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## Politics and Pedagogy

### Disrupting the criminalization of HIV

**W**ikipedia speaks of popular education as the crossroads between politics and pedagogy. These days, however, this crossroads seems to have been upgraded to an overpass. Political and pedagogical traffic may occupy the same GPS point, but they often fail to intersect and interact.

Even Freire's iconic *Pedagogy of the Oppressed*, for example, spends a lot of time talking about the pedagogy of *conscientização*, but makes scarcely a mention of the kind of political action learners might embark on once their consciousnesses have been duly raised.

On the other hand, "politics" is increasingly about mobilization and rallying, often giving short shrift to pedagogy. In mainstream politics especially, it is far easier to determine the concerns already present across an electorate and construct a platform to appeal to them than it is to figure out how to change people's minds. Farther left, we often deplore false consciousness among the masses and spend more time rallying already like-minded people, than we do figuring out how to mutually deconstruct hegemonic ideas with the active participation of those under their sway.

The problem with much of even progressive education, then,

is that it doesn't involve a concrete political goal. In this, it fails by even its own standards. Unless learners actually commit to engaging in concrete practice that consolidates and reinforces what they have learned, they will soon slip back into hegemonic ways of thinking and feeling.

The problem with much of even progressive political organizing is that it rallies people on the basis of what they already know and feel, rather than trying to transform knowledge and feelings of those not already on side. Given what we know about hegemonic or dominant ideas, such politics fails even by its own standards, because at best it becomes a politics of maneuver rather than a politics of transformation.

### **Zone of proximal development**

When we are engaged in education we need to attend to what Vygotsky called the “zone of proximal development.”<sup>21</sup> That's a fancy term for a common sense notion that educational efforts need to be concentrated on concepts that a learner can understand with assistance. The “zone” will be dependent on what she or he already knows. For example, it's pretty much a waste of time for someone to walk into a grade-five math class and give a lecture on advanced trigonometry. It will go over the learners' heads. The students won't have the knowledge base to make any sense of it. So it will be beyond their zone of proximal development. On the other hand, make those same grade-five kids spend that hour doing simple addition and they will be bored out of their minds, and probably will let you know it. That content is below their zone of proximal development. Curriculum that hits the sweet spot of the zone of proximal development will introduce new concepts that are comprehensible with guidance and a bit of practice, given what learners already understand. It will move their knowledge forward. What's more, learners are also more likely to find it interesting and engaging rather than incomprehensible or boring.

A good teacher therefore begins with a review of the concepts that students have already understood, then introduces the new material and finally, asks the learners to embark on a course of action to work with the new material — practice, problems, homework — to consolidate their new knowledge.

## Basis of unity

On the other hand, when we are involved in political action, we need to attend to the notion of “basis of unity.” Different political projects will unite different kinds of groups of people. For example, if we want to oppose old growth forest logging, we should be able to construct a basis of unity that would bring together local Aboriginal people, ecologists, conservative conservationists, anti-colonial radicals, even the local anglers and hunters association. On other issues these groups might be at each other’s throats, but they can unite, and produce a potent political force, on a basis of unity around the particular goal of stopping the logging.

Mainstream political parties usually try to construct a platform around a basis of unity that will focus on a range of issues appealing to largest number of people, so that they can win a majority.<sup>2</sup> Regional parties will build a basis of unity that appeals to people in their region and forget about the rest. Traditional leftist political parties that see the task as organizing the working class will come up with a basis of unity that they feel reflects working class interests, and usually won’t spend time trying to figure out how include issues that appeal to the rich.

Constructing a basis of unity can be complicated. Include too many issues, and some people will always find something that they disagree with and you lose their support for the whole package. Have too few issues and people won’t support you because they have no stake in what you are trying to achieve. On the other hand, there are moments when most people are concerned about a particular burning issue. If you make that single issue the focus of your platform, you can win broad support from people who might disagree with each other if other issues were raised.

Although they refer to two different fields — basis of unity to politics and zones of proximal development to education — structurally they have a great deal in common. A basis of unity assembles a critical mass, or “bloc,” on the basis of shared interest, articulates that interest, and proposes a course of action that will resolve the common concerns. A zone of proximal development assembles a group of learners on the basis of their shared knowledge, attempts to build on that knowledge and proposes a course of action that will reinforce and consolidate their learning. Politics focuses on the first and last terms, the assemblage

of the bloc and the course of action (such as voting). Pedagogy focuses on the middle term, building new knowledge.

### **When both are necessary**

I would argue that efforts for long-term social change always need to *combine* politics and pedagogy — and the fact that they so often do not, is a serious weakness. Sometimes, however, a situation will arise *requiring* a response that includes both education and political mobilization. One such situation can be a pressing social problem that primarily affects a minority. On its own, the minority will not have the political weight to produce a concrete solution to its problem, especially if hegemonic discourses posit its interests as “special interests,” that run contrary to the “general interest” of the rest of society.

