Lost in transmission : law's 'insubordinate openness" and the use of HIV-related criminal offences in the governance of HIV in New South Wales

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Lost in Transmission:

Law's 'Insubordinate Openness' and the use of HIV-Related Criminal Offences in the Governance of HIV in New South Wales.

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Recently, the HIV sector in New South Wales has developed a strong interest in HIV-related criminal offences which have been vigorously contested in policy and public health literature.

This research attempts to move beyond specific issues of public policy or doctrinal development and situates the imposition of HIV-related criminal offences as a part of a broader question of the nature of law itself, its place in contemporary approaches to regulation and understandings of power and importantly its relationship with other techniques of governance such as the disciplines of public health and health promotion in particular.

The central argument of this research is that law is mischaracterised in current debates about the governance of HIV. In characterising the nature of law 'itself' and the interplay between legal-juridical power on the one hand and bio- and disciplinary power on the other, an anaemic characterisation of the law has led to a kind of knee-jerk antinomianism which risks embedding or simply re-creating the problems which the entire law reform and public health project sets out to solve.

I undertake the review of HIV-related criminal law through the work of Foucault. I use Foucault in an exegetical mode rather than the more traditional methodological application of Foucault's various methods. By reading Foucault's substantive statements on law we see that rather than Foucault "refus[ing] to accord any major role to legal regulation in creating the distinctive features of modernity," a revised characterisation of the governance of HIV requires that we cease portraying HIV-related law and public health approaches as mutually exclusive. We must reorient our understanding towards one where law and public health are understood to exist in a relationship of mutual co-constitution through processes of strategic withdrawal and conflict. This position provides a new contribution to a literature which has generally underplayed the dynamic interrelation of HIV-related law and public health, which has tended to call for decriminalisation and other discrete modes of law reform, reflective of a view which sees law and its disciplinary 'other' as separately constituted domains and a law which prohibits rather than adapts to resistance and transgression.

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Required length of the LLM Thesis is 60,000 words including footnotes and any appendices.

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Contents

Abstract

This thesis examines one of the ways in which we engage with HIV in New South Wales (NSW): via HIV-related law and in particular HIV-related criminal offences. Specifically, this thesis takes as its central focus the ongoing contestation of these HIV-related criminal offences and looks to the interplay between law and public health disciplines through the perspectives adopted by the literature in relation to these criminal offences. It does so in order first to critique and then to build upon the accepted ways of understanding law and its relationship to the discipline of public health. This thesis considers: the governance of HIV; the calls for decriminalisation of offences concerning the intentional or reckless transmission of HIV; and, other modes of law reform in health and welfare policy which have emerged in the literature in recent years. It does so in the context of a questioning the nature of law itself, its place in contemporary approaches to regulation and understandings of power and importantly, its relationship with other techniques of rule.

The central argument of this thesis is that law is mischaracterised in current debates about the governance of HIV through literature produced both in Australian and elsewhere which criticises the continued role of criminal law in relation to instances of HIV-transmission. In characterising the nature of law 'itself' and the interplay between legal-juridical power on the one hand and bio- and disciplinary power on the other, this body of literature has adopted a characterisation of the law which positions law as mechanistic, negative, limited and determinate and wholly separate from other techniques of rule especially that of public health and its associated interventions. This anaemic characterisation of the law has led to a kind of knee-jerk antinomianism which risks embedding or simply re-creating the problems which the law reform agenda spurred on by the extant literature sets out to solve.

Instead, this thesis proposes a revised characterisation of law which says that law is both as the literature describes it but is also something ineluctably more: a law which is flexible, responsive and illimitable. This vision of law requires that we must reorient our understanding towards one where law and public health are understood to exist in a relationship of mutual co-constitution, one with the other, through processes of strategic withdrawal and conflict. This position provides a new contribution to a literature which has generally underplayed the dynamic interrelation of HIV-related law and public health and which has tended to call for decriminalisation and other discrete modes of law reform. These are reflective of a view which sees law and its disciplinary 'other' as separately constituted

domains. This more relational understanding of how we engage with HIV in NSW argued for here builds upon the work of writers who have noted the difficulty of law in maintaining its grasp on HIV as a subject of its jurisdiction and those who note the preference for public health approaches to HIV-transmission based on arguments of law's ineffectiveness. This seeming incompatibility between law, public health and HIV is not rendered negatively in this thesis, leading to the conclusion that law is somehow 'out of place' in its relation to HIV and should be expelled from the scene of its governance. Rather, the slippages, shifts and even law's seeming disunity with the work of public health activities are instead understood as descriptive of the very open, illimitable and dynamic nature of law itself and the operation of legal-juridical power. I assert that HIV-related law and public health are not separate but interrelated, constituted in a co-determined relationship which more properly describes the nature of the engagement between law and its disciplinary other.

The underlying framework for this approach to law and the principal theoretical position of this thesis is the work of Michel Foucault. Instead of following Foucault's advice and the path taken by many others of adopting his concepts, methods and frameworks as 'tools' to be applied, I instead draw upon Foucault's own substantive statements and positions on law to develop my critique of the characterisation of law in the current debate. I use Foucault in an exegetical mode rather than a application of his various methods. Using Foucault's own perspectives on law and subsequent debates in the post-Foucault literature to explain legal and public health approaches to HIV provides a nuanced characterisation of the law, public health and (crucially) their interaction.

This finding has ramifications for current debates and approaches to reform in this area. It is hoped that this critique of the understanding of the HIV-related criminal offences under which we labour might assist in some way to reduce the risk that proposed reforms might further embed or re-create the problems which such reform aims to solve by their ignorance of the interconnection between law and public health where law cannot be critiqued without consequence for public health, which has been conventionally regarded as being 'outside' law.

At night we consoled ourselves
by discussing the meaning of homesickness.
But there was no home to go to.
There was no getting around the ocean.
We had to go on finding out the story
by pushing into it –

The sea was no longer a metaphor.
The book was no longer a book.
That was the plot.
That was our marvellous punishment.

– From *Voyage,* Tony Hoagland[1]

[1] Tony Hoagland, *Unincorporated Persons in the Late Honda Dynasty: Poems* (Greywolf Press, 2010), 86.

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"The criminal law's response…has failed to acknowledge the fact that HIV and AIDS are, and should be understood as, public health issues first and foremost, rather than as problems necessarily capable of effective legal resolution through the criminal law."[2]

– Matthew Weait

"Criminal prosecutions undermine public health's HIV prevention and treatment response and, conversely, public health procedures undermine the appropriateness of a criminal law response except in very unusual circumstances".[3]

- Sally Cameron and John Rule

"Law eludes containment"[4]

– Ben Golder and Peter Fitzpatrick

[2] Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007), 3; ibid.

[3] Sally Cameron and John Rule, 'Outside the HIV strategy: challenges of 'locating' Australian prosecutions for HIV exposure and transmission.' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 18-30, 20.

[4] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 82.

1 Introduction

1.1 Introduction

Human Immunodeficiency Virus (HIV) and Acquired Immunodeficiency Syndrome (AIDS) emerged in the west at a time of great change. It was a time in which in which the fundamental approaches to, and understandings of, the world were being contested. It was a time after the libertarian movements of 1968 but also one before the techno-utopianism of the 1990s. It was an era marked by the emergence of particular economic understandings of the world and the concomitant political and policy outcomes of such a worldview, as exemplified by Reagan and Thatcher in the US and the UK, respectively. In Australia, the libertarian movement, such a part of the late 1960s elsewhere, was somewhat delayed. We had entered into a time characterised by a fundamental orientation towards the market. The beginnings of economic reform which had begun with the ascension of the Whitlam government and its almost immediate removal of import protections, had now gained pace under the Labor Governments of the 1980s and early 1990s. It was a time, of course, still beholden to the pressures and difficulties of a long-running Cold War and all that this entailed geo-politically, socially, economically and philosophically. HIV and AIDS emerged at this time as a kind of "memento mori"[5] in a world which was already engaged headfirst in what Tony Judt so wonderfully portrays as a new era of insecurity:

> For the foreseeable future we shall be as economically insecure as we are culturally uncertain. We are assuredly less confident of our collective purposes, our environmental well-being, or our personal safety than at any time since World War II. We have no idea what sort of world our children will inherit, but we can no longer delude ourselves into supposing that it must resemble our own in reassuring ways.[6]

[5] Jean Comaroff, 'Beyond Bare Life: AIDS, (Bio)Politics, and the Neoliberal Order' (2007) 19(1) *Public Culture* 197. 197.

[6] Tony Judt, 'What is Living and What is Dead in Social Democracy?', *The New York Review of Books* (New York), December 17, 2009 <http://www.nybooks.com/articles/archives/2009/dec/17/what-is-living-and-what-is-dead-in-social-democrac/?pagination=false>.

HIV and AIDS emerged in the early decades of this new age of insecurity; a disease so perfectly suited to its time that rendered human interactions and later the most private of sexual encounters a source of insecurity marked by risk and danger:

> As Sontag intuited, [the emergence of HIV] marked an epochal shift, not merely in the almost omnipotent status of medical knowledge and its sanitised language of suffering, nor even in the relationship with death, so long banished from the concerns of those preoccupied with life and their seemingly limitless capacity to control it. AIDS also casts a pre-modern pall over the emancipated pleasures, the amoral, free-wheeling desires that animated advanced consumer societies.[7]

What was presented in this new age of insecurity was the disintegration of our very bodily security; our very 'functioning' embodiment.[8] What was demanded was a response to this insecurity through programmes and technologies which would allow – in the particular ways which were possible in our political context – some form of control, some form of defence to be mounted to return us to security and control.[9] Population-based public health and health promotion activities, medico-legal surveillance, management and quarantine systems with their concomitant administrative powers[10] and finally criminal legal responses[11] were the programmes and technologies deployed to render aid to our failing sense of security and control.

These responses continue to this day to form the core of HIV and AIDS responses as they do too the core of this thesis. They are responses which have been constructed in subsequent literature into a binary of criminal legal responses and population-based public health responses[12] with the medico-legal surveillance, management and quarantine systems being

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[7] Jean Comaroff, 'Beyond Bare Life: AIDS, (Bio)Politics, and the Neoliberal Order' (2007) 19(1) *Public Culture* 197. 197.

[8] Annette Houlihan, *(Ill-legal) Lust is a Battlefield: HIV Risk, Socio-Sexuality and Criminality* Griffith University, 2007) <http://www4.gu.edu.au:8080/adt-root/public/adt-QGU20090908.155111/index.html>.

[9] Renata Salecl, *On anxiety* (Routledge, 1st ed, 2004).

[10] See Chapter Two below for an overview of these administrative powers.

[11] See Chapter Two below for an overview and discussion of these criminal legal responses.

[12] See Chapter Three below for a discussion of the relevant literature. See especially the treatment of these two forms of intervention in: David Scamell and Chris ward, 'Public health laws and politics on the issue of HIV transmission, exposure and disclosure' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV*

given minimal acknowledgement or analysis.[13] Regardless of the construction into binaries or otherwise, these responses are enacted in the world, operating to effect the lives of those living with HIV or AIDS, those 'at-risk' of infection and those 'at-risk' of infecting others.

Sharleen Spiteri was, in the parlance which is used today, a Sex Industry Worker, an injecting drug user and HIV positive.[14] Sharleen's story is one which traverses the boundaries of the population-based public health programmes and technologies of communicable disease control and those less-acknowledged medico-legal surveillance, management and quarantine systems. It is presented here alongside the story of Kanengele-Yondjo as narratives which foreground some of the issues present in the analysis which follows. In 1989, Sharleen appeared on the current affairs program *60 Minutes* and told reporter Jeff McMullen that she tried to get her clients to practice safe sex, but sometimes they refused to wear condoms:

> I don't tell them [that I have HIV], no, but I make them wear condoms, I mean, it's something, because I don't think...if I told them and that I'd probably get killed or something, you know, that's what I'm worried about...I've caught men trying to take it [the condom] off when they're halfway there, you know, trying to be shifty and all that.[15]

Jeff McMullen's journalistic treatment of Sharleen's revelation on *60 Minutes* was declamatory, drawing on a risk-infused epidemiological language:

> Marianne [(Sharleen's pseudonym)] says she's been sleeping with at least ten men a week. It means if only half of them are wearing condoms, at least 1,000 men, not to mention their wives and

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Transmission in Australia: Legality, Morality and Reality (National Association of People Living with HIV/AIDS (NAPWA), 2009). And see also: Melissa Woodroffe, 'Criminal Transmission of HIV in Australia' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 60-73.

[13] To this end only one detailed overview of non-criminal forms of law has been published recently: David Scamell and Chris ward, 'Public health laws and politics on the issue of HIV transmission, exposure and disclosure' ibid.(National Association of People Living with HIV/AIDS (NAPWA)).

[14] Eurydice Aroney and Tom Morton, 'Shutting Down Sharleen', *ABC Radio National Hindsight*, 21 March, 2010 (Australian Broadcasting Corporation) <http://www.abc.net.au/rn/hindsight/stories/2010/2848373.htm>.

[15] Ibid.

> girlfriends, are at risk of getting the AIDS virus. No matter how much we feel sorry for Marianne, she's more dangerous than a serial killer.[16]

This presentation of Sharleen, combined with the hegemonic understanding of HIV in 1989 when the story aired – a disease not well understood by the populace, replete with the strongest of stigma and still the subject of government advertising such as the famous 'grim reaper' advertisements of the late 1980s[17] – was to contribute to her eventual 14 year detention and confinement by the New South Wales Department of Health.[18] This was a detention which journalists responsible for uncovering Sharleen's case argue included 12 years of detention without legal sanction.[19]

In relation to HIV-related criminal law, there have been very few trials in the entire jurisdiction of Australia for the criminal transmission of HIV.[20] NSW has seen two such trials including the trial of Stanislas Kanengele-Yondjo,[21] who in 2005 pleaded guilty to two counts of causing grievous bodily harm and was sentenced to six years gaol. His trial took place under the previous arrangements within the *Crimes Act 1900* (NSW) under s36 which, as noted below in Chapter Two, provided a cause of action against any person who intentionally transmitted HIV to another (defined as a "grievous bodily disease").[22] Although charges were initially brought against him under s36 for Intentional Infliction of Grievous Bodily harm, these were later dropped when it became apparent that the prosecution would not succeed on these grounds.[23]

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[16] Ibid.

[17] Australian Broadcasting Corporation, '20 Years after Grim Reaper ads, AIDS Fight Continues', *News*, April 5, 2007 <http://www.abc.net.au/news/2007-04-05/20-years-after-grim-reaper-ad-aids-fight-continues/2234798>.

[18] Eurydice Aroney and Tom Morton, 'Shutting Down Sharleen', *ABC Radio National Hindsight*, 21 March, 2010 (Australian Broadcasting Corporation) <http://www.abc.net.au/rn/hindsight/stories/2010/2848373.htm>.

[19] The details of the 14 year detention of Sharleen Spiteri were unvocered by two journalists in 2010. The NSW Department of Health and other similar agencies do not regularly report instances of the use of detention powers under their public health and quarantine powers. See: ibid.

[20] To-date 31 which are known: Sally Cameron, 'HIV, Crime andthe Law in Australia: Options for Policy Reform - a law reform advocacy kit' (Pt AFAO) (February, 2011)(Discussion Paper) <http://www.afao.org.au/library_docs/policy/DP0211_HIV_Crime_and_the_Law.pdf>. 5.

[21] *Kanengele-Yondjo v R* [2006] NSWCCA.

[22] S4 ('Definitions') works to include the transmission of HIV as a recognised instance of Grievous Bodily Harm. See Chapter Two for a more complete explanation of this offence and its history in NSW.

[23] Gina Mitchell and Melissa Woodroffe, 'Criminal Transmission of HIV: A Guide for Legal Practitioners in NSW' HIV/AIDS Legal Centre Inc., 18 April, 2011) 48 <www.halc.org.au/downloads/crim_transmission.pdf >.

Stanislas Kanangele-Yondjo was born on 22 December 1963 in the Democratic Republic of the Congo. He was accepted to and studied at a tertiary level in that country before coming to Australia in April 1993. Hislop J, in an appeal of the conviction, described Mr Kanangele-Yondjo as someone who had been convicted for a range of "matters of dishonesty"[24] in his time in Australia. The facts are set out here in some detail from Andrew DCJ's Remarks on Sentence from his original hearing in the District Court:

> On 5 February '99, in addition to notifying the accused of his HIV positive result, the accused was counselled by Dr Furner in relation to how the HIV virus was transmitted, how to undertake safer sexual practices, the fact that all persons with HIV remain infectious to their sexual partners for life, the legal responsibility to notify future sexual partners of his HIV status, and of the necessity to use a condom on all occasions of sexual intercourse…
>
> In the course of the counselling on 5 February '99 Dr Furner also told Stanislas Kanengele-Yondjo that if he was to infect anyone in the future with the HIV virus civil or even criminal action could potentially be undertaken against him if there was a failure to take steps to prevent the transmission of the HIV virus by notifying sexual partners and by using a condom…
>
> In the case of Stanislas Kanengele-Yondjo Dr Furner gave to him more information and more explicit direction than any other person for who [sic] she has provided medical care. Over the course of several interviews at the Albion Street Centre Dr Furner emphasised to the accused that contact details of all known sexual partners were needed to identify anyone with the HIV virus so that they could access appropriate treatment if needed and so that those persons did not transmit the HIV virus to their sexual partners…The accused was initially reluctant to disclose the information relating to his sexual partners. He was seen by a second physician, Dr Julian Gold. Dr Gold

[24] *Kanengele-Yondjo v R* [2006] NSWCCA 354 at 354.

> is the Director of the Albion Street Centre, and advised the accused of his responsibilities to provide the information and of the consequences of failure to provide that information. [After a twelve month visit to Africa]… He was tested at the Albion Street Centre and was advised to attend for further assessment in six weeks' time and to discuss possible recommencement of antiretroviral therapy. Stanislas Kanengele-Yondjo was lost to follow-up following this visit and Dr Furner had no further contact with him for clinical care at the Albion Street Centre.[25]

This outlines the sentencing judge's summation of the facts regarding Mr Kanengele-Yondjo's experience of his testing and being informed of his HIV positive status by the clinical staff at the Albion Street Centre in Sydney, the leading health service for HIV/ AIDS and other infectious diseases treatment in the inner-city. His Honour continued in summary:

> In 2003 the accused had unprotected sexual intercourse with Ms A and with Ms B and communicated the HIV virus to each. Both have been diagnosed as HIV positive. In each case the HIV virus was communicated by Stanislas Kanengele-Yondjo.[26]

Ms A, born in 1977 in Ireland and trained as nurse, was living in Australia from 2002 onwards, and met Mr Kanengele-Yondjo in early 2003. Andrew DCJ describes their meeting, which took place "at the Cheers Establishment in George Street, Sydney"[27] as one where Ms A thought the "accused was quite charming."[28] Ms A and Mr Kanengele-Yondjo began a sexual relationship at the same time:

> On several [occasions] Ms A and the accused had conversations about the accused wearing condoms. Ms A and the accused discussed infections and pregnancy. In the course of one conversation about

[25] *Kanengele-Yondjo v R* [2006] NSWCCA 354 at 354.

[26] *Kanengele-Yondjo v R* [2006] NSWCCA 354 at 355

[27] *Kanengele-Yondjo v R* [2006] NSWCCA 354 at 354.

[28] *Kanengele-Yondjo v R* [2006] NSWCCA 354 at 355

> pregnancy and infections, Ms A said that she was concerned about pregnancy and also concerned that she did not know where the accused had been before or what the accused might have. The accused said to her "I would never hurt you, I don't have anything." Ms A said something like 'How can you be sure?" The accused indicated that he could be sure because he went back to the Congo so frequently he got tests. Ms A asked him what tests and the accused replied that he got everything tested. The accused told Ms A that he got tests regularly. Stanislas Kanengele-Yondjo had unprotected sexual intercourse with Ms A at no stage advising her that he was HIV positive... Some time after 7 March 2003, Ms A last saw the accused. She became sick with a sero conversion illness. She suffered sore throat, headaches and a rash. The rash spread all over her body and she had lesions in her mouth and throat.[29]

Similar too is the characterisation of Ms B, the source of the second count of grievous bodily harm brought against Mr Kanengele-Yondjo. Ms B, a German graduate who holds a Master of Arts in Organisational Psychology, was working in Austraila when she began seeing Mr Kanengele-Yondjo from 4 March, 2003. The following day, as Andrew DCJ records in his Remarks on Sentence, "sexual intercourse took place and a condom was used by Stanislas Kanengele-Yondjo."[30] Andrew DCJ continues:

> On 8 March 2003 Ms B visited the accused at his address and stayed there until 11 March 2003. On one occasion during intercourse the accused withdrew his penis from Ms B's vagina and took the condom off his penis. Ms B asked the accused why he took off the condom and told him that she was concerned about HIV, hepatitis and pregnancy in the absence of a condom being used. The accused said "You shouldn't be worried, I have private health insurance and I have to do an HIV test once a year." The accused also told her that he had

[29] *Kanengele-Yondjo v R* [2006] NSWCCA 354 at 355

[30] *Kanengele-Yondjo v R* [2006] NSWCCA 354 at 355

> given seminars about sexually transmitted diseases. The accused indicated to Ms B that he was not HIV positive. From about this time sexual intercourse without condoms took place. At no stage did the accused tell Ms B that he was HIV positive.
>
> Ms B became sick with a sero conversion illness. She suffered red spots on her face and the front of her body and upper arms and thighs. She had ulcers all the way down her throat and a high temperature. Later on 31 July 2003 she was advised that she was HIV positive. A second test on 11 August 2003 confirmed that she was HIV positive. Her treating doctor made enquiries about the whereabouts of the accused but he was unsuccessful. He also advised her to contact police.[31]

Sharleen's story and the stories of Ms A, Ms B and Mr Kanengele-Yondjo foreground some of the key concerns of this thesis, where the seriousness of HIV including its perceived threat to the health of the population, links with human sexual behaviour and the interplay between the practices of public health and law combine to make critique or proposed reforms in this field a high-stakes undertaking. The law and the discipline of public health both play a role in these stories, and others, of quarantine, control, treatment and prosecution of infectious diseases. Seen in the light of the legal history of infectious disease, Sharleen (a more contemporary instantiation of Typhoid Mary) and Ms A, Ms B and Mr Kanengele-Yondjo are each but one of the players in the ongoing debate relating to the proper role of law, criminal punishment and the disciplinary interventions of public health authorities in relation to infectious diseases first emerging in the case of *R v Clarence*[32] and the Contagious Diseases Acts of the same era.[33] These same themes and conflicts remain active today in the contemporary infectious disease debates surrounding the criminalisation of HIV-transmission. It is this debate and its underlying understanding of law 'itself' and law's relationship to its disciplinary 'other' in the guise of public health practices which this thesis critiques.

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[31] Kanengele-Yondjo v R [2006] NSWCCA 354 at 355

[32] *R v Clarence* (1888) 22 QB 23.

[33] See for a general overview of the Acts: Margaret Hamilton, 'Opposition to the Contagious Diseases Acts, 1864-1886' (Spring, 1978) 10(1) *Albion: A Quarterly Journal Concerned with British Studies* 14.

1.2 Aim of the Thesis

The law in NSW and in a rapidly growing list of other international jurisdictions accepts a person with HIV as the suitable site for a range of coercive and other measures relating to her behaviour.[34] The development by the state of legal responses to HIV transmission either through the use of laws of a general application or more specifically targeted communicable disease control measures is, in and of itself, not a particularly new intervention in the lives of citizens and has been the subject of debate throughout the history of state engagement with infectious disease.[35] However, the emergence of the criminal law as a response to infectious disease and HIV in particular is however, relatively new.[36] It is a development which has been contested by a significant body of literature and with which this thesis engages. These criminal legal interventions exist in jurisdictions which have specifically enacted such laws through legislation[37] or where the evolution of the common law has doctrinally expanded to allow for the possibility of HIV-related offences being prosecuted.[38] The laws in question provide for punitive measures directed at certain behaviours which did not previously fall within the purview of the law at all or were regulated through the combination of medico-legal surveillance, management and quarantine systems[39] with their concomitant administrative powers which I refer to as 'public health laws', alongside concerted population-based public health and health promotion efforts on the part of government, community groups and other actors.

It is in this broad context that this thesis engages with the story of the governance of HIV in New South Wales, with a particular interest in HIV-related criminal offences which are

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[34] For Example: *Public Health Act 1991* (NSW) s13.

[35] Communicable disease acts. Margaret Hamilton, 'Opposition to the Contagious Diseases Acts, 1864-1886' (Spring, 1978) 10(1) *Albion: A Quarterly Journal Concerned with British Studies* 14. And See: Christopher Reynolds and Genevieve Howse, *Public health law and regulation* (Federation Press, 2004). And also a more local example: Michael Brown, '2008 Urban Geography Plenary Lecture - Public Health as Urban Politics, Urban Geography: Venereal Biopower in Seattle, 1943-1983,' [1] (2009) 30(1) *Urban Geography* 1.

[36] Two cases have been prosecuted with a third trial currently. The first criminal law which targeted HIV Transmission, s36 of the Crimes Act 1900 (which is now repealed) came into force in 1991. The first case of HIV was diagnosed in NSW in 1982 peaking in the mid-1980's: Kim Stewart and Ron Penny, 'Containing HIV in NSW: A World Class Success' 14(3) *NSW Public Health Bulletin* 57.

[37] Such as is the case in NSW: *Crimes Act 1900* (NSW) s36 for example.

[38] Such as is the case in the United Kingdom. See: Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007).

[39] See Chapter Two for an overview of these forms of law, for example those contained in the NSW public health statute: *Public Health Act 1991* (NSW).

currently strongly contested in the literature and the HIV/AIDS sector.[40] However, the approach in this thesis to these specific issues situates the imposition of HIV-related criminal offences as part of a broader question about the nature of law itself, its place in contemporary approaches to regulation and understandings of power and, importantly, its relationship with other techniques of governance such as the disciplines of public health and health promotion in particular.

In charting and critiquing the ongoing contestation of HIV-related criminal law, a contestation which has recently increased in focus with a number of high-profile criminal cases in Australia, I adopt the framework offered by Michel Foucault in his substantive work in relation to law.[41] This is to take Foucault as 'legal theorist' rather than to borrow his various methods and apply them as 'tools' which is the more common methodological usage of his work.[42] This use of Foucault touches upon ongoing debates within post-Foucault legal theory in relation to the reception of his substantive perspective on law: did Foucault 'expel' the law from his conception of the operation of power in contemporary society[43] or was there something more to his understanding of law 'itself' and its interaction with contemporary forms of disciplinary and bio-political power? The thesis holds back from engaging directly in any such analysis of Foucault's works themselves, leaving the textual hermeneutics to other writers.[44] Instead, I move to adopt the analysis provided by Ben Golder and Peter Fitzpatrick[45] on Foucault's perspective(s) on law and to apply this analysis to a critical reading of the literature surrounding HIV-related criminal offences, particularly those which argue for decriminalisation. It is through this critical re-reading of the HIV-criminalisation

[40] See for example: Scott Burris, Edwin Cameron and Michaela Clayton, 'The Criminalization of HIV: Time for an Unambiguous Rejection of the Use of Criminal Law to Regulate the Sexual Behavior of Those with and at Risk of HIV ' (2008) *Working Paper*; Sally Cameron, 'HIV, Crime andthe Law in Australia: Options for Policy Reform - a law reform advocacy kit' (Pt AFAO) (February, 2011)(Discussion Paper) <http://www.afao.org.au/library_docs/policy/DP0211_HIV_Crime_and_the_Law.pdf>; Ralf Jürgens et al, *10 Reasons to Oppose Criminalization of HIV Exposure or Transmission*, The Open Society Institute, Open Society Foundations (soros.org) No (2008).

[41] I derive some of this framework from recent scholarship which attempts an 'exegetical' reading of Foucault rather than an application of his methods to law in Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009).

[42] Examples of the various methodological applications of Foucault's work can be found in the indespensible: Gavin Kendall and Gary Wickham, *Using Foucualt's Methods* (SAGE Publications, 1999).

[43] Such as the argument found in the principal recent proponents of the 'expulsion thesis' discussed in further detail in Chapter Four below: Alan Hunt and Gary Wickham, *Foucault and law : towards a sociology of law as governance* (Pluto Press, 1994).

[44] I draw extensively from the reading of Foucualt's work and of his interpreters provded by Golder and Fitzpatrick in: Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009).

[45] Ibid.

literature that echoes of the broader post-Foucault debate emerge in relation to law: is the law expelled from the scene of contemporary HIV governance, should it be, and if not what role does it play? Like the current crop of critical hermeneuts who render visible Foucault's substantive view of law, I too move to similarly render visible the substantive understandings of law operative within the HIV-transmission criminalisation literature in order to answer these questions. The narrative which emerges from the literature in relation to HIV-related law is one marked by an establishment of a binary between criminal law and public health, of incompatibility between these two elements. What is more, this narrative generally includes the call for the swift expulsion of the criminal law from the scene of HIV-transmission.[46] Rather than agreeing with the bulk of the literature that law is, or necessarily should be, expelled from the scene of HIV-transmission, I conclude instead that the literature's positioning of law being 'out of place' in relation to HIV-transmission[47] – where population health or health promotion approaches are presented as separate from the law – is based on a flawed characterisation of law's nature (law 'itself') and law's relationship to other forms of power such as public health. This characterisation of law presents law as only mechanistic, negative, limited and determinate. By recourse to Foucault I hope to challenge this characterisation. Thus, I propose that a re-characterisation of the law is required. Such a rechanracterisation would imply a repositioning of legal and public health approaches. It would move us from a structure of opposition to one which reflects the co-constitution and interrelation of these two programmes and techniques deployed in relation to HIV-transmission. Without this re-characterisation of the law, debate in relation to de-criminalisation will be inadequately framed thus limiting the possibilities of contemporary engagement with HIV by its ignorance of the interconnection between law and public health Simultaneously, this approach involves the risk that proposed reforms might further embed or re-create the problems which such reforms aim to solve where law cannot be critiqued without consequence for public health and other approaches to HIV-transmission which have been conventionally regarded as being 'outside' law.

[46] See Chapter Three Below for further detail. For the most detailed and sustained exposition of this position see: Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007).

[47] Sally Cameron and John Rule, 'Outside the HIV strategy: challenges of 'locating' Australian prosecutions for HIV exposure and transmission.' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 18-30.

1.3 Context of the Thesis

HIV is a lentivirus (a member of the retrovirus family) that causes AIDS.[48] It is this virus which has been the subject of intense medical, scientific and academic discussion and research since its emergence in the early 1980s.

From this early period where the unknowns about HIV outweighed what science, medicine and government understood about the virus, HIV has taken on a range of meanings across its thirty-odd year history. From the catalyst for a rights-grounded and identity-based political liberation movement in the Global North[49] to one linked to economic and social development campaigns for women in the Global South.[50] From the kernel of a new disease-based kinship formation amongst HIV-positive 'Poz' gay men,[51] to the foundation of morals campaigns and the topic of iconic fear-based public health campaigns.[52] HIV has and continues to mutate into ever-new social and cultural formations and exhibits revised meanings across cultures, time and space. It continues to be the lead justification for government efforts and expenditure on sexual health services, needle and syringe exchange programs, trials of legal injecting centres and advances in sex education policy. It has, in short, taken on meanings which work to ground and motivate highly productive and often very visible activity and justifies significant structural changes to the governance of a range of often difficult and contentious domains of human activity.

Sharleen Spiteri was but one woman with one story which is tied to and produced by the competing meanings of HIV. It is her story in particular which in prompted this exploration of HIV-related legal offences. The story of Kanengele-Yondjo is returned to through the general analysis of the operation of the criminal law throughout this thesis. Sharleen's story, as a narrative linked to public health's own legal intervention, is the story which is left

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[48] For an overview of AIDS and HIV in general see: Gina Mitchell and Melissa Woodroffe, 'Criminal Transmission of HIV: A Guide for Legal Practitioners in NSW' HIV/AIDS Legal Centre Inc., 18 April, 2011) 7-14 <www.halc.org.au/downloads/crim_transmission.pdf >.

[49] Adrienne E Christiansen and Jeremy J Hanson, 'Comedy as cure for tragedy: ACT UP and the rhetoric of AIDS' [157] (1996) 82(2) *The Quarterly journal of speech*.

[50] Sally Zierler and Nancy Kreiger, 'Reframing Women's Risk: Social Inequalities and HIV Infection' [401] (1997) 18 *Annual Review of Public Health* 401.

[51] Tim Dean, *Unlimited intimacy : reflections on the subculture of barebacking* (The University of Chicago press, 2009).

[52] N Vitellone, 'Watching AIDS, Condoms and Serial Killers in the Australian'Grim Reaper' TV Campaign' [33] (2001) 15(1) *Continuum*.

largely untold in the literature. Yet, it is one which foregrounds some of the unspoken links between a public health apparatus and its ways of engaging with HIV which are generally seen as 'other' to that of public health.

The case of Sharleen Spiteri is an incredibly sad part of the history of legal, health and policy responses to HIV in NSW. For many years, the reality of Sharleen's story remained an urban myth in the HIV and AIDS service sector.[53] Her story highlights at the level of the individual human narrative like no doctrinal analysis, theoretical position or judgement can, the reality of the interplay between law and public health. Through this narrative we can begin to see the complex, co-determined and relational nature of law and public health which far too often the literature renders as separate, unequal powers in opposition, either incompatible or expelled.

Sharleen was a woman who ran away from home at 15, lived in refugees and squats, got herself a criminal record and a drug habit. She contracted HIV at about age 22 from using an infected syringe to inject drugs. It was the peak of the HIV epidemic in Sydney.[54]

Sharleen had agreed to participate in a *60 Minutes* story by Jeff McMullen. It was this story which made her the epicentre of a moral panic which would deny her liberty for the remainder of her life.

