

# **“CFL has its patient zero”: A Critical Examination of HIV Nondisclosure in the Trevis Smith Case**

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*To everyone who lives with HIV/AIDS*

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## **Abstract**

Canada is currently the world leader in the number of per capita prosecutions of HIV nondisclosure (Hastings, 2017). Many of these cases garner the attention of media and receive sensational and dramatic coverage. This thesis provides a feminist critical discourse analysis of the juridical and mediated content on Trevis Smith who was a former Canadian Football League linebacker convicted of aggravated sexual assault for not disclosing to his sexual partners that he was living with HIV. Mobilizing an intersectional (Crenshaw, 1989, 1991) and masculinities (Connell, 2005/1995; Messerschmidt, 2012; 2016) theoretical framework, I specifically explored the ways in which the media and juridical content constituted Smith by considering how the different discourses were shaped by race, gender, class, criminality, sexual orientation, and seropositivity.

The analysis revealed three main discourses: Dr. Jekyll and Mr. Hyde, The “Sodom and Ghomorra of Shared Sexual Partners” and Playing a Dangerous Game. These discourses demonstrate that Smith was initially shown sympathy by way of his construction as a philanthropist, and sports hero. However, as the case progressed his masculinity was discursively linked to racialized tropes of hypersexuality, dangerousness, and criminality due to his failure to disclose that he was HIV positive. I conclude that these discursive connections are part of a broader historical narrative that subjugates and controls Black men while also working to symbolically and literally segregate the Canadian HIV-negative social body from the hypersexual Black ‘AIDS fiend’.

**Keywords:** HIV Nondisclosure; intersectionality; masculinities; critical discourse analysis; media and crime

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# Chapter 1.

## Introduction<sup>1</sup>

Using the law as an intervention for public health matters is not a new phenomenon. Some of the most contentious examples include the ‘war on drugs,’ the regulation of the right to die in medically assisted dying, and abortion. More recently, the use of criminal law to try to govern HIV disclosure practices – a phenomenon that has been at the heart of public health prevention campaigns since the dawn of the epidemic in 1981 – has become a key concern of HIV activists who argue that using the criminal law undermines public health efforts (O’Byrne, 2012; Simoni & Pantalone, 2004). As a result of Supreme Court decisions that declared HIV nondisclosure a criminal offence, Canada has earned the reputation of being the world leader per capita for the prosecution of HIV nondisclosure and is the only country in the world to convict someone for first-degree murder in an HIV nondisclosure case where two of the complainants<sup>2</sup> died of AIDS (Grant, 2011; Symington, 2009). More recently, the Canadian Coalition to Reform HIV Criminalization (CCRHC) was formed by legal and academic experts, people living

<sup>1</sup> The title of this thesis was taken from a news article headline that used the turn of phrase ‘patient zero’ to refer to Smith as a foreigner bringing HIV/AIDS to the CFL (Mackinnon, 2005, p. C2) much like Gaéton Dugas who was a gay Canadian flight attendant thought to have introduced HIV/AIDS to the United States. Dugas was incorrectly identified as patient zero by Randy Shilts in his book *And the Band Played On*, about the AIDS crisis in the early 1980s. That Smith is the first openly HIV-positive CFL player is similar to other athletes who have come out as living with the illness such as Magic Johnson in the National Basketball Association and Greg Louganis in diving.

<sup>2</sup> Throughout this thesis I purposefully use the term complainant as opposed to ‘victim’ since many individuals who are living with HIV/AIDS are ‘victims’ of someone’s nondisclosure. The law problematically neglects to make these distinctions and draws clear lines between the ‘offender’ and ‘victim’ thereby creating a dichotomy that further stigmatizes people living with HIV/AIDS.

with HIV/AIDS (PLWHA), and frontline workers who argue that criminalizing HIV nondisclosure should be limited to cases in which there is:

- proof that the person intended to transmit HIV;
- proof that the person engaged in sexual activity that was likely to transmit the virus;
- proof that HIV was actually transmitted; and
- in the case of a conviction, a penalty that is proportionate to the actual harm caused. (CCRHC, 2017, p. 2).

Their efforts finally paid off when on World AIDS Day 2018, the Canadian federal government recognized the growing number of people criminalized for HIV nondisclosure by declaring that PLWHA should not be criminalized if they “are on treatment; are not on treatment but use condoms; or, engage only in oral sex (unless other risk factors are present and the person living with HIV is aware of those risks), because the realistic possibility of transmission test is likely not met in these circumstances” (Department of Justice, 2018, p. 30).

In the early days of the HIV/AIDS epidemic people living with HIV were not under the gaze of the criminal law as they are today because the virus was “contained within stigmatized groups such as intravenous drug users, sex workers, Africans, and especially gay men” (Buchanan, 2015, p. 1237). As such, the politics of AIDS can be characterized as “a politics of division, stigmatization, and moral blame” (Singer, 1994, p. 1321). For example, the speed with which one dies of HIV/AIDS or the ability to survive the virus is dependent on the person’s socioeconomic status. Specifically, the wealthier you are the greater access you have to healthcare, which also means that wealthier individuals are more likely to be healthy/healthier at the time of infection.

Wealthier individuals also live in conditions where they are better equipped to survive the virus. For example, access to antiretroviral therapy (ART) was originally very expensive – more than \$25, 000 per patient per year – which meant individuals in countries with poor health resources could not access ART (Smith & Whiteside, 2010). As a result, “AIDS had become a chronic disease in the west, [while] in most of the developing world it was still a death sentence” (Smith & Whiteside, 2010, p. 4).

Additionally, HIV/AIDS was and continues to intersect with the politics of race, class and sexual orientation. In the early days of the epidemic, HIV was thought to have been imported from Africa and as such was thought of as a disease that was located in the Black body. Given that it spread rapidly amongst gay men and men who have sex with men (MSM), HIV/AIDS was also primarily considered a disease of the gay body. As such, HIV/AIDS was constructed as a disease of “the distant and diminished Other” (Singer, 1994, p. 1323). We continue to see these politics (re)produced in the criminalization of HIV nondisclosure and especially in today’s media representations of people criminalized for HIV nondisclosure. Research shows that Black heterosexual immigrant men receive a disproportionate amount of attention in the media and are portrayed as hypersexual and deviant ‘AIDS monsters’ (McKay, Thomas, Holland, Blood, & Kneebone, 2011; Mykhalovskiy, Hastings, Sanders, Hayman, & Bisailon, 2016; Persson & Newman, 2008).

Generally, studies on media representations of people criminalized for HIV nondisclosure have examined the issue by looking at a multitude of cases and most have been conducted in Australia or New Zealand. In Canada, only three studies exist that



explore the portrayal of people criminalized for HIV nondisclosure. The first, is Miller's (2005) examination of Callwood's book written about Charles Ssenyonga. The second and most recent study was conducted by Mykhalovskiy et al. (2016) who looked at all HIV nondisclosure cases that received media attention. They conducted the only quantitative study about HIV nondisclosure cases in the media which provides us with much needed descriptive statistics on the amount of media attention received by individuals criminalized for HIV nondisclosure based on race and gender, among other things. They also explored these news stories qualitatively to find common themes regarding the representational strategies used by reporters. Lastly, Kilty (2014) is the only researcher that has explored the portrayal of women criminalized for HIV nondisclosure in media and legal discourses. This study adds to the limited Canadian literature by qualitatively examining the portrayal of former Canadian Football League (CFL) player Trevis Smith in media and juridical content using an intersectional (Crenshaw, 1989) and masculinities (Connell, 2005; Messerschmidt, 2016) theoretical framework. In particular, I explore the ways in which race, class, gender, sexual orientation, HIV positive status, and the label criminal coalesce in the juridical and media content to discursively constitute Trevis Smith in different ways.

Following this introduction, Chapter 2 reviews the legal landscape of HIV nondisclosure common law in Canada and provides a feminist critique of those laws. Second, I discuss the relationship between public health and criminal law, and the common debate in the literature which discusses the various benefits and downfalls of each approach to HIV/AIDS. Third, I explore some of the consequences of criminalizing

HIV nondisclosure. Fourth, I discuss in greater detail the limited literature on the mediated portrayal of defendants facing or who have faced charges related to HIV nondisclosure and/or intentional transmission.

In Chapter 3, I outline the theoretical framework, which is divided into three sections. In the first section, I discuss the history of intersectionality and address some of the common critiques of the theory. The second section is similarly constructed but also contains a specific focus on Black masculinities and sport given that Smith was a Black athlete playing for the Saskatchewan Roughriders football team. In the conclusion of this chapter I draw together intersectionality and masculinities theories to form the framework for this thesis.

Chapter 4 describes the methodological approach I used to conduct this research. I start by discussing the case study method and how I collected the data. Next, I describe the analytical strategy I employed to study the data and situate my use of critical discourse analysis in the broader literature on the various approaches to using this method. This is followed by a review of two specific genres of discourse (mediated and juridical) and how I specifically went about conducting a critical discourse analysis. In section 4.3, I provide a discussion of my epistemological stance and the qualitative criteria used to evaluate this study. The last section of this chapter describes the limitations of this research.

Chapter 5 is divided according to the three main discourses I identified from analyzing the data. The first discourse, “Dr. Jekyll and Mr. Hyde” discusses the ways in

which Smith was portrayed as ‘good’ because he was a hero to children and was loved by fellow teammates and coaches, and ‘evil’ because he maliciously seduced women into having sexual relationships with him and failed to disclose that he was HIV positive. The second discourse outlines how Smith’s promiscuity was simultaneously justified by the media, which describes all athletes as hypersexual, while also portraying him as a playboy whose celebrity status allowed him to have a ‘woman at every port.’ Finally, the third discourse frames Smith’s sexuality and ‘evil other side’ as lethal to the larger HIV-negative social body.

In the conclusion, I situate the findings from Chapter 5 within the socio-politics of race, class, sexual orientation, gender, HIV/AIDS and criminality. By doing so, I bring attention to some of the social consequences of discursively constructing Black men living with HIV as hypersexual, lethal and malicious. This is followed by a brief discussion of some ideas for future research.

## **Chapter 2.**

### **A Review of the Literature**

I start this chapter by reviewing the current demographic trends on HIV nondisclosure cases in Canada. Next, I provide an overview and critique of two major Canadian cases of HIV nondisclosure that outlined the legal standard for when nondisclosure of HIV constitutes a criminal offence. Then, I move to a discussion about the use of scientific evidence in HIV nondisclosure cases. This is followed by feminist critiques that focus on the use of aggravated sexual assault to prosecute people living with HIV for failing to disclose their positive serostatus to partners before sex. Section 2.2 of this chapter reviews the larger debate in the HIV nondisclosure literature that pertains to the use of public health law and/or criminal law and section 2.3 calls for the reframing of HIV nondisclosure as a public health rather than criminal law issue by outlining the harmful consequences of criminalizing HIV nondisclosure. Lastly, I outline the limited research on mediated portrayals of people criminalized for HIV nondisclosure and/or intentional transmission of HIV.

#### **2.1. The Legal Landscape of HIV Nondisclosure in Canada**

Unlike some American states and Australian territories, Canada does not have a specific law that criminalizes HIV nondisclosure. Instead, Crown attorneys use existing criminal code legislation to prosecute individuals who have been accused of failing to disclose their HIV-positive status to their partners (Dej & Kilty, 2012; Kirkup, 2015). In the only comprehensive study showing the demographic patterns of HIV nondisclosure cases in Canada, Mykhalovskiy et al. (2016) “identified a total of 181 people who have

faced charges in 196 HIV non-disclosure criminal cases in Canada since 1989” (p. 21). Their study showed that in 2004 HIV nondisclosure cases jumped with 80% of known cases occurring since 2004 (Mykhalovskiy et al., 2016, p. 21). Moreover, demographic patterns show that from 1989 to 2015 men accounted for 88% of all people charged, while women made up only 9% of defendants charged (Mykhalovskiy et al., 2016, p. 21). Despite the fact that HIV rates continue to be elevated amongst gay men and men who have sex with men (MSM) – 48.8% of all known HIV cases were attributed to MSM while only 29.2% were attributed to heterosexual sex in 2015 in Canada – the majority of criminal cases involved heterosexual sex (68%) while only 26% of cases involved gay, bisexual or MSM (Mykhalovskiy et al., 2016; Public Health Agency of Canada, 2015). Furthermore, most of the male defendants were white (27%) compared to 21% Black, 6% Aboriginal, 2% Asian and 2% Latin American (p. 22).

Not only are increasing numbers of people being charged for HIV nondisclosure, but the charges themselves are also increasing in severity (Dej & Kilty, 2012). For example, early charges included causing a nuisance or administering a noxious substance, which, over time, gave way to more severe charges such as, criminal negligence causing bodily harm, assault, aggravated assault, aggravated sexual assault and in 2009, murder (Dej & Kilty, 2012; Grant, 2008; Mykhalovskiy, Betteridge, & McLay, 2010). The most common charges laid are aggravated sexual assault, assault or aggravated assault; unlike the charge of causing a nuisance, assault charges do not have a causation requirement meaning that people can be charged whether or not they have transmitted the virus (Dej & Kilty, 2012; Grant, 2008). However, Crown prosecutors still

have to prove that no consent was obtained; therefore, one of the key legal debates in nondisclosure cases centres on the issue of consent (Grant, 2008). Specifically, the Supreme Court of Canada decision in *R. v. Cuerrier* (1998) changed our understandings of consent for assault charges by stating that failure to disclose one's HIV-positive status constitutes fraud which vitiates consent.

Cuerrier was charged with two counts of aggravated assault under s. 265 and 268 of the *Canadian Criminal Code*. The B.C. trial court found that the charge of aggravated assault could not be made because the two women consented to sexual activity (Grant, 2008). The Supreme Court of Canada thought differently. Specifically, they were concerned with whether or not the failure to disclose one's HIV-positive status constituted fraud (Elliott, 1999). The Supreme Court justices decided that nondisclosure does constitute fraud which vitiates consent in the context of physical contact including sex (Elliott, 1999; Grant, 2008). The majority of the Court outlined three tests that the prosecution must prove in order to establish fraud:

- an act by the accused that a reasonable person would see as dishonest;
- a harm, or a risk of harm, to the complainant as a result of that dishonesty; and
- the complainant would not have consented but for the dishonesty by the accused (Elliott, 1999, p. 12)

However, the Supreme Court was concerned that lower courts might interpret the definition of harm too broadly so as to include trivial harms. Therefore, they determined that the “harm in question must constitute a significant risk of serious bodily harm”

(Grant, 2008, p. 135). Therefore, the Supreme Court's decision in *Cuerrier* articulates that when a person living with HIV fails to disclose his or her HIV-positive status this poses a significant risk of serious bodily harm, which means that consent was fraudulently obtained (Grant, 2008, p. 135).

There are two major issues identified in the literature with the legal test of *significant risk of serious bodily harm* established by the Supreme Court in *Cuerrier*. Namely, there have been vast inconsistencies in how the lower courts have applied the legal test and there are no clear parameters for determining when a 'significant risk' has occurred nor what constitutes a significant risk. For example, Mykhalovskiy et al. (2010) identified three general types of inconsistencies:

- inconsistencies in evidence used to establish whether the sexual relation involved a significant risk of HIV transmission
- inconsistencies in how courts have interpreted the legal test
- inconsistencies in actual decisions. (p. 19)

The common thread in these contradictions, is that at the time of the *Cuerrier* decision in 1998, scientific evidence on HIV/AIDS was still limited (Dej & Kilty, 2012). As the scientific evidence developed, the lower courts inconsistently used this evidence and experts provided diverse risk estimates for the same sexual activities (Mykhalovskiy, 2011; Mykhalovskiy et al., 2010). For example, there is confusion amongst lower courts in terms of their interpretations of what constitutes a *significant risk* with respect to different sexual activities – especially those generally considered to be low risk, such as oral sex and protected sex (Symington, 2009). In *R. v. Nduwayo*, *R. v. Smith* and *R. v.*

*Edwards* the courts determined that the accused had a legal duty to disclose his HIV-positive status to his sexual partner if the sexual encounter was unprotected, but that there was no legal duty to disclose if the accused used a condom at all times (Dej & Kilty, 2012; Mykhalovskiy et al., 2010; Symington, 2009). However, in *R. v. Mekonnen* the judge decided that any evidence pertaining to the risk of HIV transmission is irrelevant and determined that vaginal sex with a condom without disclosure constituted an aggravated sexual assault (Grant, 2011; Mykhalovskiy et al., 2010).

More recently, a Manitoba trial judge in *R. v. Mabior* did not follow the pattern of decisions made in *Nduwayo*, *Smith and Edwards*. Mabior had sexual relations with nine complainants with whom he would inconsistently use condoms and with whom he failed to disclose his HIV-positive status. However, he was compliant in taking antiretroviral medication – there was only one occasion when he failed to take his medication – which successfully brought his viral load down to an undetectable level. *Mabior* was complicated by the fact that in some sexual encounters he used a condom, but had a detectable viral load; other times he did not use a condom, but had a low or undetectable viral load.<sup>3</sup> The only instances for which he was acquitted was when he used a condom and had a low or undetectable viral load (Dej & Kilty, 2012). In other words, nondisclosure still constitutes a *significant risk* as set out in *Cuerrier* unless the accused had a low viral load *and* used a condom (Dej & Kilty, 2012). These conditions

<sup>3</sup> An undetectable viral load consists of having 50 copies or less per millilitre of blood.



were set out after Justice McKelvey determined that Mabior had endangered the life of the complainant regardless of whether a condom was used (Grant, 2009). This finding was based on expert testimony given at trial that stated condoms had a 20% failure rate (through breakage/tearing or falling off) (Grant, 2009). According to Dej and Kilty (2012) this decision changed the legal standard from *significant risk* to *low risk* and according to Grant (2011) it changed the legal standard to *any risk*. Moreover, this decision is in contrast to the majority ruling in *Cuerrier* who stated “the careful use of condoms might be found to so reduce the risk of harm that it could no longer be considered significant [...]” (Dej & Kilty, 2012; Grant, 2011; *R. v. Cuerrier*, 1998, para. 129). Also, *Mabior* was the first case to consider scientific evidence on viral load (Dej & Kilty, 2012).

In contrast, the appeal court “took a more restrained approach” and “held that the trial judge was wrong to hold that any risk of harm is significant and erred in failing to identify the baseline risk before assessing an 80% reduction of that risk” (Grant, 2011, p. 17). The court of appeal thus began to develop a “careful use of condoms test” which addresses the *obiter* comment made by Justice Cory in *Cuerrier* that “condom use might reduce the risk of harm below significance” (Grant, 2011, p. 18). Given these differing and controversial decisions between the trial and appeal courts, *R. v. Mabior* went to the Supreme Court of Canada in 2012. Chief Justice McLachlin attempted to clarify the decision in *Cuerrier* (1998) “with a framework for interpreting ‘significant risk of serious bodily harm’” (Hartford, 2014, p. 171). Specifically, she wrote in her decision

that “where there is a *realistic possibility of transmission of HIV*, a significant risk of serious bodily harm is established” (*R. v. Mabior*, 2012, para 84).

Closely examining the use of statistical reasoning in the *Mabior* case problematizes the way courts have mobilized statistics in order to determine what constitutes a *realistic possibility of transmission* (Hartford, 2014). In *R. v. Mabior*, Chief Justice McLachlin used statistics related to the risk of HIV transmission inaccurately and ultimately “generate[d] serious logical contradictions and create[d] uncertain liability” (Hartford, 2014, p. 169). For example, Hartford (2014) is concerned with how the Chief Justice defined certain variables arguing that she defined them too “crudely” (Hartford, 2014, p. 175). Specifically, he is concerned with the variables Chief Justice McLachlin used to assess the risk posed by Mabior’s conduct. One of those variables is the effectiveness of condoms, which, as mentioned previously, were cited as reducing the risk of HIV transmission by 80% (Grant, 2011; Hartford, 2014). Hartford (2014) argues that this percentage was taken from a meta-study that did not control for “correctness of use or condom type” (p. 175), which when controlled, the effectiveness of condom use in preventing HIV transmission rises to approximately 98%. In short, Hartford (2014) argues that:

Chief justice McLachlin defines her relevant variables so imprecisely that safe behaviour is criminalized. Second, she defines so few relevant variables so as to provide virtually no guidance for HIV-positive individuals seeking to avoid liability, creating uncertainty in a judgement that was intended to clarify the law. Third, her approach criminalizes behaviour that would not be illegal in comparable non-HIV contexts (p. 178).

Similarly, Shaffer (2013) argues that the standard outlined in *Mabior* is not a medical one but a legal one. Specifically, in the medical context condom use alone would so reduce the risk of HIV transmission that it is sufficient enough to negate the *realistic possibility of transmission* standard (Shaffer, 2013). She adds that the standard does not explain how it would be used in the context of sexual activities that do not involve vaginal intercourse (Shaffer, 2013). For example, the risk of transmitting HIV during oral sex is so low that the standard does not outline whether or not a person is required to wear a condom and have a low viral load (Shaffer, 2013). The same can be said for anal sex, which is said to carry the highest risk of transmission – will a condom and low viral load be sufficient enough to negate the *realistic possibility of transmission*? (Shaffer, 2013). Indeed, Hartford (2014) argues that “the type of sex act in question drastically affects the odds of transmission” (p. 176); for example, “unprotected oral sex poses virtually no risk of transmission” citing that the risk of transmission ranges from 0 to 0.04% (Hartford, 2014, p. 176). However, he acknowledges that different studies will come to different risk estimates and so criminal liability will depend on the specific study chosen by the expert (Hartford, 2014).

The *Mabior* decision and the Supreme Court’s inability to properly mobilize scientific evidence has made the criminalization of HIV nondisclosure even more problematic. For example, a recent study by Hastings, Kazatchkine, and Mykhalovskiy (2017) found that post *Mabior* there was an 18% increase in the number of Black men facing charges related to HIV nondisclosure and a 12% increase in the number of gay men criminalized for HIV nondisclosure (p. 8). Moreover, the number of cases involving

a defendant with an undetectable or low viral load and the proportion of cases in which no HIV transmission occurred also increased post *Mabior*, with 67% of cases involving no HIV transmission and only 59% of cases involving no transmission prior to the *Mabior* decision (Hastings et al., 2017 p. 8). More importantly, the criminalization of HIV nondisclosure seems to be more punitive when compared to other sexual assaults – the average prison sentence for someone convicted of sexual assault in the context of HIV nondisclosure is 54 months while the average prison sentence for people convicted of sexual assaults that do not involve HIV nondisclosure is 24 months (Hastings et al., 2017 p. 9).

### **2.1.1. Feminist Critiques**

The Supreme Court’s decision in *R. v. Mabior* to broaden the conditions under which a person living with HIV must disclose his or her serostatus and be safe from criminal prosecution was based on feminist thought (Klein, 2016). Specifically, the *Mabior* decision states that “a generous approach to the issue of consent and when deceit might vitiate it respect[s] the right of women involved to choose whether to have intercourse or not” (*R. v. Mabior*, 2012, para 31). In other words, the decision to criminalize the nondisclosure of HIV supports a woman’s right to choose/consent not only to the sexual activity but to all of the risks associated with it. On the other hand, Buchanan (2015) argues that law makers cannot use sexual autonomy to justify criminalizing HIV nondisclosure when all other “material sexual deceptions are lawful” (p. 1231). More importantly she questions:

If HIV prosecutions purport to vindicate an interest that sexual consent be fully informed, we must ask why expanded criminal prosecution of this interest would be limited to nondisclosures about HIV and transgender identity. In the absence of persuasive justifications for singling out these nondisclosures, we must ask whether heterosexist gender norms might inform a jurisprudence that affirmatively permits the kinds of sexual deception that are stereotypically associated with heterosexual men, while punishing sexual deception by transfolk and people with HIV who violate conventional expectations of heterosexual privilege. (Buchanan, 2015, p. 1231)

Moreover, Mackinnon and Crompton (2012) argue that in cases of HIV nondisclosure the law is overly concerned with the sexual autonomy of the HIV-negative partner while the sexual autonomy of the HIV-positive partner is deemed irrelevant, dirty and unacceptable. For example, the “good” HIV-positive person is one who abstains from sex therefore “exchang[ing] sexual integrity for social acceptance” (Mackinnon & Crompton, 2012, p. 429). The sexual autonomy of women living with HIV is especially difficult because they are afforded the protection of victimhood while they are sexually inactive (Mackinnon & Crompton, 2012). However, when HIV-positive women engage in sex, whether they practice safe sex or not, they lose “the protection of their victimhood, which adheres to chaste women, sexually active HIV-positive women are subject to the misogynistic slur of whorishness—they are stripped of the social protection afforded to women whose sexual practices fall within socially accepted parameters” (Mackinnon & Crompton, 2012, p. 431).

On the other hand, someone who has unprotected sex with an HIV-positive person and is not aware of his/her partner’s seropositivity can be both a victim exposed to the risk of HIV but also an agent choosing to have sex with all the risks that entails (Klein, 2016). The law on HIV nondisclosure is unable to grapple with the fact that most

people do consent to sex that is ‘risky’ and in doing so law denies the HIV-negative person any agency in deciding their own sexual autonomy (Klein, 2016). In contrast, Mathen and Plaxton (2011) argue that the assumption that “one’s partner is not invested in her own health and well-being, and is therefore willing to make herself sexually available in spite of obvious risks—may be to treat her as if she had no plans or priorities beyond her own immediate sexual gratification” (p. 483). In short, the deception involved in the nondisclosure of HIV constitutes the very wrong sexual assault law was meant to protect women against (i.e. objectification) (p. 485).

In opposition, Klein (2016) argues that this view “[relies] on under-examined conceptions of agency and autonomy that privilege the interests of HIV negative people at the expense of those more marginalized” (p. 178). Moreover, she articulates that pro-criminalization advocates such as Mathen and Plaxton (2011) and the majority in the *R. v. Mabior* Supreme Court decision use feminist thought to justify the expansion of the criminalization of HIV nondisclosure (Klein, 2016). However, this type of carceral feminist thought is essentialist and does not take into consideration the “complex power dynamics where HIV, sex, and gender interact” (p. 178). For example, people living with HIV experience stigma that is not associated with other diseases such as cancer. This stigma marginalizes people living with HIV, which creates a power imbalance that disempowers the HIV-positive person. Mackinnon and Crompton (2012) argue that this power imbalance makes the “*disempowered* individual [...] the assaulter” (p. 426). In other words, the law on HIV nondisclosure reverses the power dynamic associated with typical sexual assaults – namely, that it is the defendant who is powerless in sexual

assaults involving HIV nondisclosure (Mackinnon & Crompton, 2012). Instead, the authors suggest that “society at large [...] has *created* the sexual assault by constructing the HIV-positive person as menacing and powerful” when in fact the HIV-positive person is disempowered and marginalized (Mackinnon & Crompton, 2012, p. 426).

The negative effects of HIV nondisclosure laws are felt most intensely by those individuals in the HIV-positive community whose seropositivity intersects with racism, classism, and sexism (Mackinnon & Crompton, 2012). As stated in the beginning of this section, heterosexual men are disproportionately criminalized for HIV nondisclosure (Hastings et al., 2017 ). Buchanan (2015) writes that the “gender, sexual orientation, and social status of the complainant (much more than that of the accused) tends to shape perceptions of whether and when sex is a crime” (p. 1248). In other words, the over-criminalization of heterosexual men suggests that “HIV is tolerable when contained within low-status groups such as MSM, sex workers, and intravenous drug users, but intolerable when higher-status heterosexuals are put at risk” (Buchanan, 2015, p. 1253).

