

CHAPTER ELEVEN

CRIMINALISATION OF HIV TRANSMISSION: ANGLO-NORTH-AMERICAN COMPARATIVE PERSPECTIVES AND OPTIMAL REFORMS TO FAILURE OF PROOF DEFENCES

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Introduction

The Law Commission have recently considered the broader ambit of reform of offences against the person precepts.¹ This important review has directly examined whether, under a revised statute in this arena, bespoke criminal liability should apply to the transmission of disease, particularly in the context of the reckless transmission of HIV or sexually transmissible infections through consensual sexual intercourse.² The recommendation promulgated is that the creation of any individuated offence attached to the transmission of HIV ought to be delayed pending a wider review of substantive principles, but that disease may fall within the wider definition of ‘serious injury’, under more general statutory reform proposals that can propitiously be advanced immediately.³

A fundamentally different perspective to the criminalisation of transmission of HIV is advanced in this chapter. It is asserted that a de novo legislative response is urgently needed to specifically address thresholds of culpability and blameworthiness to ‘legitimate’ any potential inculpation, and to provide much needed clarity and certainty that ‘there is a troubling lack of predictability in an area of the law that cries out for

¹ Law Commission, *Reform of the Offences Against the Person* (Law Com No 361, 2015).

² *ibid* [6.1 - 6.146].

³ *ibid* [6.143 - 6.146].

certainty'. There is an egregious failure under extant law to distinguish between levels of culpability and levels of (risk) of harm, and to consequentially avoid the danger of over-criminalisation for consensual sexual activity.⁴ In this context our focus is to consider a spectrum of legislative defences that ought to apply as failure of proof factorisations, and are individually exculpatory.⁵ The parameters of these failure of proof defences are examined against three posited questions: (1) If D1 uses a condom, is it imperative still to disclose their HIV status?; (2) If D1 has a non-detectable or a very low viral load, can non-disclosure still result in criminal liability?; and (3) Can a failure of proof defence apply if the sexual activity that D1 is engaging in is viewed as low risk? These postulations are extirpated in a comparative sense, reviewing extant English law in juxtaposition with Canadian precepts, and set against a myriad of beguilingly inconsistent current principles adopted across a panoply of US states. The aim is to charter a pathway towards a novel optimal reform model for statutory defences applicable to the transmission of HIV. Moreover, it is contended whether if D1 was justified in exposing V to the risk of infection without disclosing the condition should be a question for the jury in each particular case.⁶ The evaluation by jurors, as moral arbiters, should be with an awareness that the evaluation of recklessness or otherwise on the part of D1 may apply in certain defined situations at an earlier temporal individuation than consent.⁷

A cogent rationale exists for autonomous individual determination to consent to the risk of becoming infected with HIV via consensual intercourse. This is not, nor should it be, the end of potential defences for D1 and there are a number of other circumstances whereby it can be argued that an actor has behaved in a responsible manner to sexual activity, and no criminal liability should apply.⁸ If a defendant uses condoms, or is aware of the level of their low viral load, or knows that certain sexual activities pose less of a risk of transmission, then they should be able to utilise these defences, either disjunctively or conjunctively, to avoid

⁴ See generally, Jonathan Rogers, 'Criminal Liability for the Transmission of HIV' (2005) 64(1) Cambridge law Journal 20.

⁵ See generally, Matthew Weait, *Intimacy and Responsibility: The Criminalisation of the Transmission of HIV* (Routledge-Cavendish, Abingdon 2007).

⁶ See generally James Chalmers, *Legal Response to HIV and AIDS* (Hart Publishing, Oxford, 2008).

⁷ Udo Schuklenk, 'Should We Use Criminal Law to Punish HIV Transmission?' (2008) International Journal of Law in Context 277.

⁸ Law Commission (No 361) (n 1) [6.19].

criminal sanctions. Medical and scientific advances in our understanding of the disease, and effective prevention, should prompt a wider recategorisation of harm/risk of harm.

The statistical probability attached to no transmission through safe sex, the advancement of anti-retroviral medication, and that certain types of sexual activity pose less of a risk of transmission, signify that there are more extenuating circumstances where the defendant should not be criminally responsible for his actions. Condom use, viral load, and certain types of sexual activity should be considered to be defences of ‘reasonable precautions’,⁹ where the defendant has attempted to reduce the risk of the virus being transmitted, and the risk was a reasonable one to take in that the risk of transmission is very small. The concomitant is that the issue of recklessness, and conscious advertence to the risk of harm on the part of the defendant, is presented at an earlier temporal individuation, prior to the consent question.¹⁰ Recklessness, or otherwise, may, thus, arguably be viewed through a legal prism where it is supererogatory with consent not affected by non-disclosure. These defences can be categorised as ‘failure of proof’ defences,¹¹ in that condom use, viral load, and low risk sexual activities negate definitional elements of the offence (recklessness), and with an affirmative evidentiary onus on D1. The defendant as a practical matter may have to act affirmatively to present evidence on the issue of a given element of the offense; he may have certain evidentiary burdens. Robinson has categorised the ambit of such defences in the following broad terms:

Failure of proof defenses consist of instances in which, because of the conditions that are the basis for the ‘defense’, all elements of the offense charged cannot be proven. They are in essence no more than the negation of an element required by the definition of the offense.¹²

The focal inquiry should be whether a defendant, who uses a condom, has awareness of low viral load from a practitioner, or engages in low risk sexual activity, is reckless *ab initio*, in light of medical and scientific

⁹ Keith JM Smith, ‘Sexual Etiquette, Public Interest and the Criminal Law’ (1991) 42 Northern Ireland Law Quarterly 309, 328.

¹⁰ See generally, Sun Goo Lee, ‘Criminal Law and HIV Testing: Empirical Analysis of How at Risk Individuals Respond to the Law’ (2015) 14 Yale Journal of Health Policy Law and Ethics 194.

¹¹ Paul H. Robinson, ‘Criminal Law Defenses: A Systematic Analysis’ (1982) 82 Columbia law Review 199, 204.

¹² *ibid* 204.

developmental awareness. As previously stated, recklessness embodies not only that the individual actor knowingly adverts to and takes a risk, but also that the conduct was ‘unjustified’ in the circumstances that D knows or believes it to be. This factorisation should involve a wider pantheon of legitimate inculcations that extend to the social value of the activity in question (freedom to pursue sexual relationships), the level of harm risked, and probability of actual harm or consequential harm reduction.¹³

The corollary is that awareness of one’s undetectable viral load per se may denote that an individual is not being reckless or acting intentionally as to harm through transmission, encompassing situations where a medical practitioner has confirmed that the actor was not infectious at the time of the sexual contact. It has been recently submitted that the risk in such circumstances is *de minimis*, practically non-existent in practice, with a study of 44,000 unprotected sex acts involving an HIV positive partner, but with an undetectable viral load due to treatment, revealing no cases at all of actual transmission;¹⁴ a stark iteration of positive scientific developments impacting on harm reduction.

Furthermore, condom use per se as a defence is in line with public health initiatives, and utilising such precautions should be encouraged, given that they can significantly decrease the risk of transmission of the virus, and thereby encourage safe sex practices. It is proposed that if condom use can be a defence, then viral load, and certain types of sexual activity, should also be permitted as failure of proof categorisation defences, and all constitutively *eiusdem generis*. The defences share articulated commonalities in that the statistical probability of transmission through protected intercourse can be the same as, or more risky than, a low or undetectable viral load, and can be akin to certain types of sexual activity. Systematic review and meta-analysis have indicated, for instance, that the risk of transmission in vaginal sex decreases to 1 in 10,000 for the woman and 1 in 20,000 for the man.¹⁵

The subsequent parts of this chapter are split into four sections, examining in turn the current relevance of condom use, low or undetectable viral

¹³ See generally, Scott Burris, ‘Do Criminal Laws Influence HIV Risk Behaviour? An Empirical Trial’ (2007) 39 *Arizona State Law Journal* 467.

¹⁴ Law Commission No 361 (n 1) at [6.19].

¹⁵ Isabel Grant, ‘The Prosecution of Non-disclosure of HIV in Canada: Time to Rethink *Cuerrier*’ (2011) *McGill Journal of Law and Health* 7; and see generally Sun Goo Lee (n 10).

load, and types of sexual activity as a probative defence, or otherwise, within England, Canada and identified U.S. states. Extirpation of the individuated legal systems is conducted in a comparative review framework in order to promulgate an optimal statutory defence template for universal adoption and holistic incorporation: our new template reconceptualises individuated legislative responses that have been beneficially adopted in Iowa, Illinois and California. The aim is to present a cathartic panacea to incremental ad hocery and uncertainties that obfuscate extant law in terms of fault (recklessness) conjoined with appropriate defence parameters. It will also assist jurors as moral arbiters in terms of the determination of questions of fact, invoking systematic medical and scientific guidance appurtenant to probative exculpatory conduct.

Failure of Proof Defences: English Law

Condom Use as a Potential Defence to the Reckless Transmission of HIV

Neither the common law of England, nor specific legislation, has determinatively stipulated that any defence, other than informed consent, can be raised in a sexual transmission of HIV case.¹⁶ Under extant precepts, as determined in *Dica* and *Konzani*, liability prevails for the infliction of grievous bodily harm (HIV) where four offence-definitional constructs apply: (i) transmission of the disease occurs, and exposure to the risk of infection is insufficient; (ii) D intends to inflict some harm upon V or consciously adverted (recklessly) to that risk; (iii) there was no prevailing consent on the part of V to the risk of infection; and (iv) a lack of honest belief on D's part that V consented to such a risk. In *Dica*,¹⁷ Judge LJ stated obiter that levels of precaution 'may' lead to a defence, and that it could be left for the jury to assess whether such protection would be sufficient:

If protective measures had been taken by the appellant that would have provided material relevant to the jury's decision whether, in all the circumstances, recklessness was proved.¹⁸

¹⁶ The Law Commission has recently considered the relevance of condom use in cases of HIV Transmission: Law Commission, *Reform of Offences against the Person A Scoping Consultation Paper* (Law Com SP no217, 2014).

