of forms of information originating from a criminal case of HIV non-disclosure, exposure, or transmission reinforces and amplifies legal forms of violence. A document also carries the power to harm, meaning that when engaging with those documents a certain level of critical reflection is required to further mitigate any future harm. What I mean by engaging with documents

with care equates with referring to the past. Thus, I aimed not to further or reproduce past breeches of confidentiality, leaving out names if possible or details that seemed sensational, always remembering that real people are attached to the names appearing in archival texts.

In this section I outlined considerations of care for approaching archival research on criminalized people, which included remembering that documents acted in the service of the criminalization process. In the next section, my task is to provide an overview of my approach to conducting data analysis for the interviews that I conducted.

Analysis

In this section, I outline the steps I took to analyze the interview data I collected for this project. The process I employed to undertake analysis was one which started at the level of human social relations, taking place from the ground up, from the perspectives of criminalized people and the worlds they inhabit day-to-day with attention paid to experiences of violence. My interest was examining how people living with HIV who were criminalized understood the world around them, what people said to them, how social actors from institutions engaged with them, and how the process of criminalization was socially activated around them. This was a process where I treated people as trusted experts in their own experience, aiming to honour their lives, and to act as a witness to their story of criminalization. To conduct this analysis, I took inspiration from a number of approaches located within institutional ethnography, specifically, looking up from a place of social relations to examine how the social world is externally coordinated, examining the disjuncture between the actual and the conceptual, and looking at and asking about texts. Through examining the disjuncture between the official conceptual forms of knowledge of institutions, and that between the knowledge that is lived and embodied by people, an institutional ethnography approach can work to counter the reproduction of ongoing forms of epistemological, administrative and material violence that certain people face as a result of criminalization.

To assist in better examining social relations, in a way that moves beyond solely the descriptive, Dorothy Smith focused attention on how social relations are coordinated and regulated by external forces (Smith, 1987, 1990, 2005). Smith's analysis aimed to examine how people's daily lives and interactions are organized, mediated, regulated, and constrained externally through a variety of institutional sequences of action and textual formations (Smith, 1987, 1990, 1999, 2005). Smith wanted researchers to consider how social relations are constituted externally to actual people and places,

through attention paid to how people see the world around them, as well as how texts are mobilized and activated. With this, a researcher can focus attention on how official accounts of people are constituted externally by institutions. In institutional ethnography, the disjuncture that exists between people's own experience and the ways in which they are known conceptually by institutions becomes the site of research (Smith, G. 1995).

To examine the notion of disjuncture between the actual and the conceptual, I took inspiration from institutional ethnographer and criminologist John McKendy, as previously discussed in *Chapter 1: Bearing witness to violence*. In the article "Ideological practices and the management of emotions: The case of "wife abusers"' (1992). McKendy participated as an observer in a therapeutic treatment group held within a corrections institution for men led by psychologists. He examined how these men came to be understood by the criminal justice system as "wife abusers". To conduct his analysis, McKendy focused attention on juxtaposing the primary narratives of the men that he had collected against the expert and institutional ideological accounts, to make visible the disjuncture between the actual and the conceptual (DeVault & McCoy, 2004, p. 39). In the group, the men were highly encouraged to take on an official responsibilized discourse by the expert facilitators that was grounded in feminist ideals, but which, often ended up reinforcing sexist attitudes and behaviour. The men often described experiences of complex interpersonal family violence that arose due to the stresses of poverty. But these discussions were discouraged in group. Instead the men were understood as self-possessed, rational, self-controlled, and emotionally self-sufficient individuals (p. 69). At the beginning of each group the men would take on this official discourse, stating "I am here because I have been abusive to my wife (or girlfriend)", and according to McKendy's analysis, this process of "taking responsibility" meant the exclusion of any social relational context which could be interpreted as ground for excusing, justifying or minimizing the abuse the men had enacted (p. 69). Paying attention to the disjuncture between the men's experiences and how they came to be known through the discourse of the psychiatrists and corrections institution, McKendy examined how men were counselled to "stop externalizing blame" and "take responsibility for their actions" (McKendy, p. 61, 1992). The results were that the men had to "block out their emotion-laden of constraint and powerlessness, and recognize themselves as fully rational, autonomous and self-possessed agents" (McKendy, p. 61, 1992). Through this process the men were left with a reified sense of their "abusive behaviours" evacuated of any social or relational context (McKendy, p. 77, 1992).

The approach of McKendy's, to present what people know about their own lives and experiences, in contrast with how they are institutionally known, was a primary approach to analysis

that I employed throughout my project. This approach helped to reveal institutional forms of violence and erasure. It can help counter dominant ways of knowing people who have been deemed institutionally as criminals. For example, often people were conceptually understood as a risk to the public, when there was no such actual risk. A prime example comes from the experiences of Shaun, described in greater detail in the following chapter. Shaun, a Black man in his late 20s, was arrested on charges of aggravated sexual assault for alleged HIV non-disclosure, after his ex-girlfriend went to the police because she was angered about their break-up. She had known about Shaun's HIV-positive status. He was virally undetectable and when a couple they had regularly also used condoms. She lied to police out of anger. When arrested Shaun noted to me: "it's like automatically they are looking at it like there is a risk, there wasn't a risk. But because he's HIV, automatically 'ok we should use the HIV law and we should charge him.'" Because of the institutional conceptual construction of HIV within the criminal justice system as a heightened risk, Shaun's experience of being virally undetectable, and therefore non-transmissible, on top of having used condoms, was erased. These places of disjuncture were a site of investigation throughout the entire process of analysis.

Data analysis began as soon as the first interview was conducted. I employed an iterative approach to analysis guided by the emergence of themes as they arose using the constant comparative method established in grounded theory (Glaser & Strauss, 1967; Charmaz, 1994). I integrated this approach as it aligned with my aim to ensure the primacy of the first-hand experiences of people. I did not want to objectify experiences of people for the sake of theory, rather I wanted any theory to emerge from the daily experiences of people. What this meant is that throughout the interview data collection phase of my project I continually reviewed the content of the interviews, working to refine questions, and comparing the discussions I had with each participant against others as the process expanded. Throughout this initial phase, I examined the content of each interview against others looking for commonalities and differences as a series of initial themes arose. While inspired by a grounded theory approach, I did go into the interviews with a set of questions, and the initial set of themes that emerged mostly ended up being structured around the interview questions. For example, when I asked each participant about experiences with police, issues with policing then emerged as a theme for this initial phase of analysis. However, my questions about police were open ended, asking generally about people's experiences first interactions. As the people I interviewed began to speak about experiences of violence and discrimination at the hands of police, the theme that emerged from the discussion of police moved to a focus on violence and discrimination, which meant my questions about police became refined and focused to these areas as the later stage of interviews progressed.

After a majority of the interviews were complete there, I then began a general thematic analysis organized around the chronological overview of the construction of a case. A key approach I undertook during the general thematic analysis was to pay attention to "asking about texts" (DeVault & McCoy, p. 36, 2004). Sequences of action within institutional complexes are organized through documents and texts of varying sorts, and so understanding how people's daily lives were coordinated was facilitated through a careful study of texts that came up during interviews (Smith, 1990, 2005). Documents were an important part of how people's lives were organized and a study of them allowed for uncovering textually coordinated events, practices and activities. As mentioned previously, during interviews I asked people about institutional texts that documented their experiences and constructed them into cases (i.e. public health orders, media articles, and conditions of release or parole). I then asked people about how they relate to and understand those documents in relation to how they understand their own experiences and lives (DeVault & McCoy, p. 36, 2004). The iterative process of developing theory took place throughout all aspects of the analysis, including the thematic analysis on the construction of a case, paying attention to the disjuncture between the actual and conceptual, and focusing on the coordinating role of texts. Through these steps of analysis, is where, in greater detail, the notions of legal violence, interlegality, interinstitutionality, and the institutional amplification of risk and punishment began to emerge.

After the development of this general thematic analysis was complete, I returned to each interview individually. From here, I developed individual narrative accounts of each experience of criminalization from the first-person perspective. Trusting each person as an expert in their own experience meant developing their experience into a form of knowledge that could be understood as true and real on its own merit, in order to be presented as actual, in contrast to the conceptual knowledge of experience as constructed by institutions. Here, I took what people told me, and ordered it chronologically from when people had been initially contacted by police or public health, through to their arrest, court proceedings, incarceration, and release, if applicable. Throughout this process, to align the narrative accounts to the larger thematic analysis, I highlighted specific instances where people spoke of violence and suffering, and explored how they experienced and understood those moments.

In the next phase, I read each of the narrative accounts against each other, looking to how people spoke about the role of structural factors in their own experiences. Throughout the narrative accounts, people addressed forms of racism, histories of gendered sexual abuse, poverty, social marginalization, mental health, misogyny and homophobia. Here my aim was to look from the ground up, to examine how people understood their experiences to be coordinated externally by structural

forces. Linking people's first-hand accounts to larger structural factors was part of the process of understanding how social relations were coordinated extralocally, and specifically how violence operated. Through the emerging analytic of violence, this is where I employed a multi-axial analysis, linking experiences of personal physical and psychological violence to forms of structural violence, which is described in further detail in the following chapter.

After these phases of analysis had been conducted, I began to garner feedback externally. I wrote up a draft analysis and shared it on the HIV Justice Network blog, as well as giving a public lecture with the same content. The lecture and blog were titled, "HIV criminalization: Legal violence and the lives of people living with HIV" (McClelland, 2016). In part, I shared these initial findings to garner corrective feedback from people who had been involved in the interviews, as well as from legal experts, and HIV criminalization activists. As the legal landscape in Canada was slowly changing, I also shared the findings as part of my ethical obligation to bear witness. This meant I felt a sense of urgency to share what had been going on for people who were criminally charged to help inform potential reforms. At the time, I was working closely with advocates who formed the Canadian Coalition to Reform HIV Criminalization, and got detailed legal feedback from a number of members with legal training. While sharing my initial findings, I was conscious of how this feedback may shape the work. In his work on sensitive research, Lee also examined the notion of "appreciative understanding", in which he discusses how researchers can tend to focus on groups to which they have "some liking or sympathy" (Lee, 1993, p. 136). For me this is a very obvious issue, as the nature of the criminalization of HIV is one that could very easily touch me, and has touched people I know, and is an issue I work on as an activist. Lee (1993) discussed the tendency for such research to reproduce left-wing and liberally sympathetic narratives. This was one area where I aimed to be continually reflexive. Through working with the organizational partners, these groups may have a vested interest in promoting the most sympathetic stories of people charged with HIV non-disclosure, exposure, or transmission to help instrumentally with advocacy. I employed a number of strategies to address this issue, namely in how I initially structured the research not to focus on the specifics of what a person did, and to disaggregate people from the easy dichotomous trap of criminal justice narratives. In writing out the findings, I primary aim to explain what happened to people, not what people were alleged to have done.

Through sharing the initial outcomes with a broad range of actors, including those who had participated in the interviews, I got overwhelming positive feedback with how the research findings had been organized and elaborated. From there I began to more formally write out my project. In the

next section, I outline some of the considerations I worked with to write in detail about violent experiences that emerged from the interviews.

Writing violence

An ongoing complexity in my project involved writing in detail about experiences of violence. In *Chapter 1: Bearing witness to violence*, I expanded upon the notion of bearing witness, outlining the ethical role I play as a researcher to handle the experiences of the people I interviewed for this project with care. Applying this approach, my role as a critical researcher must extend beyond acting as someone who simply documents and describes experiences of violence. The focus on violence tends to denaturalize experiences of violence, so as to interrogate and hold to account forms of avoidable suffering. Throughout the writing phase of this project, I continually referred back to the ethical questions posed by Sontag (2003), whilst elaborating the notion of bearing witness. Sontag, in exploring the role and function of images of violence, questioned the point of such images. Were they intended to make the viewer feel bad? Were they intended to immobilize or desensitize the viewer? Or could viewing images of violence act as a spark to mobilize people into action (p. 102)? In writing about the experiences of violence faced by the people I interviewed, these questions oriented my use of language and the descriptions that emerged. These considerations were twofold: First, I wanted to ensure justice was done to the stories that people entrusted to me, and, second, I wanted to avoid alienating, overwhelming, or immobilizing the reader. I, thus, aimed to avoid sensationalistic or political language, and remained conscious to avoid editorializing or to make judgements, instead allowing the experiences to stand for themselves. I often reflected, whilst constructing a narrative from the interview transcripts, on whether this research was exploitative. That is, where was the line between explaining what happened to people and being gratuitous? Many of the experiences I heard and describe are graphic, shocking, and difficult to comprehend; that does not make them untrue. Ensuring that the language I used and descriptions I constructed were balanced, and somewhat neutral, represented an ongoing dynamic and required a reflective negotiation throughout the writing process.

In the next chapter, *The amplification of penality*, I detail my findings from the series of qualitative interviews that I conducted with people living in Canada criminalized in relation to alleged HIV non-disclosure. The chapter focuses specifically on experiences of violence. I outline a typology of violence, inspired by the work of Paul Farmer and Johan Galtung, both of whom have worked extensively examining the idea and materiality of structural violence. Outcomes of my analysis help to denaturalize

the violence faced by criminalized people, revealing that when various legal tools and institutions intersect in the project of criminalization, the levels of material violence are intensified.

Chapter 4: The Amplification of penality

How might we discern the nature of structural violence and explore its contribution to human suffering?

– Paul Farmer*, On suffering and structural violence: A view from below,* 1996, p. 274

All people marked as criminal in Canada are vulnerable to violence. However, the intersection of HIV and criminal sexual assault charges provides unique insight into the materiality of living in a negative relation to the law. As I detail in this chapter, when HIV is combined with criminal sexual assault charges, the institutional conception of risk heightens. Various processes are deployed to incapacitate such risks across jurisdictions and institutions, compounding and amplifying forms of violence. The intersection of sexual assault law in relation to HIV non-disclosure, transmission, and exposure makes possible a range of formal legal and bureaucratic punishments. Such punishments include the most severe and harsh sanctions, along with a range of social processes, such as interpersonal forms of stigma and discrimination. Criminal laws and public health laws also intersect and reinforce one another. For instance, information generated by healthcare institutions can be used within the criminal justice system for the purposes of criminalization. In addition, media representations of a particular case can lead to direct personal forms of violence in the lives of those criminalized. Information about a person and their case proliferate, such as press releases, legal case files, expert opinions, medical files, police communications and interviews, and sensationalized media reports that include private photographs. Details about people become public, and those individuals become recognizable in their own communities. Social media and online posts disclose information and charges, encouraging if not asking the community to 'watch out' for those criminalized. Moreover, information can be dispersed and mobilized to discriminate, to enhance surveillance of them, to

attempt to predict perceived future risks, and to regulate and circumscribe behaviour and opportunities. Those criminalized can be shunned and banished from public spaces and services, denied housing and employment, and face a wide range of physically and emotionally violent consequences such as beatings and verbal abuse.

Quite simply, living in a negative relation to the law in Canada when HIV-positive amplifies penality. These amplified legal and extralegal punishments begin as soon as charges are applied, regardless of a whether a case goes to court or a guilty verdict. Because such individuals are no longer regarded as a person protected under legal regimes, people who live in a negative relation to the law become threatened. They are over-policed and under-protected, surveilled in their communities, and live in a context where information about them is collected, exposed, dispersed, and mobilized to incapacitate their bodies and circumscribe their life chances and opportunities.

In this chapter, I present the findings from my critical ethnographic inquiry, findings grounded in the daily lives of criminalized people. This form of criminalization begins with people's first interactions with policing, public health, and criminal justice institutions, and extends through to their lives following long periods of incarceration. This chapter is organized into three primary sections. First, I explore how a person's experiences become constructed into cases institutionally, cases mobilized for institutional purposes and disconnected from the actual worlds in which the events originated. I then outline a typology of violence resulting from the process of criminalization. In doing so, I explore violence not just as a blow from one person to another, but rather as connected to a system, where criminalized people face the denial of autonomy, safety, and security, and the means to realize their potential. Finally, I describe people's experiences of how crime governance is socially dispersed and crowd-sourced. Such governance ultimately causes forms of civil and social death that limit people's ability to claim aspects of liberal forms of personhood, even after a case is officially resolved. Throughout this chapter, I weave into the discussion relevant theoretical concepts, while aiming to preserve the primacy of the actual and lived experiences. Additionally, while I have ordered the construction of cases somewhat chronologically, the process of becoming a case can be messy, is not uniform, and is completely unique in each instance. Boundaries and categories blur, and nothing is succinct or definitive. This detailed examination of these processes aims to understand how personhood is deconstituted and the meaning of living in a negative relation to the law.

The making of a case

The analytical focus in this chapter lies not on an examination of the specific details or 'facts' of different legal cases. I, thus, avoid playing into the dichotomous legal logic of right versus wrong, criminal versus victim, or innocent versus guilty. Instead, I aim to disarticulate people from the narrative of wrongdoing, expounding upon the materiality and consequences that accompany being criminally charged. To begin this examination, I must look first at how people are taken up by authoritative institutions that govern the criminalization of HIV non-disclosure, transmission or exposure, namely, by policing, criminal justice, and public health institutions. In this section, then, I examine this first step in the process of criminalization—becoming a case. That is, I focus on how people's nuanced lived experiences are translated via institutional logics to render a person as negative or non-person. Becoming a case stands as the institutional entry point enabling the processes required to criminalize individuals, deconstituting their personhood, and resulting in a form of civil and social death. What I mean by becoming a case should not be confused with the specific acts of wrongdoing a person is alleged to have committed. Instead, a person becomes a case when they interact with and their experiences are recorded by authoritative institutions. By becoming a case, people's lived experiences are rendered into an abstraction of their actual experience. This process of abstraction occurs when people's experiences are institutionally recorded and put onto paper, where people become reframed as risks requiring management or incapacitation through a range of institutional actions. Bureaucracies require these institutional recordings to activate criminalization processes, such as charging a person with a criminal act or enacting a public health order or both. Furthermore, once reframed as a case, such people targeted with criminalization lose their autonomy over their own experiences. While the abstracted recording of experiences is constructed and mobilized to serve institutional purposes, the actual person upon whom the case is based faces a wide range of violent consequences.

No single uniform way exists whereby a person becomes a case. Some people were already taken up as cases via therapeutic or medical institutions, such as public health, before their case was amplified and translated into the criminal realm. Some individuals learn that they have become a case when they engage with the police as the first point of institutional contact. That is, they may be called upon and asked to appear at a local police station, they can be arrested in public seemingly out of the blue, and some individuals turn themselves in after being notified of an arrest warrant. For others, the first point of institutional engagement occurs with public health officials. For example, they may receive a public health order or meet with a public health official after testing positive for HIV. Regardless of how that

person enters into the institutional realm as a nascent case, being translated into a case can occur through a negotiated process, relying on both formal institutional processes and social relations which intersect across policing, criminal justice, and public health institutions.

Institutional ethnographers are particularly interested in how people's experiences become translated into cases, specifically as such an examination can reveal the disjuncture between how people come to be known institutionally versus how they know their own lives. Legal scholars using institutional ethnography have helped to reveal the construction of people into legal cases and how lived experiences are translated into a legal logic. This transformation objectifies marginalized people and erases the complexity and social context for the benefit of conceptual legal discourse (Beaman-Hall, 1996; Pence, 2001). For example, Ellen Pence (2001) conducted an institutional ethnography of instances of domestic violence against women examining how legal processes construct complex social relations into cases managed and cycled through the criminal justice system. In doing so, Pence mapped out women's social and institutional interactions in domestic violence cases to understand the organization of sequences of juridical action, with the problematic existing between women's lives and how their cases were institutionally processed. Pence used the process of mapping social and institutional relations to understand and explore how women's lives in cases of domestic violence were organized by external power relations beyond the women's immediate experiences (Welsh & Rajah, 2014, p. 3). Ultimately, Pence explored the disjuncture between women's lives and the criminal justice system, which was more concerned with processing cases than perusing forms of justice for the women.

Similarly, Lori Beaman-Hall (1996), feminist legal scholar, also mobilizing the work of institutional ethnographer Dorothy Smith, examined how the practices of lawyers obscured the experiences and lives of women complainants while constructing their experiences into legal cases. Beaman-Hall explained that the "legal method" is the approach taken by lawyers to construct a legal narrative which is intelligible to other actors in legal systems. Through this approach legal actors construct a comprehensible narrative that fits within the institutional course of action (Beaman-Hall, 1996, p. 58). The outcome of the method however, obscures any nuance, complexity and actual experiences of women who engaged the legal system to support them. Beaman-Hall wanted a new way to study how women's experiences and voices were marginalized within the legal system. She noted that previous means of legal analysis had often previously only relied on written court outcome documents, "yet, the majority of the discursive practices that work to obscure the everyday experiences of women are located in lawyers' offices" (Beaman-Hall 1996, p. 58). There had been a limited focus

on the local mundane practices that acted to erase experiences of women. The result is that the ways in which a legal narrative is constructed had been ignored by researchers, and legal outcome documents had come to be understood and reified as truth. Beaman notes,

> This idea is especially significant given that the vast majority of cases never reach the courtroom. These practices are particularly elusive because they are seen only by the lawyer, who more likely than not, fails to appreciate their significance. In most cases, the client trusts that the lawyer knows what she is doing, or feels unable to challenge the legal process and, therefore, rarely asserts her right to tell her story her way. (Beaman-Hall 1996, p. 58)

Beaman-Hall argued that the outcome of the legal method process is that women's experiences become invisible, erased and marginalized (1996). She further explained how the legal method works, where a primary narrative is rendered into a series of legal facts for institutional purposes. For example, a woman named Joan comes into her lawyer's office. She tells the following story of her family:

> Last night John came home and said he was leaving to live with a friend... I don't why he left ... I thought things were going alright ... so anyway, I started crying, and then the kids started crying because they knew that I was upset.., he said all of this in front of the kids, you know.., then the kids asked me if daddy was leaving because they were bad... well that just made it worse, and he called me a useless bitch and then he slammed the door and left. (Beaman-Hall 1996, p. 62).

Beaman-Hall notes that in order to reconstruct Joan's story as a legal issue, her lawyer will extract from what Joan has said, that Joan has a legal relationship with John, and that Joan and John are living separate and apart. The complexities of Joan's pain and suffering, or her anxieties about the children, are set aside and obscured. Those details do not fit into what is required to take a legal course of action (Beaman-Hall 1996, p. 63). The story is reconstituted into a series of facts that are required to tell a legal narrative that is comprehensible to other lawyers, judges, the legal system, or experts such as psychologists.

Furthermore, to apply this analysis to the issue of my study, out of many of the complex narratives that will be explored in this chapter, a prosecuting lawyer applying the 1998 Supreme Court decision would look for two major facts: was the person HIV-positive, and did they disclose their status to the complainant? If they can prove the first to be true, and that the person did not disclose, then their work was done. Under the current legal regime of "realistic possibility" their job may be

somewhat tougher, but perhaps not much so (SCC 2012). Those are the facts required to argue a case in court, nothing else really matters. The legal method extracts anything extra reducing complexity to facts, where "the primary narrative is dissected, selections made, and then the story is reassembled in a manner that supports and is supported by legal discourse" (p. 63). The legal method works in a binary opposition, seeking for what is relevant, and what is irrelevant. Whatever does not fit within the required legal course of action is discarded as irrelevant.

Beaman-Hall notes that such legal narratives work to maintain the authority of institutions and experts. When complex experiences are reduced to facts, such as medical facts, the primacy of medical regimes of truth are upheld, and people's expertise of their own lives and experiences is marginalized. Further, she states,

> At a general level, the reconstitution of a story into the facts works to maintain the authority of medical discourse. The same can be said about the reconstitution of the primary narrative of the legal client. The stories of women are obscured as they are replaced by facts created by more qualified story tellers, be they psychologists or lawyers or… those who more closely conform to ideals of normality (Beaman-Hall 1996, p. 64)

I take Beaman-Hall's approach to analyze the legal method and apply it to the constructed cases that follow, where people's experiences come to taken up institutionally for the purposes of criminalization. While many of the experiences described in this chapter originated not from a lawyer's office, I believe Beaman-Hall's analysis is applicable across a range of institutions, including policing, public health, media, and legal actors in the criminal justice system. The institutional sequence of action required to criminalize someone, to label them as a risk, to describe them as a violent perpetrator, to enact sanctions against them; all of this requires that people's complex experiences come to be reconstituted into a narrative required by the logic of institutions. What does not fit within the institutional narrative required to criminalize someone is discarded or is rearranged. This will become more evident as the chapter unfolds through exploring the first-hand accounts of criminalized people.

To expand upon this process of becoming a case, in what follows I present the first-hand experiences from the people whom I interviewed. Here, they describe the nascent stages of their engagement with policing and public health institutions. Each person recalls how they came to understand that they were being criminally charged in relation to HIV non-disclosure. In this section,

I detail the areas of a case's development through a series of narratives primarily ordered chronologically from the beginnings of institutional engagement to when criminal charges were applied, and. further, to when a case advanced to court if a trail took place. I then discuss the process of dichotomization, which contributed to the construction of a people's experiences into cases.