The intent of this section was to provide a brief overview of how the case law on HIV nondisclosure has evolved since *Cuerrier* and to problematize the use of criminal law to punish those who do not disclose their HIV-positive status to their partners before sex. Specifically, I wanted to draw attention to legal scholarship that critiqued the decisions made in *Cuerrier* and *Mabior*. While I recognize that there might be instances in which deliberate transmission of the virus occurs, the lack of specific guidelines set out by the Supreme Court of Canada has led to the criminalization of all sexual activities and in turn to the disproportionate criminalization of persons living with HIV (Grant,

2013). Moreover, using the law to punish the sexual activity of people living with HIV has negatively affected public health efforts at preventing the spread of HIV, such as routine testing (Galletly & Pinkerton, 2006; Mykhalovskiy, 2015; O'Byrne, 2012). Most scholars contend that the law should only be used as a last resort when public health laws fail.

## **2.2. Public Health Law or Criminal Law**

In *Addressing HIV Risk Behaviours: A Role for Public Health Legislation and Policy* (2010), the HIV/AIDS Legal Network and Interagency Coalition on AIDS and Development outline public health laws more generally pertaining to behaviours that pose a significant risk of HIV transmission. They describe how public health laws fall on a continuum of measures that range from the least coercive to the most coercive in their efforts to prevent the transmission of HIV by modifying behaviours deemed risky. For example, at the least coercive end public health officials can require:

Voluntary HIV & STI testing including pre- and post-test counselling, access to HIV prevention tools (condoms, clean injecting equipment, substitution therapy), voluntary partner notification (also known as “contact tracing”), counselling, including intensive counselling and mental health services, support and linking to other medical, social and community services (*Addressing HIV Risk Behaviours: A Role for Public Health Legislation and Policy*, 2010, p. 3).

On the more coercive end, public health officials can require “mandatory reporting of cases of HIV and AIDS, behaviour orders, examination, testing and treatment orders, detention orders, court enforcement of public health authorities’ orders, and offences and penalties” (*Addressing HIV Risk Behaviours: A Role for Public Health Legislation and Policy*, 2010).



For instance, in Saskatchewan Canada,<sup>4</sup> s. 33(3) of the *Public Health Act*, 1994 states that a person who is diagnosed with HIV must “take all reasonable measures to reduce significantly the risk of infecting others.” Specifically, under s. 33(4) the HIV-positive person must listen to advice given by physicians, nurse practitioners or clinic nurses and communicate with all known sexual partners about his or her HIV-positive status either personally or by asking the medical officer to contact his or her sexual partners. Moreover, medical officers may issue an order that prohibits certain behaviours by the HIV-positive person. The requirements of these orders are set out in s.38(1) and include amongst other conditions that the person act in a way that will reduce exposure of the disease to others; attend counselling in order to reduce risk behaviours and the spread of the disease; or leave a job that may spread the disease. In the event that a person fails to comply with the order, under s. 60(1) the medical officer may apply to the Court of the Queen’s Bench for a court order that requires the person to fulfill the conditions of the order. If the person does not obey the court order, under s. 61(a)(i)(ii) the person is found guilty of a summary conviction. Upon conviction, if this is the first offence, the person is fined up to \$75, 000 and further fined up to \$100 for each day the person does not comply with the order. If this is the second offence, the person is fined up to \$100, 000 and fined up to \$200 every day the person does not comply with the order.

<sup>4</sup> In Canada, public health is under the jurisdiction of the provinces and territories. As such, each province and territory will have different guidelines regarding communicable diseases. For the purpose of this thesis, I only outline the guidelines for communicable diseases in the *Public Health Act* of Saskatchewan given that Trevis Smith was charged and convicted in this province.

In these ways, public health laws are better equipped to deal with preventing the spread of HIV because they are based on strategies that target individual reasons and challenges that result in HIV risk behaviours (*Addressing HIV Risk Behaviours: A Role for Public Health Legislation and Policy*, 2010). Namely, these laws require that medical professionals provide counselling and other support services in order to reduce behaviours that lead to a significant risk of HIV transmission (*Addressing HIV Risk Behaviours: A Role for Public Health Legislation and Policy*, 2010). Even when public health laws are coercive, there is more freedom under these legislations to withdraw coercive measures when the person is found to no longer pose a significant risk of HIV transmission; officials can subsequently implement voluntary interventions that offer more support and care (*Addressing HIV Risk Behaviours: A Role for Public Health Legislation and Policy*, 2010).

Moreover, there is no evidence that the criminalization of HIV nondisclosure actually prevents the transmission of HIV. In fact, a recent study showed that specific laws relating to HIV exposure resulted in no “detectable HIV prevention effect” (Sweeney et al., 2017). In fact, the authors found that factors such as “urbanicity, unemployment, low education, poverty and minority populations” were all “positive[ly] and significantly associated with HIV and AIDS diagnoses rates” (Sweeney et al., 2017) meaning that factors other than whether a person discloses or not is associated with HIV prevalence. In short, laws which address the social determinants of health such as poverty and education are better at preventing HIV transmission than laws that are coercive and punish people living with HIV.

Nonetheless, there is still considerable debate in the literature regarding the effectiveness of the criminal law to prevent the transmission of HIV. Some scholars argue that criminalization should be a ‘last resort’ for when public health efforts fail. For example, Klein (2009), Galletly and Pinkerton (2006), and Mathiesson (2010) argue for a hybrid model in which the criminal law is used as a last resort. Specifically, Klein (2009) describes a “support-then-enforcement” model to dealing with nondisclosure. She explains that this model would involve a broader range of actors which would “facilitate more explicit negotiation of boundaries between the criminal law and neighbouring orders” (p. 267). She argues that a hybrid model will distinguish those who are morally blameworthy from those who could not disclose based on their circumstance (Klein, 2009). For example, in the Canadian case of *R. v. DC* the accused – a woman – had charges brought against her by a man who, apart from their first sexual encounter, knew she was HIV-positive throughout their four-year relationship. The complainant used the criminal law as retaliation for when DC reported to the authorities that she and her son were being violently abused by the complainant. Klein (2009) argues that a hybrid model would prevent these types of coercive situations from happening.

Similarly, Galletly and Pinkerton (2006) argue that HIV nondisclosure laws should complement public health efforts to prevent the spread of HIV. They say that the public health system should continue to encourage shared responsibility and community members to be active participants in their health, while the criminal justice system should “[demand] compliance and [give] out punishment if compliance is not met” (Galletly & Pinkerton, 2006, p. 452). However, Grant (2008) makes a compelling

argument stating that those who do not follow public health laws are similarly unlikely to be deterred by the criminal law. In response, Elliott (2002), using the four objectives of criminalization (i.e. rehabilitation, incapacitation, deterrence and retribution), asserts that public health laws can accomplish these objectives better than criminal laws.

Specifically, he writes that “public health interventions are more flexible, and can be better tailored to the individual’s circumstances than the blunt tool of a criminal prosecution” (Elliott, 2002, p. 29). However, he also asserts that criminal laws should be used as a last resort – thus only when public health efforts have been exhausted (Elliott, 2002). Interviews with individuals working in the public health sector reveal that these interlocutors “viewed the criminal law as a power of “last resort” to be used only after the failure of traditional public health responses” (Mykhalovskiy et al., 2010, pp. 47-48).

Alternatively, some scholars take a more radical stance in the debate; arguing that the use of public health laws are just as coercive as criminal laws. For example, Weait (2007) asserts that,

Public health law may – rather than being a ‘soft option’ – amount to criminalisation by the back door, and that its coercive potential not only threatens the human rights of [people living with HIV] but may actually impede the effective management of the epidemic (p. 3).

Critiquing England’s public health policies, Weait (2007) argues that those who carry a disease that can be transmitted “are legitimate objects of state regulation” (p. 20). Taking a similar radical stance, Shevory (2004) argues that “notions of sanitation, cleanliness, and purity were deeply embedded in emerging doctrines of public health” (p. 122). He explains that social reformers and public health officials had a dual motive of caring for

the sick and injured but also to keep “the social body free of elements that undermined its purity” (Shevory, 2004, p. 122). He concludes that the increase in state power with regards to public health (re)produced racism, anti-immigration sentiments and eugenic ideas (Shevory, 2004). More recently, Hoppe (2018) contends that public health is a form of “punitive disease control” that “labels, surveils, controls, and punishes people living with infectious diseases” (p. 7).

Similarly, while this particular article is generally not sympathetic to PLWHA, Sullivan and Field (1988) argued that the use of quarantine and criminal laws are coercive measures that encourage people to avoid getting tested, intrude in the private sexual lives of people who do not transmit HIV and increases the risk of harassment and stigmatization of already marginalized groups. Instead, they advocate for medical research and public education on how HIV is transmitted and how risk can be reduced (Sullivan & Field, 1988). Moreover, the decision by officials to implement quarantine laws has been used for purposes beyond the need to protect public health – specifically, authorities have historically used quarantine measures for economic and discriminatory purposes (Shevory, 2004). For example, in Connecticut during the eighteenth century Scottish and German immigrants were associated with disease and so quarantine laws were implemented to target these groups (Shevory, 2004). Also, in the case of *Louisiana v. Texas*, Louisiana argued that Texas was simply using the emergence of yellow fever and quarantine laws “as a pre-text to justify shutting down trade from its most significant state competitor” (Shevory, 2004, p. 128). Scholars have responded to these concerns by

stating that oversight and transparency can ensure that these laws do minimal harm to already marginalized groups (Drummond, 2011; Elliott, 2002).

Given this debate, considerable research has been conducted on the consequences of criminalizing HIV nondisclosure. Notably, that such a coercive instrument has undermined public health efforts aimed at preventing the spread of HIV.

### **2.3. Consequences of Criminalizing HIV Nondisclosure**

Most scholars writing about the criminalization of HIV nondisclosure agree that criminal laws must be consistent with public health policy (Elliott, 2002; Galletly & Pinkerton, 2006; Grant, 2009; Klein, 2009). In fact, Elliott (2002) proposed that “preventing the transmission of HIV should be the primary objective” of policy makers when developing law and policy in regards to HIV transmission (p. 5). However, a number of researchers have noted that criminal laws have the potential to commit more harm than accomplish the goal of prevention.

First, criminal laws have the potential to create a false sense of security amongst HIV-negative people because they now believe that the law will force people to disclose and therefore they do not have any obligation to practice safe sex (Adam, Elliott, Husbands, Murray, & Maxwell, 2008; Elliott, 2002; Galletly & Pinkerton, 2006). In other words, the use of the criminal law to prevent HIV transmission has changed the public health message of ‘shared responsibility’ to the neoliberal notion of ‘individual responsibility.’ Specifically, the criminal law has advertised that the HIV-positive partner is responsible for disclosing his or her serostatus to potential partners and the

HIV-negative partner is responsible for protecting him or herself (Galletly & Pinkerton, 2006, p. 455). The law places an undue burden on the HIV-positive person to disclose his or her serostatus, which permits the negative partner to neglect the risk that comes with unprotected sex (Weait, 2001). In short, Weait (2001) explains that framing responsibility as an individual concern “prevents us from thinking about responsibility for transmission as shared between the parties” (p. 450). Put another way, messages of individual responsibility create “[categories] of ‘other’ people who are the sole focus of criminal sanctions” (Elliott, 2002, p. 25). More importantly, Kilty and Orsini (2017) argue that “law is a field of scientificity and the jurisprudence that criminalizes nondisclosure functions as an episteme that obfuscates the doctrine of neoliberal self-government when applied to HIV disclosure practices” (p. 5). In other words, the criminalization of HIV nondisclosure contrasts long-ingrained neoliberal messages about individual responsibility for sexual health to disproportionately put the responsibility for safe sex on the HIV-positive person. Moreover, 62% of all male defendants who have been criminalized for HIV nondisclosure are heterosexual (Hastings et al., 2017 ). Kilty and Orsini (2017) assert that over-criminalization of heterosexual sex “suggests that men who have sex with men embrace neoliberal sexual health responsibilities more completely than do heterosexual couples, who appear to be more likely to seek punishment for and to feel wronged by nondisclosure” (p. 5).

Engaging in discourse that promotes ‘individual responsibility’ overlooks the everyday barriers to disclosure. Namely, some people may not want to disclose that they are HIV-positive after engaging in behaviour deemed ‘risky’ because admitting would be

tantamount to a crime (Drummond, 2011; Elliott, 2002; Klein, 2009). Similarly, people may not want to get tested because then they hold the burden of criminal liability (Drummond, 2011; Klein, 2009). In a more theoretical analysis of responsibility, Adam (2005) asserts that

The neoliberal view constructs human actors as rational, adult, contract-making individuals in a free market of options. It does not account for the much more complex motivators and vulnerabilities that characterize real human interaction and it denies the vulnerabilities, emotions, and tough dilemmas faced by people in their everyday lives. (p. 344)

Some of these dilemmas include erectile dysfunction due to condom use, differential power relations, safety, or momentary lapses – for example, where a person may be drunk (Adam, 2005).

In particular, women often face greater burdens when disclosing. Symington (2009) writes that since men are overwhelmingly the accused in HIV nondisclosure cases and women are the complainants – in practice, the criminal law seems to work with the intention of protecting women. However, she argues that the law is a poor option for empowering women because it forces women to depend on their partners, public health officials or the police to protect them from potential transmission of HIV (Symington, 2009). Furthermore, women who are criminalized for HIV nondisclosure may have partners who are abusive or upon whom they depend financially. In these cases, women who are HIV-positive face a distinct disadvantage as the law is currently set out because it places them in a position of increased violence or indigence (Symington, 2009) given that disclosure is distinctly gendered (Allard, Kazatchkine, & Symington, 2013). Studies show that, women often disclose their status to their partners



before sex because they feel a moral responsibility toward their sexual partner and to protect their partner's sexual health (Siegal, Lekas, & Schrimshaw, 2005). In light of this finding, law creates a "problematic and inaccurate view that people living with HIV who choose not to disclose are consciously trying to transmit HIV to others, which ultimately sustains the stigma felt by people living with HIV" (Kilty, Orsini, & Balogh, 2017, p. 15). However, when women choose not to disclose they often do so out of fear that their partners will tell others of their HIV-positive status, rejection, abandonment and/or violence (Allard et al., 2013; Siegal et al., 2005). Moreover, some HIV-negative sexual partners have used the law as a coercive tool to blackmail their HIV-positive partner (Allard et al., 2013), which rightly makes an HIV-positive person question whether they should disclose. As such, Kilty et al. (2017) argue that "some decisions to disregard the law do not reflect irrational or purposively reckless behaviour, but rather the messiness inherent in complex, emotional decision-making" (p. 15). In other words, the law is an improper tool in the prevention of HIV through disclosure because it cannot recognize the complexity that is inherent in the disclosure practices of people living with HIV – law only sees a victim and perpetrator and whether disclosure occurred – nothing in between (Allard et al., 2013)

Given such complicated notions of responsibility resulting from the lack of direction in recent Supreme Court cases, those who work in AIDS service organizations, nurses, doctors and other public health officials are also left confused about how they should consult their clients. In particular, Mykhalovskiy (2011) conducted extensive research with AIDS service organizations (ASOs) about how the criminal law affected

their ability to provide public health services to people living with HIV. He concluded that the criminal law's notion of *significant risk* has created "confusion and contradictory HIV counselling advice" (Mykhalovskiy, 2011, p. 674). For example, counsellors expressed that criminal law has created an environment in which clients no longer want to discuss challenges they faced around disclosure (Mykhalovskiy et al., 2010). One way that counsellors in ASOs try to counter the effects of law is by understanding the "structural and interpersonal barriers" to disclosure that each client faces and then confessing to "build trust with and to elicit similar reflexive confessionals from service users, which positions the ASO worker as an authority figure in the support relationship and for some, as a model of neoliberal sexual citizenship" (Kilty & Orsini, 2017, p. 9). Counsellors also had a hard time communicating with their clients about the limits of confidentiality, which ultimately impacted their relationship with their clients (Mykhalovskiy et al., 2010). In short, the intrusion of law into the counselling relationship has undermined the confidence people living with HIV have with their counsellors, which may affect people's willingness to seek treatment and counselling for HIV (Elliott, 2002). Notably, Mykhalovskiy (2011) argues that sensationalist media coverage of HIV nondisclosure cases promotes uncertainty and distrust in the public health system, therefore perpetuating a climate of distrust between service users and frontline workers in ASOs.

## **2.4. HIV Nondisclosure in the Media**

Jewkes (2015) identified a list of 12 features that make crime stories newsworthy. First, crime stories need to meet a certain threshold of importance or drama to be

considered newsworthy. The importance depends on whether reporters and editors work in more local, national or global contexts. For example, to be newsworthy at the national level the crime event must be of a particularly high magnitude whereas petty crimes such as vandalism will receive more local attention. Second, crime stories that are predictable will also be newsworthy because news organizations can plan out coverage. Criminal trials are particularly favoured because editors and reporters know how long it will last and thus know how many personnel to deploy and where. Third, crime events need to either be simple or “reducible to a minimum number of parts or themes” (Jewkes, 2015, p. 49). Thus, news reporting encourages “brevity, clarity, and unambiguity” which allows the reader to suspend all critical thinking (Jewkes, 2015).

Fourth, individual definitions and explanations of crime are preferred over more complex justifications. One of the ways in which reporters achieve individualism is through a process of personalization which simplifies news stories by giving them a human-interest angle thereby resulting in “events being viewed as the actions and reactions of people” (Jewkes, 2015, p. 50). In this way, offenders and complainants are often constructed through individualistic frameworks which positions readers in such a way that they see themselves as vigilantes and victims who fear dangerous predators (Jewkes, 2015). This discourse of individualism is tied to notions of a risk-focused society in which news stories feed into the public’s fears and social anxieties about victimization (Jewkes, 2015).

One of the most prominent aspects of a crime story that makes it extremely newsworthy is sex. More specifically, crimes of a sexual nature are featured to such

extreme proportions in the media that they create an exaggerated sense of fear about being victims of a crime among women in particular. These stories are often centered around the victim who is portrayed as innocent which leads to the under-reporting of sex crimes against women deemed not innocent or immoral such as sex workers (Jewkes, 2015). When sexual crimes are attributed to celebrities this makes the crime story even more newsworthy.

Next, Jewkes (2015), describes that crime stories that have both spatial and cultural proximity, or in other words crimes that occur geographically close to the reader and/or have relevance to the audience, are deemed more newsworthy. In cases of celebrity criminal activity, even the most ‘mundane’ crimes make both local and national news by way of their intersection with other news values. Violence is the most common news value in most media reporting “because it represents a basic violation of the person and marks the distinction between those who are of society and those who are outside it” (Jewkes, 2015, p. 55). In particular, those crimes that have the most visual or graphic images will be regarded as more newsworthy because images often validate the ‘truth’ of a story (Jewkes, 2015). Lastly, Jewkes (2015) contends that the common thread among these news values is a conservative ideology that shores up support for more punitive penal policies “where political process and mass discourse are indistinguishable and mutually exclusive” (p. 57). Put another way, “mass media is understood to construct “pseudo-events” according to the dictates of an unwritten moral agenda which constitutes newsworthiness” (Watney, 1996, p. 39).

Media representations of people criminalized for HIV nondisclosure include many if not all of the news values discussed above and are no different than representations of other health issues. For example, Taylor (2008) writes that images of drug users, drugs and drug crimes are not based on fact or reality but “on a half-formed image and discourse of drugs that is centered around notions of social exclusion, and the perceptions and management of risk that drugs represent to certain segments of society” (p. 375). Similarly, people criminalized for HIV nondisclosure have been portrayed in the media as hypersexualized deviants, racialized ‘Others,’ AIDS criminals who threaten the (inter)national body politic (Kilty, 2014) and HIV sexual predators (Kilty & Bogosavljevic, 2018). On the other hand, images of drug users who defy stereotypical descriptions of people who use drugs can “de-mystify addiction” by showing that “anyone can become an addict” (Netherland & Hansen, 2016, p. 665). However, these images which aim to “de-mystify” addiction “are [simply] resetting the terms of drugs and race in popular culture in ways that insidiously further distinguish white from black (and brown) suffering, white from black culpability, and white from black deservingness” (Netherland & Hansen, 2016, pp. 665-666).

In the case of HIV nondisclosure, heterosexual men are predominantly prosecuted—this focus on heterosexuals “de-mystifies” HIV to show that anyone can become infected. However, media reporting on HIV nondisclosure has exclusively focused on racialized defendants. In fact, 21% of nondisclosure cases involve Black defendants while 68% of media reporting concentrates on racialized defendants and 62% of these news stories focused on African and Caribbean Black men living with HIV

(Mykhalovskiy et al., 2016, pp. 22-24). On the other hand, white defendants received only 25% of news coverage even though they make up 27% of nondisclosure cases (Mykhalovskiy et al., 2016, pp. 22-24). This media coverage portrays Black men living with HIV as AIDS criminals who “bring out the psychic fear of the bogeyman, miscegenation, pedophiles stalking children, and excessive sex” (Worth, Patton, & Goldstein, 2005, p. 7). This shows that race is a “significant determinant of whether one is included in newspaper coverage” (Mykhalovskiy et al., 2016, p. 23).

When racialized defendants are reported on, journalists often refer to the “length of [the defendants’] penis[...], duration of their sexual act, their uncontrollable lust, their sexual duplicity, their calculated good looks, and excessive charm” (Worth et al., 2005, pp. 7-8). For example, Miller (2005) explains that Callwood (in her book on Charles Ssenyonga) described him as a “charismatic political animal” who had sex with copious amounts of women and who killed using his exceptionally long penis (p. 39). Miller (2005) argues that Callwood’s reference to doctors who explain that Ssenyonga infected so many women because he could sustain an erection for a long period of time and because his penis was large—was simply for “spreading the myth-bolstered rumor that Ssenyonga was sinisterly well hung and supremely endowed with sexual stamina” (p. 40). Similarly, Shevory (2004) notes that the number of potential women Nushawn Williams infected was often conflated in media reporting because of reporters’ inability to differentiate between “primary and secondary exposure, HIV positivity, and actual AIDS” (p. 13). For example, the original number of women thought to be infected by Williams was 4 – this number rose in subsequent media reporting to 100 (Shevory,

2004). The actual number of women who had a chance of being infected by Williams either through primary or secondary contact and who also tested positive for HIV was 13 (Shevory, 2004).

More generally, media representations of a man with a long penis, increased sexual stamina and multiple partners might be considered positive because the characterization embodies masculine ideals of sexual prowess. However, in the case of HIV-positive heterosexual Black men, these referrals construct a type of “monstrous masculinity” (Persson & Newman, 2008). Thus, a dichotomy is created between the traditional understanding of white heterosexual masculinity and HIV-positive Black masculinity. Persson and Newman (2008) argue that “the men’s ruthless pursuit of condom-less sex is amplified to such extreme proportions, and with such ruinous consequences, that it comes to perform a monstrous other to a ‘civilised’ masculinity that preserves heterosexuality” (p. 639). In essence, this dichotomy between proper masculinity and a monstrous masculinity creates an understanding that heterosexual individuals are either immune to HIV or that heterosexuals do not have the potential to infect others (Persson & Newman, 2008).

Notably, in the only book to analyze the media’s portrayal of a Black HIV-positive man who was criminalized for HIV nondisclosure, Shevory (2004) writes that the representation of Nushawn Williams as a ‘monster’ was “indicative of the monstrous workings of a system of popular-culture productions that appears dangerously out of control” (p. 73). The author argues that Williams was cast as a monster simply because he “crossed boundaries”, “transgressed limits”, did not use force and offered an escape

from the boredom that had taken hold in Jamestown due to reduced economic strength in the small town (Shevory, 2004, p. 77). Shevory (2004) writes that Williams represented,

A primal fear of the disease, the virus. He wasn't just a victim or a carrier, he was the transmitter, a "devil incarnate" in the words of Health Commissioner Berke. He would take his place along with Dahmer, Gacy, and Berkowitz. He had terrorized a town and frightened a nation, and for that he would pay a hefty price (p. 87).

Moreover, the volume of media attention the Williams' case received galvanized the State of New York and the Nation to uphold and reinforce the criminalization of public health issues (Shevory, 2004). For example, the prosecutor in the Williams' case rallied for three changes in New York State's law on HIV nondisclosure following the successful conviction of Williams (Shevory, 2004). Namely, he wanted to provide victims of HIV nondisclosure with the same status as victims of sex crimes so that their identities are protected, to make it easier to release the name of any person who was an "imminent health threat" and he wanted the state of New York to pass a statute that specifically criminalizes the transmission of HIV (Shevory, 2004). In short, Shevory (2004) argues that the "demonization" of Nushawn Williams filled the pockets of news outlets with money from selling advertising "while reinforcing caricatures of race, sex, and HIV" (p. 170).

One way the media reinforces "caricatures of race and HIV" is by referring to the "Blackness" of men who are criminalized for HIV nondisclosure, which is often shown in media reporting by reference to the accused's immigrant status or African origins. Mykhalovskiy et al. (2016) report that 18% of all people criminalized for HIV nondisclosure in Canada are immigrants or refugees and that 75% of these men are



Black (p. 24). Scholars identify that media coverage often refers to the accused's "visa status, or country of birth" and therefore connects the status of refugee and African birth with criminality, which frames HIV-positive refugees as a threat to the Canadian public (McKay et al., 2011, p. 29). For example, Ssenyonga's Blackness was distinguishable because reporters frequently referenced his Ugandan nationality or African roots (Mykhalovskiy et al., 2016). Moreover, even his particular strain of HIV was given a "foreign, national identity" because it was often referenced as predominant in Uganda (Mykhalovskiy et al., 2016, p. 41). As such, these connections between Africa and the HIV contained within Ssenyonga's body constituted "the ideological symptoms of African AIDS, the imaginary strain made especially virulent by its association with murderously uncontrollable Black male lust [...]" (Miller, 2005, p. 41). By contrast, when white defendants receive media coverage their ethnicity or immigrant status is almost never mentioned (Mykhalovskiy et al., 2016).

Representing Black men as sinister, hypersexual and as carrying a dangerous African strain of HIV, the news coverage depicts them as a dangerous and deviant 'Other.' Persson and Newman (2008) argue that this representation distinguished Black men from the white Australian norm. In other words, "the media outing of these men reinforces the idea that it is through these foreign bodies that HIV is 'imported' into an otherwise supposedly disease-free heterosexual Anglo-Australian community" (Persson & Newman, 2008, p. 639). Similarly, refugees in New Zealand are portrayed as threats to the national identity, therefore perpetuating the need for a protectionist state with intensive screening of immigrants to keep safe those who are native to the country

(Worth, 2002). As such, “AIDS was constructed as an imported problem” when in fact HIV and AIDS emerged as a problem in New Zealand in 1989 – long before the influx of refugees (Worth, 2002, p. 73). Also, McKay et al. (2011) argue that the “construction of disease sees refugees as a deadly and costly problem, and one that threatens the life of the host society, particularly women, with their deadly diseases and deviant behavio[u]rs” (p. 32). In short, constructions of HIV-positive people as ‘Others’ makes us forget that HIV infection is the result of particular actions instead of particular people (Persson & Newman, 2008). Alternatively, the structural Othering of Black immigrants and refugees allows us to justify the increased criminalization of people living with HIV because they are depicted as people whose sexuality is “lethal” and are represented as “reckless vectors” who lack “moral judgement” and “sexual ethics” (Worth et al., 2005, p. 8).