¹⁷ *Dica* (n 17) [11].

¹⁸ *ibid* [11].

Further comments by Judge LJ in *Dica* seemed to indirectly indicate that other circumstances, including potentially the use of condoms, could present a defence: illustratively, consent to running the risk of becoming infected should not be invalidated where¹⁹ a Catholic couple,²⁰ because of religious beliefs, are unable to use protective precautions, even though one may become infected by the other, and there is prior awareness that one partner is HIV+. The inference, albeit disjunctive, is that condom use may be utilised as a defence in other cases as the risk of transmission is significantly reduced, and the use of precautions in such circumstances would demonstrate that a defendant was acting responsibly. Emphasis was also made of condom use when referring to casual encounters.²¹ Additional support for this proposition can be found in the Crown Prosecution Service (CPS) guidelines,²² where it is acknowledged that prophylactic measures may implicate that no prosecution should ensue: it would be problematic to establish that the person using the precautions was acting recklessly.²³ The CPS appears to concede that a defendant's actions demonstrate responsible behaviour, the apotheosis of recklessness. It was, however, emphasised that it is the responsibility of the infected person to ensure that precautions are taken. The CPS guidelines also indicate that public policy rationalisations implicate that prosecutions will not take place when precautions have been used.²⁴ The statement of Judge LJ in *Dica* and the CPS guidelines are rational proposals: an individual should be viewed in such circumstances as acting responsibly, and by acting responsibly D's conduct may be justified. If the infected person is practising safe sex, then it would be extremely difficult for the prosecution to prove that he acted recklessly or intentionally. The counterpoise is that use of condoms is more effective in restricting the spread of the virus than informed consent: consenting to running the risk of infection offers no protection.

¹⁹ *ibid* [49].

²⁰ *ibid* [48].

²¹ *Dica* (n 17) [47].

²² Crown Prosecution Service (CPS), 'Intentional or Reckless Sexual Transmission of Infection'

<http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/index.html#Safe> accessed 18th April 2015.

²³ *ibid*.

²⁴ *ibid*.

Further support for this proposition has emanated from a number of academicians.²⁵ As early as 1991, it was advocated that condom use could be a defence in these types of cases: it is 'a proper and necessary concession to human nature'.²⁶ To restrict an individual from becoming intimate with another person as a result of their condition, and allowing consent as the only means to circumvent liability, is a threshold that is set too high. There should be a different inculpatory-exculpatory gradation whereby an individual can still maintain intimate sexual relationships, particularly as stigma is still attached to those who are carrying the virus.²⁷ It is paradoxical to allow consent to act as a defence, but not the use of condoms. It is conceded that consent gives a person the opportunity to make an informed decision, and this is not an attempt to exclude consent as a defence, but consent does not reduce the risk as significantly as precautions. In concurrence with this proposition, it has been suggested by a number of commentators that precautions should be demarcated as higher than informed consent via disclosure, and that even attempted use of protective measures should be sufficient as a defence to transmission.²⁸ The effective use of protection should be a defence, but attempted use should not, as it is the equivalent to unprotected intercourse. In such circumstances, disclosure of HIV status should be a requirement to ensure that the party who is unaware has the opportunity to make an informed decision. A distinction must also be drawn, as Chalmers has articulated, between a moral duty and a legal duty, when referring to the use of precautions,²⁹ and the disclosing of HIV status. Indeed, an individual has a moral duty to inform all of their prospective sexual partners, even when he is using protection, but a moral duty does not necessarily equate to a legal duty, a proposition that has been helpfully advanced by Bergelson in the wider context of the overarching parameters of consent.

²⁵ Matthew Weait, 'Criminal Liability for Sexually Transmitted Infections' (2009) 173 *Justice of the Peace* 45; Samantha Ryan, 'Risk-Taking, Recklessness and HIV Transmission: Accommodating the Reality of Sexual Transmission of HIV within a Justifiable Approach to Criminal Liability' (2007) 28 *Liverpool Law Review*, 215.

²⁶ Smith (n 9) 328.

²⁷ Emily Mackinnon and Constance Crompton, 'The Gender of Lying: Feminist Perspectives on the Non-Disclosure of HIV Status' (2012) 45 *University of British Columbia Law Review* 407, 425.

²⁸ Dennis Baker, 'The Moral Limits of Consent as a Defence in the Criminal Law' (2009) 12 *New Criminal Law Review* 93, 114.

²⁹ James Chalmers, 'The Criminalisation of HIV Transmission' (2002) 28 *Journal of Medical Ethics* 160, 162.

If a defendant uses a condom, does that mean that he is being reckless or otherwise? It is arguable that even if the defendant used precautions, the Crown, in contrast to the CPS guidelines, may still establish that the defendant foresaw harm, and still took an unjustified risk.³⁰ This, we contend, is unsustainable, as the use of condoms demonstrates that the user is seeking to alleviate the risk of transmission: responsibility rather than recklessness is the apposite standardisation.³¹ Recklessness is best defined as unjustifiable risk taking,³² and Judge LJ stated in *Dica* that recklessness is established, 'if he knew or foresaw that the complainant might suffer bodily harm and chose the risk that she would'.³³ The use of a condom establishes that the defendant is conscious that he may infect another, and as he has used precautions, it can be persuasively asserted that he has endeavoured to eradicate the risk of transmitting the virus, to a reducibly justifiable threshold. It is worth re-emphasising that statistical data, in reference to protected receptive vaginal intercourse, set the approximate risk in such a situation as extremely remote at one in ten thousand for the woman, and one in twenty thousand for the man. A failure of proof defence predicated on lack of mens rea is consequently adumbrated. The use of prophylactics indicates that the threshold for reckless behaviour has not been met: the risk has been so significantly reduced that D1's actions should not establish culpability.

English Law and the Relevance of an Individual's Viral Load

A number of proponents have suggested that actors with an undetectable viral load would not be considered reckless for transmission of HIV within the purview of English law,³⁴ but strikingly, there is no judicial clarity on the matter.³⁵ Confusion reigns supreme as to whether a low or undetectable viral load can act as a defence, or whether it ought to be exculpatory, as this has not been an issue that has been directly raised within our courts. The guiding appellate decisions in *Dica* and *Konzani*³⁶

³⁰ Simon H. Bronitt, 'Spreading Disease and the Criminal Law' (1994) Criminal Law Review 21.

³¹ Ryan (n 25) 234.

³² *R v G* [2003] UKHL 50.

³³ *R v Konzani* [2005] EWCA Crim 706 [2005] 2 Cr. App. (Judge LJ) [37].

³⁴ James Chalmers (n 6) 146.

³⁵ The Law Commission has recently considered the relevance of viral load in cases of HIV transmission: Law Commission, *Reform of Offences against the Person A Scoping Consultation Paper* (Law Com SP no 217, 2014).

³⁶ *R v Konzani* (n 33) 14.

were concerned with unprotected intercourse, and the issue of consent. Probatively, a defendant who has a low or undetectable viral load would need to be fully aware of the level in order to raise it evidentially as a failure of proof defence. Support for this proposition has been cogently advanced by Smith, who submits that relying on medical advice should enable the defendant to evade responsibility.³⁷ This would be achieved by regular testing of the level of the viral load. The World Health Organisation endorses such proposals by suggesting that the level of an individual's viral load is one of the greatest risks in transmitting the virus to another person, and that reducing the viral load can be one of the most effective ways of diminishing the possibility of HIV transmission.³⁸ The level of an individual's viral load can be a deciding factor as to whether the virus will be transmitted: the lower the load, the less likely is the possibility of infecting another person.³⁹ The viral load is reduced by taking antiretroviral treatment (HAART), and consistent use of the medication can decrease the load to an amount where it will be undetectable.⁴⁰ A further, and more radical, endorsement has emanated from the Swiss Federal Commission for HIV/AIDS vis-à-vis the use of HAART, and the transmission of HIV. It was announced that if an individual does not have another sexually transmitted disease, complies with their HAART, and has had an undetectable load for at least six months, they will be unable to transmit the virus.⁴¹ In light of this factorisation, the CPS have acknowledged that the risk may be significantly reduced, and that it can be argued that the level of the viral load can be just as effective as condom use.⁴² This may denote that an individual's viral load might need to be taken into practical consideration when deciding whether to prosecute an individual. If the accuracy of the

³⁷ Smith (n 9) 328.

³⁸ World Health Organisation 'Antiretroviral Treatment as Prevention (TasP) of HIV and TB: 2012 update WHO/HIV/2012.12' (June 2012) <www.who.int/hiv/pub/mtct/programmatic_update_tasp/en/index.html> accessed 20 April 2015.

³⁹ *ibid.*

⁴⁰ *ibid.*

⁴¹ Pietro Vernazza and others, 'HIV-positive individuals not suffering from any other STD and adhering to an effective anti-retroviral treatment do not transmit HIV sexually' (January 2008) http://www.edwinjbernard.com/pdfs/Swiss%20Commission%20statement_May%202008_translation%20EN.pdf accessed 20 April 2015

⁴² Crown Prosecution Service (n 22).

Swiss statement is to be assumed, then an undetectable viral load is even more effective than condom use in terms of effective harm diminution.