As noted above, in response to McMullen's questioning, Sharleen revealed her struggle with maintaining safer sex practices in the context of her work in the sex industry. Her predicament was then summarised by McMullen in the following terms: "No matter how much we feel sorry for [Sharleen], she's more dangerous than a serial killer."[55]

The next day, *The Daily Telegraph* picked up the story and ran with a headline which drew on the understanding of HIV as a dangerous weapon – and by extension the HIV positive person themselves metamorphosing into a weapon herself: "This woman is a lethal weapon.

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[53] Eurydice Aroney and Tom Morton, 'Shutting Down Sharleen', *ABC Radio National Hindsight*, 21 March, 2010 (Australian Broadcasting Corporation) <http://www.abc.net.au/rn/hindsight/stories/2010/2848373.htm>.

[54] Kim Stewart and Ron Penny, 'Containing HIV in NSW: A World Class Success' 14(3) *NSW Public Health Bulletin* 57.

[55] Eurydice Aroney and Tom Morton, 'Shutting Down Sharleen', *ABC Radio National Hindsight*, 21 March, 2010 (Australian Broadcasting Corporation) <http://www.abc.net.au/rn/hindsight/stories/2010/2848373.htm>.

If a restaurant persisted in serving poisoned food it would be shut down. This woman is a public business and must be treated accordingly."[56]

The coverage of the Sharleen Spiteri case by *60 Minutes* and the very headline of *The Daily Telegraph* each, in their own way, pick up on some of the various meanings and understandings of HIV which were at play at that time. Many of these understandings of HIV persist to this day – some justified and others less so. There is however an underlying acknowledgement in both these media representations of the centrality of *health* and of *law* in the construction and understanding of both HIV, the person living with HIV and all that is involved in this field of human experience. McMullen in his work to build the case that Sharleen was a danger to the community employed the health-related language and models of healthcare in order to shape and construct Sharleen as epidemiological threat.[57] *The Daily Telegraph's* headline, on the other hand, deployed the language of regulation and law.[58] It interestingly adopted the discourse utilised by contemporary advocates *for* the decriminalisation of sex work and the sex industry.[59] and turns this same positivist language used by advocates for criminalisation against Sharleen, making the argument that she had undertaken her *business* in a manner which breached the public's safety, thus being in breach of the core motivation for the regulation of commerce. Although the interplay of law and health runs much deeper in this story of Sharleen, even from the very earliest moments, the twin powers of law and health are identified as especially important to the formation of this narrative and governance of HIV and Sharleen herself.

The interplay of the twin powers of law and health led to Sharleen's detention by the NSW Department of Health, first in a locked AIDS ward and then in a locked mental hospital. She

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[56] Ibid.

[57] Jeff McMcullin described Sharleen in the following epidemologically inflected terms "she's been sleeping with at least ten men a week. It means if only half of them are wearing condoms, at least 1,000 men, not to mention their wives and girlfriends, are at risk of getting the AIDS virus" : ibid.

[58] The article read in part: "If a restaurant persisted in serving poisoned food it would be shut down. This woman is a public business and must be treated accordingly" : ibid.

[59] In 1995, the Government reformed prostitution laws in New South Wales. *Disorderly Houses Act 1943* (NSW). was amended by the *Disorderly Houses Amendment Act 1995* (NSW). to abolish the common law offence of keeping a brothel. This made brothels a legitimate commercial land use regulated through environmental planning instruments under the*Environmentral Planning and Assessment Act 1979* (NSW).. At the same time, amendments to the Summary Offences Act 1988 and the Crimes Act 1900 abolished the common law misdemeanour of keeping a common bawdy house or brothel, and provided that people in a legitimate commercial relationship with a sex worker are not guilty of the offence of living off the earnings of prostitution.

was to live for the next sixteen years under twenty-four hour supervision by government health workers.[60] She was to become the most expensive public patient in NSW history. A law, known at the time as 'Sharleen's Law'[61] was rapidly passed by the NSW Parliament which introduced compulsory disclosure of HIV or any other sexually transmissible disease, a law which exists today.[62] She was sentenced to gaol for three months for assaulting a police officer whilst allegedly attempting to cause a police officer to contract HIV.[63] Her sixteen year long detention was achieved through the use of Public Health Orders. These orders, which remain available today, are fundamentally a quarantine power which allows the executive to forcibly detain a person or to compel them to undergo tests, treatment or other activities.[64] These Public Health Orders form a key part of the medico-legal surveillance, management and quarantine systems which operate in NSW today. Whilst these *administrative* provisions are not the central focus of this thesis, it was the status of these Public Health Orders which concerned Tom Morton and Eurydice Anthony, two journalists who presented a landmark documentary on the story of Sharleen, revealing much of her story for the first time.[65] These administrative provisions, however, are also another example of the interface between law and public health. When questioned, the NSW Department of Health (as it was then known) released all Public Health Orders which related to Sharleen Spiteri to Morton and Anthony. The orders released showed only two Public Health Orders, one from 1989 and another from 2001 with a twelve year gap without orders being made.[66] When questioned further, the Department of Health in a statement said that:

> Intensive supervision outside the framework of a Public Health Order is provided with the consent of the client concerned. Providing more

[60] Eurydice Aroney and Tom Morton, 'Shutting Down Sharleen', *ABC Radio National Hindsight*, 21 March, 2010 (Australian Broadcasting Corporation) <http://www.abc.net.au/rn/hindsight/stories/2010/2848373.htm>.

[61] Ibid.

[62] *Public Health Act 1991* (NSW) s13.

[63] Sun Herald, 31st March, 1991.

[64] *Public Health Act 1991* (NSW) s23.

[65] Eurydice Aroney and Tom Morton, 'Shutting Down Sharleen', *ABC Radio National Hindsight*, 21 March, 2010 (Australian Broadcasting Corporation) <http://www.abc.net.au/rn/hindsight/stories/2010/2848373.htm>.

[66] Ibid.

> detail would involve release of personal health information of Ms Spiteri and release could be contrary to new privacy laws.[67]

Sharleen died in 2005. The Public Health Order was taped to the wall above her bed.[68]

Sharleen was the locus of a complex interaction of law and public health. She found herself between the juridical-disciplinary intervention of Public Health Order and the disciplinary and bio-political reality of life under "intensive supervision"[69] outside of the legal framework designed to guarantee the rule of law. Public Health and Law are the twin powers whose relationship one to another emerge again today in this thesis as key to understanding the current contestation of HIV-related criminal laws.

1.4 The Literature: Context and Overview

Sharleen herself, whilst the subject of the aforementioned documentary, has had little written about her and her ordeal. Throughout its thirty-odd year history, however, HIV and social, political and scientific responses to it have been the catalyst for a wealth of literature. From the significant policy-based literature which has affected what can only be described as a step change in governmental responses to all manner of complex areas of health governance and regulation,[70] through to powerful works of intellection reflection[71] and those of popular and high-culture,[72] HIV has been a phenomenon which has touched a broad range of human endeavour and expression.

In very recent years the literature has continued to develop. In the Global North, particularly centred on North America, responses to HIV increasingly focus on the emergence of post-epidemic cultures of risk and the emergence of the sub-culture of barebacking: the intentional practice of unprotected anal intercourse.[73] This risk-centred literature includes a veritable

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[67] Ibid.

[68] Ibid.

[69] Ibid.

[70] Mainly through the application of harm-reduction strategies

[71] Susan Sontag, *AIDS and its metaphors* (Farrar, Straus and Giroux, 1st ed, 1989).

[72] Tony Kushner, *Angels in America : a gay fantasia on national themes* (Theatre Communications Group, 1st combined pbk. ed, 2003).

[73] Known also as 'barebacking' in an "analogy drawn from equistrian pursuits": Tim Dean, *Unlimited intimacy : reflections on the subculture of barebacking* (The University of Chicago press, 2009), 1.

avalanche of online content[74] as well as offline policy papers, strategies and advertising campaigns.[75] It includes at least one substantial academic monograph,[76] and a variety of journal articles and research.[77] This is not to exclude the provocative 'documentary' film making which aims to document "male sexuality in the 21st Century"[78] through the filming and portrayal of both condomless sex and an associated sub-culture which values condomless sex and maintains a view on HIV transmission and sero-status which stands in stark contrast to mainstream messages on the topic.[79]

In the Australian context, this shifting meaning of HIV, no doubt linked to the emergence of effective medication regimes which can prolong the life of people living with HIV, has seen official recognition of non-condom based risk reduction strategies for HIV transmission prevention and control in the *Risk Reduction Strategies Gay Men's HIV Prevention 2010-2012*.[80] This strategy marks a new chapter in HIV prevention in NSW. The behavioural strategies advocated in the *Risk Reduction Strategies: Gay Men's HIV Prevention 2010-2012* paper (such as coitus interruptus or sero-sorting) acknowledge or, perhaps in some cases, advocate for behaviours which could be construed as instances of intentional, reckless or other forms of HIV transmission which are viewed as a harm punishable by criminal sanction.[81] Whilst its joint authors, the Aids Council of NSW (ACON) and Positive Life NSW, note that "reinforcement of consistent condom use remains the foremost prevention priority"[82] the strategy itself notes that this condom reinforcement message is for the "broader

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[74] Postive Life NSW, *Wrapped or Raw: Pos-Pos Sex* <http://wrappedorraw.org.au/>.

[75] For example see: Positive Life NSW and AIDS Council of New South Wales (ACON), 'Risk Reduction Strategy Paper: Gay Men's HIV Prevention 2010-2012' <positivelife.org.au/risk-reduction-strategy >.

[76] Tim Dean, *Unlimited intimacy : reflections on the subculture of barebacking* (The University of Chicago press, 2009).

[77] Gregory Tomso, 'Bug chasing, barebacking, and the risks of care' [88] (2004) 23(1) *Literature and Medicine* 88.

[78] Treasure Island Media, a San Franscisco-based pornography/documentary company which films and distributes pornography/documentaries of condomless sex including a recent documentary made by one Treasure Island Media's staff about his time wokring for the company: *Ryan Sullivan's Island* (Directed by Ryan Sullivan, Treasure Island Media, 2011).

[79] For a discussion of the documentary status of Treasure Island Media productions see: Tim Dean, *Unlimited intimacy : reflections on the subculture of barebacking* (The University of Chicago press, 2009), 118-136.

[80] Positive Life NSW and AIDS Council of New South Wales (ACON), 'Risk Reduction Strategy Paper: Gay Men's HIV Prevention 2010-2012' <positivelife.org.au/risk-reduction-strategy >.

[81] See Chapter Two for an outline and discussion of these HIV-transmission related criminal offences.

[82] Positive Life NSW and AIDS Council of New South Wales (ACON), 'Risk Reduction Strategy Paper: Gay Men's HIV Prevention 2010-2012', 1,4. <positivelife.org.au/risk-reduction-strategy >.

gay community"[83] rather than the group of men who practice unprotected anal intercourse. The strategy proposes a range of risk reduction strategies including sero-sorting, use of undetectable viral load readings to assess risk, strategic positioning of HIV positive partners as receptive partners in anal intercourse and withdrawal prior to ejaculation as risk reduction strategies for use by this group of men. Each such risk reduction strategy is hotly debated in the HIV/AIDS sector and forms part of the *avant garde* of HIV prevention and control strategies alongside efforts such as rapid testing at community and sex on premises venues. Whilst they arguably represent a conscious harm minimisation response to the behavioural realities of unprotected anal intercourse, they are a far cry from the "consistent condom use"[84] which researchers called for as an urgent response to the very research which prompted the risk reduction strategy in the first place.

Much of this emergent literature in relation to non-condom based strategies for HIV-transmission risk reduction is contextualised as a response to actual behaviours exhibited by men who have sex with men (MSM) and thus can be seen to provide its guidance through the harm-minimisation framework adopted by the HIV-sector. This harm-minimisation approach would approach such behaviours as an empirical reality and thus accepting (although not necessarily fully condoning) such behaviours, move to adopt a non-judgemental approach which would include providing risk-reduction interventions for usage by that section of the community of MSM. This motivation notwithstanding, these strategies and the general thrust of recent associated literature, especially in relation to barebacking practices, resonates strongly with the topic of HIV-related criminal offences. They do so where these behaviours and practices sit in an uncomfortable space where they may well form a part of a criminal offence. The continued availability of criminal-legal sanctions for such behaviours threatens a hard-barrier against which the seemingly more 'flexible' medico-legal surveillance, management and quarantine systems could seem to be a preferred approach; being more malleable and responsive to the control of public health authorities. The emergence of these strategies, the emergent populations and behaviours they target and the associated literature sets the scene for both the attention given to criminal HIV-transmission offences and the contestation thereof.

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[83] Ibid., 5.

[84] L. Mao et al, "'Serosorting" in casual anal sex of HIV-negative gay men is noteworthy and is increasing in Sydney, Australia' (2006/05/13) (2006) 20(8) *AIDS* 1204.

In this context, the literature on HIV-transmission has taken a significant turn in recent years towards a focus on the emergence of HIV-related criminal law. It is this literature which I focus upon in this thesis. As is the case with the vast bulk of literature on HIV (apart from that emerging from medical research and science), the literature and debate has emerged from writers, academics and others who are aligned with the HIV and AIDS service sector through HIV health and social policy groups, HIV and AIDS Service Organisations and the various other largely non-government, community or quasi-autonomous-non-government organisations who have been at the forefront of the HIV response.[85] In NSW and Australia more generally, this is not surprising given the strong historical involvement of third sector or non government organisations in the official structures and publically-funded responses to HIV and AIDS.

This literature forms the core of the current debate regarding the suitability and desirability of understanding HIV transmission as an appropriate or prudent basis for criminal offences ranging from assault-type offences, reckless endangerment and through to attempted murder and murder in some jurisdictions.[86] Recent media attention[87] paid to prosecutions of HIV-transmission has catalysed what may have been a relatively slow-burning issue for the HIV/AIDS sector into a more focused effort.[88]

In NSW, the jurisdiction with which this thesis engages, HIV transmission may form the basis for an assault charge of inflicting grievous bodily harm either intentionally[89], recklessly[90] or negligently.[91] Similarly, in other Australian jurisdictions the criminal law

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[85] Authors for example of the most extensive work on HIV-related offences include those who work for peak-bodies in the HIV/AIDS sector, professional researchers attached to HIV/AIDS research centres and other HIV and AIDS community organisations. Two academics, from the law and justice fields (Stephen Tomson and Peter Rush) contributed to this monograph and do not report any formal association with the HIV or AIDS sector as such: Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009).

[86] There has been no use of murder or attempted murder offences in Australia. See Chapter Two below for an overview of these offences and instances of their prosecution in other jurisdictions. See also: Gina Mitchell and Melissa Woodroffe, 'Criminal Transmission of HIV: A Guide for Legal Practitioners in NSW' HIV/AIDS Legal Centre Inc., 18 April, 2011) 48 <www.halc.org.au/downloads/crim_transmission.pdf >.

[87] Georgina Robinson, 'HIV Acrobat May have Had Hundreds of Lovers: Police', *The Sydney Morning Herald* (Sydney) <http://www.smh.com.au/national/hiv-acrobat-may-have-had-hundreds-of-lovers-police-20100526-wcjt.html>.

[88] Sally Cameron, 'HIV, Crime andthe Law in Australia: Options for Policy Reform - a law reform advocacy kit' (Pt AFAO) (February, 2011)(Discussion Paper) <http://www.afao.org.au/library_docs/policy/DP0211_HIV_Crime_and_the_Law.pdf>. 11-12

[89] *Crimes Act 1900* (NSW) s33.

[90] Ibid., s35.

regards HIV transmission as a form of harm which attracts the sanction of the criminal law, albeit in a variety of ways.[92] In other national jurisdictions, HIV transmission, and in some instances putting another at risk of transmission (however that might be defined) is accepted as a suitable form of harm which would attract the imposition of criminal punishment.[93]

These laws draw on understandings of HIV and its transmission as a certain form of harm and in so doing have created a new meaning for HIV: its transmission constitutes a *criminal* harm. Whilst this meaning is a relatively new one in some international jurisdictions and one which is slightly more established in Australia,[94] the attention given to it by a rapidly expanding literature and policy research focus is perhaps at odds with the relative lack of prosecutorial activity in relation to the number of HIV transmission events in Australia.[95] In fact, by admission from the writer of the most sophisticated treatment of HIV-criminalisation and HIV-related criminal law, concern for a sense of proportion in relation to criminal prosecutions is required where in the larger context of HIV-transmission globally, HIV-transmission criminal prosecutions represent a "bourgeois concern."[96]

Regardless, this literature continues to grow, diverse in motivations, prescriptions and focus. It emerges from a variety of jurisdictions where legal systems vary – sometimes quite markedly – and even where such systems claim a shared common law lineage the law itself

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[91] *Crimes Act 1900* (NSW) s54. It is through the operation of s4 of the Act where Grievious Bodily Harm includes the infliction of a Grievious Bodily Disease where HIV transmission becomes an instance of a charge of Grievious Bodily Harm.

[92] See Sally Cameron, 'HIV, Crime andthe Law in Australia: Options for Policy Reform - a law reform advocacy kit' (Pt AFAO) (February, 2011)(Discussion Paper) <http://www.afao.org.au/library_docs/policy/DP0211_HIV_Crime_and_the_Law.pdf>. 6

[93] For example see: *Offences Against the Person Act 1861* (UK), ss18, 20, 23, 24 or 47

[94] The first criminal law which related to HIV transmission was passed in NSW in 1991 criminalising the causing of a grievous bodily disease: *Crimes Act 1900* (NSW) s36. as repealed by the *Crimes Amendment Act 2007* (NSW) Sch 1 Item 9.

[95] Some twenty prosecutions in total have been launched in Australia (Gina Mitchell and Melissa Woodroffe, 'Criminal Transmission of HIV: A Guide for Legal Practitioners in NSW' HIV/AIDS Legal Centre Inc., 18 April, 2011) <www.halc.org.au/downloads/crim_transmission.pdf >.) whilst approximately 1000 episodes of transmission occur each year, with some 20,000 people currently living with HIV in Australia: The Kirby Institute for infection and immunity in society, *HIV, viral hepatitis and sexually transmissible infections in Australia Annual Surveillance Report 2011* (The Kirby Institute, the University of New South Wales, Sydney, NSW, 2011).

[96] Matthew Weait quoted in: The Hon. Michael Kirby, 'HIV Criminalisation - Summing Up: UNAIDS Expert Meeting on the Scientific, Medical, Legal and Human Rights Aspects of the Criminalisation of HIV Non-Disclosure, Exposure and Transnmission.' (2011), 23 <http://www.pacificfriendsglobalfund.org/wp-content/uploads/2011/10/MICHAEL-KIRBY-SUMMING-UP-UNAIDS-HIV-CRIMINALISATION-GENEVA-SEPT-2011.pdf>.

has developed subtle but highly significant differences.[97] The diversity of national context also includes a variety of approaches to HIV in both medical and public policy arenas not to mention a set of different governmental and non-governmental public health structures. When comparing different jurisdictions, all of these factors can become significant when discussing health or legal approaches to HIV or proposals for law reform.

These oftentimes significant differences belie a shared set of concerns and a shared set of underlying themes and approaches which informs the literature's position to-date. That being said, some of the jurisdictional or contextual differences do make some of the international literature's concerns largely inapplicable in other contexts. However, there remains a significant gain in engaging with this literature where insights can be validly applied to another context or perhaps, more importantly, where we can work to suitably distinguish those insights which cannot be sustainably applied elsewhere. In the specific instance of NSW and Australia, this engagement with literature is essential given that the state of our own scholarship and literature on the topic is less developed than elsewhere.[98]

Despite these differences, the core shared concern of the literature is located in its questioning of the prudence of enacting, or of continuing to enforce, HIV-related criminal offences. Specifically, the majority of the literature questions HIV-related criminal offences in relation to their efficacy in controlling HIV transmission rates where public health agencies feel that their activity and their approaches have successfully governed HIV in the past.[99] To give a sense of the general position of the literature in relation to HIV-related law, an emblematic and oft-repeated quotation from a key study on the effect of the criminal law on HIV and safer sex practices provides a neat summary:

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[97] For example, the UK and NSW/Australian HIV-related criminal law,whilst emerging from a shared tradition, emerges from a common law evolution and statute respectively. Whilst both jurisdictions utilise the criminal law of assault to characterise HIV transmission the subtle but highly significant differences between the two jurisdiction's elements of assault should not be overlooked in any discussion of the law's operation or likely operation in either jurisdiction.

[98] Sally Cameron, 'HIV, Crime andthe Law in Australia: Options for Policy Reform - a law reform advocacy kit' (Pt AFAO) (February, 2011)(Discussion Paper) <http://www.afao.org.au/library_docs/policy/DP0211_HIV_Crime_and_the_Law.pdf>. 11-12

[99] Melissa Woodroffe, 'Criminal Transmission of HIV in Australia' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 60-73. 60.

> The criminalization [sic] of HIV has been a strange, pointless exercise in the long fight to control HIV. It has done no good; if it has done even a little harm the price has been too high. Until the day comes when the stigma of HIV, unconventional sexuality and drug use are gone, the best course for criminal law is to follow the old Hippocratic maxim, 'first, do no harm'.[100]

This negative assessment of HIV-related criminal offences, which is represented more fully in discussion below, is shared almost universally within the literature.[101] In a vein similar to the Hippocratic Maxim, the bulk of the literature adopts a form of opposition to HIV-related offences based specifically on a form of utilitarian logic. In this logic, criminal legal intervention is assessed in relation to its effect in reducing HIV transmission in the population. This outcome of communicable disease control is understood as the single goal against which all activity must be measured in the utilitarian calculus the literature performs.

Beyond this outcomes-based assessment of criminal legal intervention, much of the literature proceeds further, and notes that whilst they may understand HIV transmission as a significant harm (one which would normally justify the imposition of criminal sanction) this use of the criminal law too must be surrendered to the more important aim of disease control via public health methods.[102] This portion of the literature does not take great issue with the understanding of HIV transmission as a significant harm per se. Through this expanded utilitarian calculus it instead asks us to ignore this harm all the same; to punish this harm would, in its view, reduce the effectiveness of public health interventions and thus, in accordance with the utilitarian logic, render the criminal legal intervention unwanted. This is the core of the call for decriminalisation. This perspective is no doubt motivated by the epistemological standpoint of public health rooted in a population-centred approach to

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[100] Originally stated in: Scott Burris et al, 'Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial ' (2007) *Arizona State Law Journal*.

[101] Ibid; Sally Cameron, 'HIV, Crime andthe Law in Australia: Options for Policy Reform - a law reform advocacy kit' (Pt AFAO) (February, 2011)(Discussion Paper) <http://www.afao.org.au/library_docs/policy/DP0211_HIV_Crime_and_the_Law.pdf>; Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009); Tim Dean, *Unlimited intimacy : reflections on the subculture of barebacking* (The University of Chicago press, 2009); Gina Mitchell and Melissa Woodroffe, 'Criminal Transmission of HIV: A Guide for Legal Practitioners in NSW' HIV/AIDS Legal Centre Inc., 18 April, 2011) <www.halc.org.au/downloads/crim_transmission.pdf >; Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007).

[102] Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007), 199-205.

understanding HIV-transmission. Thus, to ignore the harm brought by and on an individual, which the criminal law is concerned with, allows for a population-based approach to communicable disease control. This kind of utilitarian argument differs from standard utilitarian theories of criminal law which see punishment as justifiable only in so far as it can be proven socially beneficial and as such is not simply a reworking of these alternative jurisprudential grounds for punishment.[103] It also diverges significantly from the hegemonic liberal conception of the criminal law, grounded as it is in a concern for the individual as an autonomous moral agent. This traditional approach to criminal law and punishment, based on the Kantian injunction to treat each individual as ends in themselves rather than as means, in its specifically jurisprudential application includes concepts such as Dworkin's principle of equal respect and concern,[104] Hart's principle of fairness[105] and Kant's formulation in relation to the law's role in achieving justice:

> Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he [sic] has committed a crime.[106]

In diverging from this liberal legal conception of criminal law and justification of punishment, the literature's utilitarian logic removes the precedence which the criminal law is usually accorded in such matters.

I argue that underlying these calls for decriminalization is a series of understandings of the law which must be examined. These underlying assumptions produce a particular understanding of both the criminal law (and the law more generally) and the nature and work of public health. Beyond the strong preference for ends-focused evaluative approaches to assessing law, the character of the literature is linked by these shared understandings of the law. Thematically, these include a view of 'law' being only the criminal law, and a characterisation of this law as only mechanistic, negative, limited and determinate. It is an

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[103] See for a succinct overviewo of utilitarian theories of punishment, and others more generally: Ted Honderich, *Punishment : the supposed justifications revisited* (Pluto, Rev. ed, 2006).

[104] Nicola Lacey, *State Punishment: Political Principles and Community Values* (Routledge, 2002 ed, 1988), 144.

[105] Ibid., 63.

[106] Immanuel Kant as cited in Deirdre Golash, *The case against punishment: retribution, crime prevention, and the law* (New York University Press, 2005), 14.

understanding, then, which in the final analysis constructs law as separate from and incompatible with public health approaches to HIV-transmission. Alternatively or in addition, it acknowledges law to be at best a 'tactic' to be utilised by the public health apparatus, subject to its overarching control.

This positioning of law in relation to public health is expressed either in a straightforward way or, in other more subtle instances, through a range of subsidiary questions which ask: "what is the law's impact on communicable disease control?", "is the criminal law an (effective) communicable disease control measure?" and, finally, "is criminal law compatible with the discipline of public health and health promotion?" In the Australian context, Sally Cameron and John Rule state emphatically that in relation to law and public health's relationship, "criminal prosecutions undermine public health's HIV prevention and treatment response and, conversely, public health procedures undermine the appropriateness of a criminal law response."[107]

To this end, the *Australian Federation of Aids Organisations*, the peak-body for HIV and AIDS organisations in Australia, has released a discussion paper and advocacy toolkit for a campaign to "inform development of [a project targeting the nexus between these laws and HIV] and other related advocacy."[108] This discussion paper follows a significant monograph released by the *National Association of People Living with HIV/AIDS* which focused on a range of HIV-related legal issues but which also made a significant contribution to the discussion of HIV-related criminal law and offences in the Australian context.[109] These publications sit alongside other smaller contributions, public meetings and the production of a significant community legal guide on HIV-related criminal law produced by the *NSW HIV/AIDS Community Legal Centre.*[110] This work draws upon and in some way mirrors similar work in other jurisdictions and on the international front via *UNAIDS* and other

[107] Sally Cameron and John Rule, 'Outside the HIV strategy: challenges of 'locating' Australian prosecutions for HIV exposure and transmission.' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 18-30, 20.

[108] Sally Cameron, 'HIV, Crime andthe Law in Australia: Options for Policy Reform - a law reform advocacy kit' (Pt AFAO) (February, 2011)(Discussion Paper) <http://www.afao.org.au/library_docs/policy/DP0211_HIV_Crime_and_the_Law.pdf>. 1

[109] Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009).

[110] Gina Mitchell and Melissa Woodroffe, 'Criminal Transmission of HIV: A Guide for Legal Practitioners in NSW' HIV/AIDS Legal Centre Inc., 18 April, 2011) <www.halc.org.au/downloads/crim_transmission.pdf >.

international bodies.[111] It also tends to echo arguably the most sophisticated writing on the topic by Matthew Weait who holds that as a public health issue the law should have nothing to do with HIV transmission other than in the guise of a public health directed approach.[112]

This thesis argues that the bulk of the decriminalisation literature does not adequately account for the crux of its argument for decriminalisation by relying on a conception of law which artificially segregates law and public health, imagining a world where law is or could be expelled from the contemporary operation of power in relation to HIV-transmission. This thesis critiques the literature by uncovering what is in fact a poor rendering of the nature of the law 'itself' and of the relationship between law and the disciplines of public health and health promotion. This thesis, then, is about the questioning and critique of proposals for law reform and decriminalisation by providing a more nuanced but also more accurate characterisation of the criminal law than the one provided by the literature in this area.

1.5 Critique

Whilst the analysis offered of the work throughout this thesis might well be applicable to other issues where health and law intersect, the specific move away from the position of a reformist-minded assessment of the correctness, utility or otherwise of the way we govern HIV may well cause some to question the value of the analysis. Whilst the production of policy advice based on thorough analysis is a valuable undertaking, this form of inquiry and research, which characterises most of the anti-criminalisation scholarship to-date, is not what this thesis hopes to achieve. In fact, the central position of this kind of inquiry within the corpus of HIV-related offences literature is perhaps one of the significant issues with which this thesis takes issue. The production of further and further reams of policy-centred research, extolling the 'current state' of HIV-related offences and proving comparison with the ascendant public health discourse is far from what is required. Instead, the work of a more critical vein seen in Matthew Weait[113] or Peter Rush,[114] which is discussed below, is what is

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[111] For example see: UNAIDS, 'Summary of main issues and conclusions. International Consultation on the Criminalization of HIV Transmission: Joint United Nations Programme on HIV/AIDS United Nations Development Programme' (2007).

[112] Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007).

[113] Ibid.

[114] Peter Rush, 'HIV transmission and the jurisdiction of criminal law' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 74-90.

required to ensure that the debate and its eventual outcomes in law reform, policy shifts or other practical measures does not embed or re-introduce the problems which such action and policy-focused research hoped to solve.

In this way, I take my lead here from Foucault himself and his thinking on the centrality of criticism where "[t]he necessity of reform mustn't be allowed to become a form of blackmail serving to limit, reduce, or halt the exercise of criticism. Under no circumstances should one pay attention to those who tell one: "Don't criticise, since you're not capable of carrying out a reform"."[115]

So what then is the value of critique as such? In this case it is the chance to stop and review the basic operating assumptions utilised by the various encampments engaged in the turf-war between the criminal legal and public health approaches to HIV-transmission. It is a practice which in the words of Wendy Brown and Janet Halley:

> offers possibilities of analysing existing discourses of power to understand how subjects are fabricated or positions by them, what powers they secure (and disguise or veil), what assumptions they naturalize, what privileges they fix, what norms they mobilize, and what or whom those norms exclude. Critique is thus a practice that allows us to scrutinize the form, content, and possible reworking of our apparent political choices; we no longer have to take them as givens. Critique focuses on the workings of ideology and power in the production of existing political and legal possibilities. It facilitates discernment of how the very problem we want to solve is itself produced, and thus may help us to avoid entrenching or reproducing the problem in our solutions. It aims to distinguish between symptoms and sources, as well as between effects of power and origins of power. It invites us to analyse our most amorphous and inchoate discontents and worries, indeed to let these discontents and worries themselves spirit the critique. And it invites us to dissect our most established

[115] Michel Foucault, 'Questions of Method ' in Colin Gordon Graham Burchell, Peter Miller (ed), *The Fouculat Effect: Studies in Governmentality* (University of Chicago press, 1991), 84.

> maxims and shibboleths, not only for scholastic purposes, but also for the deeply political ones of renewing perspective and opening new possibility.[116]

In particular, the motivation for this research is prompted by Peter Rush's insight that it is an open question as to how to properly represent HIV within the criminal law, without necessarily advocating for criminalisation.[117] I develop the answer to this open question by integrating the insight of Golder and Fitzpatrick as well as that of Rush as to the law's inherent instability where law, constantly displaced by things external to it, is made new again through this very displacement.[118] This work of critique, then, assists us to extend our frame of reference, to illuminate the areas and activities which have formerly been rendered invisible. This work will help us to see what we might do in relation to HIV-related law. Again, it is my hope that in drawing into this critique the fundamental maxims and positions contained in the anti-criminalisation discourse in relation to its understanding and portrayal of law, this work might add to deeper discernment in relation to actions which may follow. This is in aid of, as Brown and Halley hope also, avoiding a position which entrenches or re-inscribes the problem(s) which such action hopes to solve. This concern is to avoid misunderstanding the vital interconnection between law and public health. If misunderstood, both law and public health will struggle to find continued legitimacy and authority in relation to engagement with HIV-transmission. It is argued below that in fact law and public health are interrelated, constituted in a co-determined relationship where law cannot be critiqued without consequence for its 'other', namely, public health, which has been conventionally regarded as being 'outside' law, separate and without need for law. Rather, following Foucault, I show that public health and law each do important work for the other either in providing definite content to a formless and basically empty law or by buttressing public health's identity and claim to authority in relation to HIV and its field more broadly.

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[116] Wendy Brown and Janet E. Halley, *Left legalism/left critique* (Duke University Press, 2002). 26-7.

[117] Peter Rush, 'HIV transmission and the jurisdiction of criminal law' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 74-90, 81.

[118] Ibid., 81. Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 71-80.

1.5.1 A Foucauldian Vision of Law.

As noted above, HIV takes on a range of different and varied meanings across time, cultures and spaces. The specific meaning which we are interested in interrogating here is the meaning of HIV as a specific form of criminal harm. These HIV-related criminal offences however form a part of broader and less examined public health law which shares some significant affinities and connections with the currently more controversial HIV-related criminal offences. This broader public health law includes disclosure regimes[119] and public health orders[120] which form a part of the apparatus of quarantine with their focus on the restriction of physical liberty, compulsory testing, treatment and restriction of certain activities or attending certain spaces.[121] These broader HIV-related laws are examined in some ways in this thesis and their provisions, including recent amendments, are outlined in Chapter Two to assist in more detailed thinking on these provisions.[122] The focus however remains those HIV-related criminal provisions, in particular assault offences, which exist in NSW.

The literature of the anti-criminalisation scholarship is one which rests upon a vision of the criminal law as fundamentally incompatible with public health aims. The strong calls for law's expulsion from the scene of HIV-transmission, argued across the literature,[123] brings to mind the account of Foucault's work which renders law 'expelled' from the operation of modern power most strongly argued by Hunt and Wickham in their *Foucault and Law: Towards a Sociology of Law as Governance*.[124] This thesis presents a different way of thinking about HIV transmission and the law. In working towards this goal a re-

[119] *Public Health Act 1991* (NSW) s13.

[120] Ibid., s23.

[121] Ibid., s23(3).

[122] *Public Health Act 2010* (NSW).