Conversely, victims of persons criminalized for HIV nondisclosure are commonly portrayed as innocent women who were betrayed by monstrous men; ultimately creating a victim-carrier or victim-criminal dichotomy (Mykhalovskiy et al., 2016; Persson & Newman, 2008). Victims are often given space through media coverage to voice their anger and struggles of being betrayed by the accused, while the accused’s voice is often ignored (Mykhalovskiy et al., 2016). For example, Ssenyonga was “rendered an object” because he was “spoken about” instead of having an “active presence as a speaking subject” (Mykhalovskiy et al., 2016, p. 42). Specifically, Ssenyonga was only quoted once in media coverage while his complainants were quoted 54 times (Mykhalovskiy et al., 2016, p. 37). Mykhalovskiy et al. (2016) argue that the

limited quotes from defendants may be because they are advised by their lawyers to refrain from speaking to the media. However, they write that framing the story solely on the complainant's understanding of the events and not allowing defendants to be "active speaking subjects" – serves as a "powerful strategy for objectifying Black men facing HIV-related criminal charges" (Mykhalovskiy et al., 2016, p. 37). On the other hand, when victims are written about in the media they are often portrayed according to stereotypical notions of female sexuality and class. For example, victims in the Ssenyonga case were represented in Callwood's book as "carrying [Ssenyonga's] viral child"; these women "became the daughters of the virus [...] since the villain's virulent strain of HIV had irrevocably bound itself to the DNA in their own cells" (p. 48). Similarly, media representations silenced the victims in the Nushawn Williams case, who were often portrayed as lacking sexual agency and as "white trash" (Shevory, 2004, p. 22).

The (in)visibility of certain victims suggests that like any sexual assault case, distinctions are made between witnesses who are credible and those who are not (Worth et al., 2005). For example, drug users and sex workers are not often seen as credible in court (Worth et al., 2005). Specifically, because of their addiction drug users are "thought to have lost their selves and therefore their citizenship" while sex workers are constructed as criminal and therefore cannot be an "innocent party to a crime" (p. 7). Additionally, because "victimization denies agency" only some victims are deemed worthy, such as prison guards and the 'proper' woman, while other victims such as the drug user and the sex worker are portrayed as unworthy (p. 7). Nonetheless, while

women are predominantly the victims in HIV nondisclosure cases they can also be perpetrators. In fact, women are now considered the fastest growing subgroup of persons infected with HIV (Grant, 2008; Mykhalovskiy & Betteridge, 2012; Mykhalovskiy et al., 2016). Despite this fact, women who have been criminalized for HIV nondisclosure are largely absent in the literature, perhaps because they are not reported on in the media as much as their male counterparts. However, there is one study that extensively examined the representation of women who did not disclose their HIV-positive status to their partners.

Kilty (2014) used a moral panic framework to analyze the media discourse on J.M. and Suwalee Iamkhong. She found that J.M. and Iamkhong “were constructed as threats to the (inter)national body politic as a result of their HIV infection and failure to disclose their HIV-positive serostatus to their sexual partners” (Kilty, 2014, p. 281).

Kilty (2014) argues that,

The legal and media construction of J.M. and Iamkhong established them as contemporary HIV-positive “folk-devils” and lies, sex, and HIV as their weapons of choice; the assemblage of these subjectivities contributed to the broader AIDS commentary and moral panic that situates HIV-positive individuals as irresponsible, morally depraved, and potential sexual predators. (p. 288)

While this discourse is similar to the portrayal of the African male who is criminalized for HIV nondisclosure as a deviant Other who threatens the national identity, it is important to differentiate the representation of women in HIV nondisclosure cases, as “historical narratives” of sexually active women as “promiscuous vectors of disease that must be contained and, in a sense, quarantined” (Kilty, 2014, p. 281) perpetuate the

continued marginalization of and increased violence towards those women who do not abide by cultural standards of ‘proper’ female sexuality. For example, since J.M. was accused by two military men and was reported as supposedly soliciting sex from Canadian military men, she was constructed as representing not only a threat to the national body politic, but also to the international body politic (Kilty, 2014). Kilty (2014) explains that it is ironic that “the soldiers were not constructed as risky subjects, in spite of the fact that it would be they, if they proved HIV-positive, who would transmit the disease while abroad” (p. 284). Thus, we see another distinction between worthy and unworthy victims. J.M. was initially a victim infected with HIV from Williams (who was also criminalized for HIV nondisclosure), but became the vector of disease as respected soldiers were portrayed as victims. Ultimately, in every case of HIV nondisclosure the accused was a victim of someone who did not disclose their HIV-positive status to their partner. These distinctions between who is a victim and who is not contributes to women’s oppression by either portraying them as innocent victims with no agency or as sexually promiscuous vectors of disease.

Similarly, the media portrayed Suwalee Iamkhong as a hypersexual woman, a construction that was aggravated by her work as an exotic dancer during her time in Canada and supposed participation in the sex trade while she was living in Hong Kong (Kilty, 2014). While J.M. was a white Canadian born woman, news coverage constantly referred to Iamkhong “as a Thai foreign national” which “easily distinguished and ‘othered’ her different Asian body as a threatening prime character identifier” (Kilty, 2014, p. 284). In Iamkhong’s case we see the intersection of both gender and race that

constructed her as a particularly dangerous threat to the (inter)national body politic. In fact, after serving her prison sentence, Iamkhong was deported back to Thailand. This decision “constituted Iamkhong as unscrupulous and whose subjectivity was marked by interpretations of her failure to internalize the accepted moral codes of sexual conduct (that typically implicate the need for women to be chaste) or to act in accordance with those codes by disclosing her HIV status” (Kilty, 2014, p. 287). Indeed, Iamkhong’s deportation shows that fears about her failure to abide by sexual moral codes do not matter when it comes to the Thai body politic (Kilty, 2014).

To my knowledge, no study has explored the portrayal of Black male defendants in both media reporting and juridical content using the concepts of intersectionality and masculinity theory in Canada. As such, this project explores the portrayal of former CFL player Trevis Smith in media and juridical content. Specifically, I engage the concepts of intersectionality and hegemonic/toxic masculinity to examine the juridical and newsprint media content of the case of Trevis Smith. This project explores how the intersection of race, class, gender, sexual orientation, HIV positive status and the label ‘criminal’ coalesce in juridical and media content to discursively constitute Trevis Smith in different ways. Therefore, this research helps to fill the gap not only in terms of the limited number of Canadian studies, but also the lack of research examining the intersection of different social locations in the discursive production of people criminalized for HIV nondisclosure in both news and juridical content.

The following chapter outlines the conceptual framework I adopt for this thesis, namely intersectionality and masculinity theories. The first section provides an overview

of the history of intersectionality and clarifies the origins of the concept. The second section presents some of the key debates amongst scholars who use or write about intersectionality. Next, I address the history and origins of masculinity theory, starting with Connell's initial conceptualization. This section is followed by a brief sketch of some of the debates in masculinities theory, including some of the critiques. I then outline the relationship between Black masculinities and sport, given that Smith is a Black football player. Lastly, in the conclusion I outline my own critique of masculinities theory and situate myself within these literatures.

## Chapter 3.

### Theoretical Framework

The conceptual framework I engage for this research involves the harmonization of intersectionality and masculinities theory in order to understand the complex ways in which Trevis Smith was discursively constituted in both media and juridical content. In the first section of this chapter, I summarize the origins of intersectionality and pay particular attention to the works of Black feminist scholars who wrote about intersectionality long before Crenshaw coined the term. In the second section, I discuss some of the critiques of intersectionality including the ambiguity and categoricalness of the concept. The third section outlines the origins, history and definitions of masculinities theory followed by some of the key critiques amongst scholars working in this area. In the last part of this chapter, I discuss how I take up intersectionality and masculinities theory and explain the value of mobilizing them for this research.

#### 3.1. Intersectionality

The origins of intersectionality have often been attributed to the work of Kimberlé Crenshaw (1989) and her influential paper titled “*Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Anti-discrimination Doctrine, Feminist theory, and Anti-racist Politics.*” However, intersectionality emerged long before Crenshaw (1989) coined the term (Collins & Bilge, 2016). Scholars such as Bilge (2013) argue that equating the origins of intersectionality solely to Crenshaw (1989) “bypass[es] [intersectionality’s] origins in Black feminism” (p. 414). Therefore, an account of intersectionality’s beginnings must start from its roots in socialist feminism



whose followers rejected Marxist feminism's belief that class struggles were the cause of all other oppressions and radical feminists, who argued that male dominance was the primary injustice (Gordon, 2016). Instead, they expanded their analyses to include how multiple sites of oppression affect poor women and women of colour disproportionately. Moreover, they had a particularly activist orientation by protesting against police brutality alongside Black Panthers, picketing with unions, rallying against the Vietnam War, and supporting prisoners' struggles (Gordon, 2016). Intersectionality's other roots began in Black feminism in the 1960s and 1970s when women who were part of groups such as Black Power, Chicano liberation, and Red Power noticed their subordinated position within the broader women's movement (Collins & Bilge, 2016). Black feminists had long created their own organizations in which they mobilized intersectional analysis and rallied for Black women's equality by organizing political pamphlets, writing essays, poetry, edited volumes, and creating art (Collins & Bilge, 2016).

For example, early work on intersectionality included Frances Beale's (1970) essay "*Double Jeopardy: To Be Black and Female*" which begins with a critique of the capitalist system. She argues that capitalism manipulated, "economically exploited and physically abused" Black women (p. 109). Specifically, she asserts that white women's labour, which involved caring for children and the home, differed drastically from Black women's labour as Black women not only had to care for their own children, but also had to provide financially for their families (Beale, 1970). Beale (1970) simultaneously critiques patriarchy in the Black Power movement and racism in the white feminist movement while situating her argument within a broader critique of the capitalist system.

Beale's (1970) use of the term "double jeopardy" was meant to describe the "dual discrimination of racism and sexism that subjugate black women" (King, 1988, p. 46).

In contrast, Doborah K. King (1988) argues that Beale's (1970) use of double jeopardy and subsequent addition of various oppressions such as classism, heterosexism and homophobia makes the application of double, triple or fourth jeopardy overly simplistic because it assumes the "relationships among the various discriminations are merely additive" (King, 1988, p. 47). She argues that simplifying the use of double jeopardy to a mere mathematical equation that adds oppressions makes each "discrimination [have] a single, direct and independent effect on status" and where one discrimination can replace the other (King, 1988, p. 47). Instead, King (1988) introduces the term "multiple jeopardy" to refer "not only to several, simultaneous oppressions but to the multiplicative relationships among them as well. In other words, the equivalent formulation is racism multiplied by sexism multiplied by classism" (p. 47). In her essay, King (1988) describes the subordinate place Black women hold within white feminism, the prioritization of racial and class interests over gender in movements for racial and class justice, and the failure of trade unions and anti-capitalist movements to recognize the diverse needs of Black women.

Even before King and Crenshaw, in 1983's *Women, Race & Class* Angela Davis wrote about the intersection of race, gender and class during slavery, the women's rights movement, and the civil rights movement. Specifically, she documents the different experiences of female and male slaves stating that "if the most violent punishments of men consisted in floggings and mutilations, women were flogged and mutilated, as well

as raped. Rape, in fact, was an uncamouflaged expression of the slaveholder's economic mastery and the overseer's control over Black women as workers" (p. 7). Moreover, she compares the struggles of white middle class women and Black female slaves in capitalism; while white women were relegated to the role of 'mother' and 'housewife' Black female slaves were left out of this ideological pattern—domestic work for Black women meant they were not seen as simple 'housewives' (Davis, 1983). Indeed, the slave community managed to achieve a kind of sexual equality within their family and community life where both men and women took part in domestic work (Davis, 1983).

Davis (1983) identifies that:

Black women were equal to their men in the oppression they suffered; they were their men's social equals within the slave community; and they resisted slavery with a passion equal to their men's. This was one of the greatest ironies of the slave system, for in subjecting women to the most ruthless exploitation conceivable, exploitation which knew no sex distinctions, the groundwork was created not only for Black women to assert their equality through their social relations, but also to express it through their acts of resistance (p. 23).

Slave owners became concerned about the new equality between men and women in the slave community since it gave Black women the power and motivation to resist (Davis, 1983). In response, slave owners purposefully tried to break the equality achieved in the slave community and Black women's urge to resist through whipping, mutilating and raping enslaved Black women (Davis, 1983). Davis (1983) asserts that "rape was a weapon of domination, a weapon of repression, whose covert goal was to extinguish slave women's will to resist, and in the process, to demoralize their men" (pp. 23-24).

Motivated by the sexual assaults against Black women, white women joined the abolitionist movement and “often related stories of brutal rapes of slave women as they appealed to white women to defend their Black sisters” without realizing “the complexity of the slave woman’s condition” (Davis, 1983, p. 27). White women’s involvement in the abolitionist movement inspired them to protest “their own exclusion from the political arena” because they realized they were fighting an oppression which resembled their own (Davis, 1983, p. 39). As such, white women within the abolitionist movement learned how to fundraise, how to distribute literature and how to use the petition which “would become the central tactical weapon of the women’s rights campaign” (Davis, 1983, p. 39). However, this union between the Black abolitionist movement and the women’s rights movement became increasingly tense as white middle class women began to defend their own interests (Davis, 1983). This is the starting point for Crenshaw’s articulation of intersectionality.

Specifically, Crenshaw (1989) argued that Black women were marginalized from feminist theory and antiracist politics, which she contends encompass discourses that are “predicated on a discrete set of experiences” that do not account for the “interaction of race and gender” (p. 140). For example, Crenshaw (1989) argues that feminist theory ignores the role of race and more specifically that white feminists fail to account for the ways in which their race mitigates sexism and privileges them over other non-white women. In other words,

The assumption that emancipation had rendered the former slaves equal to white women—both groups equally requiring the vote for the completion of their social equality—ignored the utter precariousness of

Black people's newly won "freedom" during the post-Civil War era. While the chains of slavery had been broken, Black people still suffered the pain of economic deprivation and they faced the terrorist violence of racist mobs in a form whose intensity was unmatched even by slavery (Davis, 1983, p. 77).

In short, Crenshaw and Davis reject a "single-axis framework" as traditionally used in feminist theory and antiracist politics (Nash, 2008, p. 2). Instead Crenshaw (1991) uses intersectionality to describe "how the experiences of women of color are frequently the product of intersecting patterns of racism and sexism and how these experiences tend not to be represented within the discourses of either feminism or antiracism" (pp. 1243-1244). Furthermore, Crenshaw (1991) explored how "race and gender intersect [to shape the] structural, political and representational aspects of violence against women of color" (p. 1244). In defining structural intersectionality, Crenshaw (1991) explores the ways in which "the location of women of color at the intersection of race and gender makes our actual experience of domestic violence, rape, and remedial reform qualitatively different than that of white women" (p. 1245). She argues that Black women of colour experience violence in different ways than their white counterparts and "intervention strategies that are based solely on the experiences of women who do not share the same class or race backgrounds will be of limited help to women who because of race and class face different obstacles" (Crenshaw, 1991, p. 1246).

The second part of Crenshaw's (1991) analysis centres around the issue of Black women representing two subordinated groups that pursue contradictory political agendas. Namely, racism as experienced by men determines anti-racist politics while sexism experienced by white women determines the politics of the women's rights

movement (Crenshaw, 1991). Lastly, representational intersectionality includes both “the ways in which [...] images are produced through a confluence of prevalent narratives of race and gender, as well as a recognition of how contemporary critiques of racist and sexist representation marginalize women of color” (Crenshaw, 1991, p. 1283). In this research, I take up representational intersectionality to explore the ways in which narratives of gender, class, race, HIV, crime, and sexuality are (re)produced in the media and juridical discourses pertaining to Trevis Smith.

### **3.1.1. Critique of Intersectionality**

Intersectionality has been critiqued on a number of fronts. For example, Collins and Bilge (2016) identify two arguments related to intersectionality’s ties to identity. The first, is that intersectionality “overuses [...] personal identity as a category of analysis” therefore undermining more macro analyses of class and power (Collins & Bilge, 2016, p. 124). Second, intersectionality studies are utilizing “conceptions of identity that do not acknowledge difference” instead of focusing on identities that are diverse (Collins & Bilge, 2016, p. 125). For example, Nash (2008) suggests that intersectionality has an “internal paradox [...] as a theory about *black women’s experiences* and intersectionality as a theory of ‘*multiple groups of identity*’” (p. 10). Specifically, she grapples with “the use of black women as prototypical intersectional subjects” and questions whether “*all* identities are intersectional or whether only multiply marginalized subjects have an intersectional identity” (Nash, 2008, pp. 8-9). Other scholars such as Alexander-Floyd (2012), assert that intersectionality has been “(neo)colonized” by attempts to “universalize intersectionality, [and] to consolidate its meaning such that [it] is

disconnected from the lived experiences of women of color and made available to larger numbers” (p. 18).

In contrast, Carastathis (2013) supports intersectionality’s ties to identity and problematizes critiques raised by Nash and Alexander-Floyd for situating identity categories as essentialist. Instead, she asserts that:

Conceptualizing identity coalitionally allows us to overcome some of the pitfalls of political alliances organized on the premise of homogenous or essential identities. For one, the integration of all aspects of our individual identities is crucial to achieving the internal balance missing in one-dimensional political movements. Too often we are asked to subordinate one or more aspects of our identities to that which a monocular analysis privileges as significant. But in so doing, we are foreclosing a potential coalition with all those who share the repressed or excluded identities—not to mention betraying the possibility of a coalition among all parts of ourselves (p. 942).

Collins and Bilge (2016) contend that arguments that problematize or question intersectionality’s ties to identity “work within narrow understandings of intersectionality that simultaneously emphasize intersectionality as a form of abstract inquiry and neglect intersectionality as a form of critical praxis as it actually happens” (Collins & Bilge, 2016, p. 129). Indeed, some scholars have argued that intersectionality is meant to move beyond “shifting subjects” and “any particular social position” (Carbado, Crenshaw, Mays, & Tomlinson, 2013, pp. 306-307). Moreover, Carbado (2013) asserts that intersectionality is not simply about certain subjects or identities “but rather, [about] marking and mapping the production and contingency of both” (p. 815). Also, arguments that criticize Black women as the archetypal intersectional subject emphasize that “Black women are too different to stand in for a generalizable theory

about power and marginalization” (Carbado et al., 2013, p. 305). As such, intersectional scholars have mobilized the concept to engage in research that examines multiple sites of oppression including “class, sexual orientation, nation, citizenship, immigration status, disability, and religion” (Carbado, 2013, p. 815). Indeed, intersectional scholars have used the concept to analyze Black male essentialism (Butler, 2013) and to uncover how Black men use the narrative of racial injustice to undermine similar claims made by Black women (Harris, 2013).

Intersectionality has long moved beyond research that singularly examines Black women as the prototypical intersectional subject. This research adds to those studies and merges the concept with masculinities theory to identify the ways in which narratives of race, sexuality, gender, HIV, criminality, and class have been mobilized in the case of Trevis Smith. The next section offers a discussion on the history, origins and definitions provided by masculinities theory, followed by critiques of this approach. I conclude by outlining how and why intersectionality should be merged with masculinities theory.

### **3.2. Masculinities Theory**

The idea that there is a diverse expression of masculinities emerged in the 1980s and was influenced by thinking coming from a number of different disciplines. These include, feminist theories of patriarchy; literature in social psychology and sociology that found that the concept of a “male sex role” does not distinguish between behaviour and norms, which has an “homogenizing effect of the role concept”, and fails to account for differential power dynamics; the gay liberation movement, which included concerns about power and difference; empirical social research which “added ethnographic



realism” to the sex-role literature; and psychoanalysis (Connell & Messerschmidt, 2005, pp. 831-832). In short, Connell (2005/1995) places the history of masculinities within three main domains: clinical knowledge, the male role and the new social science.

In clinical knowledge, the science of masculinity began with Freud who believed “that adult sexuality and gender were not fixed by nature but were constructed through a long and conflict-ridden process” (Connell, 2005/1995, p.9). Freud hypothesized that “humans were constitutionally bisexual, that masculine and feminine currents coexisted in everyone” (Connell, 2005/1995). According to Freud, if women expressed masculine characteristics, this was simply “a way station on the road to femininity and its inherent passivity” (Salberg, 2008, p. 278). Similarly, after separating from Freud, Carl Jung became interested in the “balance between a masculine persona and a feminine anima” (Connell, 2005/1995, p. 12). Specifically, Jung believed that the masculine/feminine dichotomy was a “universal structure of the psyche” in which the constitution of masculine and feminine is unchangeable but the balance between the two is malleable (Connell, 2005/1995, p. 13). In other words, men do not oppress and dominate women but the “masculine [...] dominate[s] the feminine” (Connell, 2005/1995, p. 13).

Psychoanalysis at the time of Freud and Jung addressed

[...] both the central subjective significance of sexual division (that one experiences oneself as masculine or feminine in ways which are emotionally highly charged) and its untenability (that, because masculine and feminine are constructed categories, they never hold firm, but are always collapsing into one another) (Frosh, 1994, p. 65).

Freud and Jung were the first in their field to explore masculinity and femininity in this way. Eventually, their colleagues from 1930 to 1960 became more conservative in

the way they approached the science of masculinity (Connell, 2005/1995). As a result, homosexuality was pathologized and demonized while “the course towards adult heterosexuality, which Freud had seen as a complex and fragile construction, was increasingly presented as an unproblematic, natural path of development” (Connell, 2005/1995, p. 11). That is, “[...] Freudian psychoanalysis and the two most influential alternatives to it developed conservative gender practices and normalizing theories of masculinity – theories that identified psychological health with a narrow orthodoxy in sexuality and emotion” (Connell, 2005/1995, p. 15).

The next phase in the science of masculinity began when a social science of masculinity developed and focused on the male sex role. Scholars working from the ‘role’ approach to masculinity argue that:

[...] being a man or a woman means enacting a *general* set of expectations which are attached to one’s sex – the ‘sex role’. In this approach there are always two sex roles in any cultural context, a male one and a female one. Masculinity and femininity are quite easily interpreted as internalized sex roles, the products of social learning or ‘socialization’ (Connell, 2005/1995, p. 22).

An advantage to this way of thinking about masculinity is that internalized male sex roles are seen as social facts (Connell, 2005/1995) and the idea of sex roles more generally “facilitated a partial break from biological essentialism” (Messner, 1998, p. 258). As such, they are malleable to the current and changing expectations of “agencies of socialization” such as mass media, school, and family (Connell, 2005/1995, p. 23). Moreover, the pliability of sex roles means that role research can be used as a political tool to subjugate or free those who are oppressed by changing the expectations for

women/girls and men/boys in agencies of socialization (Connell, 2005/1995). However, Connell (2005/1995) argues that “there is nothing here that positively requires an analysis of power. On the contrary there is a basic tendency in sex role theory to understand men’s and women’s positions as complementary” (p. 25). Indeed, the theory of sex roles “implies a false symmetry between the male role and the female role, thus masking the oppressive relations between women and men” (Messner, 1998, p. 258).

Connell’s initial conceptualization of hegemonic masculinity was formulated in response to sex role theory’s failure to account for “power relationships between and within genders” (Demetriou, 2001, p. 338). This critique led to the now predominant social science approach to studying masculinity, wherein the core concept of hegemonic masculinity is “understood as the pattern of practice (i.e., things done, not just a set of role expectations or an identity) that allowed men’s dominance over women to continue” (Connell & Messerschmidt, 2005). In particular, Connell (2005/1995) provides this definition of masculinities:

Rather than attempting to define masculinity as an object (a natural character type, a behavioural average, a norm), we need to focus on the processes and relationships through which men and women conduct gendered lives. ‘Masculinity’, to the extent the term can be briefly defined at all, is simultaneously a place in gender relations, the practices through which men and women engage that place in gender, and the effects of these practices in bodily experience, personality and culture (p. 71).

This definition emphasizes that masculinity, like power, is relational and must be conceptualized in relation to the feminine and to other masculinities (Connell, 1987; Connell & Messerschmidt, 2005). Schippers (2007) adds that hegemonic masculinity must also be “defined by the way in which it articulates a complementary and

hierarchical relationship to femininity” (p. 94). As such, her reformulation of Connell’s (1995) definition is that “hegemonic masculinity is the *qualities defined as manly that establish and legitimate a hierarchical and complementary relationship to femininity* and that, by doing so, guarantee the dominant position of men and the subordination of women” (Schippers, 2007, p. 94).

However, Connell (1987) argues that there is no hegemonic femininity in the same way as some forms of masculinity are hegemonic among men because “all forms of femininity in this society are constructed in the context of the overall subordination of women to men” (pp. 186-187). Instead, he describes emphasized femininity as a form of femininity that is “given most cultural and ideological support at present” because one of its central features is compliance to the subordination of women to men (Connell, 1987, p. 187). Importantly, Connell (1987) writes that emphasized femininity which is “organized as an adaptation to men’s power, and emphasiz[es] compliance, nurturance and empathy as womanly virtues” is not a kind of femininity that is hegemonic in relation to other femininities (p. 188).

On the other hand, Schippers’ (2007) reformulation of hegemonic masculinity mentioned above, offers “conceptual space” for an articulation of hegemonic femininity. She describes hegemonic femininity as “[...] *the characteristics defined as womanly that establish and legitimate a hierarchical and complimentary relationship to hegemonic masculinity and that, by doing so, guarantee the dominant position of men and the subordination of women*” (p. 94). In other words, men must have sole access to symbolic characteristics of masculinity such as “desire for the feminine object, physical strength,

and authority [in order to] define and legitimate their superiority and social dominance over women” (Schippers, 2007, p. 94). When women embody characteristics such as “having sexual desire for other women, being promiscuous, “frigid”, or sexually inaccessible, and being aggressive” they are actively “refus[ing] to complement hegemonic masculinity in a relation of subordination and therefore are threatening to male dominance” (Schippers, 2007, p. 95). Schippers (2007) calls these characteristics “*pariah femininities*” to illustrate that these characteristics are not inferior per se, but that they are “contaminating to the relationship between masculinity and femininity” (p. 95). If a woman embodies one or more of these characteristics she is thought to be contaminated and therefore becomes “a lesbian, a “slut”, a shrew or “cock-teaser”, a bitch” (Schippers, 2007, p. 95). She is not only contaminated, but thought to be “social[ly] undesirable and contaminating to social life more generally” (Schippers, 2007, p. 95). Importantly, hegemonic femininity is always dominant over pariah femininities because it maintains the relationship between masculinity and femininity.