In order to succeed, the minority will need to construct a basis of unity around a goal that can mobilize a critical mass, a bloc of others beyond those directly affected. Only then will the minority convincingly be able to portray its interest as congruent with the “general interest.”<sup>3</sup>

But how are the potential members of this bloc to be identified? How are they to be distinguished from those who are fundamentally opposed? In fact, potential participants in this bloc can be differentiated from the opposition by their capacity to be educated. Even though they do not share the direct experience of the minority or the understandings that flow from it, they share enough of a worldview and corresponding values that understanding the issue is within their zone of proximal development.

So basis of unity and zone of proximal development become entwined. One needs to identify, first, who might potentially make up the required critical mass of a successful bloc; secondly, what their zone of proximal development might in terms of their present understanding and how far they might be able to be moved and; finally, what they need to know to make that movement. In short, what basis of unity can be proposed that they can be expected to adhere to with adequate guidance and education.

This is precisely the situation that the Ontario Working Group on Criminal Law and HIV Exposure (CLHE) found itself in 2009.

CLHE was formed in 2007 in response to anxieties over the effect that a growing number of high-profile court cases about

HIV non-disclosure were having on the lives of people living with HIV/AIDS (PHAs), and the fight against the AIDS epidemic in Canada. The group's membership was largely drawn from AIDS Service Organizations (ASOs) and included PHAs.<sup>4</sup>

### **The criminalization of HIV**

In 1998, the Supreme Court of Canada found that an HIV positive man, Henry Cuerrier, had committed fraud by not disclosing his HIV status to two women before having unprotected sex. (Neither of the women became HIV positive.) Since the women presumably would not have consented to such sex had they known his status, the Supreme Court ruled that their apparent consent was invalid, and Cuerrier was therefore guilty of aggravated assault. The court elaborated that HIV positive people were required to disclose their status before engaging in any behaviour that involved "significant risk" of infecting others. While it was suggested that use of a condom might mean that a person with HIV did not have to disclose, the Court did not clarify what significant risk was, or how it was to be determined.

Against a background of AIDS phobia and ignorance, the ruling resulted in wildly different interpretations in courts across the country. A number of people were charged and convicted of sexual assault although they had only engaged in what was generally considered very low risk activity. The charges themselves began to escalate both in number and seriousness. Police began publishing the names and pictures of those accused in a hunt for other "victims" before there had been any finding of guilt. Lurid media reports of trials exaggerated the risk of HIV transmission and represented PHAs as irresponsible, dishonest and criminally dangerous. The process amplified itself — the more publicity the more accusations and cases, the more cases the more convictions, the more cases and convictions, the more media attention, the more media attention, the more accusations and so on.

But this was not simply a matter of injustice to HIV positive individuals who had not put anyone at risk. It had cascading effects throughout the fight against the epidemic itself. Many PHAs reacted to the growing stigma by becoming less likely to disclose their status. Other high-risk individuals who didn't know their status reportedly stopped testing regularly on the mistaken belief that being unaware of their status meant that

they could not be charged. Counselors and clients at ASOs censored frank conversations about sexual risk-taking, fearing liability, or that records could end up subpoenaed in court. The lack of legal clarity led to confusing messages from public health and ASO counselors. Messages about everyone's responsibility for safer sex were undermined, as legal responsibility for transmission was increasingly focused on those who were HIV positive. Many of these factors arguably increased the general risk of HIV infection rather than diminishing it, and indeed, Canada's rate of infection began to rise.

### **Basis of unity—a first attempt**

By the time CLHE developed its "Position Paper on the Criminalization of HIV Non-Disclosure" in 2008, over 60 people had been criminally charged across the country. The Position Paper was the result of months of discussions and served as a kind of basis of unity for the group. It opened with the statement, "The criminal law is an ineffective and inappropriate tool with which to address HIV exposure. HIV/AIDS is an individual and public health issue first and foremost and should be addressed as such." It stated that the group's purpose was "to oppose the expansive use of the criminal law with respect to issues of HIV exposure."<sup>5</sup>

The Paper spoke of the "negative effects" that came with the use of criminal law, including: "hindering HIV testing and access to services, spreading misinformation about HIV, increasing stigma and discrimination associated with HIV, and invasions of privacy." It argued, "criminalization disproportionately places the responsibility for preventing HIV transmission on PHAs." It also pointed out the "disproportionate impact" on specific groups such as new immigrants, racialized men, Aboriginal women and prisoners. It listed reasons why PHAs might be unwilling or unable to disclose, such as psychological impairment or fear of harm. Finally, it called for a "review of Canada's present criminal law and its application with respect to HIV exposure."

While the process of producing the Position Paper helped the group understand and clarify the issues, and provided a basis of unity around which it could cohere, it was not adequate to mobilize a significant broader bloc to work for change. Although most slowly came around over time, even getting endorsement for the position from Boards of ASOs across the province proved difficult

for a number of reasons.