[123] For example: Sally Cameron, 'HIV, Crime andthe Law in Australia: Options for Policy Reform - a law reform advocacy kit' (Pt AFAO) (February, 2011)(Discussion Paper) <http://www.afao.org.au/library_docs/policy/DP0211_HIV_Crime_and_the_Law.pdf>; Sally Cameron and John Rule, 'Outside the HIV strategy: challenges of 'locating' Australian prosecutions for HIV exposure and transmission.' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 18-30; Richard Elliott, UNAIDS Best Practice Material, *Criminal Law, Public Health and HIV Transmission: A Policy Options Paper* Joint United Nations Programme on HIV/AIDS (UNAIDS) No (2002); Ralf Jürgens et al, *10 Reasons to Oppose Criminalization of HIV Exposure or Transmission*, The Open Society Institute, Open Society Foundations (soros.org) No (2008); Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007).

[124] Alan Hunt and Gary Wickham, *Foucault and law : towards a sociology of law as governance* (Pluto Press, 1994).

characterisation of the law is required so that a re-positioning of legal and public health approaches to HIV-transmission might take place. This re-positioning, influenced by Foucauldian jurisprudence, renders law and public health as co-constituted and interrelated.

What has become known as the 'expulsion thesis' in the post-Foucault literature concerns this alleged expulsion of law from his formulations of how power operates in modernity. This thesis, proposed most strongly by Hunt and Wickham,[125] is both an argument about the 'correct' interpretation of what view Foucault *himself* argued but also about the actual place of law within modern operation of power.[126] This view of law comes from a reading of Foucault's development of his theory of power (rather than of law only). Instead of seeing the debate through the lens of a kind of public health epistemology – a discourse of public health which sees law's relationship to public health rendered in opposition – I instead use recent work in the post-Foucault expulsion thesis debate to break down the sense that such a dominant way of thinking might be the *only* way of thinking. Instead of seeing 'criminal law' as something unique, operating only in a certain form of oppressive manner, I instead use Foucault here to break down that understanding of the operation of power and law. I show that law, in some practical senses is productive, rather than simply the well-known, familiar litany of prohibition, demarcation and authorisation.

1.6 Structure of the Thesis

I begin the following chapter by outlining and discussing the various elements of HIV-related law which operate in NSW including both criminal offences as well as administrative provisions related to public health regulations and powers. This includes an overview of key criminal statutes and case law as well as a discussion of recent amendments to administrative provisions which work to significantly expand administrative powers in relation to communicable diseases, powers of quarantine and surveillance.

Next, in Chapter Three, the hegemonic view of the criminal law 'itself', as well as in its operation is outlined. This chapter undertakes a reading of key examples of the HIV-related criminal law literature and extrapolates from it a vision of law as mechanical, negative, limited and determinate. It pursues the literature's vision of law to conclude that law and

[125] Ibid.

[126] Hunt and Wickham are of course not the only writers to have made this point or to have presented law in this way, see Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009). 13.

public health are constructed in this field as separately constituted, independent, working at odds with one another. It is at the close of this chapter that the complete picture of the law as understood by the HIV-decriminalisation literature is established.

To provide a critique of this picture of the law and its relationship to public health, Chapter Four engages with the work of Foucault and his recent interpreters. In this exegetical engagement with the work of Foucault, his understanding of power is first established. An engagement with Foucault's thinking in relation to law is then undertaken. Foucault did not write great volumes of work on 'the law' specifically. Thus, rather than what might come of a sustained meditation upon the working and nature of the law alone, law is treated here as it was by Foucault: in and amongst the explication of the development of his theorisation of power, and in particular of the specific modes of disciplinary power (*Discipline and Punish)*[127] and bio-power (*The History of Sexuality).*[128]

It is his consideration of law, particularly during the 1970s, from which has what has been termed the 'expulsion thesis', briefly introduced above. The expulsion thesis argues that Foucault either rendered law as subject to other forms of modern power (namely discipline and bio-power) or that he expelled it completely from the operation of power in modernity. It is this perspective on Foucault's vision of law which Golder and Fitzpatrick critique in their work by providing a more nuanced reading of Foucault's substantive writing, thus providing a renewed vision of law 'itself' and its operation in modernity. For Golder and Fitzpatrick law is not only fixed and determinate nor instrumentally subordinated or expelled from the operation of power in modernity but is instead also a responsive and pervasive law and a surpassing law, eluding total control by any power. I outline Golder and Fitzpatrick's rejoinder to the expulsion thesis, and move then to apply their revised vision of 'Foucault's Law' to the case of HIV-related criminal law in this same chapter. This application sees HIV-related criminal law and public health re-imagined through the application of 'Foucault's Law' to various instances of the operation of HIV-related criminal law and public health interventions. The resulting vision of law and public health which shows the dependence of each upon the other, with law dependent on powers external to itself to provide definite content to its otherwise empty character and public health buttressed by law's role as a limit

[127] Michel Foucault, *Discipline and Punish* (1978).

[128] Michel Foucault, *History of Sexuality* vol 1.

against which public health establishes its authority and from which public health gains an imprimatur for its knowledge claims.

In conclusion to this thesis then, I attempt a recharacterisation of legal intervention in relation to HIV-transmission and a reassessment of the law reform approach currently ascendant in the Australian literature.

2 HIV-Related Law in NSW

The emergence of infectious diseases has occurred throughout history and legal responses to them have varied across time. They include in the common law heritage significant criminal cases such as *R v Clarence* [129] and in the administrative law the 19th century *Contagious Diseases Acts* of the mid to late 1800s[130] not to mention commentary in the 1670 Hale's History of the Pleas of the Crown.[131] Today's public health and infectious diseases legal framework includes both international and domestic law and in Australia remains largely within the remit of state and local government.[132] In this chapter I present the law as it applies in New South Wales (NSW). I present both the criminal law and administrative provisions which relate to both HIV-transmission specifically, communicable disease control more generally, sexually transmissible infections specifically and other public health surveillance, quarantine and control measures which may relate to HIV-transmission. It is quite a clinical presentation of the law as it stands, presenting the law with commentary where appropriate in order that discussion of the anti-criminalisation literature might be given its proper legal context for NSW. The treatment of new and as-yet ungazetted public health law is provided not only to provide a charting of the shifting emphasis and powers granted to public health authorities in relation to HIV and communicable disease control, but also, it is hoped, as a resource for further inquiry into the operation of these laws which in the literature is largely accepted without any hint of critical analysis.[133]

2.1 Current Law in Relation to HIV Transmission

As noted above, HIV takes on a range of different and varied meanings across time, cultures and spaces. The specific meaning which we are interested in interrogating here is the meaning of HIV as a specific form of criminal harm. These HIV-related criminal offences however, form a part of broader and less examined HIV-related law which shares some

[129] *R v Clarence* (1888) 22 QB 23.

[130] Margaret Hamilton, 'Opposition to the Contagious Diseases Acts, 1864-1886' (Spring, 1978) 10(1) *Albion: A Quarterly Journal Concerned with British Studies* 14.

[131] J R Spencer QC, 'Liability for Reckless Infection - Part 1' [384] (2004) 154(7119) *New Law Journal* 384.

[132] Christopher Reynolds and Genevieve Howse, *Public health law and regulation* (Federation Press, 2004).

[133] For example see: David Scamell and Chris ward, 'Public health laws and politics on the issue of HIV transmission, exposure and disclosure' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS (NAPWA), 2009).

significant affinities and connections with the currently more controversial HIV-related criminal offences, namely HIV-related administrative provisions.

Laws are regimes of practices that operate in the terrain of the governance of HIV. These regimes of practices seem at first reading to be relatively organised, complex, rational routines and ways of doing things which aim to direct conduct in relation to HIV. This vision of law is critiqued in subsequent chapters, however, at this stage, it is important first to engage in a thorough outline of the criminal and administrative legal interventions currently available in NSW.

2.2 Criminal Law

HIV-related criminal provisions in NSW are established by statute rather than through the evolution of the common law as has been the case in the UK.[134] These HIV-related offences in NSW include murder,[135] manslaughter by criminal negligence,[136] manslaughter by unlawful and dangerous act[137] and most importantly assault[138] and other specific statutory offences.[139]

As there has been very limited prosecutorial activity in relation to HIV-related offences in NSW[140] and in Australia more generally, when viewed as a percentage of total episodes of transmission, the law has had limited application.[141] As such, there is limited judicial commentary – authoritative or otherwise – available to add depth to the discussion of offences although there is a long and developed body of judicial opinion and refinement of the general offences such as assault, which HIV transmission is now regarded as an instance

[134] Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007), 90-98 especially.

[135] *Crimes Act 1900* (NSW) s18(1).

[136] An offence of the common law.

[137] Similarly, an offence of the common law.

[138] *Crimes Act 1900* (NSW) s36.

[139] See below for other specific statutory offences.

[140] Gina Mitchell and Melissa Woodroffe, 'Criminal Transmission of HIV: A Guide for Legal Practitioners in NSW' HIV/AIDS Legal Centre Inc., 18 April, 2011) 48 <www.halc.org.au/downloads/crim_transmission.pdf >.

[141] Rather than this lack of prosecutorial activity being a sign of a lack of importance, the law retains importance not only because of its symbolism, political impact and other such reasons, but also because, as it shall be shown in Chapter Four, this lack of prosecutorial activity in fact does important work for public health and is in fact a sign of law operating in a manner which is outside the standard accounts of it in the anti-criminalisation literature.

of. Because of this underdeveloped state of HIV-related offences I have chosen to structure my exposition of HIV-related law in the same manner presented in the leading HIV transmission legal guide, *Criminal Transmission of HIV: A Guide for Legal Practitioners in NSW*,[142] so as to hopefully assist in deepening the information presented there and to allow ease of comparison and cross-referencing with this authoritative resource which will likely inform much policy and community activists on the specifics of HIV-related law in NSW. This guide presents the law under the guise of considerations for the prosecution and the defence with some discussion of specific evidentiary and human rights law as they relate to HIV-transmission.

The Crimes Act 1900 (NSW) is the principal legislative source of the criminal law which works to constrain, direct and legitimate certain behaviours of bodies which come into contact with HIV within NSW. It is also the place where serious offences are enumerated or codified consistent with the doctrines of liability established by a traditional criminal law. The Act is updated and the subject of constant review through various legislative processes and works to define the acceptable borders, outside of which behaviour will be regarded by the law as 'criminal' in nature and, further, will trigger a range of penal sanctions.

The Act does not specifically refer to HIV, AIDS or even to 'sexually transmissible medical conditions' as does the *Public Health Act 1991* (NSW) which is referred to below. Rather HIV is implicated in various offences through the definition of what constitutes a criminal harm through the infliction of a "grievous bodily disease"[143] (a "really serious"[144] bodily disease) rather than a specific offence of HIV-transmission per se.

The *Crimes Amendment Act 2007* (NSW) which was assented to on 27 September, 2007, is the key enabling legislation for HIV-related offences as they currently stand. The *Crimes Amendment Act 2007*(NSW) worked to remove s36, which contained a stand-alone offence of causing a grievous bodily disease[145] replacing it with an assault offence of general application which is discussed below.

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[142] Gina Mitchell and Melissa Woodroffe, 'Criminal Transmission of HIV: A Guide for Legal Practitioners in NSW' HIV/AIDS Legal Centre Inc., 18 April, 2011) <www.halc.org.au/downloads/crim_transmission.pdf >.

[143] *Crimes Act 1900* (NSW) s4.

[144] *DPP v Smith* [1961] AC 290.

[145] *Crimes Amendment Act 2007* (NSW) Sch 1 Item 9.

2.2.1 Murder

Murder is the most serious of offences in the criminal law, carrying the harshest penalties and perhaps still the strongest sense of societal disapproval.[146] Whilst no such prosecution has ever been brought in NSW or Australia, it is theoretically possible that HIV-transmission could found a charge of murder in some specific cases.

Section 18 of the *Crimes Act* sets out the various mental elements for a charge of murder, whilst the elements of manslaughter are contained in the common law:

1)

a) (a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.

b) Every other punishable homicide shall be taken to be manslaughter.

2)

a) No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.

b) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only.

<u>Murder and Manslaughter: Actus Reus and Causation</u>

The dense definition of murder in the *Crimes Act* is the result of its development in this jurisdiction and others throughout the common law. As such a detailed and accurate

[146] Murder has been described as the most serious offence in the criminal calendar*: R v Penisini* [2003] NSWSC 892 at [82]; *R v Dalley* (2002) 132 A Crim R 169 at [95]. It carries a maximum penalty of life imprisonment: *Crimes Act 1900* (NSW) s19(a).

understanding of the offence, the definition of various elements and others relies on an understanding of the common law in addition to this.

For HIV-related murder charges to be laid, like other forms of murder, the common law rules of causation and defining the 'act' in question must be satisfied. In this case the old common law rule which required death to occur within one year and one day from the act or omission would have rendered a murder charge founded upon HIV transmission almost impossible. Particularly today where successful therapies have lengthened the expected life-span of those living with HIV this rule would have precluded HIV-transmission founding a charge in anything but the most exceptional cases.[147] This rule however was amended in NSW in 1990 so that it is a question of fact (for the jury to decide) if the act of HIV-transmission was the "operating and substantial cause of death."[148] Further, significant evidentiary challenges exist in proving to the criminal standard, of beyond a reasonable doubt, that the defendant did in fact transmit HIV to the victim.[149]

Attempts to Corral Prosecutorial Discretion

Murder charges have been successfully laid in the Canadian jurisdiction[150] and the willingness of the Courts to award damages of $750,000 in a recent landmark civil case[151] regarding HIV-transmission in this jurisdiction points to an expansion of liability which may, in due course, see a charge of murder arise due to HIV-transmission. HIV infection does work to reduce life-expectancy, and this eventuality sees the authors of *The Criminal Transmission of HIV* note the need for prosecutorial guidelines in the case of murder and

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[147] The authors of Criminal Transmission of HIV note the theoretical possibility of HIV super-infection causing a death from HIV/AIDS within this time period (Gina Mitchell and Melissa Woodroffe, 'Criminal Transmission of HIV: A Guide for Legal Practitioners in NSW' HIV/AIDS Legal Centre Inc., 18 April, 2011) 14 <www.halc.org.au/downloads/crim_transmission.pdf >.) – a risk which more recent guidelines for Sexually Adventurous Men (Positive Life NSW and AIDS Council of New South Wales (ACON), 'Risk Reduction Strategy Paper: Gay Men's HIV Prevention 2010-2012' <positivelife.org.au/risk-reduction-strategy >.) seem to regard as negligible.

[148] *R v Hallett* [1969] SASR 141.

[149] Edwin J. Bernard et al, *The use of Phylogenetic analysis as evidence in criminal investigation of HIV transmission: A Briefing Paper* (National AIDS Trust and NAM, 2007).

[150] Gina Mitchell and Melissa Woodroffe, 'Criminal Transmission of HIV: A Guide for Legal Practitioners in NSW' HIV/AIDS Legal Centre Inc., 18 April, 2011) 21 <www.halc.org.au/downloads/crim_transmission.pdf >.

[151] Ani Lamont, '$750,000 payout for HIV infection', *Sydney Star Observer*, 27 April 2010.

manslaughter charges.[152] I however, following J R Spencer QC, feel that such guidelines are themselves problematic to warrant their drafting especially where the drafting of such guidelines can work to create a situation of law reform through prosecutorial policy rather than proper, lasting and settled reform.[153] Should advocates desire that murder and manslaughter not be available charges in relation to HIV-transmission events which satisfy the elements of murder, I believe that outright law reform is far more desirable rather than prosecutorial guidelines. It is tempting to read too much into the UK's own set of guidelines which, contrary to the wishes of its authors, does not in any way limit or define those instances where a decision will or may choose to prosecute.[154] Attempts to formulate guidelines which achieve such clarity is a form of law reform by stealth and will do greater harm to those who may come to rely on a misreading of such guidelines as an imprimatur for behaviour or actions which are prima facie still illegal and liable to be prosecuted.

Murder - Mens Rea

Establishing a murder or manslaughter charge based on HIV-transmission requires the establishment of one of various mens rea or 'mental' elements: intention to kill, intention to to inflict grievous bodily harm or a reckless indifference to life. The seriousness of the murder or manslaughter charge is reflected in the propensity of the mens rea element to move towards that of intention - a suitably high standard of mental culpability. For Jacobs J in *La Fontaine v R*[155] (*La Fontaine)*, "Recklessness…is used as a compendious word to describe actual knowledge of the consequence of an act…and positive indifference whether that consequence follows or not."[156]

At common law, a charge of manslaughter by unlawful and dangerous act however will be a version of manslaughter which may fit well with a scenario of HIV-transmission. Unlawful and dangerous act manslaughter requires that the act causing the death must be unlawful and that it created an appreciable risk of serious injury. The unlawful act requirement is that the

[152] Gina Mitchell and Melissa Woodroffe, 'Criminal Transmission of HIV: A Guide for Legal Practitioners in NSW' HIV/AIDS Legal Centre Inc., 18 April, 2011) 17, 21 <www.halc.org.au/downloads/crim_transmission.pdf >.

[153] J R Spencer QC, 'Liability for Reckless Infection - Part 1' [384] (2004) 154(7119) *New Law Journal* 384.

[154] Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007).

[155] *La Fontaine v R* (1976) 136 CLR 62.

[156] Ibid., at 95.

act be contrary to the criminal law (which as will be seen below HIV-transmission is a prima facie assault) and that the act be objectively dangerous, an objective test such that a "reasonable person would realise that it was exposing others to an appreciable risk of serious injury."[157]

Any likely prosecution of murder or manslaughter would risk the creation of a prosecutorial situation where an act demonstrating the highest standard of culpability – an event for which the swiftest form of justice would be warranted – might be a 'justice delayed' resting on the eventual death of the victim some years or perhaps decades afterwards. This likely lengthy delay in prosecuting murder of manslaughter (except perhaps attempted murder) makes the likelihood of such a charge being prosecuted highly unlikely. Even so it remains theoretically possible for any such offence being prosecuted and as such warrants at least some brief discussion.

2.2.2 Attempted Murder

Attempted murder is still governed by common law principles in NSW. Broadly speaking, rather than attempted murder in the case of HIV-transmission being a scenario of the defendant going beyond mere preparation, it would seem logically to arise in a situation where HIV-transmission could have occurred, yet for whatever reason did not. The offence requires that the accused had the intention to commit the substantive offence. Recklessness as to the substantive offence will not be enough to establish the mens rea element of attempt.[158] In this way attempted murder would require that the accused in fact, and proven beyond a reasonable doubt, had formed the intention to commit murder via the transmission of HIV.

No case of attempted murder by HIV-transmission has been brought in NSW although in the US jurisdiction one such case has been brought. This case where the accused was convicted of attempted murder for spitting on a prison guard.[159] The case is interesting because of its intersection with questions surrounding the appropriate interpretation of the risk of transmission from spitting (or for that matter other similarly 'low risk' activities) and more importantly from a legal perspective, the application of subjective and objective tests of

[157] *Wilson v The Queen* (1992) 174 CLR 313. per Mason CJ, Toohey, Gaudron and Mchugh JJ at 335

[158] *Giorgianni v The Queen* (1985) 156 CLR 473.

[159] *State v Smith* (1993) 262 NJ Super 487.

intention in relation to situations where activities understood to be dangerous were undertaken.

2.2.3 Manslaughter by Criminal Negligence

Manslaughter by criminal negligence is another offence which, whilst not having been prosecuted in NSW or elsewhere in the Australian jurisdiction, is, theoretically at least, a possible criminal offence arising in relation to an episode of HIV transmission. The description of the offence by the authors in *Criminal HIV Transmission* is short[160] as reflects the likelihood of such an offence being prosecuted. However, in their brevity they run the risk of inadequately describing the offence and its elements which may have an effect on the understanding of those situations in which prosecution of such an offence is theoretically possible. The test proposed in *Nydham v R*[161] is the authoritative test in relation to manslaughter by criminal negligence in Australia.[162]

Again, the test is complex and careful in its construction of the situations which might give rise to a finding of manslaughter by criminal negligence. The fundamental elements however are:

1. that the accused had a duty of care to the deceased;
2. that the accused was negligent in that by the accused's act, the accused was in breach of that duty of care in that the accused performed an act which breached that duty
3. that such act of the accused [caused/accelerated] the death of the deceased; and
4. that such act merited criminal punishment because:
    1. it fell so far short of the standard of care which a reasonable person would have exercised in the circumstances; and
    2. involved such a high risk that death or really serious bodily harm would

[160] Gina Mitchell and Melissa Woodroffe, 'Criminal Transmission of HIV: A Guide for Legal Practitioners in NSW' HIV/AIDS Legal Centre Inc., 18 April, 2011) 22 <www.halc.org.au/downloads/crim_transmission.pdf >.

[161] *The Queen v Lavender* (2005) 222 CLR 67. approved the test in *Nydam v The Queen* (1977) VR 430.at 17, 60, 72 and 136.

[162] In order to establish manslaughter by criminal negligence, it is sufficient if the prosecution shows that the act which caused the death was done by the accused consciously and voluntarily, without any intention of causing death or grievous bodily harm but in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.

follow; and

3. the degree of negligence involved in the conduct is so serious that it should be treated as criminal conduct.

Manslaughter by criminal negligence is interesting because it raises a new issue of breach of duty of care – which is established in certain relationships. It is also an offence which can be established by an omission to act where it was found that an omission to fulfil a legal duty may be suitable to found a prosecution. It must be an omission of a person legal duty, the omission of which represents a danger to life as a natural and ordinary consequences of the duty.[163] In the current context, an omission to fulfil the legal duty to disclose HIV status, which is discussed below, may be suitable grounds for an omission-based prosecution of manslaughter by criminal negligence. The likelihood of an omission-based prosecution being founded increases where the accused had an established relationship with the victim. It may be that evidence can be put that the accused voluntarily assumed responsibility for another such as in Taktak[164] or Stone and Dobinson[165] or that more feasibly, the circumstance of a person with HIV is found to have created a situation of danger by dealing with dangerous things or doing dangerous acts might create the legal duty to act.[166] Beyond negligent manslaughter by omission, the general rationale behind this offence is that:

> without any intention of causing death or grievous bodily harm, but in circumstances which involved such a great falling short of the standard of care which a reasonable man [sic] would have exercised, and which involved such a high risk that death or grievous bodily harm would follow, that the doing of the act merited criminal punishment.[167]

The standard of care which the accused must be found to have breached is established by an objective test. The standard of care required is that which a reasonable person in the same positions as the accused. This includes any special knowledge which the accused might have,

[163] *People v Beardsley* (1907) 113 NW 1128, at 1129-1130. Cited in *R v Taktak* (1988) 14 NSWLR 226, 242-243.

[164] *R v Taktak* (1988) 14 NSWLR 226.

[165] *R v Stone and Dobinson* (1977) QB 354.

[166] *Callaghan v R* (1952) 87 CLR 115.

[167] *Nydam v The Queen* (1977) VR 430, at 445.

which may extend to knowledge of the riskiness of engaging in unprotected or other forms of intercourse or acts whereby HIV-transmission occurred.

2.2.4 Manslaughter by Unlawful and Dangerous Act

This offence requires that an act which is both unlawful and dangerous caused the death of the victim. Importantly, it does *not* require the intention to kill or in the alternative to inflict grievous bodily harm upon the victim. As such, it is the second of the involuntary manslaughter offences (manslaughter by criminal negligence being the other). The offence itself has four elements which must be satisfied for a successful prosecution:

1. The defendant's act must cause the death,
2. The defendant's act must be unlawful,
3. The defendant's act must create an appreciable risk of serious injury,
4. The defendant's act must be objectively dangerous.

The offence itself received significant clarification in the Australian context by the High Court in *R v Wilson*[168] which confirmed the offence as a separate category of homicide. However, there remains some significant unresolved areas in relation to the offence including some important questions surrounding the issue of the exact meaning of both *unlawful* and *dangerous* for the purposes of the offence.

Although receiving a cursory consideration by the literature in relation to its application to HIV-transmission, this homicide offence represents the offence most open to application to HIV-transmission cases. Primarily, this openness to fact situations of HIV-transmission is based both on the actual construction of the offence itself, namely its reliance on an unlawful act where HIV-transmission is a *prima facie* assault and lack of a requirement of specific intent in relation to the killing of another. This last element in particular is key in relation to HIV-transmission offences, where the literature has argued strongly that those who transmit HIV do not hold an intention to cause death but may well be reckless or wilfully blind as to the risks of infection instead. They do, doctrinally speaking, support a limited mens rea (such as an intention to commit the foundational offence) but not so as to intend to kill or inflict grievous bodily harm. Such a lack of intention may well be fatal in proving other homicide

[168] *Wilson v The Queen* (1992) 174 CLR 313.

offences where intention to kill or to inflict grievous bodily harm is required, but it lacks any significance at all for the head-charge of manslaughter by unlawful and dangerous act which does not require any such intention. It does have relevance for the 'unlawful act' which forms the pre-requisite for the head-charge of manslaughter but, in relation to HIV-transmission, *intention*, *recklessness* and perhaps also *negligence* will all suffice as suitable mental elements to make out a foundational offence which would be a suitable pre-requisite offence being both *unlawful* and *dangerous*.[169] Assault would be an example. For these reasons the offence of manslaughter by unlawful and dangerous act deserves more consideration than it has been given in the literature to-date. The significant hurdle to the offence being prosecuted at all remains the same for all homicide cases – the possibility of an absurdly long wait until such a charge might be laid, requiring the death of the victim prior to the offence having been 'completed' as it were.

The second limb of the test of manslaughter by unlawful and dangerous act remains one of the less settled elements of the offence and one to which the Court in *R v Wilson*[170] did not add a great deal of clarity. For an act to give rise to a charge of manslaughter it must be both 'dangerous' and 'unlawful' whilst also leading to the death of the victim.[171] The unlawfulness required of an act in this situation was once more broad than it is today. Originally an unlawful act could consist of a tortious wrong or any other unlawful act, broadly defined. Today however, the Courts only regard criminally unlawful acts as satisfying the definition of unlawfulness for the purposes of unlawful and dangerous act manslaughter.[172] As the Victorian Law Reform Commission wrote "...the requirement of unlawfulness had nothing relevant to add. Dangerousness is the key element and it is satisfied by an objective test."[173] HIV transmission as a criminal offence, and one which is not regarded as one of the mere 'technical' criminal offences, would both satisfy the test and also form a suitable foundational offence.In the case of HIV-transmission-based unlawful and dangerous act manslaughter, the underlying unlawful and dangerous act might well be that of an assault charge, which

[169]It is still unclear if other non-criminal offences (those technically still 'unlawful' if broken) will suffice to form the pre-requisite offence required for a charge of manslaughter by unlawful and dangerous act. In this case non-disclosure (an unlawful act by reason of the Public Health Act NSW) may suffice as a pre-requisite offence.

[170] *Wilson v The Queen* (1992) 174 CLR 313.

[171] Ibid.

[172] *Pemble* (1971) 124 CLR 107.

[173] Victorian Law Reform Commission, *Homicide* (1991), 113.

transmission of HIV constitutes a *prima facie* example of. The dangerousness of which will be a question for the jury to decide based on the clarification provided in *R v Wilson*.[174]

This third limb of the offence was the key consideration in *R v Wilson* where the High Court proposed a slightly revised definition of what constituted a 'dangerous act' for the purposes of the offence.[175] NSW and Victorian Courts had utilised slightly different definitions up until this time which the Court resolved by rejecting the broader NSW test based on the English decision of *Larkin*[176] and instead chose the slightly more narrow test which the Victorian Courts had been using from the case of *Holzer*[177]:

> Authorities differ as to the degree of danger which must be apparent in the act. The better view, however, is I think that the circumstances must be such that a reasonable man in the defendant 's position, performing the very act which the defendant performed, would have realised that he was exposing another or others to an appreciable risk of really serious injury.[178]

This more narrow test chose phrasing of an "appreciable risk of really serious injury"[179] in rejecting the broader phrasing of "at least the risk of some harm resulting therefrom, albeit not serious"[180] which NSW had continued to apply and the minority of the High Court (Brennan, Deane, Dawson JJ) had approved of.[181] Instead the majority of the Court slightly modified the test in *Holzer* where they felt: "it is better to speak of an unlawful and dangerous act carrying with it an *appreciable risk of serious injury*."[182] It is therefore now a question for the jury to resolve as to whether an act satisfies the test of a sufficient likelihood or risk of serious injury to be regarded as *dangerous.* In relation to HIV-transmission however, the language of *Wilson* speaks to typical violence – such as that of a punch to the

[174] *Wilson v The Queen* (1992) 174 CLR 313.wils

[175] Ibid., at 335 per Mason CJ, Toohey, Gaudron and McHugh JJ.

[176] *Larkin* [1943] 1 All ER 217.

[177] *Holzer* [1968] VR 481.

[178] *Wilson v The Queen* (1992) 174 CLR 313, at 335 per Mason CJ, Toohey, Gaudron and McHugh JJ.

[179] Ibid., at 335 per Mason CJ, Toohey, Gaudron and McHugh JJ.

[180] Ibid., at 341.

[181] Ibid., at 341.

[182] Ibid., 333 per Mason CJ, Toohey, Gaudron and McHugh JJ.

face – rather than the kind of physical harm or injury which HIV might be understood to be. In this way an instance of HIV-transmission might stretch the traditional test quite significantly.

2.2.5 Assault and Specific Statutory Offences

Whilst there are a significant range of offences which are theoretically available in the case of HIV-transmission where death has occurred in NSW, as mentioned above, the practical implications of having to await the death of the victim in order that such an offence be prosecuted will make the pressing of homicide charges highly unlikely. Instead, as has been the case in other Australian and international jurisdictions, assault charges tend to be the offences most frequently prosecuted in the context of HIV-transmission. These offences generally rest on the event of HIV-transmission and in NSW would be brought under sections 33 and 35 of the *Crimes Act 1900*.

Wounding or Grievous Bodily Harm with Intent

Section 33 (1): Intent to cause grievous bodily harm

A person who:

(a) wounds any person, or

(b) causes grievous bodily harm to any person;

with intent to cause grievous bodily harm to that or any other person is guilty of an offence.

Maximum penalty: Imprisonment for twenty five years.

Reckless Grievous Bodily Harm or Wounding

Section 35 (1): Reckless grievous bodily harm-in company A person who, in the company of another person or persons, recklessly causes grievous bodily harm to any person is guilty of an offence.

Maximum penalty: Imprisonment for fourteen years.

Section 35 (2): Reckless grievous bodily harm

A person who recklessly causes grievous bodily harm to any person is guilty of an offence.

Maximum penalty: Imprisonment for ten years.

These two sections divide what was a unitary offence of grievous bodily harm into two offences, one based on intention of infliction of grievous bodily harm and the other on the reckless infliction of the same.

This division of the two forms of grievous bodily harm was made under the *Crimes Amendment Act* 2007 (NSW) (*Crimes Amendment Act*) as an outcome of the removal of the term 'malicious' from a range of criminal offences contained within the *Crimes Act 1900* (NSW) including that of the then section 35 offence of 'Malicious Wounding or Infliction of Grievous Bodily Harm'.[183] In that amendment the legislature moved to replace the word 'malicious' with the word 'reckless'. This change necessitated the splitting of the old section 35 offence which was so worded as to make both intentional and reckless infliction of grievous bodily harm an offence through reference to 'whosoever maliciously by any means...'. In this way the amendment preserved both the reckless and intentional infliction of grievous bodily harm. Whilst this modernisation of the criminal law through the *Crimes Amendment Act* had little to do with HIV-related offences, the same act altered the definition of 'grievous bodily harm' itself to now include within that definition "any grievous bodily disease (in which case a reference to the infliction of grievous bodily harm includes a reference to causing a person to contract a grievous bodily disease)."[184] This amendment of the definition of grievous bodily harm was made in parallel with the repeal of the separate offence found in section 36 of 'causing a grievous bodily disease' the effect of which was to bring the causing of a grievous bodily disease into the general law of assault, namely through the offence of intentionally or recklessly inflicting grievous bodily harm.

Recklessness

Recklessness is a category of *mens rea* which looks to the state of mind of the person who is aware that a particular consequence is likely to result from their act. Actual awareness, foresight, knowledge or a realisation of a risk is the essential element of proving the *mens rea* element of recklessness (the preferred method of referring to recklessness being foresight). The element of recklessness itself is an element of a range of crimes in NSW including

[183] *Crimes Amendment Act 2007* (NSW) Schedule 9, Item 1

[184] *Crimes Amendment Act 2007* (NSW) Schedule 9, Item 1. Now see *Crimes Act 1900* (NSW) s4 'Definitions'.

infliction of grievous bodily harm as found in s35 of the *Crimes Act 1900*. It is made out if the jury is satisfied beyond a reasonable doubt that the injury was caused recklessly by the accused. To recklessly cause an injury occurs where the defendant realised that a specified harm may possibly be inflicted upon the victim by their actions, but went ahead and acted as they did anyway. The test for recklessness thus has within it two parts, a test of the *degree* of harm but also the degree of foresight. On this second point the literature gives an unclear and perhaps misleading exposition of the current state of the law regarding the degree of foresight required.[185] The authors of *Criminal Transmission of HIV*, describe the degree of foresight required thus:

> The degree of foresight required for this offence has been compared with the tests for recklessness used to establish the offence of murder (*Crabbe v R* and *Royall v R*). The prosecution must prove beyond a reasonable doubt that the accused person foresaw that grievous bodily harm (here infection with HIV) would be the *probable* result of the accused person's acts. Probability is a higher test to establish than mere possibility. Where it is merely possible (but not likely) that HIV infection will occur as a result of the act, the offence will not be established. The High Court's reasoning in Crabbe was applied in both R v Reid at 7-11 and in Mutemeri v Cheesman at 400.[186]

Whilst the authors are correct in pointing to the Court's consideration of recklessness for the offence of murder, perhaps due to a lack of clarity in drafting here, they go no further than noting that the test of foreseeability for the offence of recklessly inflicting grievous bodily harm has been "compared"[187] with the test in cases of murder. The risk run here is that in describing the test of recklessness in the case of homicide offences the authors risk seriously confusing the important differences of this the test for recklessness in the case of less serious offences such as grievous bodily harm. In fairness, the case law on this matter is surprisingly unsettled with superior courts in Queensland and Victoria applying tests for recklessness in HIV cases which would arguably represent bad law in NSW at least.