Similarly, hegemonic masculinity is always dominant over the three other types of masculinities identified by Connell (2005/1995); namely, subordinate, complicit, and marginalized (explained below). For Donaldson (1993) hegemony is:

About the ways in which the ruling class establishes and maintains its domination. The ability to impose a definition of the situation, to set the terms in which events are understood and issues discussed, to formulate ideals and define morality is an essential part of this process. Hegemony involves persuasion of the greater part of the population, particularly through the media, and the organization of social institutions in ways that appear “natural,” “ordinary,” “normal.” The state, through punishment for non-conformity, is crucially involved in this negotiation and enforcement (p. 645).

Hearn (2004) defines hegemony as the consent of some men and even some women to preserve “patriarchal relations of power” (p. 52). Similarly, Schippers (2007) argues that “hegemonic features of culture are those that serve the interests and ascendancy of ruling classes, legitimate their ascendancy and dominance, and encourage all to consent to and go along with social relations of ruling” (p. 90). As such, Carrigan, Connell, and Lee (1985) define hegemonic masculinity as “a question of how particular groups of men inhabit positions of power and wealth, and how they legitimate and reproduce the social relationships that generate their dominance” (p. 592). Hegemonic masculinity is also a “cultural ideal” that is (re)produced through institutions, including the media, which show depictions of “exemplary masculinities”, such as that expressed by Jon Snow in *Game of Thrones* or archetypal superhero Captain America and which in turn perpetuate patriarchy (Demetriou, 2001, p. 342). For other scholars, hegemonic masculinity is defined based on the “*quality content* of the categories “man” and “woman”” or in other words the characteristics of “man” and “woman” that make gendered relations complementary or hierarchal (Schippers, 2007, p. 90). For men, one of these qualities is “the possession of erotic desire for the feminine object” and for women to be constituted as “the object of masculine desire” (Schippers, 2007, p. 90). While there are other features to masculinity and femininity, Schippers (2007) argues that “the construction of hetero-desire as the ontological essence of gender difference establishes the meaning of the *relationship* between masculinity and femininity” (p. 90).

Other qualities of hegemonic masculinity include physical toughness, violence, aggression and assertiveness as the means through which to solve conflicts and

demonstrate authority (Schippers, 2007). Some of these qualities also reflect what Kupers (2005) calls *toxic masculinity*. He writes that this form of masculinity

[...] is constructed of those aspects of hegemonic masculinity that foster domination of others and are, thus, socially destructive. Unfortunate male proclivities associated with toxic masculinity include extreme competition and greed, insensitivity to or lack of consideration of the experiences and feelings of others, a strong need to dominate and control others, an incapacity to nurture, a dread of dependency, a readiness to resort to violence, and the stigmatization and subjugation of women, gays, and men who exhibit feminine characteristics (Kupers, 2005, p. 717).

However, these features of hegemonic masculinity and toxic masculinity only legitimate men's dominance over women when they are paired with "complementary and inferior" feminine qualities (Schippers, 2007, p. 91). For example, feminine qualities of physical weakness, gentleness, and passivity are complementary to the masculine traits mentioned above and work to subordinate femininity to masculinity (Schippers, 2007).

Moreover, men who hold power do not necessarily have to embody all of these characteristics in order to be considered as possessing hegemonic masculinity (Hearn, 2004; Schippers, 2007); rather, the mere association of some men with other men who embody hegemonic masculinity allows them to express a complicit masculinity because they benefit from gender hegemony and the "patriarchal dividend, the advantage men in general gain from the overall subordination of women" (Connell, 1995/2005, p. 79) and other masculinities. In short, "the significance of masculinity and femininity in gender hegemony is that they establish symbolic meanings for the relationship between women and men that provide the legitimating rationale for social relations ensuring the ascendancy and dominance of men" (Schippers, 2007, p. 91).

More importantly, hegemonic masculinity does not refer only to the domination of men over women but also includes “hegemony over other masculinities” (Demetriou, 2001, p. 341). For example, heterosexual men dominate homosexual men so that gay masculinities are subordinate to straight masculinities (Connell, 2005/1995; Demetriou, 2001). Connell, 2005/1995 argues that “oppression positions homosexual masculinities at the bottom of a gender hierarchy among men. Gayness, in a patriarchal ideology, is the repository of whatever is symbolically expelled from hegemonic masculinity, the items ranging from fastidious taste in home decoration to receptive anal pleasure” (p. 78). Importantly, homophobia practiced through job discrimination, negative media portrayals, imprisonment and even murder is a way of drawing “social boundaries, [and] defining ‘real’ masculinity by its distance from the rejected” (Connell, 2005/1995, p. 41). .

While hegemonic, subordinate and complicit masculinities are “relations internal to the gender order”; marginalized masculinities are relations between gender and other social structures such as class and race (Connell, 2005/1995, p. 80). Marginalized masculinities according to Connell’s (2005/1995) initial conceptualization include the intersection of race and class with masculinity. Namely, “marginalization is always relative to the *authorization* of the hegemonic masculinity of the dominant group” (Connell, 2005/1995, pp. 80-81). In other words, “marginalized masculinities are those of subordinated classes or racial/ethnic groups. This relationship is one of authorization and marginalization because hegemonic masculinity is conflated with whiteness and middle-class status, and it is conferred authority in a way marginalized masculinities are



not” (Schippers, 2007, p. 88). For example, in the United States and Canada “particular [B]lack athletes may be exemplars for hegemonic masculinity. But the fame and wealth of individual stars has no trickle down effect; it does not yield social authority to [B]lack men generally” (Connell, 2005/1995, p. 81). Moving beyond race and class, recent scholarship has engaged masculinities theory and theories of gender with other social structures including disability. For example, Gerschick (2000) argues that:

Bodies are central to achieving recognition as appropriately gendered beings. Bodies operate socially as canvases on which gender is displayed and kinaesthetically as the mechanisms by which it is physically enacted. Thus, bodies of people with disabilities make them vulnerable to being denied recognition as women and men. The type of disability, its visibility, its severity, and whether it is physical or mental in origin mediate the degree to which the body of a person with a disability is socially compromised (p. 1264).

Gerschick (2000) mobilizes West and Zimmerman’s (1987) concept of ‘doing gender’ to articulate how people with disabilities are recognized as occupying a subordinate masculinity or femininity because they do not express or produce traditional masculine and feminine ideals.

The next section highlights some of the critiques of masculinities theory. I then explain Messerschmidt’s (2016; 2012) most recent reformulation of the theory, which he wrote in response to these critiques.

### **3.2.1. Critique of Masculinities Theory**

After the initial conceptualization of masculinities by Connell (2005/1995) a number of critiques emerged, which Connell and Messerschmidt (2005) identify and engage with in “*Hegemonic masculinity: Rethinking the concept.*” The first critique, is

the idea that the “underlying concept of masculinity is flawed” because the concept of masculinity is confused and essentialist (p. 836). For example, Hearn (2004) argues that masculinities scholars use the approach in various ways which “can be a conceptual and empirical weakness” (p. 58). Christensen and Jensen (2014) similarly argue that hegemonic masculinity is too structural and abstract which results in “contradictory approaches to, and uses of, the concept” (p. 61). In response to this critique, Connell and Messerschmidt (2005) assert that masculinity is not static and tied to an individual body and that scholars using the concept need to approach gender in terms of relations of power rather than a simple dichotomy of man/woman (Connell & Messerschmidt, 2005).

The second major critique centres around the issue of who/what represents hegemonic masculinity, to which the authors suggest that the very “ambiguity in gender processes may be important to recognize as a mechanism of hegemony” (p. 838). Indeed, Demetriou (2001) critiques Connell’s (2005/1995) conception of hegemonic masculinity because it considers non-white and non-heterosexual elements from subordinate and marginalized masculinities that are sometimes embedded in hegemonic masculinity as a weakness and contradiction of the concept. For example, Demetriou (2001) asserts that a new masculine hegemonic bloc has formed which integrates elements from marginalized and subordinate masculinities. Specifically, the increase of gay images in popular culture represents not an acceptance of homosexuals as social subjects but the production of homosexuals as consumers; it is a “strategy [...] for the reproduction of capitalism, not for the liberation of homosexuals” (Demetriou, 2001, p. 350). Moreover, the visibility of gay culture by capitalism “makes it possible for many men to appropriate bits and pieces

of this alternative culture and produce new, hybrid configurations of gender practice than enable them to reproduce their dominance over women in historically novel ways” (Demetriou, 2001, pp. 350-351). Demetriou (2001) contends that such elements exemplify the concept’s “constant hybridization, its constant appropriation of diverse elements from various masculinities that makes the hegemonic bloc capable of reconfiguring itself and adapting to the specificities of new historical junctures” (p. 348). In other words, hegemonic masculinity does not encompass a static set of elements that make up and characterize this type of masculinity; rather, hegemonic masculinity is constantly being molded and changed so that it can continue to produce patriarchal power relations that subordinate women and other masculinities.

Scholars also argue that the concept of hegemonic masculinity is a “reification of power or toxicity” (Connell & Messerschmidt, 2005, p. 839) and a reification of “normative masculinity positions” (Christensen & Jensen, 2014, p. 61). For example, the constitutive parts of hegemonic masculinity sometimes become an excuse for men’s behaviour, which ultimately perpetuates gender dominance by men (Connell & Messerschmidt, 2005). For example, Harris (2013), in his examination of the sexual harassment of Anita Hill by U.S. Supreme Court Nominee Clarence Thomas, writes that:

For many “brothers” and “sisters,” the mere fact that Thomas was a heterosexual Black man seemed a sufficient condition to warrant supporting him despite his questionable relationship with the truth and an extensive record on his part that bore witness to his promotion of a variety of public policies perceived by most Black people to be deeply inimical to the interests of their community” (p. 521).

In other words, Thomas' status as a Black, heterosexual male who was also a republican conservative enabled him to be taken as a more credible witness and to assert his dominance over Anita Hill. Connell and Messerschmidt (2005) respond to this critique by stating that masculinities theory is not meant to be a "rigid trait theory of personality"; once we move beyond this notion, we can then conceptualize masculinities in terms that not only equate men with violence but with positive actions as well (p. 840).

Lastly, the concept of masculinities is said to homogenize the male subject. Connell and Messerschmidt (2005) assert that such an argument simplifies the concept to a "single dimension of gender relations (usually the symbolic)" and "treat[s] [the concept] as the specification of a norm" (p. 843). For example, discursive practices often focus on the symbolic dimension of masculinities instead of recognizing that gender relations are produced through non-discursive practices as well, including "wage labor, violence, sexuality, domestic labor, and child care" (Connell & Messerschmidt, 2005). In response, Schippers (2007) argues that Connell and Messerschmidt are "conflating gender relations with masculinity" when they suggest that discursive practices focus on the symbolic dimension of masculinities instead of recognizing that "gender relations are constituted through [discursive and] non-discursive practices" (p. 93). Instead, she asserts that the discursive practices that situate masculinities solely or even primarily within the symbolic realm are just one facet of differential power and gender relations (Schippers, 2007).

In the wake of these critiques, Connell and Messerschmidt (2005) reformulated the concept. In their revised definition of masculinities, the authors agreed that the concept must continue to focus on gendered power relations (Connell & Messerschmidt, 2005). They also contend that the concept must integrate a more comprehensive “understanding of gender hierarchy, recognizing the agency of subordinated groups as much as the power of dominant groups and the mutual conditioning of gender dynamics and other social dynamics” (p. 848). Messerschmidt (2012a) suggests that one way to do this is by integrating work on intersectionality, “or how class, race, ethnicity, age, sexualities, and nation impact both hegemonic and nonhegemonic masculinities” (p. 73).

Messerschmidt (2012b, 2016) further refines masculinities theory by articulating two forms, which he calls dominant and dominating. The first, he writes is “the most powerful or the most widespread type [...] in the sense of being the most celebrated, common or current form [...] of masculinity” (Messerschmidt, 2016, p. 33). The latter, he defines as a masculinity that involves “commanding and controlling specific interactions and exercising power and control over people and events – ‘calling the shots’ and ‘running the show’ (p. 33). Hegemonic masculinity can be either/both dominating and dominant, however, these new masculinities are “never hegemonic if they fail [to] culturally [...] legitimate patriarchal relations” (p. 33). Indeed, through “discursive persuasion, [hegemonic masculinity] encourages consent and compliance” instead of direct control and command to the patriarchy (p. 34). Lastly, Messerschmidt (2016; 2012b) emphasizes that we may be able to identify a burgeoning society-specific or global articulation of hegemonic masculinity, but that this has not been achieved to

date. As such, what has been referred to in the literature as hegemonic masculinity is most likely a form of dominant and/or dominant masculinity.

One critique that Connell and Messerschmidt (2005) do not address is how the concept of hegemonic masculinity is realized in “men’s practices, everyday life, identity constructions and self-presentations” (Christensen & Jensen, 2014, p. 61). For example, Wetherell and Edley (1999) suggest that “the notion of hegemonic masculinity is not sufficient for understanding the nitty gritty of negotiating masculine identities and men’s identity strategies” (p. 336). They write that Connell’s (2005/1995) notion of hegemonic masculinity does not tell us what (non)conformity to hegemonic masculinity looks like in practice and in the everyday lives of men (Wetherell & Edley, 1999). To study this, the authors interviewed men about the ways in which they “negotiate regulatory conceptions of masculinity in their everyday interactions as they account for their actions and produce or manage their own (and others’) identities” (Wetherell & Edley, 1999, p. 337). They found that very few men in their study engaged in heroic masculinity—the author’s version of hegemonic masculinity; instead men commonly portrayed themselves as “‘ordinary’ in relation to a macho stereotype” or as ‘rebellious’, unconventional or nonconforming (Wetherell & Edley, 1999, p. 347 & 351). However, men’s self-presentation as ordinary is not meant to excuse their power; rather identifying as ordinary is “sometimes one of the most effective ways of being hegemonic, or being a ‘man’” (Wetherell & Edley, 1999, p. 351).

In response to the dilemma articulated by Wetherell and Edley (1999), Hearn (2004) urges masculinities scholars to “go back from *masculinity* to *men*, to examine the

hegemony of men and about men [which] seeks to address the double complexity that men are both a *social category formed by the gender system* and *dominant collective and individual agents of social practices*” (p. 59). He asserts that scholars who study the hegemony of men need to critically examine the “ordinary taken-for-granted accepted dominant constructions, powers and authorities of men – in relation to women, children and other men, both men who are subordinate and those who are superordinate” (Hearn, 2004, p. 59) In particular, masculinities scholars need to be critical of the “formation of the social category of men, and its’ taken-for-grantedness, as well as men’s taken-for-granted domination and control through consent” (Hearn, 2004, p. 59).

Others, such as Beasley (2012), critique Connell’s (2005/1995) conceptualization of masculinities and some of the work written by masculinities scholars at the epistemological level. Beasley (2012) reasons that there is an epistemological inconsistency within critical studies of masculinities and men (CSMM) scholarship, where scholars in this field use modernist approaches and terms while concurrently referencing writers and concepts that are epistemologically postmodern. Beasley (2012) writes:

[...] the incoherence of the mixture may take the form of initial or occasional rhetorical gestures towards postmodernism, by making passing reference to major figures such as Butler or Foucault, followed by development of analyses which in all other respects demonstrate a continuing adherence to modernist assumptions — including, among others, unqualified usage of terms like ‘patriarchy’ and ‘oppression’ and a focus upon detailing typologies of groups of men (p. 753).

Specifically, Beasley (2012) argues that Connell employs a weak modernist social constructivist approach in her theorizing when she writes about gender identities as

“formed by a social structure of gender taking the historically specific form of male dominance – patriarchy: an account which constitutes power as macro and oppressive” (p. 755). This is in stark contrast to postmodern thinking that

[...] conceives power as decentered, as having no foundational centre or centres. Power is a matter of competing discourses which are *not externally imposed* upon subjects. Since *subjects are not distinct from discourses* but instead produced by them, power is constitutive and not merely prohibitive. Hence subjects do not break from/resist structures as autonomous agents who thereby enact social change, as is the case in modernist thinking. Rather the competing character of discourses which produce subjects is the means to a variety of modes of conduct [...] (Beasley, 2012, p. 756).

Indeed, postmodern thinkers believe that social change arises out of a discursive dispute, such as that pertaining to the formation of gender norms and ideals. Moreover, postmodern approaches situate gender and masculinity as discursive productions and practices (Beasley, 2012). In other words, “subjects/identities are understood as constructed through difference – that is, in relation to the Other” (Beasley, 2012, p. 758). This way of thinking is the antithesis to modernist approaches to the study of identity, such as Connell’s, which view “identities as unified stable platforms for action that can be revealed or protected, or can throw off power” (Beasley, 2012, p. 758). In postmodern thinking, subjects are placed in “multiple competing discourses” or ‘subject positions’ which are “fluid inchoate *practices*” (Beasley, 2012, p. 758).

Some scholars also critique Connell’s (2005/1995) theory of masculinities for failing to adequately engage with the interplay of race/ethnicity, gender and sexuality (Christensen & Jensen, 2014) even though Connell and Messerschmidt (2005) briefly engage with intersectionality in their reformulation of the concept and urge masculinities



scholars to employ more intersectional analyses. Christensen and Jensen (2014) argue that “creating a dialogue between the concept of hegemonic masculinity and an intersectional approach could get masculinity studies at least some way to remedy this omission” (p. 68). Similarly, Hearn (2011) suggests that the concept of masculinity “can be seen as intersections of gender and other social divisions, especially class, ethnicity, racialization and sexuality” (p. 91). In this sense, hegemonic masculinity is created through the intersection of gender, class, ethnicity and sexuality, while subordinated masculinity is produced through the intersection of gender and subordinated sexualities, such as gay and trans-masculinities, and marginalised masculinity is formed through the intersection of class, ethnicity and racialization, such as in Black masculinities (Hearn, 2011, p. 91). Christensen and Jensen (2014) utilize an intersectional analysis of masculinities in the Danish and Scandinavian context arguing that:

[...] in a predominantly white society occupied with ethnic difference [...] whiteness is central to hegemonic masculinity. However, in order to obtain legitimacy and symbolic power, white hegemonic masculinity needs to define itself in a relational opposition to other masculinities. In the current Danish and Scandinavian context, these ‘others’ are often ethnic minority men who are marginalized and made illegitimate. In a sense (minority) masculinity is constructed as Danish white masculinity’s ‘other’. These processes of marginalization and ‘othering’ – the relegation to the bottom of the hierarchy of masculinities – can be said to subvert several concrete dimensions of male privilege for ethnic minority men and result in marginalization in the labor market and in the educational system. To add to the complexity, ethnic minority men are often marginalized and ‘othered’ because they are (imagined to be) too masculine or (imagined to) have excess masculinity, that is, they are (seen as) carriers of atavistic, patriarchal, non-equality orientated forms of masculinity (p. 70).

Intersectionality and masculinities both suffer from categorization and ambiguity; however, placing intersectionality in dialogue with masculinities can “sharpen the grasp

of changes within and overlaps between different masculinities rather than localizing fixed categories and power relations” (Christensen & Jensen, 2014, p. 71).

### **3.2.2. Black Masculinities and Sport**

Given that Black men occupy the majority of positions in sports such as American football and basketball, one might view this image as a progressive step towards equality and Black men’s ascendancy towards a hegemonic masculinity. As such, sports are said to reinforce a colour-blind ideology which positions Black men as “symbol[s] of color-blind ideal[s]” (Crenshaw, 1997, p. 98). The colour-blind paradigm, as described by Crenshaw (1997) is a form of equality that is achieved through the “formal removal of race categories across society” and a world defined by this paradigm is one in which “race is precluded as a source of identification or analysis” (p. 103). Thus, the integration of Black athletes into organizations like the National Football League (NFL) and National Basketball Association (NBA) is supposedly evidence of “the fulfilment of the American dream [and] America’s racial progress” (Leonard, 2004).

However, scholars argue that even though Black men represent the majority of players in organizations such as the NFL and NBA and therefore might seem like “a form of liberation” during slavery and modern-day Jim Crow (i.e. incarceration), “Black males were [and continue to be] at the mercy of the [w]hites who controlled the sports industry” (Griffin, 2012, p. 163). Indeed, Griffin (2012) contends that “the Black image functions to mask the [w]hite majority that controls the NBA” (pp. 165-166) and acts as a mechanism for upholding colour-blind ideology through our love for Black athletes and entertainers (Leonard, 2004). In other words,

This supposed colorblindness substantiates not only the signs of institutional progress from Jim Crow to Black dominance but also individual changes as Whites demonstrate their colorblindness through their pocketbooks (tickets, gear, and jerseys), heroworship, and love for players regardless of race (Leonard, 2004, p. 289).

One of the ways in which Black men continue to be subjugated in sports is through the reinforcement of racial tropes by dominant discourses. For example, while Black men seem to represent a dominant/dominating masculinity through their athleticism, size, aggressiveness and physical power, these attributes may actually reinforce “the traditional [racial] hierarchy by reifying stereotypes of their animal-like nature” and suggesting that they are naturally more athletic than their white counterparts (Ferber, 2007, p. 19; Oates & Durham, 2004). Athleticism in this instance stands in for displays of violence, aggressiveness and thus domination that when performed by Black men on the field or on the court is celebrated and naturalized; however, this type of masculinity is also “understood to be beyond the realm of ‘average’ men” (Enck-Wanzer, 2009, p. 6).

Characteristic of this aggressive masculinity is a healthy sexual appetite and sexual prowess that is problematically mobilized in mediated discourses of Black male athletes who commit crimes to reify fears about their sexuality (Leonard, 2004; Crenshaw, 1997). In the Kobe Bryant rape trial for example, Leonard (2004) found that online and mediated discourses made references to Bryant’s penis size and castration, the victim’s supposed innocence and purity, his crime of having sex with a white woman which revealed the ways in which discourses about rape “represent [...] a continuation of long-standing fears, myths, and hatred of Black male bodies, all of which are wrapped up

in the histories of lynchings, injustice, and state violence” (p. 294). Therefore, Black male athletes represent the ways in which society today has transcended issues of race because they get “conditional passes to cross racial lines” (Crenshaw, 1997, p. 106); however, through these racialized, gendered, and classed discourses Jim Crow era notions of Black men continue to permeate through our policies and laws.

### **3.3. Conclusion**

While Connell’s conception of masculinities separates subordinate and marginalized masculinities, I suggest that certain subjects may be understood as both (just as some men express/perform hegemonic masculinity without possessing the sculpted physique of the latest film action hero); for example, men can be Black *and* poor *and* gay, which means they can be both marginalized and subordinate. In other words, using an intersectional approach to studying masculinities allows me to consider not just the ways in which Trevis Smith’s racialization as a Black man situates him as a marginalized subject; rather, I consider how Smith’s Blackness, sexuality, class, HIV status and celebrity coalesce to create a unique characterization of his masculinity. I disagree with how Connell separates structures of class, race and gender to fit into different categories of masculinity. As such, this research explores how hegemonic masculinity (re)produces the marginalization and subordination of men who do not comply with or embody the ideals of hegemonic masculinity. I use intersectionality to help guide my analysis of the different ways in which hegemonic masculinity dominates other masculinities, namely, how Trevis Smith who as a successful athlete seemed to

embody the ideals of hegemonic masculinity yet was discursively reconstituted after he was outed as HIV positive.

Moreover, I align myself with Carbado (2013) and Collins and Bilge (2016) who contend that intersectionality should move beyond discussions about Black women, race or gender. This is not to say that I find the issues surrounding Black women, race and gender less important, but rather that intersectionality should move beyond the prototypical subject of intersectionality research (Black women) to also study men. I focus this research on Trevis Smith precisely because intersectionality has often been used to explore the ways in which Black women have been marginalized from antiracist and feminist politics yet little research has investigated how different masculinities (e.g. Black gay masculinities or, specific to this thesis, Black heterosexual HIV positive masculinities) are marginalized through mediated and juridical discourses.

## **Chapter 4.**

### **Methodology**

This project examines how the intersection of race, class, gender, age, sexual orientation, HIV positive status and the label ‘criminal’ coalesce in juridical and media content to discursively produce Trevis Smith in different ways. My specific research goals include: describing the discourses about Trevis Smith and HIV and how Smith is constituted in the media and juridical content; identifying how HIV is understood and constituted in the media and juridical content; describing how the identity categories victim/accused are discursively produced in this case; describing how the identity categories of HIV-positive/HIV-negative are constituted; and identifying which of the social locations that Smith occupies are given more attention in the media coverage and trial transcripts and how these particular social locations are portrayed. I use a critical paradigm to guide the research and structure the analysis of how these discursive productions “have actual material and phenomenological consequences for groups of women and men” who live with HIV (Lazar, 2007, p. 2), and therefore how discourses (re)produce reality. Specifically, discourses (re)produce gender, race, sexual orientation, and HIV-positive and criminal identities in particular ways that have material consequences for people living with HIV.

In the next section, I review the methodological approach I used to conduct this research. Namely, I describe the case study method and how I went about collecting the data for this project. Then I discuss critical discourse analysis and identify where I situate myself in this field, which is followed by a description of two genres of discourse

(mediated and juridical) and how I specifically conducted the analysis. Next, I review the criteria for assessing qualitative research as articulated initially by Lincoln and Guba (1985) and later expanded by Tracy (2010). The last section of this chapter reviews a few of the limitations of this study.

#### **4.1. The Case Study Method and Data Collection**

My supervisor had already acquired copies of the trial transcripts for Trevis Smith's criminal proceedings, which I made copies of. For the media content, I searched the *Canadian Newsstand* database to find articles published from Smith's arrest in 2005 to his parole release in 2009. Using the search words "Trevis Smith and HIV" my initial search yielded 714 results. After reading through every article and deleting ones that were less than 100 words, non-relevant information such as sports briefs and articles that repeated I had a final sample of 255 articles.

I used a case study method which allowed me to gain a "holistic understanding of [the] problem, issue, or phenomenon within its social context"(Hesse-Biber & Leavy, 2011, p. 256). Reinhartz (1992) explains that the purpose of case studies is "generating and testing theory" but also "to analyze the change in a phenomenon over time, to analyze the significance of a phenomenon for future events, and to analyze the relation among parts of a phenomenon" (p. 164). In particular, she asserts that the researcher chooses a case to study that will "illustrate a particular point of theory that may be posed as a question" (p. 165). I have chosen the Trevis Smith case because I wanted to explore the intersections of race, class, gender, sexual orientation, seropositivity and

criminalization; Smith is a Black, heterosexual male athlete living with HIV and now designated as not only a criminal but also a sexual offender.

Furthermore, Reinhartz (1992) writes that case studies are useful “to illustrate an idea, to explain the process of development over time, to show the limits of generalizations, to explore uncharted issues by starting with a limited case, and to pose provocative questions” (p.167). Some of the provocative questions I include: (1) what are the ways in which Smith’s race is talked about and represented in the media and trial transcripts; (2) does this depiction reflect a more hegemonic/dominant masculinity or a subjugated one; (3) how was the discursive construction of Smith’s sexuality, gender, race, class, HIV status and criminality positioned in relation to the women who brought charges against him; (4) did Smith’s position as a CFL linebacker for the Roughriders buffer/protect him against the common portrayal of Black men accused of HIV nondisclosure as lethal hypersexualized AIDS criminals; (5) is there a difference between the ways in which Smith is portrayed in the media and juridical content; and (6) how does all of this contribute to the politics of race, class, gender, sexual orientation, HIV and criminality?