First, the document could be read as internally inconsistent, beginning by calling the use of criminal law “ineffective and inappropriate” (presumably in all cases) and then opposing the “*expansive* use of criminal law” which indicated that in some cases the use of criminal law might be appropriate after all. Its standpoint was that of PHAs concerned about the *social* effects of criminalization on their lives, and the social impact on those on the front lines trying to control the epidemic, but it did not take up the *individual* concerns of those who felt they had been exposed to a dangerous disease out of negligence or malice. Since the majority of the most high-profile cases involved heterosexual men failing to disclose to women, the document could be accused of sexism — privileging the privacy rights of men over the physical safety of women.

Finally, the Position Paper’s call for a “review” of criminal law and its application was far from a concrete demand. Who would conduct such a review? The Supreme Court had already made its position clear. Could anyone expect the Harper government, perhaps the most right-wing and homophobic in recent Canadian history, to conduct a review of the Criminal Code that did not further promote its established pro-incarceration, law-and-order agenda? The Position Paper did not seem to have a grasp on what was politically possible in the present moment.

## Aziga

That the discussion of the social effects of criminalization was beyond the zone of proximal development of most people became especially evident during the Aziga trial in 2008-2009. Aziga, a Ugandan-born Canadian was accused of infecting a number of women, two of whom had subsequently died. He was charged with and finally found guilty of two counts of first-degree murder and 10 counts of aggravated sexual assault. The case was an opportunity for right-wing *Globe and Mail* columnist Margaret Wentz, who has made a career out of using wedge issues to isolate racialized minorities and progressive organizations,<sup>6</sup> to launch another attack on the “AIDS establishment” and its evasion of the issue of “personal responsibility.”

The debate around the Aziga case was stacked against those, like CLHE, who focused on the social impact of criminalization.

First was the character of the narrative. It was a simple, powerful story — a Black immigrant, through gross negligence or malice, had deceived his partners and infected them with a virus that killed them. The story was congruent with racist tropes about Black men assaulting White women, immigrants as diseased and dangerous, guilt and innocence, love and betrayal, death and sex. It was a story of good and evil that mimicked the plot structure of every TV crime drama.

If we analyse this in terms of pedagogy, the process begins with what was already known, the well known stereotypes about good and evil, sex and death etc. The new material is the idea of PHA's as dangerous criminals and HIV as their weapon. The course of action that follows from this new material and reinforces it, is increased surveillance and suspicion on the part of the general public and support for further criminal prosecutions through the criminal justice system.

On the other hand, CLHE began by trying to advance a complex, nuanced narrative focusing on the cascading of effects of stigma on marginalized groups and its effects on transmission. It was like a second year sociology lecture. It did not build on what most people generally knew already since the experience of PHAs is not generalized among the larger public. The only course of action suggested seemed to be supporting giving guilty PHAs a “get out of jail free card.”

Little wonder which account the media and the public found most easy to grasp and to embrace. Any expression of concern about the role that criminal law was playing on transmission, any attempt to ask people to reflect on the nuances and long term effects of criminalization, was to side with evil against innocence and justice, and well beyond the general public's zone of proximal development.

### **Neoliberalism**

Part of the reason why arguments about the social were beyond the general public's zone of proximal development was that on a deeper level, arguments about individual responsibility and punishment were congruent with the hegemonic discourses of neoliberalism. Neoliberalism is a political and economic philosophy that argues that if left to its own devices, private enterprise and the market will produce the best of all possible worlds. The phi-



losophy has become increasingly dominant among elites and governments in the developed capitalist countries since the 1980s, especially after the fall of the Soviet bloc. Neoliberalism seeks to limit and shrink the influence of government in the economy, especially programs of wealth distribution (pensions, welfare, employment insurance etc.) and pushes for deregulation, “free” trade and privatization of public services.

But Neoliberalism is more than just an economic philosophy. One of its great heroes, British Prime Minister Margaret Thatcher, famously quipped “economics are the method: the object is to change the heart and soul.” The goal of this change was to promote a new identity among people as self-interested individuals — Adam Smith’s economic man. Such an identity does not include community. Everyone is out for themselves. People have to stand on their own feet. The “nanny state” has to be dismantled. Individual success is to be measured by wealth accumulated, and demonstrated by how much each individual can consume.

After twenty years of neoliberal policies in Canada, beginning with Mulroney and escalating through successive governments to Harper, Margaret Thatcher’s other famous statement about there being “no society only individuals” had become common-sense truth. How then could anyone plausibly talk about the *social* effects of criminalization? The world was inhabited by rational individuals who made good or bad decisions. Such individuals would be discouraged from making bad decisions through threat of punishment. If they insisted on being bad, they should be punished. End of story.

### **Isolation and division**

Not unexpectedly then, CLHE was isolated politically. While the process of seeking endorsement for the Position Paper and conducting workshops with AIDS Service Organizations had by this point won the support of many of AOS leaders and staff, such service organizations were often reluctant to take public political stands on controversial issues that potentially could interfere with funding.