***England: The Transmission of HIV
and the Type of Sexual Activity***

Although experts have recognised the complexity of providing a precise assessment of the risk of sexually transmitting HIV, it is accepted that some activities carry less of a risk than others.⁴³ Statistical and meta-data analysis have revealed, for instance, that risk of infection from oral intercourse is extremely low, and risk of infection from unprotected anal intercourse is higher with a dissonance between whether the HIV partner is receptive / insertive. Where the HIV partner is the receptive participant, risk has been assessed at 4 in 10,000 for each act of unprotected intercourse. Even though there is no prescriptive formula for assessing the risk, it is evident that certain types of sexual activity can reduce the risk of transmitting the virus. As the risk of transmission fluctuates between the types of conduct, Bennett *et al.*,⁴⁴ propose that if an individual participates in low risk activities, these do not require a duty to inform the other person of one's HIV status as the risk is reduced, and they are therefore acting in 'a responsible and morally justifiable way'.⁴⁵ Thus, it is suggested that the type of activity in which the defendant partakes may signify that he has been acting in a responsible manner if he is aware that this would reduce the risk of infecting another person. The type of activity is important in assessing the probability of transmission. Although, as stated, it is recognised that unprotected anal intercourse, where the insertive partner is HIV+, is the most precarious activity,⁴⁶ the risk of transmitting the virus becomes far more attenuated when assessing other types of interaction. Unprotected vaginal intercourse poses less of a risk⁴⁷ when it involves male to female transmission. The risk is even more diminished when it encompasses potential transmission from unprotected female to male

⁴³ Eric Mykhalovskiy, Glenn Betteridge and David McLay, 'HIV Non-Disclosure and the Criminal Law: Establishing Policy Options for Ontario' (August 25, 2010) <http://www.catie.ca/pdf/Brochures/HIV-non-disclosure-criminal-law.pdf> accessed 20 April 2015.

⁴⁴ Rebecca Bennett, Heather Draper and Lucy Frith, 'Duties to Forewarn Ignorance is Bliss? HIV and Moral Duties and Legal' (2000) 26 *Journal of Medical Ethics* 9.

⁴⁵ *ibid* 12.

⁴⁶ Carol Galletly and Steven D Pinkerton 'Toward Rational Criminal HIV Exposure Laws' 2004 32 *Journal of Law Medicine and Ethics* 327, 328.

⁴⁷ *ibid*.

through vaginal intercourse. What ought to make the type of sexual activity a defence is that when the HIV+ partner is the receptive partner, the statistical probability of transmission through protected intercourse is thought to be the equivalent of female to male unprotected vaginal intercourse.⁴⁸ If condom use is to be a defence, particularly as public health initiatives encourage their use, then certain types of sexual activity should also be included within our range of failure of proof bespoke defences.

It is incongruous to homogenise different types of sexual activity, each carrying the same penalty, particularly when disparate types are clearly less likely to transmit the virus. Under extant law, the particular type of sexual activity is treated as irrelevant where transmission occurs, and where the complainant has not consented to running the risk of infection. The failure to evaluate perspicuous consideration of sexual risk by D1 is counterfactual, and treating all types of sexual activity in the same manner in terms of thresholds of hard gradations, 'would be irrational and unfair'.⁴⁹ An individual who deliberately takes part in low risk activities ought not, and should not be, as culpable as a person who only partakes in high risk activities. There are suggestions that the type of sexual activity should not be taken into account, because someone involved in sexual intimacy that is a low risk may, on that particular occasion, be as likely to have transmitted the virus as someone taking part in high risk activity.⁵⁰ This is indefensible as it inappropriately blends together different levels of risk. This cannot be the case; if they were, then they would both pose the same level of risk on each occasion. It is the equivalent of stating that someone who has placed a bet on a 2000 to 1 horse winning a race is just as likely to win as someone who has put a wager on the favourite on that occasion. The level of risk is calculated for a reason: the more remote the risk of transmission, the less likely that an individual will transmit the virus, and this factorisation needs remedial legislation to reflect effective due process, responsibility, and blameworthiness.

⁴⁸ *ibid.*

⁴⁹ Ryan (n 25) 229.

⁵⁰ Matthew Weait (n 5) 176.

Canada: The Defences of Condom Use, Viral Load and the Type of Sexual Activity

The Canadian position is that a defendant can be prosecuted for a variety of substantive criminal law offences⁵¹ if he does not disclose his HIV status to sexual partners. It is irrelevant whether the virus is transmitted. Some find it problematic to comprehend how there are a number of different charges that can be brought for the same conduct as a defendant never really knows what offence they can potentially commit.⁵² This invariably conflicts with the law being certain. The first case that was heard in the Supreme Court was *Cuerrier*,⁵³ where the defendant was prosecuted under the aggravated assault provisions of the Canadian Criminal Code.⁵⁴ *Cuerrier* engaged in unprotected intercourse with two women, and did not disclose that he was HIV+; this was despite the fact that he had been told, on a number of occasions, by health officials that he must use condoms, and disclose that he was carrying the virus. It was held that consensual intercourse without disclosure of HIV status was fraud if there is 'a significant risk of serious harm', and thus vitiated consent.⁵⁵ The majority judgment stated that fraud vitiating consent embraced not simply deceptions as to the nature and quality of the act itself, and the identity of the person, but that it extended to circumstances where there was a significant risk of serious harm. It was felt that a broader view of fraud was justified at common law: a particularised definition of fraud had been removed from the Canadian Criminal Code.⁵⁶

Cory J⁵⁷ asserted in *Cuerrier* that the 'proper use of condoms' might reduce the risk so that it would no longer be considered 'significant'. The utilisation of condoms could provide a defence to any charge that could be put before the courts, but emphasis was provided that each case should be dealt with incrementally on its own specific facts, and subsequent precedents have revealed a lack of clarity as to the parameters of this failure of proof defence. Prosecutors in Canada, at least prior to *Mabior*, seemed willing to provide specificity and lucidity, endorsing the use of

⁵¹ For example common nuisance: *R v Summer* 1989 98 A.R. 191, A.J. No. 78 to Murder: *R v Aziga* 2011 ONSC 4592, 2011.

⁵² Isabel Grant (n 15) 9.

⁵³ *Cuerrier* [1998] 2 S.C.R. 371.

⁵⁴ Criminal Code, RSC 1985, c C-46, s. 268.

⁵⁵ *Cuerrier* (n 53) [128].

⁵⁶ *ibid* [105].

⁵⁷ *ibid* [129].

condoms as an affirmative defence, and prepared to distinguish between protected and unprotected intercourse.⁵⁸

Their Lordships have subsequently adopted a straitened conjunctive dual threshold standardisation for exculpatory defences attached to HIV transmission/exposure in Canada. The Supreme Court decision in *Mabior*⁵⁹ provided explicit guidance on condom use, and the duty to disclose: condom use will only provide a defence where the defendant in juxtaposition has a low viral load. A combination of dual bifurcatory factors are essential, with a higher defence threshold standardisation in non-disclosure cases, notwithstanding that the Supreme Court in *Mabior* concluded that further medical advancements and other matters could be taken into account. The decision sends out an inappropriate message, and can be seen as discriminatory to women as the odds of transmission from the recipient are greater than from the insertive partner. Furthermore, it is detrimental to public health initiatives, as the defendant who has used protection will still be susceptible to criminal sanctions. This now means that there is no overarching incentive for using a condom, and could increase reckless behaviour. Even more perplexing is the rather contradictory manner of the court in acknowledging that proper use of good quality condoms would mean that the virus will not be transmitted to another individual.⁶⁰ If this is the case, then why criminalise protective consensual sexual intercourse? The judgment has raised more questions than answers vis-à-vis exculpatory-inculpatory standardisations: it confuses the culpability/blameworthiness contextualisation in terms of genuine risk of harm, obfuscates legitimate fault principles, and unduly widens the net of liability. It seems that unprotected or protected intercourse *per se* is now unimportant in Canada: it is no longer considered to be the demarcation line for prosecutions.⁶¹

Prior to the decision in *Mabior*, condom use as an affirmative defence had received significant academic approval. It had legitimately been suggested that allowing condom use is a more effective way of reducing transmissions than relying on disclosure.⁶² There is also a consensus of

⁵⁸ *McGregor* 2008 ONCA 831, 240 CCC (3d) 102 [7]; *R v Wilcox* 2011 QCCQ 11007 (available on CanLII).

⁵⁹ *Mabior* [2012] SCC 47.

⁶⁰ *ibid* [98]

⁶¹ This has been affirmed in a number of cases for an example see *R. v. Felix*, 2013 ONCA 415 [48].

⁶² Grant (n 52) 19.

opinion that it is generally accepted that condom use is one of the most widely recognised ways to prevent transmission.⁶³ The promotion of condom use as a failure of proof defence is particularly relevant when a significant number of infections take place before the actor is aware that they are carrying the virus.⁶⁴ As previously stated, consent will not protect an individual from the risk of infection, but condom use can be an effective way of protecting against infection. An individual who uses condoms is being conscious of his own, and others', sexual health. By using such protection, it can be seen that there is a genuine attempt at reducing the risk of not only HIV, but a number of other sexually transmissible infections. If criminalisation of sexual exposure to HIV does not act as a deterrent, then allowing the use of condoms at least sends a message that is consistent with health policies,⁶⁵ and as a matter of policy, using protection should be encouraged under the auspices of legislative policy inculcations.

Moreover, the Supreme Court has clarified that a low viral load per se will not present an affirmative defence in non-disclosure cases.⁶⁶ It has been determined that the ambit of any failure of proof defence, predicated on low/non-detectable viral load, poses probative evidential difficulties.⁶⁷ If this is correct, then why conjunctively enable a low viral load conjoined with condom use to be a supererogatory defence?⁶⁸ The outcome in *Mabior* demonstrates that a low viral load in isolation is irrelevant, but the Supreme Court appears to indicate that, solipsistically, an undetectable load may still be relevant in other factual circumstances.⁶⁹ However, in *D.C.* the Supreme Court affirmed that an undetectable viral load could not present a bespoke defence.⁷⁰ Lower courts, however, have not strictly applied the test that was set out in *Mabior*. In the recent case, for example, of *R. v J.T.C.*,⁷¹ the Provincial Court of Nova Scotia has affirmed that, providing there is cogent expert evidence of the remoteness of the possibility of infection, a defendant will not be considered to have

⁶³ Isabel Grant 'Rethinking Risk: The Relevance of Condoms and Viral Load in HIV Nondisclosure Prosecutions' (2009) 54 McGill Law Journal 389, 398.