I am not interested in generalizing the results beyond this case study; rather my goal is to show the limitations of generalizing a case of HIV nondisclosure to other cases.<sup>5</sup> This is precisely what the Supreme Court of Canada did in the *Mabior* decision

<sup>5</sup> Although the critique of case law as non-generalizable is not specific to cases of HIV nondisclosure.



without realizing that every case of HIV nondisclosure has different circumstances to which a ‘one fits all’ test cannot be applied. Specifically, the Supreme Court of Canada decided on a legal test to be applied to all cases of HIV nondisclosure.<sup>6</sup> However, the realities surrounding disclosure and condom negotiation are different for each person living with HIV/AIDS depending on their social location. For example, in *R. v. DC*, the accused was a victim of intimate partner violence. When DC wanted to leave the relationship because of the abuse, her partner used the fact that she did not disclose her positive serostatus the first time they were intimate – 4 years prior – to further control and manipulate her. As such, generalizing one case of HIV nondisclosure to all cases can marginalize, oppress and put PLWHA in danger. Lastly, I want to show how discourses regarding HIV nondisclosure in the media shift over time. Specifically, how discourses pertaining to race, class, sexuality, gender, HIV, and crime changed or did not change from 2005 when Trevis Smith was first arrested to 2009 when he was released on parole.

## **4.2. The Analytical Approach: Critical Discourse Analysis**

Critical discourse analysis is often associated with the work of Norman Fairclough, Ruth Wodak, and Teun van Dijk (Blommaert & Bulcaen, 2000, p. 454). In their formulations of CDA, these scholars include analyses of power, ideology, inequality, social theory and language, but they do so in slightly different ways. In what

<sup>6</sup> In 2012 the Supreme Court of Canada in *R. v. Mabior* decided that if there is a “*realistic possibility of transmission of HIV*, a significant risk of serious bodily harm is established” (para 84). Thus, a person living with HIV does not have to disclose if he or she wears a condom *and* has a low viral load which is the only situation that would pass the legal standard.

follows, I engage with each of these scholar's formulations of CDA followed by an in-depth discussion of two specific types or genres of discourse: legal and mediated.

Van Dijk (2001) focuses on three dimensions of CDA: cognition, discourse and society. He defines cognition as “personal [and] social [...], beliefs and goals as well as evaluations and emotions, and any other ‘mental’ or ‘memory’ structures, representations or processes involved in discourse and interaction” (p. 98). Social cognitions are the “shared representations of societal arrangements, groups and relations” including the ways in which we think, interpret, learn and argue (van Dijk, 1993, p. 257). The role of CDA is to describe critically how dominant discourses shape these various components of social cognition (van Dijk, 1993). Van Dijk's notion of discourse is much broader than Fairclough's who understands discourses as content that is located in written and printed text (e.g. transcripts of spoken conversations, interviews and television and webpages) and “a way of signifying a particular domain of social practice from a particular perspective” (Fairclough, 1995a, p. 14; 2003); van Dijk (2001) describes discourses as a “communicative event” that includes written text, and conversations but also the “gestures, facework, typographical layout, images and any other ‘semiotic’ or multimedia dimension of signification” (p. 98). Wodak (2001) adds that not only are discourses composed of texts, conversations, and dominant structures, but they are also “historically produced and interpreted, that is, [they are] situated in time and space” (p. 3). Importantly, the description of text offered by Fairclough (1995a) is key to this study; namely, that text is viewed as choice, “operationalized as networks of systems of options which are selected [...]” (p. 5). Each carefully selected text

contributes to the construction of discourses; for example, those that sustain inequality, or when used by activists or marginalized groups those that resist unequal power relations (van Dijk, 2009).

As such, critical discourse analysis is a way of understanding “the role of discourse in the (re)production and challenge of dominance” (van Dijk, 1993, p. 249). Dominance in this case is “the exercise of social power by elites, institutions or groups, that results in social inequality, including political, cultural, class, ethnic, racial and gender inequality” (van Dijk, 1993, pp. 249-250). The exercise of social power by elites is not only performed through action, such as physical violence, but by changing the minds of others through the manipulation of text and talk (Fairclough, 1995a; van Dijk, 1993). In this way, Wodak (2001) contends that “language is not powerful on its own – it gains power by the use powerful people make of it” (p. 10). Specifically, van Dijk (1993) argues that:

Power and dominance are usually *organized* and *institutionalized*. The social dominance of groups is not merely enacted, individually, by its group members, as is the case in many forms of everyday racism or sexual harassment. It may also be supported or condoned by other group members, sanctioned by the courts, legitimated by laws, enforced by the police, and ideologically sustained and reproduced by the media or textbooks. This social, political and cultural organization of dominance also implies a *hierarchy of power*: some members of dominant groups and organizations have a special role in planning, decision-making and control over the relations and processes of the enactment of power (p. 255).

Those with less social power in the hierarchy have limited and perhaps even no access to the discourses espoused by the elite. Therefore the “power and dominance of groups are measured by their control over (access to) discourse” (van Dijk, 1993, p. 257). In other

words, those with greater access to the creation, structure and mobilization of dominant discourses are able to control and manipulate those discourses by choosing the text they include or do not include in order to influence people's "knowledge, beliefs, understanding, plans, attitudes, ideologies, norms and values" (van Dijk, 1993, p. 257). Thus, the role of the analyst is to uncover the ways in which powerful elites (represented in this study by the institutions of mainstream news media and law) constitute and (re)produce discourses that perpetuate, create and sustain oppressive discourses related to gender, race, class, criminality, sexual orientation, and seropositivity.

Importantly, "one of the aims of CDA is to 'demystify' discourses by deciphering ideologies" (Wodak, 2001, p. 10). For van Dijk (1993) ideologies are the "cognitive 'programmes' or 'operating systems' that organize and monitor the more specific social attitudes of groups and their members" (p. 258). On the other hand, Fairclough (2003) and Wodak (2001) consider ideologies to be representations of the world which create, sustain and change relations of power; any analysis of text must consider the ways in which "bodies of texts" influence power relations (Fairclough, 2003, p. 9). In particular, a feminist critical discourse analysis (discussed in more detail below) takes a "political perspective on gender" and attempts to "demystify the interrelationships of gender, power and ideology in discourse" (Lazar, 2007, p. 144). The focus of this thesis was to expose the relationships between power, race, class and gender in discourses pertaining to Trevis Smith and HIV nondisclosure.

Another important component of critical discourse analysis is for researchers to take a "sociopolitical stance" (Kress, 1990); meaning that their work is inherently

political and that they aim to make “change through critical understanding” (van Dijk, 1993, p. 252). Researchers should make this change “from a perspective that is consistent with the best interests of dominated groups” so that they are not (re)producing the discourses they are trying to deconstruct (van Dijk, 2001, p. 96). One way that I am able to advance an alternative sociopolitical stance on the criminalization of HIV nondisclosure is to publish counter-discourses in the form of news columns and op-eds which I hope to do more in the future. By doing so, I hope to critically engage the wider public about the perils of criminalizing HIV nondisclosure. Critical discourse analysts are also encouraged to target powerful elites who perpetuate, create, and disregard the impact of social inequality and injustice (van Dijk, 1993). By analyzing juridical and media content I am challenging the dominant discourses of judicial and media elites who perpetuate racist notions about Black male sexuality and stigmatizing language about people living with HIV/AIDS.

My use of intersectionality theory supports Fairclough’s (1995a) assertion that:

The concern in most [critical discourse] analysis is with social relations of domination *within a social system* which is capitalist, and dominated by—but not reducible to—relations of class. I believe it is misleading to focus upon, for instance gender relations (or for that matter class relations) without attention to their functioning within the social system (and therefore to how gender intersects with class, ethnicity, etc.) (p.18).

Following Fairclough, Lazar (2007, 2005) advocates for the union of feminist studies and critical discourse analysis. The primary concern of a feminist critical discourse analysis is with “critiquing discourses which sustain a patriarchal social order: that is, relations of power that systematically privilege men as a social group and disadvantage,

exclude and disempower women as a social group” (p. 5). The author writes that the purpose of a feminist critical discourse analysis is

[...] to show up the complex, subtle, and sometimes not so subtle, ways in which frequently taken-for-granted gendered assumptions and hegemonic power relations are discursively produced, sustained, negotiated, and challenged in different contexts and communities. Such an interest is not merely an academic de-construction of texts and talk for its own sake, but comes from an acknowledgement that the issues dealt with (in view of effecting social change) have material and phenomenological consequences for groups of women and men in specific communities (p. 142).

Lazar (2007) asserts that CDA must be “guided by feminist principles and insights in theorising and analysing the seemingly innocuous yet oppressive nature of gender as an omni-relevant category in many social practices” in particular because the founders of CDA are largely white men (p. 143). In short, researchers using feminist CDA are interested in “how gender ideology and gendered relations of power get (re)produced, negotiated, and contested in representations of social practices, in social relationships between people, and in people’s social and personal identities in texts and talk” (Lazar, 2007, p. 150).

Interpreting the data by way of a feminist critical discourse analysis aligns with my use of an intersectional and masculinities theoretical framework. Specifically, at the heart of feminist critical discourse analysis is the notion of gender relationality which involves the “discursive *co-construction* of ways of doing and being a woman and a man in particular communities of practice” and an “analytic focus on the dynamics between forms of masculinity [...] in terms of how these participate within hierarchies of oppression that affect women” (Lazar, 2007, p. 150). However, while a feminist critical

discourse analysis is concerned with how discourses “sustain a patriarchal social order” that privileges men above women (Lazar, 2007, p. 145), we cannot consider all masculinities to be equally socially situated, which means that all masculinities are not inherently privileged above all femininities. In particular, Black men who live with HIV occupy a less privileged masculinity because of these intersecting social locations, something I explore at length in the next chapter.

#### **4.2.1. Juridical and Mediated Discourses**

As discussed above, “language is a powerful tool for social manipulation and seduction” (Wagner & Cheng, 2011, p. 1). Nowhere is this more evident than in the courtroom where discourses of law are “*discourses of power*” (Wagner & Cheng, 2011, p. 8; Bax, 2011). Language in particular is “not the mere passive vehicle for the imposition or transmission of law but actually constitutes and transforms evidence, facts, and rules into relevant objects of legal knowledge” (Matoesian, 2001, p. 3). Lawyers, judges, witnesses, defendants and victims use language to create and sustain certain identities and storylines in order to position their clients or themselves as more credible. For example, cross-examination is used to persuade a judge or jury of the accused’s innocence or guilt and the specific strategies used to question witnesses is a form of turn-taking and turn-giving which can be used to gain power (Bax, 2011). For instance, when lawyers use questions that start with ‘who, what, where, why and how’ they are allowing the person on the stand to answer freely and thus do not yield as much control over the answer (Bax, 2011). However, if the lawyer poses a confirmation question (e.g. you woke up at 7 am that day. Is that correct?) he is able to make the person answer in such a

way that favours his or her case (Bax, 2011). These are just some examples of the ways in which lawyers in the courtroom pose questions that can control, restrict or guide people's answers on the stand so that they benefit the questioning lawyer's case (Bax, 2011).

Lawyers also engage in what Matoesian (2001) calls "poetic repetition" which functions as a "conversational cement that connects utterances in a powerfully cumulative fashion over the span of discourse space and time" (p. 55). This "poetic repetition" allows lawyers to clarify long or unclear testimonies and to manage any problems jurors might have in interpreting the importance of particular testimonies (Matoesian, 2001). More importantly, by using repetition lawyers are able to hint at blame and therefore lack of credibility by both expanding and controlling testimony (Matoesian, 2001). For example, in the trial transcripts for *R. v. Smith*, the Crown repeatedly asked complainants whether Smith wore condoms and whether he, at any point, told the complainants that he was HIV-positive. This repetition functioned as a constant reminder to the judge deciding the case that Smith was reckless and malicious by not wearing condoms and not disclosing his seropositivity to his partners even though the complainants had asked him whether he was HIV-positive.

These strategies gain power when they are connected to a set of ideas that appeal to naturalized ideologies (Bax, 2011) about, for example, sexuality, race, gender, sex and people living with HIV/AIDS. For example, Matoesian (2001) contends that language, law and power intersect in trial talk "to create a richly layered logic of patriarchal and legal domination, which are naturalized (made to appear self-evident or



commonsensical) and, which are, in turn, incrementally produced through the imposition of symbolic power: the power to create reality through language” (p. 38). For example, in an analysis of the trial transcripts of seventy-eight criminal cases of HIV nondisclosure in the United States, Hoppe (2018) argues that “lawyers and judges wield stigmatizing rhetoric as a hammer; ignorant and prejudicial views of HIV serve as justifications for harsh sentences demanded by prosecutors and imposed by judges” (p. 135). Hoppe (2018) found that judges would often berate defendants for being a “deadly threat to society” and prosecutors would use similar stigmatizing language such as “carrier of death” to create the illusion of harm even though HIV was not transmitted in the majority of cases (pp. 135-139). In short, Hoppe (2018) concludes:

To put HIV on trial in American courtrooms, judges and prosecutors translate HIV from the language of medicine (risk, treatment) to the language of the law (harm, punishment). Judges and prosecutors conduct this translation through the language they use to discuss and interpret the cases. HIV is not a virus or a chronic disease, but a “deadly weapon.” Defendants are not merely people living with HIV; they are potential killers. These analogies assign blame and establish victimhood in a system that deals in prisons and handcuffs rather than hospitals and pills. The language used in court by victims, prosecutors, and judges is not just meaningless banter: their implicitly and explicitly stigmatizing rhetoric creates the illusion of harm in these cases, a veil under which prosecution and conviction seem the logical response to the defendant’s actions (p. 156).

Hoppe (2018) demonstrates how legal discourses are discourses of power by showing the ways in which the law and actors in the various HIV nondisclosure trials co-opt and manipulate not only the (non)disclosure experiences of people living with HIV/AIDS but also the meaning of HIV risk to create the image of a dangerous and deadly “AIDS criminal”.

When these legal discourses are combined and translated into mediated discourses, they wield more power to oppress, marginalize and stigmatize ‘Othered’ groups such as people living with HIV/AIDS. The news media often distorts and misrepresents the facts of cases by sensationalizing certain aspects. van Dijk (2009) argues that this is done through the use of extreme cases, the emphasis or de-emphasis of “bad characteristics of outgroups or the good ones of ingroups” and also for dramatic effect because there is a “tacit assumption that readers will be more interested in, or will better remember the ‘exaggerated’ news”(p. 195). Moreover, this need to make news sensational obfuscates the line between what is fact and what is meant for entertainment. This is in large part due to the commercialization of media that causes content producers to compete for consumers (Fairclough, 1995b). In a more radical tone, Watney (1996) argues that the media allows “interest groups [...] to bypass the traditional structures of democratic process in order to force the enactment of laws in the name of the ‘good’ population which is never actually consulted” (p. 42). Consumers use media to make sense of the world and as such “the central ideological business of the communications industry [is] to retail ready-made pictures of ‘human’ identity, and thus recruit individual consumers to identify with them in a fantasy of collective mutual complementarity” (Watney, 1996, p. 43).

With this in mind, I focused the analysis on the ways in which juridical discourses pertaining to notions of race, class, sexuality, HIV and criminality were translated into mediated discourse. Specifically, I noted what facts tended to be overstatements and overgeneralized, the rhetorical strategies used by legal actors and

journalists, who and what was emphasized and de-emphasized in both juridical and mediated content, and what parts of the case were exaggerated in the news media. Given that media content often conveys emotional and sensational storytelling in relation to HIV nondisclosure cases (Kilty & Bogosavljevic, 2018), I made note of moments where the media dramatized certain facts or embellished aspects of the case with phrases or words that falsely emphasized the dangerousness, promiscuity and lethality of Smith, as well as the ways in which the two genres discursively constructed Smith's masculinity as monstrous.

#### **4.2.2. Doing CDA with Juridical and Mediated Text**

I am interested in uncovering how the media and juridical content constitutes and (re)produces discourses pertaining to race, gender, class, criminality, sexual orientation, and seropositivity. Specifically, I explored which of these social locations were given significance in the media and juridical content and how the connections between Trevis Smith's seropositivity, gender, race, class, sexual orientation, and criminality are discursively produced. Since Smith is a heterosexual athlete he embodies at least some of the main characteristics of hegemonic masculinity; however, I was interested to see how this hegemonic masculinity was communicated in the media and juridical content given that he is Black and HIV-positive. Do these identity locations render him different, dangerous, or Other in certain ways?

With these questions guiding the research, I used Carvalho's (2008) framework for analysing media discourse. I specifically engaged with four of the steps she describes, namely the analysis of objects, actors, language and discursive strategies (p.

167). Indeed, Fairclough (1995b) writes that researchers may choose to concentrate on different aspects of critical discourse analysis (i.e. either the linguistic analysis of text, the ways in which mediated texts are produced and consumed, and/or the wider social and cultural context in which the communicative event is situated). For the purpose of this thesis, I have chosen to focus on the third aspect of critical discourse analysis which Fairclough (1995b) defines as the ways in which “media are shaped by [...] wider society” and how media also “play[s] a vital role in the diffusion of such social and cultural changes” (p. 51). In the remainder of this chapter, I review the four parts of Carvalho’s (2008) approach to CDA and explain how I conducted these steps.

Carvalho (2008) describes analyzing the “objects” of discourse as involving an analysis of the wider context surrounding the issue being studied. For example, I asked “what events/specific issues are associated to the broader issue under consideration” (p. 168). By conducting a thorough literature review, I was able to analyze the relevant issues and events surrounding HIV nondisclosure in Canada and situate the discourses I traced within a broader context. Second, I turned my analysis to the different “actors” located in the text. Questions I asked include “who does the article mention? How are these actors represented? Whose perspective seems to dominate? What is the “framing power” of social actors in relation to the media?” (Carvalho, 2008, p. 168). In particular, I questioned the portrayal of Smith in both the media and juridical content with an eye towards the ways in which his race, class, gender, sexual orientation, HIV-positive status and criminality were talked about by journalists, various legal actors, and witnesses called to testify in court.

Next, my analysis became more detailed and focused on the language that was mobilized to “represent[] a certain reality [...] and the writing style (e.g. formal/informal, technical, conversational)” which Carvalho (2008) argues “are important dimensions of the constitution of meanings” (p. 168). For example, when analyzing the trial transcripts, I made sure to examine the ways in which the defence and prosecution, the judge, Smith himself, and witnesses and complainants would discuss Smith’s conduct, demeanor, and character. In particular, by comparing the trial transcripts to the media content I was able to analyze how formal/informal, technical and conversational styles of language were used to either elevate social actors in the trial process (i.e. when the judge would say “coitus interruptus” to paraphrase Smith and the complainants who used the more colloquial terminology of ‘pulling out’) or in the case of the news articles, when journalists would use more conversational and informal language to transform the information from the trial into more digestible and sensational vocabulary.

Next, I identified the discursive strategies mobilized in the media text and trial transcripts. Carvalho (2008) explains that discursive strategies are the “[...] manipulation of reality by social actors including journalists to achieve a certain effect or goal” (p. 169). An example of a discursive strategy that she provides is the positioning or assembling of actors into certain relationships with others that enables them to do certain things (pp. 169-170). For example, defence and prosecution positioned the complainants and the defendant in very different ways in order to frame Smith as either guilty and not credible, or innocent and credible. One way of determining the discursive strategies used

by journalists is by comparing their strategies to those of other social actors (p.170). For example, I juxtapose the news stories about Trevis Smith to the juridical material which allowed me to compare and contrast the different and/or similar discursive strategies used by reporters and actors in the trial.

Indeed, using *Nvivo 12* I was able to separate the codes I created in order to compare the juridical and media content. Specifically, in the first round of coding I read through the data making a total of 662 *in vivo* and *descriptive*<sup>7</sup> codes. I then created two larger categories titled *masculinities media* (298 codes) and *masculinities transcripts* (108 codes) in which I placed all codes that referenced Smith's appearance, attitude, and/or behaviour. These decisions were guided by the characteristics of dominant, dominating, marginalized, and subordinate masculinities as identified in the theoretical literature on masculinities (section 3.2), and prior research on mediated portrayals of defendants in HIV nondisclosure cases (section 2.4). I also created a category for *race and class* (15 codes) in which I placed all codes that discussed Smith's identity as a Black man, wealth, and/or status with the Roughriders. I then read through the codes in each category while also re-reading sections of the data to better understand the context within which the particular quote was taken from.

This iterative process consisted of five rounds of coding, during which I refined the initial *in vivo* and descriptive codes by collapsing those that were expressly similar

<sup>7</sup> For a detailed explanation of these codes see Johnny Saladaña, *The Coding Manual for Qualitative Researchers*, 2<sup>nd</sup> ed (Los Angeles: SAGE, 2013).

and that showed overlap between categories in order to create analytical codes.<sup>8</sup> For example, under the analytical code *deadly* I included all codes that referred to death, dangerousness, and/or the lethality of HIV. In this way, I was able to develop the three main discourses analyzed in this thesis. I also uncovered two additional discourses (these refer mainly to emotions and the portrayal of victims) that did not answer the research questions posed and did not fit within the theoretical framework mobilized herein. I intend to examine these discourses via the literature on law and emotions in future research publications.

### **4.3. Evaluation of Qualitative Research**

Critical social research is often inherently political and the social scientist must therefore be politically engaged. Consequently, the evaluation criteria and ethics of this research are closely linked to political action. Specifically, I used a “political model of rigour” which is “linked to a commitment to political action and participant inclusion” (Ezzy, 2002, p. 55) . At the heart of this model are the principles of “do no harm” and “genuine respect for the ‘other’” (Ezzy, 2002, pp. 55-56). These principles apply to all points of the research process including data collection, analysis and the writing of the thesis or report (Ezzy, 2002). From a political model of rigour, the procedural ethics currently advanced by university research ethics boards must be malleable enough to consider the on the ground ethical moments and questions that arise during the research

<sup>8</sup> Hesse-Biber and Leavy (2011) write that analytical codes are “developed from literal codes [and] are not tied as tightly to the text itself but begin to rely on the researcher’s insights for drawing out interpretation” (p. 330).

process (Ezzy, 2002; Felices-Luna, 2014; Felices-Luna, Kilty, & Fabian, 2014).

Moreover, a political model of rigour considers the “community as arbiter of quality” meaning the “academic, political and participant communities” come together to become authorities on the “quality” and “value” of the research project (Ezzy, 2002, p. 56). In other words, to do no harm the research should be shared with the community or individuals being researched in order to determine the quality and value of the study. Similarly, to have genuine respect for the ‘Other’ the research needs to be written for the consumption of the affected community, rather than for a small community of scholars (Ezzy, 2002). Moreover, practicing ethics that involve the community under study is at the heart of critical praxis which is central to doing intersectional work. Intersectionality as critical praxis is articulated by Collins and Bilge (2016) to mean the merging of “*both* scholarship *and* practice as intimately linked and mutually informing each other, rejecting views that see theory as superior to practice” (Collins & Bilge, 2016, p. 42).

For the purpose of this project, I intend to share the research results with HIV/AIDS organizations, especially those working with people who have been criminalized for HIV nondisclosure. Moreover, to make the information more accessible and to create counter-discourses I will write media pieces to make the research findings available not only to academics but to the broader public. To date, I have written an opinion column about the discriminatory effects of criminalizing HIV nondisclosure that



was published in *The Winnipeg Free Press* on World AIDS day, 2017.<sup>9</sup> In this way, I am bridging research with political action to open dialogue about the marginalization and oppression of people criminalized for HIV nondisclosure. This dialogue helps to create a platform of engagement for those who are marginalized from and silenced within the political processes surrounding criminalization.

However, I do not simply want to ‘give voice’. Indeed, Alcoff (2009) asserts that “the practice of speaking for others is often born of a desire for mastery, to privilege oneself as the one who more correctly understands the truth about another’s situation or as one who can champion a just cause and thus achieve glory and praise” (p. 132). This research is based on an analysis of documents (media and juridical content) because obtaining interviews with people criminalized for HIV nondisclosure would take more time than a two-year Master of Arts degree would allow. As such, it may be perceived that I am speaking for others instead of grounding this research in lived experience. However, by practicing reflexivity (discussed in section 4.3.1) throughout the research process I acknowledge that I am not trying to speak for others but rather to ally with people living with HIV and to do my part in fighting the stigma and discrimination they experience.

<sup>9</sup> See: Bogosavljevic, K. & Kilty, J.M. (01 December, 2017). Justice isn’t blind on HIV nondisclosure. *The Winnipeg Free Press*. Retrieved from: <https://www.winnipegfreepress.com/opinion/analysis/justice-isnt-blind-on-hiv-non-disclosure-461196833.html>

Lincoln and Guba (1985), in their seminal work on naturalistic inquiry, articulated a different way of evaluating qualitative research that is separate from the more positivist criteria of validity and reliability which they argue are inappropriate concepts when applied to constructivist or critical qualitative work. Specifically, they called for four criteria: truth value or trustworthiness to replace credibility, transferability to replace applicability or external validity, dependability to replace consistency or reliability and confirmability to replace neutrality or objectivity (pp. 294-301). More recent work on criteria for evaluating qualitative research outlined by Tracy (2010) involves: a worthy topic, rich rigour, sincerity, credibility, resonance, significant contribution, ethical research (discussed above), and meaningful coherence.

A worthy topic is one that is relevant, timely, significant and interesting (Tracy, 2010, p. 840). Given that Canada is currently the world leader in per capita prosecutions of HIV nondisclosure cases, this research is timely in that it provides insight into the ways in which people criminalized for HIV nondisclosure are represented in the media and how this might reinforce stereotypes of PLWHA that provide ammunition for the application of more punitive laws. Rich rigour involves questioning things such as: whether there is enough data to provide rich thick descriptions for the researcher's arguments, did the researcher spend enough time collecting data, is the actual sample appropriate for what the research wants to do, and is the method of analysis appropriate for the research questions. The trial transcripts contained 708 pages of material while the media content provided 255 articles which I spent 10 months coding and analyzing.

Establishing sincerity involves either what Lincoln and Guba (1985) called auditing or what is more commonly known as reflexivity. Tracy (2010) specifically argues that for a study to be sincere the researcher must be vulnerable, honest, and transparent about the messiness of the research process; I address these points in the next section where I discuss the ways in which my identity locations shaped the research. Credibility is achieved by way of thick rich descriptions that show the reader the complexity of the data and through crystallization, which involves the use of multiple sources of data, and different methods and theoretical frameworks to analyze the issue at hand (Tracy, 2010).<sup>10</sup> I use quotes to provide thick rich descriptions of the discourses I found in the two data sources, which I compared in order to understand how the ways in which Smith was discursively constructed in juridical discourses were taken up by the media in potentially exaggerated and sensationalized ways. Moreover, I used two different theoretical approaches (intersectionality and masculinities) as lenses through which to analyze the data.