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[185] Granted, this is an area of law which is currently not completely settled.

[186] Gina Mitchell and Melissa Woodroffe, 'Criminal Transmission of HIV: A Guide for Legal Practitioners in NSW' HIV/AIDS Legal Centre Inc., 18 April, 2011) 25, emphasis my own. <www.halc.org.au/downloads/crim_transmission.pdf >.

[187] Ibid.

The High Court in *Crabbe*[188] considered the nature of recklessness in relation to the exact level and type of foresight that is required to establish recklessness in a case of *murder*. The choice which the Court was faced with was to endorse a level of foresight required where the defendant was required to foresee the *possibility* or the *probability* that their conduct may cause death of serious injury. In a unanimous judgement, the Court held that in cases of *murder* the required level of foresight was that the defendant had to have known that death or grievous bodily harm was the *probable* consequence of their actions.[189] For less serious offences however the strict definition does *not* apply and instead the broader definition defined by the *possibility* rather than the stricter *probability* requirement still stands. This position has been confirmed by the NSW Court of Criminal Appeal in *Coleman v R*[190] and would therefore be the correct definition of recklessness for any HIV-related grievous bodily harm prosecutions in New South Wales at least:[191]

> As the High Court made it clear in R v Crabbe, although there had previously been some difference of opinion in that Court as to the appropriate test for murder, the balance of opinion had been in favour of "probable" which had been stated to be the law as long ago as 1877 in Stephen's Digest of Criminal Law (art 223). There was no change in the law intended by the High Court when it stated (at 469) that such should now be regarded as settled law in Australia.
>
> At the time of that decision, it was also generally accepted law in Australia that, in statutory offences other than murder, the degree of recklessness required in order to establish that an act was done maliciously was a realisation on the part of the accused that the particular kind of harm in fact done (that is, some physical harm — but not necessarily the degree of harm in fact so done) might be inflicted (that is, may possibly be inflicted) yet he went ahead and

[188] *Crabbe v R* (1985) 156 CLR 464.

[189] Ibid.

[190] *R v Coleman* (1990) 19 NSWLR 467

[191] see *R v Coleman* (1990) 19 NSWLR 467 , above, at 475 and *R v Stokes and Difford* (1990) 51 A Crim R 25 at 40; *Pengilley v R* [2006] NSWCCA 163 at[45.

> acted. That general acceptance in Australia appears to have flowed from the decision of the English Court of Criminal Appeal in R v Cunningham, as explained by that Court in R v Mowatt [1968] 1 QB 421 at 426.[192]

and later at 476:

> The contemplation by the accused of the probable consequence of death is required for murder because it has to be comparable with an intention to kill or to do grievous bodily harm. Such a test of probable consequences is by no means required in relation to lesser crimes as a matter of law, of logic or of commonsense.[193]

This opinion of the Court was then subsequently confirmed in *R v Stokes and Difford*[194] where the Court cited approvingly the position in *Coleman* that the "decision in *Crabbe* should not be interpreted as requiring any change in that generally accepted law" [195] in Australia as expounded in the line of cases from *Cunningham* and *Mowatt* then adopted approvingly in *Coleman.* Similarly, in *Pengilley v R*[196] McColl JA (with Adams and Latham JJ concurring) stated the correct position of the law after a discussion of the possibility/probability question as being "foresight of the possibility that some injury such as was caused might result, but nevertheless proceeded to act."[197]

However, confusion exists due to the alternative direction given in at least two cases involving HIV-transmission in the jurisdictions of Victoria and Queensland. These two cases are cited in the literature as instances where "the High Court's reasoning in *Crabbe* was applied"[198] that is, the High Court's reasoning in relation to the extent of foresight required in

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[192] Ibid., 475.

[193] Ibid., 476.

[194] *R v Stokes and Difford* (1990) 51 Crim R 25.

[195] Ibid., at 40.

[196] *Pengilley v R [2006] NSWCCA 163.*

[197] Ibid.

[198] Gina Mitchell and Melissa Woodroffe, 'Criminal Transmission of HIV: A Guide for Legal Practitioners in NSW' HIV/AIDS Legal Centre Inc., 18 April, 2011) 25 <www.halc.org.au/downloads/crim_transmission.pdf >.

Australian in relation to homicide cases (that of *probability*) has been applied to at least two cases of less serious offences in relation to HIV-transmission, namely, *R v Reid*[199] and *Mutemeri v Cheesman.*[200]

The case of *R v Reid*[201] was a case heard in Queensland regarding the prosecution of Reid for unlawfully transmitting a serious disease with intent where he was sentenced to ten years and six months imprisonment. On appeal, which was dismissed, McPherson J, Keane JA (Chesterman J agreeing) gave consideration to the correct definition of intent and recklessness. McPherson JA held that in fact the trial judge did err in their direction to the jury however Keane J (Chesterman J agreeing) felt that the directions given to the jury were adequate on that count.[202] This finding however should not be understood to endorse the *Crabbe* formulation requiring *probability* or *likelihood* as the correct *degree of recklessness* required for offences other than murder. The better reading of both the judgements of McPherson JA and Keane J must carefully note the specifics of both Queensland law and the question at hand.

In relation to those issues under consideration here, the reasons of Keane JA for the majority are clear in his finding that the decision in *Crabbe* must be distinguished in Queensland. He states "it might be said that the discussion in these authorities and some of the texts is confined to the intent in murder; but that is not how I read the introductory qualification in *R. v. Crabbe* "*if no statutory provision affects the position*".[203] More specifically for Keane JA "it is clear that, in relation to the present case, the position is indeed affected by statutory provision. The language of the *Criminal Code*, and in particular s. 317(b), obviates the need for any elaboration of the meaning of "intent" in the *Criminal Code* by reference to common law concepts of foreseeability, likelihood and probability."[204] Thus the decision in *R v Reid* must be distinguished from the position in NSW. The position stated in *Crabbe* arguably remains good law as opposed to Queensland as a code jurisdiction for which the definition in *Crabbe* is affected by statute (code) in that State. The position in *Crabbe*, confirmed in *R v*

[199] *R v Reid* [2006] QCA 202.

[200] *Mutemeri v Cheesman* (1998) 100 AcrimR 397 at 400.mut

[201] *R v Reid* [2006] QCA 202.

[202] Ibid., per Keane J at 71.

[203] ibid.

[204] Ibid.

Coleman[205] is that the level of foresight required in a homicide case is that of *probability* but in other instances (such as grievous bodily harm with which we are concerned here) the test remains the less stringent one of the *possibility* of harm. To regard the finding of the Queensland court as instructive in relation to the law in NSW is thus risky. Good law in NSW, and other common law jurisdictions where no modification by statute has taken place, is still the definition in *Crabbe* which proposes the test of probability. Whilst this position remains open to either legislative modification, the position of the law in NSW on this count currently widens the possibility of prosecution for reckless infliction of grievous bodily harm somewhat. It means that the required foresight is that the accused person foresaw that grievous bodily harm (here HIV infection) would be a *possible* result of their act or omission rather than the test which applies for homicide cases of the *probable* result of their act or omission. This less stringent construction of the required foresight of the accused then will turn on the actual knowledge of the accused as to their serostatus and any consideration of wilful blindness on the part of the accused.

Knowledge of the Accused

For a person to be successfully prosecuted for reckless infliction of grievous bodily harm they must have had actual knowledge of their HIV positive status. The degree of harm required, which is the first element of recklessness, has very recently been reformulated in NSW. The accused now must have chosen to engage in an act, in this case sexual intercourse or otherwise, whilst being aware that *grievous bodily harm* would be a possible outcome of their actions. The case of Blackwell[206] has seen the test of the degree of harm changed from the accused being required to have had some foresight of the possibility that 'some physical harm' (even some harm which is far less serious than grievous bodily harm) would possibly have been inflicted. This change in the requirement was motivated by the removal of the requirement for malice described above, where the court felt that this required a new approach and reading of the law. The previous formulation in relation to HIV would have allowed for an accused to have had subjective foresight of the possibility that their actions would transmit a less serious sexually transmitted infection (such as Chlamydia) and yet, be unaware of their positive sero-status transmitted HIV to the victim, thus being guilty of the greater offence of inflicting grievous bodily harm. With the recent shift in degree of harm

[205] *R v Coleman* (1990) 19 NSWLR 467

[206] *Blackwell v R* [2011] NSWCCA 93.

which must have been foreseen by the defendant, this evidently is now not possible. The accused now must have subjective foresight as to the possibility that their actions will inflict grievous bodily harm, consistent with requirements of specific intent. In the case of HIV-transmission this would mean subjective awareness of the possibility of HIV-transmission rather than some lesser sexually transmitted infection and represents a strong tightening of the test.

Wilful Blindness

There are some cases however where a person may not be aware of their HIV positive status but can be said to have been *wilfully blind* to that fact. The doctrine of wilful blindness is designed to reduce the availability of claims of ignorance of facts by defendants who might escape prosecution by their proactive, wilful blindness to these facts. There has been no case in Australia which turned on the issue of wilful blindness in relation to HIV transmission. However, the law of wilful blindness is relatively settled and its application to cases in other circumstances is analogous to instances where it might emerge in relation to HIV transmission cases.

Wilful blindness is where the accused as "turned a blind eye" to the existence of a fact. Knowledge that something is the fact may be inferred where the prosecution proves that the accused knew it was likely to be the fact or suspected it to be the fact, but deliberately does not make reasonable inquiries to ascertain whether it was the fact. In the case of HIV transmission it could be that recent known exposure to HIV through unprotected sex or high-risk sex with a person known to be HIV positive or direct advice from a doctor that the accused may be HIV positive or soon would be[207] are the sorts of evidence which might assist in establishing wilful blindness on the part of an accused.

The approach to wilful blindness is one of an evidentiary proposition which in the case of reckless infliction of grievous bodily harm would be used as *proof* of knowledge of the fact of HIV positive status. The actual knowledge still would need to be proved beyond a reasonable doubt, the establishment of which wilful blindness might play a part. Contrary to

[207] See the case of 'Adaye', Gina Mitchell and Melissa Woodroffe, 'Criminal Transmission of HIV: A Guide for Legal Practitioners in NSW' HIV/AIDS Legal Centre Inc., 18 April, 2011) 26 <www.halc.org.au/downloads/crim_transmission.pdf >.

the authors of *Criminal HIV Transmission* who state, relying on *He Kaw Teh v The Queen*,[208] that "the High Court accepted that wilful blindness may be treated as the equivalent of knowledge",[209] the better position is that described in subsequent judgment of *Pereira v DPP*.[210] The position as stated in the literature is one which proposes an understanding of wilful blindness as a state which can be treated as the "equivalent"[211] of knowledge, as if somehow wilful blindness to a fact might be 'substituted' for knowledge of a fact in cases where actual knowledge is a requirement of the offence. In our case this would mean that the establishment of wilful blindness to their HIV positive status would, in and of itself, substitute for the actual knowing of that fact by the accused. Rather, following the reasoning of the Court in *Pereira*,[212] the correct position, is that wilful blindness is better understood as a part of *evidence* which might used in proof of knowledge about the fact.[213] As stated above, it is an evidentiary proposition. The actual use of wilful blindness is an important area of law. In particular those who advocate the decriminalisation of HIV-transmission offences elevate the risk of exacerbating wilful blindness to a central outcome of the continued criminalisation of HIV transmission. The argument is that the criminalisation of HIV will cause those at risk of HIV infection to remain wilfully blind to their status – by not getting tested – in order to escape the chance of prosecution. The deterministic relationship between wilful blindness and the propensity to be tested is overstated. Further, as outlined in detail below, the actual operation of wilful blindness in relation to reckless transmission offences will in fact operate as an incentive to be tested as the net of the doctrine of wilful blindness should act to ensnare those who choose to remain untested when it would be otherwise recommended. Canadian jurisprudence on this fact is perhaps an indication of the role of a broad test of wilful blindness – which it must be remembered goes to the jury's evaluation rather than the more reasoned argument of lawyers – whereby in "*R v Williams*, the Supreme Court of Canada

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[208] *He Kaw Teh v The Queen* (1985) 157 CLR 523.

[209] Gina Mitchell and Melissa Woodroffe, 'Criminal Transmission of HIV: A Guide for Legal Practitioners in NSW' HIV/AIDS Legal Centre Inc., 18 April, 2011) 26 <www.halc.org.au/downloads/crim_transmission.pdf >.

[210] *Pereira v DPP* (1989) 63 ALJR 1, at 3.

[211] Gina Mitchell and Melissa Woodroffe, 'Criminal Transmission of HIV: A Guide for Legal Practitioners in NSW' HIV/AIDS Legal Centre Inc., 18 April, 2011) 26 <www.halc.org.au/downloads/crim_transmission.pdf >.

[212] *Pereira v DPP* (1989) 63 ALJR 1.

[213] Ibid., at 3.

held that where a person was aware of the risk of HIV positive status and persists in unprotected sex, this will be sufficient knowledge to establish recklessness outright."[214]

2.2.6 Causing Grievous Bodily Harm by Unlawful Act or Negligent Act or Omission.

Section 54 of the *Crimes Act* establishes the offence of causing grievous bodily harm through any unlawful act or by negligent act or omission.[215]

This offence could be established in cases less culpable than recklessness or where recklessness might not be proved due to lack of evidence, but otherwise adopts the standard of *Nydam*[216] – being a high degree of criminal negligence. The offence is the broadest of the assault offences in relation to HIV-transmission and carries with it a sentence of up to two years imprisonment.

The negligent causing of grievous bodily harm could be established where an HIV positive person transmits HIV but does so in the context not of intent, nor recklessness but in a situation where "such a great falling short of the standard of care which a reasonable man [sic] would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment."[217]

Moreover the laying of s54 charges based on the causing of grievous bodily harm through unlawful act or omission is theoretically open to application across a broad range of fact situations. Whilst the core requirement of an 'unlawful act' in relation to manslaughter by unlawful and dangerous act, as discussed above, is the *dangerousness* of the unlawful act, it is possible that this lesser offence might be satisfied by appeal to a broader range of negligent acts or omissions. *Criminal Transmission of HIV* cites breaches of the *Public Health Act (1991)* NSW as an offence which could but would be unlikely to satisfy the unlawful act

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[214] Gina Mitchell and Melissa Woodroffe, 'Criminal Transmission of HIV: A Guide for Legal Practitioners in NSW' HIV/AIDS Legal Centre Inc., 18 April, 2011) 26 <www.halc.org.au/downloads/crim_transmission.pdf >.

[215] *Crimes Act 1900* (NSW) s54.

[216] *Nydam v The Queen* (1977) VR 430.

[217] Ibid., per Young CJ, McInerney J and Crockett JJ at 445 which establishes the standard of negligence applicable in cases of manslaughter by criminal negligence.

requirement of this offence.[218] The use of disclosure requirements established in relation to HIV status by s13 of the *Public Health Act 1991* (NSW) as a pre-requisite offence a s54 unlawful or negligent grievous bodily harm is a possible connection between the public health law and criminal law. The non-disclosure of HIV positive status is a suitable and in many ways logical pre-requisite offence in relation to such a charge under s54. It is foreseeable that in cases of HIV-transmission where grievous bodily harm is a prosecutorial option, that disclosure of HIV status would not have taken place in breach of s13 of the P*ublic Health Act.*

2.3 Public HealthLaw

Public health law is a diffuse area of legislation, regulations, codes and protocols which, whilst arguably not forming a coherent, single area of law – such as what we term the criminal law or constitutional law – works to achieve public health objectives and as such presents at least an identifiable body of laws and regulations. The laws cover areas as diverse as sewer and civil engineering requirements, sanitation, food and medicine safety as that which we are concerned with here, communicable disease.

The definition of public health law can be divided into two broad categories, those set of statutory or other laws which affect the public health *directly* or those which do so *indirectly.*[219]

In the case of public health, public health law and HIV, the principal focus is on the communicable disease control aspects of public health law. In NSW there is a range of public health laws which are significant in relation to communicable disease in particular those found in the *Public Health Act* (1991) NSW and *Public Health Act* (2010) NSW. The *Public Health Act* (2010) NSW, an Act which repeals and re-instates the *Public Health Act (1991)* with amendments is currently entirely unproclaimed. The commencement date of the Act or parts thereof is, as yet, unclear with the Act granting unfettered discretion to the executive in relation to commencement of the Act. This however, as noted by the relevant Legislation Review Digest of the NSW Parliament, is perhaps necessary due to the need to utilise

[218] Gina Mitchell and Melissa Woodroffe, 'Criminal Transmission of HIV: A Guide for Legal Practitioners in NSW' HIV/AIDS Legal Centre Inc., 18 April, 2011) 28 <www.halc.org.au/downloads/crim_transmission.pdf >.

[219] Christopher Reynolds and Genevieve Howse, *Public health law and regulation* (Federation Press, 2004), 6.

"appropriate administrative and transitional arrangements"[220] to ensure the roll-out of significant changes in relation to local government responsibility for various elements of the Act and other significant changes such as to the requirement of counselling by medical practitioners on the *suspicion* (rather than if the practitioner believes on the basis of reasonable grounds) of a patient having a scheduled condition.[221]Whilst it is unclear when or if the Act will be commenced the commentary contained here refers to this Act and thereby the revised position of public health law on matters in relation to communicable disease control. Comparison or notes will be made with the current *Public Health Act* (1991) NSW where applicable.

The *Public Health Act* (2010) NSW contains a series of sections which apply to the transmission of HIV and associated communicable disease control activities and systems. These include:

1. Section 7 – Power to deal with public health risks generally (a revised, very broad power which allows the Minister to deal with public health *risks* in areas of the State as they consider necessary regardless of the enactment of a state of emergency for 90 days under the threat of imprisonment and/or a fine. See s5 of the 1991 Act for the previous power which included the involvement on the Premier of the State and a stricter relationship to the declaration of a state of emergency);
2. Section 8 – Power to deal with public health risks during state of emergency (largely a restatement of s4 of the 1991 Act similarly under the threat of imprisonment and/or a fine);
3. Section 11 – where the Director General of NSW Health may make an order to close public premises on public health grounds (replacing s8 of the 1991 Act where the *Minister* only was able to make such an order);
4. Part 4 of the Act (ss51-76) – 'Scheduled Medical Conditions' which includes notification requirements and the issuing of public health orders under the Act including quarantine (physical isolation), arrest and other actions allowable following detention or surrender of a person subject to a public health order. This Part refers to 'Scheduled Medical Conditions' which are contained in various schedules to the Act.

[220] Parliament of New South Wales, *Legislative Review Committee: Legislation Review Digest*, Parl Paper No No 17 of 2010 (2010) vii.

[221] Ibid., 124-5.

(This Part in ss61, 62 lowers the standard of the threshold required to issue a public health order or to direct a person to undergo a medical examination).

5. Part 5, Division 1 (ss77-80) – Establishes the duty to disclose HIV positive status, and infection with any other sexually transmitted infections prior to intercourse including gaining voluntary consent to the risk of transmission by sexual intercourse, establishes duties doctors to provide information where they suspect a patient under their care to have a sexually transmitted infection (replacing s13 and s12 of the 1991 Act respectively, lowering the threshold required where a medical practitioner is compelled to provide information and significantly increases the penalties for non-disclosure of a sexually transmitted infection).
6. Part 6, Division 4 (ss97-98) – Creates a series of public health registers in Part 6 of the Act in which ss97-98 gives the Minister the ability to create other "disease or public health" registers to allow for the treatment, care, follow-up, epidemiological tracking and tracing, risk factor monitoring of persons with a disease, who have been exposed to a disease, to monitor the outcomes of specified public health interventions or to facilitate the "identification and monitoring of risk factors for diseases or conditions that have a substantial adverse impact on the population." (Creates a new system of public health or disease registers which were not available under the 1991 Act whereby data can be centralised from de-centralised primary care, hospital, pathology labs and public health organisations).

The powers conferred on the Chief Health Officer, Director General of NSW Health and upon the Minister through this legislation are broader and are potentially more powerful than in the current Act. In particular, the powers of the Minister under s7 to deal with public health issues in a general manner, that is outside the declaration of a state of emergency, are substantial and are without precedent in NSW. The previous sections now replaced by s7 included the mechanism of approval of actions under that section by the Premier of NSW and a more stringent relationship between the powers under this section and the *State Emergency and Rescue Management Act* (1989) under which states of emergency may be declared. Whilst it is unlikely that a 'rogue' NSW Health Minister might take singularly oppressive or unjustifiable actions against the general polity of NSW, this power is perhaps unreasonably broad, allowing almost unfettered power to "take such action and...by order give such directions as the Minister considers necessary to deal with the risk and possible

consequences"[222] of a risk or likelihood of a risk to public health. The reasons for removing the need to seek approval by the Premier and the loosening of the relationship with a formal state of emergency are unclear in this case. It is however an indication of the far-reaching powers which are available to the Minister flowing from a concern for the protection and promotion of public health and an indication of a more general increase in power, lowering of applicable thresholds, reduction in safeguards and devolution of powers lower down the 'chain of command' in the health apparatus of NSW.

More germane to the issue of HIV-transmission are the powers of the Director-General and an authorised medical officer under ss61-62 *infra* in relation to the making of public health orders and the revised duties of persons in relation to sexually transmitted infections found in s79.[223] Some brief discussion of these issues is undertaken here. In particular, the issue of disclosure-regimes as found here in s79 (cf s13 of the 1991 Act) is a key issue raised in relation to the criminalisation of HIV-transmission. It is often opposed by public health advocates, or the stringency of the requirement is questioned, and the disclosure of HIV status which this section requires (whether motivated by this section or otherwise) has some evidentiary links to HIV-transmission offences as well. Finally, the s79 disclosure requirements might well also be used as the pre-requisite offence in charges of causing grievous bodily harm through unlawful act found at s54 of the *Crimes Act*. First however, the very ability to make public health orders under s62 and the Director-General's power to compel a person to undergo medical examination requires some brief discussion:

61 Director-General may direct persons to undergo medical examination

(cf 1991 Act, s 22)

(1) This section applies if the Director-General:[224]
  (a) suspects on reasonable grounds that a person may have a Category 4 or 5[225] condition and may, on that account, be a risk to public health, and
  (b) considers that the nature of the suspected condition is such as to warrant medical examination.

[222] *Public Health Act 2010* (NSW) s7(2).

[223] This as noted will replace the current disclosure regime found at s13 of the 2001 Act.

[224] Of *NSW Health* or the *Ministry of Health* as it is now know.

[225] AIDS and HIV are listed as Category 5 Conditions in the Schedule to this Act: *Public Health Act 2010* (NSW) Schedule 5.

(2) In these circumstances, the Director-General may, by notice in writing, direct the person concerned to undergo, within a specified period, a specified kind of medical examination and associated tests:
   (a) by a registered medical practitioner in general practice, or
   (b) by a registered medical practitioner practising in a specified field.

(3) If the person fails to comply with a direction under subsection (2), the Director-General may, by further notice in writing, direct the person to undergo the specified kind of medical examination and associated tests, at a specified time and place, by a specified registered medical practitioner.

(4) A person must not, without reasonable excuse, fail to comply with a direction under subsection (3).

2) Maximum penalty: 50 penalty units.

(1) A direction under subsection (2) or (3) must have due regard to the sensitivities of the person concerned in relation to the gender, ethnicity and cultural background of the registered medical practitioner by whom the examination is to be carried out.

62 Authorised medical practitioner may make public health order

(cf 1991 Act, s 23)

(1) An authorised medical practitioner may make a public health order in respect of a person if satisfied, on reasonable grounds, that the person:
   (a) has a Category 4 or 5 condition, and
   (b) because of the way the person behaves may, as a consequence of that condition, be a risk to public health.

(2) A public health order:
   (a) must be in writing, and
   (b) must name the person subject to the order, and
   (c) must state the grounds on which it is made, and
   (d) must state that, unless sooner revoked, it expires at the end of a specified period (not exceeding 28 days) after it is served on the person subject to the order.
   Note: An order based on a Category 5 condition expires after 3 days unless an application is made for its confirmation (see section 63 (2)).

(3) A public health order may require the person subject to the order to do any one or more of the following:
   (a) to refrain from specified conduct,
   (b) to undergo specified treatment,
   (c) to undergo counselling by one or more specified persons or by one or more persons belonging to a specified class of persons,
   (d) to submit to the supervision of one or more specified persons or of one or more persons belonging to a specified class of persons,
   (e) to undergo specified treatment at a specified place.

(4) A public health order based on a Category 4 condition, being an order that requires the person to undergo specified treatment at a specified place, may

> authorise the person subject to the order to be detained at that place while undergoing the treatment.
> (5) A public health order based on a Category 5 condition may authorise the person subject to the order to be detained at a specified place for the duration of the order.
> (6) In deciding whether or not to make a public health order, the authorised medical practitioner must take into account:
> (a) the principle that any restriction on the liberty of a person should be imposed only if it is the most effective way to prevent any risk to public health, and
> (b) any matters prescribed by the regulations for the purposes of this section.
> (7) A public health order may include provisions ancillary to, or consequential on, the matters included in the order.
> (8) A public health order does not take effect until it is served personally on the person subject to the order.

This power, the mechanism in NSW linked to the ancient technology of quarantine, is one of the most coercive powers of the executive in NSW and elsewhere. Compared with the character of Victorian legislation on the matter however, the NSW legislation which creates the technology of quarantine and its coercive restrictions upon liberty are nothing other than archaic. The Victorian legislation for example, whist still coercive in nature, also outlines a range of principles that apply generally to the administration of communicable disease controls in that State.[226] Similarly, the administrative safeguards, judicial scrutiny and appeal process which apply to issues of involuntary medical treatment or physical confinement in relation to mental health, seem far more concerned with the 'proper', or at least transparent, and challengeable use of these coercive regimes.[227]

The powers under s61 and s62 of the *Public Health Act,* in its 2010 or 1991 (currently applicable) versions are simply unconcerned with anything beyond the basics of administrative review.[228] To further develop the point, the Victorian principles in the now-named *Public Health and Wellbeing Act* (2008) state that:

> *The following principles apply to the management and control of infectious diseases—*

[226] *Public Health and Wellbeing Act 2008* (Vic) ss4-10, 111.

[227] Ibid., ss205-208.

[228] See *Public Health Act 2010* (NSW) ss61-62. Cf *Public Health and Wellbeing Act 2008* (Vic).

> *(a) the spread of an infectious disease should be prevented or minimised with the minimum restriction on the rights of any person;*
>
> *(b) a person at risk of contracting an infectious disease should take all reasonable precautions to avoid contracting the infectious disease;*
>
> *(c) a person who has, or suspects that they may have, an infectious disease should—*
>
> *(i) ascertain whether he or she has an infectious disease and what precautions he or she should take to prevent any other person from contracting the infectious disease; and*
>
> *(ii) take all reasonable steps to eliminate or reduce the risk of any other person contracting the infectious disease;*
>
> *(d) a person who is at risk of contracting, has or suspects he or she may have, an infectious disease is entitled—*
>
> *(i) to receive information about the infectious disease and any appropriate*
>
> *available treatment;*
>
> *(ii) to have access to any appropriate available treatment.*[229]

No such guidelines or principles exist in the context of NSW public health law. Similarly, in the corresponding sections of the Victorian *Public Health and Wellbeing Act* (2008) where the Victorian equivalents of s61 and s62 (involuntary medical examinations and public orders) are found, the relevant officer is to choose the "measure which is the least restrictive of the rights of the person".[230] The equivalent NSW provisions for involuntary medical testing do not contain such a clause requiring that the least restrictive approach be taken. Further, in the case of the very broad power of making a public health order under s62 of the *Public*

[229] *Public Health and Wellbeing Act 2008* (Vic) s111.

[230] Ibid., s112.

Health Act (2010) the legislative language supports a degree of discretion, requiring that the relevant officer takes into account the principle that "any restriction on the liberty of a person should be imposed only if it is the most effective way to prevent any risk to public health" when deciding to make an order under that section. It lacks both the equivalent of s111 principles and the requirement that the less restrictive approach be taken in cases of involuntary testing or public health orders instead choosing to construct a broad executive power to be subject to review by the Administrative Appeals Tribunal rather than including similar statements of principles and a more stringent requirement upon the executive to choose the less restrictive order where it arises as an option. The construction of these powers are significantly more broad than those available to the executive, DPP, judiciary or police force in relation to criminal offences and carry with them far fewer of the restrictions and safeguards upon action with which the criminal justice system is laden.

The duties of persons in relation to sexually transmitted infections is the area of most significance in relation to the government of HIV-transmission. Under s79 of the *Public Health Act* (2010) the legally required duties of persons who "knows that he or she suffers from a sexually transmitted infection"[231] are outlined in the form of a disclosure regime:

79 Duties of persons in relation to sexually transmitted infections

(cf 1991 Act, s 13)

(1) A person who knows that he or she suffers from a sexually transmitted infection is guilty of an offence if he or she has sexual intercourse with another person unless, before the intercourse takes place, the other person:
  (a) has been informed of the risk of contracting a sexually transmitted infection from the person with whom intercourse is proposed, and
  (b) has voluntarily agreed to accept the risk.
  Maximum penalty: 50 penalty units.

(2) An owner or occupier of a building or place who knowingly permits another person to:
  (a) have sexual intercourse at the building or place for the purpose of prostitution, and
  (b) in doing so, commit an offence under subsection (1),
  is guilty of an offence.
  Maximum penalty: 50 penalty units.

(3) It is a defence to any proceedings for an offence under this section if the court is satisfied that the defendant took reasonable precautions to prevent the transmission of the sexually transmitted infection.

[231] *Public Health Act 2010* (NSW) s79(1).

(4) For the purposes of this section, a person is not presumed incapable of having sexual intercourse by reason only of the person's age.
(5) A person (other than a member of the NSW Health Service) must notify the Director-General if the person commences proceedings against a person for an offence under this section.

Failure by the person infected to directly disclose and ascertain the voluntary acceptance of the risk of contracting a sexually transmitted infection from sexual intercourse, results in an offence being committed.[232] The structure of the disclosure requirement/offence differs little from its current version found at s13 of the *Public Health Act* (1991). The subject matter is described in the 2010 section as a "sexually transmitted infection"[233] rather than the currently applicable law which describes the subject matter of the disclosure requirement as a "sexually transmittable medical condition."[234]

The significant change in this section however is that a complete defence to a charge under the section has been included where the "the court is satisfied that the defendant took reasonable precautions to prevent the transmission of the sexually transmitted infection."[235] This defence presumably would allow for evidence of the use of condoms or other safer sex precautions to be offered to the court as evidence of the "reasonable precautions"[236] taken to prevent the transmission of the sexually transmitted infection. What constitutes such reasonable precautions is not defined in the Act and nor are any regulations which might stipulate such reasonable precautions contemplated. In the context of the disagreement between public health advocates and the criminal justice system about the expectations that one might reasonably hold in relation to the behaviour of people who live with HIV, this defence, if ever raised, may be cause for further division.[237] Such a courtroom testing of the defence may, in the age where many HIV and AIDS advocates are beginning to advocate practices such as serosorting[238] rather than more traditional safer sex practices, see the Court

[232] Ibid., s79(1).

[233] Ibid., s79(1).

[234] The HIV/AIDS Legal Centre in its submission to the NSW Parliament on the draft of this Act notes that the current Act (1991) lacks a definition: HIV/AIDS Legal Centre, 'HIV/AIDS Legal Centre Sbumissions 19 April 2010' (2010), 4 <http://www.halc.org.au/downloads/HALC_Submissions%20_Part1.pdf>.

[235] *Public Health Act 2010* (NSW) s79(3).

[236] Ibid.

[237] Positive Life NSW and AIDS Council of New South Wales (ACON), 'Risk Reduction Strategy Paper: Gay Men's HIV Prevention 2010-2012' <positivelife.org.au/risk-reduction-strategy >.

[238] Ibid.

not accept the kind of behaviour encouraged by serosorting as "reasonable" in the case of an episode of HIV transmission.

This reform to the disclosure regime is motivated by the arguments about the various difficulties and realities of disclosure for people who live with HIV. As such, it is a positive change in the law when viewed from the position of HIV and AIDS service organisations and some public health advocates. As discussed below however, there is a significant risk that those groups may end up disappointed with the reality of such a legal regime as is the case so often when unexpected consequences emerge from laws or judges thought to deliver outcomes according to a particular logic.

I feel that here we see the law again providing the basis for an unexpected double-movement where a reform which looks on the surface at least to be responding to calls for further liberalisation in the law's understanding of the difficulties and multiple ways that HIV positive people negotiate risk through disclosure, safer sex behaviours and various other techniques, in fact it casts its net wider and deeper into matters of HIV disclosure; no longer asking if disclosure took place, but also mounting an inquiry into the reasonableness of precautions taken. Further, the operation of a law which now will demand an answer of precautions taken will thus create a normative standard of what constitutes effective, reasonable precautions in relation to safer sex, a standard which, no-doubt, may conflict with the opinion of those who advocate techniques such as serosorting.

2.3.1 Responsibilities of Counselling and Reporting

Part 5, Division 1 (ss77-80), establishes the duty to disclose HIV positive status, and infection with any other sexually transmitted infections prior to intercourse including gaining voluntary consent to the risk of transmission by sexual intercourse, establishes duties doctors to provide information where they suspect a patient under their care to have a sexually transmitted infection. This replaces s13 and s12 of the 1991 Act respectively, lowering the threshold required where a medical practitioner is compelled to provide information and significantly increases the penalties for non-disclosure of a sexually transmitted infection.

2.4 Conclusion

This chapter has presented an outline of the criminal and administrative provisions which apply to HIV-transmission in NSW. Those criminal provisions form the core focus of this thesis and the literature which is examined in the following chapter. For this reason they have received a more lengthy treatment than the administrative provisions. This treatment however does not indicate that the administrative provisions are without want of critique. Rather, administrative provisions are, in the black letter of statute and in the case of Sharleen described above, significant areas for highly intrusive state power. The treatment given to these powers in the literature to-date has been largely uncritical[239] and usually this area of public health law has been left completely unacknowledged.