Shaun[4]

I spoke to Shaun, a young Black man in his late 20s, while he was living in the suburbs of a large Canadian urban centre. A relaxed guy, living in a spartan apartment, he offered me a coffee as we spoke about his dog, a large, yet very friendly Doberman Pinscher. Shaun lived in a low-income high rise and worked in a factory a bit further north of his place. Many years earlier, while dating a woman his own age, he learned he was HIV-positive. He immediately told her his status: "They said I was undetectable, I was not a high risk. So, pretty much I disclosed my status and, at that time, and we went to public health and spoke to them, spoke to a doctor and a counsellor." He took his partner to also speak to the public health authorities: "We went to public health and spoke to them, spoke to a doctor and a counsellor, and ended up moving in together." At the clinic, the doctor told Shaun and his girlfriend that it was against the law for an HIV-positive person to have sex with someone without telling them their status. His partner knew his status and they moved into an apartment together as a couple. After finding out his status, Shaun looked towards moving on from drinking and partying: "I started to feel the impact of HIV. I've got to slow down and I was, like, to my partner, 'I can't keep up, you know, so, like, I have to change my ways.'" She continued to enjoy going out a lot, and their lives drifted apart. Their relationship took a downward turn and he decided to break it off. When he ended the relationship, "She got mad, then pressed charges, because she found out from when we met with public health that she could, and was like, 'Well, you are going to leave me, leave me here by myself'… I ended up getting charged with non-disclosure." His ex-partner did not want to actually press charges. She knew his status, HIV was never transmitted, Shaun was undetectable, and they had also regularly used condoms. Shaun said, "They asked her if she even wanted to press charges and she was, like, 'no' but, you know, it happened anyhow." Moving forward with aggravated sexual assault charges was perceived as serving the public's interest. Once a case is in the hands of the police, it is no longer up to the complainant to determine if a case moves forward. Shaun turned himself into the

[4] All names have been changed to pseudonyms.

police voluntarily once learning of his charges. As he drank his coffee, he continued, noting that the police were unaware of the risks associated with HIV:

> ...[T]he cops, they didn't really understand the viral load. If you're going to charge someone you guys should kind of dig in a little deeper, you know, make sure there is a risk. But it's like automatically they are looking at it, like, there is a risk; there wasn't a risk. But, 'because he's HIV, automatically, ok, we should use the HIV law and we should charge him.' Even when the cops were dealing with me, they were, it was just, like, 'just be careful; he's HIV positive.'

After his arrest, the police released a public safety warning about him. The warning, essentially a press release posted online using the police Twitter account and sent to multiple media outlets, included Shaun's biometric details, including his height, weight, eye and hair colour, any visible identifying marks, a mug shot, and a statement asking for anyone who had sex with him to come forward. A number of media articles were published, which were widely dispersed online, and which included Shaun's name, picture, and the police profile of him along with his charges. He was denied bail and incarcerated immediately upon remand, or pre-trial detention, noting, "I didn't have a proper lawyer at first, got a legal aid lawyer. Had to do 18 months in remand until my trial."

Lenore

Lenore is a kind, and initially shy Indigenous woman in her late 20s.When I first met her, we agreed to meet for lunch at the local Tim Horton's with her boyfriend. She was reluctant to talk about her experience, given previous betrayals of her trust and privacy. I spoke with them both, clearly observing that they were in love, openly affectionate towards one another, and he unequivocally supported her. Her boyfriend was HIV–negative. He and Lenore met shortly after she had been charged and he had helped her throughout the entire experience. After ordering sandwiches, she jumped into telling me about her first engagement with the police in her small town. She explained how she was initially charged: "It was my social worker who called me. It was about a phone call from the RCMP [Royal Canadian Monted Police]." A nurse from the local public health authority had previously visited Lenore a few times. The nurse stated that they were aware that Lenore was HIV-positive, and demanded that she disclose her status to her sexual partners, but provided no support on how to do so. Lenore found the encounters jarring and disturbing, encounters that left her feeling insecure. She told me that she believes the public health authorities went to the police. While sitting

together, Lenore continued, "My social worker said, 'We need to talk to you about something. Can you come to the police station?'" Lenore, scared and confused, went to the police station: "They read me my rights, then they took me upstairs to the interrogation room." She immediately received duty counsel, a publicly available defence lawyer, who she called and who told her not to say anything to the police. She was being charged with aggravated sexual assault. Then, a constable that Lenore knew through her family came into the room, "I knew his son's nephew. We had that direct relationship, so, then, I talked, I told him everything." She went on to tell him about how she got infected: "What I had been doing to change my life around, all of the abuse I went through before and since finding out I had HIV. To him, I'm like one of his other children, so he had to leave the interrogation room to go cry." Lenore told them that she had slept with a man a few times while intoxicated, she was in a deep depression since finding out she had HIV. When she was sexually assaulted by another man, HIV was transmitted to Lenore. With this new guy, she never told him her HIV-positive status, but neither did she keep it a secret. Lenore and another guy had hooked up when they both were quite inebriated. She tried to give him a condom, but he did not use it. The man was known to public health officials, and had told authorities about his interactions with Lenore. Following that revelation, the authorities reached out to her.

The constable that knew Lenore told the other officers that they should release her on her own recognizance. They released her with a promise to appear in court: "I was told that [the incident] was going to remain under investigation and that nothing would happen." A day later, Lenore heard from her social worker again, "asking me 'How are you doing? Your name is in the paper, and so is your picture', she said, I was like, 'Whaaat?'" Lenore then told me how she went into a long period of self-imposed social isolation out of fear, checking into a motel in another town. She continued,

> I come from a small town, so everybody knows everything. The quiet girl is all of a sudden a big media star, everybody knows who I am … my name in the news, my grad[uation] picture was up in the media. I felt very violated, I was told by my doctors and by the police that I'm innocent until proven guilty. It's my right to disclose; those rights were taken away.

Lenore told me that a former teacher from her high school leaked her graduation picture to the media. That picture was now everywhere, with headlines saying she had HIV and was being charged with aggravated sexual assault.

Cynthia

I met Cynthia at an agreed upon rendezvous time in her neighbourhood on the outskirts of a large urban centre. As her second or third language, she was still learning English. She told me about her move to Canada a few years earlier from a South American country. She felt that living as a transsexual woman in her home country was impossible. Had she remained, she would face life-threatening violence. Since moving to Canada, she had been working as a sex worker. She told me she enjoyed the work, she generally had clients she liked, and she worked out of her home. She was in her late 30s, well-dressed, and had a gentle demeanour. As we sat together, she began telling me about how she was threatened with a charge of aggravated sexual assault. She was on anti-HIV medications and regularly used condoms with her clients. She did not tell her clients her HIV-positive status—it was not their business, and if they knew about it, it might also be bad for business. But, she also knew that she was protecting them and also herself.

One of her regulars came over one night more intoxicated than typical for him. He pulled a knife on her and raped her, holding the knife to her neck. He did not use a condom. She was terrified and called the police afterwards. During the police investigation, they learned about her HIV-positive status, and when speaking with the man who raped her, told him that he could press charges against her. A few weeks later, she received a letter from a detective, stating that she was under investigation and they were considering pressing criminal charges of aggravated sexual assault. She was scared. The man knew where she lived and had been violent towards her, and now she was potentially facing criminal charges. She told me that because she was a sex worker, her rape and assault were not being further pursued by the police. But, now, she was under threat of a charge of aggravated sexual assault for not disclosing her HIV status to her rapist.

Danny

I met Danny at a mutually agreed upon location in a park near where he was staying. I had travelled to his town to meet him, and he was eager to speak about his experience. He told me he was from a working-class background, and grew up with limited means. He was a young, white man in his early 20s. He wore baggy clothes, and in a deep monotone voice told me how the police did not immediately press criminal charges—the process took time. He was in his teens at the time, and very newly diagnosed as HIV-positive. He told me about how years earlier, he had slept with a woman his own age at the time, and how he had a hard time negotiating dating as a teenager living with HIV.

Disclosing his status was difficult. He was virally undetectable and knew that he could not transmit HIV. While he did not disclose his status, he knew that he was protecting his sexual partners by taking his medications. Somewhat unrelated, the young woman he had been dating later ran away from her family home. Her parents opened an investigation with the police, telling them that she and Danny had briefly dated. The police then spoke with Danny about her disappearance. A month or so later, he received a call from the Major Crimes Unit of his local police station, and the detective asked that Danny come in to speak with her. The detective told him no charges were being applied, and told him not to worry. The woman's disappearance had been resolved, and she was found. So, scared and wondering what this was all about, Danny went to the police station to speak with the detective: "I said, 'Maybe I should get a lawyer', and she's like, 'No, just come yourself', and stuff like that." The detective knew his age, yet told him not to get a lawyer. He went to see this detective a few times: "She just hammered me with questions, and they didn't charge me at first." Then, the detective called him, "She asked me if I'd be ok if, you know, my medical files were released to them and stuff, and I was, like, 'not really.' Well, she said, 'If you don't consent, we are just going to do it anyways.'" Danny's healthcare providers immediately relented to a seizure warrant and the police accessed his medical files. A few days later, the detective told him he was being charged with aggravated sexual assault and he was asked to come into the station for arrest. Danny felt the detective was just fishing for wrongdoing where none existed. Danny told me that after his arrest the detective said he would likely now remain in pretrial detention because of how serious the case was: "So, it goes in front of the judge. They say, 'We are going to remand you until next week until you have a bail hearing, because of the seriousness of the charge.' Fuck, this sucks." The police then released information about his arrest to the media; but, due to his age, his name was not included in the release. Subsequently, he secured a lawyer.

Each of these experiences from Danny, Lenore, Cynthia, and Shaun, as nascent constructed cases, relied on mundane social relations in tandem with official institutional processes. In some of the cases, people actively participated in the construction of their own case out of goodwill, fear, and confusion. For example, Lenore told a police officer, who was a family friend, information she would have not told anyone else. That information was later used against her at trial. Shaun's girlfriend learned that she could go to the police because of a conversation she and Shaun had in a clinical setting with a public health doctor. Cynthia told the police her HIV-positive status, and they then informed her rapist that he could charge her with assault, which he did. Danny—a minor at the time—participated in a series of coerced but voluntary interviews out of fear and without a lawyer present or an understanding that the interviews were being used to develop a case against him. That reliance on

informal processes also meant that institutional actors possibly bypassed their own protocols and rules for appropriate procedures. Such bypasses include encouraging interviews without a lawyer present and when the person was unaware of the consequences attached to their disclosures. For example, Danny did not understand he was being actively investigated, while Lenore assumed she was talking to a family friend. Examining informal social relations in these contexts helps account for how formal institutional processes are enacted. In some instances, formal institutional processes rely on and are constituted through these initial informal social actions. Examining these early informal social processes allows for an exploration of how institutional processes that comprise criminalization are neither neutral nor benign. Furthermore, these processes do not emerge out of thin air nor do they result due to some egregious wrongdoing on behalf a violent perpetrator. Rather, the institutional processes that comprise criminalization can rely substantially on the informal and mundane activity of social actors working within institutions. Aligned with Beaman-Hall's analysis (1996), all of these social relations, and mundane experiences of the initial engagement with institutional actors are missed if the study of criminalized people only looked at legal outcome documents.

Further aligned with Beaman-Hall's work (1996), after these initial institutional interactions comes the retelling of a story in the form of a dichotomous narrative, so that the experiences become rendered into a criminal legal issue. This is a process of creating a dichotomy out of nuance. The process of creating a dichotomous narrative is required institutionally to take criminal legal action and prove some form of wrong-doing has occurred. This is where people's first-hand accounts are reconstituted into a framing of victim versus perpetrator.

Dichotomization

In the history of media representations of HIV, a pervasive idea persists. That idea is that violent individuals exist who aim to spread HIV and infect the public (Mykhalovskiy, et al., 2016). Instead, each of the experiences that led to an institutional case indicates that what becomes understood institutionally as wrongdoing was initially less obviously so. Lenore's silence, fear, and inability to address her own HIV status become institutionally understood as intent to harm her partner. Danny's active protection of his partner evidenced by his use of anti-HIV medications is disregarded, while his non-disclosure was then framed by policing actors as the intent to harm his partner. Cynthia was assaulted in her own home by one of her clients, yet she was under investigation as the perpetrator of harm. Shaun's ex-partner's angry and untrue statement to the police—one encouraged by public health authorities and despite his undetectable viral load and frequent condom use—were used to

institutionally construct Shaun's intent to cause harm. These initial engagements with institutions were not aimed at helping enable an understanding or providing support. Rather, they aimed at classifying people into the dichotomous logic of victim and perpetrator.

Translating the experiences of Shaun, Lenore, Cynthia, and Danny into institutional ways of knowing represents the point at which these people then lose control and their own autonomy over events. The lived experiences of normal behaviour, informed healthcare decisions, problems or misunderstandings, disputes or lies, moments of silence, things unsaid or no action at all were framed, not by the people originally involved, but instead via institutional actors and the varied logic of authoritative institutions. Translating these nuanced and complex experiences into the dichotomous narrative of right versus wrong serves as the first step required to enable the process of deconstituting someone's personhood through the criminal law. This process of dichotomizing nuances also serves to activate a range of legal tools and extralegal processes comprising the formal institutional aspects of criminalizing a person.

In the next section, to further examine how a case of HIV-related criminalization comes to be constructed, I explore how such cases come to be marked as hyper-risks within institutions. Through the interlegal and interinstitutional governance of a case, where public health and criminal justice jurisdictions are tasked with managing a case, the intersection of public health risk and criminal legal risk leads to a case's risk level being understood as heightened. The outcome is that such cases come to be institutionally managed with amplified forms of punishment.

Hyper-risks

Through the intersection of HIV with a charge usually reserved for violent non-consensual sex involving a weapon, cases of HIV non-disclosure, transmission, and exposure can become institutionally framed as hyper-risks. A wealth of academic literature has emerged on the notion of risk. Risk is a highly popular theoretical concept in both studies on HIV and on criminality. Here, I do not deeply engage with that work, since the notion of risk only becomes important within the context of my study when an individual marked as a risk leads to intensified forms of violence enacted against them. Risk itself can be understood as a "technology of governance" (Weir, 2006, p. 17). That governance has been described as both rationality and as a way of operationalizing rationality (Weir, 2006; Rose, O'Malley, and Valverde, 2006). In turn, risk as a technology aims to enact forms of governance targeted at pre-empting and arresting future ideological or actual harms. Therefore, risk is

not often equated with actual harm, but rather as a rationality aimed at pre-empting and managing the future. In this analysis, the idea of risk is mobilized to render operable a criminalizing rationality of institutions. In her work on pregnancy and biopolitics, Weir (2006) proposes a range of risk technology typologies. These are epidemiological, clinical, actuarial, and legal risks (Weir, 2006, p. 17). Thinking about risk across these typologies was intended to help in "foregrounding the analytic specificity of risk techniques and their varying effects" (Weir, 2006, p. 17). Mobilizing Weir's typology in the context of the experiences of criminalized people charged in relation to HIV non-disclosure, transmission, and exposure, varied risk techniques emerge as at play. Specifically, the epidemiological and legal interact, are co-constitutive, and are productive in relation to each other. The simultaneous interaction of multiple risk technologies—that is, a public health risk coupled with a criminal risk—leads to a case becoming understood as a hyper-risk. What I mean by cases becoming hyper-risks is quite simple: due to being marked as a risky individual by multiple authoritative institutions, the intersection of multiple risks increases the understood severity of the case. A case which was solely a public health risk would be considered less of a risk than a case that is considered a criminal and a public health risk combined.

In these nascent constructed cases, people described to me how multiple institutions and legal frameworks mobilized the idea of risk to increase the priority and importance, and amplify the treatment of a case. During this interinstitutional and interlegal criminalization process, public health, policing, legal, and media actors frame cases as extremely serious threats in need of immediate, extreme intervention. A case institutionally framed as a hyper-risk provides the justification for deploying exceptional actions. Thus, hyper-risk becomes institutionally understood as one of great urgency with a potential for social and individual harm. Canadian scholar Erica R. Speakman (2017) examined the social construction of people criminally charged in relation to HIV non-disclosure as villains. Through an analysis of the media analysis examining articles written about specific HIV criminalization cases, she outlined a series of social construction processes which comprise the "techniques of vilification". The process of turning people into villains involves several strategies or techniques, one of which is "constructing HIV non-disclosers as perpetrators of great harm" (p. 5). This technique contradicts the realities of HIV today. Contrary to the scientific reality of HIV, the media mobilizes a language implying great harm, using terms such as a "deadly disease" or "terminal" illness, and in some cases equating HIV as a murder weapon. Similarly, Mykhalovskiy et al. (2016) completed the most comprehensive media analysis of HIV-related criminal cases to date outlining similar findings. In their report, they note that the media frame people as a "way of writing 'other' people living with HIV who face HIV-related charges by treating them as nothing more than 'criminal subjects'" (p. 8). This media

othering disproportionately racializes, where more than half of the articles published on HIV non-disclosure criminal cases is highly racialized and focused on Black, African, and Caribbean male defendants (p. 6). The content of such articles frames complex experiences as dichotomous narratives, pitting an innocent victim against a guilty perpetrator. The authors note that the media relies on reproducing the logic of criminal justice institutions, using the language of the courts and talking about people adopting a common formulation of "the combination of 'name of person' + 'basic descriptor(s)' + 'charges'", which "reduces people living with HIV to bearers of a criminal charge and produces a connection between them and the criminal justice system" (p. 36). The outcome is that people are conflated and flattened, and understood solely as a subject of the criminal justice system.

While these studies solely relied on media analyses, I revealed a similar process through qualitative interviews with actual people labelled criminals in relation to HIV non-disclosure, transmission, or exposure. Additionally, to take up a case, the series of institutions enacting criminalization onto individuals requires a further entrenchment of the dichotomous narrative. That is, there must be a risky perpetrator of harm and a victim (or as many as possible) who experienced harm. To enact the most serious of legal tools and to enter into institutional processes, a person must be understood as an urgent problem requiring intervention and management by state actors. Being framed as an extreme hyper-risk highlights the massive disjuncture between people's lived experiences and how they become known institutionally. The more extreme the case, the more extreme the reaction becomes justified, including intensified and amplified forms of legal violence.

George

I met George in his condominium. He is a warm and gregarious white gay man in his late 50s, with a self-described long history of problematic prescription drug use, gambling, and mental health issues. When George began a specific relationship around 10 years earlier, he initially did not tell his boyfriend at the time about his HIV-positive status. At the time, he told me, he was himself uncertain about how HIV was transmitted. He told me that he was often depressed and in denial about aspects of his life. One day, a few months after his own diagnosis, George told me that his boyfriend came home with an HIV-positive test result from the clinic after a routine sexually transmitted infection screen. George, then, finally told his boyfriend his status in a letter: "There is a possibility that you may have gotten it from me, and I'm very deeply sorry for not disclosing [it to you]." His boyfriend went into a rage and demanded that George pay him $150,000.00 or he would press criminal charges. They broke up after a massive fight. George then tried to commit suicide, taking a full bottle of prescription

sleeping pills out of guilt, grief, and shame. While in a psychiatric facility for recovery, public health officials visited him. He told me, "Three nurses and a manager came to see me, with all these conditions in their public health order." They told him he was mandated to take his medication, undergo counselling, and disclose his HIV status to all sexual partners. He also had to refrain from sex unless it was with a condom, put on prior to reaction. "Before an erection, I had to have a condom on. I'm looking at this thing and thinking, 'How is that possible?'" One of the public health nurses was his now ex-boyfriend's cousin. "She worked for the public health [department] in the region where I was charged, so she put all these things on me." George thought his ex-boyfriend was trying to get back at him through his cousin, since she enacted a bizarre and impossible condition on him out of anger and seeking to protect her family. Other sanctions mandated that he disclose his HIV-positive status to all new partners and that he take his anti-HIV medications. After his release, he went to a casino in a manic state to try and appease his angered ex-boyfriend, "I was there for 48 hours, and I was up $78,000. Well, I lost that." A few days later, he received a text from his ex-boyfriend that he was at the police station giving them his story. George immediately went to the station. "The next thing I knew, they were taking me into custody, and they said, 'You have the right to call a lawyer', and they told me that 'you are being arrested for sexual assault.'" George told me that a constable initially told to him, "You've never had a criminal charge before. You will probably just have to stay overnight and tomorrow we'll get your bail sorted." But, a few hours later, the same constable came to see him and told him his charges had been elevated due to how serious his case was. Thus, they were now charging him for attempted murder: "'You aren't going anywhere,' she says, and she was right. I said, 'Attempted murder, aggravated sexual assault, I never even heard these goddammed words before, you know. I have never done anything violent, what is this?'" Due to the seriousness of the charge, George was denied bail even though he had no previous criminal record.

Matteo

When I met him, Matteo was still under curfew as part of the conditions of his release. His parents were his sureties—he was mandated to live with them in the suburbs. A gay white man in his early 20s, Matteo was still in college, and only allowed out of his parents' house to attend school for the day. He only recently found out his HIV-positive status. In fact, we met on the one-year anniversary of his diagnosis. Speaking on the phone, he told me about how he had used hook-up applications like Grindr and Scruff. He met a guy that way, and they had sex. Matteo did not tell the guy his status. He had been told by his doctor that since he was virally undetectable it was impossible for him to transmit

HIV. He, then, concluded that he only had to disclose his status if there was a risk of transmission: "I thought if I was taking medication I didn't have to disclose. Apparently, that is not the case." A few weeks later, he was at work and the police came to arrest him. Matteo was arrested in front of his staff, coworkers, and customers: "I felt really shitty, like I, like I had just robbed a liquor store. They [the military police] said, 'You know why we are here. You are being charged and arrested.' They read me my rights and said, "This is what you are being charged—four counts of aggravated sexual assault."' Matteo immediately received a duty council—a public defender—who told him not to speak to the police. They took him to the military base in their cruiser and into an interrogation room. After aggressively pressuring him, the "extremely intimidating" military police got him to speak about his experience. "I told them a lot about myself—they didn't know what undetectable meant, they didn't have any knowledge on it." He ended up educating the detectives on the risk factors for transmission. Fundamentally, the police tasked with arresting and framing Matteo as a risk did not know the current science behind the actual risks of HIV transmission. The police then released his picture, biometric details including his height, weight, eye and hair colour, any visible identifying marks, the charges filed against him, and his HIV-positive status. They also released a picture of Matteo as part of a public safety warning, asking his past sexual partners to come forward. The warning was widely covered in the media. As a result, it was also shared online, including on a Facebook page for a training program of which Matteo had been a part. Many negative posts appeared there, asking that Matteo be punished. One post read, "If we still had the lash in Canada for punishment, this would be a case for its proper application… #crediblesexualthreat #AIDS."

While talking at his place, Matteo told me more about what it was like to live under curfew at his parent's house and the other conditions of his release. He pulled out a piece of paper and read to me the more than 20 conditions of his release. Among the many conditions, he was barred from socializing in the gay community or going out to participate in social events. But, the condition that most bothered him was that he was mandated to contact both his local police and the military police 24 hours before any potential sexual conduct, providing them with the name and contact information of the person. The police would then directly verify that the person knew Matteo's HIV-positive status and that they consented to sex with him. "Like, who is going to want to do that? How am I going to meet anyone?" He felt extremely isolated and lonely.

Stephanie

I met Stephanie at the transition house in which she was temporarily living. A few months earlier, she has been released from a women's federal correctional institution. She showed me around her transitional housing unit, we went to some appointments together, walked around the city, hung out with her boyfriend, and shared a few meals. Stephanie told me about her two HIV-related legal cases, the challenges of probation and living under constant surveillance, and what it felt like to have her privacy and autonomy taken away. A white woman in her early 40s, Stephanie described her experience upon first learning that she had been charged with aggravated sexual assault: "I went to the police and I told them I had been raped." She lived in a small town near an army base and ended up at a hotel party with a bunch of soldiers. Drunk and in a blackout, a group of men raped her. The next day, she went to the police.

Sitting in a Tim Horton's while drinking coffee, looking across at me, Stephanie continued, "Then they came to me and told me I was going to be arrested for aggravated sexual assault. I had not ever been involved in anything with the police, so I had no idea where this was coming from." She had previously been very public about her HIV-positive status, and openly spoke to the media about her life and living with HIV. She was on HIV medication and taking care of her health. Her rape was never officially taken up or recorded institutionally despite her initially going to the police. At the military police station when she was interrogated without a lawyer present, "I got tripped into a statement which negated the fact that I got raped." Stephanie was scared, and had no trust that the system would take her seriously. As a working-class woman, she had a long history of doing what she needed to do to get by, including working as a street-based sex worker. She has been assaulted numerous times by men over the years.

After her arrest and interrogation, the military sent out a worldwide safety warning about her, "All over the world, to every base with Canadian soldiers." The warning asked that people who had sex with her to come forward since she was a public health risk who has been promiscuous. "Reporters, reporters, and more reporters" immediately and internationally picked up the case. Her sex life and sexuality were widely scrutinized in the press, along with her perceived risqué clothing choices and drinking behaviour. She was framed as knowingly trying to transmit HIV. Because of the severity of the aggravated sexual assault charge, she was denied bail. Following intense media scrutiny and a desire to not miss her family including her son for too long, Stephanie ultimately agreed to a plea bargain. She was terrified and had no support. She told me how she felt as though her lawyer was a bully who was ill informed about HIV. In the end, she pled guilty to one count of aggravated sexual assault.

"Guilty for being raped," she said angrily, her eyes fixed on mine, gripping her coffee cup. Stephanie told me that she thought the military was trying to cover up the pervasiveness of sexual assaults on the base, and mobilized her as a case to deflect attention and blame. She told me that was a woman with no power, while they were a massive institution.

Prior to her sentencing, the Crown Prosecutor in charge of her case had an expert sex offender psychologist interview Stephanie to evaluate her level of risk to the public. Stephanie told me it was the first time the psychologist had seen a case involving HIV non-disclosure. They had no official diagnostic tools to calculate her potential level of risk based on the circumstances of the case. She did not fit any of the official criteria of sex offenders that the psychologist used during the interview. Despite this, Stephanie was still designated a sex offender, deemed a risk to the public, and denied bail. Stephanie told me the psychologist said she was a unique threat and a "different kind of sex offender." She is now registered as a sex offender for life, and was sentenced to multiple years under house arrest and, later, incarceration.