Quality qualitative research must resonate with the audience by way of “aesthetic merit, evocative writing, and formal generalizations as well as transferability” (Tracy, 2010, p. 844). I use quotes and language that are evocative and will prompt the reader to question the ways in which media and law construct PLWHA who are criminalized for HIV nondisclosure. Moreover, I attempted to write the analysis in a way that tells a

<sup>10</sup> The other two ways of establishing credibility are multivocality and member reflections which are more relevant for methods that use interview data as they require the researcher to “analyze social action from the participant’s point of view” and to “seek input during the process of analyzing data and producing the research report” (Tracy, 2010, p. 844).

story. Namely, how Smith was constructed as having a ‘good’ side composed of his philanthropy and Bible reading and his ‘bad’ side composed of promiscuity, adultery and deceit, as outlined in sections 5.2 and 5.3. The significance of the research is measured by questioning the theoretical, heuristic, practical and methodological significance (Tracy, 2010). Given that there is very little research that has explored the mediated portrayal of HIV nondisclosure defendants and even less that has compared mediated and juridical discourses, my hope is that this research will contribute to this field. Lastly, this study has meaningful coherence because it accomplished: (a) what I set out to do (i.e. to analyze the ways in which Smith’s gender, race, class, HIV-positivity, and criminality were discursively constructed in both mediated and juridical content); (b) aligned my methodology, methods, and theoretical frameworks by connecting them to feminist knowledge production and ways of doing research; and (c) weaved together the findings in the analysis with the substantive and theoretical literature reviewed in chapters 1 and 2.

#### **4.3.1. Epistemological Considerations and Positionality**

I aligned myself with a feminist epistemology that seeks to examine the relationship between gender and knowledge (Grasswick, 2011). Specifically, feminist epistemologists are interested in power relations and the ways in which they affect knowledge production (Grasswick, 2011). Recently, feminist epistemologies have broadened to include other “axes of division” such as race, class, gender, and sexual orientation (Grasswick, 2011). I use intersectionality and masculinities theory to analyze how different intersecting social locations are mobilized to discursively constitute Trevis

Smith and to challenge the normative ways that my own intersecting identity markers shape this research. For example, I am a cis-gendered woman, HIV-negative, white, and a student among other things – the ‘ideal victim’ in HIV nondisclosure cases. I tried to consider how these intersecting identity markers might shape how I interpreted and made sense of the data and thus the knowledge I produced.

By identifying my positionality, I was able to remain open and transparent about the various social locations I occupy and how my experiences, ideologies and beliefs shaped research decisions and the politics of the research – including how I align myself in terms of the politics of AIDS, gender, class, race, sexual orientation, and crime. In particular, by acknowledging that I am an outsider and ally to the HIV/AIDS community, as well as my opposition to the criminalization of HIV nondisclosure I was able to “identify [...] the discourses which have impacted on the lenses through which the researcher views the worlds and participants under study” (Grbich, 2004, p. 71). In other words, I must locate my social position(s) and evaluate how they impact my research decisions. This process involved keeping detailed notes about my emotional reactions, prejudices, discomfort, confusion, and pressures at different stages throughout the research. For example, my belief that criminalizing HIV nondisclosure does not make us safer, that it does not demonstrably show increased disclosure practices, and that it reduces the willingness of people to get tested thereby increasing the risk of transmission and the spread of HIV. Moreover, I often noticed that I would sympathize with Smith because I would blame the complainants. I was frustrated that they continued to have sex with Smith given that they knew he was living with HIV since they heard

rumours of his seropositivity and one complainant even found a pamphlet titled “Living with HIV” in his bag. I found myself feeling angry at the women because they brought charges against Smith for something that they could have prevented; yet, I also realize that there may have been power struggles between the two parties and a desire to have sex without a condom that prevented the women from demanding he wear one. I hope to explore some of these feelings and questions I had about the complainants in my doctoral research.

#### **4.4. Limitations**

The biggest limitation to this study is the lack of participant voices free from the constraints of the courtroom. As a feminist researcher, I value the importance of situated knowledges (Haraway, 1988); however, the realities of research are such that access to participants is hard to come by without being somehow embedded within the group you are wishing to research. This limitation does not mean that textual analysis is second best to interviewing. Indeed, by analyzing the juridical content I was able to gather participant voices even if they are limited to courtroom dialogue.

Moreover, I want to emphasize the ambiguity of critical discourse analysis that critics have called attention to. Widdowson (1998) argues that discourses are both “in vogue and vague” meaning that it is a term that is popularly used in academic circles and that at the same time no one really knows what it means (p. 158). He contends that one can look at discourse through multiple perspectives such as linguistic or sociological and therefore there “will always be differences in the direction of enquiry which will inevitably privilege one perspective over the other” (Widdowson, 1995, p. 165). While I

agree with Widdowson (1995), I have tried to reduce some of this ambiguity by situating my work within one mode of CDA, namely feminist critical discourse analysis as advanced by Lazar (2007).

Given that I have now set up the basis for the analysis by way of laying out the literature review, theoretical framework and methodological approach, I now turn to the analysis chapter which is composed of three sections outlining the discourses that shaped how Smith was constructed in court and in the news media.

## Chapter 5.

### Analysis<sup>11</sup>

This chapter provides an analysis of the trial transcripts in *R. v. Smith* (2007) and the media content related to the case. In order to compare and contrast the discourses found in the two data sources, I integrated the trial and media quotes together to compose an intricate narrative of the ways in which Smith was discursively constructed by legal actors, complainants, and journalists. This presentation style allows me to showcase and emphasize the ways in which journalists sensationalized Smith's masculinity, Blackness and positive serostatus. I found three major discourses: Dr. Jekyll and Mr. Hyde, Sodom and Gomorrah of Sexual Partners, and Playing a Dangerous Game with each discourse containing two components.

#### 5.1. Dr. Jekyll and Mr. Hyde

*“I was slowly losing hold of my original and better self, and becoming slowly incorporated with my second and worse.” -- from Robert Louis Stevenson's The Strange Case of Dr. Jekyll and Mr. Hyde (Warick, 2005, C1)*

Research shows that people criminalized for HIV nondisclosure are discursively constructed as hypersexual deviants, reckless vectors and HIV sexual predators (Hoppe, 2018; Kilty & Bogosavljevic, 2018; Miller, 2005; Worth et al., 2005). In media reporting specifically, HIV-positive Black men have been constructed as a “monstrous other to a

<sup>11</sup> In the excerpts from the trial transcripts Mr. Burge is the crown attorney, Mme. Giroux is the defence counsel, and “the court” is the judge.



‘civilized’ masculinity” (Persson & Newman, 2008, p. 639). While these constructions are present in the Trevis Smith case, his class and status as a CFL player acted as a buffer that to some extent mitigated his construction as an HIV-positive hypersexual deviant. This section discusses the two competing discourses that simultaneously characterized Smith as a good man and “model minority subject” (Kalman-Lamb, 2013, p. 243). who was a committed and productive member of society, and an evil immigrant with a deadly secret. In other words, Smith was constructed as embodying a civilized masculinity because he adhered to notions of a white dominant masculinity but also a subjugated and marginalized masculinity because he lost his right to that white privilege when he stepped outside the bounds of white dominant masculinity by “expos[ing] the vulnerabilities of heterosexuality [and] the ambiguities and perils of sexual interactions, [and thus] the violence that lurks within its gender power asymmetry” (Persson and Newman, 2008, p. 638).

Journalists and lawyers used these two discourses in very different ways and for different reasons. While the crown mobilized the monstrous masculinity discourse to discredit Smith, the defence played up Smith’s civilized masculinity to show that he simply made a mistake – a defence that has been successfully used by white defendants

in cases of sexual assault, as demonstrated by the highly publicized Brock Turner case<sup>12</sup> (Levin, 2016) – but which failed for Smith. Journalists used these competing discourses to encourage sympathy and empathy for Smith as an admired football star while at the same time constructing him as public enemy number 48.<sup>13</sup> The next two subsections describe in more detail how these two discourses played out in the media and juridical content to constitute Smith as both Dr. Jekyll and Mr. Hyde.

#### **5.1.1. Dr. Jekyll: “Admired football star”<sup>14</sup>**

When Smith was first arrested in 2005 the media and defence counsel depicted him as a “model minority subject” who expressed key traits of dominant masculinity and who “perform[ed] complete allegiance to the nation” (Kalman-Lamb, 2013, p. 243). Defence counsel portrayed Smith as considerate and conscious of his sexual partners’ privacy to justify why he failed to disclose to police and public health some of the names of the women he had sexual relations with. While the judge was concerned that he did not name one of the complainants, the defence argued that Smith never harmed Olivia Asante because she tested negative for HIV and that he therefore did not feel the need to disclose her name to police.

<sup>12</sup> Brock Turner was a white 20-year-old Stanford University student athlete who was convicted of sexually assaulting an unconscious woman behind a dumpster in Santa Clara, California. He was caught by two international students who intervened and detained him until the police arrived. The judge sentenced Turner to 6 months in a county jail because sending him to prison any longer would “have a severe impact on him”. Turner was released after only 3 months because of California’s new Criminal Justice Realignment Act of 2011 which is meant to address overcrowding in prisons and jails.

<sup>13</sup> Number 48 is Smith’s jersey number.

<sup>14</sup> Warick, J. (2005e, December 03). The secret life of Trevis Smith. *Calgary Herald*, p. A19.

**MME GIROUX:** He tells [the police], yes, I tested positive and then I went to Alabama and then I went – and he volunteered to go to Calgary again to get tested and he signed waivers for them to access his medical records.

**THE COURT:** Yeah.

**MME GIROUX:** So he was trying to be helpful to all this.

**THE COURT:** Yeah.

**MME GIROUX:** And also it is maybe a bit difficult to tell a police officer yes, I slept with this woman, this woman, this woman, this woman, this woman. You never know, it's also privacy. It's privacy and it's also respect towards the other person. Maybe you don't want to go and tell the police that this person was involved with you.

**THE COURT:** No, but if I'm HIV or they're telling me I'm HIV –

**MME GIROUX:** But no, but he knew he was.

**THE COURT:** Okay, and he knows at that stage, surely if you're being asked who you're sleeping with –

**MME GIROUX:** Yes, if the nurse asks him.

**THE COURT:** - and - yeah, okay, but I mean if he starts naming names – if he starts naming names –

**MME GIROUX:** Can you blame him not to name others?

**THE COURT:** Yeah, well, it also do you think I can look at, well, why is he not saying this name, Olivia Asante.

**MME GIROUX:** Olivia's name is easy why he didn't say it. First of all she knew when he was wanted by the police that he was HIV.

**THE COURT:** Okay.

**MME GIROUX:** She had gotten tested.

**THE COURT:** Okay.

**MME GIROUX:** Four days prior.

**THE COURT:** Okay.

**MME GIROUX:** So where is the harm to her? She knew? She's gotten a test. Why go to the police and say this girl has slept with me? (*R. v. Smith*, Volume III, p. 623).

Moreover, Smith's lawyers emphasized that he was helpful and cooperative throughout the investigation because when questioned by police he did not exercise his right to stay silent or consult a lawyer.

**MME GIROUX:** So obviously put in its context there is no more contradictions and it just falls within common sense and now, my colleague is also pointing the fact that during [Smith's] statements, not even KGB statements but statements to the police when he was under investigation he did not say everything and rightly so and he shouldn't

have said a word either. He has the right to remain silent. He did not have to tell a single word to the police. Yes, he did volunteer information. He did not have to volunteer it at all so he did waive partially his right to remain silent but he was under no obligation therefore to go further [...] (*R. v. Smith*, Volume III, p. 620).

While the judge was concerned about Smith's failure to name one of the women, he also seemed to realize that it is often difficult to disclose one's serostatus (Adam, 2005) and empathized with Smith by acknowledging that he was probably embarrassed to disclose. This conclusion reflects research showing that the decision to disclose is often complicated and layered with emotions, vulnerabilities, power relations, momentary lapses in decision-making, the daily dilemmas of life and fear that disclosing would mean admitting to a crime (Adam, 2005; Drummond, 2011; Elliott, 2002; Kilty & Orsini, 2017; Klein, 2009). In this way, the judge seems to humanize Smith by calling out the difficulties he faced when deciding whether to disclose or not.

**THE COURT:** So he's a little reticent in terms of disclosure and again, I'm not going to make too much out of that. Obviously it's embarrassing to him, you know, it's maybe something a person just doesn't want to come forth with. It's humanly understandable, that sort of thing, so I don't place a great deal but it is a little bit of indication in terms of how he deals with his knowledge (*R. v. Smith*, Decision, p. 16).

The judge simultaneously elevates Smith to a hero who embodies a dominant masculinity (Messerschmidt, 2016) as characterized by other sports heroes such as Michael Jordan and LeBron James. While not specifically citing Smith's size, strength and athleticism as the requisite features of dominant masculinity, the judge ultimately characterizes Smith as someone who was doing a service to the community by visiting Bethany Gray's (one of the complainants) child and acting like a fatherly figure to a

child whose real father was absent. In other words, Smith is represented as a role model for what a man should be.

**THE COURT:** Well, okay, he wants to be nice to the 11-year-old. That's okay. I have no problems with that and, you know, that's a perfectly valid explanation. To 11-year-olds football players are heroes and sometimes to 60-year-olds they're heroes, too, but to 11-year-olds they're obviously heroes and she wanted him to – to basically, you know, meet him and this sort of thing, so he did a favour there (*R. v. Smith*, Decision, p. 56).

In this example, the judge emphasizes Smith's willingness to spend his free time acting as a fatherly figure to his girlfriend's son, thus changing Smith's characterization as an HIV-positive Black football player who was sleeping with multiple women and spreading HIV to show him in a more positive light as a caring man.

However, the judge also describes Smith as going through a “metamorphosis” in which he is trying to become a better man, which has the effect of constructing Smith as a ‘failed’ man and husband. This characterization of Smith problematically reinforces stereotypes of Black men as absent husbands and fathers (Collins, 2004) and therefore perpetuates racial hegemony by constructing white men as ‘better’ men because they are ‘present’ fathers. This discursive construction, however, fails to acknowledge the poverty and high incarceration rates of Black men (Maynard, 2017; Collins, 2004) that prevents them from being present in the lives of their children; an irony in this case given that Smith's conviction resulted in his incarceration and absence from his children. However, by stating that Smith is attempting to change the judge shows some empathy and lends his narrative a degree of credibility.

**THE COURT:** [...] he's attempting to have his reconciliations with - with his legal wife. He's indicated he's trying to put all things back together and this sort of thing. It also speaks volumes with him trying to get [his wife] a room in the place where the Riders are staying and he's going through this great metamorphosis in terms of being a better man and - and reconnecting with his spouse (*R. v. Smith*, decision, p. 44).

Nowhere is this idea of Smith going through a metamorphosis more pronounced than in the news coverage, which often depicted him as a philanthropist who was a great teammate and role model:

A popular philanthropist, the Saskatchewan player is accused of spreading deadly HIV virus. On the surface, Saskatchewan Roughriders linebacker Trevis Smith is an excellent role model. He is unfailingly polite, reads the Bible, volunteers for numerous charities and always signs autographs for children (Warick, 2005a, p. A12).

In this way, much of the media coverage showed sympathy and even empathy towards Smith, something that is not easily afforded to other Black men criminalized for HIV nondisclosure (Kilty & Bogosavljevic, 2018; Miller, 2005; Persson & Newman, 2008; Shevory, 2004). Smith's class and status as a Roughriders linebacker granted him public support and somewhat protected him from popular discursive constructions of Black men criminalized for HIV nondisclosure as reckless vectors of disease (Worth et al., 2005). One of the ways in which the media showed sympathy for Smith was through quotes from fellow teammates and coaches who referred to Smith as "part of our family" (Davis, 2005a, p. B12; Gilchrist, 2005, p. A3; Vanstone, 2005a, p. C1), that they loved Smith and "would trust him with [their] wi[ves] and kids" (Warick, 2005b, p. C1), and in some cases a victim since "somebody had to give it [HIV] to him" (Lovric, 2005, p. A12). One reporter recognized that Smith was being "portrayed as a monster, and [that] this [was] not fair"; he also wanted to remind readers that "when having consensual sex,

both parties have a responsibility to protect themselves” (Houston, 2005, p. A21) – a longstanding public health message that has been muddled with the criminalization of HIV nondisclosure (Kilty & Orsini, 2017).

This sympathy for Smith discursively constructed him as a “good Black man” who deserves our compassion, and also acted as evidence that Black men’s aggressiveness can be somewhat tamed and controlled by the white men who dominate CFL management (Ferber, 2007).<sup>15</sup> For example, Smith’s girlfriend was quoted saying that Smith was very “sweet, caring, and sensitive” because he always “put her first” (Pruden, 2007a, A1) and was the “ideal boyfriend” who acted like an “old school gentleman” (Pruden, 2007b, A3). Smith was also a “good and well-liked teammate” (Vanstone, 2005b, B1) who had a “generous and polite public persona” because “he would often cite Bible verses, volunteered at hospitals and as a tutor for disabled children, and rarely if ever cursed” (Warick, 2009a, A1). Even while incarcerated, Smith was an “exemplary prisoner” (Warick, 2009b, C8) because he displayed an exceptional attitude and behaviour that later enabled him to be released on parole. More importantly, Smith was portrayed as distinct from other Black athletes who were portrayed as “bad boys refus[ing] to submit to control” (Ferber, 2007, p. 22) because he was “an educated,

<sup>15</sup> It’s interesting to note that from 1999-2006 the Saskatchewan Roughriders’ general manager was Roy Shivers, who was the first Black general manager in professional football (Shivers, Maragos, & Kuffner, 2005). During his tenure, Shivers hired Danny Barrett, a former football player as head coach making the Roughriders the first team in professional football to have a Black general manager and Black head coach. When Shivers was fired in 2006 and replaced with Eric Tillman, a white Canadian football executive, Tillman replaced Barrett for Kent Austin who is white as head coach. As such, it’s easy to see how race tensions play out in the CFL. More specifically, this shows how the public image of racial transcendence in the CFL is simply an illusion – one that sustains a “racialized [...] unequal power relationships within the league” (Griffin, 2012, p. 164) (Griffin, 2012, p. 164; Ferber, 2007).

quiet, strong individual who has done a lot of good work in the community. He's not an outspoken or flashy player", said his lawyer" (Bellett, 2005, A1).

Discursively constructing Smith as an admired and respected football player while seeming to offer sympathy and empathy towards him also served as a mechanism to show other Black men who belong to a wealthier class that they are guests in both a white settler nation and the bourgeoisie class. If they disobey and return to their 'animal-like nature' they risk being constructed as sexual predators (Butterworth, 2007; Ferber, 2007; Griffin, 2012; Leonard, 2004). Reports that highlighted Smith's philanthropy, compassionate and caring attitude, and hero status were followed by accounts of him as a public enemy no.48. The next section details the ways in which Smith was constructed as Mr. Hyde, his evil other side.

#### **5.1.2. Mr. Hyde: "Public enemy No. 48 (His Jersey Number)"<sup>16</sup>**

Admiration and sympathy for Smith did not last long as he came to be discursively constructed as an aggressive 'AIDS fiend' with no emotion who lies and seduces women until they trust him so that he can ultimately convince them to have condom-less sex and expose them to HIV. Particularly problematic in HIV nondisclosure cases is the use of public health nurses' notes and testimony, which in the Smith case were used to show that he was, on multiple occasions, warned about his responsibilities

<sup>16</sup> Maki, A. (2005b, November 08). Smith debate divides a Prairie CFL city. *The Globe and Mail*, p. S1.



to his sexual partners and chose to ignore those directives by having unprotected sex with the complainants. By using this testimony, the crown was able to constitute Smith as irresponsible, reckless and indifferent to the lives of his sexual partners. For instance, in the passage below, Susan Nasewich, who was one of Smith's nurses, testifies that Smith understood what she communicated to him in regards to safe sexual practices and confirmed that Smith failed to disclose one of the complainant's names.

**MR. BURGE:** You said he was receptive to your discussion?

**SUSAN NASEWICH:** Well, yeah, and so I would mean that he's understanding of what's been discussed. He was compliant or appeared to be compliant with the discussion. There was no - we had no concerns at that time. He wasn't, you know, verbalizing that we were making things up or that it was incorrect or that he was going to be doing anything different from what we had asked him to do so he was understanding and receptive to the discussion.

**MR BURGE:** On that occasion did Mr. Smith disclose to you the name of Olivia Asante as a sexual contact?

**SUSAN NASEWICH:** He did not.

**MR. BURGE:** You said you gave him a Safer Guidelines form?

**SUSAN NASEWICH:** Right (*R. v. Smith*, volume I, p. 149).

The crown painted Smith as not only indifferent to the lives of his sexual partners but to the families of his partners by using testimony from Olivia Asante to highlight that Smith knew of Asante's intention to be an organ donor for her father. Smith's failure to disclose his seropositivity to Asante meant that she had to wait for six months until the incubation period was over before she could donate her kidney to her father. Thus, his nondisclosure of HIV ultimately delayed the transplant and could have cost Asante's father his life. Discursively positioning Smith as a malicious Black man who exposed an innocent and self-sacrificing woman to HIV reflects long standing myths and fears of Black men and their sexuality, namely Jim Crow era images of the Black male brute

terrorizing innocent women (Collins, 2004; Leonard, 2004; T. O. Patton & Snyder-Yuly, 2007). This discursive positioning serves the purpose of justifying the increased surveillance, incarceration and control of Black men and their sexuality (Maynard, 2017).

**MR. BURGE:** Okay. Did Mr. Smith know of your father's health condition?

**OLIVIA ASANTE:** Yes.

**MR. BURGE:** Did he know of your plan to be an organ donor?

**OLIVIA ASANTE:** Yes, he did.

**MR. BURGE:** When would you have discussed your plan with Mr. - or did you discuss your plan with Mr. Smith about being an organ donor?

**OLIVIA ASANTE:** Well, when my dad was first - well, when my dad finally told us that he was ill I remember I was really upset because to me my dad's a really nice man. He's worked hard. He worked two jobs and whatnot, so when I found out he was sick it really put a damper, like I was really upset and I guess I had called him and I was crying and I was upset.

**MR. BURGE:** You called who?

**OLIVIA ASANTE:** Trevis, and I think either that same day or the next day he flew out to Vancouver.

**MR. BURGE:** Because you were upset about your father?

**OLIVIA ASANTE:** Yes.

**MR. BURGE:** Did you have to go through some screening procedures to see if you could be an organ donor?

**OLIVIA ASANTE:** Yes (*R. v. Smith*, volume II, pp. 266-267).

**MR. BURGE:** Once you learned from Tammy Brandt about what Mr. Smith may have did that have any impact upon your - on you as an organ donor?

**OLIVIA ASANTE:** Yes, I had to - I called actually the clinic. There's like a living donor clinic they have and I called the nurse there and I told her that I could have been exposed to the HIV virus and then she asked me, I guess, the last time I'd had contact with it and I mentioned in May and then she says I think it was six months incubation time as I said earlier, so I waited six months to make sure that I didn't have it.

**MR. BURGE:** Did this - had there been any other or earlier plans about when you might be an organ donor?

**OLIVIA ASANTE:** We were going to do it in the fall of 2005 but we did it the following year.

**MR. BURGE:** In 2006?

**OLIVIA ASANTE:** Yeah, February 2006.

**MR. BURGE:** And why did you wait till February of 2006?

**OLIVIA ASANTE:** I had to wait the six months to make sure that I didn't have it (*R. v. Smith*, volume II, pp. 268-269).

In his closing statement, Mr. Burge made sure to repeat and thus emphasize that Smith's knowledge of Asante's decision to be an organ donor and his subsequent failure to disclose his seropositivity "set him apart from most of the people who had been dealt with in previous cases" because even though he met her family and the transplant still occurred – it could have been "permanently prevented [because] with this knowledge of her intention he continued to expose her to risk" (*R. v. Smith*, decision, pp. 23-24). In other words, not only was Smith apathetic towards Asante's health and her father's life, he sinisterly charmed his way into Asante's life and then exposed her to HIV making her unable to be an organ donor until she was certain she tested HIV-negative.

Journalists emphasized that Smith continued to have unprotected sex with Asante after he found out that she was going to be an organ donor for her father because it represents one of the most newsworthy and salacious aspects of the case (Jewkes, 2015). Some of the headlines read: "Woman feared for father in HIV scare: Plan to donate organ to sick dad put on hold" (Pruden, 2007c, p. A6) and "Linebacker deceived B.C. woman, trial told" (Prudent, 2007d, p. B1). Pruden (2007e) specifically describes that "A 26-year-old B.C. woman said Trevis Smith continued to have unprotected sex with her long after he learned he was HIV-positive, even knowing she was planning to be a living organ donor for her ailing father" (p. A1). These headlines depict Smith as "shameless in his deceptions" and identify him as a potent vector of disease that was not contained to his sexual partners thus inducing fears about the *potential* number of people he could

have infected, which is a common discursive strategy in the media coverage of HIV nondisclosure cases (Kilty & Bogosavljevic, 2018; Miller, 2005, p. 39).

Modern western cultural iterations of dominant masculinity are characterized by rationality and thus “real” men are supposed to not only exercise control over women and other men who are lower on the masculinities hierarchy, but over their emotions as well (White & Peretz, 2010). While emotional unavailability may place some men in the dominant category, when expressed in certain situations this same characteristic may place men in either a subordinate or hegemonic masculine position (Kilty & Bogosavljevic, 2018) and can be used to vilify them, especially when used to discursively construct HIV-positive Black men who are criminalized for HIV nondisclosure as the imaginary “AIDS fiend” (Persson & Newman, 2008; Shevory, 2004; Worth et al., 2005). One news story made sure to reference that “Smith knowingly risked the health, and possibly lives, of the two women with whom he had unprotected sexual relations. He showed no remorse for his actions” (*The Gazette*, 2007, A22). Others went so far as to describe in detail that Smith expressed no emotion other than being nervous and stressed about his testimony – possibly suggesting that he was lying on the stand.

After testifying, Smith emitted a deep breath and rejoined the defence team. Upon sitting down, the 30-year-old Alabama native undid his tie. The tie hung around his neck and rested on his shirt for the remainder of the afternoon session. His collar was unbuttoned. Smith rested his head on his left hand and remained virtually frozen in that position, without making eye contact with anybody. Rarely did he even blink in the first few minutes following his testimony. The defence had summoned another witness -- a Regina woman who stated that Smith had used protection in

his post-diagnostic intimacy with her -- but a pensive Smith was unresponsive to the early stages of that testimony (Vanstone, 2007, C1).

Moreover, the description of Smith as lacking emotion was used to argue for tougher penalties: “In neither case was the term adequate to the crimes committed, the lack of remorse displayed by the accused or the harm to the victims” (*The Gazette*, 2007, A22). This quote is problematic given that expressing no emotions is a characteristic of hegemonic and dominant masculinity and we teach and actively require men to not show emotion, which has long been characterized as a feminine trait (Schippers, 2007). Moreover, evidence shows that eye contact can actually be indicative of deception (DePaulo et al., 2003; The Global Deception Research Team, 2006) and therefore describing defendants as remorseless, callous and indifferent because they make no eye contact is a false representation which plays on racial tropes that construct Black men as ruthless and emotionless predators. As such, Smith’s performance of this dominant masculine characteristic worked against him because it enabled his construction as Mr. Hyde, which shows how dominant masculine characteristics when expressed by Black men (or gay men) places them into a subordinate or marginalized position.

The discursive construction of Smith as “a very good liar” (Warick, 2005c, E1) was a common theme in both the transcripts and the media content. The crown described Smith as purposefully “attempting to conceal the fact that there was a relationship between he and [the complainant]” (*R. v. Smith*, volume III, p. 606).