In the following chapter an outline of the basic form of the anti-criminalisation literature is presented. In this chapter the commentary and policy debate surrounding the HIV-related criminal offences presented above is analysed and a vision of the criminal law itself and how it operates and relates to public health and other powers is sketched.

[239] David Scamell and Chris ward, 'Public health laws and politics on the issue of HIV transmission, exposure and disclosure' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS (NAPWA), 2009).

3 The View of the Criminal Law: Themes of the Literature

3.1 Introduction

This chapter will outline the parameters of the anti-criminalisation narrative as it appears in the literature which focuses on the intersection of HIV transmission and the law. By 'anti-criminalisation narrative' I mean the arguments and conceptual tools which anti-criminalisation advocates use to explain the ways in which the 'criminalisation of HIV' (as they call it)[240] is taking place and how this move towards the use of the criminal law is an unwanted intervention in relation to HIV.

Simply put, this narrative suggests that the use of the criminal law is a form of intervention which is incompatible with public health approaches, violates human rights and human rights-centred approaches to HIV and may well cause the reversal of HIV-transmission reductions experienced in countries which have seen infection rates decline. The principal tool which anti-criminalisation advocates utilise is a particular conceptualisation of the law and criminal law in particular. Presenting this conceptualisation of the criminal law which supports the anti-criminalisation narrative is my central concern here.

This chapter also considers some of the attempts and proposals which anti-criminalisation advocates have enacted, or otherwise propose, in order to address their concerns with HIV-related criminal law. These attempts make strong use of the techniques of law reform, the production of prosecutorial guidelines and formal liaison protocols between healthcare workers and police and other efforts. All efforts are well within the bounds of a settled liberal approach to the government of HIV and liberal legal systems. And whilst there may well be implications for such practices or proposals which flow from a revised conceptualisation of law in the anti-criminalisation literature, these practices are not my principal concern here. In fact in many ways the questions I pose in this chapter and in this thesis generally are

[240] In this thesis I choose to characterise the 'criminalisation of HIV' as HIV-related criminal offences, or HIV-related law, or similar. This characterisation is in deference to the somewhat more limited scope which this thesis takes on – focusing on the interplay between HIV, public health approaches to HIV and criminal law specifically. Other scholarship which utilises this term 'criminalisation of HIV' often does so in the context of a broader interrogation of laws which include HIV exposure laws– none of which exist in the jurisdiction of NSW – and as such it may well be argued that the characterisation of that regime (which includes HIV exposure laws as distinct from transmission laws) might be acceptably tagged as the 'criminalisation of HIV'. I do not claim that 'HIV' itself is criminalised, but rather that I deal with reckless or intentional transmission consitutiting assualt or other criminal offences. Matthew Weait utilises the term 'criminalisation of HIV *transmission*' as I do in parts of this thesis. This I feel is a more accurate and more helpful way of referencing the situation as it exists in NSW.

preliminary to any discussion of whether or not HIV-transmission should be criminalised and what action(s) should be taken. The critique of the underlying conceptualisation of the criminal law is essential to ensure that any actions, already enacted or proposed, to reform this area of law or public health are done so without running the risk of further entrenching the issues which such reform attempts to resolve through ignorance of the interconnections between law and public health which are explained in the following chapter.

These attempts and proposals for concrete law reform are based upon arguments about the impact of the criminal law, various formulations of which are distilled by the anti-criminalisation scholarship into litanies of harms caused by the criminalisation of HIV-transmission.[241] These include views in the literature which present the HIV-related criminal law as "negat[ing] public health mutual responsibility messages"[242] or that "HIV-related prosecutions ignore the reality that failure to disclose HIV status is not extraordinary."[243] Law is thus, as shall be seen in more detail below, characterised as something 'other' than public health, something which works against public health and because of this characterisation requires removal from the scene of HIV-transmission through law reform.

These impacts or harms, which the literature cites the criminal law as committing, are the arguments upon which concrete calls for reform are based. But these impacts or harms caused by the criminal law are structured by the full range of concepts, conceptual tools, perspectives and knowledge(s) about the law, all of which are visible in the literature and which this chapter sets out to describe. It is this conceptualisation of law and the unwritten rules, structures, practices and power relations in which it is implicated which structures the thinking and understanding of the world presented by the anti-criminalisation scholarship in relation to its field of objects: HIV, HIV transmission and the operation and impact of criminal law amongst others. Rather than attack or deface the conceptualisation of law present in the literature, the critique which develops out of my survey in this chapter and the

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[241] See for examples of these lists: Sally Cameron, 'HIV, Crime andthe Law in Australia: Options for Policy Reform - a law reform advocacy kit' (Pt AFAO) (February, 2011)(Discussion Paper) <http://www.afao.org.au/library_docs/policy/DP0211_HIV_Crime_and_the_Law.pdf>; Ralf Jürgens et al, *10 Reasons to Oppose Criminalization of HIV Exposure or Transmission*, The Open Society Institute, Open Society Foundations (soros.org) No (2008).

[242] Sally Cameron, 'HIV, Crime andthe Law in Australia: Options for Policy Reform - a law reform advocacy kit' (Pt AFAO) (February, 2011)(Discussion Paper) <http://www.afao.org.au/library_docs/policy/DP0211_HIV_Crime_and_the_Law.pdf>. 7.

[243] Ibid. 9.

next, attempts to build upon the very conceptualisation of law which is critiqued. Rather than struggle to present a wholly competing conceptualisation of law, rendering the literature as either misguided or wholly mistaken, I conclude with Foucault and some of his recent interpreters that there is another side to law present at the scene of HIV-transmission. The inclusion of this 'other law' provides us with a more complete way of understanding law 'itself' and of coming to see more fully the reality of an inter-dependent relationship between law and public health. This can only be achieved by building upon, rather than tearing down, the conceptualisation of law already present in the literature.

I characterise this current conceptualisation of law present in the literature as one which represents law as mechanical, negative, limited and determinate. Law in the literature is rendered as a negative power, it "'excludes', it 'represses', it 'censors', it 'abstracts', it 'masks', it 'conceals'"[244] in a famous formulation of Foucault's to describe the power's negative characterisation. It is a law understood as positivist, autonomous and hermetically sealed from interaction with the powers outside of it; unable to 'understand' the world through the eyes of public health. This characterisation of law 'itself' strongly echoes some of the readings of Foucault's view of law known collectively as the 'expulsion thesis' and which serve as the link between Foucault's jurisprudence and HIV-related criminal law. Beyond this vision of law 'itself', I explain using Foucauldian jurisprudence and evidence from the field of HIV-transmission law and prosecutions, that such a view of law is actually somewhat one-sided. In adopting this partially one-sided view, the literature is arguing for what law should be or perhaps what it once was and should now return to: a marginalised, historically limited form of power which operates in a negative fashion, allowed to operate in the guise of an instrument, accessory or support to other forms of power such as public health. In short, law is to be either expelled from the scene of HIV transmission or instrumentally subordinated to the powers outside of it. Following this chapter however, I reverse this HIV-related law variant of the 'expulsion thesis' by building upon the conceptualisation of law which currently informs the literature's calls for the law to be marginalised.

[244] Michel Foucault, *Discipline and Punish* (1978), 94.cited in Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 15.

Before outlining the expulsion thesis and my re-reading of HIV-related literature in the light of it, two key foundations are presented in this chapter. In this chapter, a general overview of the anti-criminalisation literature are presented here followed thereafter by a distillation of the conceptualisation of law present in that self-same literature. This chapter then works to provide the understanding of law which the current anti-criminalisation debate labours under, after which a critique of this conceptualisation of law through the application of Foucault's thought on law can be undertaken.

3.2 The Anti-Criminalisation Narrative: The Literature

The criminalisation of HIV is a recent area of the law's development and remains somewhat on the periphery of academic legal writing. For this reason there exists a paucity of literature, particularly from a legal perspective, which deals with the topic.

The literature which does exist includes a range of non-academic writing and electronic tools which provide summaries of the development of criminal laws across jurisdictions aimed at an activist, law reform-centred set of activities rather than a sustained analysis either for or against the criminalisation of HIV transmission. These writings, such as the Global Criminalisation Scan[245] come out of a community organising and social change agenda and provide a growing and useful index of legislative regimes, case law and relevant news items regarding the development and prosecution of individual cases of criminal HIV transmission.[246] In very recent years peak HIV/AIDS bodies have begun to focus their attention on the development of criminal law in relation to HIV.[247] At the current moment, the most recent publication in the Australian context is a discussion paper and toolkit published by the *Australian Federation of AIDS Organisations* (AFAO) which signals the start of an ongoing project for AFAO and the sector of engaging with and overturning or significantly reforming HIV-related criminal law.

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[245] Global Network of People Living with HIV (GNP+), *The Global Criminalisation Scan* <http://www.gnpplus.net/criminalisation/index.php?option=com_content&task=view&id=12&Itemid=34>.

[246] Ibid.

[247] For example see: Australian Federation of AIDS Organisations, *Workshop on Criminal Transmission of HIV*, 10th November, 2006. (Australian Federation of AIDS Organisations)

In general, academic writing on the topic has tended to relate to the criminalisation of HIV only tangentially, for example, by focusing on the nature and role of verbal and non-verbal communication within regimes of compulsory HIV status disclosure.[248] These have in some cases taken on diverse theoretical perspectives, however, the bulk remain in an orthodox public health vein and focus on the reporting and analysis of attitudes towards and practices of men who have sex with men regarding disclosure of HIV status in various settings.[249] These writings are silent in relation to the legal, evidentiary or jurisprudential implications of their research and the law itself – which creates status disclosure regimes for example[250] – and the law is left largely or completely unacknowledged or unexamined. Instead, the writing in this area focuses on improvement of the public health interventions associated with such behaviours seemingly blind to legal implications or responsibilities. The literature examined here includes these more academic texts, but also policy and position papers as well as public health texts in an effort to complete the picture of the debate.

Including important non-academic sources, the literature on HIV transmission and criminalisation includes indexes of current law and cases,[251]news blogs which document developments in the area,[252] model codes and legislation from international bodies such as UNAIDS,[253] community legal guides,[254] academic legal analyses[255] and law reform and similar research, policy papers and position papers. Further, the more academic literature includes doctrinal analyses of legislation, case law and judgements, jurisprudential writings

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[248] For example see: Thomas Haig, 'Bareback Sex: Masculinity, Silence and the Dilemmas of Gay Health' [859] (2006) 31 *Canadian Journal of Communication* 859.

[249] For example see: Barry D Adam, 'Constructing the Neoliberal Sexual Actor: Responsibility and Care of the Self in the Discourse of Barebackers', *Culture, Health and Sexuality* (2005) 7:4, 333-346 Barry D Adam, 'Constructing the Neoliberal Sexual Actor: Responsibility and Care of the Self in the Discourse of Barebackers' [333] (2005) 7(4) *Culture, Health and Sexuality* 333.

[250] David Scamell and Chris ward, 'Public health laws and politics on the issue of HIV transmission, exposure and disclosure' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS (NAPWA), 2009).

[251] *the AIDS and Law Exchange (AIDSLEX)*, <www.aidslex.org>.

[252] See (<www.criminalhivtransmission.blogspot.com>) accessed 09/09/2010.

[253] Southern African Development Community Parliamentary Forum, 'Model Law on HIV & AIDS in Southern Africa', (2008) SADC, Windhoek, Namibia [www.sadcpf.org] accessed 09/09/2009.

[254] Gina Mitchell and Melissa Woodroffe, 'Criminal Transmission of HIV: A Guide for Legal Practitioners in NSW' HIV/AIDS Legal Centre Inc., 18 April, 2011) <www.halc.org.au/downloads/crim_transmission.pdf >.

[255] For example see: Peter Rush, 'HIV transmission and the jurisdiction of criminal law' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 74-90; Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007).

and commentary, social science approaches to HIV-related offences, including social research and other empirical approaches to the interaction between law and behaviour, public health and medical perspectives on legislative regimes, most especially focused on criticism and analysis of the effectiveness of criminalisation as a method of communicable disease control and finally broader theoretical and philosophical writings on HIV and criminalisation more generally (including criminological theory).

3.3 General Overview of the Literature

The narrative which emerges from the literature in relation to HIV-related law is one marked by an establishment of a binary between criminal law and public health, of incompatibility between these two elements and generally includes the call for the swift expulsion of the criminal law from the scene of HIV-transmission. Regardless of jurisdiction, across which laws do vary greatly in form and content, the literature exhibits this same narrative in relation to HIV-related criminal law.[256] The single exception to this call for expulsion is in relation to any case of transmission which involves complete recalcitrance on the part of the infecting partner to comply with public health interventions resulting in intentional transmission of HIV allowing some space for law, though only at the periphery of the operation of public health.[257] This situation is examined specifically in chapter four below.

The narrative, expressed across the full gamut of forms which the academic literature takes, is included here here by drawing upon doctrinal writing, legal theory, social science and other genres of literature and I show in more detail the shape and contours of this narrative which calls for the expulsion of law.

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[256] See for example: Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007). Scott Burris, Edwin Cameron and Michaela Clayton, 'The Criminalization of HIV: Time for an Unambiguous Rejection of the Use of Criminal Law to Regulate the Sexual Behavior of Those with and at Risk of HIV ' (2008) *Working Paper*; The Hon. Michael Kirby, 'HIV Criminalisation - Summing Up: UNAIDS Expert Meeting on the Scientific, Medical, Legal and Human Rights Aspects of the Criminalisation of HIV Non-Disclosure, Exposure and Transnmission.' (2011) <http://www.pacificfriendsglobalfund.org/wp-content/uploads/2011/10/MICHAEL-KIRBY-SUMMING-UP-UNAIDS-HIV-CRIMINALISATION-GENEVA-SEPT-2011.pdf>.

[257] Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007), 22-24. Sally Cameron, 'HIV, Crime andthe Law in Australia: Options for Policy Reform - a law reform advocacy kit' (Pt AFAO) (February, 2011)(Discussion Paper) <http://www.afao.org.au/library_docs/policy/DP0211_HIV_Crime_and_the_Law.pdf>; UNAIDS and UNDP, *Policy Brief: Criminalization of HIV Transmission* (2008), 15.

Matthew Weait in his *Intimacy and Responsibility: The Criminalisation of HIV Transmission*[258] provides us with the most sustained book-length treatment of the topic of HIV-related criminal law. It is this work which is often-cited by subsequent literature and in many ways represents the key perspectives of the literature to-date in relation to both the role (if any) law should play in relation to HIV-transmission as well as a description of the relationship between law and public health which should be developed or supported. Whilst Weait does not offer a broader comparative perspective on the criminal law related to HIV transmission, his analysis of cases and then further treatment and analysis of the various policy and social forces behind the development of the law in the United Kingdom is certainly instructive for the NSW jurisdiction. The applicability of Weait's text, however, must in some important ways be distinguished with the development and current state of the law in the UK being somewhat different to that in NSW.[259]

Writing in the UK context and as both a lawyer, legal academic and sometimes-policy adviser to government on HIV/AIDS issues, Weait's analysis attempts to ask "in what circumstances, and on what basis, should those who transmit serious disease to their sexual partners be criminalised?"[260] Weait's entire analysis begins with an epigraph taken from Burris et al (discussed below) which is a clear indication of the argument and conclusion which Weait subsequently develops:

> The criminalization [sic] of HIV has been a strange, pointless exercise in the long fight to control HIV. It has done no good; if it has done even a little harm the price has been too high. until the day comes when the stigma of HIV, unconventional sexuality and drug use are

[258] Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007). 233.

[259] In particular the evolution of HIV-related offences in the UK is significantly different to the experience in NSW. The UK experience, discussed below, is one where broader and somewhat unrelated common law/court-led reform to key cases (*Clarence* and *Brown)* opened the possiblity for HIV-transmission to be properly regarded as a form of harm which could be prosecuted under the Offences Against the Person Act 1861 (UK). The NSW experience is one bound to actual legislative creation of the offence – or arguably confirmation of the offence which, like the UK, may have been theoretically possible as a common law offence.

[260] Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007). 233.

> gone, the best course for criminal law is to follow the old Hippocratic maxim, 'first, do no harm'.[261]

The fundamental basis for and key influence upon Weait's analysis is established early in his book. It is his strongly held contention that "HIV and AIDS are, and should be understood as, public health issues first and foremost, rather than as problems necessarily capable of effective legal resolution through the criminal law."[262] This is essential to understanding Weait's analysis. Weait regards HIV as a public health issue[263] rather than one which is necessarily something upon which the law has any purchase. Whilst it is clear that he holds a supportive position in relation to public health approaches, his construction of the criminal law as attempting to, albeit unsuccessfully, *resolve the problem of HIV* provides the epistemological groundwork for his analysis and later conclusions. I would argue that there is little evidence put forward in Weait's analysis which shows that the criminal law 'itself', law-makers[264] or relevant others think that they are attempting to 'resolve' the problem of HIV through the criminal law, which I take to mean in the context of his affirmation of public health approaches, to be to stop or reduce instances of HIV transmission. This assumption, that criminal law operates as a transmissible disease control measure, may go unnoticed in his writing and is one which reoccurs throughout large parts of the literature.[265] Law here is being assessed against what are fundamentally bio-political aims of disease control. This measuring of the criminal law against bio-political aims performs work for public health. Whilst I discuss this in further detail in chapter four, for now, suffice it to say that by creating a 'failed' law, a law which cannot achieve against the outcomes demanded (or suitable) for public health, the bio-political power of public health is rendered strengthened and its unique identity buttressed. In this way, as well as others outlined in chapter four, I believe that HIV-related law in its criminal instantiation performs a great deal of unexpected work. In the most straightforward reading however, to measure law by fundamentally bio-political aims means

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[261] Scott Burris et al, 'Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial ' (2007) *Arizona State Law Journal*. 1.

[262] Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007). 3.

[263] Ibid.

[264] Particularily due to the reality that HIV tranmission offences became available through the developmetn of the common law in largely urelated behaviours rather than through direct legislative action.

[265] An important and exciting excpetion being that of Sally Cameron and John Rule, 'Outside the HIV strategy: challenges of 'locating' Australian prosecutions for HIV exposure and transmission.' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 18-30. Discussed below.

to deny the more traditionally legal meaning of criminal sanction: the punishment and reprimand of those who transmit HIV.

It is a point not made in the scholarship on the topic that whilst the use of the criminal law has a number of effects including arguably a deterrent effect, its use is only *ever* used after the fact of transmission having occurred. It is therefore difficult to maintain that the criminal law has much, if anything, to do with prevention or reduction of instances of HIV transmission per se with its post-facto operation, at least in the programmatic sense which Weait seems to ascribe to it here. In the NSW context itself it is made quite clear in a Second Reading Speech of the NSW Attorney General where the purpose of this law was to "help protect the community"[266] from the intentional or reckless transmission of HIV which is a "horrifying breach of trust that many people in the community would find abhorrent."[267] Whilst it may be that even this post-facto operation of HIV-related criminal offences is something to which some may object to, it is certainly a very different thing to argue that HIV-related criminal law *fails* as a communicable disease control measure which is to make an argument about its purpose rather than its effectiveness in its current form.

In closing off the possibility that the criminal law may be motivated by understandings of HIV and directed at outcomes which have little in common with the public health understandings of HIV or its aims of disease control across the population, Weait forecloses the possibility of criminal law operating alongside public health efforts as a form of intervention which is fundamentally incompatible with public health or its techniques.[268] In fact, Weait goes so far as to describe their effect as detrimental to the success of public health efforts. The binary which Weait constructs here, whereby HIV-related criminal law is measured solely against the end(s) of reduction of the diseases burden, leads to a conclusion that law should be removed from the scene of HIV-transmission completely save however for its role in relation to cases of intentional transmission of HIV.[269]

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[266] New South Wales, *Parliamentary Debates*, Legislative Council, 26 September, 2007, 2318 (The Hon. John Hatzistergos, Attorney General).

[267] Ibid., 2318.

[268] Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007), 3, 205-208.

[269] Ibid., 24.

These concluding observations each stem from his perspective that criminal law must necessarily be or perhaps should work (although he is unclear on the distinction) to *solve* the problem of HIV transmission.[270] The judgement of the criminal law against this public health aim is problematic and forms probably the most significant of blind-spots in Weait's analysis. The failure to make explicit *why* criminal law either is or should be aimed at reducing HIV – and perhaps excellent arguments of this nature can be made – undermines the strength of Weait's characterisation of the criminal law as a 'failure' when the suitability of the end(s) against which it is measured is unclear.[271] This construction of the nature of law as a tool of public health thus allows for the rendering of the law as both a failure and as something which must therefore be removed, through law reform, from the ongoing engagement with HIV-transmission.[272]

The lengthiest Australian contributions to the literature of the criminalisation of HIV transmission are found in the various articles collected by Sally Cameron and John Rule in *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality.*[273] In his Foreword to the monograph, The Hon. Michael Kirby reveals at once the understanding of law present in the monograph and thus the shape of the questions which the monograph seeks to answer:

> in Australia, the invocation of the criminal law, with the objective of altering human conduct so as to reduce the risk of transmission of HIV from infected persons to the uninfected, will only ever be of tiny significance in the control of the epidemic as a whole. Nevertheless, prosecutions do occur. A question is: should they?[274]

Like the work of Weait, the view presented here immediately forecloses the possibility of law being anything other than to a tool of communicable disease control, an undertaking which the (re)emergence of law threatens.

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[270] Ibid., 3.

[271] Ibid., 205-206. where Weait lists four principle arguments for decriminalisation of HIV-transmission based on the law's failure to support attempts to reduce the disease burden (the public health aim).

[272] Ibid., 3, 206.

[273] Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009).

[274] Hon. Michael Kirby, *Foreword*. 15 in: ibid. 15.

Cameron and Rule themselves, in their co-authored introductory chapter, consider the overarching situation of criminalisation of HIV transmission in Australia.[275] In a significant departure from both Weait's position and authors represented in the monograph itself, they are careful neither to assume nor accept that criminalisation has been a part of efforts to reduce HIV transmission nor as a 'tool' of the HIV reduction strategy of government. They situate their inquiry instead as stemming from an understanding that public health and criminal law responses to HIV are informed by *different* rationales.[276] The explicit stating of their position on the different rationales of the criminal law and public health responses is rare within the literature, but is an important acknowledgement of some of the differences between criminal law and public health. Whilst this position may seem like the possibility for a rapprochement between the law and public health, the continued activity of the criminal law in the sphere of HIV transmission and the activity of public health raises some important questions for the authors:

> While the public health and criminal law responses to HIV might be understood as being informed by different (at times opposing) rationales, the prosecution of individuals for HIV exposure or transmission has brought the intersection of these two approaches into stark relief – and those points of intersection are problematic. For example, what of a person's decision to have an HIV test being used against them later in a criminal trial as proof of their HIV status and (given requirements on GPs to inform patients of their responsibilities) their awareness of their obligations to prevent HIV transmission? What of therapeutic/treatment notes being subpoenaed and used as evidence against a former (or 'current') patient? What of people's fear of prosecution reducing their honesty with health care providers, and subsequently reducing the effectiveness of their treatment? Criminal prosecutions undermine public health's HIV prevention and treatment response and, conversely, public health

[275] Ibid.

[276] Ibid. 20.

> procedures undermine the appropriateness of a criminal law response except in very unusual circumstances.[277]

Even with the acknowledgement of the differing rationales, the law and public health are situated in opposition to one another, mutually irreconcilable. Although again, they are strong in their opinion that intentional transmission of HIV should remain a matter for criminal prosecution. Unfortunately, the opportunity to more fully explore and understand the differing rationales for legal and public health responses to HIV is left alone in this instance, as are questions which look to explore legal responses to HIV on their own terms rather than imputing public health aims as the measure against which other non-public health responses (i.e. legal responses) will be measured which their acknowledge of different rationales presents as an option.

The most recent Australian writing on the topic – which will form the basis of future action by the sector[278] – is written by Sally Cameron and echoes her and John Rule's contention, cited above, that that the application of the criminal law in relation to HIV transmission has a series of harmful and highly problematic impacts for a range of reasons.[279] This strategy paper argues for a "narrow category of circumstances in which prosecutions may be warranted, involving deliberate and malicious conduct where a person with knowledge of their HIV status engages in deceptive conduct that leads to HIV being transmitted to a sexual partner."[280] This would seem to open the possibility of both intentional ("deliberate") and reckless ("malicious"[281]) transmission cases. Perhaps in this sense, Cameron's hopeful consideration of the rationale underlying criminal law in this field is better read as a re-affirmation of the thrust of the anti-criminalisation literature: as hoping to limit the use of criminal law in relation to HIV based on its incompatibility with public health rationales and thus outcomes of communicable disease control. Cameron's reference then to "deliberate and

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[277] Ibid. 20.

[278] Reference to future action and the strategy: Sally Cameron, 'HIV, Crime andthe Law in Australia: Options for Policy Reform - a law reform advocacy kit' (Pt AFAO) (February, 2011)(Discussion Paper) <http://www.afao.org.au/library_docs/policy/DP0211_HIV_Crime_and_the_Law.pdf>.

[279] Ibid.

[280] Ibid. 11.

[281] I note the bill which introduced GBH also replaced references to malicious to reckless which the courts had settled was an interchangeable term: *Crimes Amendment Act 2007* (NSW). The effect of this law reform was also to have a significant and perhaps unexpected impact in relation to the definition of the nature of subjective foreseight required for a charge of recklessly inflicting grievous bodily harm in NSW, see: *Blackwell v R* [2011] NSWCCA 93.

malicious conduct"[282] forming the basis for criminal sanction might then be read in the narrower sense of intentional transmission only, with 'malice' rendered as an adjective similar to 'deliberate' rather than an indication of openness to maintaining recklessness-based offences as criminal legal doctrine would indicate. This acceptance or a role for the criminal law in relation to instances of intentional transmission is further explored in chapter four below in relation to the ultimately recalcitrant subject.

Criminal laws related to HIV-transmission are of course only one part of the legal response to HIV and other communicable diseases. Public health's own legal apparatus[283] is largely ignored in the broader literature[284] and to-date does not in general extend its analysis to those areas of law and their interaction with the broader questions of HIV-criminalisation. Matthew Weait in his work notes the somewhat invisible treatment given to public health law noting his concern that such laws might, in his view, amount to criminalisation through the back door rather than the 'soft option' they seem to present.[285] The invisibility of public health's own legal apparatus is not confined to Weait's engagement with the subject. In fact, the whole operation of the public health legal apparatus itself is one which takes place outside of the public record and can, as was seen in the case of Sharleen discussed in chapter one above, be grossly misused even in the context of a human rights-centred approach to public health. This body of law which is so invisible in the literature to-date is often described as *public health law,* a body of law which, although difficult to define,[286] has a definite content and some of the most serious powers available to a government or medical profession granted

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[282] Sally Cameron, 'HIV, Crime andthe Law in Australia: Options for Policy Reform - a law reform advocacy kit' (Pt AFAO) (February, 2011)(Discussion Paper) <http://www.afao.org.au/library_docs/policy/DP0211_HIV_Crime_and_the_Law.pdf>. 11.

[283] Mainly found in NSW in the *Public Health Act 1991* (NSW).

[284] Although both Cameron and Scammell provide a treatment of this area of law: Sally Cameron, 'HIV, Crime andthe Law in Australia: Options for Policy Reform - a law reform advocacy kit' (Pt AFAO) (February, 2011)(Discussion Paper) <http://www.afao.org.au/library_docs/policy/DP0211_HIV_Crime_and_the_Law.pdf>. David Scamell and Chris ward, 'Public health laws and politics on the issue of HIV transmission, exposure and disclosure' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS (NAPWA), 2009).

[285] Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007), 3,12.

[286] The sense of surety give to the area of 'public health law' by Reynolds in his leading text on the matter in Australia is thankfully problematised in his discussion of 'Public health law – an "area" and an "approach" in the widening and widening field of what can be (or should be) understood to be a law of 'public health'. Specifically see: Christopher Reynolds and Genevieve Howse, *Public health law and regulation* (Federation Press, 2004). 3-12.

today. It is best described as a medico-juridical jurisdiction with a range of administrative powers. Beyond laws which pertain to sewerage and sanitation - which are the bedrock of these public health legal interventions[287] - public health laws are laws which define the power and jurisdiction of health agencies or authorised persons to authorise or mandate health assessments, data collection and analysis, provide for health service provision, authorise the detention or implementation of control orders on persons or certain classes of person.[288] Gostin, Burris and Lazzarini in their *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*[289] provides a detailed overview of the types of public health law in the United States alongside an analysis of three models which are mobilised to conceptualise the determinants of population health and the political and social problems which each model tends to generate.[290] Christopher Reynolds in the Australian context has provided the most detailed and updated overview of this area of law making and regulation in the Australian context in his Public Health Law and Regulation.[291] This work includes treatment of disease-related public health law and regulation. None of these texts, however, provide a link between criminal statutes which punish HIV-transmission and these other 'offences' and powers. David Scamell and Chris Ward in their *Public health laws and politics on the issue of HIV transmission, exposure and disclosure* provide a specifically Australian overview of public health law across the various state and territory jurisdictions as it relates to HIV transmission, and come the closest to making and assessing any link between these two forms of law.[292] The paper however serves in the main as a catalogue of public health and criminal laws in relation to HIV transmission and public health activities more generally in Australia noting that criminal laws and public health laws now operate in parallel.[293] There is no critique or sustained discussion of any link between the two forms of law. In this text as well as others, attention paid to these public health laws on the one hand,

[287] For a fascinating history of these 'sanitary' laws see the excellent history of public heath: Dorothy Porter, *Health, civilization, and the state : a history of public health from ancient to modern times* (Routledge, 1999).

[288] These civil confinement regimes are known as Public Health Orders in NSW and are discussed above.

[289] Gostin et al. The law and the public's health: a study of infectious disease law in the United States. Columbia Law Review (1999) vol. 99 (1) pp. 59-128

[290] For Gostin et al, the three models are the microbial, behavioral, and ecological models Gostin et al. The law and the public's health: a study of infectious disease law in the United States. Columbia Law Review (1999) vol. 99 (1) pp. 69-76

[291] Christopher Reynolds and Genevieve Howse, *Public health law and regulation* (Federation Press, 2004).

[292] David Scamell and Chris ward, 'Public health laws and politics on the issue of HIV transmission, exposure and disclosure' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS (NAPWA), 2009).

[293] Ibid. 58.

and the exclusion of them from a discussion of HIV-related criminal law underlines the binary which the literature positions HIV-related criminal laws into. Rather than a discussion which looks to all legal interventions in relation to HIV-transmission, public health law is somehow treated as 'other' to that of criminal law. This being the case even when without public oversight Public Health Orders, which have now been recently strengthened in their operation,[294] have, and can continue to be used to detain those with HIV not because of some proven case of transmission, nor of public judgement of some form of wrongdoing in relation to intentional or reckless transmission, but instead because of an assessment of a person living with HIV as presenting a risk. This is a far lower standard than that required by the criminal law and one which requires positive act or omission on the part of the public health detainee at all, instead it is essentially a status-based power.

3.4 The Conceptualisation of the Law in HIV-Transmission Literature

The scholarship produced in relation to HIV-related criminal law is, as has been shown above, a diverse set of writing which stretches from the very applied in focus towards more theoretical considerations of the interplay between HIV transmission and the criminal law. Fundamentally, though, the literature views HIV-related offences in a negative light. It is a law which is 'other' to the (effective) public health and it is a 'failed' law when measured against the bio-political aims of public health. Most striking is the unspoken assumption that the criminal law is a failed attempt at disease control thus setting the scene for the literature to call for the expulsion of the law from the scene of HIV-transmission, a call which now is included in NSW at least in a building and coordinated effort on the part of the HIV/AIDS sector.[295] It is also a law, as is explored in the following sections, which is characterised as mechanistic, negative, limited and determinate. It is a law which operates in a command-based manner, prohibiting and preventing. It is a law which says 'no'. This vision of law is the focus of the following paragraphs. It is a vision which, when submitted to discussion in the following chapter resonates strongly with the view that Foucault in his substantive writing on the law had expelled law from the operation of power in modernity, either relegating it as an anachronism of the past to be replaced by the disciplines or bio-power or allowing it some

[294] See Public Health Act 2010 (NSW).

[295] Sally Cameron, 'HIV, Crime andthe Law in Australia: Options for Policy Reform - a law reform advocacy kit' (Pt AFAO) (February, 2011)(Discussion Paper) <http://www.afao.org.au/library_docs/policy/DP0211_HIV_Crime_and_the_Law.pdf>.

continued existence, but subordinated to those very same powers. Known as the 'expulsion thesis' in the post-Foucault literature, it was based on a reading of Foucault which maintained that he saw law as "essentially negative (and violent) in its mode of operation; historically tied to monarchical sovereignty; and, finally, with the transition to modernity, overtaken by more productive and effective technologies of power which invest it and instrumentally subordinate it to their operations."[296] The version of the law present in the following sections, drawn from the HIV-related criminal law literature, is one which draws upon a similar but unacknowledged conceptualisation of law. It is a conceptualisation of law which allows for the anti-criminalisation narrative to regard criminal law as separate to public health and as something quite possibly dangerous to public heath efforts and thus requiring swift expulsion through law reform. It is a conceptualisation of law which maintains that law is mechanical, negative, limited and determinate. I discuss each of these aspects in turn to build up a picture of the expulsion thesis present in the anti-criminalisation narrative.

3.4.1 Mechanical Criminal Law

One of the varied ways in which the literature discussed above conceptualises law is that as a mechanistic, non reflexive and inflexible force. This view of law in its black-letter guise, predictable and wholly coherent is something which legal scholars have worked to undo. However, it remains a consistent theme of the literature. This mechanistic, inflexible view of criminal law is tied to the representation of criminal law in the literature as a tactic of communicable disease control. In contribution after contribution, most notably in the work of Matthew Weait, the criminal law is assumed to either be, or that it can only exist as, a force of communicable disease control. The criminal law is of course not (only) a force of communicable disease control. At least in the programmatic focused way in which the literature envisions the activity of the criminal law. This representation works to subtly change the nature of law as it is presented in both the literature and associated debate about HIV-related offences. As it becomes rendered as a 'tactic', as one of the many parts of a "wider dispersal of governmental sites and [begins to] function throughout the social body"[297] as but one of the tools available to the state in governing HIV, the law becomes subtly shifted towards a position of being "instrumentally subordinate to the imperatives of modern

[296] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 15.