Worse still, there was division even among the community that traditionally rallies around AIDS issues. Dr Mark Wainberg, co-chair of the 2006 International AIDS Conference in

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Toronto had come out early and unequivocally against criminalization.

But in one of her *Globe* articles, “To tell or not to tell”, Wenté managed to recruit dissenting comments from Drs Phillip Berger and Brian Cornelson, two Toronto physicians well known for their commitment to AIDS issues.<sup>7</sup> When quoting them she displayed their qualifications prominently. Although their remarks were more nuanced than Wenté’s, in the context of her article, they were positioned as an attack on ASOs and anyone who was concerned about the effects of criminalization. The article immediately sparked an angry exchange of letters between Berger and the Co-Chair of the Toronto HIV Primary Care Physicians Group Dr John Goodhew.

The queer community was likewise divided. A libertarian current which found voice in *Xtra*, Toronto’s gay and lesbian biweekly, argued there should never be any role for criminal law in HIV infection, and that criminal prosecutions illustrated AIDS phobia and its inevitable spill over to homophobia. Ironically, they too often found themselves echoing a neoliberal individualism — that it was the individual responsibility of HIV negative people to protect themselves. If someone contracted HIV it was no-one’s fault but their own. Others, like CLHE, skirted the issue of individual responsibility to concentrate on the negative social effects of criminalization. Still others echoed hegemonic discourses that anyone who was positive had an unequivocal responsibility to disclose at all times. Why the hell were these people having sex anyway?

Many feminists, normally sympathetic to AIDS concerns, saw the intervention of the justice system as a legitimate way to protect women from unscrupulous or irresponsible men. In the anti-criminalization camp, many racialized people alleged that the Aziga trial and the disproportionate number of Black men charged in such cases were examples of the criminal justice system’s perpetration of racism.

The escalation continued. By 2009 there had been 104 charges laid across the country, slightly less than half of them in Ontario. Eighty-four percent of these cases had been laid since 2004. The seriousness of the charges continued to escalate— from sexual assault to aggravated sexual assault to attempted murder to, in Aziga’s case, murder.

While its engagement with the media had produced some counterbalance to Wente, and its work with the ASOs had helped consolidate the understanding among those organizations, CLHE had been seriously bloodied in the public battle. Even its traditional base of support in the AIDS community was fragmented. If it was going to stop the damage being done, the group obviously needed a different strategy that would allow for a broader basis of unity.

### **Prosecutorial guidelines**

The idea of prosecutorial guidelines had been bouncing around since before 2008 when the Crown Prosecution Service of England and Wales finally published a “legal guidance” to Crown prosecutors entitled “Intentional or Reckless Sexual Transmission of Infection.” The document set out how the courts should deal with such cases. Although the law in Canada and the UK is substantially different, (in Canada transmission is not the issue, failure to disclose in situations of significant risk is) the principle seemed to be applicable.

The Canadian Criminal Justice system has three basic components: the police who investigate and lay charges, Crown prosecutors who pursue the charges in the courts, and judges or juries who decide on guilt or innocence and appropriate punishment. Crown prosecutors are therefore pivotal. If they decline to pursue particular kinds of cases, police will not waste time and resources arresting people and charging them. Prosecutors also decide which cases judges and juries will hear. If one can influence the behaviour of prosecutors, one can influence the entire system.

While prosecutorial guidelines would not meet the demands of those who argued that there was no place for criminal law whatsoever, they might at least be able to reduce the number and the severity of the charges and the damage caused. Just as importantly it might be able to serve as a basis of unity that could overcome the divisions in the traditional AIDS community base, a precondition before any broader bloc could be constructed.

### **Changing course**

Still, it took a lot of soul searching for CLHE to shift gears and to seriously consider the strategy of pushing for prosecutorial guidelines. The shift was facilitated by the concept of “harm

reduction” which was already widely accepted among ASOs. Harm Reduction had emerged as a response to the “War on Drugs” that focused on policing, punishment and incarceration to discourage drug use. Harm Reduction points out that such an approach has been spectacularly unsuccessful. Since drug use has deep roots and tenaciously refuses to disappear despite criminalization, Harm Reduction strategies focus on how to limit the harm it can cause though providing clean needles, supervised injection sites recovery programs, etc.

By the same principle, given the Supreme Court decision, the deployment of the criminal justice system in cases of HIV non-disclosure was not going to go away. Prosecutorial guidelines, however, might limit the harm being done by restricting cases to those few that involved real significant risk and intent to infect.

### **Building a basis of unity for a new bloc**

A hint to the possibilities this new strategy might open up was found in an article by Dr Berger in the *Canadian Medical Association Journal*, “Prosecuting for knowingly transmitting HIV is warranted.”<sup>8</sup> CLHE had read this article as another setback. It was hard not to see it as encouraging further criminalization.