**MR. BURGE:** When you look at the - I won’t say recklessness, this goes beyond a recklessness but the deliberate nature of his deception for the purpose of his sexual gratification that he put these women at that risk and

it's not – it's not like a momentary indiscretion. This was - this seems to be part of his life at that time. It was - he was deceiving these women when he had the - well, throughout it seems, Your Honour (*R. v Smith*, decision, p. 29).

Similarly, news reports emphasized the judge's construction of Smith as deliberately deceptive and selfish: "Bellerose said Smith's status with the Saskatchewan Roughriders appeared to have been of greater concern to Smith than the well- being of his victims" (Pruden, 2007f, A5).

Smith was specifically constructed as deliberately deceptive as though he purposefully made his partners fall in love with him so that he could convince them to have condom-less sex – a construction that is common and amplified in mediated portrayals of Black men criminalized for HIV nondisclosure (Miller, 2005; Persson & Newman, 2008). More importantly, condom-less sex is "archetypically masculine" as condoms are thought to constrain men's pleasure; however, when heterosexual Black men living with HIV/AIDS have sex without a condom, media reporting emphasizes this behaviour to "such extreme proportions, and with such ruinous consequences, that it comes to perform a monstrous other to a 'civilized' masculinity that preserves heterosexuality" (Persson & Newman, 2008, p. 639). This is exemplified by the use of direct quotes from complainants in the news stories:

"I asked him to (wear a condom). He told me, 'No, no, no, no ... there's no one else. I'd never do anything to hurt you'," she said, estimating they had sex more than 30 times without a condom (Warick, 2005b, C1).

Amanda's description of her relationship with Smith is similar to that of the other women interviewed. They all fell in love with him, and Smith told them he felt the same way. At some point, the women said they agreed to let Smith stop wearing a condom during sex. The relationships

all ended with the realization that Smith was married or was dating other women (Warick, 2005a, A12).

Early in the relationship, she asked Smith to wear a condom during sex and he did. After about a year, Amanda said he convinced her no condoms were necessary (Warick, 2005c, E1).

Whether or not Smith used condoms fails to consider if he was taking his medication and thus had a low viral load; the science on HIV/AIDS tells us that if he had a low viral load he would not be able to transmit HIV (Loufty et al., 2014) thus confirming law's inability to keep up with science (Elliott, 2002; Mykhalovskiy, 2011) and its inappropriateness in terms of preventing HIV transmission.

Media reporting and the trial focused on condom use alone and discursively constructed Smith as a callous man who only cared about his sexual pleasure and not the sexual health of his partners. This construction problematically neglects the fact that he was taking medication, had a low viral load and would have been unable to transmit the virus, which shows an ethic of care to make sure his sexual partners were not at risk. Moreover, it changes the way we think about sex and who has the ultimate responsibility for safe sex by telling us that PLWHA are responsible for the sexual health of their partners (Weait, 2001) without recognizing that the sexual partners/complainants are choosing to have sex with all of the risks that it poses (Klein, 2009). In addition, given that heterosexual men are disproportionately criminalized for HIV nondisclosure (Hastings, 2017), discursively framing heterosexual PLWHA such as Smith as solely responsible for their partner's sexual health reinforces the rejection of neoliberal sexual health messages by heterosexual couples (Kilty & Orsini, 2017) and thus creates a false

sense of security amongst HIV-negative people (Adam et al., 2008; Elliott, 2002; Galletly & Pinkerton, 2006).

A common characteristic of the western iteration of masculinity is a demonstration of physical strength, size and athleticism (Kilty & Bogosavljevic, 2018; Messerschmidt, 2016). The large number of Black athletes in professional sports constitutes an assumption that Black men are naturally more athletic – thus evoking the historical stereotype of Black men as physically aggressive while whites are superior mentally (Enck-Wanzer, 2009; Ferber, 2007). In the Smith case, reporters positioned his size and his aggressive nature on the field in contrast to the victim who is discursively constructed as innocent, traumatized and attacked by a large and aggressive brute:

The real alleged victim is out there having to deal with who knows what considering this guy's HIV-positive, 6-foot and 240 pounds, and smashes into people as a way of making a living (Gilchrist, 2005, A35).

A six-year veteran with the Saskatchewan Roughriders was arrested at his Regina home yesterday on a Canada wide warrant and charged with aggravated sexual assault in an attack on a B.C. woman (*Toronto Star*, 2005a, A02).

These reporters problematically failed to recognize that the women were not attacked but rather consented to sex with Smith. As such, they reinforce notions of Black men as not just violent (which is a celebrated characteristic of dominant masculinity when expressed by white men for justified purposes such as saving a damsel in distress), but as naturally more dangerous and thus outside the bounds of a white dominant masculinity (Enck-Wanzer, 2009; Ferber, 2007; Oates & Durham, 2004).



When Black men are HIV positive, this characteristic becomes even more problematic. As Worth, Patton and Goldstein (2005) argue: “AIDs criminals bring out the psychic fear of the bogeyman, miscegenation, pedophiles stalking children, and excessive sex” (p. 7). Smith was described as a “shadowy figure” while boarding a plane “and [that] it was an eerie sight” (Hughes, 2005a, A2) thus bringing to the foreground an image of a Mr. Hyde type figure lurking in our midst. More problematic was the association of HIV to a live hand grenade even though with proper medical care HIV is now considered a chronic manageable illness and emphasis that Smith is now a convicted sex offender, even though the women consented to sex and presumably all of the risks that it brings. One reporter went so far as to link Smith to a child molester, even though the complainants were all above the age of 18 (Olivia Asante was 26 years old and Bethany Gray was 31 years old at the time of the trial).

If they knew a man with a live hand grenade was roaming a neighbourhood, they’d let residents know. Ditto if a potential rapist was on the prowl (Thompson, 2005, A6).

Trevis Smith -- once a dependable Saskatchewan Roughriders linebacker, a high school football coach, and a familiar figure at many Regina nightclubs -- is now a convicted sex offender looking at a lengthy prison term (Pruden, 2007g, A1).

But it’s like having a convicted child molester move into your neighbourhood. Would you rather know he’s around, even if he’s paid his debt to society, even at the risk of his rights? (Cole, 2005a, A1).

Linking Smith’s HIV status to a live hand grenade not only brings about long standing fears of HIV/AIDS that emerged during the early onset of the disease in the 1908s (Kilty & Bogosavljevic, 2018) and perpetuates HIV-related stigma or what Watney (1996) describes as an ongoing moralized AIDS commentary; it also intimates that Smith is

both deadly and dangerous and that the vehicle he uses to bring about this destruction is his penis.<sup>17</sup> The next theme discusses the mediated and legal discourses that construct all football players and Smith in particular as promiscuous.

## **5.2. The “Sodom and Gomorrah of sexual partners”<sup>18</sup>**

A dominant white hegemonic masculinity is often characterized in western cultural standards as an expression of sexual prowess through promiscuity, womanizing, and heteronormativity (T. O. Patton & Snyder-Yuly, 2007; Schippers, 2007). These characteristics, when exhibited by white powerful men such as Donald Trump, are often celebrated or at least dismissed in terms of their negative repercussions; when these same characteristics are expressed by Black male athletes in particular, the men are described as hypersexual and their sexuality is discursively constructed as animalistic. For example, Leonard (2004), writing about Magic Johnson and his coming out as HIV-positive, contends that “the constant coverage of groupies/sexual appetites of Black athletes, mainstream media voyeuristically imagines Black male athletes as hypersexual bodies” (p. 292). In what follows, I discuss the ways in which all football players were cast as sinful and sexually promiscuous, which helped to somewhat minimize Smith’s construction as a promiscuous womanizer by suggesting that having multiple sexual

<sup>17</sup> The third discourse discusses in more detail the ways in which Smith was specifically constructed as deadly.

<sup>18</sup> Cole, C. (2005b, November 05). Safe sex talks are nothing new. *The Vancouver Sun*, p. 11.

partners is natural for athletes. Nonetheless, Smith's sexuality stood out because of his seropositivity, remaking him as exceptionally deviant.

### **5.2.1. "Athletes are like kids walking into a candy store"<sup>19</sup>**

As the title of the larger theme suggests, the media described Roughriders football players as disrupting a peaceful town in Saskatchewan by way of their sexual activities, turning the city into Sodom – a town in ancient Palestine that was destroyed by fire from heaven along with the female sinner Gomorrah because of the sexual sins and immorality of its citizens.

Getting HIV through unprotected sex was also discussed. In the CFL's smallest city, a place that's been portrayed this week as a sort of Sodom and Gomorrah of shared sexual partners and wide-eyed groupie devotion, it appears to be a significant concern among many players (Cole, 2005b, p. 11).

In the English language, the word *sodomy* is derived from the story of Sodom and is used to describe sexual acts that are deemed to be unnatural, non-conforming and disgusting. Hence, sodomy laws or crimes against nature were created to specifically criminalize sexual acts such as bestiality and anal and oral sex, although it is most often associated with homosexuality (Conrad & Schneider, 1992). Therefore, to suggest that football players who are predominantly Black<sup>20</sup> brought about these acts (as if they did not exist already), discursively constructs Black male sexuality as unnatural, uncontrollable,

<sup>19</sup> Walton D and Maki A (2007, February 26). Trevis Smith: anatomy of sexual assault. *The Globe and Mail*, p. S1.

<sup>20</sup> According to a race and gender report card prepared by the Institute for Diversity and Ethics in Sport, 69.7% of National Football League players are African American while 27.4% are white, 0.80% Latino, 1.9% Asian and 0.2% other (Lapchick, Malveaux, Davison, & Grant, 2016). No such report to my knowledge exists in Canada.

depraved, immoral, sinful, and wicked (T. O. Patton & Snyder-Yuly, 2007) and thus preserves and reinforces white dominant hegemonic masculinity (Christensen, Gill, & Pérez, 2016).

Some of these religious discourses frame athletes as deserving forgiveness for their sins because of their class status. However, when athletes are living with HIV, old discourses that describe the virus as god's punishment to homosexuals and 'the gay plague' (Conrad & Schneider, 1992) creep up again. For example, one article suggests that "like musicians, actors and even some politicians, athletes can still be revered despite their brazen sins" (Walton, 2007, p. 1) while another questioned whether HIV is "God's punishment [...], for adulterers and people too stupid to know better than to have unprotected sex with a stranger? (Cole, 2005a, p. A1). It is clear that while the 'God's punishment' discourse was used against gay men at the onset of HIV, modern iterations of this discourse remain and continue to draw a line between immoral and moral sexual practices and the people that engage in them.

Athletes in particular are discursively constructed as sinful and dirty because they engage in sex with multiple women and share sexual partners. Mediated and juridical accounts that paint athletes as promiscuous creates an image of mass orgies amongst football players. For example, Smith's trial judge justifies the complainant's suspiciousness of Smith and reinforces the belief that athletes are naturally promiscuous:

**THE COURT:** So she tells him just to sort of ease her mind that, look, I went and got tested for AIDS or STDs because I'm concerned if you're sleeping around with somebody and I mean he's an athlete, that's in her

mind, and not unnatural for her to be suspicious (*R. v. Smith*, decision, p. 27).

Mediated discourses similarly described athletes as inherently promiscuous despite the risk of getting sexually transmitted infections:

And this is not only the case for athletes, who by their nature are prone to taking risks, and who often have access to many willing partners (*Star Phoenix Saskatoon*, 2005, p. A10).

But that was two years ago. These days, the prevailing mentality among some players is that the Smith case was an extreme example and athletes will continue to indulge in women who want to have sex with them simply because they can (Walton, 2007, p. S1).

In keeping with this discourse, Beamish (2005) writes that having multiple partners is a “lifestyle that some players might want to reconsider” and that athletes should “re-evaluate the risk-versus-reward ratio” because “sleeping around indiscriminately shouldn’t be part of the job description” (p. E2). In a way, Beamish (2005) infantilizes athletes by writing that they do not consider the risks involved in having multiple sexual partners while also casting them as irresponsible because sleeping with multiple women is not part of the job. Using the same infantilizing discourse, journalists Dawn Walton and Allan Maki (2007) quote a sports psychologist who outright calls football players children and suggests that there are some players who cannot control their sexuality and thus have to learn to be more accountable:

‘If we ever learned anything it would have been after [basketball star] Magic Johnson announced he had HIV [in 1991]. He was at the top of his game and yet how did he get infected?’ Paskevich said. “Athletes are like kids walking into a candy store and there are women who are attracted to that kind of power, prestige, money.... At the end of the day, it comes down to personal accountability’ (p. S1).

These discourses challenge western cultural iterations of dominant masculinity in which men who express sexual prowess through promiscuity and womanizing are celebrated, therefore suggesting that these characteristics when expressed by some men, such as Black men, are problematic and devious (Consalvo, 2003).

The ‘common sexual partners discourse’ was used to describe the many ways in which Smith could have spread HIV to the wider predominantly white Canadian body politic, thus bringing back Jim Crow era notions about the Black male brute terrorizing white women (Ferber, 2007; Leonard, 2004; T. O. Patton & Snyder-Yuly, 2007) and creating a sense of fear of Black male sexuality and in particular the number of women Smith could have potentially infected (Kilty & Bogosavljevic, 2018). Reporters questioned “how many CFL players are thinking about their sexual partners and their partners’ partners and their partners’ partners’ partners. You wonder if they’re trying to imagine the size of that group” (Willes, 2005, p. A46) given that “over the years, there have been stories of players taking girls on the road with them and sharing them with teammates” (Petrie, 2005, p. C7). Journalists inflated the number of women and other football players that Smith could have infected by stating that “the circle widens” (Barnes, 2005, C1) since “the bigger issue relates to the women in each city who date football players around the league. If Smith had sexual contact with any of these women, that could put a number of players at risk” (Hall, 2005a, C1). In particular, reporters quoted other football players who stated that they were “worried about sexually transmitted diseases being transferred among athletes who have common partners in Regina and in other CFL cities” and that there was probably a “flurry of women [getting]

tested for HIV” (Davis, 2005b, B6). The next theme discusses the discourses which made Smith stand out from the rest of the promiscuous football players and that painted him as a savage playboy whose sexuality was exceptionally deviant because of his seropositivity.

### **5.2.2. “Playboy ways”<sup>21</sup>**

Smith was portrayed as embodying idealized notions of masculinity, notably womanizing and promiscuity, but was not regarded as expressing a dominant masculinity because of his seropositivity, which rendered him weak – a theme that is common across other studies exploring the mediated portrayals of Black men criminalized for HIV nondisclosure (Kilty & Bogosavljevic, 2018; McKay et al., 2011; Miller, 2005; Mykhalovskiy et al., 2016; C. Patton, 2005; Persson & Newman, 2008; Shevory, 2004). Specifically, moral and religious discourses were utilized to construct Smith as a man who has a “moral duty to society and the pandering public who foots [his] paycheques” (Thompson, 2005, A6) and a man who the judge believed to be “deceitful and dishonest” because he did not believe “Smith’s contention that he never had carnal relations with one of the women and had disclosed his HIV-positive status to the other” (DiManno, 2009, p. A2; *R. v. Smith*, decision, p. 55). This discursive portrayal of Smith’s sexuality as “carnal” tells the reader that Smith is actively going against Christian teachings that deem sex for pleasure as immoral and thus Smith’s sexuality as depraved and wicked. McKay et al. (2011) found similar religious metaphors in their

<sup>21</sup> Walton D and Maki A (2007, February 26). Trevis Smith: anatomy of sexual assault. *The Globe and Mail*, p. S1.

analysis of the representation of refugees living with HIV who have been criminalized for deliberately infecting their sexual partners. Specifically, they contend that HIV was “used as a metaphor for a ‘sinful’ or evil act, and as a punishment for a perceived moral transgression” (p. 27).

This was particularly true in court where the crown purposefully questioned witnesses in a way that painted Smith as an adulterous womanizer to try to discredit him. For example, in this passage the Crown questions Asante about her knowledge of Smith’s marriage and whether or not she had talked to Smith about Mika, Smith’s wife. Asante testified that she approached Smith about this and he lied in order to save his relationship with her, which was already on the rocks at this point because she had found out about his HIV-positive status.

**MR. BURGE:** Did you ever learn that Trevis Smith was married?

**OLIVIA ASANTE:** She said they were and then the last time I spoke to her she said that if I wanted she would fax over, then I believed her at that point.

**MR. BURGE:** This was to Mika?

**OLIVIA ASANTE:** Yes, I believed her because –

**MR. BURGE:** Did you ever –

**OLIVIA ASANTE:** - I don’t think someone would lie about something like that.

**MR. BURGE:** Did you ever discuss this with Trevis Smith?

**OLIVIA ASANTE:** I asked him because I guess she’d called me one time and was like, I need to talk to you.

**MR. BURGE:** Who had called you?

**OLIVIA ASANTE:** She had called me one time, I think this is just in 2005 it was, and she’d spoke to me. She was like, um, like what are you doing sleeping with my husband? I’m like your husband? He says he’s not married.

**MR. BURGE:** Did you talk to Mr. Smith about this conversation?

**OLIVIA ASANTE:** I had spoke to him I think right after I hung up with her, I called him and he didn’t pick up his phone but he called me back



and he said that that's not true, I'm not married to her and he said I guess she had spoken to Tammy [another girlfriend], I don't know, and I'm like, you know what? I don't really care. At this point, I'd already spoken to Tammy and I was more focussed on myself and my health. Whatever he had to say didn't really matter anymore (*R. v. Smith*, volume II, pp. 263-264).

At the end of the trial and before sentencing, Smith apologized to the women he had relationships with and to his wife for “committing adultery” (*R. v. Smith*, decision, p. 50) – not a criminal offence in Canadian law, but an act that is largely considered immoral in most religious discourses and is symbolically criminalized through HIV nondisclosure laws. As such, Smith was constructed as an immoral man with an uncontrollable sexual appetite who seduced and endangered women by having unprotected sex with them and lying about both his marital and HIV statuses. This construction is common among Black male athletes who are accused of sex crimes, including Kobe Bryant (Leonard, 2004) and O.J. Simpson (Crenshaw, 1997), but also Black men criminalized for HIV nondisclosure (Miller, 2005; Persson & Newman, 2008; Shevory, 2004). This discursive strategy is used to foster anger towards and fear of uncontrollable Black male sexuality and to justify the increased surveillance of Black bodies, which is problematic given that Black men are already surveilled to such extreme proportions that they are “*made* into criminals by the very policing strategies that target them” (Maynard, 2017, p. 87).

Even Smith's lawyer described him as a “frivolous man” which she argued does not mean that he is untrustworthy when it comes to his testimony in court. Specifically, she argues that society might not agree with how Smith handled his sex life but that the court needs to be more rational in determining his credibility.

**MME. GIROUX:** Mr. Smith is a frivolous man. He had a lot of women in his life. We heard that. We saw that. He had many casual sex relationships. He was unfaithful to his wife. He was unfaithful to Tammy [a girlfriend] and to others. That's fine, but this is no reason to disbelieve him. Maybe we don't agree with his sex life. Maybe we don't agree with his lack of commitment to women but this is no reason to put aside his testimony (*R. v. Smith*, volume III, p. 576).

The media sensationalized the construction of Smith as a frivolous man through a number of exaggerated and dramatized words and phrases. van Dijk (2009) writes that for “dramatic effect [...] scholarly discourse tends to hedge, [while] media discourse tends to be much more categorical and exaggerated” (p. 195). He suggests that reporters use exaggeration because readers will be more likely to remember when stories are dramatized rather than the mundane (van Dijk, 2009) which is often what happens in a trial. For example, reporters emphasized that Smith was an “HIV-positive football star said to have cheated on wife with two lovers” (Warick, 2005d, p. A3). Almost all of the news stories referenced Smith as “a married father of two” (Pruden, 2006a, p. A1; *Toronto Star*, 2005b, p. E02; Warick, 2005a, p. A12) or a “married father of two young daughters” (Pruden, 2006b, p. A1). One article went so far as to call Smith a “serial, HIV-infected adulterer” who engaged in “reckless behaviour, [and] duplicitous actions” (Walton & Maki, 2007, p. S1). Others reported that the “court heard numerous tales of infidelity on the part of Smith” (Vanstone, 2007, p. C1) and that “Judge Bellerose seemed at times to be sorting through layers of girlfriends, trying to establish who was No.1 at any given moment” (Frieson, 2007, p. A7). Suggesting that Smith had relationships with many women implies that he could have potentially infected numerous women. Media reporting in cases of HIV nondisclosure often exaggerate the number of women Black defendants could have infected (Miller, 2005; Mykhalovskiy et al., 2016;

Shevory, 2004) and this discursive construction is no different in Smith's case. As per van Dijk's (2009) assertion that exaggerated news stories are more likely to be remembered, constructing Smith as an "HIV-infected adulterer" became the main part of the story and key way to identify Smith, which decontextualizes the circumstances surrounding his experiences and enables the public to perceive him as someone who does not deserve our sympathy. Dehumanizing a defendant also allows for harsher punishment, in this case helping to ensure that conviction rates in HIV nondisclosure cases remain at or rise above the current 70% (Hastings et al., 2017 ).

In one particularly problematic news story, Hughes (2005b) uses the turn of phrase "it is black and it is big" to imply that Smith is Black and big and even that Smith's penis is big and black (p. A2). Being able to attach different meanings to this phrase evidences how talk and text are manipulated to (re)produce certain ideological meanings (Fairclough, 1995a; van Dijk, 1993). By using loaded words with multiple interpretations, Hughes (2005b) reinforces stereotypes of Black men as exceptionally "well hung" with remarkable sexual stamina, a common discourse in media reporting on cases of HIV nondisclosure (Miller, 2005). Moreover, Hughes' (2005b) suggestion that Smith was big and Black, could imply that he was expressing a western cultural iteration of dominant masculinity characterized by aesthetic attractiveness, physical strength and size (Kilty & Bogosavljevic, 2018). However, while these characteristics are celebrated when exhibited by powerful white men and action movie superheroes like *Captain America* and *Batman* (Demetriou, 2001), Smith is regarded as using his size and aesthetic attractiveness to seduce multiple women and as having a devious and immoral

sexuality because he was a well-hung adulterer who could not “zip it for six months of the season and continue his career in silence” (Griffin, 2005, p. B05).

Given that gender is relational (Connell, 2005; Messerschmidt, 2012b, 2016; Schippers, 2007) I also want to address how the complainants were discursively positioned in relation to Smith, namely as willing to engage in risky sex. For example, defence counsel tried to challenge the construction of Smith as promiscuous by arguing that complainant Bethany Gray was equally ‘loose’ and had engaged in unprotected sex with Sheldon Thompson (her boyfriend prior to Smith) and as using injection drugs, which has a higher risk of HIV transmission than does unprotected sex (Elliott, 2002). Furthermore, defence claimed that she underwent testing for HIV as a result of her relationship with Thompson, not Smith, thus making her a less credible witness.

**MME GIROUX:** You testified to a discussion that you had with Mr. Smith with regard to his - the rumours concerning him with the fact that he was HIV positive. Did you mention to Mr. Smith the investigation that you were undergoing yourself?

**BETHANY GRAY:** I wasn’t under investigation for anything. Are you talking about this assault charge?

**MME GIROUX:** No, no, no, I’m talking about HIV. You were undergoing testing at the time. Did you mention that to Mr. Smith, the discussion that you had had –

**BETHANY GRAY:** My testing was completed. I often would do random testing, not because I was required to at any given time over 10 - 15 years. There was no - if you’re making a reference to the issue with Sheldon Thompson there was no proof that he had it. There was an accusation that there was no charge against.

**MME GIROUX:** Is Sheldon Thompson a user of drugs?

**BETHANY GRAY:** He is (*R. v. Smith*, volume I, pp. 64).

The crown on the other hand was quick to counter this line of questioning, arguing that promiscuity is not what is at issue in this case, but rather that Smith’s relationship with

the complainant and whether or not he disclosed and used condoms are at issue. This is in stark contrast to the crown's argument above, which constructs Smith as untrustworthy because he is an adulterer, womanizer and promiscuous playboy.

**THE COURT:** HIV can also be by needles.

**MR. BURGE:** But that isn't an issue in this case, Your Honour.

**THE COURT:** No. It's – it's not relevant and whatever she believes may not be correct but she knows him.

**MR. BURGE:** Sure, but she - the question was, is he a user of drugs. Is Sheldon Thompson a user of drugs and my submission is maybe he is, maybe he isn't. What does it matter to this proceeding? That's my – that's my submission, Your Honour.

**THE COURT:** Your comment on that?

**MME. GIROUX:** Well, she knows him, as you say, and if he's a user of drugs or needles it's the risk of transmission of HIV is also very high, therefore, she's only mentioning about the charge but she also mentioned during her - today - the police when she gave her statement that he was a junkie and so I want to have some precision on that because promiscuity is one thing and the use of drugs is another thing in HIV transmission and she - and she mentioned it as being concerns to her during the police - in the police statement.

**THE COURT:** Okay. In terms of herself obviously she is concerned with respect to HIV, I mean that is clear, okay? In terms of where HIV comes from, obviously it can - sexual intercourse, needles, this sort of thing, there's various sources of HIV, okay, so as far as I'm concerned if she has personal knowledge that her boyfriend does do needles that is relevant as far as I'm concerned in terms of her personal knowledge, okay? Again, I don't know what the evidence is that's going to come out but I don't see any harm in her asking that question.

**MR. BURGE:** The questions about Sheldon Thompson's drug use? My friend's - my friend made comments about promiscuity and - and drug use and it's my submission, Your Honour, this case has nothing to do with promiscuity or drug use. This is confined to what she has described between her relationship with Mr. Smith, whether that happened or not, and that's the Court's role here (*R. v. Smith*, volume I, pp. 65-66).

Smith's class status as a football player allowed for a "woman at every port" discourse that suggested he had multiple sexual partners in different cities. For example, Thompson (2005) wrote that he is among the players who "regularly bask[s] in the fame,

fortune and adoration of fawning fans” (p. A6) and Walton and Maki (2007) wrote that Smith had “at least seven women in three provinces who believed Smith was everything he said he was” (p. S1). However, according to the trial transcripts Smith did not actually earn as much money as Thompson (2005) intimated. Smith’s lawyer states that “he used to be a football player playing with the Roughriders – the Saskatchewan Roughriders, [and had] a salary of \$85,000 – \$90,000 a year” (*R. v. Smith*, decision, p. 48). Indeed, as exemplified by the passage below, Smith’s job with the Roughriders allowed him to buy plane tickets for friends and family at a low cost which was used by the judge as evidence that he did in fact travel to see the complainants:

**THE COURT:** First of all, he attempts to minimize the sexual encounters by denial of being there. He clearly had an opportunity to go out there. He’s got a fairly - a \$20 plane ticket from Regina to Vancouver so opportunity is clearly there. It’s not a great expense to him but that doesn’t – that’s neither here nor there with respect to whether he did or did not have protected sex (*R. v. Smith*, decision, p. 46).

Exaggerations of Smith’s wealth and the judge’s assertion that Smith had access to 20-dollar plane tickets because he played with the Roughriders, enables readers and people present in the courtroom during the trial to treat Smith as having the wealth and privilege to meet and infect women across Canada. In other words, white men’s wealth is commonly celebrated as evidence of success (e.g., Donald Trump) while Smith’s fiscal privilege is used to discursively facilitate his construction as hypersexual.