[297] Ibid. 33.

power,"[298] that is, to the bio-political power i.e public health. The literature achieves this by drawing a distinction between public health and criminal legal approaches to HIV, where the law remains tied to state power and on the contrary public health activity is left uncriticised and is assumed to have purely ameliorative or beneficial impacts. We see in fact that public health's own legal apparatus is left basically invisible in this entire literature apart from the broadest textbooks on public health generally.[299] The literature achieves this binding of the law to the state and state power, by its association with the parliament, official reports, committees, government action[300] and so on and is ability to be subject to law reform, lobbying efforts and advocacy to the central authority of the state.[301] Public Health activity is of course implicated and supported by this same state power. Apart from funding and other relationships of support or official dialogue,[302] we see in the narrative of Sharleen the most obvious use of state power upon the body of a person with HIV.[303]

The criminal law is not however always the mechanistic un-reflexive force which the literature holds it to be. Perhaps the critique of the criminal law as being far too mechanistic and unresponsive to change or the realities of the community is really about its responsiveness not being one which the public health apparatus can firmly grasp a hold of; something which Rush finds law has difficulty doing in relation to HIV.[304] For example in the discussion of the applicability of phylogenetic evidence.[305] This evidence is essential in providing factual causation (that the Defendant caused the infection in the Victim). This outcome, which may well be picked up in court rooms, conflicts with the worried view of the

[298] Ibid. 33.

[299] James Chalmers, *Legal responses to HIV and AIDS* (Hart, 2008). Christopher Reynolds and Genevieve Howse, *Public health law and regulation* (Federation Press, 2004).

[300] Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007).

[301] Sally Cameron, 'HIV, Crime andthe Law in Australia: Options for Policy Reform - a law reform advocacy kit' (Pt AFAO) (February, 2011)(Discussion Paper) <http://www.afao.org.au/library_docs/policy/DP0211_HIV_Crime_and_the_Law.pdf>.

[302] Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007).

[303] Eurydice Aroney and Tom Morton, 'Shutting Down Sharleen', *ABC Radio National Hindsight*, 21 March, 2010 (Australian Broadcasting Corporation) <http://www.abc.net.au/rn/hindsight/stories/2010/2848373.htm>.

[304] Peter Rush, 'HIV transmission and the jurisdiction of criminal law' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 74-90.

[305] Edwin J. Bernard et al, *The use of Phylogenetic analysis as evidence in criminal investigation of HIV transmission: A Briefing Paper* (National AIDS Trust and NAM, 2007).

literature where there is a straight forward relationship between facts and their use as evidence, such as Cameron and Rule's worry that "a person's decision to have an HIV test [could be] used against them later in a criminal trial as proof of their HIV status."[306]

What of Kirby's sobering view that prosecutions for HIV transmission will be rare in the Australian context?[307] In reality, the prosecutions which have been mounted are for the most egregious violations of a person's trust with repeated intentional removal of a condom during sexual intercourse whilst knowing of HIV infection,[308] having unprotected sexual intercourse whilst knowingly being HIV positive,[309] not using condoms whilst being both aware of HIV positive status as well as being under a Public Health Order requiring the Defendant to use condoms[310] and 35 offences of attempting to and deliberately infecting others with HIV whilst being a person of concern to health authorities.[311] This is not a mechanistic criminal law. It is a law working to prosecute only the most egregious cases, which make up a tiny portion of HIV-transmission cases each year. Most cases of transmission would be amenable to some form of criminal prosecution, in particular a lesser assault charge.[312] In light of the small number of cases and some of the developments in case law, perhaps the law's structure is less coherent, stable and more contingent than the literature would have it be. Removed from its application, rarefied and sealed-off from the reality of cases *actually* prosecuted, the law is anything but the mechanistic force described in the literature. In fact, if anything can be drawn from the cases which have been mounted, it is that the criminal law has stayed well away from cases where anything other than a prima facie case of deliberate transmission has

[306] Sally Cameron and John Rule, 'Outside the HIV strategy: challenges of 'locating' Australian prosecutions for HIV exposure and transmission.' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 18-30, 20.

[307] Michael Kirby, 'Foreword' ibid. 1-15.

[308] *Kanengele-Yondjo v R* [2006] NSWCCA.

[309] *Mutemeri v Cheesman* (1998) 100 AcrimR 397 at 400.

[310] See 'Kuoth 2007' cited in Gina Mitchell and Melissa Woodroffe, 'Criminal Transmission of HIV: A Guide for Legal Practitioners in NSW' HIV/AIDS Legal Centre Inc., 18 April, 2011) 51-2 <www.halc.org.au/downloads/crim_transmission.pdf >.

[311] Neal (2008) cited in ibid., 52-3.

[312] Such as occassioning Actual Bodily Harm.

occurred, instead focusing on cases where exceptional, willed or blatantly reckless behaviour has occurred.[313]

Golder and Fitzpatrick cite Foucault's writing in *Security, Territory and Population* in their discussion of this subtle shift in the view of law towards one of a 'tactic', where Foucault says:

> Here, on the contrary, it is not a matter of imposing a law on men [sic], but of the disposition of things, that is to say, of employing tactics rather than laws, or, of as far as possible employing laws as tactics; arranging things so that this or that end may be achieved through a certain number of means.*[314]*

Law is rendered as welcome only in so far as it supports or bolsters this more general public health approach. But where it seems to move beyond, or differ, or perhaps even to actively detract from the utility of public health approaches, it is marked as heretical to its operation. It is found, to borrow a legal phrase, to be acting *ultra vires*, beyond what it rightly can hope to do, a view founded on the binary split between public health and law and the assessment of criminal law on the basis of public health goals and methods.

When viewed in this way, when characterised as a mechanical, unthinking force unable to meet the demands of public health, criminal law's very existence in any way connected to HIV is questioned and found to be in need of 'reform'. The criminal law, and perhaps the law more generally, is required to withdraw from the scene, to remove itself from the issue of HIV-transmission in the name of utility - another characterisation of the law which is discussed below. It is, by being rendered a 'tactic' in the fight against HIV – just one tactic alongside others such as peer education – then relegated perhaps only to a "'mop-up' strategy for the exceptional or extreme cases"[315], the outliers and recalcitrant subject, expelled from

[313] See case summaries: Gina Mitchell and Melissa Woodroffe, 'Criminal Transmission of HIV: A Guide for Legal Practitioners in NSW' HIV/AIDS Legal Centre Inc., 18 April, 2011) 48 <www.halc.org.au/downloads/crim_transmission.pdf >.

[314] Cited in Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009). 32.

[315] Peter Rush, 'HIV transmission and the jurisdiction of criminal law' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 74-90. 75.

the 'proper' management of HIV, and in the words of Cameron and Rule "outside the HIV strategy."[316]

The outcome of this 'othering' of law in practical terms is outlined in the following call by *Positive Life*, a major NSW HIV/AIDS not-for-profit organisation, in media comments in relation to a recent criminal trial in NSW urging those exposed to HIV to move away from the law, leaving utilisation of it as a last resort:

> ...Lake [CEO of Positive Life] urged the use of the public health system in cases of allegations of deliberate transmission or exposure.
>
> "Where a person acquires HIV, and believes they were misled into having unsafe sex, they should ask their GP to make a report to the NSW Health Department and seek action," Lake said.
>
> "The Department has a range of measures it can use for both the victim and the alleged perpetrator, and where it is considered appropriate, they can refer [a matter] to police."[317]

This binary split between public health and criminal law works in other more subtle ways as well. Whilst discussed further below, in building the mechanistic sense of the criminal law through the construction of the criminal law as being "outside the HIV strategy,"[318] this 'othering' of HIV-related criminal law then implicitly draws the criminal law and public health into a comparative framework. Here we are asked to compare the success of public health approaches to HIV, led by strategy, with the uncontrolled criminal law, unwelcome, untied to any strategy or program of action. Whilst the criminal law remains in this frame, viewed in comparison with public health and thereby reinforcing its assessment against a

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[316] The very title of Cameron and Rule's chapter: Sally Cameron and John Rule, 'Outside the HIV strategy: challenges of 'locating' Australian prosecutions for HIV exposure and transmission.' Ibid. 18-30.

[317] 'First Gay HIV Criminal charge', *Sydney Star Observer* (Sydney, nSW), 28 July, 2010 <http://www.starobserver.com.au/news/australia-news/new-south-wales-news/2010/07/28/first-gay-hiv-criminal-charge/28573>.

[318] Again, the very title of Cameron and Rule's chapter: Sally Cameron and John Rule, 'Outside the HIV strategy: challenges of 'locating' Australian prosecutions for HIV exposure and transmission.' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 18-30.

rubric of communicable diseases control, it cannot but seem to fail as a tactic in the fight against onward transmission, something the criminal law is not designed for nor suited to.[319] This framing of the criminal law in the concepts and schema of public health also does further work for public health and the law. By creating a failed law, a law which cannot achieve against the outcomes demanded (or suitable) for public health, the bio-political power of public health is rendered strengthened and its unique identity buttressed. This strengthening of public health via critique of criminal law is one which is discussed in further detail in the chapter which follows.

3.4.2 Negative Criminal Law

Building on the singular focus upon the criminal law as a monolithic and internally coherent body of law, the scholarship tends to understand the intervention and character of the criminal law as a law tied to the sovereign, deductive and oppressive format of law. This characterisation of the criminal law as deductive and oppressive is not new and nor is there a lack of evidence to support this characterisation of the criminal law. Perhaps intensified by the lack of contextualisation of the criminal law as a part of the law more generally, this form of law, the law that 'says no' in the famous formulation of John Austin, the law that forbids or prevents conduct, is not the most accurate characterisation of 'law' nor, indeed of criminal law as it operates today. The criminal law admittedly does operate at times in what seems to be an oppressive and deductive manner – its punishments for example are often classically that of imprisonment and historically physical punishment of the body. Today, though, where risk-based jurisprudence and actuarial approaches to criminal justice as embodied in criminal law in relation to, for example, serious sex offences,[320] serious sex offenders and the reformative aspects of incarceration, render this characterisation of the criminal law as at least problematic. The law is not only the law which says 'no', it is a productive power which works also to construct the very subjects which it governs. This productive aspect of law is investigated further in chapter four.

[319] See discussion above about post-facto operation of the criminal law.

[320] Heather Douglas, 'Preventive Detention and Judicial Assessment of Risk' (Paper presented at the Sentencing Conference, Canberra, 8-10 February, 2008).

Foucault's own oft-used formulation of the *productive* nature of power is perhaps a good way of expressing this truth of the operation of the criminal law today, as well as power more generally, as a more productive force than is perhaps imagined in the literature:

> But it seems to me now that the notion of repression is quite inadequate for capturing what is precisely the productive aspect of power. In defining the effects of power as repression, one adopts a purely juridical conception of such power; one identifies power with a law that says no; power is taken above all as carrying the force of a prohibition. Now I believe that this is a wholly negative, narrow, skeletal conception of power, one which has been curiously widespread. If power were never anything but repressive, if it never did anything but to say no, do you really think one would be brought to obey it? What makes power hold good, what makes it accepted, is simply the fact that it doesn't only weigh on us as a force that says no, but that it traverses and produces things, it induces pleasure, forms knowledge, produces discourse. It needs to be considered as a productive network which runs through the whole social body, much more than as a negative instance whose function is repression.[321]

The characterisation of the criminal law's function and operation as one which according to Weait "is not to liberate but to repress, censure and condemn"[322] is a widespread characterisation of law which neglects to see how the criminal law is open to change and modification through its radical openness to discourses, knowledge and concepts external to its form. To take this perspective sees the operation of the criminal law in the limited rendering of the liberal adversarial criminal trial as concerning only the defendant and state.[323] This perspective completely ignores the work which the criminal trial 'does' for

[321] Michel Foucault, 'Truth and Power' in Craig Calhoun, Joseph Gerties and James Moody (eds), *Contemporary Sociological Theory* (Wiley-Blackwell, 1977), 203.

[322] Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007), 200.

[323] A state of affairs some contemporary legal writers would have us maintain in many senses: Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (Pt Springer Netherlands) (2008) 2(1) *Criminal Law and Philosophy* 21.

victims for example in much the same way as the narrow focus on criminal law in the HIV-related offences literature ignores the work that civil law does precluding us, to use Weait's own words out of context, "from thinking differently, laterally and imaginatively about the very conduct, consequences and people that are objects of it..."[324]

3.4.3 Limited Criminal Law

In the work of Cameron in the most recent contribution on HIV-related offences in Australia, the focus is on "targeting the nexus between these laws and HIV"[325] with the discussion paper intended to inform the development of a reform and advocacy programme. In fact the paper contains a specific 'advocacy kit'[326] instrumentalising the findings of the discussion paper into action for further study and advocacy for change where "aside from the harm to individuals caught up in legal proceedings, prosecutions for HIV exposure and transmission have the potential to undermine HIV prevention effort"[327] requiring a form of engagement and action "unlike anything seen since the early HIV response."[328] Concerns for the utility of criminalising HIV-transmission occurs across the range of more theoretical works as well. Utility is a theme which emerges and re-emerges in every critical analysis of HIV-related offences and our approaches to them.[329] It emerges as one of the key standards against which law is measured when it is regarded as a tactic of public health. Even in the more critical approaches to the topic such as that of Cameron and Rule[330] or Houlihan,[331] this same focus

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[324] Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007), 200.

[325] Sally Cameron, 'HIV, Crime andthe Law in Australia: Options for Policy Reform - a law reform advocacy kit' (Pt AFAO) (February, 2011)(Discussion Paper) <http://www.afao.org.au/library_docs/policy/DP0211_HIV_Crime_and_the_Law.pdf>. 1.

[326] Ibid. 14-20.

[327] Ibid. 13.

[328] ibid. 13.

[329] Numerous articles ask the question of utilitarian calculus – 'does it work' – including: Scott Burris et al, 'Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial ' (2007) *Arizona State Law Journal*; Sally Cameron, 'HIV, Crime andthe Law in Australia: Options for Policy Reform - a law reform advocacy kit' (Pt AFAO) (February, 2011)(Discussion Paper) <http://www.afao.org.au/library_docs/policy/DP0211_HIV_Crime_and_the_Law.pdf>; Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009); Ralf Jürgens et al, *10 Reasons to Oppose Criminalization of HIV Exposure or Transmission*, The Open Society Institute, Open Society Foundations (soros.org) No (2008); Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007).

[330] Sally Cameron and John Rule, 'Outside the HIV strategy: challenges of 'locating' Australian prosecutions for HIV exposure and transmission.' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 18-30.

on the utility of law's intervention is present. In the work of Matthew Weait the concern for utility clearly structures his inquiry, seen in his conclusion where he holds that "where the negative social impact of criminalisation in a particular context has the potential to outweigh any social benefits it might achieve...it is legitimate to question whether criminalisation is, as a matter of principle, always and in every case defensible and justifiable."[332] Peter Rush in his paper on the topic summarises the centrality of utility to the literature in this way: "one question that has loomed large is whether the institutions of criminal law or those of public health are the most appropriate venue for responding to the social problem of HIV transmission."[333] The result in Rush's opinion being that "the most commonly articulated position has been one which prefers a public health response, with criminal law relegated at best to a secondary role."[334] We ask then in relation to HIV-transmission and the criminal law questions which we ask of many things in our contemporary culture, those questions which some say are those "we can *only* ask"[335] today. For Judt, writing in relation to broader political concerns, "we can only ask, how much will it cost? Who will pay? How much are we willing to sacrifice? And will it be efficient?" And again in his words elsewhere: "We no longer ask of a judicial ruling or a legislative act: Is it good? Is it fair? Is it just? Is it right? Will it help bring about a better society or a better world?"[336]

Instead, we ask the questions of utility, we ask those questions we are allowed to ask of an intervention. They are of course questions which flow from the epistemological standpoint of public health and its epidemiologically influenced rationality.[337] Some of this focus on utility, in its defence, is justified. When faced with the spread of a disease which universally is regarded as a menace, the spread of which we would prefer to halt, it 'makes sense' to ask for

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[331] Annette Houlihan, *(Ill-legal) Lust is a Battlefield: HIV Risk, Socio-Sexuality and Criminality* Griffith University, 2007) <http://www4.gu.edu.au:8080/adt-root/public/adt-QGU20090908.155111/index.html>.

[332] Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007). 206.

[333] Peter Rush, 'HIV transmission and the jurisdiction of criminal law' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 74-90. 74.

[334] Ibid. 74.

[335] Remarqe Lecture: *What is Living and What is Dead in Social Democracy* (Directed by Remarque Institute, New York University, 2009).

[336] Tony Judt, 'Ill Fares the Land' (2010)(April 29, 2010) *The New York Review of Books* <http://www.nybooks.com/articles/archives/2010/apr/29/ill-fares-the-land/>.

[337] Neil Pearce, 'Traditional Epidemiology, Modern Epidemiology, and Public Health' (1996) 86(5) *American Journal of Public Health* 678.

approaches which prioritise actions based on utility or effectiveness over questions of justice, or right or any other perspective. But in assessing the involvement and activity of the criminal law does it still make sense to regard law simply as a 'tactic' in the fight against HIV as has been discussed above? Does this line of questioning accurately represent what the law hopes to achieve? In essence, is it fair to judge the activity of law and to characterise its 'success' or 'failure' based on its effectiveness as a tool of public health or a tactic of communicable disease control? The literature overwhelmingly answers yes.

The most direct engagement with the question of utility in the literature is found in the empirical legal study of Burris et al which at its core asks the question 'does it work' in relation to HIV-related criminal statutes and disclosure regimes in the United States.[338] It is a very lengthy and detailed accounting of their empirical trial on the question of the effect of criminal laws on HIV risk behaviours and is the single available piece of literature which undertakes an empirical legal studies approach to HIV-related criminal offences.[339] Specifically, Burris et al provide a comparison between two US States where one (Illinois) had instigated a regime of HIV-specific criminal laws and another (New York) had not. Although both states had laws which could be used to prosecute behaviours which pose some risk of HIV transmission, the study attempted to track any behavioural change between two resident populations (men who have sex with men and injecting drug users) and between the two States. Having first gained an understanding of the safer sex behaviours of their cohort, Burris et al applied two tests to trial the null-hypothesis that "law has no effect on sexual behaviour."[340]

The two tests which were applied were to test the effect of the law in two distinct ways. The first test - to find a 'belief that the law required condom usage' - was designed to capture those who lived in Illinois (where specific laws were enacted) *and* who were both aware of the law and understood its requirements. This first test was also designed to capture those test subjects who lived in New York, where there was no specific statute which required this behaviour, but yet understood that the general criminal law could be applied against those who had unsafe sex in certain circumstances, thus in effect, that the law of New York

[338] Scott Burris et al, 'Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial ' (2007) *Arizona State Law Journal*.

[339] Ibid. 467.

[340] Ibid. 501.

required condom use in certain circumstances. This test also captured those who had an accidentally correct view of the law – i.e. those who believed it was required (say due to it being the moral thing to do and therefore *would* be the legal requirement), but had not been accurately or specifically informed of the law. The null-hypothesis that the law had no effect on sexual behaviour withstood this test. Those who believed that condom use was required by the law were no more likely to have used condoms or to have disclosed their status during their most recent experience of anal or vaginal sex than those who did not believe that the law required condom use. There was no difference between those who were HIV positive and those who were uninfected.[341]

No significant difference was found between the population who lived in a State with a criminal law explicitly regulating sexual behaviour of HIV positive persons and those from the other State. Those who *believed* that the law required the infected person to practice safer sex or to disclose their status reported engaging is just as risky a set of behaviours as those who did not.[342]

The second test was to compare state of residence. The test looked for broad differences between behaviours of those who lived in Illinois with the HIV-specific statute and New York which did not have the HIV-specific law.[343] The authors acknowledge that this test provides little in the way of a direct test of the law's influence specifically - as a huge range of other untested differences between the States could not be tested such as culture and historical influences. However, it was felt that the test could be influential in uncovering if the null-hypothesis was correct. Any difference seen between the states could be an indication that having the HIV-specific law does make a difference, even if only by the law filtering down through culture and then influencing people's sexual behaviour.
By way of results, those who reported anal sex as their most recent sexual experience yielded no difference in sexual behaviour between the state-segmented cohorts. However, those who reported vaginal sex as their most recent experience were more likely to have used a condom when they were residents of Illinois, the state with the HIV-specific statute. The authors

[341] Ibid., 501.

[342] Ibid., 497.

[343] Ibid., see footnote 121 and associated text for extracts of the statute concerned.

suggest that the result of this state vs state test are only a weak refutation of the null-hypothesis in the context of the results of the first test:

> *State of residence is an extremely broad proxy for the effect of law. If people in Illinois are having safer vaginal sex because of the law, they are doing so without knowing that the law requires it...it would be incautious to conclude that the law is "working" from this association.*[344]

An interesting finding of the study was the widespread belief that safer sex behaviours were the correct behaviours from a moral perspective.[345] However this majoritarian moral belief was not associated with beliefs held about the law nor the actual law under which they lived.[346] I note however some caution in relation to this research, which, on the face of it, seems to show that HIV-related law has no effect on safer sex (or other) behaviours. Rather than this broader characterisation of the findings, I note with caution that the two states which were compared do in fact have legal apparatus designed to capture and enforce certain forms of behaviour in relation to sexual interactions. What was different between the two was that Illinios had an HIV-specific law (as NSW did pre-2007) where New York on the other hand did not have a HIV-specific law. New York State does have a range of disclosure and other laws in relation to HIV[347] as well as civil confinement regimes in place.[348] New York State now does have a range of criminal offences including HIV-specific public endangerment and reckless transmission offences.[349]

The findings of the study lead the authors to conclude that public health benefits (the reduction in the transmission rate of HIV) are unlikely to arise due to prosecutions of HIV-

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[344] Ibid., 502.

[345] Ibid., 505.

[346] Ibid., 506.

[347] For a summary of New York State law in relation to HIV/AIDS transmission see: New York State Department of Health, *HIV/AIDS Laws & Regulations* <http://www.health.state.ny.us/diseases/aids/regulations/>.

[348] For the application of these civil confinment law see: Danny Hakim, 'Man Who Spread H.I.V. May Be Held', *N.Y./Region*, *New York Times* (New York), 13 April, 2010 <http://www.nytimes.com/2010/04/14/nyregion/14nushawn.html>.

[349] *A1908-2011: AN ACT to amend the penal law, the criminal procedure law and the correction law, in relation to criminalizing the reckless transmission of HIV/AIDS and to require testing for AIDS and HIV for certain persons 2011* (New York State).

related risk behaviours under the criminal law.[350] The discussion which follows this conclusion is a useful précis of the various arguments for and against the use of the criminal law as a *disease control* measure and a considered discussion on the possible *negative* consequences of HIV-specific legislation (e.g. as providing a disincentive to be tested for HIV when knowledge of HIV status is an element of the offence - the wilful creation of blindness to status). In relation to the criminal law as a disease control measure, the authors rightly note the use of this rationale for implementation of HIV-specific criminal laws across a range policy, political and academic debates. More importantly, the authors note the tendency to treat the "disease control effect" of these laws by those writing in the *legal* field as a "secondary issue."[351] For those writing in the legal field, any disease control effect, has been seen as secondary or at best dependent upon the laws successfully achieving its "deterring, detecting and incapacitating [of] individuals who endanger others...and the *moral/retributive* purpose of validating a social norm and condemning and punishing individuals who deviate from it."[352] In an interesting footnote to the conclusion, the authors write that perhaps "we have never actually tried to use criminal law as a public health tool."[353] This comment is made in reference to the author's observation that the focus of debate in legal circles (in the US at least) has steered away from taking the position that criminal law, and particularly HIV-specific laws, are a communicable disease control measure. Instead, writers in the legal field who support law's intervention in this field have "taken its [disease control] impact for granted or essentially ignored the point" instead focusing on the moral/retributive purpose the authors refer to above. While on the other hand those who argue against the enactment of laws in relation to HIV-transmission have "taken as self-evident...that the law would not influence sexual risk behaviour any more effectively in this area than it had in others"[354] like anti-sodomy laws or the banning of sex-work. The legal literature which Burris et al are here speaking about has generally not concerned itself with the influencing of population behaviours through criminal law - the essence of public health interventions - but rather has concerned itself with definition of culpability and dealing with

[350] Scott Burris et al, 'Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial ' (2007) *Arizona State Law Journal*, 506.

[351] Ibid.

[352] Ibid., 506.

[353] Ibid., 507. See footnote 159

[354] Burris et al. Do Criminal Laws Influence HIV Risk Behavior-An Empirical Trial. Ariz. St. LJ (2007) vol. 39 p. 483

individual law-breakers.[355] In this way we see the legal and legal-academic literatureacting in its traditional mindset dealing with doctrinal or normative legal perspectives. It is, however, the anti-criminalisation advocates who have taken HIV-related criminal law to have its aim, albeit a failed one, to influence behaviour on a population or public health basis. Is it perhaps then not surprising that the implementation of HIV-specific laws in the form of safe sex and/or disclosure regimes "will neither directly promote public health nor directly harm it".[356] For Burris et al, the law, in summary, does not serve as a communicable disease control measure and as such should perhaps not be measured against the aim of reducing the burden of HIV in the population.

3.4.4 Determinate Criminal Law

The consideration given to the law in the extant literature centres on that particular body of knowledge identified as the 'criminal law'. Whilst this may seem unsurprising due to the explicitly stated focus upon criminal offences which render HIV transmission a criminal harm punishable by criminal sanction, the lack of contextualisation or acknowledgement of the links between the corpus of the criminal law and other 'bodies' of law renders such analysis lacking. In particular, this abstracting of the criminal law as a distinct and separate body of law from the operation of other areas of law in relation to HIV-transmission or HIV infection more generally tends to grant to the criminal law a sense of consistency and internal coherency which many would argue it in fact lacks.[357] This treatment of the criminal law as a wholly coherent body of law I feel grants a sense of uniform rationality to the jurisprudential motivations of the criminal law which, even in the most settled areas of criminal law, remains in some senses disputed.[358] This internal coherency and structural integrity portrayed in the literature through reference to the criminal law without reference to other forms of law and

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[355] Burris et al. Do Criminal Laws Influence HIV Risk Behavior-An Empirical Trial. Ariz. St. LJ (2007) vol. 39 p. 483

[356] Burris et al. Do Criminal Laws Influence HIV Risk Behavior-An Empirical Trial. Ariz. St. LJ (2007) vol. 39 p. 505

[357] Peter Rush, 'HIV transmission and the jurisdiction of criminal law' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 74-90.

[358] See for example: G.P. Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown, 1978) and excellent discussion by Nicola Lacey of the debate between critical theorists and those who aspire to a more coherent structure of a 'philosophy of law' in Nicola Lacey, 'Contingency, Coherence, and Conceptualism: Reflections on the Encounter between 'Critique' and 'the Philosophy of the Criminal Law'.' in Antony Duff (ed), *Philosophy and the criminal law : principle and critique* (Cambridge University Press, 1998).

without any reference to their interrelation and interaction begins to develop then the binary scene of criminal law *vs.* public health which becomes in some important ways a binary of *law itself* and public health. In this way the criminal law comes to be a synecdoche for law as such. The treatment of 'other' law both in its public health guise (civil confinement through Public Health Orders for example) or civil law has only been given some space in the most recent of publications in NSW with Cameron dedicating a short section to this body of law,[359] a body of law which I would feel represents perhaps the most significant undermining of the 'mutual responsibility' message of public health discourse which Cameron is so critical of the criminal law for undermining.[360] The emergence of a very significant award of damages in a recent NSW case[361] (where the Defendant is now being prosecuted in a criminal case based on the same facts)[362] is a form of legal intervention which, as Cameron rightly notes, the HIV/AIDS sector and government in many ways have very little control over. The nature of complaints being brought by individuals renders the talk of law reform of offences, prosecution guidelines for the DPP, Police and healthcare information sharing policies and so on[363], useless in the face of individuals seeking monetary damages for HIV transmission through torts of negligence or the intentional torts. This approach to seeking damages for a wrong committed will, in my opinion, do far more to undermine any sense of mutual responsibility which the HIV/AIDS sector wishes to maintain than criminal cases. The granting of monetary damages will forever re-shape the understanding of HIV as a harm which is significant enough to be granted a quantum of damages of $750,000. The subtle but important shift which could emerge here is that responsibility is found to lie with one party to the sexual encounter rather than in any way being shared, damages, particularly of this kind of quantum, being proof positive of this scenario. The emergence of this eventuality, where civil law comes to play a role which disputes public health's hold on the jurisdiction of HIV-

[359] Sally Cameron, 'HIV, Crime andthe Law in Australia: Options for Policy Reform - a law reform advocacy kit' (Pt AFAO) (February, 2011)(Discussion Paper), 2 <http://www.afao.org.au/library_docs/policy/DP0211_HIV_Crime_and_the_Law.pdf>.

[360] Ibid. 7.

[361] Unpublished at the time of writing. Case is cited in ibid. As Truss DCJ, File No: 3298 of 2008 Judgement, District Court of NSW, 8 April 2010.

[362] ibid. 13; 'First Gay HIV Criminal charge', *Sydney Star Observer* (Sydney, nSW), 28 July, 2010 <http://www.starobserver.com.au/news/australia-news/new-south-wales-news/2010/07/28/first-gay-hiv-criminal-charge/28573>.

[363] All strategies to "reduce the damage of HIV criminalization...[by reducing]... room for police and prosecutorial discretion" which is in effect law reform by proxy advocated by Burris, Edwin Cameron and Clayton in Scott Burris, Edwin Cameron and Michaela Clayton, 'The Criminalization of HIV: Time for an Unambiguous Rejection of the Use of Criminal Law to Regulate the Sexual Behavior of Those with and at Risk of HIV ' (2008) *Working Paper*. 12.

transmission is a real and present possibility. In that case, the lack of attention to the emergence of civil claims for HIV-transmission is surprising when, in fact, the emergence of these claims are more difficult to 'reign in' than law reform of the criminal law such as through agreed prosecutorial guidelines with the DPP.

3.5 The Law and Public Health in the Literature: Separation and Difference

In the Australian context again, Cameron and Rule highlight the theme of the criminal law's incompatibility with HIV public health efforts:

> Criminal prosecutions undermine public health's HIV prevention and treatment response and, conversely, public health procedures undermine the appropriateness of a criminal law response except in very unusual circumstances. [364]

For Cameron and Rule elsewhere too, Australian HIV-related criminal law is rendered "*outside* the HIV strategy."[365] For Weait, who notes that while public health approaches might not be the perfect solution to HIV-transmission,[366] "an approach to public health which *deploys law* in a way that allows both for the isolation and detention of people in the absence of any evidence of the risk that they pose to others and simply on the basis of some hypothetical risk, and for the criminalisation of those who are"[367], fails as a tactic of HIV prevention. This incompatibility of the criminal law with public health approaches is rendered in the literature as law being regarded as a failed tactic of public health. This failure as a tactic of public health-centred tool or strategy of communicable disease control results in the move to expel law from the scene of HIV-transmission, in particular the expulsion of law in its criminal guise.

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[364] Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009), 20.

[365] Sally Cameron and John Rule, 'Outside the HIV strategy: challenges of 'locating' Australian prosecutions for HIV exposure and transmission.' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 18-30. 18. Emphasis my own.

[366] Peter Rush, 'HIV transmission and the jurisdiction of criminal law' ibid. 74-90, 74.

[367] Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007), 21.

It is this call for the expulsion of law, founded upon a particular conceptualisation of law as mechanical, negative, limited and determinate, which resonates with Foucauldian jurisprudence. As noted at the introduction to this chapter, the expulsion or instrumental subordination of law to disciplinary or bio-political imperatives forms the core of the 'expulsion thesis' which reads Foucault's position on law as endorsing the gradual reduction of law's power and relevancy in modernity.[368] It is this ongoing theoretical dispute about Foucault's view of law, and of a view of law in post-Foucauldian scholarship, which I believe will shed some light upon this instrumentalisation of criminal law as (failed) tactic of HIV communicable disease control as presented in the anti-criminalisation literature. In undertaking this analysis in the following chapter, Foucault's perspective on knowledge, power and the subject will work to undermine this dominant 'law as tactic' discourse founded on themes of the criminal law as a coherent body of law/knowledge, characterised by mechanical and negative operation, limited in scope and determinate in nature which should be rendered subordinate to public health. In fact, 'Foucault's Law', as the two central writers I engage with in the following chapter term it, sees a revised position of law 'itself' as well as a surprising form of relationship between itself and its 'other', that of public health.

[368] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009). 74..

4 Foucault's Legal Philosophy and HIV-Related Criminal Law

4.1 Introduction: Applying Foucault to HIV-Related Criminal Law

In the outline of the various laws and regulations in chapter two, law itself may seem to take on a well-known, familiar character. The seemingly endless litany of prohibition, demarcation and authorisation seem well-known when presented in the black-letter of statute. This view of law is present in the HIV-related criminal law literature as well. In a variety of ways as shown in the previous chapter, the literature adopts a view of law which is mechanistic, negative, limited and determinate – a conceptualisation of the law which aligns with the black letter view of law.

In the following pages I develop a conception of legal-juridical power which is both adequate to the task of engaging with HIV-related law and as a rejoinder to the literature which, based on an inadequate conceptualisation of the law, contests the involvement of law in the work of governing HIV-transmission.

This difficulty of adequately conceptualising law is not one which is unique to the literature associate with HIV-related offences. It is in fact a classic debate in jurisprudence and a key question which has been debated in post-Foucault scholarship. In relation to Foucault's conceptualising of law, there are distinct similarities between the conceptualisation of law present in the HIV-related offences literature and in the representation of Foucault's view on the subject too. Foucault himself, and those who wrote after him, provide many instances of a characterisation of law understood to be fixed and determinate in a dependent relationship to other forms of power to which it is made subject. Foucault himself at one point described the disciplines as constituting a "counter-law"[369] and his work has been interpreted by many writers as charting the terminal decline of law in modernity, a position which is examined below.