The article began with the story of a young woman who was told she was infected on her 19<sup>th</sup> birthday. She had been in a relation with a man, eight years older, who knew he was positive, who had been counseled about HIV transmission, and who had lied to her about his status. It was the kind of story that had regularly been deployed in the media to arouse anger and disgust against the irresponsibility of people with HIV. Even the title itself seemed misleading and disingenuous. In Canada, prosecutions were not about transmission at all, only failure to disclose. The distinction was not clarified in the article, and one could scarcely expect the *CMAJ*'s generally conservative readership to understand it. In this context, the article seemed to be an attempt to politically mobilize doctors to support the increasing surveillance and criminalization of their HIV+ patients.

However, if one read against the grain, the article might be understood very differently. If prosecution were in fact to be restricted to cases where someone had actually *transmitted* the virus, then almost 40% of those charged in Canada would have

never found themselves in court. That was the percentage of cases where no transmission had been alleged. Further, if prosecutors were required to prove that the accused had “knowingly” transmitted the virus, the reach of the police and the courts would be restricted even more.

Finally, although the article never raised the arguments made by those opposed to criminalization, the second to last paragraph unexpectedly suggested, “It is time to establish the reasonable threshold of HIV transmission behaviour that should justifiably lead to criminal prosecution.” This again could be understood as an attempt to limit the use of the criminal justice system, a position not incongruent with that of CLHE.

Berger was approached. If CLHE were to begin a campaign to lobby for the development of guidelines with the aim of restricting prosecutions to the areas that he seemed to suggest, would we have his support? He said he would have to see what exactly we were calling for, but despite the harshness of some of the previous polemics, he was not hostile to the idea.

## The call

The working group set out to try to draft a call to Ontario’s Attorney General to establish prosecutorial guidelines.<sup>9</sup> CLHE recognized that this document would serve as the basis of unity for the campaign. It needed to have the potential to heal the fractures in the traditional AIDS community base, and just as importantly, to bring together a broader bloc that would be politically significant enough to catch the attention of the AG. It needed to be short and precise so that its argument was clear and could not be read in ways that might unwittingly alienate potential support. In order to be meaningful, it needed to demand a concrete course of action. It needed to be constructed so that any reasonable person would not have difficulty signing it and therefore within hegemonic discourses.

It therefore needed to propose arguments that were within the zone of proximal development of the groups and individuals whose support it hoped to elicit.

When it was finally completed the call had four main points.

It opened by affirming the belief that the use of criminal law needed to be compatible with attempts to prevent the spread of the epidemic. It conceded that criminal prosecutions might be

warranted in some circumstances, but insisted that the “current expansive use of criminal law” was cause for concern. It called on the AG to “undertake a process to develop guidelines for criminal prosecutors” in such cases, and to ensure that this process involved “meaningful” consultation with stakeholders.<sup>10</sup> The call purposefully did not suggest what such guidelines should entail, or where the line between significant or insignificant risk should be drawn. That was an issue around which there would no doubt still be divisions. But what could be agreed on, the basis of unity, was that a line needed be drawn somewhere.

CLHE also estimated that understanding such a demand was within the zone of proximate development of enough people outside the immediate AIDS community base to provide a critical mass to win a struggle around this demand. The basic knowledge that it built upon was the notion of miscarriage of justice, a notion within hegemonic discourses. The new knowledge that was being introduced was the effect that this injustice was having on PHAs and further, the social ramifications that this effect would have on transmission. The argument therefore started from the individual to move toward a discussion of the social.

### **Educational materials**

The group recognized that those it wished to mobilize around the call would need some assistance in understanding the issue. It therefore developed a “Questions and Answers” document<sup>11</sup> to supplement the call, and address the kinds of questions that those struggling to understand it might ask. That document gave some general legal background, explained the problems that expansive use of the law was producing, the role of public health, how prosecutorial guidelines worked, and their use in other jurisdictions. It was written in simple, straight-forward language.

The process was facilitated by another parallel effort that took place through the Ontario HIV Treatment Network (OHTN).<sup>12</sup> York University Professor Eric Mykhalovskiy spearheaded a research effort funded by the OHTN which produced a document entitled, *HIV Non-disclosure and the Criminal Law: Establishing Policy Options for Ontario*.<sup>13</sup> This was a more scholarly document constructed to fall within the zone of proximal development of policy makers and lawyers within the ministry

of the Attorney General. In a series of sections it brought together what was known about the trends and patterns of legal cases, their legal and public policy rationale, demographic data of those charged, medical research on risk of HIV infection, and social science research on the effects of criminalization, concluding with a list of policy options to address the issue. It provided important reference material for the Q&A document.

## Leadership

There are also practicalities when it comes to pulling together a broader political alliance. Before the campaign went public, the working group individually approached “opinion leaders” in the various sectors it hoped to mobilize.

These people and organizations, who were listed as “Supporters” when the campaign went on line, illustrated the parameters of the bloc that CLHE was attempting to pull together. It included the traditional base of the AIDS community — AIDS researches in the social, medical and epidemiological sciences, physicians, AIDS activists and ASOs. Specifically, it demonstrated unity among the previously divided traditional “AIDS community” — for example, Drs Berger, Cornelson, Goodhew and Wainberg all signed.