Hyper-risks facilitating amplified punishment

Comprised as a whole, these constructed cases and how they emerged can be understood thusly: how cases are handled institutionally does not depend on what criminalized people did or did not do. Due to the seriousness of how a crime is institutionally perceived, the harshest and most punitive functions of the criminal justice system and public health institutions can be deployed, regardless of the actual circumstances that led to the construction of the case itself. The conception of heightened risk justifies and enables institutional actions against the people behind cases, allowing the case to be addressed through incapacitation and violence. Very simply, being marked as a hyper-risk in these cases, leads to forms of punishment - whether legal or extralegal punishments – to be amplified. These forms of violence will be further explored in the following section: *A typology of violence*. However, Shaun explicitly exemplified the above point—similar to Matteo—whereby the police who arrested and charged both of these men did not fully understand the biomedical risks involved. The police were tasked with constructing both Shaun and Matteo as risks to the public in terms of health and criminality, regardless of the actual or evidence-based risk. Stephanie was labelled a risky sex offender by a psychologist despite not fitting any institutional criteria. Regardless, she was marked as an exceptional kind of sex offender. The institutional imperative to construct these cases as hyper-risks supersedes the actual experiences at hand.

In each of these instances, certain institutional practices, procedures, or processes were evoked to assist in marking cases as a hyper-risk. The experiences of Matteo, George, and Stephanie, while highly divergent, are unique in their own complexity, but also share characteristics and represent the experiences of people facing this form of criminalization. People needing help and support, or who did nothing wrong, were transformed into extreme threats via the practices of institutions. Stephanie's case was framed as a worldwide threat by the military—despite herself being assaulted by military personnel. The military then sent out a worldwide security warning regarding her case, transforming her case into a massive public media spectacle. George was most likely a risk to himself and in need of mental health support and care, but he was denied bail despite not having any previous criminal record when his charges were elevated to attempted murder. Matteo was released on bail, but under extreme and exceptional conditions never before seen. Despite an undetectable viral load, Matteo faced harsh conditions framing him as an infectious threat that did not account for his actual experience. The institutionally perceived risk constructed in these cases is heightened, thereby designating these cases as hyper-risks. These hyper-risks, both public health and criminal, then require urgent intervention. Aligned with this analysis is the institutional criminal justice designation outlined in the Criminal Code of Dangerous Offender, which is applied to people who come to be labelled as extremely "high-risk" for potential future offences (R.S.C., 1985, c. C-46, 753). A number of people who have been criminalized in relation HIV non-disclosure and transmission have been classified as Dangerous Offenders, where the Crown Prosecutor can apply to detain someone past the time of their official sentence of incarceration in the name of protecting the public from a future risk of harm.

In certain ways, each of these cases of HIV non-disclosure, and exposure represent exceptions to the rule, the rule of institutions. Mobilizing exceptions enables institutional actors to increase the risk level of a case: the greater the exception, the greater the risk, and, therefore, the greater the justification for enacting forms of legal violence. Matteo must be framed as an extreme risk due to his perceived—not actual—threat of potentially infecting others, thus the extreme bail conditions. Becoming a case in the context of HIV criminalization means people must be understood as violent perpetrators and risks to public safety when no violence, intent to cause violence, or actual harm occurred. The intersection between health and crime intensifies the conception of risk. In these cases, this risk calculus was then amped up via sensationalistic, populist, and moralizing means through the media and online. The process of amplified punishment, further explored in the following section, *A typology of violence*, is a by-product of interinstitutionality and interlegality. Before discussing the typology, I first turn to examine in greater depth, the interinstitutional and interlegal forces at play.

Additionally, I examine the ways in which private information of criminalized people is exposed to the public once someone loses autonomy as a criminalized individual.

Interinstitutional and interlegal information, actions, and actors

A range of sources of information from various institutions and jurisdictions constructed individuals as specific cases. This information stemmed from the individuals I interviewed, their sexual partners, public health authorities, the police, as well as healthcare providers. For instance, healthcare providers allowed the seizure of Danny's personal medical files, which the police then used against him. Lenore believes that the public health officials with whom she was in contact called the police on her. In addition to how this merging of information sources served to construct a case, an intersection takes place between policing, criminal justice, and public health actors whereby people's cases are scaled up to reach the criminal realm. For instance, Shaun's partner learned about the possibility of pressing charges against him when she and Shaun sought care and support while in a relationship after he tested HIV-positive. Lenore was first contacted by public health authorities, who then escalated her case to the criminal realm by engaging the police. These nascent cases serve as the entry point via which the public health, policing, and criminal justice systems become intertwined and inter-reliant upon one another. They also illustrate how medical and public health information can be mobilized to construct a person as a case perceived as exemplifying heightened risk, requiring management through coercive and punitive means. Such nascent cases are derived from a range of information sources, from various institutions, public health and police, each of which reinforces and intensifies the institutional risk associated with any one case. Thus, an individual case comes to be no longer solely a public health risk, but is now a criminal and public health risk, where the target of criminalization receives sanctions from both governing institutions. To further increase a case's level of risk, which leads to amplifying forms of punishment, the private information of criminalized people in transformed into a public spectacle.

Private information turned public spectacle

As soon as a dichotomous logic is applied to the experiences of people rendered cases and a criminal charge is filed, the police immediately enter information about the case into the public realm. The presentation of information to the public is positioned as a form of protection—that is, as a warning about risky individuals. The people framed as cases immediately lose all of their rights to

privacy, since their intimate details are disclosed, details including their HIV-positive status and biometrics as well as the criminal charges. However, information about the person being virally undetectable or their use of condoms is often excluded from these police communications. For example, the police framed Shaun, who was virally undetectable and had used condoms, as a threat to public safety. Information about his specific case was widely dispersed in the media and online. This public spectacle also represents a further loss of autonomy for people, since their case now becomes fodder for media engagement and uptake by the public in people's own communities. Lenore's personal photographs were leaked to the media after the police went public with her case. Providing information to the public ultimately serves to crowd-source the process of criminalization, policing, and surveillance, enabling a populist engagement with cases. Publicizing a case also feeds into the required perception that institutions protect the public from threats. This all serves to provide evidence that they are doing their jobs, so as to maintain and reproduce the logic and operations of these authoritative institutions.

The various factors from these nascent constructed cases—that is, dichotomization, interinstitutional and interlegal flows of information, and the making of a public spectacle—become further underlined and entrenched in the cases of Stephanie, Matteo, and George. Reflecting more deeply upon the narrative dichotomization, the process of creating a story criminal justice institutions can use to take a case forward relies on flattening any complexity and excluding nuances or inconveniences. Similar to Cynthia's case, Stephanie's assault did not appear in the official institutional account of her case. Instead, she became known as the perpetrator of multiple assaults These experiences underline the analysis of Beaman-Hall (1996). What people say and do can differ from what their case becomes. Some people do not share everything with the institutions overseeing a case, whereby specific experiences remain unsaid, secret, or unspoken because people lack trust in or simply fear those institutions. In the case of Stephanie, she understood that her experience was deliberately silenced. Cases are framed using institutional logic and are used for institutional purposes, such that whatever does not fit with that logic is flattened and erased.

These first-hand accounts of people's experiences becoming cases help further explain how the institutional processes at play are needed to justify the legal and extralegal processes of criminalization, such as shunning, incapacitation, and violence. Such processes serve to mitigate the potential risk as it is conceived. In the next section, I examine the first-hand experiences of people who became cases, became the objects of criminalization, and became the subjects of multiple forms of legal and extralegal violence. To help denaturalize violence, I outline a typology of forms of violence people experienced

in their daily lives as a result of being criminalized. Through this typology, I aim to disentangle forms of violence, rendering them not as matters of fate, but rather as outcomes of deliberate institutional practices and decisions. In doing so, I again focus on the first-hand experiences of those criminalized.

A typology of violence

Thus far in this chapter, I have analyzed how people become constituted as cases in relation to an alleged act of HIV non-disclosure, transmission, or exposure. I have also examined how those cases are then mobilized institutionally as extreme and urgent risks to the public. Through first-person accounts and archival research, I have examined how cases first emerge and how those cases were formed and amplified by institutional logics disconnected from the actual social worlds within which such cases originated. In this section, I now take on the task of denaturalizing forms of violence enacted against criminalized people. To do so, I look at the forms of direct, structural, legal, and extralegal forms of violence that emerge as a case moves through the various processes of the criminal justice system. That is, I examine the process of deconstituting legal personhood. To do so, I outline a typology of violence, inspired by the work of Johan Galtung (1969). This typology disaggregates the complex and myriad forms of violence enacted against people labelled and constructed as criminal and public health risk cases. Examining the forms of violence experienced in the individual daily lives of criminalized people can analytically pinpoint the origins of violence, the material impact of that violence, and how individuals cope with it. Such an analysis also allows for an understanding of how some violence is considered justifiable, while other violence is not. It may also provide an understanding for how legal violence constitutes extralegal violence, and how the label of criminal itself becomes a justification for violence. This typology of violence focuses on criminalized people subjected to the criminal justice system, but with one caveat: while the focus here is situated on individual accounts of violence using the first-hand experiences of criminalized people, I aim not to individualize forms of violence, but rather to link the violence experienced by individuals to a broader system organized by institutions. Although my analysis aims to disaggregate forms of violence, I reveal that those forms are deeply intertwined, reliant upon and constitutive of each other, and intimately connected.

Scholars have developed multiple violence typologies for varied purposes. Some developed typologies of violence to explore and understand forms of interpersonal violence and domestic violence (Johnston & Campbell, 1993; Holtzworth–Munroe, 2000; Swan & Snow, 2002; Babcock, 2003; Johnson, et al., 2006; Johnson 2010). Criminal justice actors and psychologists developed and

now mobilize typologies of violence to institutionally categorize people as certain types of risks (Hall, 1987), such as the with the diagnostic tool used by a psychologist on Stephanie to define her as a sex offender. A common thread running through each of these typologies of violence is the desire to categorize people according to the forms of violence they enact on others. This mobilizes violence committed in the past as a diagnostic tool and as a predictor for future forms of violence. In some cases, such typologies classify people institutionally and determine the institutional course of action. For example, if someone is understood as a violent risk to the public based on past actions, they could be labelled as a risk of reoffending. In these instances, violence becomes individualized and removed from the social context in which it develops, is facilitated, and takes place. I do not seek to take on this sort of analysis or typology of violence.

There have also been typologies of violence designed to explore and understand forms of violence in society, which aim to make distinct structural violence from interpersonal forms of violence. Norwegian sociologist and mathematician Johan Galtung, instrumental in establishing the field of Peace and Conflict Studies, conceived of the notion of structural violence with his typology of violence. He also founded the *Journal of Peace Research*, a periodical dedicated to understanding, examining, and explaining the functions of structural violence in society. Galtung defines peace as the absence of violence. But, his definition of violence is not quite so simple. Violence for Galtung (1969) exists "when human beings are being influenced so that their actual somatic and mental realizations are below their potential realization" (p. 168). Therefore, "violence is here defined as the cause of the difference between the potential and the actual" (p. 168). In his typology, Galtung uses the example of life expectancy, noting that during the Neolithic period a life expectancy of 30 years would not represent an expression of violence. This life expectancy contemporarily would, however, stand as an expression of violence. When an outcome is unavoidable, violence, according to Galtung, is not present. If the actual is avoidable, then violence is present (p. 169). Here, I use the example of a tsunami. Applying Galtung's definition, in general, destruction caused from a tsunami might not be understood immediately as violence; it may be understood as unavoidable. But, in a country governed by rich elites, for instance, a poor Indigenous community might be situated close to a shoreline with a known threat of a tsunami. If no preventative measures were put into place by the rich elites to reduce potential future damage due to a tsunami, because they overlooked and marginalized the community due to racism and a lack of access to resources or power, then when a tsunami does hit, resulting in extensive if not catastrophic damage, this would be understood as a form of structural violence. According to Galtung's definition, if the intensity of the outcome can be mitigated or avoided, and the

Indigenous community is provided with resources for tsunami prevention, security, and protection, their opportunity to realize their individual and collective potential would not have been compromised. Rich elites denying the community access to such protection represents a form of structural violence. Without the development of a typology of violence, to disentangle forms of violence, the outcome of the tsunami might be solely understood as a natural disaster in which no other outcome was possible. Through his work on disaggregating forms of violence, however, Galtung sought to denaturalize structural violence. Doing so allows us to understand and hold it to account.

However, when Galtung developed his typology of violence, it was not imperative to solely classify forms of violence. He noted:

> It is not so important to arrive at anything like *the* definition, or *the* typology—for there are obviously many types of violence. More important is to indicate theoretically significant dimensions of violence that can lead thinking, research, and, potentially, action towards the most important problems (Galtung, 1969, p. 168).

Therefore, such a typology works not to fetishistically categorize and classify varied forms of violence simply for the sake of academic analysis. In a typology of violence, the imperative for analysis lies in spurring action, helping to understand, and denaturalizing violence and its origins. Furthermore, this serves to reduce, mitigate, and overcome forms of avoidable suffering in society. To be relevant and ethical, a typology of violence is only useful if it can analytically address the problems faced by marginalization and inequality leading to violence in society.

In his typology, Galtung explored six distinctions, modes of influence, or dichotomies that characterize violent actions. Examining these types of violence remained important to Galtung, such that he could examine their relationships to one another. This also allowed him to understand how forms of violence can presuppose or constitute one another. In what follows, I briefly outline Galtung's six distinctions of violent action.

Physical or psychological. This distinction between "violence that works on the body and violence that works on the soul" was established because violence often was understood only as direct and enacted on the body (p. 169). Physical violence is personal and direct, and situated where humans are "hurt somatically to the point of killing them" (p. 169). This sort of bodily physical violence is direct, and can constrain human movement, such as through incarceration or where groups of people's access to freedom of movement is denied or limited. Psychological violence decreases an individual's mental potential through lies, indoctrination, brainwashing, threats, and mental abuse. However, Galtung,

notes that the idea of potential realizations remains problematic, especially when the focus moves from bodily to psychological realizations. Psychologically, the notion of potential becomes more subjective and characterized less by consensus. Galtung uses the example of literacy, a value widely regarded globally, and one which if limited could be understood as a form of violence. While the value of being a Christian represents one characterized less by consensus and may be controversial, would the denial of people realizing their Christian faith represent a form of psychological violence? Galtung does not seek a definitive answer to a such question, but leans towards people's autonomy, noting, "our guide here would probably often have to be whether the value to be realized is fairly consensual or not, although this is by no means satisfactory" (p. 169).

Negative or positive. This distinction applies when people may be influenced not only by how they are punished, but also by how they are rewarded. Such a distinction may not immediately appear related to violence. However, using Galtung's definition, "the net result may still be that human beings are effectively prevented from realizing their potentialities" (p. 170). For example, in a capitalist society based on rewards, certain people who do not deviate from the structure of that society are rewarded, but their range of action and potential is drastically narrowed. This distinction can bring about normative conversations. That is, a capitalist society enables certain types of pleasure and is, therefore, better, or perhaps worse in terms of covert manipulation. Galtung does not seek answer questions in such a debate. Rather, he focuses on how "awareness of the concept of violence can be extended in this direction" (p. 170).

Whether or not an object is hurt. Can violence exist if it is against an object where a biological being was not hurt? This distinction for Galtung features prominently, since the definition of violence does not relate independently to the destruction of things. This condition holds unless such destruction was intended to cause a form of psychological violence against people, as a threat or through the destruction of things people considered important (p. 170). The threat of a nuclear attack against a country may not represent a form of direct visible violence where people are physically hurt, but a psychological violent toll is enacted. Threats of physical violence, as well as indirect threats of mental violence, can, thus, fall within this distinction.

Whether or not a subject acts. Can violence exist when no direct individual commits the act? Here, the distinction between direct personal violence and violence without an actor comes into play. The later, an indirect form of violence, represents the notion of structural violence Galtung coined. In both cases, individuals may be killed, maimed, or hurt. But, in the first instance, the violent acts can be traced back to an individual or individuals. In the second instance, the act of tracing violence back to

one individual no longer represents a meaningful endeavour. As Galtung notes, "there may not be any person who directly harms another person in a structure. The violence is built into the structure and shows up as unequal power and, consequently, as unequal life chances" (p. 171). Structural violence can come about due to the uneven distribution of resources, other barriers, or forms of inequity within an institution. This leads to people being unable to realize the means for their own survival, such as through classism, racism, ongoing colonization, homophobia, misogyny, and transphobia.

Intended or unintended. This distinction, as Galtung notes, relates to the history of Judaeo-Christian ethics, where guilt is tied to the intention of one's actions rather than the consequences of one's actions. If a person did not intend violence, then they may be considered less guilty than if they intended to harm. Galtung states that this presents a problem within ethical systems holding violence to account when there is no clear perpetrator operating with an intent, such as with structural and indirect violence (p. 172). Furthermore, Galtung, specifies, "[T]he question is rather whether violence is structured in such a way that it constitutes a direct, personal link between a subject and an object, not how the link is perceived by the persons at either end of the violence channel. The objective consequences, not the subjective intentions, are the primary concern" (p. 178). Galtung notes that if the intended outcome is peace and if the absence of violence is peace, then ethical systems of analysis and action must account for all forms of violence, regardless of intention or if a specific guilty individual is involved.

Manifest or latent. Here, Galtung distinguishes between two levels of violence, where manifest violence is observable whether it is direct or structural. Violence where a clear "subject–object" relationship exists defines manifest violence, since there is a clear discernible action (p. 171). How such violence is observed may remain debatable when the notion of potential realization comes into play. In this case, potential is understood as limited, and may not be as clear as a broken bone. On the other end of the spectrum of manifest violence lies its latent form, which is invisible, although it might easily come into view (p. 172). Latent violence, Galtung argues, exists just under the surface in unequal societies and can be easily triggered, such as with racism. This can bring about racialized direct violence in the form of an atrocity or a genocide. Inequality in social stratification is such that certain people can easily be regarded as less than human, and when triggered it can bring about forms of manifest violence that target certain groups.

This closes out a summary of the six distinctions related to violent actions based on Galtung's typology. Galtung viewed this typology, originally published in 1969, as necessitating more attention to direct forms of personal violence and less to structural violence. Since that time, a wide range of advancements in the development of knowledge on structural violence have emerged in part due to

his work. This typology, Galtung notes, is also not exhaustive; in fact, many more distinctions could be included (p. 172). For the purposes of this analysis, I move forward with Galtung's typology, adding to it, and applying it to the experiences of people criminalized in relation to HIV. Thus, for the purposes of my project it is important to include a final distinction to the typology developed by Galtung: *legal or extralegal violence*. This vital distinction further focuses on the forms of violence facing criminalized people.

Legal or extralegal. Legal violence is that which society deems acceptable as a way to deal with complex social problems. Legal violence is sanctioned, justified, and rationalized, held solely by the state as a form of punishment, risk management, and an act of retribution, enacted on people deemed deserving because they broke state laws. Punishment here focuses on reducing capacities, includes forms of surveillance and regulation, and is organized around forms of incapacitation and compromising personal autonomy, security, and safety. Legal violence, then, is understood as a rational and measured outcome to lawbreaking, and is regularly conflated with the notion of justice. In some cases, the acceptability of legal violence remains contested, such as with solitary confinement or administrative segregation, yet these can still be rendered legal under certain conditions.

Legal violence relies on institutions and institutional documents. While it can be imposed specifically by individual actors representing institutions onto individual people deemed criminal—through a "subject–object" relationship—the origins preceding that violence stem from a system that enables action. An institutional actor enacting forms of legal violence may simply be doing their job. Furthermore, legal violence targeting one individual aims to threaten psychological violence against other members of a society as a coercive deterrent to future lawbreaking. In comparison, extralegal violence is that which is illegal or exists in a legal grey area. It is often considered unjustified or is not considered as falling within the purview of the law. Legal violence might be generally understood as a form of structural violence leading to individual direct violence, for instance, through the mass incarceration of people of colour in the United States. While extralegal violence can manifest in various ways, it is generally not sanctioned or enabled through the laws of the state.

Following Galtung, the typology in this chapter primarily functions to aid examinations of the relationship between different forms of violent actions. For analytical purposes, the typology supports actions aimed at non-violence and avoiding the suffering of criminalized people. Galtung questioned the relationship between structural violence and individual violence, asking "Is there really a distinction between personal and structural violence at all? … Does not one presuppose the other?" (p. 177). Galtung notes that without an understanding or examination of structural violence, as well as how

structural violence links to direct violence, analyses may solely focus on violence where a clear "subject–object" relationship exists, where violence manifests only as a visible action. Such a focus only trained on visible direct violence will not account for other forms of indirect violence.

To address Galtung's questions, I introduce one further element to the typology that I have applied, relying on the work of physician and medical anthropologist Paul Farmer. In his work, "*On suffering and structural violence: A view from below*" (1996), Farmer asks, "How might we discern the nature of structural violence and explore its contribution to human suffering?" (p. 274). In answering his own question, Farmer also provides answers to Galtung's questions. To do so, Farmer detailed stories of his patients and key informants in Haiti, aiming to "illustrate some of the mechanisms through which large-scale social forces crystallize in the sharp, hard surfaces of individual suffering" (p. 263). Through an examination of the life histories and untimely deaths of two Haitians, one who died of AIDS and one who was murdered, Farmer connected individual violence and the resulting suffering to structural violence. Farmer wanted to understand what led to increased and compounded vulnerabilities, leading some people to experience more suffering than others due to structural violence.

As a physician and anthropologist, Farmer spent many years in Haiti. He observed that his patients and research informants' lives and choices were highly structured in relation to forms of structural violence—that is, sexism, racism, political violence, and extreme poverty. Haiti as a country has been subjected to multiple intersecting forces leading to extreme levels of suffering, years of political violence due to colonization and the global history of slavery, natural disasters, and multiple epidemics of HIV, tuberculosis, as well as other parasitic and infectious diseases. In 1991, the Human Suffering Index was developed to measure a range of markers related to human welfare, from life expectancy to political freedom. Haiti was listed as one of the 27 countries globally characterized by "extreme human suffering" (Farmer, 1996, p. 262), representing the only such country in the Western hemisphere. The three countries fairing worse than Haiti were in the middle of civil wars at the time.

One outcome of Farmer's analysis is the notion of "multiaxial models of suffering" (p. 273), where gender, race, and income "play a role in rendering individuals and groups vulnerable to extreme human suffering" (p. 274). However, Farmer notes that each axis carries limited explanatory power within a silo. This essentially represents an intersectional analysis, first offered by feminist thinkers in the 1980s (Davis, 1983). Farmer examines each of his cases along an axis of gender, race, and poverty, coming to the conclusion that "any distinguishing characteristic, whether social or biological, can serve as a pretext for discrimination, and thus as the cause of suffering" (p. 278). Moreover, Farmer notes that such a multiaxial analysis must avoid the trap of identity politics, which often obscures forms of

structural violence by focusing solely on individuals. Rather, a multiaxial analysis—particularly in the context of this project that also looks at HIV among other diverse characteristics—provides a view from the individual all the way up to the structural level. This can aid courses of action aimed at identifying where to dedicate resources to address and alleviate suffering, and understand who is suffering and in what ways.

Finally, before moving to the individual experiences of violence, the question asked by Galtung regarding the relationship between individual and structural violence is one I wish to reformulate. In my formulation, the question relates to the distinction between legal and extralegal violence. In doing so, I ask the following: Is there a distinction between legal violence and extralegal violence? And, does one presuppose the other? Using this typology, these questions become crucial, since I seek to examine how legal violence constitutes its extralegal counterpart, and how the two are intertwined. For example, illegal violence may lead to legal violence if someone assaults someone else. In turn, the perpetrator of the assault, if caught by the authorities, will likely be subjected to a form of sanctioned punishment in the form of legal violence. But, can this relationship work in the other direction? Can legal violence result in extralegal violence? And, if so, how does such violence manifest? This constitutive relationship is one I further examine through the first-hand accounts of the violence of criminalization in what follows in this section. First, I detail personal experiences of the criminalization processes from my interviews. This is followed by an analysis where I apply the above typology, the distinctions between violent actions, and questions about the relationship between the different forms of violence individuals experienced.

Frank

I met Frank, an Indigenous man in his 40s, in a public park. His living situation remained rather precarious, so meeting in a public park was easiest for him. Tall and covered in tattoos, he has a gruff voice and demeanour. He told me angrily that after being charged with one count of aggravated sexual assault he was almost immediately fired from his job. His employer learned about his charge from a social media post. Frank lives in a major Canadian city, and had worked as a bouncer in local bars. He told me that the criminal charge stemmed from a recent relationship he was in with a woman. When he broke up with her, she went to the police. His ex-girlfriend knew his HIV-positive status, and she had remained HIV-negative. But, she was angry about their breakup. Frank had never been violent or acted with the intent to harm her, although he acknowledged he was a bad communicator and perhaps flirted with other women. He told me how hard it is to date as a straight man living with an HIV

diagnosis. Within a few days of the police coming to his door to arrest him, his charge and HIV-positive status were widely disclosed online without Frank's consent by people close to the woman who accused him. Frank began receiving harassing messages through his Facebook account and on a number of online bulletin boards. People called him a rapist who was trying to spread HIV. As a result, he had to close his online accounts. Furthermore, his close friends sided with the woman after finding out he was HIV-positive. Thus, Frank lost his social network in both the material and digital worlds. As a result, he became alienated and felt he had no recourse to challenge his charge in the public sphere. The aggravated sexual assault charge, along with the loss of his job and his social network, resulted in a mental breakdown. He had been living paycheque to paycheque; after losing his job, he then lost his housing. In a deep depression, he ultimately ended up living out of a McDonald's bathroom for more than a month. The mark of an accusation alone drastically altered Frank's entire reality for the worse.

Frank had a hard time finding a lawyer, initially going to a local community organization that provided legal support for HIV-positive people. The only lawyer they had who would see him was a woman. Frank felt that she judged him, a feeling he often experienced with women. He told the organization he was distrustful of women after his ex-girlfriend made a false allegation about him and went to the police. But the lawyer brushed him off and told him to "get used to it." Ultimately, he went with the duty counsel, but was worried that they were insufficiently informed about HIV. He was still awaiting trial when I last saw him.