It is with this very same Foucault that I begin, in this chapter, to construct a different conceptualisation of the being of law (or law 'itself') and of the operation of legal-juridical power in relation to HIV-transmission. I do so by building upon the insight of Peter Rush who has described law's seeming inability to maintain a firm grasp on HIV as a subject of its

[369] Ibid., 23.

jurisdiction,[370] and of the work of Ben Golder and Peter Fitzpatrick, two recent interpreters of Foucault.[371] In particular, the motivation for this research is prompted by Rush's insight that it is an open question as to how to properly represent HIV within the criminal law, without necessarily advocating for criminalisation.[372] Yet, that this proper representation of HIV needed to be balanced by the insight, by both Rush in relation to HIV and Golder and Fitzpatrick at a more general level, that the law was inherently unstable, constantly being displaced and made new again.[373] I present a Foucauldian conceptualisation of law as it relates to HIV-transmission which draws into itself this *slipperiness* described by Rush, not as an anomalous but *integral* part of its nature.

To achieve this more nuanced conceptualisation of law, Foucault is deployed here in an exegetical rather than the more traditional methodological mode. By this I mean to draw upon Foucault's own writings as interpreted by post-Foucault scholarship rather than to take one or more of Foucault's 'tools'[374] (such as his genealogical method) and apply it to HIV-related offences as such. Here in particular, I draw the recent scholarship of Ben Golder and Peter Fitzpatrick in their efforts to provide a radical corrective to the corpus of post-Foucault legal scholarship through a similarly exegetical approach to Foucault and law.[375]

This revised conception of legal-juridical power, law and its relationship to public health is a contemporary example of the confrontation with one of the most fundamental questions of legal theory: 'what is the nature of law and how can we characterise its operation?' By applying the substantive jurisprudential writing of Foucault to this question, the resulting form which the law takes brings with it explanatory power in relation to this classic question of jurisprudence and to the specific issue of HIV-related criminal offences, assisting us in a rethinking of the field of HIV-related criminal law.

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[370] Peter Rush, 'HIV transmission and the jurisdiction of criminal law' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 74-90.

[371] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009).

[372] Peter Rush, 'HIV transmission and the jurisdiction of criminal law' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 74-90, 81.

[373] Ibid., 81.

[374] Gavin Kendall and Gary Wickham, *Using Foucault's Methods* (SAGE Publications, 1999).

[375] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 5.

To build this revised conception, I first provide an overview of Foucault's thinking on the nature and operation of power generally, with a focus on the nature of juridico-discursive power in his work and then emergence of other types of power, namely 'discipline' and 'bio-power'. Analysis of Foucault's view of law itself is undertaken, as Foucault himself did so, within the context of the particular and specific modes of disciplinary power and bio-power described above. Secondly, I explain and explore the 'expulsion thesis', as it is known in post-Foucauldian scholarship, where Foucault is read as having either expelled law from its place in the working of power in modernity or allows it to remain but in a subjugated position to the newer, more effective, powers of discipline and bio-power. Having reconstructed this 'expulsion thesis', its link to HIV-related criminal law literature is made, whereby law is seen to be in both the post-Foucault expulsion thesis literature and HIV-related criminal law literature to be understood as expelled (or 'outside the strategy')[376] in relation to the governance of HIV-transmission in modernity or, in the alternative, made subordinate to the power of public health. I then apply Golder and Fitzpatrick's reading of Foucault to the case of HIV-related law. This revised reading of Foucault and law describes law as persisting, eluding total control by any power, responsive and pervasive. It is a law which is in a constant relationship of co-determinacy with public health, relationally inter-dependent and more nuanced than that which is conceptualised by the literature to-date.

To achieve this refiguring of law and of HIV-related law in particular, not only is textual evidence drawn from the literature and 'black letter' law-as-statute utilised, but so too is evidence of the law as it exists 'beyond the page' as it were. In the same manner in which the 'criminal law' is merely one part of a greater 'whole of law' which includes far more genres, so too does the law printed on the page, this 'black letter law', exist in a similarly broad contexts. This context includes other forms of law such as that made and interpreted by the judiciary, but also what I term the law-as-enacted. This law-as-enacted is the 'law made flesh' if you will. It is the law beyond the written word which is operationalised through embodied action in the world in criminal or civil cases and actions by public health authorities.[377] It is the law as it works in the world in cases such as *Kanengele-Yondjo*[378] or

[376] Sally Cameron and John Rule, 'Outside the HIV strategy: challenges of 'locating' Australian prosecutions for HIV exposure and transmission.' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 18-30.

[377] Such as through Public Health Orders or the more mundane processes of reporting and analysis of data.

[378] *Kanengele-Yondjo v R* [2006] NSWCCA.

the narrative of Sharleen.[379] It is the law as it undertakes its work in a world where public health efforts contest law's very viable existence yet all the while, in some of the ways sketched above, law relates to public health either working to buttress public health's own identity and hold on its 'jurisdiction' of HIV-transmission[380] or to compete with and undermine public health approaches.[381] It is this operationalisation of the law which renders the law as something ineluctably more than words on a page. It is this character of law-as-enacted combined with black letter law where law takes on its full life and meaning. This combination of words which will in some way be 'operationalised' completes the picture of 'law', grounding the characterisation of this thing called 'law' as a form of power which can only be analysed 'beyond the page'. It is law as a form of power, still present and vital, which I want to bring to the fore in this chapter.

4.2 Foucault on Power

The effect of the thought and writing of Michel Foucault has been felt across the breadth of academic disciplines. His work continues to engage readers, students and researchers today who attempt to 'use Foucault' in a variety of ways and in a variety of settings.

Foucault himself wrote nothing directly about HIV-related criminal law. The substantive statements which form the ground of this inquiry relate to his more extensive treatment of 'the law', 'the juridical', 'medicine', 'bio-power' and more broadly on the nature and operation of power today. These areas were absolutely central to the greater body of Foucault's work and power, the law, sovereignty and medicine are all central considerations that Foucault returned to across the arc of his writing. Whilst these themes returned time and again, Foucault's own theorization of law, the place (or otherwise) which he accorded law within his conception of power in modernity as well the relationship between law and other forms of power are the central focus of this thesis' engagement with him.

Foucault has become for many the dominant theorist of power of the late twentieth century. His work engaged with a range of topics from medicine, psychiatry, prisons, architecture and

[379] Eurydice Aroney and Tom Morton, 'Shutting Down Sharleen', *ABC Radio National Hindsight*, 21 March, 2010 (Australian Broadcasting Corporation) <http://www.abc.net.au/rn/hindsight/stories/2010/2848373.htm>.

[380] As Rush describes it: Peter Rush, 'HIV transmission and the jurisdiction of criminal law' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 74-90.

[381] Sally Cameron and John Rule, 'Outside the HIV strategy: challenges of 'locating' Australian prosecutions for HIV exposure and transmission.' Ibid. 18-30, 18.

sexuality[382] but always returned first and foremost to the analysis of power and its operation in modernity and history. In this way many of his various works can be seen as extended case studies on the working of power in modernity. Foucault's work delivered new ways of speaking about and conceptualising the forms of power which operate today. Theorists and others now regularly refer to explicit forms and modalities of power in Foucauldian terminology, such as *disciplinary power*[383] or *biopolitical power*.[384]

In his engagement with the nature and operation of power, Foucault touched on law and legal institutions at a variety of points.[385] He did turn his attention to law, but never did he take up 'the law' as an object of study in the same way in which he turned his attention to say the emergence and forms of penal systems or of sexuality.[386] However, it was in his attention to these other topics, notably in his great work *Discipline and Punish*[387] regarding the emergence of penal systems and the first volume of his *History of Sexuality*,[388] where Foucault's writing on law has been most influential. It is thus within his research and writing on the broader development of techniques and modes of power in modernity that Foucault's consideration of law and legal-juridical power is to be found. As such, rather than what might come of a sustained meditation upon the working and nature of the law alone, law is treated in these writings in and amongst Foucault's explication of the development of his theorisation of power, and in particular of the specific modes of disciplinary power (*Discipline and Punish)* and bio-power (*The History of Sexuality).* It is his consideration of law within the context of the development of these modes of power in the 1970s from which has emerged in the post-Foucault literature what has been termed the 'expulsion thesis'.[389] This argument about the place of law in the operation of power in modernity focuses on a variety of Foucault's writings, but most importantly those of the genealogical period such as his first volume of *The History of Sexuality*[390] and *Discipline and Punish*.[391] Admittedly, proponents

[382] Gary Gutting, *Foucault: A Very Short Introduction* (Oxford University Press, 2005).

[383] Michel Foucault, *Discipline and Punish* (1978).

[384] Michel Foucault, *History of Sexuality* vol 1.

[385] Most notably in Michel Foucault, *Discipline and Punish* (1978).

[386] Both of which were the objects of his major contributions to the academy.

[387] Michel Foucault, *Discipline and Punish* (1978).

[388] Michel Foucault, *History of Sexuality* vol 1.

[389] The key recent scholarship upon which is given to us byAlan Hunt and Gary Wickham, *Foucault and law : towards a sociology of law as governance* (Pluto Press, 1994).

[390] Michel Foucault, *History of Sexuality* vol 1.

of the expulsion thesis find in these works ample textual support for the view that for Foucault, law in modernity is in fact expelled from the operations of power[392] or is perhaps still operative but merely as instrumentally subordinated either disciplinary power or bio-power.[393] The 'expulsion thesis' reading of Foucault is described below and is key to understanding what a revised 'post-expulsion thesis' Foucauldian jurisprudence (offered by Golder and Fitzpatrick) can offer to HIV-criminalisation debates. However, it is necessary first to engage in an exploration of Foucault's conceptualisation of power more generally, with a focus on those areas where he touched on law and the alleged shift from a time of law's centrality to power's operation to one of law's receding. This alleged shift from a time of law's ascendency to one of law's subordination takes place for Foucault beginning in the Eighteenth Century. The historical narrative which Foucault develops in *Discipline and Punish* in particular is the foundation of claims that from this time onwards we see law, once the technology of sovereign, oppressive power superseded by another power, that of discipline and later bio-power. It was a movement from a theory of sovereign power which was for Foucault a system of "law-and-sovereign"[394], to one of the new constellation of technologies of power in modernity.

4.1.1 The Dominant Paradigm

Perhaps the dominant view of power which seems to remain well established in popular and political characterisations of power and its operation is one which sees power as "enhancing the capacities of those who possess it and consequently, in so far as it impinges on other persons, as an imposition on the freedom of those persons."[395] Such a view of power, shared by political theorists, historians and others in the academy, was exactly the target of Foucault's significant reformulation of power and its operation. The effects of power in the traditional formulation were that "power in the hands of others prevents its victims from doing what they otherwise would have done, from obtaining what they otherwise would have obtained, or even from thinking what they otherwise would have thought."[396] These conceptions of power see it as repressive, as something which "excludes, forbids, limits,

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[391] Michel Foucault, *Discipline and Punish* (1978).

[392] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009).

[393] Ibid.

[394] Michel Foucault, *History of Sexuality* vol 1, 97. Cited in Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 23.

[395] Barry Hindess, *Discourses of power : from Hobbes to Foucault* (Blackwell Publishers, 1996), 96.

[396] Ibid., 96.

censors, and says 'no'".[397] It is therefore something to which the questions of legitimacy and illegitimacy become central. Caught up in a conception of the sovereign, autonomous liberal individual, the activity and debate surrounding power has centred on its legitimate application under conditions of free consent of the individual and its inverse the illegitimate application of power under conditions characterised by a lack of consent.

Traditional writing and thought regarding power have recounted, in a form of Whig history, the gradual, enlightened shift from the government of the many by the one, towards the democracies of today, heralding for some the end of history, the end-point of our political evolution from autocracy towards the liberal democratic paradigm.[398] So too has political philosophy concerned itself with analysis centred and conceptually reliant upon concepts of sovereignty. These concepts of sovereignty are modelled on the sovereign powers of the monarch and by extension the state and its relationship to individual subjects. Starting out from a set of assumptions about 'Man' as an autonomous individual or collective agent, conventional political thought conceives of the nature of the state as a constituted phenomenon with law as its power:

> [T]he juridical model of sovereignty...presupposes the individual as the subject of natural laws or primitive powers[;]...sets out to account for the genesis, in ideal terms, of the State[; and]...makes law the fundamental manifestation of power.[399]

Political philosophy thus concerned itself with questions of legitimacy and illegitimacy of sovereign rule and other like questions which assumed *a priori* the conception of sovereign power described above. For Foucault, this conception was the core of what he described as the "juridico-discursive" conception of power.[400]

This 'juridico-discursive' conception of power assumed the character of power to be fundamentally rule-based and operating through the law.[401] It was above all a negative

[397] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 16.

[398] Francis Fukuyama, *The End of History and the Last Man* (Free Press, 1992).

[399] Roger Alan Deacon, *Fabricating Foucault: Rationalising the Management of Individuals* (Marquette University Press, 2006), 115.

[400] See Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 15.

[401] Ibid., 16.

conception of power based on law: it represses, excludes, limits, refuses, censors, blocks, divides and rejects.[402] Foucault presented the horrific majesty of this rule-based, negative, juridico-discursive concept of power in the very opening pages of *Discipline and Punish* with his description of the 1757 execution of Damiens the Regicide where law in its fully sovereign, oppressive and horrific modality ordered that the guilty man be:

> taken and conveyed in a cart, wearing nothing but a shirt, holding a torch of burning wax weighing two pounds"; then, "in the said cart, to the Place de Grève, where, on a scaffold that will be erected there, the flesh will be torn from his breasts, arms, thighs and calves with red-hot pincers, his right hand, holding the knife with which he committed the said parricide, burnt with sulphur, and, on those places where the flesh will be torn away, poured molten lead, boiling oil, burning resin, wax and sulphur melted together and then his body drawn and quartered by four horses and his limbs and body consumed by fire, reduced to ashes and his ashes thrown to the winds.[403]

It is this vision of sovereign power at its most horrific we can see most clearly the negative conception of juridico-discursive power; homogenous, centralised, in the hands of a (sovereign) ruler or state which *inflicts* power *upon* those lower down the hierarchy. This is a power which is wielded by one over the other, against their will, negative and intentional. This is a power for which law is essential and from which law's alleged modus operandi is drawn.

4.1.2 Foucault's Critique of the Traditional Conception of Power

This 'traditional' conception of power is one where power is "exercised in a fundamentally negative fashion. Power lays down a rule which demarcates the licit from the illicit, seeking to repress and negate that which it prohibits."[404]

Foucault's most central supposition however was that power did not always centre on the person or institution of the sovereign or state contrary to the juridico-discursive conception of

[402] Roger Deacon, 'Why The King Has Kept His Head: Foucault on Power as Sovereignty' (2002) 21(3) *Politeia* 6, 8.

[403] Michel Foucault, *Discipline and Punish* (1978), 3-8.

[404] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 15.

power. Foucault in the pages following the description of the horrific execution above, presents us with the kernel of his alternative vision of power. In these pages Foucault presented the detailed rules and timetable of a Paris reformatory for young people where:

> Art. 17. The prisoners' day will begin at six in the morning in winter and at five in summer. They will work for nine hours a day throughout the year. Two hours a day will be devoted to instruction. Work and the day will end at nine o'clock in winter and at eight in summer.
>
> Art. 18. Rising. At the first drum-roll, the prisoners must rise and dress in silence, as the supervisor opens the cell doors. At the second drum-roll, they must be dressed and make their beds. At the third, they must line up and proceed to the chapel for morning prayer. There is a five-minute interval between each drum-roll.
>
> Art. 19. The prayers are conducted by the chaplain and followed by a moral or religious reading. This exercise must not last more than half an hour.
>
> Art. 20. Work. At a quarter to six in the summer, a quarter to seven in winter, the prisoners go down into the courtyard where they must wash their hands and faces, and receive their first ration of bread. Immediately afterwards, they form into work-teams and go off to work, which must begin at six in summer and seven in winter…[405]

This narrative – from public execution to timetable – was to form the kernel for Foucault's major contribution to our understanding of the dynamics of power. The nature of power in modernity was no longer to be understood as one which was wholly negative, oppressive, unilaterally inflicted upon an unwilling subordinate as the juridico-discursive view would have it. Foucault attempted to highlight something other than the traditional conception of the operation of power and did so through the construction of a historical narrative from the earlier sovereign-based juridico-discursive vision of sovereign power through to the more

[405] Michel Foucault, *Discipline and Punish* (1978), 82.

modern institutionally ingrained, more fine-filamented operation of power present in the timetable of the Paris reformatory. This shift away from the focus upon sovereign power is in a way a partial working out of Foucault's earlier plea that "in political thought and analysis, we still have not cut off the head of the king,"[406] and his urging to:

> ...Cease once and for all to describe the effects of power in negative terms: it 'excludes', it 'represses', it 'censors', it 'abstracts', it 'masks', it 'conceals'. In fact, power produces; it produces reality; it produces domains of objects and rituals of truth.[407]

Foucault's vision of power is tightly linked to his understanding of knowledge, discourse and 'truth' as highlighted in the quotation above and again here:

> We should admit...that power produces knowledge (and not simply by encouraging it because it serves power or applying it because it is useful); that power and knowledge directly imply one another; that there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations.[408]

Power and knowledge – often represented in relation to Foucault by the neologism power/knowledge – are central to Foucault's position on power more generally. In this, Foucault draws our attention, as cited above, to the necessary relationship between power and knowledge, but more specifically to the operation of power in the construction of knowledge(s) and the application of knowledge to underpin the very relations of power which constructs it in the first place. Rather than some necessarily programmatic or willed relationship between power and knowledge, this circular relation is used to highlight the role that power plays in constructing objects of knowledge through discourse which then opens the way for further implementation of power relations. This also closes or limits discussion on a topic – and HIV is definitely seen as governable or not according to its discursive field of relevance In our case, as Foucault did in relation to prisons, schools or medicine more

[406] Ibid., 88 89.

[407] Ibid., 94.cited in Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 15.

[408] Michel Foucault, *Discipline and Punish* (1978), 465.

generally, we can identify the construction of individuals into at-risk populations or individual 'cases' through observations and application of epidemiological and risk-centred discourses.[409] From this point of identification we come to construct the individual case or population as an object of knowledge about which we can study, observe, collect data and map in space. This process then allows for more 'effective', targeted, clearer or more broadly 'controlled' methods and modalities of intervention – I think it does more than this – it creates what can be talked about and what cannot. Thus the construction of knowledge(s) and their application come to allow for further implementations of power and the re/creation of power relations between say HIV Physician and patient or HIV/AIDS Service Organisation and the 'gay community'. .[410] Knowledge and power are therefore so interwoven as to justify the use of that neologism of power/knowledge. There is no attempt to undertake knowledge-work, to establish knowledge about an object, to operate within a certain scientific discipline's strictures of what constitutes 'good' or 'bad' method. Further, no use of knowledge at all can be undertaken without particular power effects nor can we speak or write of knowledge without acknowledging the power relations which are central to its formation and which are the result of its application.

Thus, when we look at the various knowledge(s) which are operative in the constitution of public health approaches to HIV-transmission, we must remember as we assess these that there are power relations at work in the construction of these knowledge(s) and it is through the discourse of the anti-criminalisation scholarship that we can see the contours of this power/knowledge operating in that field. To draw from an example already used, it is epidemiological knowledge for example which makes the subject of those 'at-risk' available to us as a site of governance and an opportunity for the re/creation of further power relations. The subject-position here of a person 'at-risk' or the 'target population' of an HIV/AIDS Service Organisation's are examples of subject positions created as the effect of the working of power/knowledge:

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[409] Neil Pearce, 'Traditional Epidemiology, Modern Epidemiology, and Public Health' (1996) 86(5) *American Journal of Public Health* 678. Or on the challenges of describing the formation of 'at-risk' populations in relation to MSM "The details of the relation between men who had sex with menand public health's surveillance and treatment functions remain tantalizingly opaque, impelling further research." see: Michael Brown, '2008 Urban Geography Plenary Lecture - Public Health as Urban Politics, Urban Geography: Venereal Biopower in Seattle, 1943-1983,' [1] (2009) 30(1) *Urban Geography* 1. 2.

[410] Nina Glick Schiller, Stephen Crystal and Denver Lewellen, 'Risky business: The cultural construction of AIDS risk groups' (1994) 38(10) *Social Science & Medicine* 1337. 1338 infra.

> The subject that knows, the objects to be known and modalities of knowledge must be regarded as so many effects of these fundamental implications of power-knowledge and their historical transformations. In short, it is not the activity of the subject of knowledge that produces the corpus of knowledge, useful or resistant to power, but power-knowledge, the processes and struggles that traverse it and of which it is made up, that determines the forms and possible domains of knowledge.[411]

Foucault's conception of power then is a move away from the question of legitimacy and illegitimacy which so preoccupies analysis which retains the juridico-discursive conception of power; the concept of power exerted over and against someone's will in the classic definition presented earlier. No longer are we to understand power only in the top-down sovereign format. Nor was the classical characterisation of power as necessarily negative, deductive, oppressive or exclusionary wholly accurate. Instead, Foucault moved away from the sovereign and state and instead began to highlight the diffuse, de-centralised nature of power "not because it embraces everything, but because it comes from everywhere"[412], being "produced from one moment to the next."[413] This more diffuse, decentralised and productive form of power was the corrective to the 'juridico-discursive' conception of power.

4.3 Foucault on Discipline, Bio-Power & Population

In his work to identify the working of power in various institutions and times, Foucault wrote about the workings of power in many and varied contexts. In this work he also identified various *formations* of power other than that of the juridico-discursive form, types of power which are operative at different times in the west in very distinctive manners and identified by their unique sets of practices. Principally, and central to our purposes, these included *disciplinary power*, which worked primarily on the body of people towards forming them towards a particular comportment and *bio-power* which utilises the concept of the 'population' and seeks to govern this grouping.

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[411] Michael Foucault cited in Beatrice Han, *Foucault's Critical Project: Between the Transcendental and the Historical* (Stanford University Press, 2002), 143.

[412] Michel Foucault cited in Alan Sheridan, *Michel Foucault: The Will to Truth* (Michel Foucault: The Will to Truth, 1980), 143.

[413] Michel Foucault cited in ibid., 143.

To free ourselves from the juridico-discursive conception of power, Foucault suggested that we need to develop an "analytics", as opposed to a "theory" of power relations,[414] or at least a theory as 'toolkit'. In other words, instead of attempting to say *what power is,* we must attempt to show *how it operates* in concrete and historical frameworks by asking "by what means is it [power] exercised?" Similarly:

> Rather than asking what, in a given period, is regarded as sanity or insanity, as mental illness or normal behaviour, I wanted to ask how these divisions are operated.[415]

This method of inquiry yielded Foucault's description of both 'discipline' and 'bio-power'.

Central, to 'discipline', is the notion of the 'norm'. Three procedures were and are central to this making of the disciplined subject: hierarchical observation, normalising judgement and the examination.[416] These terms are significant in that each hints simultaneously at an exercise of power (hierarchy, judgement, testing) and a formation of knowledge (observation, normalisation, evaluation).[417] In the first instance "the exercise of discipline presupposes a mechanism that coerces by means of observation; an apparatus in which the techniques that make it possible to see induce effects of power, and in which, conversely, the means of coercion make those on whom they are applied clearly visible."[418] In the second instance, "the art of punishing, in the regime of disciplinary power, is aimed neither at expiation, nor even precisely at repression. It brings five quite distinct operations into play:…[it] compares, differentiates, hierarchizes, homogenises, excludes. In short, it *normalises.*"[419] In the third and final instance, hierarchical observation and normalising judgement are combined in the examination:

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[414] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 3.

[415] Michel Foucualt cited in Colin Gordon Graham Burchell, Peter Miller (ed), *The Foucault Effect: Studies in Governmentality* (University of Chicago press, 1991), 74.

[416] Roger Deacon, 'An Analytics of Power Relations: Foucault on the History of Discipline' (2002) 15(1) *History of the Human Sciences* 89.

[417] Ibid.

[418] Michel Foucault, *Discipline and Punish* (1978), 170-1.

[419] Ibid., 182-3.

> the examination is highly ritualised. In it are combined the ceremony of power and the form of experiment, the deployment of force and the establishment of truth. At the heart of the procedures of discipline, it manifests the subjection of those who are perceived as objects and the objectification of those who are subjected. The superimposition of the power relations and knowledge relations assumes in the examination all its visible brilliance.[420]

The examination permits particular features of the subjects under observation or analysis to be reported, classified, assessed and utilised, and functions both to produce and to discipline, since it not only authenticates but extorts for the benefit of others an immense tactical knowledge.

Normalisation is the key instrument of the disciplines, where "the power of the Norm…has joined other powers – the Law , the Word, and the Text, Tradition, - imposing new delimitations upon them."[421] Normalisation also feeds on and encourages the paradoxical twin trajectories of totalisation and individualisation that have been the hallmark of Western political rationalities:

> In a sense, the power of normalisation imposes homogeneity; but it individualises by making it possible to measure gaps, to determine levels, to fix specialities and to render the differences useful by fitting them one to another. It is easy to understand how the power of the norm functions within a system, the norm introduces, as a useful imperative and as a result of measurement, all the shading of individual difference.[422]

Whereas "for a long time ordinary individuality – the everyday individuality of everybody – remained below the threshold of description"[423], the contemporary technologies borne out of the human sciences and rational administrative approaches to government centred on

[420] Ibid., 184-5.

[421] Ibid., 184.

[422] Ibid., 184.

[423] Ibid., 191.

technologies and practices such as statistics, notation, record keeping and the archive. This allowed for the first time the greater number of the population to be individually identified, facts and descriptions kept in relation to them and finally compared.

"The disciplines mark the moment when the reversal of the political axis of individualisation – as one might call it – takes place"[424], it was this moment when the individual, previously part of the great mass, the singularly unidentifiable, unrecorded and anonymous, was to become the focus of power, identified, measured, recorded , compared and known: "disciplinary power…is exercised through its invisibility; at the same time it imposes on those whom it subjects a principle of compulsory visibility:"[425]

> In a system of discipline, the child is more individualised than the adult, the patient more than the healthy man, the madman and the delinquent more than the normal and the non-delinquent. In each case, it is towards the first of these pairs that all the individualising mechanisms are turned into our civilisation, and when one wishes to individualise the healthy, normal and law-abiding adult, it is always by asking him how much of the child he has in him, what secret madness lies within him, what fundamental crime he has dreamt of committing.[426]

Golder and Fitzpatrick note that the key point in relation to discipline and its relationship to law is that the disciplines as Foucault proposed them operated not through the imposition of force, nor the imposition of rule or law as was the case in the example of the torture and execution of the Regicide Damiens.[427] Rather, they write "the constitution of the modern subject of discipline was achieved through new and different techniques – spatial distributions, hierarchical observations, normalizing judgements, constant surveillance and examinations."[428] This norm-referenced system of power measured and surveyed compliance

[424] Ibid., 192.

[425] Ibid., 187.

[426] Ibid., 193.

[427] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 19.

[428] Ibid., 19.

and continual striving for adherence to standardised norms rather than adherence to laws or rules. "In formulating his concept of disciplinary power which produced the subject upon which it acted through the articulation of the norm, Foucault was attempting to isolate a modality of power which exceeded the logic of the state and which transcended the usual theatres of state power."[429] For Golder and Fitzpatrick, "[Foucault] was searching for the exercise of power in places where political theorists of the state had not been wont to look – in the interstices of the disciplinary regime; in the workplace, the asylum, and so forth."[430] And in Foucault's words, he was searching for power's effects "at its extremities, at its outer limits at the point where it becomes capillary."[431]

Adding to this conception of disciplinary power, Foucault then introduce the concept of 'bio-power' in the mid-1970s. This was not necessarily a move *from* disciplinary power to that of a new technology of power but instead was an *additional* technology of power operative in modernity. Foucault developed the idea of bio-power to capture technologies of power that address the management of, and control over, the *life* of the population. Emerging in 1976 in the first volume of Foucault's study of sexuality known in English as *The History of Sexuality*,[432] Foucault added this new technology to his description of the disciplinary technologies of power described above. This new technology did not focus upon the adherence to the norm of individuals, but instead worked to govern the populace as a whole:

> Now I think we see something new emerging in the second half of the eighteenth century: a new technology of power, but this time it is not disciplinary. This technology of power does not exclude the former, does not exclude disciplinary technology, but it does dovetail into it, integrate it, modify it to some extent, and above all, use it by sort of infiltrating it, embedding itself in existing disciplinary techniques. This new technique does not simply do away with the disciplinary technique, because it exists at a different level, on a different scale,

[429] Ibid., 21.

[430] Ibid., 21.

[431] Michel Foucaul cited in, in ibid., 21.

[432] Michel Foucault, *History of Sexuality* vol 1.

> and because it has a different bearing area, and makes use of very different instruments.[433]

This new technology is bio-power. Bio-power was concerned with the "'vital' character of living human beings; an array of authorities considered competent to speak that truth; strategies for intervention upon collective existence in the name of life and health; and modes of subjectification, in which individuals work on themselves in the name of individual or collective life or health."[434] Bio-power, then at the most elemental level is the bringing to bear upon life, the body and the population a series of rational attempts to foster and manage life. Bio-political methods to bring the body and population under control include things such as a focus on mortality and morbidity, birth, indicators of relative health of a population and measures of behavioural risk of a population. All of these are the key tools of public health (and also now of law which has adopted them).[435] A specific form of activity which utilises bio-power, 'bio-politics' is that which Mitchell Dean, following Foucault, defines as:

> ...a politics concerning the administration of life, particularly as it appears at the level of populations. It is 'the attempt, starting from the eighteenth century, to rationalize problems posed to governmental practice by phenomena characteristic of a set of living beings forming a populations: health, hygiene, birth rate, life expectancy, race'...It is concerned with matters of life and death, with birth and propagation, with health and illness, both physical and mental, and with the processes that sustain or retard the optimization of the life of a population. Bio-politics must then also concern the social, cultural, environmental, economic and geographic conditions under wehich humans live, procreate, become ill, maintain health or become healthy and die. From this perspective bio-politics is concerned with the family, with housing, living and working conditions, with what we

[433] Michel Foucault, *Society Must Be Defended: Lectures at the College de France, 1975-1976* (Picador, 2003), 242.

[434] Paul Rabinow and Nikolas Rose, 'Biopower Today' (2006)(1) *BioSocieties* 195, 195.

[435] See Chapter four where I discuss law's inherent vacuity.

> call 'lifestyle', with public health issues, patterns of migration, levels of economic growth and the standards of living...[436]

Turning back to the concept of bio-power described by Foucault and recounted above, Rabinow and Rose provide a more detailed definition of the concept with their three-fold test for identification of bio-power. This definition included a requirement that one of more "truth discourses"[437] about the vital character of living human beings and an array of authorities considered competent to speak that truth. Further, strategies for intervention upon collective existence in the name of life and health, initially addressed to populations that may or may not be territorialised upon the nation, society or pre-given communities, may also be specified in terms of emergent bio-social collectivities.[438] Finally, it must also include modes of subjectivisation through which individuals are brought to work on themselves under certain forms of authority, in relation to truth discourses, by means of practices of the self, in the name of their own life or health, that of their family or some other collectivity, or indeed in the name of the life or health of the population as a whole.[439]

For Foucault, one of the defining features of this new population-focused technology of power, was, like its disciplinary cousin, its productivity. Whereas sovereign power, exercised through the law, was seen as *deductive* in nature, the new forms of power, namely discipline and bio-power on the contrary, were ones defined by their *productive* nature. Sovereign power and law were defined by the "right of a ruler to seize things, time, bodies, ultimately the life of subjects"[440] whereas bio-power and its cousin disciplinary power are technologies of power which are innately productive in their operation. Bio-power and its bio-political implementation aims to *produce* a healthy population, to form and guide it towards that mode of living that is most healthy and most effective. The 'population', either as a whole (i.e. the 'Australian population') or as a specific sub-population often defined by various vectors of risk (i.e. 'sexually adventurous men') and often named variously 'at-risk' or 'target' populations, then becomes the object around which the power/knowledge process outlined above becomes operative. In relation to healthcare practices, this form of power becomes

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[436] Mitchell Dean, *Governmentality : power and rule in modern society* (SAGE, 2nd ed, 2010), 118-19.

[437] Paul Rabinow and Nikolas Rose, 'Biopower Today' (2006)(1) *BioSocieties* 195, 197.

[438] Ibid., 197.

[439] Ibid., 197.

[440] Ibid., 196. And see Michel Foucault, *History of Sexuality* vol 1, 136.

obvious when we chart the rise of the preventive health regime which continues to grow in prominence in Australia today within our primary care systems.[441] These regimes of preventive intervention and 'disease management' processes take aim at the well-being of the patient through multidisciplinary and multi-modal interventions.[442] No longer is it acceptable to engage in 'medicine' any more in the 'see and treat' modality of its operation for the past century, but instead we now engage with our 'primary healthcare provider', who aims not to treat illness but to prevent its very onset, to promote wellness and manage disease processes and symptoms when and if chronic disease arises. This contemporary Australian form of social medicine exists in a continuum from the form of social medicine discussed by Foucault in his formulation of bio-power in his *The Birth of Social Medicine*.[443] From the simple through to the more complex, various mechanisms and tools make possible this population-level administration of life. From episodic data collection through the Medicare Benefits Schedule, or through notifiable disease surveillance systems,[444] a hallmark of bio-power is the use of technologies of aggregation and segmentation, disease tracing and norm comparison rooted in a population-centred epistemology.[445]

Foucault introduced the concept of population in his work counterposing it with that of sovereignty and the family.[446] He introduced the concept of the population which was a unique formation not controlled through the various techniques of sovereignty nor understood as a kind of "extended family."[447] It was this concept of the population which was to form the central object of government: "of 'each and all', evincing a concern for every individual and

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[441] Note the proliferation of risk models (such as AUDRISK for diabetes risk screening which is to be undertaken on every 45 year-old and others 'at-risk' of developing diabetes) or the development of preventive health resources by the Royal Australian College of General Practitioners (RACGP) so-called 'Red' and 'Green' books: Royal Australian College of General Practitioners, 'Putting Prevention Into Practice - The Green Book' (2006); Royal Australian College of General Practitioners, 'Guidelines for preventive activities in general practice (The Red Book) 7th Edition 2009' (2009).