But most importantly the Supporters’ list went on to include a broader coalition of legal experts, academics, religious figures, unions, feminist leaders and social justice groups — the wider bloc necessary to exert pressure on the government. These were groups and individuals who had been identified as sharing some basic core values and world-views that would be a necessary foundation for understanding not only questions of miscarriage of justice but also the importance of the social implications of criminalization. (Although it was not immediately apparent from the supporters list, the campaign also provided an opportunity to build relationships with other “disease groups” that could also be similarly targeted through the justice system.<sup>14</sup>)

These opinion leaders were people who because of their age, position, training or experience would have credibility among a much broader population, especially within the sectors in which they were leaders. While they embodied a range of political opinions, they would not, like Margaret Wente’s readers, be people who could be seduced by the simplistic notion that there was no

society, only individuals. Approaching them was also a test of the call and the Q&A document to see if they were adequate in playing their respective roles as a basis of unity for a political coalition and as educational materials that could help people understand the issues.

### **Rolling out a campaign**

The campaign was officially launched at a joint forum organized by the Canadian HIV/AIDS Legal Network, HALCO and CLHE at the end of September 2010. The keynote speaker was Edwin Bernard, a British HIV-positive writer and activist who had been involved in the negotiations that had resulted in the UK guidelines. The meeting was well attended, and although there were some probing questions from individuals who appeared to be closer to the “no criminal code under any circumstances” position, the vast majority seemed to be convinced by the arguments that the campaign was an important step. In fact, immediately afterwards I was approached to write an op ed piece for *Xtra* which had previously only expressed the hard line no-criminal prosecutions position.

To sum up, at this point we had succeeded in articulating a basis of unity that had overcome the divisions in our traditional base in the AIDS movement and had aligned the major players around a common course of action through the demand for prosecutorial guidelines. That basis of unity fell within the zone of proximal development of opinion leaders for a much wider coalition or bloc outside the traditional AIDS movement base. We had therefore been able to convince a significant group of these leaders to publicly support the campaign. Their participation in turn would help orient a wider public to the arguments we were making. Finally, even most of those opposed on principle to any intervention by the Criminal Justice system did not actively oppose the campaign.

This did not mean however that the battle was won. We had solidified our base and established a broader coalition that we hoped would be adequate to exert sufficient political pressure on the AG to convince him to begin a process of consultation. Now we had to mobilize both our base and that coalition and engage them in a course of action to put pressure on the AG and concretize and reinforce what they had understood.



This involved a simple course of action. We wanted individuals to sign on the call to the AG, asking him to establish consultation for prosecutorial guidelines. A website was set up to facilitate that action. One had only to enter one's name, email and postal code, and a message was sent directly to the AG's office. It was relatively easy to do, but did involve going on record and making a public commitment to the campaign. This also provided CLHE with a growing list of supporters across the province who could be contacted if further political action was needed.

Although this political course of action was the same for everyone, the educational process necessary to bring them to an understanding that such action was warranted needed to be targeted. The bloc that we were establishing was heterogeneous. It included people from different standpoints and with different understandings of the issue. Each sector would therefore exhibit different zones of proximal development.

The Q&A section of the website laid out the basic arguments. It had originally been deployed to solicit the support of the opinion leaders who had been approached on a one-to-one basis by appropriate members of CLHE. The fact that they had been approached by someone who followed up on the request helped motivate them to dedicate the time to read and digest the material.

The question was, how could this be replicated on a much wider basis? How could we motivate a much larger number of people who were not directly affected, to take the time and energy to understand the campaign and participate?

### **Organizational vehicles**

A major conduit for outreach was the network of ASOs that make up the Ontario AIDS Network (OAN). A first meeting with representatives of ASOs across the province was held at an OAN member conference in May 2010. This group was already acquainted with and concerned about the issue through their front line service work. Many groups had already discussed and endorsed the original CLHE Position Paper. This group needed to understand the mechanics of the campaign and the role they could play. In terms of their ability to agree with the basis of unity of the campaign, I felt a certain level of relief in the room that a more practical and perhaps less controversial approach

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was being taken. This after all was the “AIDS establishment” that had been under attack by Wente and other media. For such social service organizations, dependent on government and private funding, especially in a time of cutbacks, such “bad press” had been a source of real concern.

It was also made clear that ASOs would be in the driver’s seat in terms of the campaign’s roll out in their local communities. We would depend on them to figure out the appropriate strategy, contact local media or not, and engage their networks as they saw fit.

At this point the campaign had still not been officially launched. This meeting was advanced warning to give organizations time to prepare. Participants received copies of the call, the Q&A and petition sheets. They brainstormed ideas about how best to roll out the campaign in their local communities.