Contrary to Thompson’s (2005) assertion that athletes like Smith are wealthy, other reporters mentioned that Smith “was having financial problems because he wasn’t able to look for work until [judge] Bellerose relaxed his bail conditions earlier this

month, and Smith may need legal aid” (Pruden, 2006a, p. A1) and some even directly quoted Smith who said ““You can’t make a living for yourself,’[...] ‘I can’t even support my kids by being under these (bail) conditions and now I have to wait three more months. It’s unrealistic’” (Calgary Herald, 2006, p. A2). While Thompson (2005) inaccurately regarded Smith as having a fortune, other reporters recognized the toll that the trial was taking on Smith and his family. However, this discourse also then frames Smith as a man who is not able to take care of his family – a framing that runs counter to dominant masculinity (Collins, 2004). By discursively constructing Smith as unable to be the primary earner in his family, reporters emphasize that he is a failed man whose adulterous womanizing and inability to control his sexual desires caused his family to suffer. This discourse is part of a broader narrative that constitutes Black men’s sexuality as uncontrollable and thus sustains the hegemony of white dominant masculinity (Ferber, 2007; Leonard, 2004; T. O. Patton & Snyder-Yuly, 2007).

While Smith was discursively constructed as hypersexual, well-hung, and sexually deviant, he was also constituted as dangerous and lethal because of his seropositivity. The next theme describes the ways in which Smith’s sexuality was often referred to and portrayed as deadly.

### **5.3. Playing a dangerous game**

The first section of this theme addresses the ways in which Smith’s evil other side (Mr. Hyde) combined with his portrayal as hypersexual to craft a discourse that constitutes Smith’s sexuality as dangerous and deadly. This construction of Black men situates them in opposition to white men expressing dominant masculinity who are given

permission to perform both physical and symbolic violence through socially sanctioned means; rather, in order “to appeal to hegemonic gender norms, Black men have expressed this violence through embodied and physical means” (Christensen et al., 2016). Importantly, Black athletes act as a “symbol of a color-blind ideal” because they are able to transcend race; however, when they transgress dominant white masculine ideals they are quickly “spat [...] out as the embodiment of [B]lack criminality and irresponsibility” (Crenshaw, 1997, p. 1998) and lethal sexuality should they be HIV-positive. Moreover, and as the second sub-theme discusses, Smith was often referred to as a foreigner which constituted him as a public health hazard to the larger HIV-negative Canadian social body.

### **5.3.1. Deadly sexual desire**

Smith was portrayed in both media and juridical content as malicious and as not needing to use force in order to seduce women into having a relationship. In a similar case, Shevory (2004) contends that “Nushawn did something that all monsters do. He crossed boundaries. He transgressed limits. He wandered. He didn’t stay put. He wound up in a place where he “didn’t belong.” The very fact that he did *not* use force made him dangerous” (p.77). In the passage below, defence counsel attempts to blame the complainant by questioning her decision to sleep with Smith given that she suspected he had HIV after finding a pamphlet titled *Living with HIV* in his bag and hearing rumours of his HIV-positive serostatus.

**MME. GIROUX:** Why would you go on after August of 2004 and have non-protected sex with Mr. Smith? Didn’t you have enough information ringing a bell that it could be sexually dangerous to sleep with him?



**OLIVIA ASANTE:** I didn't think someone could be so malicious actually to do such a thing to somebody they claimed to care about and love (*R. v. Smith*, volume II, p. 309).

By claiming that Smith is sexually dangerous the defence discursively constructs him as not just lethal in the sense that he could potentially transmit HIV, but also as devoid of emotions by way of his indifference to the health of his sexual partners. While white men are able to conceal their emotions and still be seen as adhering to hegemonic notions of masculinity, the same is not the case for Black men accused in HIV nondisclosure cases (Collins, 2004). When Black men living with HIV do not express their emotions, media and juridical content exaggerate and play on this trait to discursively construct them as malicious, refusing to take responsibility for their actions and threatening to innocent and unsuspecting women. Indeed, the crown in the Smith case argued that "there is, I suggest, absolutely no remorse on the part of Mr. Smith. There's no acceptance of responsibility, in fact it would have to be characterized as a denial of responsibility that continues to this day" (*R. v. Smith*, decision, p. 23).

These types of discourses were also present in the media, albeit dramatized. For example, Smith was constructed as brainwashing women into sexual relationships to the point where they began to believe that they could not live without him. Not only is this a problematic construction, but it also reinforces popular discourses in HIV nondisclosure cases that constitute female victims as innocent and lacking agency (Mykhalovskiy et al., 2016; Persson & Newman, 2008).

"They've been brainwashed," Schwartz says, speculating that among other things, Smith has convinced these women he's their life; these women have "eroded" self-esteem; and they've convinced themselves,

with his help, that they're nothing without him (Summerfield, 2007, p. C13).

The brainwashing discourse also characterizes Smith, like the Ssenyonga case before him, as a “charismatic political animal with a will to dominate the weaker sex—a mini tyrant whose reign of terror was just about to begin at a viral level” (Miller, 2005, p. 39). Other stories would discuss “the dangers of a promiscuous lifestyle that can kill” (Cole, 2005b, p. I1); “the reality of sexually transmitted diseases means that such dalliances can in fact be deadly” (Lovric, 2005, p. A12); that “off the field, there was nothing heroic about [Smith’s] criminal sexual behaviour” (*Leader Post Regina*, 2007, p. B7); ““regardless, if he used protection or not, it was still a huge risk,’ said Fitzgerald [a recent resident of Regina]. ‘It could have been a death sentence’” (Benjoe, 2007, p. C8). These types of sensationalized quotes intimate the lethality and criminality of Smith’s uncontrollable sexual desire and thus situate Smith as expressing a marginalized Othered masculinity.

Christensen and Jensen (2014) contend that ethnic minority men are often relegated to the status of a marginalized masculinity because “they are (imagined to be) too masculine or (imagined to) have excess masculinity, that is, they are (seen as) carriers of atavistic, patriarchal, non-equality oriented forms of masculinity” (p. 70). Smith, while embodying notions of a dominant hegemonic masculinity such as sexual prowess, was discursively constructed as hypersexual and thus was shifted into the realm of the deadly, marginalized masculinity. Moreover, his dangerous promiscuity and exotic excess made him a mesmerizing and attractive figure for media as “an industry which is intrinsically involved with *excess*, with a voracious appetite and capacity for

substitutions, displacements, repetitions and signifying absences” (Miller, 2005; Shevory, 2004; Watney, 1996, p. 41).

Given that Smith was constructed as seducing women, both media and trial content advocated and called for his incapacitation as a way to not only protect the HIV-negative social body but also to punish his excess masculinity. However, sending people who are living with HIV to prison neglects consideration of the fact that carceral spaces are “elevated HIV risk environments that can facilitate rather than prevent HIV and other infections” (Kilty, 2018, p. 79). Regardless of this knowledge, the crown argued that because Smith actively chose to put not only women at risk but all people because of his “deadly sexual desire” (Lovric, 2005, p. A12) he needed to be cordoned off from the rest of the Canadian citizenry:

**MR. BURGE:** Mr. Smith has chosen to put people at risk. He has - as we know, there are other sexual partners that he has admitted that he doesn't tell his sexual partners of his status and it's my submission that Mr. Smith will continue to put females at risk as long as he has the opportunity and I would ask the Court to consider separating him from society for a substantial period of time to prevent that opportunity from occurring (*R. v. Smith*, decision, p. 28).

Media reports similarly suggested that “Smith knowingly risked the health, and possibly lives, of the two women with whom he had unprotected sexual relations” while also “show[ing] no remorse for his actions. (*The Gazette*, 2007, p. A22). Even more problematic, Cole (2005a) questions the danger Smith posed “to young girls who hang around CFL football's version of the stage door – yes, fans of the team, albeit misguided ones – hoping to be taken home by a player?” (p. A1). He even compared Smith to a

child molester and proposed that society needs to be warned of who is HIV positive in the community so as to manage the risk he posed to the HIV-negative social body:

All right, there are circumstances. Legally, outing an HIV- positive individual is potentially actionable. It's not against the law to have HIV -- as long as you don't knowingly spread it. But it's like having a convicted child molester move into your neighbourhood. Would you rather know he's around, even if he's paid his debt to society, even at the risk of his rights? (Cole, 2005a, p. A1).

In a letter to the editor, Ryan Rados went so far as to suggest that “If I had my way, there would be an international database available online containing the names of everyone infected with HIV (*Leader Post Regina*, 2005, p. C4). In these ways and by quoting Smith's former girlfriend who claimed that she contracted HIV from Smith and “fear[s] for the other women he's going to meet” (Warick, 2009c, p. A1), journalists actively supported calls for the control of people living with HIV via more punitive risk management tactics such as the HIV registry proposed by Rados.

Victims are often given space in the media to discuss their emotions and feelings, which can solidify a particular discursive construction of the defendant and act as a powerful mechanism for subjugating and oppressing Black men living with HIV/AIDS (Mykhalovskiy et al., 2016). The complainants in the Smith case were regularly quoted in the articles as saying ““He could have killed me”” [Olivia Asante] said (Walton & Maki, 2007, p. S1) and ““Even though my test came back negative I was still depressed because I had been violated in the worst way,’ [Olivia Asante] wrote” (Pruden, 2007f, p. A5). Particularly problematic is the line drawn between victim and offender – a line that is less clear when it comes to HIV because most people living with HIV are a ‘victim’ of

someone else's nondisclosure. As such, discourses that solely frame the defendant living with HIV/AIDS as sexually dangerous shift the public health message of shared responsibility to neoliberal notions of individual responsibility for safe sex thereby placing the onus on the HIV-positive person to protect not only himself but his partners (Adam et al., 2008; Elliott, 2002; Galletly & Pinkerton, 2006; Kilty & Orsini, 2017; Weait, 2001, 2007).

The trial and media content (although more so the media) intimated that Smith was sexually dangerous by referring to HIV as a fatal disease. For example, the judge noted that "[Smith] testified as to his knowledge of the deadly nature of this – of this affliction, how it's transmitted and that there's no known cure" (*R. v. Smith*, decision, p. 23). This quote suggests that Smith knew the seriousness of HIV yet continued to put his sexual partners at risk. In particular, Smith was constructed as sexually dangerous because he was a "217-pound master of muscle [who] chose not to let on that his bodily fluids were potentially deadly to others" (Thompson, 2005, p. A6). This reference to Smith's deadly bodily fluids was also present in the trial when the crown questioned Gray about a red spot she found on a towel after Smith had ejaculated:

**MR. BURGE:** Now, Ms. Gray, can you describe to the Court how you say you know there was no form of protection used?

**BETHANY GRAY:** Well, he didn't put any on when we started to have intercourse and when it came time for him to ejaculate he would pull out.

**MR. BURGE:** Okay, and would he ejaculate?

**BETHANY GRAY:** Yes.

**MR. BURGE:** Would there be evidence of that?

**BETHANY GRAY:** Yes.

**MR. BURGE:** What did you see?

**BETHANY GRAY:** I would have to clean myself. One particular time he asked for a towel and it's a light-coloured towel and he wanted to

clean himself off and when I went to pick up the towel it was on there or if I wiped myself with a cloth it was on there. There was one particular time that he used the lighter towel and I couldn't help but notice when I picked it up that obviously he had used it to clean himself off. There was - it was almost like a blood spot or something on it, but I didn't think too much of it because he - that night that he was over he had a cold or something so he was coughing quite a bit so it could have been bloody phlegm or whatever. I really didn't pay much mind to it (*R. v. Smith*, volume I, pp. 47-48).

This questioning leaves doubt as to whether or not this red spot was there before Smith used it to wipe himself off or if it was not Smith's blood at all but rather Gray's.

Confusion was a discursive strategy the crown used to reinforce the notion that Smith's blood was lethal. There was no discussion in the trial about whether or not Smith was taking medication and had a suppressed viral load, which would make it impossible for him to transmit the virus. Indeed, all of the complainants in the case tested HIV-negative.

As such, the court in the Smith case created an illusion of harm given that there was no actual physical injury to the complainants by way of HIV transmission. Weait (2007) explains that the consideration of HIV transmission or the possibility of transmission as a serious offence by the criminal law is understandable given that "physical integrity and/or immunity are so profoundly bound up with our understanding of selfhood, of what makes me 'me', and you 'you'; because these establish the distinction between us, and our respective distinctiveness" (p. 108). Therefore, the risk and hazard that Smith posed is not just based on life and death as stated in the mediated reports, it is also tied to identity – where our understandings of self and the physical integrity of our bodies are deeply gendered and raced. For example, being and acting strong is a culturally delineated characteristic of masculinity that Black men enact in

order to be accepted within white male hegemony (Collins, 2004; Ferber, 2007); health is an integral part of being able to express strength and masculinity in general. That Smith is seropositive thus represents the weakness and riskiness of his masculinity. In other words, “bodies are central to achieving recognition as appropriately gendered bodies. Bodies operate socially as canvases on which gender is displayed and kinesthetically as the mechanism by which it is physically enacted” (Gerschick, 2000, p. 1264). If HIV is conceptualized as a foreign substance penetrating the bodies of healthy men, it therefore changes what it means to *be* a man and Smith is the representation of what that can look like in real life.

### **5.3.2. American Import is a Public Health Hazard**

Reports of Smith as sexually dangerous were intimately tied to his identity as an American citizen. Media reports of Smith repeatedly suggested that immigrants are a public health threat to unsuspecting Canadians. For example, reporters often called Smith the “longest serving import” (Austin, 2005, p. A3; Fong, 2005, p. A8; Maki, 2005a, p. S1) signifying that he imported HIV into the healthy Canadian body politic. These types of discourses are found in media reporting on HIV nondisclosure cases that specifically involve refugees who deliberately infect others in Australia (McKay et al., 2011), immigrant women in Canada (Kilty, 2014) and racialized individuals more generally (Mykhalovskiy et al., 2016; Worth et al., 2005). Smith was consistently referred to as an “Alabama Native” (DiManno, 2009, p. A2; Pruden, 2007h, p. A1; Vanstone, 2007b, p. C1; Zurkowsky, 2005, p. B5), a “U.S.-born athlete” (Freeze, 2005, p. S1; Hansen, 2005, p. B7) and an “American citizen” (Baron, 2005, p. B10) that

discursively positioned him as an outsider and “Other”, thus connecting criminality to his foreignness. One reporter sent a specific message to athletes who are “imported” from other countries to play in Canada that “a lot of the import players don’t understand that [they’re] a guest in the country” (Cole, 2005c, p. D4). As such, Smith, like other men and women criminalized for HIV nondisclosure, was constructed as an always-already threat to the Canadian body politic (Kilty, 2014; McKay et al., 2011) that can be expelled from the country because he failed to abide by Canadian sexual norms.

Indeed, once Smith was released on parole in 2009, he was very quickly deported back to Alabama where he was “no longer [Canada’s] responsibility” (Pruden, 2009, p. A1). One reporter was happy to see Smith leave the country and even questioned whether he should have received a tougher sentence:

“Good riddance” is our first thought. Our second is this: in getting what seems a relatively short sentence in the first place, and then being paroled, did the former footballer “beat the system”? Was his sentence disproportionately light for what he inflicted on his victims? They will forever be worrying whether they, too, will develop HIV. And, as they told Smith’s parole hearing this week in Prince Albert, their ability to enter into future relationships has been shattered (*Leader Post Regina*, 2009, p. B8).

Deportation shows that the Canadian government problematically wanted to absolve themselves of this public health hazard. Moreover, emphasizing that Smith was deported showed that he was “a consummate sexual predator to be feared [and that] there is no coming back from this form of criminal stigma, that there is no paying your debt back to society regardless of whether or not viral transmission actually occurred.” (Kilty & Bogosavljevic, 2018, pp. 14-15). In addition, positioning the complainants as innocent



victims whose lives were destroyed by Smith – the sexually dangerous Black foreign HIV-positive Other – fails to capture his experience and ultimately serves to “consolidate [his] position as [a] guilty culprit” (Persson & Newman, 2008, p. 637).

Connecting the discursive construction of Smith as hypersexual and the many quotes that refer to Smith as a foreigner rendered him a public health hazard to not only the Canadian body politic but to the community owned Roughriders who are a “sentimental part of Saskatchewan’s identity” (Mykhalovskiy et al., 2016, p. 47). By questioning “How many victims might there be? Can anyone guess? This is a monstrous, unprecedented public-health issue – not just a football matter” (Vanstone, 2005c, p. C1) and stating that “this is a potential health crisis in Regina and around the Canadian Football League” (Hall, 2005b, p. D2), journalists suggest that Smith invaded and infected women and men in this small community with HIV. In other words, he tore the identity of a quiet little town apart with his dangerous and ruthless pursuit of sexual partners. Inflating the number of women and men Smith could have infected intimates the lethality of Smith’s sexuality and reinforces stereotypical tropes of Black men as having an exceptional sexual stamina (Collins, 2004; Miller, 2005; Shevory, 2004). Smith’s portrayal as a dangerous immigrant Other who failed to disclose his serostatus to Canadian women problematically suggests that he made a conscious choice to transmit the virus even though the complainants tested negative for HIV (Kilty et al., 2017), thus making him out as a threat to the (inter)national body politic (Kilty, 2014; Kilty & Bogosavljevic, 2018) and to our understandings of masculinity.

## **Chapter 6.**

### **Conclusion**

Through a feminist critical discourse analysis of the mediated and juridical content of the Trevis Smith HIV nondisclosure case, I found three prominent discourses. First, Smith was portrayed as the ‘good’ Dr. Jekyll who was adored as a sports hero to many football fans in Saskatchewan and around Canada, and the ‘bad’ Mr. Hyde because he not only contracted HIV, but maliciously convinced women to have sexual relationships with him without disclosing his seropositivity. Second, I found that Smith’s promiscuity was somewhat forgiven because of his status as a football player, an identity that was characterized as naturally promiscuous. Nonetheless, enabled by his middle-class privilege, Smith was still constructed as a playboy who had many sexual partners across Canada. This construction was utilized in the third discourse which painted his promiscuity and thus sexuality as lethal to the healthy Canadian social body. This chapter reviews and situates these findings within the intersecting “sociocultural/political practices” (Fairclough, 1995, p. 62) of gender, class, and race relations as they are shaped by HIV/AIDS, criminality, and sexual politics. The second part of this chapter discusses future research ideas.

#### **6.1. Canadian Racism and HIV/AIDS Stigma**

Black men are disproportionately reported on in the media of HIV nondisclosure cases (62%) (Mykhalovskiy et al., 2016), evidencing how racialized, gendered and classed discourses come to permeate Canadian consciousness surrounding HIV and sexual responsibility. Specifically, the vilification of Black men criminalized for HIV

nondisclosure in media and juridical content is a discursive strategy that is part of a broader political and cultural tactic of subjugating Black bodies under the guise of “Black freedom and Black mobility” (Maynard, 2017). Smith’s disguise came from his initial construction as a sports hero, whose body was linked to racialized tropes of hypersexuality, aggressiveness, size, dangerousness, and criminality when he failed to disclose that he was HIV positive. This case shows that Black men, regardless of their celebrity status, are not immune to these constructions which are so entrenched in Canadian society they are often thought of as “benign” (Maynard, 2017, p.20).

In addition, Smith’s incarceration and deportation symbolizes the desire to segregate the Canadian HIV-negative social body from the Black HIV-positive brute. As such, these discourses create a falsified sense of risk; “the risk posed by PLWH is socially constructed (or symbolic) rather than the result of objective facts and scientific evidence” (Gagnon & Vézina, 2018, p. 65). Indeed, the year that Smith was arrested and tried (2005-2007) demonstrates how the courts and the police failed to consider the scientific evidence that proves that PLWHA who are on antiretroviral therapy pose little to no risk of transmitting the virus to others (Loufty et al., 2014). More importantly, the per-act probability of HIV transmission in vaginal-penile intercourse without a condom or antiretroviral therapy ranges between 4-8 instances of transmission per 10,000 acts and is thus considered low (Loufty et al., 2014); mainstream news media reporters and legal actors neglected to discuss that Smith was engaging in sex that posed a low risk, instead emphasizing the ways in which Smith tried to deceive women into having unprotected sex, subsequently implying that he intended to infect them.

In an ironic turn, the criminalization of HIV nondisclosure is often justified under the rhetoric of protecting the public and stopping the spread of HIV; yet, sending PLWHA to prison neglects the fact that “carceral spaces are elevated HIV risk environments” (Kilty, 2018, p. 90). As such, the discourses I uncovered in the trial transcripts and media content serve only to spread misinformation to the public about the risks of transmitting HIV and to induce fear of PLWHA and particularly Black men living with HIV. Moreover, these discourses shore up support for the incarceration of PLWHA as a way to prevent HIV from spreading to healthy Canadian citizens while disregarding the health of federally and provincially sentenced prisoners.

The discursive construction of Smith as promiscuous and deadly feeds into Canadian social anxieties and fears of Black men. These fears in turn support calls for harsher policing and punishment of Black men living with HIV/AIDS. Discursive connections between Blackness, immorality, deviant sexuality and criminality – which are also commonly found in mediated portrayals of Black men criminalized for HIV nondisclosure (Kilty & Bogosavljevic, 2018; McKay et al., 2011; Miller, 2005; Mykhalovskiy et al. 2016; Persson & Newman, 2008) – are stereotypes “used to justify the ongoing surveillance of Black communities and the restriction of Black movement” (Maynard, 2017, p. 41). Discourses that vilify Black men living with HIV induce fear of the hypermasculine Other by representing the permeability of their dangerous bodies, which is used to help justify controlling and policing specific Black lives. Importantly, Wait (2016) writes that “disease was something that undermined the unity and integrity of an individuated self, which in turn rendered the efficacy of the body’s immune

system, vital to combating allogenic threats, a matter of critical importance” (p. 24). By constructing Smith as a public health hazard and describing his sexuality as deadly, mediated and juridical discourses declare Smith to be toxic because of his masculinity (i.e. contaminating the white hegemonic notion of masculinity that he had the privilege of occupying) and seropositivity (i.e. through sharing sexual partners with other football players and to innocent unsuspecting women).

The findings of this thesis problematically reflect and reinforce binaries of healthy and unhealthy, dirty and clean, moral and immoral people/sex, and victim and vector. For example, heterosexual women, who represent the majority of complainants in cases of HIV nondisclosure (Hastings, 2017), are constructed as “‘innocents’ and ‘victims’ [who] are continuously threatened by moral reprobates and evil pleasure seekers” (Shevory, 2004, p. 11). In the Smith case, the complainants were predominantly constructed in these ways<sup>22</sup> by the mediated and juridical content without recognizing that they were agents choosing to have sex with all the risks that unprotected sex poses (Klein, 2009). These discursive constructions affect how we think about sex, pleasure and consent. Specifically, by constructing the defendant’s sexuality as lethal these discourses encourage repressing the sexual freedom of PLWHA, who are characterized as “always-already potential sexual predators” (Kilty & Bogosavljevic, 2018, p.16). In

<sup>22</sup> Although the race and class of the women is not explicitly stated in the media or trial transcripts, this finding is particularly interesting given that the women were rendered raceless while Smith’s race was so prominent throughout the mediated and juridical discourses. I hope to explore this finding in future research in comparison to the portrayal of victims in other HIV nondisclosure cases.

other words, the “good” HIV-positive person is one who abstains from sex and therefore “exchange[s] sexual integrity for social acceptance” (Mackinnon & Crompton, 2012, p. 429).

Lastly, these discourses add fuel to the stigma fire by associating PLWHA as dangerous, and morally and criminally culpable vectors of disease. As such, they help drive the HIV/AIDS epidemic by “punish[ing] HIV-positive persons for engaging in consensual sexual activities— [and] highlighting the distinction between persons with HIV and un-infected persons (whose consensual sexual activities are not subject to criminal scrutiny” (Galletly & Pinkerton, 2006, p. 457). Moreover, the use of criminal law and the mediated and juridical discourses that emerge from these cases runs contrary to public health messages of shared responsibility, instead constructing a neoliberal narrative that places the ultimate responsibility for sexual health on the HIV-positive partner while the HIV-negative partner is free of this burden (Galletly & Pinkerton, 2006; Weait, 2001). This narrative creates “[categories] of ‘other’ people who are the sole focus of criminal sanctions” (Elliott, 2002, p.25). Black men living with HIV are discursively constituted as predatory “AIDS fiend[s]” (Petty, 2005) who put innocent people at risk. Given that Black men are already disproportionately subject to the gaze of the criminal justice system (Maynard, 2017), the additional label of being HIV-positive marks them as doubly stigmatized.

While the literature on HIV nondisclosure predominantly identifies the law as a neoliberal strategy (Adam, 2005; Galletly & Pinkerton, 2006; Weait, 2001) there seems to be a tension between neoliberalism and neoconservatism in these cases. As a political

rationality, neoconservatism identifies the law as a moral compass (Brown, 2006). Indeed, the religious discourses I uncovered in the data are evidence of the ways in which the law on HIV nondisclosure is being used to punish those who go against religiously delineated morals such as monogamy and sex only for reproductive purposes. Thus, HIV nondisclosure law is also a neoconservative strategy used to construct moral subjects and regulate the “under-races and underclasses” (Brown, 2006, p. 700). More importantly, the blurring between “theological and political discourses, facilitates the reception of the de-democratizing forces of neoconservatism and neoliberalism” (Brown, 2016, pp. 705-706).

## **6.2. Future Research**

Future researchers may want to consider interviewing Trevis Smith in order to gain his personal insight into his case. While his perspective was represented in the trial transcripts through his testimony and somewhat by his attorneys, his narrative was constrained by the politics and theatrics of the courtroom and the law more generally. Gaining access to Smith may be difficult, however, because he is living in Alabama and might not want to re-live the trial. Future research should also explore the specific portrayal of the victims in the Smith case and perhaps comparatively to other cases of HIV nondisclosure. It would be interesting to examine the ways in which Smith’s victims, who were described as ‘groupies’, might or might not differ from how other victims were constructed in cases such as that of Johnson Aziga, who was the first person in Canada to be accused and convicted of first degree murder for HIV nondisclosure. Future researchers should also compare and contrast the mediated and

juridical discourses in the Smith case with those found in other cases, with particular theoretical attention paid to similarities and differences pertaining to race, class and gender.

Lastly, my Ph.D. research will build on the findings generated in this thesis and will fill a significant gap in the literature on HIV nondisclosure by exploring the emotional landscape of feeling or not feeling victimized after a sexual partner has not disclosed their seropositivity. As shown in this thesis, the line between victim and victimizer is often portrayed as ‘straight forward’ in mediated portrayals of people criminalized for HIV nondisclosure. My doctoral research aims to challenge the strict distinction between who considers and does not consider themselves to be a victim of sexual assault by way of HIV nondisclosure. To this end, I intend to fuse the critical victimology and the sociology of emotions literature to explore the ways in which this line is blurred. My Ph.D. research will contribute to our understandings of why people choose to report instances of HIV nondisclosure to police and how these decisions are structured not only by emotions, but also by differences across race, class, gender, age, and sexual orientation.



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