⁶⁴ Grant (n 52) 19.

⁶⁵ Grant (n 63) 400.

⁶⁶ *Mabior* (n 59) [101].

⁶⁷ *ibid* [102].

⁶⁸ *ibid* [102].

⁶⁹ *ibid* [102].

⁷⁰ *D.C.*, 2012 SCC 48 {29}.

⁷¹ *J.T.C.*, 2013 NSPC 105.

‘criminally exposed’ another through unprotected intercourse. Judge Campbell stated that ‘the Supreme Court of Canada did not intend in *R. v. Mabior* and *R. v. D.C.* to impose evidentiary findings on trial courts that are incompatible with the evidence actually before those courts’.⁷² Dr Schlech, the expert in the case, proposed that the odds could be one million to one of the virus being transmitted with an undetectable viral load.⁷³ It was accepted by Judge Campbell that his decision was specific to that case, and there was no realistic possibility of the virus being transmitted by the defendant. Significantly, there was disregard for the binary defence standardisation established in *Mabior*, and in *R. v. J.T.C.*, Judge Campbell clearly preferred scientific estimations and guidance to judicial precedent.

It is evident that the lower courts within Canada, adopting and adapting more nuanced perspectives to failure of proof defences, are recognising that understanding of viral loads has developed to such an extent that the viral load needs to be taken into consideration when assessing the risk that is posed.⁷⁴ When there is an undetectable viral load, it is arguable that harm is not foreseeable,⁷⁵ and there should be no prosecutions when a load is at that level.⁷⁶ It is inexplicable to contemplate that the defendant with a low or undetectable viral load would need to disclose their status when the risk of transmission is negligible or non-existent in such circumstances.⁷⁷ The real issue with low/non-detectable viral load is that not everyone is able to take the appropriate medication, but this does not justify disavowing it as a defence. When the viral load is at an undetectable or low level, any non-disclosure requirement ought not to be affected.

Concerns have been raised about the accuracy of viral loads, and what is not detectable one day does not mean it will remain the same the next.⁷⁸ This was addressed by the Supreme Court in *Mabior* when deciding that viral load could not be used in isolation,⁷⁹ but developments within the lower courts appear to indicate otherwise.⁸⁰ A further issue that has been

⁷² *ibid* [99].

⁷³ *ibid* [55].

⁷⁴ *Grant* (n 52) 20.

⁷⁵ *ibid* [25].

⁷⁶ *ibid* [11].

⁷⁷ Something that was confirmed in *J.T.C.* (n 71) 105.

⁷⁸ *Grant* (n 63) 401.

⁷⁹ *Mabior* (n 59) [02].

⁸⁰ *J.T.C.* (n 71) 105.

identified is that defendants may begin to make their own ‘risk assessments’,⁸¹ but to do this, the defendant would need to know the level of their viral load. To be able to know that level would require the appropriate test and medical advice. Grant has stated that the viral load factorisation can lead to problems regarding the burden of proof.⁸² Canadian courts, before the Supreme Court decision in *Mabior*, had been using their good sense by looking at average viral loads, and stating that it is an evidential rather than legal burden when raising the issue of viral loads.⁸³ When precise information was unavailable, the courts had been willing to accept average viral loads for determining whether there was a significant risk, and in such circumstances, it would be an evidential burden of showing that they had a low or undetectable viral load over that period of time.⁸⁴ The position has been clarified by the Supreme Court in *Mabior* to the extent that it is an evidential burden that also conjunctively requires condom use.⁸⁵

A further Canadian development can be seen in *R. v J.A.T.*,⁸⁶ where statistics regarding the type of sexual activity were utilised in order to acquit the defendant. It was proposed that whether the defendant’s conduct means there is a significant risk of harm, needs to be assessed by the type of sexual activity, and the statistical probability of transmitting the virus. In that case, the receptive partner was HIV+, and in such circumstances it was accepted that the risk was insufficient to be considered a serious risk of harm.⁸⁷ Their Lordships also heard expert opinion that stated that this type of sexual activity was equal to protected intercourse where the insertive partner had the virus.⁸⁸ This case embodies the fundamental issues attached to any inculpatory-exculpatory threshold gradation: it indicates that a defendant may still have a defence when he participates in certain sexual activities. A pressing need exists for clarity on where the demarcation point lies. The type of sexual activity can no longer be used in isolation; it may, however, be utilised with either protected intercourse or viral load. There is no guidance on these matters: clear unequivocal direction is required, and this was not achieved by the Supreme Court in

⁸¹ Grant (n 63) 402.

⁸² *ibid* [402]

⁸³ *Wright* 2009 BCCA 514 [32] [33]

⁸⁴ *ibid*.

⁸⁵ *Mabior* (n 59) [105].

⁸⁶ *J.A.T.* 2010 BCSC 766.

⁸⁷ *ibid* [88].

⁸⁸ *ibid* [31].

Mabior.⁸⁹ Courts have subsequently addressed the relevance of low risk sexual activities and a defendant's viral load. In *McKonnen*,⁹⁰ for instance, the Court of Appeal in Nova Scotia seemed to accept that oral intercourse and a low viral load would not pose a realistic possibility of the virus being transmitted. There has also been an acceptance of a defence based upon oral intercourse and an undetectable viral load before the Superior Court of Justice in Ontario.⁹¹ In this latter case, there was confirmation that a defence based upon low viral load and oral intercourse did not pose a realistic possibility of the virus being transmitted. Expert evidence presented in *Murphy*⁹² was to the effect that the odds of becoming infected could be as high as one hundred thousand to one.⁹³ It seems that there is an acceptance of oral intercourse and a low or undetectable viral load acting as a defence, but there is no clarity as to whether low risk sexual activities can be used disjunctively, beyond the conjunctive requirements of condom use/low viral load.

Grant has submitted that if condom use and viral load are to be conjunctive defences, then why not the type of sexual activity as a bifurcated stand-alone failure of proof type defence?⁹⁴ The type of sexual activity may also play a pivotal role in ascertaining whether disclosure is required, and each case is dealt with in an ad hoc manner by lower courts, rather than on evolving common law precepts as declared by the Supreme Court.⁹⁵ This means that any combination of the three suggested defences may be used to lower the realistic risk of transmission. Such a proposition may lead to further unpredictability as cases will still be relying heavily on expert evidence to ascertain whether there is realistic possibility of transmission.⁹⁶ *Mabior* left the door open for individuated solipsistic determinations, stating that medical advancements and 'other risk factors' may mean that there is no 'realistic' possibility of transmission.⁹⁷ Issues

⁸⁹ Alison Symington, 'R v Mabior and R v DC: Sex, Lies, and HIV: Injustice Amplified by HIV Non-Disclosure Ruling' (2013) 63 *University of Toronto Law Journal* 485.

⁹⁰ *Mekonnen*, 2013 ONCA 414.

⁹¹ *Murphy* 2013 Can LII 54139 (ON SC).

⁹² *ibid.*

⁹³ *ibid* [82].

⁹⁴ Grant (n 52) 27.

⁹⁵ *Mabior* (n 59) [81].

⁹⁶ Grant (n 52) 44.

⁹⁷ *Mabior* (n 59) [95].

remain to be addressed over the accuracy of expert evidence,⁹⁸ and it is still questionable whether expert opinion becomes a ‘numbers game’.

Canadian law, in truth, remains inherently uncertain in a variety of dissonant respects in terms of gradation of harms that are viewed as sufficient to negate consent and endanger life. Recent lower court decisions, out with earlier Supreme Court analysis in *Cuerrier* and *Mabior*, reveal individuated and solipsistic determinations related to types of sexual activity interdependent on conflicting expert evidence and individual risk assessment. The dual threshold criterion of condom use, conjunctively aligned with low viral load, has become attenuated, and appellate courts have recently been predisposed to leave matters to jurors, as moral arbiters, to evaluate the significance and level of risk attached to individual conduct.

U.S. State Law Perspectives: The Failure of Proof Defences of Condom Use, Viral Load and Type of Sexual Activity

The United States: Condom Use as a Defence

The U.S. Presidential Commission recognised that the use of precautions ought to be promoted and adapted as a defence: the recommendation presented was that condom use should correlate to a complainant consenting to protected intercourse with an HIV+ individual.⁹⁹ The response at state level, however, to this directed recommendation has proved eclectic, and diversely nuanced perspectives are currently in operation. Our research indicates that dissonant approaches can be compartmentalised into three classifications: (1) a limited number of U.S. states have legislatively enacted the recommendations of the Commission and facilitated the use of precautions as a defence, but only conjunctively when their use is aligned with the informed consent of the complainant; (2) other statutes have exceeded the recommendations of the Presidential Commission and approved condom use disjunctively and singularly as the basis of a defence against criminalisation; and (3) finally, there are a limited number of states that reject condom use as a defence to any specific criminal sanction. The allowance of condom use as a defence

⁹⁸Grant (n 52) 27.

⁹⁹ The Presidential Commission on the Human Immunodeficiency Virus Epidemic Report (1988) 131.

corresponds to public health initiatives within the United States, and accedes to the harm principle by recognising the relevance of the probability of the risk of serious harm.¹⁰⁰ The facilitation of the defence is further cemented by various studies that denote that using such measures reduces the risk of the virus being transmitted by 95%, in comparison to unprotected intercourse: utilisation significantly reduces the risk of infection.¹⁰¹ A defence of this type also achieves a legitimate equipoise in terms of balancing rights/responsibilities attached to sexual intercourse, constitutively ‘minimising legislative intrusion into intimate sexual activity.’