A second meeting was held, at the next OAN member conference in mid November, six weeks after the official launch. Suggestions developed at the May meeting were turned into a checklist so that organizations could keep track of their responsibilities. By this point nearly 500 people had signed the call, and we were able to provide a breakdown of signatures from regions across the province. The majority of signatures came from the city of Toronto. We impressed on the ASOs in other areas that we needed to be able to demonstrate support from across the province in order to motivate the AG. We also impressed on them the urgency of the task ahead. A provincial election campaign would be taking place the following autumn. We had less than a year’s window to achieve our goal before the government would be completely distracted. Worse, if the government fell, the shift would likely be to the right, which did not bode well for minority issues. We would be facing people in power with a much more basic zone of proximal development and a situation in which our bloc would have significantly less political influence. Even if there was no change in government, there would be a new cabinet and we would find ourselves starting from scratch.

An important part of the strategy was to try to make the campaign go viral. A facebook group where people could keep up to date with the campaign and related news, and leave their comments was set up. ASO clients, members, and staff were encouraged to forward the link to the website and the facebook sites to their lists. The idea was to help turn PHAs themselves into edu-

cators and leaders. They would become part of a conversation with their contacts, answer questions, and engage in discussion. This conversation would in turn drive them back to the website to become more acquainted with the arguments. This was part of a course of action to deepen their understanding of the issue. The fact that these conversations were happening with individuals with a personal stake in the outcome made them ideal educators. It also encouraged and empowered them to challenge the stigma that criminalization had been generating.

At the same time different ASO's took on the work to bring other organizations on board — also becoming educators to broaden the base of support. For example, Asian Community AIDS Services took on soliciting support from Asian community groups that they worked with. Several women leaders at PASAN continued to approach different feminist groups. HALCO approached other legal clinics from across the province.

### **Mass work**

As an introduction to the campaign and as direct outreach, material was designed to reach a broader audience among those most connected to our base of support — people living with HIV, and was produced for distribution through ASOs and in gay community venues such as bars or baths.<sup>15</sup> This consisted of a series of five colourful postcards, each with a different simple message reflecting the concerns experienced by this sector of our bloc. “You shouldn’t be prosecuted for oral sex,” and “You shouldn’t be prosecuted for protected sex” touched on anxieties of those engaging in low risk activities that they still might be caught up in the criminal justice system. “My HIV viral load is undetectable. That means I’m much less likely to pass on HIV during sex. Do I still have to disclose?” raised the question of uncertainty that was the result of ambiguities in the law. “He says I didn’t use a condom. The police put my name and picture all over the media. What happened to ‘innocent until proven guilty?’” addressed the questions of invasion of privacy and false accusations. Finally, “I didn’t tell him until after the first date. Four years later we broke up. Then he had me charged,” dealt with the issue of vindictive behaviour.

All of these slogans were designed to catch the attention of people living with AIDS and to bring them to the website where they

would learn more about the law, the campaign and hopefully participate by signing on. All of these messages were congruent with and built upon the basic notion of miscarriage of justice.

A second element was the narration of the case of a young gay man, ironically named Justus. Justus had been working in a rural area and had engaged in oral sex, a no risk or at least, very low risk sexual activity with another man. Several months later, when he was at a meditation retreat on the east coast, Justus was contacted by police, who subsequently came and led him away in handcuffs. He was flown back to Toronto with police escort and transported to Hamilton where he was placed in solitary confinement. Months later all charges against him were stayed and he was released. But while it was clear he had put no one at risk, stayed charges could be reactivated at any time and continue to hang over his head. His narrative clearly illustrated the notion of miscarriage of justice. Justus was the keynote speaker at the AGM of the Ontario HIV Legal Clinic and at a public meeting of AIDS ACTION NOW in Toronto.

### Media

One test of the campaign would be whether or not it could get a fair hearing in the mainstream media, as opposed to the sensationalist reporting that had characterized previous coverage of the issue—whether the miscarriage of justice frame could displace the PHAs as dangerous criminals frame. There has been discussion about soliciting media coverage within CLHE, but at the time of writing, nothing has so far been published in the mainstream media. Part of this has to do with the reluctance to engage the media given the bruising CLHE received the last time the issue became a public one during the Aziga trial. It was also feared that any bad media coverage might spook the AG's office. But if the campaign has not passed this test, perhaps the fact that there have been no public attacks on what is a relatively public campaign, is itself a testament to the success of the basis of unity.

One of the reasons that Prosecutorial Guidelines appealed to a broader audience was that it located itself within the dominant paradigm of individual justice promoted by neoliberalism. CLHE's first attempts and its original Position Paper found itself on the loosing side of arguments that pitted notions of individual

justice against concerns about the social impact of stigma and its effect on transmission. Demanding prosecutorial guidelines within the ambit of the criminal justice system avoided this polarity. Here we were clearly fighting against an *unjust* application of the justice system against individuals who had risked harm to no one, rather than apparently against the application of the justice system itself. The question was not whether individuals had been criminally responsible or not, but how to prevent miscarriages of justice against people with HIV.