Shaun

Returning to Shaun's experiences, while drinking coffee at his place, he told me more about his arrest. After his girlfriend went to the police, he learned that he was being charged with aggravated sexual assault when the police called him on his phone. He was scared and turned himself in immediately. At the police station, he was asked to enter an interrogation room, at which point the police beat him: "I was in the interview room and I couldn't get up and I'm screaming for help and no one was coming to help me. I kept falling on the ground, because, like, I was so hurt inside, like, I had broken ribs, I couldn't breathe properly." During the assault, an officer referred to him as being Black and as a rapist with HIV. After being left on the floor for an hour, beaten and asking what was happening to him, Shaun was then taken to another interrogation room. There, he was told nothing had happened and he must have been mistaken about his assault. The police, then, conducted an interrogation.

After being held in pretrial detention for a month, Shaun finally had his bail hearing. For the hearing, his aunt came to testify that Shaun was not a flight risk and had family connections, so that he could be granted bail. He had no previous criminal record. But, due to the seriousness of the charge, Shaun was denied bail. He told me that the judge said to the court, "'Shaun is a menace to society.' They said I was a high risk to the public, and 'if we let him out, he's just going to keep doing this again and again.'" When he found out his HIV-positive status, public health officials had initially told him he posed no risk; but, now the court was labelling him a high risk. He was incarcerated again, this time under lockdown in solitary confinement for two months. During that time, he had a hard time accessing his anti-HIV medications: "They didn't have my pills there for maybe the first week I was there, they just didn't have my pills." He was confused because he had been diligently following his doctor's orders, taking his medications and remaining virally undetectable. Yet, the police and court treated him like he was a threat. Now, the institutions that framed him as an infectious risk denied him the very treatment that he needed to remain healthy and to suppress the virus in his body.

In addition, staff at the institution regularly breached his privacy. "One time a sheriff was transporting me from jail to court and there were a bunch of other guys, and then he said 'Put the guy with the sexual assault over there'. Like, everyone heard, and it was already in the newspaper, and people get trashed in the jail I was at for that kind of charge." He continued, "Then the staff started leaving my transport papers around… they are supposed to put them in the locked desk, but anyone could walk by and read it so I started freaking out." The papers identified his charge as well as information about his health status and his medications. He felt strongly that the guards were doing this sort of thing so that other prisoners would assault him.

George

While sitting in his condominium looking out onto the city, George continued telling me about his experiences. Due to the fear, shame, and anxiety he experienced, he decided to plead guilty. He had no previous criminal record and had never been incarcerated. The Crown Prosecutor was asking for 10 years. George's lawyer told George to plea, that he had no case, because he had admitted his crimes. If he pled out, he would be sentenced to a lot less time inside. He listened to his lawyer. While incarcerated, he was placed in the general population with a random collection of men facing all types of charges. He started facing harassment. Prisoners made comments about him being a rapist, and were asking why he took medication. Ultimately, after days of harassment he was brutally assaulted by other prisoners while trying to call his lawyer. Those assaulting him said they knew he was trying to

spread the virus. George said the guards watched and did nothing to intervene for a long period of time. He was certain that the guards had leaked information about his charge to the prisoners, knowing he would be assaulted. Under an institutional directive, prisoners' charges and health status should remain confidential, and the only people with access to the information are guards. There was no other way for the information to end up in the hands of prisoners. He told me angrily, "I was getting beaten by all of the inmates. 'Cause the correctional officers and the bailiffs had disclosed my charge to people on the range [cellblock], I got beat up, and they put me in to, I can't remember what they called it, protective custody."

While in protective custody, George remained unprotected and was instead beaten again and again:

> I went into the protective custody wing, and there is all kinds of sex offenders there and murderers and everything else like that. And when I got there, they found out my charge. So, they beat the shit out of me as well. I never fought a day in my life. I have never lifted a hand to anybody… I was on an isolated range for violent murderers and would still get harassed. You know, this rape charge and HIV was worse than being a murderer in their eyes.

He told me that other sex offenders and murderers were left alone. But, he was continually attacked for having HIV combined with a "dirty charge"—that is, aggravated sexual assault. One day, George was being harassed by another prisoner when a guard intervened. George did not get along with this guard. George felt the guard had it out for him, and he was scared of the guard. After the altercation with the other prisoner, George started to have a panic attack. While hyperventilating, the guard forced George to strip naked and made him lay down on the cold concrete floor, holding him down on the floor with his boot. The guard pushed his boot into George's chest hard, and said "I don't touch anyone with AIDS," as a nurse arrived to sedate George, sticking a syringe in his arm.

After that, George told me, "So, at this time, they put me into segregation… I stayed at that time for 38 days in segregation. I was given no mattress during the day. One book to read, no yard. I was in segregation 23.5 hours a day." Ultimately, he served the rest of his sentence in administrative segregation, where he was not allowed any clothes, and only had a concrete floor with no bed until night time. He was given just one sheet of paper and a pencil to occupy his time while locked down alone in a cell. He served approximately one year in those conditions.

Darlene

I spoke with Darlene, an Indigenous woman in her early 30s, one summer afternoon, first on the phone, and later in person. She was warm and funny, and talked about her love of animals and her devotion to her children. Her son had been taken away from her and she was working towards regaining custody. For many years, she had worked as a street-based sex worker in a major city. She was arrested while residing in a recovery house—the police had been looking for her for some time. She had recently fled from an abusive ex-boyfriend. He knew her HIV status and out of revenge went to police. The police knew she was HIV-positive and working the streets, and found her after a sting operation against her. Her ex-boyfriend had been extremely abusive, one even trying to run her over with his car. For a time, he had also been her pimp. She further explained:

> I had a rough life growing up. I got into prostitution really young. My family, you know, we grew up very poor and my uncle raped me when I was eight. It's just, yeah, it's been an uphill battle for me.

She was arrested and charged with aggravated sexual assault. "An undercover [officer] approached me and tried to get me to say that I would do sex without a condom… Sometimes you've got to say things to get shit done. People, you know, that was just the lifestyle that I was living at that time," she told me, noting she often went along with what men asked for during negotiation. She had condoms in her purse and used them as much as possible with her clients. She told me how a few of her friends who worked alongside her on the street had gone missing. Word on the street was they had been murdered, but the Darlene told me she thought the police were not interested. As a sex worker, Darlene told me she knew the police did not care about her or her friend's lives. Instead of looking for her missing friends, the police conducted a sting operation against Darlene. An undercover police officer cornered her into saying she would have sex without a condom. She was shocked that this was what the police were spending time and resources investigating when people in her community were saying that women in the area had gone missing. Once charged, a lawyer took her case as a *pro bono*. Her photo and case information had been published widely in the media, with one headline calling her an "HIV-positive hooker." She was now portrayed in the media as if she had been actively transmitting HIV.


NEWS IN BRIEF

HIV-positive hooker charged for unsafe sex

[redacted] — A sex trade worker has been charged with having unprotected sex without disclosing her HIV-positive status.

Figure VI: Media Headline on Darlene's Case.

The media was intense. Darlene stated, "It was in the papers, you know they were encouraging people that had had sex with me to come forward and, like, testify against me in court. And, now, if you Google my name, it will come up with stuff about the case." Her lawyer convinced her to plead guilty, even though she was virally undetectable. The Crown Prosecutor was asking for a sentence of eight years; she got three years in the end. The Crown Prosecutor thought the case was cut and dry, and she was scared she would miss her kids. While incarcerated, she continued:

> …[T]hey treated me like dirt. They called me dirty and were just like "oh we don't want to touch you." In front of me, they would put a couple of layers of gloves on like they are going to catch it from touching me. They really belittled me and made me feel like a disease, really ignorant… They are not supposed to know your charges, but they knew mine. I felt the tension between me and the guards. Like, I had a label on my head, like, you know, an AIDS person. They only touched me with gloves and they used that really heavy alcohol rub after. They talked down to me, like, not talking to me like I was a person…

Her daughter refused to visit her while incarcerated, and the experience was hard on her family. She was isolated and not connected to any support organizations. It took weeks for her medications to arrive and, when they did, the guards gave them to her publicly so that the other prisoners would know she was HIV-positive.

Charles

I met Charles in the small town where he lives. He was on social assistance and barely scraping by. Registered as a sex offender for life, he found it nearly impossible to find a job. When we met, he had been released from prison for a few years, but was still having a rough time. A white man in his mid-40s, he told me he came from a working-class background, had kids, and was very proud of recently becoming a grandfather. He told me about the difficulties of being incarcerated and how he was often verbally abused by the guards. While serving a four-year sentence in protective custody, he developed a very serious bacterial infection is his genital area. The infection persisted for more than a month, during which time he repeatedly submitted requests to see a doctor. The guards delayed or denied the requests again and again. At one point, a guard who knew that Charles was HIV-positive took his written request to see a doctor. That guard then looked Charles in the eyes, and ripped up the request, and then threw it in the rubbish bin. The same guard, a few months earlier, had told a roomful of prisoners that Charles was HIV-positive while they were all getting flu shots. It was not until the bacterial infection became life-threatening to Charles that he was seen by a doctor, when it became an emergency. By this point, Charles could no longer walk and his prisoner friends on the same range, or cellblock, where Charles was housed started banging on their cells, one even lit a fire, in protest so that the guards would take him to see a doctor. Finally, months after the initial request, he was seen by a physician, who was upset with the guards that it had taken them so long to bring Charles to come to see her. She later complained to the guards, telling them that Charles could have died had he not been brought to her when he was.

Subsequently, Charles continued experiencing difficulties accessing his doctor. Guards would delay taking his requests, waiting months longer than recommended to go back to see her. During one visit, after months of asking for his routine blood tests, his appointment was finally granted. He went to the hospital, accompanied by guards, this time to a place different from where he normally received care. His doctor was not there, and he was seen by a nurse he did not know. Charles was brought in wearing his usual orange jumpsuit, a suit that made him feel ashamed, and shackled at his hands and feet. The nurse began his regular blood draw, and then one of the guards came up to Charles, saying, "'See this baton and this taser? I will fucking taser you'… and they were, like, 'Oh we will do one more for good measure,'" taking another vial of Charles's blood. Charles has been incarcerated for two years by this point and had never been violent. He was confused as to why the guard escalated the situation, and did not understand what was happening. The guard then said, "If you are not going to willing give your DNA, we will take it from your neck." Charles was not resisting, and was already strapped down,

still shackled. The nurse took an extra vial of blood, which Charles later learned was mandated as part of his registration as a sex offender.

Paul

Paul spoke with me just after his release from incarceration. He had been sentenced to 15 years, but was recently granted day parole, a form of release where someone is incarcerated for the evenings, but is able to be out in the world during the day for certain hours. He was spending time off and on with a friend of his when he was allowed out into the community during the day. A white man in his early 40s, from working-class origins, Paul was trying to comprehend everything he had endured. "They treat you like your HIV is a weapon that you used to hurt someone. You're walking around with a loaded gun. They see us people with HIV as violent, so now I'm on the registry for life because of that." When his case was first constructed by authorities, Paul told me, the police worked hard to frame him as a risky perpetrator: "The police were suggesting that I was deviant and trying to say I was trying to spread HIV purposefully." He told me what he did was what he understood to be the normal behaviour of a hedonistic young bachelor in his 20s. But, due to HIV, he was being labelled a threat: "I was dating women that I had long-term relationships with, it was normal… they [the police] used my HIV to say I was a horrible person. It scared them; they used it as a way to keep me locked up."

Because of his sex offender designation, Paul had to be housed in a medium to maximum-security correctional institution. While incarcerated, Paul was mandated to participate in the Moderate Intensity National Sex Offender Program, and also underwent regular psychiatric evaluation. Those evaluations included phallometric testing, a procedure to determine the sexual preferences of people with penises by measuring their erection responses to visual stimuli depicting various sexual behaviours. "They put an apparatus on your private parts and make you watch all sorts of rapes, child sex, torture, violence, and see if you are aroused. 'Oh when that girl was getting tortured you got excited.'" Paul was angry that he had to undergo such testing. Watching and listening to the videos traumatized him, "I had to go through all that just 'cause I had HIV." The results of the phallometric testing showed that he exhibited the average sexual impulses of a heterosexual man. Those psychological test results, however, contributed to his assessment rating, determining his potential risk level to reoffend. That rating proved important, since it was used during his parole hearings to determine if he should be allowed back into the community. His assessment ratings were generally good, since he had no other offences and he was generally assessed as having a high potential for reintegration. But, his results on the dynamic factors rating, the various things that change over time

for a prisoner, including his attitude and level of accountability, were not as positive. Those results were based on his participation in the Sex Offender Program, where his attitude was often noted as needing improvement. In a group of 15 or so other men, many had received sentences for violent sexual assaults, a number of them for assaulting children. Paul had to sit with the others and hear their stories. He also needed to frame his own sexual desires as pathological and dangerous, like the others participants were made to do. Paul continued:

> It was traumatizing sitting with those men, hearing them confess what they had done. You have to accept accountability, acknowledge that everything you did was wrong, not try to minimize, not try to rationalize, tell them that you are a horrible, horrible person, and what you did was really, really bad and wrong—if you don't go along with that there, then you are not going to get a good report.

It was hard for Paul to understand how to participate in the group. They made him feel like he had to pathologize his desires just because he was HIV-positive. He spoke with the facilitator, stating, "Even the facilitator didn't know why I was in the program. But they had to make a report and rationalize my participation. It was their job. All the normal things I did, because I have HIV, became a thing. But if I didn't have HIV, they would be considered normal behaviour." Paul found it increasingly challenging and traumatizing to participate in the program, and the facilitator, despite also agreeing that the program was not a proper fit for him, had to evaluate him using the same criteria applied to everyone else. Paul was described as not accepting his crime, and labelled as denying and rationalizing his past actions. One of the activities for the homework component of the program included outlining how to manage deviant sexual urges:

> [W]hen you have this urge to molest someone, how do you then manage that? So, what is my urge? If I ever want to have sex, because I have HIV, what is my urge? I mean, it wouldn't be an urge for anybody else. It is a normal thing, right?

Paul had to explain the kinds of sex he was interested in to the other group members, and then use the criteria of the group to frame that sex as deviant and abnormal. In his case, he sometimes liked anal sex and also enjoyed being on top during sexual intercourse with his female partners. In the group, this was framed as "unconventional sex", which meant, according to the group facilitator, a psychologist, that Paul had issues with power and control. Paul was made to accept that he had power

and control issues in relation to, what he felt, were normal sexual urges. He eventually gave in to the logic of the group—he "had to dig deep inside, bite my tongue, and do what was required of me."

After his day parole was granted, one day during a meeting with his parole officer, her manager joined in on the meeting. The parole officer's manager used to work at the same correctional institution in which Paul had spent years. She remembered him. She told Paul that when he came to the institution the staff had not had a case like his before, and they were not sure how to process him. He told me, "She said they didn't think I should be labelled as a sex offender, as I did not fit any of the criteria. But, since I was found guilty, they were institutionally mandated to put me through the program." The system in place did not allow for deviations. Paul was prosecuted as a sex offender, so the institution was mandated to put him through the program. He was angry that he had to go through the program. It had been emotional damaging to him, even more so now that he knew even the staff in the institution thought that he did not belong in that program.

Lenore

After coffees and sandwiches at her local Tim Horton's, I went over to Lenore's place with her and her boyfriend. She told me about when she was first incarcerated. When she entered the institution, the guards asked her if she wanted to be by herself or in the general population. She asked to be by herself—she was shy and wanted privacy. "Then, there was, 'Do you want to go in general population or do you want to go be in a room alone for a bit?' I would love to be alone, I need to be alone. I didn't realize that asking to be alone meant what it did." But, the conditions and consequences of "being by herself" were not fully explained to Lenore beforehand. In that specific institution, this meant administrative segregation, which also included requirements for suicide watch. A male guard took her to her room, she continued:

> So, they took away my underwear and didn't tell me why. And I was, like, why do you need all my clothes? This isn't safe. I've been molested, this isn't safe. You've got male guards here. No… It took about a half hour before they finally got me to calm down. I have never freaked out that way in my life before. I saw a side of myself that I had never seen before.

Under those conditions, Lenore was forced to strip naked, placed in a cell with only a concrete floor, with a video camera watching her and a window that a male guard would watch her through at all hours. None of her questions were answered, and the guards ignored her concerns. She did not

have access to her anti-anxiety or HIV medications. She hyperventilated and cried. After her panic attack, the male guard gave her a smock to wear, but that did not help:

> They had only male guards on duty. My fear of men after what I've been through already. There was no safe position to lay down in those rooms. There is one way, where they can see everything from the window and there is the other way where they can see everything from the camera, no one was explaining anything to me. Now you're found guilty, so they don't listen to you, you're a criminal, no one listened to my questions. I'm not guilty of anything. I'm guilty of not saying what I have, I'm guilty for being ashamed of being raped. I'm just another drunk Indian girl who got raped, no one cares about me. We were expecting community service, and I got a sentence of 2.5 years.

Eventually her lawyer got her released from these conditions, and she was later incarcerated again to serve out the rest of her sentence.

Each of these experiences is difficult to read and hear. Sharing these experiences contributes to denaturalizing violence that contributes to avoidable suffering. But, beyond sharing these stories, what can be learned from these experiences of violence, and how are these forms of violence interconnected? These experiences comprise all forms of violence included in the typology outlined above—from direct and physical, indirect and psychological, intended and unintended, latent and manifest, and the complex array of structural violence. All of these experiences quite clearly resulted in limiting, constraining, and incapacitating people's potential realizations. Much of the violence described was legal and part of sanctioned aspects of being criminalized. Yet, many of the forms of direct physical violence, such as assaults, were illegal and officially unsanctioned. However, each type of violence was intimately intertwined and reliant upon the others. My task in the sections that follow lies in explaining the relationships between types of violence.

Disaggregating forms of violence provides the most helpful analytical insight related to my research objectives of bearing witness and denaturalizing the violence that resulted in suffering. Speaking of forms of violence represents one aspect of denaturalizing violence, while understanding the origins of that violence is another. Examining the relationships between forms of violence can help situate its origins. If I only focused on the individual and visible forms of direct violence, such as those that took place during someone's incarceration, the denaturalization process would remain incomplete. These individuals were incarcerated and subjected to individual violence that was structural in origin. Identifying the relationship between direct violence and structural violence, whether that relationship

itself is direct or indirect, contributes to a broader critique of the oppressive aspects and practices of public health, the media, the police, and the criminal justice system. Such an approach calls for change. This is work that aims to help form a political basis for a life that enables flourishing instead of leading to suffering through civil and social death.

In his own work on stories of suffering, Farmer (1996) asks, "Are these stories of suffering unique, or are they emblematic of something more?" (p. 271). I put forth this same question in this work. Furthermore, I ask, if they are representative, how? While each of the experiences included in this chapter are unique, I included them because they are representative of multiple similar experiences that I heard during my ethnographic inquiry, interviews, and archival research. I attend to this question in more detail in the sections that follow.

Employing the previously elaborated typology, multiple ways exist to engage with these complex, harrowing, and violent experiences of suffering. In what follows, I primarily discuss two distinctions, consisting of structural and direct personal violence, legal and extralegal. In doing so, I integrate the varied distinctions presented by Galtung, and the multiaxial analysis focused on race, gender, income, sexuality, and one's HIV status, presented by Farmer. Throughout the following, I also identify aspects of interlegality and interinstitutionality as they emerge, as well as multiple other relationships between forms of violence from the above typology.

Structural and personal violence

As mentioned earlier, Galtung noted that the outcomes of direct personal violence are likely visible, which is not always the case with structural violence. Structural violence may also lead to injury and death, albeit to a less discernible degree and with easily obscured origins, sometimes through layers of bureaucracy or means of social obfuscation. Farmer (2009) notes, "structural violence is visited upon all those whose social status denies them access to the fruits of scientific and social progress" (p. 72). All of the people whose experiences appear in this chapter live lives marked by multiple forms of social marginalization, manifested as harsh direct violence in their daily lives, limiting their potential, and denying them access to the means to flourish. I could conclude that the very fact that these cases were constructed in the first place highlights the pervasiveness of HIV-related structural violence in society. But such an argument will not convince those who believe that the individuals whose stories appear here deserve punishment. Thus, I further outline some of the ways in which structural violence manifested and intertwined with direct violence in the lives of those criminalized. These experiences

of criminalizing enable a view into how latent biases and structural inequalities in society can manifest as direct personal violence, and how unequal access to resources limited people's ability to realize their potential, both mentally and physically.

The direct forms of personal violence shared by those criminalized included forms of incapacitating one's movement and autonomy through incarceration, house arrest, and curfews, as well as the conditions of their release that deny individuals access to certain parts of the social and physical world. With these forms of direct violence, a subject–object relationship exists, since workers in the criminal justice system enact these forms of violence against individuals. However, completely disaggregating these forms of violence as only direct and personal is somewhat unclear. As the stories shared outline, the reasons criminalized people are put into these situations of direct violence are linked to structural forces. Many of the people with whom I spoke came from working-class backgrounds with limited means to access the high costs of seeking justice. The cost of lawyers meant that many people had to make do with free counsel. In some cases, the lawyers people paid for were ill-informed on the risks involved and accepted the institutional constructions of people as risky perpetrators, pressuring their clients to accept guilty pleas. Free duty counsel was in some cases more informed, however, the practitioners had limited time to support their cases in the ways people wanted. Many of those charged had no prior criminal history, yet were denied bail and immediately incarcerated, and for long periods of time before their trials, if a trial occurred at all. Shaun had just such an experience:

> The lawyer was like a dump truck. He didn't know anything about the case, like he didn't know anything about HIV. He never even brought up anything about my viral load that was undetectable up in my case for my defence and that was the one reason why I was initially prosecuted.

Lenore had similar experiences accessing justice, which manifested as discrimination. She further linked that discrimination to both sexism and racism in her community and within the criminal justice system itself:

> Something that I have learned living in the city is people are extraordinarily racist against Aboriginal women. My prosecutor was racist, she had everything against me… the jury was staring at me the entire trial. Part of me was thinking if they were paying attention about what was being said about me, my HIV, or if they were already judging me because of my skin colour. It's really opened my eyes to the extent that, 'cause of my skin colour, I get treated different. There were no Indigenous people on my jury…

Stephanie's lawyer pushed her into taking a plea, which she took out of fear. Charles used his parent's life savings to hire a high-priced lawyer to challenge his denial of bail, and took it to a higher court. But, Charles felt the judge had a stigmatizing attitude towards HIV, and had already made up her mind, ultimately rendering the appeal impossible. Charles told me,

> …[W]e paid over six thousand dollars to go to high court, and I was put on the stand, during a bail hearing, and my lawyer said, "In the ten years I have been a lawyer, I have never had one of my clients forced to testify at a bail hearing."

His lawyer invited someone to come and speak to Charles's good character. But that witness was HIV-positive, and the judge refused to let them enter the courtroom. "The judge kicked out the witness 'cause he was also HIV-positive, 'contaminated my courtroom.'" Charles's 72-year-old uncle, a gruff working-class man, was also invited to testify on his behalf. He had a hard time understanding a few of the judge's questions, and instead of rephrasing the questions, the judge yelled at his uncle during his testimony. At that point, Charles knew he would be incarcerated, telling me:

> I knew right then and there, I'm not coming home. I was denied bail at the high court. I was sentenced to a four-year prison term, minus my dead time, and I had done 13 months dead time, which I credit 26 months, and I was sentenced to do another 22 months on top of that. So, once I arrived at the institution, and was put on a mandatory lockdown… I'm a high-profile case.

Subsequently, Charles had to change lawyers, since he could no longer afford to pay the high fees.

These experiences outline that unequal access to resources, coupled with forms of AIDS phobia, poverty, racism, and other forms of inequality, render individuals in these situations unable to adequately and effectively advocate on their behalf within the criminal justice system. This resulted in people being incarcerated, many before trial, if one occurred. Incarceration for these people, therefore, represented a direct form of violence, initially constituted through latent and manifest forms of structural violence. Through this analysis, it becomes apparent how multiple forms of violence presuppose one another.

Answering the question of whether or not an object is hurt out of these experiences was not a challenge, as was answering the question of whether violence was intended or unintended. Multiple

forms of direct and intentional violence included physical beatings and assaults, and violent sexual assaults. Shaun was beaten by the police who called him Black and HIV-positive during their assault. He faced breeches of privacy while incarcerated, and was also assaulted in his neighbourhood because his HIV-positive status was publicized. In addition, Darlene mentioned that corrections institution guards treated her "like dirt", talking down to her, only going near her with gloves on, and washing themselves with alcohol afterwards due to fears of her being HIV-positive. Charles faced direct and violent denials of access to a doctor, denials that threatened his life. George was held down on the floor while naked (and in crisis) by a corrections guard, who said he would never touch someone living with HIV. The violent sexual assaults that Cynthia and Stephanie both faced were obscured and ignored by the police due to them being women and sex workers, individuals who are often ignored by authorities when facing sexual violence. All of these experiences were marked by latent and manifest forms of structural violence, racism, misogyny, and AIDS-phobia, which became visible when enacted onto the bodies of criminalized people as direct personal violence.