Missouri is the only U.S. state that has expressly disavowed the Commission’s recommendations: a legislative framework has been assimilated that explicitly stipulates the exclusion of condom use as a defence.¹⁰² Certainty is promulgated within the constrained Missourian framework, but their deontological and mechanistic bright line exclusionary provision disregards any theoretical foundation or policy basis for the disaggregation of condom use as an affirmative defence. No consideration is given to the probability of harm occurrence or culpability thresholds of the ‘criminal’ actor, and the framework is contrary to, and out with, beneficial public health initiatives.¹⁰³ The Missourian legislative offence is centred on an exposure to the virus definitional construct, but it is evident that the legislators did not perceive the importance of balancing the social utility of sexual interaction, the magnitude of harm and the probability of harm. The exclusion of condom use as a defence conveys an egregious message that their utilisation is immaterial to individuals who are already infected with the virus.

Generally, in the absence of an explicit legislative inclusion of condom use as a bespoke failure of proof defence, it will not be accessible to a defendant at common law.¹⁰⁴ The assertion by a defendant that he has utilised protective measures, and that an affirmative defence ought to apply, have been disregarded by a number of appellate courts. By way of

¹⁰⁰ See <<http://www.cdc.gov/hiv/prevention/programs/condoms/>> accessed 20 April 2015.

¹⁰¹ Steven D. Pinkerton and Paul R. Abramson, ‘Effectiveness of Condoms in Preventing HIV Transmission’ (1997) 44 *Social Science and Medicine* 1303, 1310.

¹⁰² Mo. Rev. Stat § 191.677 (2016).

¹⁰³ See (n 100) accessed 20 April 2015.

¹⁰⁴ However, see *State v Rhoades*, 848 N.W.2d 22, 27-28 (Iowa 2014).

illustration, in *State v White*,¹⁰⁵ the Supreme Court of Arkansas refused to countenance the defendant's contention in relation to condom use, out with any legislative response to the issue, and it was determined that sufficiency of probative evidence favoured the State for inculcation.¹⁰⁶ The Supreme Court of Arkansas affirmed that the offence was committed once a defendant had sexual intercourse with an unsuspecting complainant, and with liability predicated on non-disclosure:¹⁰⁷ statutory liability extended to unprotected and protected intercourse out with informed consent. The failure to facilitate condom use as an affirmative defence is detrimental to public health awareness and conscious advertence to risk.¹⁰⁸ Perone has cogently argued that U.S. states that are stultifying the defence of condom use are 'indirectly' suggesting that protective measures are ineffective in preventing the virus being transmitted.

Appellate courts in other U.S. states have expressly declined the opportunity to consider and deliberate the potentiality of condom use as a defence, and disavowed the import of scientific and medical data analysis in terms of genuine risk. In *State v Gamberella*,¹⁰⁹ a case heard in the Court of Appeal of Louisiana, the court categorically refused to explore the defence, and the judiciary were hostile to the defendant's submissions in relation to the probative evidentiary relevance of 'intentional' utilisation of protective measures. This disavowal in Louisiana of any proof of fault defence is counterintuitive and counterfactual, especially as the extant legislative provision places primordial offence-definitional construction on the fault element: a defendant must act with 'intention' in relation to harm, and correspondingly, the use of condoms may have negated that intent.

The judiciary took a contrary position in *State v Gamberella*, and determined that the intent of the defendant was established at a rudimental level when he knew that he was HIV+, and that he could transmit the virus to another, without elaboration of the temporal individuation of fault occurrence or harm negation. Even where the defence has been presumptively denied as an evidentiary predicate, the analysis provided

¹⁰⁵ *State v White* 370 Ark. 284 (2007).

¹⁰⁶ *ibid* 289.

¹⁰⁷ *ibid* 290.

¹⁰⁸ Angela Perone, 'From Punitive to Proactive: An Alternative Approach for Responding to HIV Criminalization that Departs from Penalizing Marginalized Communities' (2013) 24 *Hastings Women's Law Journal* 363.

¹⁰⁹ *State v Gamberella*, 633 So.2d 595 (La. Ct. App. 1993).

has been confused, convoluted and, on occasions, Janus-facing: the Criminal Appeals Court of Tennessee, for instance, in *State v Bonds*¹¹⁰ refused to countenance the defence, but in an opaque and skewed delineation made implicit reference to the relevance of harm gradations:

[T]he majority of the convictions were upheld without evidence of an “exchange” of bodily fluids. Indeed, our prior case law’s emphasis on “unprotected” sex supports the conclusion that “exposure” means simply to submit to a risk of contact with bodily fluids, such a risk being substantially more prevalent in unprotected sex than when some form of prophylactic is utilized.¹¹¹

The availability of condom use as a defence, or otherwise, within Tennessee may require further reconsideration following the recent Supreme Court of Tennessee’s decision in *State v Hogg*.¹¹² The case did not directly concern condom use *per se*, but it was stated therein that the risk of transmission must be ‘more definite than a faint, speculative risk’,¹¹³ and it may subsequently be argued that the risk of infection can be speculative if protective measures have been used.

A number of U.S. commentators have rejected condom use as an affirmative defence, and it is instructive to evaluate the perspectives advanced. Markus¹¹⁴ has propounded that condom use does not conclusively prevent impeding transmission, and should, therefore, not act as an evidentiary defence.¹¹⁵ Schulman has specified that because of the deficiencies that are intrinsically linked to condom prevention, these protective measures should not be considered to be an alternative defence.¹¹⁶ Deficiencies can be identified with condom use, but this should not superimpose a conclusive rationale for excluding their use as an affirmative defence. There has been no case before the U.S. state courts where the virus has been transmitted when the defendant intentionally and reasonably used a condom. Studies also demonstrate the effectiveness of

¹¹⁰ *State v Bonds*, 189 S.W.3d 249 (Tenn. Ct. App. 2005).

¹¹¹ *ibid.*

¹¹² *State v Hogg* 448 S.W.3d 877; 2014 Tenn. LEXIS 668.

¹¹³ *ibid* 889.

¹¹⁴ Mona Markus, ‘A Treatment for the Disease: Criminal HIV Transmission/Exposure Laws’ (1999) 23 *Nova Law Review* 847.

¹¹⁵ *ibid* 870 -871.

¹¹⁶ Eric L. Schulman, ‘Sleeping with the Enemy: Combating the Sexual Spread of HIV-AIDs through a Heightened Legal Duty’ (1996) 29 *John Marshall Law Review* 957, 986.

condom use when they are correctly and consistently used as a protective measure.¹¹⁷ Under those conditions, they significantly reduce the risk of the virus being transmitted. Criminalisation should not include those who have used condoms, and it is unrealistic to assume that there are activities where it is certain that transmission cannot transpire, something that other states appear to have accepted.

The use of protection forms the basis of an individuated statutory defence within a minority of U.S. states.¹¹⁸ Illinois has accommodated condom use in a bespoke affirmative provision that may be beneficially adopted within other criminal justice systems:

- (a) A person commits criminal transmission of HIV when he or she, with the specific intent to commit the offense:
 - (1) engages in sexual activity with another without the **use of a condom** knowing that he or she is infected with HIV (emphasis added).

Condom use has been prescriptively incorporated as a defence within the legislative framework of Illinois, and this response has been replicated in California, Iowa and Minnesota. An appropriately worded statutory schema has been adopted in this panoply of jurisdictions, establishing a definite and translucent defence, consequently providing certainty and an effectual safeguarding of interests. It represents the obverse of the delimiting strictures inappropriately applied in Louisiana and Tennessee.

Interestingly, the appellate courts in a number of other U.S. states have determined that the use of protective measures can negate the *mens rea* of the offence to provide a failure of proof defence: in effect, ‘judicial’ legislation has been interposed as a remedial panacea where statutory response is silent or deficient. In *State v Richardson*,¹¹⁹ a case heard in the Supreme Court of Kansas, it was asserted that use of condoms may be relevant when considering whether the defendant had formed an ‘intention’ to expose the complainant to the virus:¹²⁰

[Kansas’ Statute] not only requires proof that the defendant knowingly engaged in sexual intercourse, but it also requires evidence of a specific

¹¹⁷ Steven D. Pinkerton and Paul R. Abramson (n 101).

¹¹⁸ Cal. Health & Safety Code § 120291 (2016); Minn. Stat. § 609.2241(2015); 720 Ill. Comp. Stat. § 5/12-5.01; Iowa Code § 709D.2.

¹¹⁹ *State v Richardson* 289 Kan. 118; 209 P.3d 696; 2009 Kan. LEXIS 180.

¹²⁰ *ibid* 128.

intent to expose the defendant's sexual partner to a life-threatening communicable disease. Thus, under our statute, condom use can be germane to the defendant's specific intent.¹²¹

The use of condoms ought to exculpate a defendant when inculcation is based upon a fault element of intention (or recklessness). Their use is indicative in ascertaining whether the defendant intended to transmit the virus.¹²² A defendant who has used protective measures has endeavoured to remove/reduce the risk of the complainant becoming infected with the virus. Minahan, however, contrary to our standpoint, iterates that defence enablement may, 'create a false sense of security' on the part of that complainant, as the expectation is upon the infected party to reduce the risk.¹²³ This is counterintuitive and does not accord with the realities of sexual intimacies. Moreover, it is irrational for an infected individual not to use a condom if he knew that their use may form the basis of a defence or negate the *mens rea* of the criminal sanction.