Questions of the social impact of criminalization were then deployed as ancillary arguments that buttressed the call for justice that guidelines should ensure. Not only are we fighting for a just application of the law, in doing so, by decreasing stigma, we are promoting the general good, limiting the likelihood of HIV transmission. The idea of the social could thus be legitimately reinserted into the hegemonic discourse rather than finding itself dismissed as opposition to it. When phrased as Prosecutorial Guidelines, the right wing media frames were disrupted and couldn't find the same kind of purchase on the issue.

## Conclusion

At this point the campaign is far from over but it has shown some significant successes. Nearly 1000 people have signed on to the call to the Attorney General. While a final evaluation of the campaign cannot be made until guidelines are put into place and the impact on the number and conduct of court cases established, it has already been a success in overcoming divisions in the community, building a larger bloc of support, opening up discussion on the issue, involving ASOs and PHAs in a concerted course of action, focusing political pressure, and finally, provoking the AG's office to take up the issue.

In January 2011, the AG's office privately communicated to CLHE that it had begun a process to draft guidelines. While this was a victory, it fell short of the kind of public consultation that was envisaged. The campaign therefore continues to roll out in order to build support in the community and across other sectors. We may well still require a coalition that will have the political weight to ensure that the final guidelines are adequate. In a recent piece of good news, the MAC Foundation was convinced by arguments for the campaign, and has made available a grant

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to CLHE and the HIV Legal Network to conduct targeted educational consultations across the province to ensure that community voices will be able to articulately respond to the AG's guidelines once they become public.

But the success of the campaign cannot simply be measured by such instrumental goals. The assembly of the bloc itself needs to be recognized as an important achievement. The broad support it represents strengthens the position of ASOs and PHAs, and by aligning opinion leaders with the AIDS community around the issue, it helps challenge continuing AIDS phobia. On another level it is also a response to the Harper government's law and order agenda, an agenda that because of the weakness of parliamentary opposition, has gone almost unopposed. It furthermore potentially lays a foundation for future alliances. The importance of the relationships established within the bloc should also not be overlooked. It will be an ongoing test of the organizations involved to continue to cultivate these relationships for joint political action. Perhaps in future it will be possible to develop an even broader alliance to resist the increasingly authoritarian impulses of the neoliberal state.

The campaign is an example how a small group with limited resources with careful consideration of basis of unity and zones of proximal development, can overcome a political impasse and begin a process aimed at concrete social change. Although this particular struggle is very specific, its principles are important for other social movements. Together, politics and pedagogy are a powerful combination in the struggle for social change.

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## ENDNOTES

<sup>1</sup> L.S. Vygotsky: *Mind in Society: Development of Higher Psychological Processes*. (Cambridge Mass.: Harvard University Press, 1978.)

<sup>2</sup> Their opponents often try to make such parties take stands on "wedge issues" that will divide their supporters and therefore deprive them of that majority.

<sup>3</sup> The idea of the “historic bloc” was developed by Gramsci who felt that the working class needed to ally with other classes in order to achieve social change.

<sup>4</sup> It’s co-chairs were Ryan Peck, ED of HALCO, (HIV & AIDS Legal Clinic Ontario) a legal aid clinic that focused on issues around HIV, and Anne Marie DiCenso, ED of PASAN, the Prisoners HIV/AIDS Support Network.

<sup>5</sup> Ontario Working Group on Criminal Law and HIV Exposure (CLHE). *Position Paper on the Criminalization of HIV Non-Disclosure*. Toronto 2008.

<sup>6</sup> See Wentewatch. <http://wentewatch.blogspot.com>.

<sup>7</sup> Margaret Wente. “To tell or not to tell.” *The Globe and Mail*. April 11, 2009 <http://v1.theglobeandmail.com/servlet/story/RTGAM.20090411.wcowente11/BNStory/specialComment>.

<sup>8</sup> Dr Philip Berger. “Prosecuting for knowingly transmitting HIV is warranted.” *CMAJ*, June 23, 2009; 180 (13) <http://www.cmaj.ca/cgi/content/full/180/13/1368>.

<sup>9</sup> Although the Criminal Code is a Federal matter, the administration of justice is a Provincial responsibility. Prosecutorial Guidelines would be the responsibility of the Provincial Attorney General, in this case Ontario.

<sup>10</sup> <http://www.ontarioaidsnetwork.on.ca/clhe/>.

<sup>11</sup> <http://www.ontarioaidsnetwork.on.ca/clhe/why.html#intentional>.

<sup>12</sup> The OHTN describes itself as “a collaborative network of researchers, health service providers, policy makers, community members and people with HIV who work together to promote excellence and innovation in HIV treatment, research, education in Ontario.”

<sup>13</sup> [http://www.aidslex.org/site\\_documents/CR-0137E\\_1.pdf](http://www.aidslex.org/site_documents/CR-0137E_1.pdf).

<sup>14</sup> So far in Canada there have been at least two similar charges around Hepatitis C and Herpes.

<sup>15</sup> Although HIV appears to be spreading most rapidly in marginalized communities such as Aboriginal people and IV drug users, almost 75% of people living with HIV are still gay or bisexual men.



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