However, in other instances, the notion of direct violence was less obvious, as well as the idea of violence being intentional. Some participants were denied access to health services and their anti-HIV medications, potentially due to bureaucracy where it may be hard to discern if the outcome was due to a deliberate actions or inactions of a subject. All of the people with whom I spoke who were incarcerated experienced numerous difficulties accessing their anti-HIV medications. Despite being incarcerated for having HIV in a country where being virally detectable can result in being criminalized, people living with HIV who are incarcerated have a very difficult time accessing their medications. These difficulties result from a range of bureaucratic, logistical, and punitive barriers. The denial of medications, in some instances, may represent a direct form of violence, such as Charles's case where guards intended to deny his right to access healthcare. In others instances, those denials may have remained more indirect, or related to inaction on behalf of the institution, albeit created by the institution's bureaucracy with perhaps no one person specifically responsible. The reality of denying individuals access to healthcare and medications becomes all the more troubling when looking at the experiences of H. Matthews and I. Williams, cases I described in *Chapter 1: Bearing witness to violence*. In those cases, two Black men, while incarcerated, died untimely deaths in 2007 and 2013, respectively. One was denied access to anti-HIV medications and one was denied access to healthcare services for an injury. The outcome of indirect and unintended violence can be equally as deadly as direct and intentional violence.

In examining if violence was physical or psychological, people also experienced myriad forms of personal psychological violence. At times people were forced to understand themselves as a pathology and a terrible person, enduring forms of harassment whether online, in their communities, or from guards and other prisoners while incarcerated. Charles had blood taken by force for the Sex Offender Registry and was threatened with being tasered if he resisted. George understood that the intentional breeches of his privacy led to intense direct violence in the form of regular beatings from other prisoners. Paul had to conceive of himself as having abnormal sexual desires similar to those of a child rapist and was forced to watch violent torture and child pornography, solely due to his HIV-positive status. These forms of psychological violence emerged from stigmas and forms of discrimination—the structural violence of racism, homophobia, misogyny, and AIDS phobia. Today, a majority of the people with whom I spoke told me that they live with post-traumatic stress disorder, which impacts on their daily lives in multiple ways. Many of them indicate they are continually haunted psychologically by what happened to them.

Weaving Farmer's multiaxial analysis throughout, it becomes apparent that due to compounding axial threads, certain people experience the violence of criminalization differently. These people include Indigenous people, Black people, women, people who live in poverty, transwomen, and gay men. Unsurprisingly, these groups have long histories of not enjoying equitable access to justice, autonomy, and the means to access economic, physical, and psychological safety, security, and lives free from coercion and surveillance. Moreover, the intensity of the violence disproportionally impacts already socially marginalized people, specifically those who are racialized and living in poverty. Four of the five women I spoke with were women of colour, with three of these being Indigenous women. Their experiences reveal the ways in which the criminalization of people with communicable diseases continues to be racialized and gendered. When those distinguishing characteristics are overlaid across one human experience, the resulting suffering can be amplified. The legacy of settler colonialism, including the ongoing generational effects of the residential school system, means that Indigenous women are asymmetrically affected by these forms of violence. Lenore's experience as an Indigenous woman is highly indicative of how structural violence can manifest and be amplified when multiple characteristics compound to increase suffering. She had endured past sexual assaults, living with limited means. She then ended up being charged with aggravated sexual assault, and was incarcerated, stripped naked, alone in a cell, and watched by male guards. All of these factors ultimately drove her to have an extreme panic attack. All of the women I interviewed revealed histories of sexual abuse at the hands of men. Yet, those women were the ones charged as sex offenders.

All of these people's experiences, and the constructed cases they became, outline situations where latent social fears, racism, misogyny, homophobia, and stigma around HIV manifested, resulting in forms of discrimination and unequal access to resources. These experiences show the deep interconnectedness of structural violence and personal forms of physical and psychological violence. Criminalized people were rendered non-persons, resulting in the confluence of structural violence and personal violence.

In this section, I outlined how structural violence and direct personal violence are interwoven and constitute each other to manifest and embody the daily lives of criminalized people. I also discussed the interactions between physical and psychological violence, direct and indirect violence and manifest and latent violence. In the next section, I briefly outline the relationship and distinctions between legal and extralegal violence, while again examining multiple other intersecting forms of violence from the typology.

Legal violence and extralegal violence

In the shared experiences of criminalization, similar to personal and structural violence, a constitutive relationship exists through the forms of legal and extralegal violence. Incarceration is legal, as are most formal institutional aspects of the processes of criminalization, pretrial detention or remand, house arrest, and sex offender registration. Furthermore, legal public health orders limit some actions and mandate others, constraining and regulating behaviour. The practice of administrative segregation or solitary confinement exists in a grey area of legal violence, but in the cases explored in this study, it was considered legal. The subject of such institutional legal processes is subsequently labelled as a criminal, a label with an understood social marker. The experiences of the above forms of legal violence and the marks of criminality shared in this chapter illustrate the relationship between legal and extralegal violence. All of the legal forms of violence described by people also resulted in direct personal extralegal violence. For example, one form of legal violence is represented in George's case, when he was institutionally housed in protective custody and later administrative segregation. However, he was mandated to be housed under those conditions because, as he believed, guards leaked his charge of aggravated sexual assault and his HIV-positive status to other prisoners, knowing that violence would be directed at him. This breach of privacy, a form of indirect personal and perhaps psychological violence, combined with the personal physical violence, manifested as multiple assaults and represented forms of extralegal violence. Those forms of extralegal violence led to intensified legal

violence and resulted in the heightened institutional incapacitation of George. Thus, the multiple and intersecting forms of violence presuppose each other, where legal violence is co-constituted through extralegal violence.

One assumption underpinning legal violence is that such sanctions are society's just response to protect persons from perpetrators of harm. That is, extralegal violence begets legal violence. Someone intentionally, or perhaps less intentionally, enacts an unsanctioned form of violence, and then they are punished. This is how punishment is organized in societies predicated under liberalism. However, as with many of the experiences shared, the idea that these individuals enacted any violence remains debatable. Here the idea of intentional or unintentional forms of violence the typology also come into play. Despite no intentional of harm or any actual harm, the individuals in this study became constructed as risky perpetrators of harm. Not only was there often no intent to do harm, following the Judaeo-Christian tradition, they often also actively worked to mitigate harm. They did so through taking steps to protect their partners through the use of condoms or regularly taking medications, so that they would be rendered non-infectious and unable to transmit the virus. For instance, Matteo knew he could not transmit HIV and acted on up-to-date information from his local AIDS support organization. Cynthia, Danny, and Shaun were all undetectable and actively used condoms. Lenore tried to give her partner a condom, but she did not possess the power to force him to use it. This specific instance underscores the gendered dimensions at play, where women who engage in sex with men have differential access to the means of protecting themselves from the risk of being criminalized. In other cases, someone may have acted irresponsibly. For example, George did not speak up about his condition. However, due to intersecting mental health and substance use issues, he did not possess the skills to navigate the complexities of HIV disclosure. Conflating those actions with intent to cause harm would remain difficult once hearing the complexity of his specific experience. So, what does it mean that the criminal justice system enacts legal violence against people when no actual or intentional violence was committed? What does this say about the role of punishment in Canadian society and the assumption that extralegal violence begets legal violence?

Another assumption in this distinction between violent actions relates to extralegal violence. If personal and manifest, whether resulting in injury or in death, extralegal violence is something that is understood to warrant legal punishment. This assumption is the foundational basis of the corrections system, to punish individuals for wrongdoing outside of sanctioned state violence. For instance, an individual who commits a physical assault will be punished. In the context of the experiences described here, this assumption collapses. Here, the target of extralegal violence also becomes subject of

subsequent legal violence. For instance, Stephanie was punished as a sex offender for her own rape, while Cynthia was similarly threatened. In addition, George was incarcerated under harsher conditions for his own multiple assaults, while Shaun was beaten by the police while in custody and no one was held accountable. The people who enacted that violence received no punitive consequence. Shaun, Stephanie, George, and Cynthia were individuals who were not understood as persons in need, or worthy, of legal protections. Instead, because of their HIV-positive status, criminal charge, and other multiaxial characteristics, they became people from whom legally safeguarded persons were protected. The assumption that the criminal justice system protects people from violence is here put on its head, as subjects of extralegal violence, also then became objects of legal violence. With this analysis, I caution here, I am not advocating for the increased state sanctioned punishment of the people who harmed Shaun, Stephanie, George, and Cynthia. Rather, I question the assumption that the criminal justice system works as a form of justice to remedy personal forms of extralegal violence.

When someone is marked as a criminal and as a threat to public safety, as these cases exemplify, a wide range of information is produced and proliferates about their cases, such as police warnings and press releases, media articles and interviews, personal photographs, and social media and bulletin board posts. While not direct forms of violence, these forms of information and the ways in which they proliferate in the public sphere are not benign. Shaun was beaten in his own community due to media representations of him as a criminal and a public health risk. Lenore went into a long period of social isolation after her image was leaked to the media. Stephanie and Darlene were labelled as highly sexualized threats by the media due to their histories of sex work. In many instances, the media acted as a populist arm of the police and the criminal justice system. Media articles were shared online or posts appeared on social media, which also led to personal psychological violence and harassment, causing people to be shunned and socially isolated. As an indirect form of violence, information can be dispersed and mobilized to discriminate against people, to enhance their surveillance, to predict perceived future risks, and to regulate and circumscribe behaviour and opportunities. This convergence of information across institutions, and the ways in which it is adopted and socially activated, helped enact forms of direct violence ultimately serving to punish and act as retribution beyond legal forms of violence.

Interlegal forms of violence can result in amplifying punishment. In relation to HIV criminalization in Canada, the process of interlegality is not deliberate, but random and aligned with Santos's work (Santos, 1987). This randomness is, as Santos notes, "because the different legal spaces are non-synchronic and thus result in uneven and unstable mixings of legal codes (codes in a semiotic

sense)" (Santos, 1987, 297–8). Matteo and Stephanie felt that their experiences of criminalization were amplified due to being watched under the jurisdictions of both the police and the military police. Both felt the military was intensely aggressive, and indeed sent information about Stephanie around the world, while Matteo's conditions of release were extremely coercive. Many of the people whose stories were shared in this chapter also had public health orders enacted against them. In this context, public health orders were used to help increase someone's perceived level of risk in the eyes of the criminal justice system. For instance, Matteo and George were both treated as a heightened risk to public safety due to an initial public health order, which was then amplified into a criminal charge.

Broadly speaking, the interlegal system is commonly understood as ideally first relying on public health legislation as the legal entry point for HIV control. Criminal law is thought to be mobilized as a last resort. Increasingly coercive legal tools are ramped up based on how much of a risk to the public the criminalized subject is perceived to represent, or how heinous their behaviour was. In actual practice, no generalized rule exists to apply to how public health orders can be enacted or why charges under the criminal code jurisdiction are enacted in some cases but not in others. A public health order is not deterministic of a criminal charge, but likely can be, depending upon the circumstances. For example, some people (outside of the sample in this study) have received public health orders when already incarcerated on charges of aggravated sexual assault (Field notes, 2017, 2018). Despite this, when someone has a public health order enacted against them, harsher police actions or heightened criminal charges can result. The public health legislation did not intend for this amplification; it represents an interlegal by-product.

Public health legislation, therefore, cannot be easily understood as a form of jurisprudence applied in a silo. Interlegality helps to explain how interconnected the differing systems of legislation are, illustrating that HIV criminalization is not simply a discreet criminal law issue or an issue solved via public health laws. Explicating the complexity of systems of legal violence helps frame responses, while challenging the assumption that public health institutions, policing, community-based organizations, and criminal law institutions act distinctly from one another. Furthermore, because these institutions operate using different forms of distinct knowledge, HIV criminalization is much more complex and intertwined. That is, it is not simply a matter of criminal law.

In this section, I outlined how legal violence and extralegal violence presuppose one another, where the legal violence of incarceration led directly to a range of personal forms of stigma, discrimination, and abuse after someone was institutionally marked as a criminal in relation to an HIV-related crime. In this context, facing legal violence means that people were deemed as less than legal

persons and no longer in need of safety, security and protection. I also described how multiple jurisdictions —public health, criminal, and military—intersect to intensify the criminalization of people.

In the following and final section of this chapter, I outline how the culmination of being constructed into a case, labelled as a hyper-risk and facing legal violence deconstitutes personhood, where criminalized people must live their lives in a negative relation to the law.

Civil and social death

The outcome of being constructed into a case, amplified as a hyper-risk and then incapacitated through forms of legal violence consequently resulting in other forms of violence, represents the experience of civil and social death. Once someone's legal personhood is deconstituted, they are no longer understood as needing legal protection. For example, this occurred with Cynthia, a migrant, transsexual, and sex worker whose access to legal personhood was already tenuous. When assaulted she was not able to rely on the policing protections granted to legal persons. For some, the impact of amplified penality extends well beyond prosecution and punishment if prosecuted. This impact extends into the daily lives of people in the form of heightened surveillance, social isolation, and denying one access to public life, safety, and security. The experiences of criminalized people's lives shared in this chapter reflect a negative personhood, constituted through law, with harsh and violent legal and extralegal consequences. These becomes lives lived in a negative relation to the law.

In this section, I continue to detail the personal experiences of the processes of criminalization from the interviews and archival research I conducted in order to explore the extension of penality into everyday life. In some instances, these experiences occurred following formal incarceration, life after being charged, or once a charge was dropped. They may also relate to daily life while awaiting further progress in one's institutional criminal and public health case.

Stephanie

Turning back to Stephanie's time in a transitional housing unit, she expressed her anger and depression regarding the strict conditions imposed upon her. While walking up the steps to the unit, she continued, impersonating her case worker:

> "Where are you going? Who are you going with? Where you gonna be?" Fuck, why don't you put the cuffs on me? I don't even have that many probation restrictions. So, like, I walked outta prison

> with even more restrictions than I had when I was inside. I don't have a curfew restriction, but the house does now… I feel like I'm not moving forward 'cause I'm still in that box.

She became upset and frustrated when explaining it to me. She had served her time and just wanted to reintegrate into society and move on with her life. The unit was a small room along a hallway in a bigger community building that resembled an office complex from the 1950s. This building housed a number of other nongovernmental organizations. We had to be buzzed in and a receptionist signed me in and checked my ID. At the transition house, her life was highly regulated and monitored, and guests were limited to daytime and staff supervision while on-site. Staff kept track of every place she went, and it felt suffocating to her. We went into a small common room, furnished with a TV, microwave, and some unremarkable beige couches and surrounding furniture. She now had her freedom, but felt more constrained than while inside. She could taste leaving her criminal record behind, which made it seem even farther away. "We can't talk here, hun. It's not safe for me," she said in a hush under her breath. With her two previous criminal cases, she was worried that anything she did or said in front of the housing staff could be used against her in future. She was also concerned about seeing her doctor—she no longer trusted healthcare professionals after her doctor handed over all her health files to the Crown Prosecutor, files which were used to transform her into a criminal. She told me how stressed and fearful she had been since leaving the institution. She had tried to go to local AIDS support organizations, but each time it seemed like they faced difficulties dealing with her. She was frustrated with the limited services available, services that seemed out of touch with what she needed in order to reintegrate into society. Additionally, on a number of occasions people had called the transition house asking for her, and when she answered they hung up. "It's the military police checking up on me, I know it." The impact of her situation caused her ongoing stress and feelings of insecurity. We decided to walk to a public park after first grabbing some food at Tim Horton's. Most of our conversations took place in the anonymity of public spaces. She no longer had the luxury of accessing privacy in her daily life.

Shaun

One day, after working long hours at a factory, Shaun took his dog for a walk around the courtyards of his suburban high-rise complex. A month earlier, his case had been dropped by the Crown Prosecutor, and he was released. He felt deeply relieved. Despite how his case had been constructed by the police, Shaun felt as though the fact that his viral load was undetectable and he had used condoms, that his case would not have held up in court. Finally, after three years under a

combination of pretrial detention and house arrest with his aunt and uncle, he was released. While at court:

> I was, like, trying to hold back tears. There was, like, fucking journalists behind me and shit. But you know what's fucking funny? I wasn't even in the newspaper for being acquitted. They were there to see if I was going to be convicted. That's why they were there. This attitude, I wasn't in the newspaper for being acquitted. But, I guarantee if I was convicted, I would have been in the newspaper. So that's messed up.

It was night time when he was out with his dog, and a group of men from his neighbourhood approached him. One said, "You're HIV-positive and you are sharing cigarettes with other people out here. We read about you, you're spreading HIV, that's what the media said." They started telling Shaun that he should leave their neighbourhood and started pushing him around. He yelled, "'I'm, like, man, I'm HIV, I'm undetectable, I am no risk, my case was overturned,"' and they are like, 'It doesn't matter, you're still HIV positive."' Regardless, the group of men beat him up, standing above and encircling him, kicking him repeatedly. He now often feels unsafe around his new home.

Lenore

While sitting on the couch at her place with her boyfriend, Lenore told me about her life following her release from the corrections institution: "I'm on the registry that is for rapists and pedophiles. I really don't feel like I belong there. I am on there because of HIV." She used to volunteer at her son's school in the daycare program, but was now no longer able to. "The guidance counsellor that works at my kid's school would love to have me back as a volunteer, but it's the school that won't allow me because of my charge." She told me how she felt as though she was under constant surveillance: "They need to keep tabs on me, I love working with kids." She felt frustrated and depressed that her charge was keeping her from doing what she loved: "Because of sexual aggravation, they can't have someone like that. But I didn't assault anybody. If anything, I was the one assaulted." She told me how she was pregnant and how she was excited about having a new child in her life. But, she was also worried because she had another appeal coming up in a few weeks, and if it was not accepted, she was going to have to return to prison to serve the rest of her sentence. She had close to nine months left to serve, and she was deeply worried. "What's going to happen with the baby?," she wondered.

Matteo

Matteo's many conditions of release barred him from accessing social media, including Facebook, Twitter, Instagram, as well as any of the dating or hookup applications such as Grindr or Scruff. He thought it was funny that the Crown Prosecutor used the spelling "Grinder" instead of "Grindr" on the form. "They are so out of touch," he laughed. He was also mandated to take his medication and see his doctor regularly, both of which he was already doing. It was confusing for him that he was now legally mandated to take his medication, when he had already been diligently doing so. He was also mandated to undergo counselling regularly with a public health nurse. He had learned about HIV and sexual health from a local AIDS organization, information he used with his partners. The public health counselling, however, promoted unnecessary practices, such as using a condom for oral sex, a practice unnecessary when an individual is virally undetectable. That counselling made him feel pathologized and bad. He felt their counselling approach was driven by a homophobic fear of gay sex. Furthermore, he no longer trusted healthcare professionals and felt scared to talk to them truthfully about his sex life. He now equated healthcare professionals as another part of the criminal justice system.

Cynthia

Sitting at her kitchen table, Cynthia continued her story. After receiving the letter about the investigation from the authorities, she felt constantly surveilled, scared, and worried. Moreover, now that he knew she was HIV-positive, the client who assaulted her began stalking and harassing her. She was terrified in her own neighbourhood, isolating herself and rarely venturing out. She deactivated her social media accounts because he also began posting messages, harassing her and her friends online. She was extremely fearful in her own neighbourhood, but also scared to call the police again. The police were the ones who placed her in this situation in the first place. She told me, "If I had not called them, I would not have this charge hanging over my head." She felt as though she was under constant watch, but with no means to protect herself. She knew the police were not going to help her, and was worried she would face additional violence from her former client.

Charles

Following his incarceration, Charles found reintegrating difficult. His post-traumatic stress disorder meant that he often isolated himself. He lived off of the social support provided from his provincial government, which limited what he could do. He tried finding work, but it was hard with

his criminal history and being registered as a sex offender. When he did try and participate in society, things did not always work out. For a while, he volunteered at the same local AIDS support organization that he went to for services. Volunteering at that organization provided him with much needed social interaction and helped him feel normal again. Later, he started having problems with his landlord and went to the organization for help, asking them to advocate for him. Charles worried that he would lose his apartment and was upset. During that interaction with staff at the support organization while asking for help, Charles appeared angry. After his many years of incarceration, he had developed anger management issues. The staff claimed that he was acting aggressively, which made him more upset and lead to an outburst. That outburst caused the staff to accuse Charles of being threatening, which ran counter to the organizational code of conduct. For two months, Charles was banned from accessing services as well as from his volunteer position. "Since I started there, they were freaked out by me, my history and charge, they were just waiting for the right moment to get me out," he told me, still obviously upset and disappointed. He understood that he could come off as threatening, and was working on his anger. But, he wished others, including those tasked with supporting him, would better understand his needs. Consequently, he no longer participated in that organization, the only one operating in his rural community.

Darlene

Following her release, Darlene found life hard. Her relationship with her family became quite strained:

> My mum she knows, but she makes like it's a secret, like only family should know. It's embarrassing for the family to have a daughter who's a sex offender. You can't be around kids without supervision, which is hard if I want to spend time with my nieces and nephews.

While out in public in her community, Darlene would regularly face harassment or be denied services. Staff at the local Tim Horton's had also refused to serve her mother. Everywhere she went, people knew about her case. She had served her sentence of incarceration, but felt it was never going to end:

> To label someone a sex offender, you know, that's for life, the sentence is over, the three years, but this is until you die. I have to carry this for the rest of my life. I think it's really unfair you

> know, like it's hard to travel. For jobs, you know, they can find out, and people in your community they know. It's really hard that someone has to carry that for the rest of their life.

She was trying to save money so she could go to hair stylist school. She wants to move on with her life, and hopes to get a job and stop relying on social assistance to survive. But, it was a challenge to get an interview for anything while being registered as a sex offender.

Joseph

I met Joseph in his apartment in a major city. He was living temporarily in the back of a friend's house. A white man in his early 40s, he had been a fashion stylist for years prior to his case, and his new boyfriend regularly stayed with him. His case had been resolved now for about four years, but he was still haunted by the experience. His case only involved a blowjob, when he was on anti-HIV medications and was virally suppressed, and the Crown Prosecutor was likely to lose at trial. He had lived under pretrial house arrest for more than three years, and his charges were ultimately stayed. Under house arrest, he had to live with different sureties, and people he knew were tasked with accounting for him. During that time, he was not able to work or go to school, and was severely isolated. Once the charges were stayed, relieved he began searching for his own housing. When applying for one apartment, he received a call back, and the landlord asked him to return to visit the place; a good sign, or so he thought. When Joseph showed up, the landlord opened the door and yelled, "I don't rent to rapists!" and then pushed him down the flight of stairs to the home.

Despite his charge being dropped, Joseph's name, HIV-positive status, and charge of aggravated sexual assault easily appeared in an online search. Joseph told me that while the media were eager to cover his case when charges were applied, no articles were written about his vindication in court. Joseph had also been denied jobs. After looking for employment for months, he finally found a position he thought was a good fit, so he applied. A few days later, he received a message back from the potential employer. The message stated that his past charge of aggravated sexual assault might make other employees in the workplace uncomfortable. Despite having the necessary expertise, they opted not to hire him.

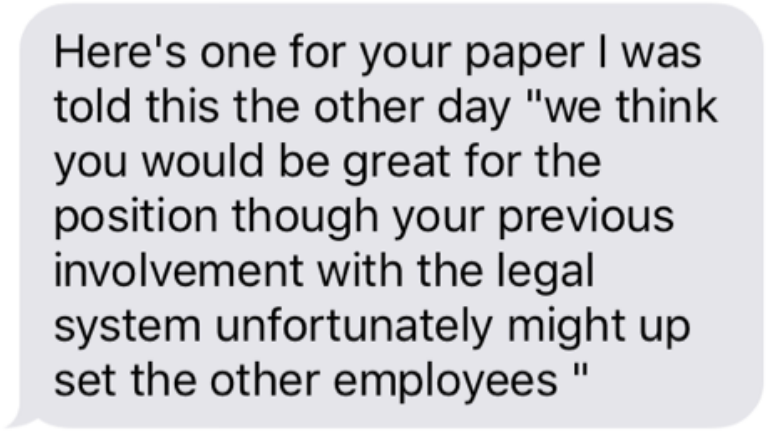

Figure VII: Text Message from Joseph Explaining Issues When Seeking Employment.

For those who come to live in a negative relation to the law, *civil death* cuts off access to certain legal protections and recourse (Patterson, 2018; Cacho, 2012). The process of criminalization enables forms of legal discrimination, accompanied by forms of extralegal discrimination that limit criminalized people's ability to access the means to realize a liberal personhood. This includes circumscribed access to employment and housing, and the ability to move about freely. People lose their rights to civil life with no legal recourse to secure their own protection, as illustrated by the cases of Cynthia and Stephanie who live in a state of constant insecurity.

Social death also comes into play, which cuts off access to participation in society as an actor with freewill and agency (Patterson, 2018; Cacho, 2012). Here, criminalized people are denied access to public life and spaces, and can be shunned from public spaces and services. These experiences outline how the mark of criminality in one's daily life can be further exacerbated via the dispersal of crime governance across all aspects of society enacted through forms of surveillance. By doing so, everyday actors are empowered to take on forms of crowd-sourced policing, acting as an arm of the policing and criminal justice institutions. Criminalized people's access to social media is also constrained, as is their ability to enjoy a private sexual and social life. People are regularly denied access to the means to garner their own economic safety, stability, and security. Joseph's experience, through being denied jobs and housing multiple times, clearly illustrates this denial of access.

Critical race scholar Lisa Marie Cacho (2012) discusses the social death experienced by criminalized people as a highly racialized process, where whiteness is protected inherently in legal

systems, while people of colour come to be classified as criminalized, experiencing forms of social death. Cacho further noted,

> [P]eople who occupy legally vulnerable and criminalized statues are not just excluded from justice; criminalized populations… imaged to be the reason why a punitive (in)justice system exists. Although they are excluded from law's protection, they are not excluded from law's discipline, punishment, and regulation (p. 5).

The people in this study who faced the most egregious forms of violence, and who were able to realize the least recognition for their own protection were people of colour. Shuan, a Black man was beaten by police for turning himself in. Cynthia, a Latinx woman, was violently assaulted, yet she was being surveilled by police. Lenore and Darlene, both Indigenous women, faced intense sexual violence in their lives, yet they both came to be classified as sex offenders.