A distinctive cadre of U.S. states have conjunctively facilitated the use of condoms as a defence, aligned with disclosure of their sero-status to a prospective sexual partner. In North Carolina and North Dakota, the legislative framework explicitly stipulates words to that effect, thereby connoting condom use, in isolation, to be irrelevant.¹²⁴ It seems that the provisions within these states are following the recommendations of the Commission, but are placing an undue burden upon a defendant to disclose their status, even when the risk of transmission is significantly reduced. There are suggestions that disclosure and condom use serves the purpose of protecting those who are unsure as to what they have consented.¹²⁵ This concern would be eradicated if a fully informed consent was expected, as a potential sexual partner needs to be fully aware of the risks associated with having unprotected intercourse with an infected defendant.¹²⁶

¹²¹ *ibid* 128 -129.

¹²² Margo Kaplan, 'Rethinking HIV-Exposure Laws' (2012) 87 *Indiana Law Journal* 1517, 1545.

¹²³ W Thomas Minahan, 'Disclosure before Exposure: A Review of Ohio's HIV Criminalization Statutes' (2009) 35 *Ohio Northern University Law Review* 83, 106.

¹²⁴ 10A N.C. Admin. Code 41A.0202(2015); N.D. CENT. CODE § 12.1-20-17 (2015).

¹²⁵ Kathleen M Sullivan and Martha A. Field, 'Aids and the Coercive Power of the State' (1988) 23 *Harvard Civil Rights-Civil Liberties Law Review* 139, 182.

¹²⁶ *ibid*.

The combined statutory defences of condom use and disclosure have proponents: Sullivan and Field advocate the use of precautions and disclosure in the following terms:

It more clearly imposes on persons with AIDS and AIDS carriers affirmative duties, as a condition of engaging in sexual intercourse, to disclose their condition to their sexual partners, to obtain their partners' knowing consent, and to use precautions such as condoms. Such a statute has a more realistic chance of influencing behavior, because it permits a person to pursue a sexual relationship if he complies with these affirmative duties.¹²⁷

Sullivan and Field do not consider our preferred optionality, whereby in specific circumstance an individual should be given the opportunity to consent to unprotected intercourse, even when that would increase the risk of transmission. The facilitation of a hard paternalistic approach to unprotected sexual liaisons precludes any right to intimate connection, procreation, and the autonomy of the prospective partner. The allowance of a defence of condom use in isolation would also allow individuals to pursue sexual relationships, and would act as a greater incentive to individuals to use protective measures. Newman legitimately recommends a defence that is based upon protective measures as their use is an important factor that assists in reducing the risk of infection, even if it has an impact upon the frequency of a defendant disclosing their status.¹²⁸ The defence of condom use ought to be an alternative to, but not a replacement of, disclosure. If the ultimate aim is to encourage condom use, then indubitably a defence of protective measures affords a more solid foundation that encourages individuals to be proactive in their use. By allowing condom use in isolation would provide a further juncture for a defendant to act responsibly. If every individual who has contracted the virus used a condom, under the principle of unity, the virus would eventually be eradicated.¹²⁹ Therefore, consent and condom use should be distinctive defences, as should an undetectable viral load.

¹²⁷ Sullivan and Field (n 125) 186.

¹²⁸ Sarah J Newman, 'Prevention, Not Prejudice: The Role of Federal Guidelines in HIV-Criminalization Reform' (2013) 107 North Western University Law Review 1403, 1422.

¹²⁹ Steven D. Pinkerton and Paul R. Abramson (n 101).

U.S. State Law and the Risk of Transmission: The Relevance of Viral Load

The U.S. Presidential Commission proposed that states enact legislation that would criminalise conduct that, ‘(...) according to scientific research, is [sic] likely to result in transmission of HIV’.¹³⁰ The level of a defendant’s viral load may be relevant to the likelihood of risk of the virus being transmitted, and may form the basis of another defence. Statistical studies have revealed that if the defendant’s viral load is consistently undetectable for a period of six months, then the virus cannot be transmitted.¹³¹ A low viral load also significantly reduces the risk of the virus being transmitted.¹³² The majority of U.S. states, however, have not considered, or continue to disregard, the relevance of a defendant’s viral load. Only two states have promulgated statutory responses to the criminalisation of HIV transmission that potentially allow examination of probative relevance of a defendant’s viral load, although this has also occurred on a limited number of occasions at common law.¹³³ By way of contrast, the preponderance of state legislators have taken an alternative stance, disregarding the probability of harm, and with a primary focus upon magnitude of harm precepts.

Idaho’s statutory response provides a rare exception in crystallising the potential for an affirmative defence of an undetectable viral load.¹³⁴ The Idaho provision states that:

(3) Defenses:

... (b) Medical advice. It is an affirmative defense that the transfer of body fluid, body tissue, or organs occurred after advice from a licensed physician that the accused was non-infectious.¹³⁵

The statute clearly enables a defence to apply when the virus cannot be transmitted as the actor was non-infectious; however, no specification or delineation applies to the actual contours of undetectable viral load. Any potential defence is heavily reliant upon a medical professional confirming

¹³⁰ The Presidential Commission (n 99) 131.

¹³¹ Pietro Vernazza et al (n 41).

¹³² World Health Organisation (n 38).

¹³³ Idaho Code Ann. § 39-608 (2015); Iowa Code § 709D.2 (2015).

¹³⁴ Idaho Code Ann. § 39-608 (2015).

¹³⁵ *ibid* (3)(b).

that the defendant cannot transmit the virus. Disappointingly, trial courts in Idaho have adopted a particularised reading of the ambit of any defence, disregarding section import, by allowing a defendant with an undetectable viral load to simply plead guilty.¹³⁶ The provision, therefore, appears to be devoid of any substance. This disregard of probative evidence is particularly disappointing when the wording of the statute is clear and self-evident. Criminalising a low or undetectable viral load, Waldman denotes, is ‘an incident of the accident fallacy’.¹³⁷ The generalisation of the law is failing to take into consideration the specifics of an individual case and, therefore, the law is being ‘inappropriately applied’.¹³⁸ This is at its most evident in Idaho, out with statutory reforms.

Recent common law developments in Iowa have indicated that the defendant’s viral load will be a relevant factor in ascertaining whether there is a risk of the virus being transmitted. Judicial legislation has triumphed in this regard over antediluvian state legislation: the former legislative framework of Iowa was to the following effect:

1. A person commits criminal transmission of the human immunodeficiency virus if the person, knowing that the person’s human immunodeficiency virus status is positive, does any of the following:
 - a. Engages in intimate contact with another person.

¹³⁶ See *State v Thomas* 154 Idaho 305 (Ct. App. 2013): the defendant had pleaded guilty even though he had an undetectable viral load. The Court denied the defendant the motion to withdraw his guilty plea as he stated that he was not forewarned about the severity of the custodial sentence. There was no discussion of his viral load within the judgment as the appeal was not based upon this issue. <<http://www.washingtonblade.com/2014/06/13/iowa-high-court-reverses-conviction-hiv-criminalization-case/>> accessed 23 April 2015; also see Perone (n 108) 381.

¹³⁷ Ari Ezra Waldman, ‘Exceptions: The Criminal Law’s Illogical Approach to HIV-Related Aggravated Assaults’ (2011) 18 *Virginia Journal of Social Policy and Law* 550, 561: ‘The Accident Fallacy occurs when a general rule is applied to a specific situation in which the rule – because of unique individual facts, or “accidents” – is inapplicable. The mistake occurs when the general rule is applied inappropriately so it misses salient differences in a heterogeneous population and fails to recognize exceptions where they should exist or when a rule of thumb is used to come to over-inclusive conclusions. It has two steps: (1) generalize about a population, and (2) incorrectly use that generalization to describe a unique subset of that population.’

¹³⁸ *ibid* 564.

- b. “Intimate contact” means the intentional exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of the human immunodeficiency virus.¹³⁹

The lack of an appropriately worded legislative framework in Iowa, beyond the rigid schema above, was highlighted in a number of important judicial pronouncements. In *State v Rhoades*,¹⁴⁰ a case heard in the Supreme Court of Iowa, it was stressed that the judiciary could no longer take judicial notice of the defendant having the potential to transmit the virus when he in fact had an undetectable viral load:

With the advancements in medicine regarding HIV between 2003 and 2008, we are unable to take judicial notice of the fact that HIV may be transmitted through contact with an infected individual’s blood, semen or vaginal fluid, and that sexual intercourse is one of the most common methods of passing the virus to fill in the gaps to find a factual basis for Rhoades’s guilty plea.¹⁴¹

The court in *State v Rhoades*¹⁴² acknowledged that the level of risk may become so insignificant that it no longer poses a likelihood of the virus being transmitted. The appeal was upheld, and it was clear that there was no longer an acceptance, by the judiciary in Iowa, that sexual contact can potentially transfer the virus to another when the defendant has a low or undetectable viral load and this is replicated within their new statutory provision:

‘Practical means to prevent transmission’ means substantial good faith compliance with a treatment regimen prescribed by the person’s health care provider, if applicable, and with behavioral recommendations of the person’s health care provider or public health officials, which may include but are not limited to the use of a medically indicated respiratory mask or a prophylactic device, to measurably limit the risk of transmission of the contagious or infectious disease.¹⁴³

The decision in *Rhoades*,¹⁴⁴ and the new legislative framework in Iowa, represents an extremely positive incremental development for failure of

¹³⁹ Iowa Code § 709C.1.

¹⁴⁰ *State v Rhoades* (n 104).

¹⁴¹ *ibid* 33.

¹⁴² *ibid*.

¹⁴³ Iowa Code § 709D.2 (2015).

¹⁴⁴ *State v Rhoades* (n 104).

proof defences, but it stands in stark contrast to other U.S. jurisdictions where reform is still urgently needed. No allowance has been generally attributed to the defendant's viral load. In Nevada, for instance, a defendant with an undetectable viral load has very recently pleaded guilty to the statutory offence of exposing another to the virus on the basis that he would be convicted of a lesser charge.¹⁴⁵ There was no consideration of the probative relevance of a defendant's viral load. Similarly, in *State v Richardson*,¹⁴⁶ a case heard in the Supreme Court of Kansas, although there was superficial discourse of the viral load issue, ultimately the defendant's undetectable viral load was not fully considered in any real sense.¹⁴⁷

The majority of U.S. state statutes are 'overbroad' in that the law does not compartmentalise defendants into those who act in a culpable manner or otherwise, or reflect lack of blameworthiness on the part of individuals who act responsibly by ensuring that they have consistently had an undetectable viral load.¹⁴⁸ Enactments are not accounting for advancements in preventative measures within the medical sphere. Newman has expressed the importance of new medication within the penumbra of the inculcation-exculpation equation by stipulating that the use of antiretroviral therapy has changed HIV from a 'death sentence', and it is unfortunate that the law has not kept up with medical advancements.¹⁴⁹ The advancement in preventative medicine should, but has not, lead to detailed statutory amendments.¹⁵⁰ The construction of a legislative framework that takes into account the concentration of the virus within the defendant's blood would denote that an undetectable and possibly low viral load could form the basis for an affirmative failure of proof defence.

What is apparent from our exposition of the current position in the U.S., with the notable exception of Iowa, is that the relevance of an undetectable viral load should not be left to the judiciary to consider in isolation, and

¹⁴⁵ Rashida Richardson, Shoshana Golden and Catherine Hanssens, 'Ending & Defending against HIV Criminalization a Manual for Advocates: Volume 1 State and Federal Laws and Prosecutions' 149.

<<http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/HIV%20Crim%20Manual%20%28updated%204-3-15%29.pdf>> accessed 21 April 2015.

¹⁴⁶ *State v Richardson* (n 119).

¹⁴⁷ *ibid.*

¹⁴⁸ Perone (n 108) 400.

¹⁴⁹ Newman (n 128) 1410.

¹⁵⁰ Kaplan (n 122) 1566

that it necessitates an expressly stated statutory footing. Perone has cogently identified the deficiencies within the U.S. standardisations of criminalisation for HIV transmission/exposure and submits that such statutory provisions:

(...) produce contrary results and actually increase misconceptions about HIV transmission by criminalizing people with HIV regardless of a person's likelihood of transmitting HIV because of condom usage, viral load, and/or engaging in activity with a very low or non-existent likelihood of transmission.¹⁵¹

The United States and the Criminalisation and Decriminalisation of Sexual Activity

The U.S. Presidential Commission specified that HIV+ individuals whose conduct posed a 'significant risk' of harm should be accountable for their actions.¹⁵² The risk of the virus being transmitted depends upon a number of factors including the type of sexual activity, and this has been confirmed by empirical studies that specify that certain types of intimacy pose less of a risk of transmission than other intimate acts.

The reality is that a significant majority of U.S. states do not consider the likelihood of the virus being transmitted, and the preponderance of statutory provisions do not define the type of sexual activity that is to be prohibited.¹⁵³ Thus, there is a diverse legislative framework within the United States on the criminalisation of HIV, and the type of prohibited sexual activity. For current purposes, our focus will be on two main categorisations: (1) states that ensure that all types of sexual activity¹⁵⁴ are encapsulated by the legislation; and (2) states that have restricted, or have attempted to restrict, prosecutions relating to specific sexual acts.¹⁵⁵

There are a number of U.S. states that have expressly stipulated an extensive list of prohibited sexual activities.¹⁵⁶ Wolf suggests that the

¹⁵¹ Perone (n 108) 379.

¹⁵² The Presidential Commission (n 99) 130 -131.

¹⁵³ For example: Wash Rev Code § 9A.36.011 (2015); Iowa Code § 709C.1(2)(b) (2011); La. Rev. Stat. Ann. § 14:43.5 (2016).

¹⁵⁴ Ark Code § 5-14-123 (2015); Mich. Comp. Laws Ann. § 333.5210 (2016).

¹⁵⁵ Cal. Health & Safety Code § 120291 (2016); 720 Ill. Comp. Stat. § 5/12- 5.01; Kan. Stat. Ann. § 21-5424 (2015).

¹⁵⁶ Ark Code § 5-14-123 (2015) ; Mich. Comp. Laws Ann. § 333.5210 (2016).

criminalisation of activities that pose no risk emanates from the legislators' utilisation of the wording of other criminal offences: 'it seems likely that this result is the unintentional effect of adopting definitions from sexual assault or rape statutes'.¹⁵⁷ It may also have been the outcomes of the legislator drafting individuated statutes in a manner that requires a defendant to always disclose their sero-status to prospective partners. Whatever the motive, these provisions have been vituperatively criticised for failing to take into account the risk of harm,¹⁵⁸ and they are, 'all consistent in one way: they do little to link the actual risk of infection with violation of the law.'¹⁵⁹ These wide-ranging statutes can be surveyed throughout a number of states.¹⁶⁰ Two of these states are Arkansas¹⁶¹ and Michigan,¹⁶² where the bespoke statutes, holistically drawn, encompass wide categorisations of potentially criminal conduct:

(...) sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into a genital or anal opening of another person's body.¹⁶³

The statutory frameworks within Arkansas and Michigan engage a number of activities that pose virtually no risk of the virus being transmitted. The provisions extend culpability to conduct where an HIV+ individual may not have physically come into contact with the sexual organs of the complainant. Evidently, emphasis is placed upon the seriousness of infection with no consideration of the 'actual' risk of the virus being transmitted or foresight of harm occurrence. This is an affront to contemporary scientific literature that has reviewed the type of sexual

¹⁵⁷ Leslie E. Wolf and Richard Vezina, 'Crime and Punishment: Is There a Role for Criminal Law in HIV Prevention Policy?' (2004) 25 Whittier Law Review 821, 851.

¹⁵⁸ Christina M Shriver, 'State Approaches to Criminalizing the Exposure of HIV: Problems in Statutory Construction, Constitutionality and Implications' (2001) 21 Northern Illinois University Law Review 319, 326.

¹⁵⁹ James B. McArthur, 'As the Tide Turns: The Changing HIV/AIDS Epidemic and the Criminalization of HIV Exposure' (2009) 94 Cornell Law Review 707, At 719.

¹⁶⁰ For example see: MINN. STAT. § 609.2241 (2015) ;OHIO REV. CODE ANN. § 2903.11 (E) (4)(2016).

¹⁶¹ Ark Code (n 154).

¹⁶² Mich. Comp. Laws Ann. § 333.5210 (2016).

¹⁶³ *ibid* (2).

activity, and the possibility of the virus actually being transmitted.¹⁶⁴ There is a chasm between real and imagined risks, and Galletly and Pinkerton have proposed that, ‘it is unacceptable for statutes to include activities that pose no risk of transmission.’¹⁶⁵ A ‘knee-jerk’ reaction to criminalise the transmission or exposure to the risk of HIV infection has occurred, unfortunately reinforcing the paradigm presumption that sexual activity with an HIV+ individual is itself a harm.

In *State v Flynn*,¹⁶⁶ by way of illustration, the inculpatory breadth of Michigan’s statutory provisions was unsuccessfully challenged. The case involved allegations of exposure due to unprotected intercourse, and the Court of Appeals in Michigan rejected the defendant’s contention that the statute was ‘too broad’, defining sexual penetration to include the use of ‘objects’. The challenge was disregarded, as the activities that Flynn had partaken in were not those that he was challenging. Markman J stated that:

This case, which does not involve a charge that defendant used an object to commit sexual penetration of the victim, requires the same conclusion. Defendant cannot challenge the scope of M.C.L. § 333.5210; MSA 14.15(5210) as overbroad where his charged conduct is encompassed by the language of the statute.¹⁶⁷

Flynn was unable to dispute the validity of the statute, as he had been convicted of exposure due to unprotected intercourse, and this did not include the use of objects.¹⁶⁸ The judgment has not assisted in determining whether the wording of the Michigan statute is appropriate. Currently, there have been no further appeals on the matter; it seems that any type of sexual exposure is within the ‘umbrella’ of potential criminalisation.

A few states have adopted a more enlightened review of the harm/risk of harm kaleidoscopic legal prism, notably contained within the purview of California and Illinois perspectives. It is only the most high-risk types of sexual conduct that are criminalised in California and Illinois. This corresponds with scientific literature that acknowledges that unprotected sexual intercourse is most likely to transmit the virus. It also denotes a

¹⁶⁴ Matthew Cornett, ‘Criminalization of the Intended Transmission or Knowing Non-disclosure of HIV in Canada’ (2011) 5 McGill Journal of Law and Health 61, 95.

¹⁶⁵ Galletly and Pinkerton (n 46) 335.

¹⁶⁶ *State v Flynn* 1998 WL 1989782 (Mich. App.).

¹⁶⁷ *ibid.*

¹⁶⁸ *People v Jensen*, 586 N.W.2d 748, 751-52 (Mich. Ct. App. 1998).

reflective equipoise attached to the contemplation of harm principle.¹⁶⁹ The express stipulation of types of prohibited activity creates certainty, and enables individuals to tailor their conduct in order to engage in a responsible manner.

The legislative responses to HIV criminalisation within California and Illinois propose that exposing an unsuspecting complainant to the virus through unprotected sexual activity may lead to a successful prosecution.¹⁷⁰ In both statutory provisions, sexual activity is defined as unprotected anal or vaginal intercourse; clearly the conduct that is prohibited must pose a significant risk of harm. The restriction of prosecutions to unprotected activity may be seen to strike the appropriate balance between social utility, the probable risk of serious harm and the magnitude of any harm. None of these determinants appear to operate in a supererogatory manner as the statutory definitions afford an effective acknowledgement of dissonant factors. Wolf and Vezina are strong proponents of the Californian legislation, contending that it has struck the ‘correct balance’ in the context of failure of proof defences.¹⁷¹

Proponents of the Californian approach to criminalisation of HIV have suggested their statutory reforms present the ‘model’ code to follow in light of precision.¹⁷² This clarity of drafting is evident throughout the Californian statute as it is specific in restricting the types of exposure that are criminalised. It is apparent that the legislators have balanced the risk of harm and the magnitude of harm, and only prohibited conduct that poses a significant risk of harm is criminalised.¹⁷³ It is for this reason that Klemm opines that the provision is ‘instructive’ for other state legislators.¹⁷⁴

A vignette of the prevailing uncertainty attached to sexual activity as an affirmative failure of proof defence is constitutively highlighted by recent volte-faces within the Floridian criminal justice system. The Floridian

¹⁶⁹ Joel Feinberg, *Harm to Others: The Moral Limits of Criminal Law* (Oxford University Press 1984).