To further, summarize these experiences of social and civil death, I return to the work of Colin Dayan (2011), and her genealogy of negative persons discussed in *Chapter 1: Bearing witness of violence*. In that genealogy, Dayan examined ancient common law, and the three principle results of treason or felony. These results consisted of the forfeiture of property, the corruption of blood resulting in cutting off blood ties and, therefore, the loss of inheritance, and, the extinguishment of civil rights resulting in no access to legal processes. These operative components of personhood—property, blood ties, and civil rights—were divested when someone was criminalized, and their legal personhood was socially and civilly deconstituted.

As with Dayan's genealogical analysis, living in a negative relation to the law in this contemporary moment for those whose experiences are described in this chapter results in a similar forfeiture of the rights to property and engagement in civil life. Outside of the criminalization of HIV, there are aspects of the principle of corruption of blood which could be interpreted to have survived in Canada's *Indian Act*, where someone might be considered less of an Indigenous person based on factors associated with their blood, such as marriage, birth and genetics (Indian Act, 1985). However, today the notion of corruption of blood no longer exists specifically as an outcome of criminal wrongdoing in common law. For example, a person is no longer likely to lose rights to their family linage due to criminal behaviour. However, the experiences described in this chapter highlight an entirely new sort of blood corruption, one which harkens back to past conceptions of the notion. The corruption of blood in these instances comes to mean that people living with HIV are biopolitically marked as criminal due

to what they have in their bodies. The corruption of blood comprises a component of the process of HIV-related criminalization, which then invokes systems that facilitate legal personhood to become untethered from a former person. Where the result is that the non-person is no longer capable of accessing the means to actualize themselves in the liberal tradition. Given how HIV is socially conceived, people's daily lives come to be highly constrained, surveilled and regulated. People also lose ties to their family due to shame and stigma, as well as perceptions attached to a family member now being listed on the Sex Offender Registry. This loss of family brings forth a similar manifestation of the corruption of blood as in the past, whereby wrongdoing led to a loss of familial rights. Furthermore, in the context of HIV criminalization, ideological fears of a bodily virus—regardless of one's infectiousness—result in personal violent consequences, including a loss of access to safety, bodily autonomy, and economic security, as well as a loss to family connections and support. People therefore lose access to housing, employment and all the means to support themselves, similarly bringing us back the forfeiture of rights to property and access to civil life. The consequence is that the ancient notion of criminality and the subsequent metaphors (property, blood ties, and access to civil rights) which constitute a person in civil society remain.

As a result of their experiences, every person I interviewed shared with me that they have either tried to commit suicide or have experienced long periods of regular suicidal ideation. Due to their experiences, all of these people now have a complex and strained relationship with society. Many are quite angry at society, which stripped them of their personhood and treated them as less than human. When the multiaxial dimensions of race and gender, along with others, become entangled and intersect with one another, just as with violence, the vulnerability to losing other forms of personhood are further amplified.

In the following sections I touch upon two aspects of the process of civil and social death which require greater attention. These consist of heightened surveillance and non-personhood, which help provide an understanding of the material consequences to the lives of criminalized people. The varied forms of heightened surveillance at play, which help constitute and become a marked feature of the civil and social death, regulate and circumscribe people's life chances and opportunities. The experience of non-personhood also limits criminalized people's ability to access the means of liberal personhood, namely, the ability to claim subjectivity.

Surveillance

What people described as they attempted to participate in society after being constructed as a criminalized non-person consisted of heightened levels of invasive daily surveillance. The experiences described above detail a confluence of forms of surveillance deployed to enable civil and social death, forms of both institutional and lateral surveillance. Multiple other forms of surveillance may also be at play. Those I explore here, however, represent the most operatively important forms.

To further examine these forms of surveillance and how they constitute what it means to live in a negative relation to the law through HIV criminalization, I turn to the concept of therapeutic surveillance. This concept, developed by Canadian critical criminologist Dawn Moore (2011), examines how both benevolent health promotion aims and coercive and punitive regulations can work in concert. Moore aimed through this theory to intervene in the surveillance studies literature, seeking to disrupt notions of *control* and notions of *care*. Moore extrapolated that while care and control are often positioned as dichotomous in surveillance studies, within certain cases and institutional practices these notions can merge. For instance, drug treatment courts in Canada operate for individuals with a series of non-violent crimes on their record and who have been labelled with a dependency on crack, cocaine, opiates, or methamphetamines. At the Crown Prosecutor's discretion, the individual enters a court-supervised treatment program that involves daily attendance at an addiction treatment centre, undergoing random urine screening, and regular mandated court appearances to address a judge. I introduce this concept because HIV is a medical condition, and a veil of therapy exists around the coercive surveillance practices faced by people who are criminally charged. Joseph provides an example of this veil, given that a nurse monitored his sex life under the guise of therapeutic counselling. Yet, he felt as though that monitoring was driven by a logic of fear and risk management divorced from the reality of his actual experience and from the science regarding infectiousness.

Moore developed the concept of therapeutic surveillance as a call to address considerations of the body in surveillance at a time when theorists were more attuned to forms of data in surveillance (2011). Thus, Moore sought to turn attention back towards people's bodies, bodies watched by others, to people who became the subjects of coercive surveillance practices. In doing so, Moore outlined how therapeutic surveillance as a form of governance aims at regulating and constituting a compliant subject through a diffused convergence of information, actors, and experts, all connected to institutions of therapy and penality. This form of surveillance relies on human connections to function, mobilizing knowledge generated from human interactions. According to Moore, the concept of therapeutic surveillance includes a number of key characteristics:

1) The gaze is focused on the individual surveilled subject who is watched by other people.
2) The model relies on many watching one, meaning that multiple actors monitor the surveilled subject, including social workers, healthcare professionals, police and lawyers, and even peers who perform a kind of lateral surveillance.
3) Therapeutic surveillance is personal and based on the intimate details of a subject's life, including their daily activities, employment, living situation, sexual practices, drug-taking habits, and so on.
4) And, the practice is presented under the guise of benevolence, aimed at helping the problematic individual and seeking to "cure the offender of her addictions" (Moore, 2011, p. 265), while simultaneously benefitting society as a whole.

While addressing how coercive and therapeutic forms of surveillance become intertwined, Moore outlined how under the gaze of therapeutic surveillance the targeted individual is watched by others. That is, the many watch the one via forms of institutional surveillance perpetrated by institutional actors through lateral surveillance performed by peers in the community. In the context of HIV criminalization, these two forms of surveillance are also prevalent. Due to the unique hybrid medico-legal composition of constructed risk, along with the outrage directed at people understood as sex offenders, these two forms of surveillance—lateral and institutional—are combined. Criminalized people are then surveilled by multiple institutions simultaneously as well as laterally by people in their communities. In cases of HIV criminalisation, the diffusion of information across a variety of actors in society aimed at watching a marked surveilled subject is activated in both the therapeutic and coercive senses. These actors can include nurses, police officers, corrections institution officers, or members of the public who engage in online chat-room forums or community members at a public pool. The confluence of both forms of surveillance is actively realized in these cases and in the lives of the people who live them. For example, Matteo experienced forms of institutional surveillance and control through regulations placed on his movements and abilities, monitoring his sexual partners, and circumscribing his ability to socialize in his community, where he also experienced forms of shunning and harassment via social media. Cynthia was also watched by both the police and her former client-turned-stalker. Like the relationship between extralegal violence and legal violence, two intersecting, interdependent, and co-constitutive forces remain at play—one form of surveillance constituted formally through institutions and another constituted informally in the social realm.

In the context of the experiences documented in this chapter, institutional surveillance is predicated on controlling and pre-empting risks through institutional regulations. Here, multiple actors

from institutions are tasked with surveilling individual criminalized people to incapacitate their potential. Those tasked with surveillance include individuals with certain types of expertise, such as nurses and psychiatrists among others. Institutional forms of surveillance are omnipotent and can target the criminalized subject at any point. In the context of the hyper-risky criminalized, the intensity and pervasiveness of surveillance increases. This type of surveillance takes the form of watching for future criminal behaviour, such as through enacting bail conditions that limit movement and access, as well as mandating forms of public health counselling. Such counselling is not enacted for health purposes, but for risk management purposes. In this context, public health case management becomes conflated with criminal justice case management. That is, they become understood as one and the same, resulting in some criminalized individuals no longer trusting healthcare professionals, and thus preventing them from accessing adequate healthcare support.

Lateral surveillance, enacted by actors living in the same social world as the criminalized, disperses throughout the community where criminalized people live, where many watch one. This manifestation of surveillance in the context of managing criminalized people is predicated on retaliation, retribution, and populist outrage, and enacted by watching in the community to protect legal persons from the risky other. Lateral surveillance aims to prevent perceived infection and contamination in a community. Shaun serves as an example of this, whereby he was beaten and shunned while walking his dog in his own neighbourhood. In addition, Darlene and her mother were denied access to services in their community. Forms of lateral surveillance such as these, originating from neighbours, potential employers, or others in the communities of the criminalized subject, are enacted and socially activated when the non-person seeks engagement in the social and civil realm of legal persons. Lateral surveillance manifests as retributive violence, beatings, and denial of access to spaces and housing.

Furthermore, Moore notes that the forms of surveillance enacted depend upon the intimate details of a subject's life (2011). When someone is charged in relation to HIV, highly personally information about the subject, including biometrics, the details of their sex lives, medical information, viral infectiousness, and their adherence to anti-HIV medications, all become public. Facebook posts, police press releases, bulletin board posts, word of mouth, media articles, health data, and various forms of information are mobilized in the service of punishment aimed at incapacitating and circumscribing people's lives. Through the circulation of people's images and biometric details in the media, individual citizens enact forms of lateral surveillance. These take the shape of vigilante

retribution and punishment, where people inform on their sexual partners, and neighbours seek to rid their communities of risks and punish perceived wrong-doers.

Moore developed the concept of therapeutic surveillance when examining people mandated to attend drug treatment courts (2011). Thus, this concept attends to clinical and institutional encounters that individuals face, as well as surveillance by peers. The concept, attuned to the conflation of care and control, does not, however, account for the forms of physical violence and retribution that result in cases of HIV criminalization. This brings about the limitations of relying solely on concepts as explanatory mechanisms for the social world. Some forms of surveillance contained in the experiences presented here were enacted under the guise of therapy (namely, institutional). Other forms of surveillance—specifically, lateral forms—however, were enacted by legal persons in the communities of the criminalized. These primarily comprised forms of personal violence resulting from fears of contamination and populist retribution. The individuals whose lives were documented in this dissertation came under heightened forms of surveillance—coercive and therapeutic, institutional and lateral—with violent and retributive consequences. All of these people became targets watched by many, with their every move tracked by institutions or confronted by people in their communities with potential violent consequences.

In the next section, I discuss the further consequences arising from being constituted as a non-person. This includes a discussion of the limitations on making claims to subjectivity and the trap that liberal personhood presents.

Non-persons

Myriad material consequences accompany living in a negative relation to the law. But, personhood itself is constituted through a wide array of invisible attributes and structures. These include the freedom of will, the desire to act in certain ways, the ability to remain unique, the ability to have a profession, the ability to makes choices, to pass moral judgements, and to speak for oneself. A defining component of the liberal *dispositif* of the person explored by Esposito lies in the ability to lay claim to one's own identity, to be self-actualized (2012). Being constituted as a risky other through the process of social and civil death limits the ability and range through which the criminalized subject can claim these attributes of liberal personhood. As the experiences in this chapter have illustrated, criminalized people are denied the agency to frame themselves in their own terms. Instead, their lives are understood through limited institutional mandates of policing, public health, the media, and

criminal legal frames. Thus, all subjects are produced through the powers of institutions, whether those institutions are social and invisible or institutional and manifest. But, while embodied legal persons can lay claims to forms of subjectivity with a seemingly agentic free will, becoming a subject with dreams, aspirations, depth, and nuance, this same capability is denied the criminalized.

In *Chapter 1: Bearing witness to violence*, I addressed the work of criminologist Jonathan Simon (2010), who stated that modern forms of punishment no longer produce various types of subjects as understood in the Foucauldian tradition. In his well-known analysis of punishment, Foucault concluded that punishment no longer focused on the body, but rather attuned to transforming the soul, aiming to render people more docile, effective, and productive. However, for Simon, Foucault's analysis no longer rang true, whereby under contemporary forms of mass incarceration, the self and its soul have been obliterated. The risk management locus of contemporary forms of punishment reduces individual subjectivities solely to a "thin risk calculus" (Simon, 2010, p. 339). One might say this is true of all subjects—whether thick or thin, they are constituted through power relations. That is, agency may play little or no actual role in the matter. However, it could be argued that the criminalized are denied access to a soul altogether. The criminalized become flattened, unable to claim a self or even a soul, becoming an object of risk, and denied the means to realize liberal subjecthood. The marker of criminality and risk to public health, in the context of the cases in this chapter, means the self no longer exists. The criminalized individual becomes an object of risk to be managed, labelled, regulated, and surveilled.

A consequence of civil and social death brings me back to the trap of liberal personhood also presented in *Chapter 1: Bearing witness to violence*. In his analysis of the *dispositif* of the person, Esposito outlined how legal personhood for citizens is constituted, in part, through denying access to the means enabling personhood for non-persons (Esposito, 2012, p. 17). In the liberal tradition of personhood, the rights of persons can be enabled and realized through denying the rights of others. Legal tools, by defining positive personhood, also result in defining the opposite. The personhood of the criminalized is revoked in order to protect the public. For example, Charles was banned from his local support organization, since, due to his behaviour and the ongoing mark of criminality, workers within the organization felt justified in feeling uncomfortable and unsafe around him. Therefore, they felt justified in banning him. This resembled the experiences of Joseph, who was denied a job and housing, where the safety of his potential future landlord and employer were considered justifiably protected at the expense of Joseph's safety and security. Similarly, Angie's community shunned her for their own perceived protection at the expense of her autonomy and freedom. Frank was fired from his job and

shunned from his material and digital community in order to protect his ex-girlfriend. Shaun was beaten by his neighbours and told to move from the area due to their fear of perceived infection. These experiences among many others highlight that living in a negative relation to the law serves to protect the safety and security of legal persons at the expense of the rights of the criminalized subject of risk. This brings me back to the previous quote presented earlier in this section from critical race scholar Lisa Marie Cacho, who noted that criminalized people form the foundation of justifying a punitive criminal justice system, but those very same people, namely racialized communities, are excluded from that very system's protection (2012, p. 5).

Furthermore, inherent in the notion of a person is the non-person, whereby a subject becomes less of a person and their access to self-determination and autonomy are stripped away. The suspension of rights to personhood for the risky, guilty, and criminal are justified in order to uphold the rights and protections of the innocent and victimized. This represents an unresolvable conflict and inherent problem within liberalism. Seeking to redress the violence faced by negative persons may mean calling into question the liberal notion of personhood altogether.

In this section, I outlined the process of criminalization as not only situated within institutions of criminal justice, but rather dispersed throughout society under various forms of surveillance. The impact of civil and social death can result in an economic death, since people may be unable to access the means to support themselves in their social and civil life. Being constituted as a criminal threat also means limited access to the means of personhood, where people become constituted as non-persons. In the conclusion that follows, I summarize the key points from the analysis in this chapter, and reflect on bearing witness to the suffering of those living in a negative relation to the law.

Conclusions

This chapter explored the findings from a critical ethnographic research project examining the experiences of people engaged with the Canadian criminal justice system because they allegedly did not tell their sexual partner(s) that they were HIV-positive. Aligned with my objectives to undertake a critical ethnographic inquiry, the analysis presented here is situated in the social worlds and perspectives of criminalized people. In doing so, I focused on the experiences of violence and suffering, ones that are avoidable and require denaturalization. The project of denaturalizing violence and suffering and bearing witness to the experiences of those who live in a negative relation to the law helps to disarticulate people from their supposed crimes. Instead, interrogation is attuned toward how punishment is organized and operates in society.

These experiences highlighted that as soon as someone is translated into a case they become understood as guilty, even when proven innocent. Once understood as guilty, information about them is dispersed into and through the public realm, and such individuals are instantly constructed as violent rapists intending to spread HIV. No mechanism exists by which to disentangle themselves from the intertwined system of institutions at play, even when their charge is dropped. When varied risk technologies are overlaid, consisting of a public health risk coupled with a criminal risk, a case becomes understood as a hyper-risk. The official institutional process of becoming a case also precipitates a range of social, extralegal, and casual forms of violence, discrimination, and social exclusion. Once an individual is framed as represented a heightened criminal and public health risk, social and institutional actors may feel justified in enacting retributive and shunning forms of punishment and direct personal violence beyond the formal functions of institutions. All of these experiences of violence limit the potential realizations of criminalized individuals, constraining and circumscribing their possibilities and choices in life.

All of the myriad forms of violence enacted towards the people described here resulted from a supposed crime. In most cases, that crime was entirely non-violent, and the notion of harm represented an ideological one rooted in HIV-related stigma and AIDS phobia. Here, the crime represents an extremely difficult one in which to prove any intent to harm. Yet, due to fear and out-dated notions of AIDS as infectious and a deadly disease, proving intent is replaced with the fact that someone simply has HIV. In many cases, those charged or prosecuted explained that they took steps they understood would protect their partners, such as using condoms or regularly taking medications so that they would be rendered non-infectious. What, then, does it say about society and the function that punishment serves that the most punitive functions are mobilized towards people who have committed no violence except perhaps that they have not told someone else that they have a medically controllable chronic disease?

Denaturalizing these forms of violence represents part of a deliberate political project—forms of violence that are simultaneously structural and direct, legal and extralegal, institutional and interpersonal, and physical and psychological. Bureaucracy often obscures these forms of violence, because the people onto whom these forms of violence are enacted are deemed unworthy of living as legally safeguarded persons. As illustrated through these people's experiences of violence, these forms of violence stand as extensions of classism, homophobia, colonization, misogyny, and a fear of the other. When these characteristics intersect, vulnerabilities to violence are compounded. Many of the people with whom I spoke live in poverty and are racialized. Coupled with HIV and charges of sexual

assault, they faced increased levels of violence due to being criminalized. Moreover, the women with whom I spoke were violently sexually assaulted, yet they were criminally charged with sexual assault.

These cases were not one-off occurrences. They are linked to a system of ongoing oppression, rooted in the colonial legal system that governs the Canadian settler-colonial state. The outcome of this analysis calls into question the popular conception of legal punishments as a form of justice, as well as the function of punishment in Canadian society. By denaturalizing and disaggregating these forms of violence, I hope I am better positioned to deem these ongoing situations unacceptable. I hope to bear witness in order to call for action.

My work on this issue represents an act of refusal—a refusal to accept this current situation of criminalization, and a refusal to allow these lives to be rendered disposable by state institutions. People living with HIV, specifically poor people, Indigenous and Black people, gay men and transwomen, remain over-policed, yet under-protected. They live under heightened state and community surveillance due to criminalization. But they are provided limited protections when they ask for help. They are deemed unworthy of care and support, unless that support is instrumental in helping us to not transmit HIV to others. Despite this, all of the people with whom I spoke for my project remain passionate, kind, funny, charming, and dynamic. They are people with visions for the future, and individuals who wanted to share their stories for this project as an act of healing. They wanted to share their stories in order to seek justice, and as a way to turn what happened to them into a positive force for change.

Conclusion

In this dissertation, I have outlined my work examining the experiences of people living with HIV in Canada who have been criminally charged, or threatened with charges, in relation to allegedly not telling sex partners their status, from their own perspective. In this conclusion, I begin by providing a brief summary of the findings of this project. I then address a series of potential limitations of this work. I then outline my approach for a criminology of the criminalized, I return to the notion of bearing witness, and I conclude by addressing some future directions of research.

I took the criminalization of HIV non-disclosure, exposure and transmission– one that is particularly harsh, and relatively new, with the first charges were applied in the late 80s - as a site to explore the material impacts of being labelled a violent criminal and threat to public safety. However, while the specifics of the current approach are relatively new, there is a long history of the use of punitive approaches towards people with communicable diseases of vice in Canada, a history that is racialized and rooted in the project of colonization. Today, as this dissertation outlined, Canada is a country with a designation of being a world leader, among the USA and Russia, for criminalizing people living with HIV in this way. In Canada, there is a long history of criminalizing people with sexually transmitted infections, with HIV becoming the newest iteration in this historical trajectory. The ways in which HIV is criminalized differ from how people with various venereal diseases were treated as criminal or incarcerated under public health auspices back at the beginning of the 20th century. Looking to the past, using also an interinstitutional and interlegal analysis, specifically helps to explore how the criminal justice system and the emerging social reform and hygiene project of public health were deeply intertwined, can help inform how we look at the issue today. Mobilizing history was one tool, among many, that I employed as a critical ethnographic researcher to help interrogate and denaturalize the social practice of criminalization, to explore how the issue is racialized and how practices of coercion and punishment were interconnected.

Looking to the past to the experiences of Lizzie Cyr, Elanor Pattison and Margaret Tippens, while also to the present to the experiences of Lenore, Cynthia, Darlene, and Stephanie, what becomes apparent is the similarities of these experiences: women who were incarcerated for having sexually transmitted infections; Indigenous women, women of colour and women working as sex workers; women who were caught up simultaneously in the institutional powers of both public health and the criminal justice system; women who were not able to seek protection from the law, but from who the enforcers of the law was used so others could be protected.

Examining the lives of criminalized people from their own perspective was a way to denaturalize the violence they had faced as a result of being criminalized. The goal of denaturalizing violence was to help understand its origins, so that forms of avoidable violence can be better understood and held to account. As I mentioned in *Chapter 1: Bearing witness to violence*, philosopher Walter Benjamin states that certain kinds of violence in society are inevitable, however, much of the violence that people in this project faced as a result of being criminalized was not so. The forms of violence that criminalized people faced emerged out of a series of deliberate institutional sequences of action, social processes, and the activities of social actors. Examining violence, both its legal and extralegal forms, meant that I could understand and examine the interconnectedness of punitive criminal laws, public health laws, and violence. Examining the qualitative experiences of people provided insight into these origins of violence, as well as how negative forms of personhood came to be constituted. The findings illustrate that the violence faced by criminalized people came to be amplified, specifically when various legal tools and institutions intersected to govern the process of criminalization. This project is unique as it aims to reclaim how the stories of criminalized peoples are told, moving the issue of HIV criminalization away from public health imperatives as a frame of analysis, to rather put into question the role and function of the criminal justice system and punishment in society. This was an original approach to examining the topic of HIV criminalization, which makes a unique contribution to the field. The project is the first qualitative research study examining people's experiences of HIV criminalization in Canada

For this dissertation, I conducted in-depth archival research and qualitative interviews with people who had been charged, prosecuted or threatened with charges, in relation to being alleged to have not told sex partners their HIV status. Over the course of the project, I spent time with sixteen people from across Canada, in a range of different provinces, from diverse backgrounds and experiences. I came to this project as someone intimately connected to the work, as an AIDS activist, as someone living with HIV, and as someone who has had friends who have been criminalized. This

work is not located around conducting inquiry into a new and interesting study of a social problem. Rather, there is an ethical stance in the work that aims to highlight the vital and urgent need for social change. Undertaking a critical ethnography meant the work was ethically grounded in an approach that moved beyond mere description of a social problem, to take a political stance and call for change.

While this dissertation has focused on experiences of violence and suffering, as I mentioned at the end of the previous chapter, *The amplification of penality*, all of the participants in this study had a vision for the future. Despite living lives in a negative relation to the law, and experiencing forms of social and civil death, all of the participants were working to move away from the past in their own ways. Shaun told me, "[I]n the future I want to go to school, to college, I think I want to be a mechanical engineer because I have always liked mechanical machines, vehicles and stuff." Similarly, Darlene was working to support herself. Through a training and re-entry program, she got a job, despite being a registered sex offender. It took her a long time, but she was persistent. She called me to let me know her good news:

> I just got a new job today or yesterday, I started my new job I working at [a fast food restaurant]. I'm trying to get off income assistance, and I'm really trying hard to get into a hairdressing course, that's my passion. I don't want to be on income assistance. Maybe once I get into that, I can eventually have a car and maybe rent or own a condo down the line or something.

Further she said:

> Despite everything, overall my family was really supportive and I am really resourceful. I did beat myself up a bit, and I went back to using, I was on a destructive path right. But then I got to thinking, you know, I could let this disease and these charges kill me or I can rise above it and live the best life if I can, and that's the path I chose.

George told me something similar. He had had a long period of being depressed, was regularly denied employment, and was turned down by men while trying to date. But things had recently started to change. He told me:

> I served my time, things have been hard. I'm just getting my life started again, relationship wise, work wise, I'm just starting to get a network of work out there. I have always enjoyed bartending so I do a

lot of banquets and weddings and private functions that I do, and do this all freelancing – working for myself now, it's been finally going well.

In all of the experiences of violence, discrimination and suffering, people enact ongoing resistance. They live dynamic and rich lives, despite how they have been socially discarded, and denied the rights of personhood. These everyday acts of looking for employment, gaining self-confidence, and conceiving of a future, slowly chip away at the confines of being denied aspects of personhood.

Due to being governed by multiple institutions, such as the intersecting powers of policing, public health, media, and criminal justice, people's constructed cases came to be understood as extremely high risk, and in need of amplified forms of surveillance, regulation and incapacitation. Many of the cases came be high profile, and people's personal details were plastered all over the media with stories labelling them as violent perpetrators. As a result of this loss of privacy and autonomy, criminalized people's potential and ability to flourish is quashed, where instead they live lives that are highly circumscribed, surveilled, and regulated. Criminalized people in this study were denied access to social and civil life, they lost the ability to be understood as people who could formulate and claim complex and nuanced subjectivities. One outcome of these findings disrupts the assumption that punishment is solely relegated to a form of state sanctioned, regulated and controlled form of legal violence. Rather what transpired was that legal violence led to a wide range of harsh forms of other violence in the daily lives of criminalized people.