¹⁷⁰ Cal. Health & Safety Code § 120291 (2016); 720 Ill. Comp. Stat. § 5/12- 5.01; Kan. Stat. Ann. § 21-5424 (2015).

¹⁷¹ Wolfe and Vezina (n 157) 879.

¹⁷² Jaclyn Schmitt Hermes, ‘The Criminal Transmission of HIV: A Proposal to Eliminate Iowa’s Statute’ (2002) *The Journal of Gender, Race & Justice* 473, 479.

¹⁷³ Sara Klemm, ‘Keeping Prevention in the Crosshairs: A Better HIV Exposure Law for Maryland’ (2010) *13 Journal of Health Care Law and Policy* 495, 523.

¹⁷⁴ *ibid* 523.

legislative schema presumptively prohibits exposure through sexual intercourse, but recent judicial precepts from this jurisdiction have struggled to appropriately identify criminally restricted activities.¹⁷⁵ The provision has received extensive judicial scrutiny, and sexual intercourse has been interpreted to be exclusive to vaginal penetration by the penis, but, disingenuously, to also encompass other ‘types of sexual activity’.¹⁷⁶ No consideration has been made to statistical probability of transmission within any of the conflicted state judgments. In *State v L.A.P.*,¹⁷⁷ a case where the defendant exposed the unsuspecting complainant to the virus through oral intercourse and digital penetration, the Court of Appeal in Florida held that sexual intercourse was exclusive to vaginal penetration by the penis.¹⁷⁸ Two further appellate decisions have since extended the definition of sexual intercourse to include anal, vaginal and oral intercourse. In *State v D.C.*,¹⁷⁹ the appellate court interpreted the statute so that it included all of the aforementioned activities. The definition from *D.C.* was affirmed by the majority in *State v Debaun*,¹⁸⁰ but Shepherd C.J., in a powerful dissenting judgment, suggested that the majority had mistakenly neglected to consider previous decisions, and inaptly utilised a dictionary definition of sexual intercourse.

Judicial conflict in determining the applicable definition of sexual intercourse within Florida signifies again the requirement of any legislative framework to provide interpretative precision and certainty, and that this must also correlate with the probability of the risk occurring.¹⁸¹ An appropriately worded statute should clarify the parameters of criminal activity, with no attendant ambiguity as to what will be considered to be culpable conduct, as we set out subsequently. Culpability should only be based upon activities that, ‘reach a certain threshold’,¹⁸² and that ‘threshold’, in cases of exposure, should only be the riskiest activities; there have been no reported cases of the virus being transmitted through

¹⁷⁵ Fla. Stat. Ann. § 775.0877 (2015) 384.24.

¹⁷⁶ *State v LAP* 62 So. 3d 693; 2011 Fla. App. LEXIS 8462; *State v Debaun* 129 So. 3d 1089; 2013 Fla. App. LEXIS 17224; *State v D.C.* 114 So. 3d 440; 2013 Fla. App. LEXIS 8595.

¹⁷⁷ *State v LAP* *ibid.*

¹⁷⁸ *ibid.*

¹⁷⁹ *State v D.C.* (n 176).

¹⁸⁰ *State v Debaun* (n 176).

¹⁸¹ Markus (n 114) 867 -869

¹⁸² Kaplan (n 122) 1540.

oral intercourse.¹⁸³ The demarcation line must be unprotected anal and vaginal intercourse, even though there are permutations depending upon who is the receptive or insertive partner.

There are substantial variations as to what will equate to culpable sexual activity within the differentiated legal state jurisdictions of the United States. Provisions that have facilitated all types of sexual activity within the penumbra of potential criminalisation may be described as ‘too broad’, and as there is no consideration of statistical probability of the virus being transmitted. While it is conceded that HIV can be a life-debilitating virus, and therefore the magnitude of harm is particularly relevant, it must be offset with the probability/risk of harm factorisation. At some point, the risk of transmission must be considered immaterial for criminalisation purposes, as acknowledged in California.

Conclusions

The issue of condom use, viral loads and type of sexual activity have not been directly raised as failure of proof defences before the English courts, but have been addressed within the Canadian and American legal systems. The distinction may be attributed to the fact that all cases within England have involved transmission of the virus, whilst in Canada and the United States, transmission is not a requirement for criminalisation. It is regrettable that the majority of those jurisdictions have not enacted legislation that would facilitate the defence of condom use and viral load, or would restrict culpability to certain types of sexual activity, and a new statutory pathway is urgently needed to reflect altered societal expectations, and appropriate thresholds of blame worthiness, fault and risk of harm temporal individuation.

Legislation is the appropriate rectification as a cathartic panacea for current problems, consequently eliminating the uncertainty that is evident within England and Canada, and avoiding retrospectivity challenges. Extant common law in both countries demonstrates that the use of non-specific HIV precepts attached to criminalisation simply promotes ad hoc interpretative measures with the unfortunate need to seek recourse in judicial divining rods; hardly a satisfactory response to significant criminal law/public health arguments. Legislative initiatives per se, however, have

¹⁸³ See <<http://www.cdc.gov/hiv/risk/behavior/oralsex.html>> accessed 24 April 2014.

not provided logical consistency or clarity within the U.S. state laws, and a multiplicity of definitional constructs of liability are contained in the divergent provisions, but no structured template as to offence-definition modification. The multi-faceted provisions, as stated herein, provide an important comparative contextualisation for the review and optimisation of approach: Illinois for accommodating condom use in a bespoke affirmative provision; Iowa for statutory promulgation of viral load considerations; and California for sexual activity standardisations. In general, however, specific U.S. state legislators have omitted to consider important scientific data; any new legislation needs to develop with this contemporary awareness.¹⁸⁴ Any proposed legislation needs to specify that factorisations of condom use, viral load or type of sexual activity within defined circumstances and parameters could be utilised as a defence.¹⁸⁵ This would enable HIV+ individuals to continue to engage in sexual activity without the fear of prosecution or rejection, and they would not generally be required to disclose their status within the boundaries of a new offence-definition modification.

It is unfortunate that the English courts have not taken the opportunity to clarify their position, although it is conceded that some of the issues were not identified or raised at the time of *Dica* or *Konzani*. It is suggested that the orthodoxy adopted in Canada, before the Supreme Court decision in *Mabior*, represents a preferred approach to the criminalisation of the sexual exposure/transmission to HIV. Allowing these defences would promote safe sexual practices and be in line with public health policies initiatives,¹⁸⁶ the ultimate goal being to reduce transmission of the virus.

Our proposed legislative failure of proof response to criminalisation of HIV constitutively promotes condom use and low viral load defences, and considers that certain types of sexual activity should be precluded from criminal sanctions. De novo legislation in relation to viral load must be constructed in a manner that promotes the administration of anti-retroviral medication. The benefits of this are twofold: it will encourage individuals to get tested; and encourage defendants to achieve an undetectable viral load. An optimal reform model for failure of proof defences may be stated in the following definitive terms:

¹⁸⁴ As was suggested *Mabior* (n 59).

¹⁸⁵ An evidential burden rather than legal.

¹⁸⁶ See generally Kate Harker and Ellen Wright, 'The HIV Stigma: Duty or Defence?' (2015) 4 UCL Journal of Law and Jurisprudence 55.

The offences:

A person will have committed an offence under this statute if he:

- (1) Intentionally or recklessly transmits HIV to another by having unprotected vaginal or anal intercourse; or,
- (2) Intentionally exposes another to HIV by having unprotected vaginal or anal intercourse

Defences

Protective Measures: Condom Use

Only the correct and consistent use of condoms (protective measures) will form the basis of a defence to the criminal acts of intentional exposure and reckless transmission of HIV.

Viral Load

An accused will not be considered to have exposed/transmitted the virus to another if he had a non-infectious viral load at the time of the sexual act.

In order to establish that the accused had a non-infectious viral load, the sexual act must have transpired after advice from a medical professional that he was non-infectious.

The wording of the suggested legislative defence of condom use ensures that a defendant can rely upon the exculpatory nature, but may still be held accountable if they are not used correctly or consistently. This would ensure that defendants are aware that their use may exonerate them from criminal sanctions, and encourage the correct use of these protective measures. It is also an acceptance that there may be a chance of the virus being transmitted; in practical terms this is unlikely to transpire, but the mechanism is in place if transmission occurs. This may also indirectly encourage disclosure by the defendant.

The preponderance of medical studies encourages the exclusion of a non-infectious viral load from the ambit of criminal sanctions. The first subsection articulates that the defendant can assert that he had a low or undetectable viral load at the time of the sexual contact. This avoids any ambiguity in relation to the defence. It also anticipates that the defendant has an evidentiary burden to establish that he had a low or undetectable viral load. This will be a relatively undemanding burden to discharge as

the defendants' medical records will confirm their viral load at that time, and will not contravene the defendant's presumption of innocence. The second element of the suggested statutory provision relies upon Idaho's recognition that the advice must emanate from a legal professional, ensuring that there is a formal requirement to the defence, and much needed consistency and certainty. Contrary to recent Law Commission perspectives, a bespoke legislative response is needed to address the overbroad criminalisation of HIV transmission, and to propagate appropriate failure of proof defences.