Throughout this dissertation I engaged with theory cautiously. I aimed to avoid instrumentalizing criminalized people's lives in the service of academic thought in ways that could be objectifying. I did not want to reproduce epistemological forms of violence that people faced due to being criminalized. While all academic endeavours are ideally aimed at advancing new knowledge and ideas, I wanted to conduct this project in a way that was not solely in the service of concepts, but rather primarily organized to help underscore the material impacts of criminalization on people's lives. I discussed the concepts of governmentality and biopolitics to help understand the material impacts of punitive systems of legal governance on the lives of women incarcerated for having venereal disease in the early 20th century. The outcome of that analysis helped elaborate how women were the primary targets of coercive and punitive approaches aimed at venereal disease control, as well as, how and when the lines between coercion and punishment were blurred. The result helps to better understand the inner workings of oppressive social systems and the material impacts on people who were labeled a risk to public health and safety at the time.

Additionally, I engaged with the notion of personhood throughout this dissertation, along with peripheral ideas to this notion, such as civil and social death, and living in a negative relation to the law. While personhood is an idea, it is an idea that governs how people are protected, or not, by the state. The focus here was to address how the liberal framework of person must be reconsidered, as the ways in which criminalized people face violence is through having their legally guaranteed personhood deconstituted. As the experiences of criminalized people comprised in this study underscore, living in a negative relation to the law is a form of life where one is rendered civilly dead, considered less of a person who is to be protected. Living in a negative relation to the law refers to a process wherein criminalized individuals become an object that people who are legal persons are to be protected from through forms state sanctioned violence and incapacitation. People in these cases are charged with aggravated sexual assault, one of the harshest charges in the *Criminal Code*, usually reserved for extremely violent rape where a weapon is involved. In relation to HIV non-disclosure, the charge is applied to situations where there was no violence, and where the sex was consensual. In a majority of the cases, HIV was not transmitted, it was just the supposed act of not telling that is against the application of criminal law. Those criminally charged, or threatened with charges, face a wide range of forms of violence, violence that is legal, such as loss of freedom and autonomy through incarceration, and sex offender registration. People also face violence that is extralegal, such as with the numerous assaults, forms of discrimination, and regular denials of the means to guarantee safety and security. I examined how people's experiences were disconnected from how they came to be institutionally constructed as cases.

In the next section, I outline the limitations that emerge in my approach of speaking directly with people about their lives.

Limitations

Speaking directly with people about their own experiences brings about a number of limitations. The first being, that it became apparent during the interviews that people did not actually know or understand much about the criminal legal and public health processes or tools being mobilized against them. When speaking to people about their criminal charges, or public health orders, it was common that people did not fully understand aspects of their constructed cases. This meant that what they were able to tell me, such as specific technical details related to their being criminalized often required some sort of verification. People I interviewed were only able to tell me what they knew about

their experience. For many the experiences was traumatizing and their memory was one of shock, shame and depression. The details of things were more of a challenge. Some did not know the full name of the charges against them, or have a full understanding of the legal proceedings and procedures that took place to process their cases. While my approach was to trust people as experts in their own experience, in some cases, when technical details were required, I also went to other sources to verify accuracy.

Additionally, I conducted 28 interviews with 16 different people. However, over the course of recruitment, I was in touch with 24 different people. For a range of reasons, including people being actively incarcerated, some deciding last minute they no longer wanted to talk about what happened to them, or some being told by their lawyers not to participate, quite a few people dropped out of the study. Due to how racialized the situation of HIV criminalization is, it is important to note that a majority of the people who dropped out or were ineligible were Black men charged and/or prosecuted in relation to heterosexual sex. Some were in the process of a case and it was decided by their lawyers that they should not participate. Nevertheless, being in an ongoing trial did not automatically exclude someone, as I did also speak to a number of people who were in the middle of various court proceedings.

Both of these limitations may have impacted what was possible to know about the issue of criminalizing HIV using a qualitative research approach. In the following section, I outline a brief story that took place while I was collecting data for this dissertation, and follow that up with a conception of a criminology of the criminalized.

A criminology of the criminalized

The aim of my project was to shift the frame of analysis toward people with lived experience of punitive criminal and public health laws. I have explored what the experience of being rendered a criminal and a risk to public safety means for those who live it. This is what I call a *criminology of the criminalized*—an approach that shifts the orientation toward the suffering of people who are subject to criminalization, the forms of violence that they face, the criminal justice system, and the role of punishment in society. This frame of analysis is rooted methodologically in critical feminist forms of ethnographic sociological research, as inspired by the work of feminist sociologist Dorothy Smith (1987, 1990a, 1990b, 1999, 2005) and the work of critical realist Andrew Sayer (2009). I initially came to study this issue from an activist point of view, and I spent a long time reflecting on how one should

study the issue, and how one should work with people who have been criminalized. I continually asked myself questions about the ethical issues that I would and did encounter. Such questions helped me in examining the tensions and consequences that could come out of my work. To further elaborate answers to these questions, I will share a story that took place while I was conducting my interviews.

In summer of 2017, I went to visit Stephanie who was criminally prosecuted on charges of aggravated sexual assault for allegedly not disclosing her HIV-positive status to a number of her sexual partners. I shared much of Stephanie's experiences in the previous chapter. She was one of the now over 200 people who have been charged with aggravated sexual assault in relation to HIV non-disclosure, exposure or transmission in Canada. For Stephanie this was an instance of non-disclosure, as HIV was not alleged to have been transmitted. Stephanie told me about her life and how had been raped at a party while in a black out by multiple men. The next day she went to the police to tell them what happened, and in the end, they told her that she was the one being charged with aggravated sexual assault. The charge came about because she had not disclosed to the men – in the context of her own rape. As someone who had been engaged in sex work for years, she was somewhat known to police, and her experience of the assault was not acknowledged or considered valid. This was a wild and heinous outcome of the approach to criminalizing HIV in Canada, where women who are assaulted could end up being charged with aggravated sexual assault, a situation I encountered multiple times during my research.

When I met Stephanie, she was in her late 40s, and was mandated to stay in transitional housing under strict conditions including a curfew. She had been released from a federal corrections institution just six weeks prior to our meeting after spending multiple years inside. She had plead guilty – "guilty of being raped" she told me. She also told me about how she thought she had an inexperienced lawyer and was scared of the criminal charge. If she pled guilty, she could get a lesser sentence and would be able to spend time more with her family. During the few days we spent together talking about her life she showed me her day-to-day life. She talked to me about her living under constant surveillance and trying to integrate back into a society she felt did not want her. She was angry and felt like her rights to privacy, and ability to make a future for herself had been taken away. Her story had been widely sensationalized in the media, with terrible headlines vilifying her as a violent perpetrator, headlines that were completely out of sync with her own experiences and reality. These headlines now haunt her everywhere she goes, as those stories are forever available online. Stephanie told me that she understood herself as a good person who had been victimized by a broken legal system. She had been

silenced, incapacitated and had her freedom taken away. Her story was taken from her, now told by the police, Crown Prosecutors and journalists in the media.

Interestingly, the neighbourhood that Stephanie was mandated to live in was in close in proximity to where another academic had been doing research on the criminalization of HIV. In fact, the academic had also been studying Stephanie's life. A few years prior to my visit, the academic, who works in a major Canadian university's criminology department, published research on Stephanie's constructed case. In the publication, the academic had examined details about the Stephanie's case, which had been previously published by the media and in court documents. In the academic publication, Stephanie's experiences, as framed by the media and courts, were discussed in relation to academic concepts. The publication came to conclusions that might be understood to help advance knowledge on those concepts. The academic was sympathetic to Stephanie's case and was employing a feminist analysis. The publication was critical of the criminal justice system and of HIV criminalization.

I asked Stephanie if she knew there was academic literature written about her, and that the academic worked not far from her transition home. Stephanie was shocked, said she had no idea. She told me, not only had she already lost all sense of privacy and decision-making, now she had become a "case" to be studied and analyzed by this other academic. I wondered if the researcher had ever thought it a possibility that Stephanie was a living person who might one day read what they had written about her. While the publication was in support of Stephanie and was slanted against her being criminalized, the academic published her life details from media and court documents without Stephanie's consent. This time Stephanie's consent was breached for academia, and the publication was distributed as a knowledge commodity for the benefit of the academy. The academic used Stephanie's case to generate forms of expertise and capital, and flew to conferences to speak about the publication, using Stephanie's real name.

The logic of that researcher's practice is commonplace among people who study laws, crimes and society. Often this approach is used by academics who are critical of practices of criminalization. It has become understood as natural that people who have been alleged to commit crimes lose agency over telling of their own stories, and it is considered a legitimate practice to turn criminalized people's experiences into cases to be studied. I too used archival research to explore a number of people's experiences in this dissertation. This other researcher did not officially require the Stephanie's consent to write about her life. Legal research and criminology can often work to construct actual people into

cases to be studied. It is not uncommon to do this type of research – and is something I am also doing right now, and is part of doing research.

As a qualitative researcher, whose program of research is organized primarily around speaking with people directly, interviewing them about intimate details on their lives, I am ethically obligated to garner consent to have people participate in my research. As I outlined in *Chapter 3*, the process is rigorous and is centred on an affirmative notion of consent, meaning the person can withdraw at any time up until the project has been published. If Stephanie contacted me within the timeline that I provided to her during the consent process, and asked to withdraw from the project, I would have destroyed all the data I collected on her. That would be that. She consented to participate in my project. She is aware that I am doing this work, and that I would share details about her experiences.

Talking with people about their lives directly brings a sense of social and ethical accountability to the process. The criminalized people in this study shared with me, as they wanted their stories taken forward to amplify their voices and address the need for social change on the criminalization of HIV non-disclosure, transmission, and exposure. The research process became a reciprocal exchange and relationship aimed to support both the community being researched, and me as the researcher. I do not want to overstate this relationship though. Many of the people I spoke with I am no longer in touch with, and it would be difficult for me to locate them. However, they engaged in the project willingly with an understanding of my objectives and what would come of what they told me.

Due to being criminalized, details about Stephanie's life are widely available online. A researcher could claim it is in the public interest, and that it is their right to conduct such work since the criminalized people's experiences are now in the public domain. Some could argue that it is the public's right to know details about people who are charged and prosecuted with serious crimes, and that there should be open discussion and analysis on their behaviours, actions, and experiences. But is it a given that just because someone's life has entered the public realm via the dispersion of media articles, police press releases, and court documents, they can become fodder for academic inquiry? If a living person, has their personhood deconstituted under contentious criminal and public health laws that many deem unjust, is it ethical to undertake research using the means of their criminalization without their knowledge or consent? Perhaps the answer depends on the intentions of the researcher? Perhaps not.

If a researcher aims to challenge the oppression of criminalizing processes with their work, what considerations should be taken about the kinds of data sources to use? Forms of data (e.g. stigmatizing media articles and court prosecution and sentencing documents) have contributed to the

oppression of the communities that the researcher is aiming to support. These materials are not benign sources of data, they constitute the means by which people are criminalized and facilitate forms of violence. Had the police, media and courts not breached Stephanie's privacy and produced a range of public information constructing her as a violent threat to the public, the researcher would have no source material as data.

Court documents are produced to develop a legal narrative of what took place on a specific instance. They are intended to flatten complexity and nuance, so as to conform to a binary logic of innocence versus guilt. They are true in as much as they aim to produce a legal outcome, the results of which are a form of state sanctioned violence. Media reports come to be complicit in stigmatizing those labelled criminals, resulting in a range of forms of discrimination and violence against people. In particular, both legal documents and media articles had facilitated the incarceration of Stephanie for being raped, a rape that was not on any official record, as it has been institutionally disavowed. Her actual experience did not even make it into the official accounts that entered the public realm, accounts which were then used as data to study Stephanie. Her actual experience was marginalized from the constructed case created to criminalize her. Media stories and court documents had made it near impossible to get a job and support herself after incarceration due to how publicly she was known.

In telling this story, I am not arguing that media accounts, police, and court documents are not rich data sources or that they should not be used for research. But there may be implications for relying solely on media and legal case files as primary sources when those same documents have been used to construct people as criminals and risks to public safety. Every single one of the people I met and interviewed for my research project who was in the media felt that they were not fairly treated, or portrayed. Many told me they thought the narrative developed in court documents did not reflect what they understood to be true. When people were charged, they faced extensive media coverage, but when acquitted the media was silent. Their actual experiences were not reflected in any of these official accounts of what took place. What is lost when experiences are turned into a "case"? Could a researcher who focuses on telling a person's story risk unintentionally reinforcing the violence of their sources by relying on them as forms of truth? Why not choose to resist that form of reduction and abstraction and instead speak with people directly about their own experiences?

I too am complicit in using Stephanie's case to make a point, which is what I am doing as you read this through the telling of this story. What makes my approach different than the other researcher who wrote about Stephanie? One starting point is that conducting a critical activist ethnography means that the researcher must always consider what Sarah Schulman underlined to me continually in a

writing seminar that I took with her in the summer of 2018, that "other people are real" (Schulman 2018). In the context of my research subject, I take the statement *other people are real* to mean that I understand Stephanie as an actual person in the world, with depth, a complex subjectivity, who should have agency over her life. I attempted successfully to meet her, engage with her, and ask her about her life and experiences. I asked for her consent to write about her, and she agreed as long as the outcomes were in the service of working to change the way people like her had been treated in society. Of course, this is not always possible, depending on the situation, such as if I chose to write about people who are currently incarcerated. However, considering that other people are real can bring a different ethical orientation to the work, one that is accountable to criminalized people and in the service of their needs, desires and aspirations. However, with this story I do not want to make any didactic assertions of my approach being superior to others, and I understand that not all research can be conducted by talking directly to the people who are directly impacted.

This experience with Stephanie made me reflect on my practice, asking myself questions such as: when is it appropriate to write about criminalized people, when is it not? How can I draw lines to help formulate an ethical sociolegal and criminological analysis that originates from the social worlds of those who are criminalized? How can I not perform the same kind of analysis that the other researcher did to Stephanie and her experiences? Based on working to answer the above questions, while conducing my own research, I have developed a series of proposals for a criminology of the criminalized that is grounded in the lived experiences of people targeted by various intersecting legal regimes. These proposals summarize the approach I have taken in this dissertation, and identify a way forward for potential future work in my program of research.

To begin, it is helpful to very briefly return to the work of critical realist Sayer (2009), as discussed throughout this dissertation. To be critical, the central orientation to the development of new social science knowledge must be ethically attuned to the suffering of social actors. At its core, Sayer's argument outlines that critical social science aims to examine and contend with suffering so as to render it contestable and unacceptable. For Sayer, critical social science work should aim to present a critique against forms of social organization that result in the suffering of social actors. The aim is to denaturalize the violence that is the source of suffering, so violence and suffering are understood not as matters of fate, but as social processes that do not need to be as they are and are subject to change. This form of analysis is one that rests on the assumption that society is always open to change—as it has been over history—and seeks to move toward a realm of human existence that is free from oppressive forms of avoidable violence and suffering.

With an approach attending to avoidable suffering and violence, a social scientist wishing to work on issues related to criminalized people could ask the following questions of their subject:

What are the actual lived experiences of criminalized people?
What does it mean to live as a criminalized non-person under this regime of criminalization?
What forms of violence do people face as a consequence of being criminalized?
What actions can the researcher take to denaturalize the violence faced by criminalized people?

The critical ethnographic researcher will only be able to adequately address the above questions, while working from the specific standpoint of criminalized people. Working from this standpoint means engaging with criminalized people about their lives, knowing them, spending time with them, and understanding their own understanding of the world around them. From this standpoint, the focus is attuned to the material consequences of being institutionally marked as a "criminal" and a "risk to public safety" and the forms of suffering and violence faced as a result of being criminalized. Working from the standpoint of the criminalized also accounts for ensuring that *other people are real*, providing nuance, depth and a subjectivity to people, who are provided with an opportunity to speak for themselves. This approach of facilitating a voice for criminalized people should also work to disarticulate criminalized people from their institutionally labeled crime narrative of innocence, guilt, repentance, and redemption. Instead, research can examine the daily lives of people and how they come to be labeled as criminal and risks at certain points in time.

Such research can look to the past to help understand forms of criminalization in the present. Looking to the past is one tool that critical researchers can mobilize in studying forms of criminalization from the perspective of the criminalized to help analytically interrogate the present. The process of looking to the past is part of working to denaturalize the violence of criminalization, and to help hold the criminal justice system to account. Such an analysis does not allow contemporary processes of criminalization to be understood as blips or as a backfiring of the criminal justice system, but rather as something that was constituted over time through deliberate actions and practices. Therefore, a criminology of the criminalized can ask:

What historical actions and practices shaped the contemporary form of criminalization?
How were criminalized people impacted under past regimes of criminalization?

What historical documents or records can be examined that elaborate the process of criminalization from the perspective of the criminalized?

Such an historical analysis can help rigorously ground critical research to ensure that forms of criminalization are not understood as natural occurrences, or as matters of fate. Rather, examining past forms of criminalization can help the critical researcher elaborate how certain types of people come to labelled as criminals at certain moments in time due a range of institutional forces.

The outcome of a criminology of the criminalized, grounded in the lives of people, helps to counter forms of legal research and criminology that continue to construct people into cases, which then become knowledge commodities that can be mobilized for capital generation within academia. Research that comes from the actual experiences and perspectives of criminalized people can help to counter the logic of constructing people into cases, to oppose the violence done by police, public health authorities, the media, and courts in constructing people into cases.

Furthermore, the criminology of the criminalized, should also ask:

What is the institutional (or interinstitutional) narrative being told about people, and how are their experiences constructed into cases?

What disjuncture exists between the experiences of criminalized people and the institutional narrative used to construct people into a case?

The work of the critical ethnographic researcher aiming to counter the violence and suffering of criminalization is to call attention to the disjuncture between how criminalized people know the world around them, and how they come to be constructed into cases by criminalizing institutions. Working solely with documents created in the service of someone's criminalization, such as court documents, media articles, or police press releases or files, often can only provide one account of experiences. Speaking directly with criminalized people helps to undo this epistemological disconnect, and presents a counter narrative to the dichotomous police and criminal justice narratives as people being violent perpetrators. Being able to elaborate what people know and how they come to be institutionally known, through understanding the actual experiences of criminalized people, is one way forward to hold to account harmful processes of criminalization.

Finally, a criminology of the criminalized must be oriented towards action and change. Again, returning to the call from Sayer (2009), this means ensuring that there is an ethical orientation to the

work. Such research must take a political stance to counter state and institutional forms of violence, and the resulting forms of social stigma and discrimination. An objective to contribute toward the advancement of academic thought is legitimate and vital. However, when engaging with criminalized people, where social research could be urgently mobilized to advance material wellbeing and change the social conditions under which criminalized people live their lives, then the imperative of a criminology of the criminalized must be in the service of criminalized people's needs first. Such an imperative moves research beyond mere description and objectification, to bear witness, and can thus contribute to healing for criminalized people. Such research can also appeal to actual forms of restorative justice, instead of punitive punishment, and works to hold the criminal justice system to account.

This criminology of the criminalized, as a form of critical activist ethnography, can assist with putting into question the practices of mainstream forms of sociolegal and criminology inquiry. It has the potential to call for new approaches that no longer enact forms of epistemological violence in the name of academic inquiry. A criminology of the criminalized seeks to contribute toward reclaiming how the stories of criminalized people are told. It can develop new knowledge in the service of emancipation, challenging oppression and injustice of the criminalized so as to help form the political basis of life worth living for people who have been subject to the legal and extralegal violence of criminalization.

In the following section, I conclude this dissertation addressing my efforts to bear witness, and move this project beyond solely an academic endeavour, to rather support the lives of the criminalized people.

Testimony

In the first chapter of this dissertation, I discussed my orientation to bearing witness. In the chapter, I outlined that bearing witness was part of ensuring that the project was ethically assertive, and that it was my ethical duty to ensure that this work moved outside of the realm of my own personal academic objectives. As I mentioned, the act of bearing witness is often understood to lead to a form of testimony provided from those who witnessed first-hand accounts of heinous acts of extreme violence and political injustice and abuse. I also addressed the impossibility of ever fulling knowing, but rather how bearing witness often relies on an outside observer. I addressed the question asked by Sontag, "What does it mean to protest suffering, as distinct from acknowledging it?" (2003, p. 40). In

the context of a criminology of the criminalized, this question implicates an ethical role of the observer who bears witness to objects of knowledge related to the suffering of social actors. Many of the people I interviewed told me directly, in one way or another: "I will speak with you, if you agree to take what I say to people in power to help change this situation."

The timing of this project occurred in the midst of a range of policy reform processes held at provincial and federal levels. Having the voices of criminalized people intervene in these policy-making processes was urgent and important. Thus, during the course of the project, I often understood that there was an imperative to share the outcomes of what people had told me about their experiences of criminalization. People had shared their stories with me so that I could take what they told me forward. This project was unique: no one had gathered the voices of people who had direct experiences of criminalization, and there was a need to ensure that these voices were shared to help inform policy-making processes.

To mobilize this ethos of bearing witness into action, I engaged in the policy-making processes as the results of the study emerged. During the federal government's ongoing reform process that was launched in 2016, I presented findings from this dissertation research to various policy makers. I was invited to participate in a number of policy-making processes with both the federal and Ontario governments. For instance, in 2017, I presented research outcomes to senior policy advisors from the Department of Justice Canada and the Public Health Agency of Canada. That meeting formed a part of the broader consultation to inform the criminalization of HIV non-disclosure reform process instituted by the Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada. As a result, findings from this dissertation were included in the Department of Justice Canada report entitled *Criminal justice system's response to non-disclosure of HIV,* released publicly and shared with federal, provincial, and territorial ministers responsible for justice across the country (Department of Justice Canada 2017). That report outlines a range of reforms and has already led to the Ontario Attorney General announcing that the province will develop prosecutorial guidance to limit the scope of law. Furthermore, based on the unique perspective of this dissertation and its findings, the office of the Attorney General of Ontario invited me to participate in a policy roundtable discussion held in April 2018, with the Attorney General, the Minister on the Status of Women, and policy advisors from the Ministry of Public Safety and the Ministry of Health and Long-Term Care.

More recently, I provided witness testimony to the House of Commons Standing Committee on Justice and Human Rights in Ottawa for their study on the criminalization of HIV non-disclosure. The Committee is comprised of federally elected Members of Parliament from all of the governing

parties and has the power to review and report on the policies, activities, and programs of the Department of Justice, which has the mandate to support the dual roles of the Minister of Justice and the Attorney General of Canada. The Committee also has the power to study policies, programs and legislation, and may review proposed amendments to federal legislation relating to certain aspects of the criminal law, family law, human rights law, and the administration of justice. Beginning on April 4 2019, the Committee undertook a study on the criminalization of HIV non-disclosure in Canada, specifically asking questions related to the recent prosecutorial directive, as discussed in the introductory chapter, limiting the scope of new prosecutions related to alleged HIV non-disclosure in the federal jurisdiction. I was invited to provide the Committee with outcomes of my dissertation research to help inform their study (Appendix 4). As a result of that testimony, along with over 30 witnesses from across Canada, the Committee released a report on June 18 2019 with a recommendation to immediately stop applying the laws of sexual assault to cases of HIV non-disclosure.

I will continue to engage with such processes as they emerge and are relevant as a part of my commitment bearing witness to the lives of people with whom I worked to realize this project.

Future research directions

Based on the approach taken in this dissertation, and a number of the outcomes, I will be moving forward in a number of areas to develop a program of research. One of the areas emerged out of my methods and the focus on ensuring the confidentiality of people in this study was paramount, while another direction is looking at how the issue of criminalizing HIV is shifting and changing under new biomedical realities. I discuss both briefly as follows.

As I explored in *Chapter 3: Methods, or how to study HIV criminalization,* communications between researchers and research participants are not guaranteed legal privilege in Canadian law. This means that anything participants say to researchers in the context of a research project could be seized by law enforcement, and guaranteed promises of confidentiality could be broken. Ethical guidelines lack specificity on how to engage with complex tensions between ethics and the law and researchers are provided with little detailed training on how to protect their participants. There have been a number of high- profile cases in recent years where researchers' data has been seized in the context of court cases. Moreover, the consequences of a breach of confidentiality can have a devastating impact on

individuals, including being ostracized from family and friends; the loss of employment, social assistance, and housing; having children apprehended by the state; harassment, bullying and violence; social exclusion and marginalization. The result of this context is that researchers may choose to avoid conducting research on criminalized and socially sanctioned social issues due to fear, uncertainty, and lack of training or support. This means that as a society we may lack important new research on complex social problems. To address this issue, I am working on a post-doctorate project that seeks to help address this issue through speaking to emerging and established researchers working on qualitative research projects involving socially sanctioned or criminalized people about the practices, tactics and strategies they use in their projects. Findings from the project will then be shared in academic and accessible formats to help establish a knowledge base of best practices, including outlining how to organize future research projects to protect confidentiality, as well as establishing how to help make better legal arguments in the event of a seizure or breach.

Another area of research emerging out of this dissertation will look to new HIV treatment and prevention technologies in the form of HIV *treatment as prevention* (TasP) and *pre-exposure prophylaxis* (PrEP) in relation to the criminalization of HIV non-disclosure and exposure in Canada and the potential for mandatory treatment adherence. This direction of research will explore new clinical and public health surveillance technologies focused on both the care and control of persons living with HIV who achieve an undetectable viral load through antiretroviral adherence, and the 'high risk' gay man who uses PrEP (with lower doses of antiretroviral therapy) to protect himself against infection. This work will consider the implications of these new technologies of risk, surveillance, and the practices of the self for both people living with and the "at risk". It will also consider how people who are targets of surveillance and forms of control are required to engage in new ways with therapeutic providers who diagnose, prescribe, monitor, and share this information with public health authorities and potentially with law enforcement.

In this dissertation I have worked to explore the criminalization of HIV non-disclosure, transmission and exposure, from the perspective of the criminalized. I began by looking to the past, exploring the historical experiences of women who had been punished for having venereal diseases in the early days of the Dominion of Canada. This act of looking to the past was intended to help address how the form of criminalization that we see today are not a blip or a backfiring of the criminal justice system. Rather, the very basis of this system, including the notion of who is considered a legally protected person, is formed on the backs of criminalized Indigenous women. Today, Canada is known as a global hot spot for criminalizing people living with HIV. In the process of interviewing people

who had faced criminal charges, I went across Canada meeting sixteen different people. I spent time with some of these people, learning about their lives, meeting their families and friends. This was a diverse array of people, from young to older, including Indigenous people, Black people, Latinx people, and white people; the participants included many socially marginalized people, including women with histories of sexual violence, some with histories of sex work, and many living in poverty. Some had served their sentence of incarceration many years before they met me, while others were under pretrial detention, still awaiting a trial. Collectively their experiences work to denaturalize the violence of criminalization, so as to help hold this violence to account. This project was conducted to help work to see justice when no justice had been done. These people's lives and experiences are shared here as a way to help form a basis for a life worth living, a life of flourishing and justice for criminalized people.

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Appendix 1: Consent and information form

RESEARCH STUDY CONSENT AND INFORMATION FORM

Title of Research Project: *Criminal charges for HIV non-disclosure and/or exposure: impacts on the lives of people living with HIV*

What is the purpose of this research project?
I understand that the purpose of this research project is to gain an understanding of the personal experiences and perceptions of people living with HIV who have been have been charged, prosecuted and/or threatened with charges in relation to non-disclosure or exposure of their HIV status.

Who is running this project?
I understand that Alexander McClelland, a doctoral student at Concordia University in the Centre for Interdisciplinary Studies in Society and Culture, is conducting this research project. This project is a doctoral thesis project for the Humanities Doctoral Program. This research is funded by the Canadian Institutes of Health Research Doctoral Award: HIV/AIDS Community-Based Research, 2013-2016.

For more information on the project please contact Alexander McClelland at:
crimprojectconcordia@gmail.com

How will the interview work?
I understand that the interview will last between 1.5-2 hours and will be digitally recorded. I will be asked a series of open-ended questions examining the following topic areas: **a)** emotions and feelings in relationship to my case and legal situation; **b)** impacts on relationships, family members, friends, and other social support supports; **c)** experiences and perceptions of public health, community organizations, the police, lawyers, and people who work in corrections institutions; **d)** experiences of access to treatment, care and support services; **e)** issues of the media and public coverage of my case; **f)** issues of discrimination, stigma and/or violence; **g)** perceptions of the criminal justice system; **h)** knowledge of the law and legal responsibilities.

During the interview, I can take a break at any time, as questions or pose questions to the researcher as I see fit. I also have the right not to answer any question I do not want to answer. I understand that at the end of the interview I will be provided 50$ cash for my time. If it is not possible to provide me cash, the researcher will seek to make alternate accommodations that suit my needs.

What are the potential risks for participating?
I understand that participating in this interview could pose a potential risk of harm. This is because I may be asked to describe past or current traumatic, stressful and/or violent events in my life. The

interview questions will also address issues that may be deemed illegal under current interpretations of the Canadian law. Depending on the situation, I may be in the process of facing criminal charges, or in a situation where criminal charges have been stayed, or be in the process of an appeal now or in the future. Where relevant, I understand that I have a right to consult my lawyer to ensure that participation in this interview will not impact my current legal situation. This could involve requesting a list of interview questions in advance. The researcher has taken all appropriate professional and ethical precautions to ensure that the potential risks of any harm are minimized. This includes the researcher respecting professional ethical obligations to maintain my full confidentiality through following best practices of data privacy, protection and storage. If I make a disclosure during the interview indicating that I could pose an immanent threat of bodily harm to myself, a child or other person, I understand the researcher will contact the appropriate authorities to inform them of the situation.

What are the benefits of participating?
I understand that there are a number of potential benefits of participating in this research project. I will receive 50$ for my time. This project will also make an important contribution, as there is no research project in Canada that documents the lives and experiences of people in this situation from their own perspective. Participation in this project will help develop a public record of the experiences of people who have been charged and/or prosecuted in relation to HIV non-disclosure and/or exposure, providing the participants a voice. Results of the project could be used for policy advocacy purposes to help address this growing situation in Canada.

Participation is voluntary!
I understand that I can stop participating in the study at any time, for any reason, if I so decide. If I decide to stop participating, I will still be eligible to receive the promised honorarium for agreeing to be in the project. My decision to stop participating, or to refuse to answer particular questions, will not affect my relationship with the researchers, Concordia University, or any other group associated with this project. If I choose to withdraw after the interview is conducted, I can contact the researcher in the means most convenient for me (either via phone, email or letter). In some cases, withdrawal from research may not be fully possible if the request comes after outcomes of the research have been published or disseminated. In this case, the researcher will delete any original files associated with my interview, but may not be able to delete other outcomes. In such a case, the researcher will inform me of the outcomes that have already been disseminated and address any limitations related to my request.

Please notify the researcher at* crimprojectconcordia@gmail.com *by September 1 2017 if you wish to discontinue participation in the study and have your data removed from the project. After this date it will likely no longer be possible to have data removed from the outcomes of the project.

How will confidentiality work?
I understand that all information I supply during the research will be held in confidence and be protected to maintain my confidentiality. My name, location, age or other identifying information will not appear in any report or publication of the research. To further protect my confidential, I can ask the to sign the consent form using a pseudonym of my choice.

I understand that my confidentiality will be ensured to the fullest extent possible through the ethical obligations of the researcher to me as a participant.

After the interview, as soon as possible, the interview will be transcribed and anonymized. This means that the recording of the interview will be written down and all identifiable information will be removed. Following this, all of the digital files of the interview recording will be destroyed. The digital recording of my interview will be safely stored in a professional password protected data storage website and only the researcher will have access to this information until it is deleted. Hard copies of the anonymous transcripts will be identified only with a pseudonym that is chosen by the researcher, and will not be linked to me in any way with identifying information.

What happens to the research findings?
I understand that outcomes from this project will be disseminated publically in various formats, including being presented at community and academic conferences and workshops published as articles in various community, policy or academic publications; and could potentially be developed into a book. The outcomes may also be available online depending on the specific situation. You can also ask that the information you provided not be used, and your choice will be respected. If you decide that you don't want us to use your information, you must tell the researcher before [date to be added]. As a research participant, I may request a copy of any of the above outcomes by contacting the researcher Alexander McClelland at: **crimprojectconcordia@gmail.com**

Questions about the research project?
If you have questions about the research in general or about your role in the study, please feel free to contact Alex McClelland at **crimprojectconcordia@gmail.com**. This research has been reviewed and approved by the Concordia Office of Research, and conforms to the standards of the Canadian Tri-Council Research Ethics guidelines. The Concordia Office of Research can be contacted at the following email address: **office.of.research@concordia.ca**

If you have concerns about ethical issues in this research, please contact the Manager, Research Ethics, Concordia University, 514.848.2424 ex. 7481 or oor.ethics@concordia.ca.

____ I HAVE CAREFULLY EXAMINED THE ABOVE AND I UNDERSTAND THIS AGREEMENT. I FREELY CONSENT AND VOLUNTARILY AGREE TO PARTICIPATE IN THIS STUDY. THE CONFIDENTIALITY PROTECTIONS, AS OUTLINED ABOVE, ARE CENTRAL TO MY AGREEMENT TO PARTICIPATE IN THIS STUDY. I HAVE BEEN PROVIDED A COPY OF THIS AGREEMENT FOR MY RECORDS.

____ I CONSENT TO HAVE THE RESEARCHER CONTACT ME IN FUTURE ABOUT ONGOING DEVELOPMENTS WITH THIS RESEACH PROJECT.

Further privacy protections: ***The research participant understands that they can sign below using a pseudonym***

Signature _____ **Date** _____
Participant

Signature _____ **Date** _____
Researcher
Alexander McClelland

Appendix 2: Project poster

Appendix 3: Interview guide

Criminal charges for HIV non-disclosure and/or exposure: impacts on the lives of people living with HIV

Overview of project

Central research question

How has the experience of being charged, prosecuted and/or threatened with charges in relation to HIV non-disclosure and/or exposure impacted HIV-positive people's lives?

Research objectives

The objectives of this project are to gain an understanding of the experiences of people who have been have been charged, prosecuted and/or threatened with charges in relation to non-disclosure or exposure of HIV status, including:

- People's emotional well-being, how they feel about themselves, confidence, feelings of self-worth, and feelings in relationship to their case and legal situation;

- People's relationships, including casual sex partners, long-term partners, family members, friends, and other social support supports since their case;

- People's experiences and perception of public health, community organizations, the police, lawyers, and people who work in corrections institutions;

- People's experiences of access to treatment, care and support services (clinical and community-based) since their case;

- People's perceptions of the media coverage of their case, and impacts of media coverage of their case;

- People's experience of various forms of discrimination, stigma and/or violence they may have faced since their case;

- People's perceptions of the legal and criminal justice system since their case;

- People's knowledge on HIV transmission, and legal responsibilities regarding disclosure of HIV status, and people's reflections on the current legal requirements.

Provide research participant with a printed copy of consent form (2 copies)

Potential risks of participation: during the interview we will be covering issues that are deemed illegal under interpretations of the Canadian law. This may involve the participant describing past instances where they did not follow the current interpretation of the law. Depending on the situation, the interview participant may be in the process of facing criminal charges, or in a situation where criminal charges have been stayed, or be in the process of an appeal now or in the future. Discussing aspects of the interview participant's case could be a potential risk in relation to these variables. During the interview the participant may describe past or current events in their lives involving the police, community organizations, public health, and/or prison institutions, as well as potential traumatic instances such as those related to be being arrested, of having their confidentiality breeched by police or the media for example.

Potential benefits of participation: there is no research project in Canada that documents the lives and experiences of people in this situation from their own perspective. Participation in this project will help develop a public record of the experiences of people who have been charged and/or prosecuted in relation to HIV non-disclosure and/or exposure, providing the participants a voice. Results of the project could be used for policy advocacy purposes to help address this growing situation in Canada.

Discuss consent process: notably the research participant has the right to withdraw at any time. Additionally, to protect their confidentiality the research participant will provide a pseudonym of their choice and can use this pseudonym to sign the consent form if they so choose. The interviewer will work to assure and protect the interview participant's confidentiality to the best of their ability (details of this are described in the interview process).

Discuss the interview and post-interview process:

- Length 1-2 hours - we can take a break whenever they like.

- The interview participant has the right not to answer any question, and can ask to have a question skipped without having to explain why to the interviewer.

- The interview will be digitally recorded (with up to two recorders). Only the interviewer will have access to the original recording(s). As soon as possible, the interview will be transcribed and anonymized (meaning that the recording will be written down and all identifiable information will be removed). Immediately after this, all of the digital files of the interview recording will be destroyed.

- Reminder that the interview can end the interview at any time and participation in the project is voluntary. The interviewer's contact information is provided on the consent form, so after the interview, if the participant wants to withdraw they can contact the interviewer.

- Depending on the situation, inform the research participant that this may be the first of two potential interviews. This means that only the first section of this interview guide will be covered, and in a follow up interview the rest of it will addressed.

- At the end of the interview the participant will be provided 50$ for their time. Depending on the institutional context within which the participant is situated, if it is not possible to provide the participant cash, the interviewer will seek to provide a 50$ amount to the interview participant's canteen, or make accommodations with the participant that suit their needs. If there is another interview, the participant will be compensated another 50$.

- Before beginning the recording, the participant and research will decide on a pseudonym for the participant. This pseudonym will be used throughout the interview when referring to the participant, and will be the only name associated with any files resulting from the interview.

Discuss future plans for research: notably that the research will be diffused publically in various formats, it will be presented at community and academic conferences and workshops, it will be published as articles in various community, policy or academic publications, and could potentially be developed into a book. The outcomes that were just described may also be available online depending on the specific situation. You can also ask that the information you provided not be used, and your choice will be respected. If you decide that you don't want us to use your information, you must tell the researcher before [insert date].

While the topics covered by this project deal with so-called illegal activity and circumstances of blame and people being judged for how others define what is *right* or *wrong*, it must be noted that the purpose of this interview is not for the interviewer to judge the past or experiences of the interview participant. Rather we hope to develop an open and non-judgemental environment during the process of this project and during the interviews.

Ask the research participant if they have questions or concerns.

Questions:

Section 1

How was your day? What did you do today?

Tell me a bit about yourself:

- Where are you from? Where would you call home?
- How old are you?
- Can you describe your family situation to me?
    - Do you come from a big family? A small family?
    - Do you have strong relationships with any family members? If, so who are they?
    - Do you have children? If so, can you tell me about them?
- How do you make a living? (if relevant?)
- What is your current housing situation?
- What kinds of people do you usually have relationships with?
    - Are you in a current relationship? If so, can you tell me a bit about it?

- How long have you known that you are HIV-positive?
- How did you find out you had HIV?
- What was your reaction at the time to finding out your status?
- Are you on medication for your HIV now? If so, how long have you been on it?
- Do you have a regular doctor? If so, where do you see them? How do you feel about your current doctor?
- Were you connected to any organizations when (or after) you found out your status? If so, which ones? And for what programs or purposes?
- What is your citizenship status?
    - If newly, when were you granted citizenship?
    - If no, what form of status do you have?
- Anything about yourself that you want me to know before we move on?

Section 2

Lets talk about some of the first details of your case right around when you were arrested and/or charged:

- Can you tell me from the beginning when you were first charged what happened?
- What charges were you told you had?
- Were you contacted by public health before by the police? If so, how did that work and what took place? How did you feel about the way public health engaged with you?
- Had you previously received an order from public health to refrain from any activity or to report your sex partners to them? If so, did you follow the terms of the order? Why or why not?
- What happened when you were first arrested in relation to HIV issues?
- What did the police tell you during or after the arrest?
- How did the police treat you?
- Where did the police take you?
- Can you tell me about the conditions under which you were held?
- How did the other people there treat you?
- If you were on HIV medications at the time did you have access to them? If not, what happened? If yes, who did that work?
- How did you feel about what was happening?
- When was the first time you spoke to a lawyer about the situation?
    - How did you get connected to the lawyer?
    - How did you feel about your lawyer?

    - Did you feel your lawyer had knowledge of HIV and other cases similar to yours?
- Were you connected to any services, or community organizations around that time? If so can you explain for what purposes?
    - How did you feel about the support or service they provided?
- Can you tell me about how members of your family members reacted? (if relevant)
- Can you tell me about how your partner(s) reacted? (if relevant)
- Can you tell me about how your friends reacted? (if relevant)
- Was the media involved at the beginning? If so, how did you find out?
- What were your feelings about any early media coverage of your case?
- How did the media find out information about you?
- What was most helpful for you during that time?
- What was least helpful for you?
- Anything else you would like me to know about that time?

Section 3

Lets talk a little bit about the experiences that led to the charge(s):

- Can you tell me what led to you being charged? If so, please explain your understanding of what took place.
- How do you feel about that experience?
- Does your understanding of what happened differ from the complainant(s)? If so, can you explain how?
- Did you ever have contact with the complainant after the charges were laid, and if so under what circumstances?
- Did you know at the time that there could be legal consequences? How did you feel about that if so?
- Do you feel like what took place is something that should be considered illegal? Please explain?
- What did you know at the time about your HIV and how it was transmitted?
- Had you previously received information, counselling or support on HIV transmission? If so, did you feel that support and information was adequate for your needs, and your practices?
- Anything else you would like me to know about that time?

Section 4

Lets talk about your first court date and other experiences in court:

- Tell me about your first court date? What took place?
- Was this the first time you had been in a courtroom? If not, was it different or the same as other times? Please explain?
- How did you feel afterwards?
- Did the judge address you? How did you feel about what the judge said to you?
- Did you case go to a trial? If so tell me about the trial? If not, what took place?
- How did you feel about what took place during the trial or court proceedings? (if relevant)
- How did you feel about your lawyer?
- How did you feel about the Crown attorney(s)?
- What supports did you have during that time?
- How did your family members react during that time? (were they supportive? Not supportive?)
- How did your friends react during that time?
- How did your partner(s) react?
- Did the media cover this period of time? Did you read what was reported?
- How did you feel about it?
- During this time how did you feel about yourself?
- What were the outcomes of the trial or court proceedings?
- How did you feel after your heard the outcome or verdict?
- What was most helpful for you during that time?
- What was least helpful for you?
- Anything else you would like me to know about that time?

Section 5

Lets talk about today and how things are now:

- How are you doing now?
- Do you think that the charges and/or trial have changed how you feel about yourself? If so, can you explain to me how, or how not?
- How are things with your health?
- Has your physical health changed since the charges and/or trial? If so, can you explain to me how, or how not?
- Has your mental health changed since the charges and/or trial? If so, can you explain to me how, or how not?

- Have your relationships with family members changed since the charges and/or trial? If so, can you explain to me how, or how not? (if relevant)
- Have your relationships with friends changed since the charges and/or trial? If so, can you explain to me how, or how not? (if relevant)
- Have your relationships with your partner(s) changed since the charges and/or trial? If so, can you explain to me how, or how not? (if relevant)
- Has what happened impacted your social life? If so, can you explain to me how, or how not? (if relevant)
- Has what happened impacted your sex life? If so, can you explain to me how, or how not? (if relevant)
- Has what happened impacted how you make a living, your job, or economic supports? If so, can you explain to me how, or how not? (if relevant)
- Has what happened impacted your housing situation? If so, can you explain to me how, or how not? (if relevant)
- Are you in contact with any organizations currently? If so, which organizations and what do they do for you?
- What have you learned from what happened?
- What advice would you give other people living with HIV based on your experiences?
- Anything else you would like me to know about how things are going now?

Section 6

This the last set of questions, so we are almost done!

Let's talk about what the future:

- What do you think is going to be coming next for you in life?
- How do you feel about the future?
- Do you look forward to what could come next in your life? If yes/no, please explain?
- Do you feel as though you have control over your future? If yes/no, please explain?
- Have your feelings about the future changed since your charges and/or trial? If yes/no, please explain?

Thank you so much for your time!

- Are there any final things you want people to know about?

- Review consent process
- Review withdraw process
- Provide contact information and reminder re: specific ways to contact, and importance of confidentiality.
- Do you have any questions for me?

Appendix 4: Testimony to Justice Committee

Alexander McClelland

House of Commons Standing Committee on Justice and Human Rights, Study on the Criminalization of HIV Non- Disclosure, Ottawa, Ontario.

April 2019

Thank you to the Chair and the members of the Justice Committee. I'm currently a doctoral student focused on sociology at Concordia University, and later this year I will begin a Social Science and Humanities Research Council Banting Post-Doctoral Fellowship, in the Department of Criminology at the University of Ottawa. I am also a member of the Canadian Coalition to Reform HIV Criminalization.

For my doctoral research, I was funded by the Canadian Institutes of Health Research and Concordia University to examine the experiences of people living with HIV across Canada who had been charged, prosecuted or threatened criminally in relation to alleged HIV non-disclosure. To my knowledge, this is the first qualitative research study, globally, focused specifically on HIV criminalization from the perspective of the people who have lived it.

I will share some findings of my doctoral research. I have also provided statements to the Committee Clerk from people who are currently incarcerated about their experiences of the harms of criminalization.

In speaking directly with people who have been criminally charged, my research puts into question dominant understandings of courts and the media, that people living with HIV are violent perpetrators who are actively trying to transmit to others. Rather, what comes to be institutionally understood as wrongdoing, is much less obviously so. Because of criminalization, complex and nuanced situations, including people's silence, fear, actual disclosure, or in some cases the inability to address their own HIV status, is forced by the criminal justice system into the dichotomous narrative of victim and perpetrator.

I conducted 28 interviews with 16 people from 5 different provinces. I spoke with 5 women and 11 men, one of the women identified as a trans woman. This was a diverse group of people, who comprise a wide range of experiences across the spectrum of who is facing charges in relation to HIV non-disclosure, many of whom are socially marginalized, including Black and Indigenous people, gay men, people who live poverty, and women with histories of street-based sex work. The youngest person I interviewed was in their mid-teens at the time of charges. The oldest was in mid-fifties at the time of charges.

The interviews consisted of detailed questions about people's experiences from the time they found out they had been criminally charged, to, if relevant, their arrest, court proceedings, sentencing, incarceration, release, and their lives outside after their sentence. 3 of these people had been threatened with criminal charges by police, while 13 had been formally criminally

charged, all with aggravated sexual assault. In only one of these cases was HIV transmission alleged to have taken place.

All of the women interviewed indicated having long histories of sexual abuse by men and discussed a context where disclosure was highly complex due to their lack of power in the relationships. A woman I spoke with was charged with aggravated sexual assault because she had been gang raped and did not disclose to her rapists. Another woman who was threatened with criminal charges was raped at knife point, yet she was the one threatened with charged with aggravated sexual assault. Both had histories of sex work, and authorities did not treat their accounts of their sexual assaults seriously. One of these women told me, "if I'm guilty of anything, I'm guilty of being raped."

The charge of aggravated sexual assault was extremely confusing for people, as they understood the sex they had as consensual. A majority of the people in the study were concerned about transmitting HIV to someone else and understood that they acted in a manner so as to protect their partners from potential transmission – such as noting that they took their medications regularly, rendering them uninfectious, or used condoms, or both. One woman I spoke with handed her partner a condom prior to sex, which he did not use; she is now a registered sex offender. In some cases, people had disclosed to their partners, who later went to the police and lied that disclosure had not taken place.

Due to being charged with a criminal sanction usually reserved for the most violent non-consensual actual sexual assaults, combined with being HIV-positive, the people I spoke with were confronted with intensified forms of punishment, violence and discrimination. This

included:

- Denial of bail and ultimately incarceration for long periods of time on remand prior to trial, or before charges were dropped or stayed.
- Extraordinary release conditions as part of bail or conditional release – including being mandated to present oneself to police 24 hours in advance of proposed sex with their sexual partner, and having the partner consent to the sex in front of police; the people I interviewed who had these conditions imposed had undetectable viral loads.
- Additionally, people I spoke with how there was wide-spread lack of knowledge on the current science of HIV by the police, lawyers and courts – putting people who were criminally charged in the position of having to educate those tasked with criminalizing them viral load and transmission. People felt the police's stigma was enabled by the legal context of criminalization.

All but 2 of the 14 people charged indicated that this was their first-ever criminal charge. Despite this, all but 1 of them were denied bail due to the perceived severity of the case and were either held in remand or under house arrest for long periods of time. 7 people I spoke with were prosecuted, with 5 of the 7 of them pleading guilty. The reasons indicated for taking a plea were due to being coerced by their lawyer into pleading (despite having undetectable viral loads, or having used condoms), being fearful of missing their families, or they were ashamed of the charge and of their HIV status being exposed widely to the public. None felt they were actually guilty of a crime deserving of such a punitive state response. The longest sentence served was close to 15 years, while the shortest sentence served was approximately 2.5 years.

From the point of arrest, through trial, incarceration and release, people described a series of events that were marked by HIV-related stigma, panic, discrimination and fear. People described a range of forms of violence at the hands of government employees, namely police officers and prison staff, including:

- Denial of healthcare and medication access from corrections employees – one person I spoke with almost died as guards would continually rip up his urgent requests to see a doctor in his face.
- Incarceration in administrative segregation for long periods of time
- Breaches of privacy by disclosing HIV status and charges by corrections in front of others, knowing that physical violence would or could result.
- Assaults by police and corrections officer, accompanied by stigmatizing comments and discriminatory behavior.

  One white man told me: "I was getting beaten by all the inmates, 'cause the correctional officers had disclosed my charge to people on the range. I was on an isolated range for violent murderers and would still get harassed, you know this rape charge and HIV was worse than being a murderer in their eyes. One officer pushed me to the ground naked, holding me with his boot on my chest, saying he would never touch someone with AIDS."

  Another indigenous woman told me: "they treated me like dirt. They only touched me with gloves and they used that really heavy alcohol rub after. They talked down to me, like not talking to me like I was not a person, an AIDS person"

Given the charge of aggravated sexual assault, as a result of being registered as a sex offender people were:

- Not able to get the past employment they had expertise in doing– and were denied jobs

when applying due to being a registered sex offender

- On social assistance even though they want to work
- Regularly denied housing: one person was told: "we don't rent to rapists" – the person had had their charges dropped by the Crown but information about the case was widely available online
- All of the participants noted that they failed or did not meet the criteria of the various psychological tests used to determine what kind of sex offender they were – with a few noting that the tests themselves had now caused ongoing psychological trauma due to having been forced to watch videos of child pornography and violent sexual assaults, as a well as being coerced into defining their normal adult sexual desires as deviant and wrong just due to the fact that they had HIV.

The past charge continues to extend into their daily lives today through threatening their economic security.

> One indigenous woman told me: "I am not allowed to work in the school I used to. I love working with kids. But the school won't allow me now… because of sexual aggravation"

> One white man told me: "To label someone a sex offender you know, that's for life, I have to carry this for the rest of my life. I think it's really unfair."

All of the people I spoke with had a very hard time psychologically coping with being understood as a violent rapist. As a result of the experiences of criminalization, all of them had tried to commit suicide, or had long periods of suicidal ideation. Today, a majority of the people I spoke

with live with post-traumatic stress disorder, which has a wide range of impacts on their daily lives.

Through speaking with criminalized people directly, it becomes apparent that applying the criminal law, specifically the laws of sexual assault, results in causing greater harm, often exacerbating situations that were already marked by trauma, shame and discrimination.