[442] The rapidly increased use of Chronic Disease Managment (CDM) – formerly EPC or Enhanced Primary Care Items – has seen CDM items be with rapdily increasing frequency compared with the general consultation Medicare Benefit Schedule items in Australia.

[443] Michel Foucault, 'The Birth of Social Medicine' in James D. Faubion (ed), *Power* (Robert Hurley trans, New Press, 2000).

[444] Such as those established by the *Public Health Act 1991* (NSW); ibid.

[445] For an excellent diagrammatic treatment of some of the various technologies of biopolitics see <http://www2.lse.ac.uk/BIOS/pdf/LarsThorupLarsen.pdf >p5

[446] Nikolas Rose, Pat O'Malley and Mariana Valverde, 'Governmentality' (2006) No 09/94 *Sydney Law School Research Paper*. 6.

[447] Ibid. 6.

the population as a whole. Thus government involves health, welfare, prosperity and happiness of the population."[448] This concept of population emerged over time and was linked intimately with the emergence of the techniques of statistics which for the first time showed that the 'population' itself had a reality which was connected to, but still distinct from, the individual juridical subject of the sovereign and operated on a different scale to that of the family. Populations are constructed by these statistical methods by erecting boundaries around these groups that did not rely on those that had utilised the physical/geographic boundaries of the nation or region which were the object of sovereign rule. Instead these boundaries could be formed on the basis of shared characteristics beyond that of the territorial definition of a group including various physical features , gender, race, sexuality, educational achievement or even a more complex grouping based on more contingent categories such as an individual's 'identity' or an individual's alleged propensity towards certain (often 'risky') behaviours. These groupings now understood as population(s) took on a character of 'truth', an objective, observable reality in and of itself. These populations could be formed, mapped, studied and targeted by the techniques of government as objects of intervention:

> From this moment on, those who inhabited a territory were no longer understood merely as juridical subjects who must obey the laws issued by a sovereign authority nor as isolated individuals whose conduct was to be shaped and disciplined, but as existing within a dense field of relations between people and people, people and things, people and events. Government had to act upon these relations that were subject to natural processes and external pressures, and these had to be understood and administered using a whole range of strategies and tactics to secure the well-being of each and of all. Authorities now addressed themselves to knowing and regulating the processes proper to the population, the laws that modulate its wealth, health, and longevity, its capacity to wage war and engage in labor, and so forth.[449]

[448] Mitchell Dean, *Governmentality : power and rule in modern society* (SAGE, 2nd ed, 2010), 28.

[449] Nikolas Rose, Pat O'Malley and Mariana Valverde, 'Governmentality' (2006) No 09/94 *Sydney Law School Research Paper*. 6.

The practices of public health are in essence an operationalisation of bio-power and bio-political practices. In many ways the profession and practice of public health is applied bio-power. In relation to HIV-transmission specifically, those who work within the public health paradigm understand their field at a population-based level, either the population of 'at-risk' or otherwise the general population who their work with specific at-risk sub-populations are designed to protect. They are centrally focused with a mission of ongoing protection and promotion of health of the population. Following Dorothy Porter, who defines public health in a suitably broad manner, I too feel that the most suitable definition of public health might be that of "collective action in relation to the health of populations."[450]

Public health practice is distinct from therapeutic medicine for its population-level analysis of health and action targeted at the population itself as a unit: "in carrying out its core functions, public health – like a doctor with his/her patient - assess the health of a population, diagnoses its problems, seeks the causes of those problems, and devises strategies to cure them."[451] Foucault writes about the importance of the emergence or 'discovery'[452] of the population in the eighteenth-century and the opportunities the emergence of population as an object of knowledge constituted for the construction of the population, knowledge about it and finally for greater and finer mechanisms of control:

> The great eighteenth-century demographic upswing in Western Europe, the necessity for coordinating and integrating it into the apparatus of production and the urgency of controlling it with finer and more adequate power mechanisms caused 'population', with its numerical variables of spaces and chronology, longevity and health, to emerge not only as a problem but as an object of surveillance, analysis, intervention, modification, etc. The project of a technology begins to be sketched: demographic estimates, the calculation of the pyramid of ages, different life expectations and levels of morality,

[450] Dorothy Porter, *Health, civilization, and the state : a history of public health from ancient to modern times* (Routledge, 1999). 4.

[451] Mary-Jane Schneider, *Introduction to public health* (Jones and Bartlett Publishers, 3rd ed, 2011). 5.

[452] Mitchell Dean, *Governmentality : power and rule in modern society* (SAGE, 2nd ed, 2010), 28.

> studies of the reciprocal relations of growth of wealth and growth of population.[453]

The emergence of 'population' as a problem and object of surveillance, analysis, intervention and modification is the key prerequisite for the emergence of the practice, profession or system we know as modern public health.[454] As a broad field of practice, most texts still utilise the classic definition of public health provided in the 1920s by Winslow which adopts a open definition of public health as with the concept of population at its heart:

> The science and the art of preventing disease, prolonging life, and promoting physical health and efficiency through organised community efforts for the sanitation of the environment, the control of community infections, the education of the individual in principles of personal hygiene, the organisation of medical and nursing services for the early diagnosis and preventive treatment of disease, and the development of the social machinery which will ensure to every individual in the community a standard of living adequate for the maintenance of health.[455]

Even more contemporary statements of what constitutes the practice of public health, in its *health promotion* guise for example, echo some of the notably bio-political overtones of the Winslow definition:

> Health promotion is the process of enabling people to increase control over, and to improve, their health. To reach a state of complete physical, mental and social well-being, an individual or group must be able to identify and to realize aspirations, to satisfy needs, and to change or cope with the environment. Health is, therefore, seen as a

[453] Michel Foucault cited in Majia Holmer Nadesan, *Governmentality, biopower, and everyday life* (Routledge, 2008). 18.

[454] See Dorothy Porter's extensive history which begins with analyis of proto-public health in the ancient world: Dorothy Porter, *Health, civilization, and the state : a history of public health from ancient to modern times* (Routledge, 1999).

[455] Mary-Jane Schneider, *Introduction to public health* (Jones and Bartlett Publishers, 3rd ed, 2011). 5.

> resource for everyday life, not the objective of living. Health is a positive concept emphasizing social and personal resources, as well as physical capacities. Therefore, health promotion is not just the responsibility of the health sector, but goes beyond healthy life-styles to well-being.[456]

Nadeson echoes this sentiment in her deeper analysis of the bio-political nature of public health,[457] noting the bio-political nature of public health intervention tied to its activity of promoting life and wellness of the population "addressing the species body the population."[458]

If public health is then tied to Foucault's concept of bio-power through the emergence of 'population', then what of law, the other pole of engagement with HIV-transmission in NSW?

4.2 Foucault on Law: Charting the Decline of Law

The narrative shift described above from the scene of execution where sovereign power was so visibly present in the tortured body of the prisoner, to the scene of the reformatory as the emergent form of power, namely, discipline, followed by the emergence of bio-power in Foucault's study of sexuality, begins to make clear how this progression has been interpreted by some as indicating a decline or death of juridical-power or law in modernity. These newer forms of power we see below were described variously by Foucault as "counter-law", as "alien to that of the law"[459] further building the sense that law was to be replaced by these newer technologies of power. It is upon these kinds of readings of Foucault that the dominant reading of Foucault and law in the post-Foucault scholarship has emerged. This reading of Foucault's conception of power has clear ramifications for understanding his view on law. For our purposes such a reading also renders the debate between the bio-political technology of public health and criminal law in a different light. Such a reading which highlights the narrative shift, renders law as providing an important role in sovereign, monarchical history,

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[456] WHO/HPR/HEP, *Ottawa Charter for Health Promotion*, 95.1, (Ottawa, 21 November 1986).

[457] See especially: Majia Holmer Nadesan, *Governmentality, biopower, and everyday life* (Routledge, 2008). Chapter Four.

[458] Ibid. 93.

[459] Michel Foucualt cited in Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 23.

subsequently relegated to a secondary position or one receding over time. As Golder and Fitzpatrick pithily encapsulate, the expulsion thesis is a state of affairs which sees law recede in application or effectiveness, in essence: "enter power (in various guises); exit law."[460] Before undertaking a reading of the expulsion thesis of the post-Foucault scholarship however in more detail, first an exegetical reading of Foucault's specific thinking on law itself is offered with a specific focus on how law becomes tied to sovereignty and thus declines over time.

Foucault himself, in a phrase which so often sits within the first paragraphs of research papers and theses, urged us to engage with his work as a "kind of tool-box others can rummage through to find a tool they can use however they wish in their own area."[461] Passive consumption of his work was not the desired outcome; "I write for users, not readers" was his catch cry. This uptake of Foucault's work as the ground of various methodological frameworks and of perhaps more numerous methods themselves is a frequent practice of writers today. However, Foucault has also been used in a variety of other ways. In addition to the reception of his work in the vein of the tool-kit – the 'applied' Foucault as it were – where his various methods are applied to problems and situations of today,[462] scholars have set about constructing and debating what Foucault himself might have thought, what he may have meant by a particular statements and to outline where Foucault's own statements betray difficulties for the unthinking application of his work in any simple way.[463] In this way, scholars, instead of retrieving tools from Foucault's tool-kit, have peered into the kit itself and, in some cases, have attempted to add to it through critique etc The utilization of Foucault's own statements to ground a variety of readings and as the source of debate was not a use which Foucault himself was unaware of. He felt that his own substantive statements in fact had the potential to "land in unexpected places and form shapes that I had never thought of".[464] This use of Foucault, following the more 'exegetical' or 'interpretive' pathway,

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[460] Ibid. 13.

[461] Michel Foucault cited in Clare O'Farrell, *Michel Foucault* (SAGE, 2005), 50.

[462] Golder notes that the disctinction between the 'applied' use of Foucault, and what he terms the 'exegetical' are rough but nevertheless helpful distinctions between works: Ben Golder, 'Foucault and the Incompletion of Law' (2008) 21 *Liden Journal of International Law* 747, 747.

[463] Sara Mills, *Michel Foucault* (Routledge, 2003), 7.

[464] Michel Foucault, 'Interview: The Masked Philosopher', *Politics Philosophy Culture* (Alan Sheridan trans, 1988) 232.

focuses on Foucault's own substantive statements and is closer to the way in which I undertake to use Foucault in this thesis to ask what is Foucault's perspective on law?

The juridico-discursive conception of power outlined above as the dominant form of power in pre-modern times (exemplified by the visible torture of the body in the example of the execution of Damiens the regicide above) is the form of power which Foucault links law to. His reformulation of the operation of power in modernity then, which moves away from this juridico-discursive form of power, has significant ramifications for law which is intractably and inseparably linked with the sovereign use of this power.

Foucault's work when presented as a historical narrative which progresses from a time dominated by the use of sovereign power linked to both the state and to law, towards a time marked by the development of bio-power, marks a shift between power in its formerly oppressive sovereign guise which operated through the law to a form of power present in modernity which was not state-centric and thus not tied to or reliant upon law for its operation:

> According to this reading of Foucault, the emergence of the new disciplinary power marks the historical transition to a modernity wherein the old forms of law and sovereignty become decreasingly important as a site, and mode of operation of power. [465]

The view that Foucault had charted the falling-away of law in modernity to be replaced by the "new methods of power whose operation is not ensured by right but by technique, not by law but by normalisation, not by punishment but by control, methods that are employed on all levels and in forms that go beyond the state and its apparatus"[466] is to see law distinguished from these newer forms of power in its operation and character:

> This new mechanism of power is more dependent upon bodies and what they do than upon the earth and its products. It is a mechanism of power which permits time and labour, rather than wealth and

[465] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009). 13.

[466] Michel Foucault, *History of Sexuality* vol 1, 89. Cited in Roger Alan Deacon, *Fabricating Foucault: Rationalising the Management of Individuals* (Marquette University Press, 2006), 121.

> commodities to be extracted from bodies. It is a type of power which is constantly exercised by means of surveillance rather than in a discontinuous manner by means of a system of levies or obligations distributed over time. It presupposes a tightly knit grid of material coercions rather than the physical existence of the sovereign. It is ultimately dependent upon the principle, which introduces a genuinely new economy of power, that one must be able simultaneously both to increase the subjected forces and to improve the force and efficacy of that which subjects them. [467]

Following Foucault's formulation then:

> The discourse of discipline is alien to that of law; it is alien to the discourse that makes rules a product of the will of the sovereign. The discourse of disciplines is about a rule: not a juridical rule derived from sovereignty, but a discourse about a natural rule, or in other words a norm. Disciplines will define not a code of law, but a code of normalization, and they will necessarily refer to a theoretical horizon that is not the edifice of law, but the field of the human sciences. And the jurisprudence of these disciplines will be that of a clinical knowledge. [468]

Subjects would now be measured by reference to the human sciences rather than to law and, through the application of the norm derived from the social sciences and 'psy' sciences, the individual would now be "fabricated by this specific technology of power that I have called 'discipline'."[469] In this narrative, encapsulated by the expulsion thesis, discipline and bio-power have replaced law.

To chart this reading of law which sees law's transition and decline with the advent of the new forms of disciplinary and bio-power, Golder and Fitzpatrick outline some of the key

[467] Michel Foucaul cited in A. W. McHoul and Wendy Grace, *A Foucault primer : discourse, power, and the subject* (UCL Press, 1995), 63.

[468] Michel Foucault cited in Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 23.

[469] Michel Foucault, *Discipline and Punish* (1978), 193.

textual sources where Foucault is seen to link law to this form of power, such as in *The History of Sexuality* where Foucault writes:

> [T]hou shalt not go near, thou shalt not touch, thou shalt not consume, thou shalt not experience pleasure, thou shalt not speak, thou shalt not show thyself; ultimately thou shalt not exist, except in darkness and secrecy. To deal with sex, power employs nothing more than a law of prohibition. Its objective: that sex renounce itself. Its instrument: the threat of punishment that is nothing other than the suppression of sex.[470]

Here law is understood as the negative, circumscribing, command-based form of power prohibiting rather than working to *produce*, the most significant marker of the working of those newer forms of power.[471] In that way law is a power which is not simply negative, but unlike the newer forms of productive power (discipline and bio-power) suited to the contemporary structures of social life, able to render the previously anonymous masses visible and subject to control, law is a limited power as well. Foucault, in another of Golder and Fitzpatrick's textual references highlights, in perhaps the strongest terms possible, the negative and forbidding nature of law through a linking of juridico-discursive *power* with *law*, describing its operation as essentially legal:[472]

> Underlying both the general theme that power represses sex and the idea that law constitutes desire, one encounters the same putative mechanics of power. It is defined in a strangely restrictive way, in that, to begin with, this power is poor in resources, sparking of its methods, monotonous in the tactics it utilises, incapable of invention, and seemingly doomed always to repeat itself. Further, it is a power that only has the force of the negative on its side, a power to say no; in no condition to produce, capable only of posting limits, it is basically anti-energy…and finally, it is a power *whose model is*

[470] Michel Foucault cited in Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 16.

[471] Ibid., 16.

[472] For an discussion of the readingof the term 'juridical' as synomous with that of 'law' or 'legal' in the wor kof Foucault see Victor Tadros, 'Between Governance and Discipline: The Law and Michel Foucault' (1998) 18(1) *Oxford Journal of Legal Studies* 75.

> *essentially juridical, centred on nothing more than the statement of the law* and the operation of taboos.[473]

For Golder and Fitzpatrick, "Foucault does seem to want to circumscribe the role of *law* (a particular form of power) as being pre-eminently negative and as functioning within a very restricted juridico-discursive economy."[474] As noted, Foucault achieves this circumscription of the law where he links critique of the juridico-discursive operation of power, as described immediately above, with law, "as if law actually functioned in this manner."[475] It is through this linkage of jurdico-discursive power to law by which the sense of the decline of the pre-eminence law over time is also established. The person or institution of the sovereign/monarch is linked to the operation of power in its juridico-discursive form, shown most clearly, and violently, in Foucault's description of the public execution of Damiens the regicide further above. This sovereign violence, enacted through law, was to be replaced in modernity with the emergence of discipline and later bio-power where:

> It was not by resort to supposedly juridical mechanisms that the resultant compliant subject …was forged. Rather the constitution of the modern subject of discipline was achieved through new and different techniques – spatial distributions, hierarchical observations, normalising judgments, constant surveillance and examinations…[476]

We have then in this reading of Foucault, a mechanistic, negative, limited and determinate law tied to the sovereign/state being displaced by another form of power. Foucault describes again the diminishing importance of law in a society "in which the juridical is increasingly incapable of coding power,"[477] where we have entered into a "phase of judicial regression"[478] and where these new forms of power are positioned as "exactly the opposite of [a]

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[473] Michel Foucault, *History of Sexuality* vol 1, 85. Cited in Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 16-17.

[474] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 17.

[475] Ibid., 17.

[476] Ibid., 19.

[477] Michel Foucault, *History of Sexuality* vol 1, 89. Cited in Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 16-17.cited in ibid., 22.

[478] Michel Foucault, *History of Sexuality* vol 1, 144. Cited in Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 16-17.cited in ibid., 22.

monarchical power"[479] which Foucault characterised as operating (often violently) through law.

4.3 The Expulsion Thesis

We have then a construction of a "system of Law-and-Sovereign"[480], declining in importance with the emergence of newer forms of power: namely, discipline and bio-power. These newer forms of power are described by Foucault as both ascendant but also, in terms of their relationship to law, as "counter-law"[481] or as in the case of discipline, the "exact, point-for-point opposite of the mechanics of power that the theory of sovereignty described."[482] This presentation of Foucault's work does leave-out some of the moments where Foucault was less than sure about this seemingly terminal decline of law. These areas where he indicated something other than a simple binary of law and discipline or of the irrelevance of law are expanded in the section below regarding Golder and Fitzpatrick's neo-Foucauldian jurisprudence. What is presented above however is the kernel of what has become known as the 'expulsion thesis' in the post-Foucault literature, and it concerns Foucault's alleged expulsion of law from his formulations of how power operates in modernity. In summary form, the expulsion thesis holds that Foucault "saw law as being: essentially negative (and violent) in its mode of operation; historically tied to monarchical sovereignty and, finally, with the transition to modernity, overtaken by more productive and effective technologies of power which invest it and instrumentally subordinate it to their operations."[483]

This view is the most enduring understanding of Foucault's vision of law[484] and finds expression in a variety of subsequent writings which consider law itself or more broadly the operation of power in modernity.[485] What is at stake in both these broader writings and in those that specifically question law's place in modernity, is really a question of the nature of

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[479] Michel Foucault cited in Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 22.

[480] Michel Foucault, *History of Sexuality* vol 1, 97. Cited in Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 16-17. cited in ibid., 23.

[481] Michel Foucault, *Discipline and Punish* (1978), 222.cited in Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 23.

[482] Michel Foucault, *Society Must Be Defended: Lectures at the College de France, 1975-1976* (Picador, 2003), 36. cited in Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 23.

[483] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 15.

[484] Ibid., 12.

[485] Most cited is that of Alan Hunt and Gary Wickham, *Foucault and law : towards a sociology of law as governance* (Pluto Press, 1994).

power today in the broadest sense. For the present thesis the question then has two outcomes. The first is a more general proposition of what conception of law and legal power we may adopt in legal scholarship today in light of Foucault's thinking on the topic. This first concern is one which this thesis engages with only tangentially. A second proposition is one which further develops the link between the literature on HIV-related criminal law outlined sketched above, where I seek to apply the explanatory power of Golder and Fitzpatrick's vision of law, what I term the post-expulsion thesis, to HIV and upon this description seek to critique boundaries for law's engagement with HIV. The first question is a theoretical question based on an exegetical reading of Foucault, whilst the second is a task of application, both of the findings of what law's role in modernity is (either expelled or subordinate to disciplinary power or something else) and the explanatory power which a Foucauldian view of law brings to the (mis)understanding of law present in the HIV-related legal literature.

These question are answered by engagement with the most recent work on the question of Foucault's vision of law, that of Hunt and Wickham in their *Foucault and Law: Towards a Sociology of Law as Governance*[486] coupled with the more recent rejoinder provided by Golder and Fitzpatrick in their *Foucault's Law*.[487] Hunt and Wickham's writing forms the central focus of Golder and Fitzpatrick's scholarship due to its status as the most recent substantial work on the topic, its direct focus on the question of the place of law in the theorizing of Foucault and finally because of the reliance of other scholars on the views expressed in that work.[488] The description of the expulsion thesis presented in this thesis is taken from the interplay of these two works and in particular from the critique of this understanding of Foucault and law provided by Golder and Fitzpatrick.

It has been established in the foregoing two sections how, in general terms, it might have come to pass that law has become rendered in the terms of the expulsion thesis based on Foucault's assessment of law through critique of jurdico-discursive power, its linkage to the sovereign and the effect of the emergence of discipline and bio-power, two forms of power more suited to contemporary society. The following section then outlines more exactly how

[486] Ibid.

[487] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009).

[488] Ibid., 2.

this reading of Foucault's position on law has been received by the bulk of post-Foucault legal scholarship and the exact shape which the resulting expulsion thesis has taken.
The expulsion thesis as outlined by Golder and Fitzpatrick, is constituted by two related but slightly varied perspectives on how Foucault viewed law and its place in modernity. The first is that Foucault in his substantive writing on law accorded it a much reduced (and arguably declining) level of importance in modernity than it had achieved before the advent of discipline and bio-power. These new forms of power were now to perform the work of law in modernity, law thus had been replaced or 'expelled' from the general economy of power in modernity. The second version accords law some, albeit limited, place in the economy of power in modernity. It states that these two new forms of power, namely discipline and bio-power, were not only ascendant forms of power in modernity, in a sense 'crowding-out' law, but that in fact rather than simply expelling law from the operation of power in modernity, they have worked to render law as instrumentally subordinated law to their own ends. In this second rendering of the expulsion thesis, law is reduced to the position of a 'tactic' or 'tool' wielded by discipline or bio-power as it was formerly wielded by the sovereign.[489]

As shown above and in more detail elsewhere, Foucault himself provides evidence in his writings of both forms of the expulsion thesis.[490] Writers have debated amongst themselves in post-Foucault scholarship which of these version of the expulsion thesis is the better reading of Foucault's own position on law and the operation of legal power in modernity. Hunt and Wickham and others wrestle with this question. Hunt and Wickham, the writers of the key text which advocates for the 'expulsion thesis', note that Foucault himself in his substantive writing on the topic was not quite as definitive in his expulsion of the law as it may well seem on first reading. For them Foucault seemed to take plural positions on law itself and law's relationship to discipline and bio-power. The debate in particular is motivated by Foucault's own reversals and withdrawals in relation to his stance on law. For example, in contrast to the strongly worded expelling impetus of the bulk of Foucault's writing extracted in the previous section, Foucault elsewhere writes:

> Here, on the contrary, it is not a matter of imposing a law on men [sic], but of the disposition of things, that is to say, of employing

[489] Ibid., 54-55.

[490] Ibid., 15.

> tactics rather than laws, or of as far as possible *employing laws as tactics;* arranging things so that this or that end may be achieved through a certain number of means.[491]

Foucault's writing here indicates the return of law from the brink of total expulsion or crowding-out by the disciplines and bio-power. It is a position which reinforces the view that rather than the simple expulsion of law, *in toto*, that law here is seen in its instrumentally subordinated guise, where it retains some presence in the economy of power in modernity, but one where it remains only the instrument of discipline or bio-power. These more open assessments of the place and operation of law in modernity ground much of Golder and Fitzpatrick's re-reading of 'Foucault's Law' (as they term it). It is these reversals and subtle shifts which allow for a reading of Foucault on law which is outlined in the following section and which, when applied to the present case of HIV-related criminal law, provides the ability for a critical re-reading of law's ontology as imagined in the literature and a way through which we can built a more accurate expanded vision of law beyond only that of a mechanical, negative, limited and determinate law.

4.4 Golder and Fitzpatrick: Law Eludes Containment

With law seemingly reduced to an inevitable historical decline with the advent of the newer forms of power in modernity, what remains for it? Is it entirely expelled or is there some space left for law to operate within? Law, in the final analysis of the bulk of the expulsion thesis literature, does therefore retain *some* presence in the operation of power in modernity. On a practical basis, courts continue to operate and legislation continues to be written. And in the exegetical mode, the literature concludes that whilst Foucault's own writing on the topic might at times seem to lack clarity on the matter, the conclusion is that Foucault "refuses to accord any *major* role to legal regulation in creating the distinctive features of modernity".[492] Law remains, but in a subordinate and limited role and in Foucault's modernity subject to the powers of discipline and bio-power.

In this section I present a construction of a different conceptualisation of the being of law, of legal-juridical power as portrayed by Golder and Fitzpatrick. This neo-Foucauldian vision of law is then later applied to HIV-related criminal offences.

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[491] Michel Foucault cited in ibid., 34.

[492] Ibid., 24.

Golder and Fitzpatrick in their work take this observation of Foucault's shifting conceptualisations of law as the basis for their radical re-reading of Foucault's position on law. This position is one which accepts the basic irresolution of Foucault's view(s) of law, as identified above, but rather than attempt a resolution by mounting a counter-argument for the law's continued but perhaps misrecognised or unrecognised role in modernity, thus reversing the expulsion thesis, they instead show that this very shifting of positions in Foucault's work is in fact an identifiable "'logic' of the law itself."[493] They demonstrate in their work a reading of Foucault contrary to the expulsion thesis where law remains present and active in the operation of power in modernity in a relationship with discipline marked by discipline's dependence upon law and law's openness and dependence upon powers outside of it. This openness of law to powers outside of itself, on the one hand allowing it to be open and dependent upon discipline or other powers outside of it also allows for and explains the susceptibility of law to instrumental subordination by other powers but also opens the possibility of a resistant law, a law open to change and constant reinvention. Their reading does not deny the negative fixed and determinate descriptors of law used in the expulsion thesis, but instead critically expands these conceptualisation of the law into a picture of law which is not only law as subordinated but also law as illimitable and unable to be contained by those powers that seek to contain it. The image of law which is expounded in this section is one which is 'both/and' rather than 'either/or'.

To establish this revised vision of *Foucault's Law*, which is both the determinate law of the orthodox recounting, but also and at the same time this dynamic and ever-responsive law, the texts of the 1970s provided above are revisited and supplemented by other less often reviewed texts such as Foucault's 1966 writing on Maurice Blanhot[494] or 1963 writing on the work of Georges Bataille.[495] Fundamentally, Golder and Fitzpatrick present an argument alongside those critics of the expulsion thesis who hold that Foucault did not imply that law would be diminished with the advent of the disciplines by noting that whilst Foucault in many instances boldly proclaimed the end of law in statements such as modernity being a state marked by "judicial regression"[496] or pushing for the need to "break free…of the

[493] Ibid., 53.

[494] Ibid., 12.

[495] Ibid., 54.

[496] Ibid., 56.

theoretical privilege of law and sovereignty,"[497] these statements were frequently revised or recanted by Foucault. Moreover, the authors note that such statements must be treated with caution in applying a straightforward reading that such calls to 'break free' or revise theoretical positions necessarily mean that the various states of affairs to which these targeted theoretical positions refer have in fact passed away. In relation to sovereignty for example, where Foucault is oft quoted as having asked for the head of the king to be cut off in contemporary political analysis, the call for such a beheading indicates, for Golder and Fitzpatrick, not that sovereignty itself has passed away but that in fact "that the head of the king (and, we might also say, his various sovereign avatars in modernity) remains stubbornly attached to the rest of his body."[498] In this way Foucault can be seen as naming that sovereignty, to which law is attached, remains an ever-present reality in modernity, and that in fact law persists in and through this persistence of sovereignty.[499]

Other writers in the field have argued, as we have seen above in relation to the second formulation of the expulsion thesis, that law and discipline or bio-power may well have a relationship of instrumental subordination rather than seeing disciplines and bio-power simply and totally displacing and expelling law. Clearly from the above quotations, law (and sovereignty) remain operative in Foucault's rendering of modernity. If law then does persist in modernity, where it remains "part of the social game in a society like ours"[500] and where the new powers of discipline and bio-power can never totally suspend the law,[501] then how does law and these newer forms of power relate to one another? Golder and Fitzpatrick here highlight the way in which law and discipline/bio-power in fact work to buttress each other's identity through their very construction as being in opposition and separate to one other:[502] "Foucault's law is anything but a law unto itself. Rather, in his understanding, the law and the powers apart from it would seem to be relationally inter-dependent."[503] The positivist, autonomous and hermetically sealed vision of law propounded by some such as Hans

[497] Ibid., 58.

[498] Ibid., 58.

[499] Ibid., 59.

[500] Michel Foucault cited in ibid., 58.

[501] Ibid., 58-59.

[502] Ibid., 60.

[503] Ibid., 61.

Kelson's famous version of *pure law*,[504] is the antithesis of a law described by Foucault as always attached to something else. It is rather, always a law-in-relation. In Foucault's writing law is reliant and attached to the various knowledge formations, institutions and operations of power such as science (scientifio-juridical complex) or the human sciences for example in the operation and formation of the penal complex.[505] In rebuffing the reading of Foucault's law which sees law as expelled from the operation of power in modernity and then showing that law is not only present but in fact is in-relation with disciplines and other powers external to it, Golder and Fitzpatrick create vision of law which is both present, but disrupt a vision of law as a coherent and stable body of rules. Rather than rest then after achieving this resurrection of law from the dustbin of (Foucault's) history, it is then disciplinary and bio-power which receive the attention as the other poles of power in modernity.

Beyond the concept that law and these other powers exist in-relationship to one another, the actual nature of this relationship is explored. In summary, it is a relationship which sees both law and these other powers in a relationship of constitute dependency, co-determinacy and mutual reliance for identity and content. Discipline and bio-power's reliance upon law is examined firstly through the illustration of the ways in which knowledge claims about subjects are made and given the imprimatur of the law and secondly, through the work which the law performs for discipline when it relates to the "ultimately recalcitrant subject."[506] In relation to the first way in which discipline comes to be reliant upon law, Foucault outlines the foundational link which the disciplines have with the human sciences. It is from the human sciences where the norm is derived which is the engine of discipline's work to form and fabricate the disciplined subject.[507] In essence, the disciplines are dependent upon the human sciences and their production of knowledge in order to operate in the ways which are described above in the description of discipline, the reversal of individualisation and the effect of norm-referencing. Yet, the core epistemological issue of immanence which haunts the social sciences' claim to 'truth' here renders the social scientific knowledge which forms the basis of disciplinary intervention somewhat groundless.[508] It is here where the law provides a "compensatory justification and authority for the incomplete epistemological

[504] Hans Kelsen, *Pure Theory of Law* (University of California Press, 1967).

[505] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 60.

[506] Ibid., 61.

[507] Ibid., 62.

[508] Ibid., 63.

project of discipline power and its knowledge claims about the individual and society."[509] Golder and Fitzpatrick utilises the example of the law's supervision of disciplinary proceedings in UK gaols in the case of *R v Board of Visitors of HM Prison, the Maze* ex parte *Hone*[510] to establish how law works to buttress discipline's legitimacy and to override the epistemological deficit at its heart. In essence what they establish provided here at length is that:

> The jurisdictional ruse by which law asserts its own power and in the process goes to constitute disciplinary power is really quite a simple one. That is, by purporting to exercise its supervisory jurisdiction only over the more egregious aberrations, abuses and excesses of disciplinary power, law confirms the basic claim at the heart of disciplinary power to adjudicate on questions of normality and social cohesion. In doing so, it inscribes the disciplinary project in the very nature of things, 'confirming' its tenuous grasp on a scientifically comprehended and disciplinarily administered world and simply acting to correct its application in those cases where something goes amiss. Thus, in confining its legal supervision to the contested periphery, the instability at the very core of disciplinary power…is left unquestioned and hence reinforced.[511]

The second way in which the disciplines come to rely on law is in law's relation to the ultimately recalcitrant subject of discipline. It is here, with the total and utter lack of compliance, the "sheer insubordination"[512] of the ill-disciplined subject that the lack of discipline's power is revealed. In essence, this lack of power is discipline's inability to enforce its normalising judgements and prescriptions for corrective actions and behaviour. Law is called upon to 'deal' with the figure of the ultimately recalcitrant subject through its enforceable edicts. This work of law occurs on the *boundary* of discipline's jurisdiction. Law in fact, on this reading, withdraws from the sites of discipline's operation, ceding territory to discipline's jurisdiction. In so doing, law allows discipline to maintain its claim of

[509] Ibid., 63.

[510] Ibid., 65.

[511] Ibid., 64.

[512] Ibid., 67.

'jurisdiction' over the supervision and correction of normality unchallenged in its authority by law. However, in the case of total refusal of the disciplining process, to this recalcitrance on the part of the ill-disciplined subject, the disciplines can do nothing other than "identify and stigmatize abnormality but can not enforce sanctions against it of their own scientific motion."[513] Law here plays a vital role in providing an *enforceable decision*, where the ultimately recalcitrant subject's transgression of the norm comes up against the law.[514]

What then of the law's relationship to discipline? If the law stands at the borders of discipline's jurisdiction providing a buttress to its knowledge claims, a strategic withdrawal to reinforce its jurisdictional claims on ceded territory and finally an enforcement mechanism for the ultimately recalcitrant subject, what work then does discipline perform for law?

The core characterisation of law present in the expulsion thesis reading of Foucault and law is one which understands law as the 'hard', negative, "calculating tool of social order"[515] operating to "control and circumscribe."[516] There is however, another side to law in the writing of Foucault which Golder and Fitzpatrick describe as law's *responsiveness*.[517] This side of law is not one which denies law's determinate or negative characterisation, but instead opens up a less rigid side of law's nature where law is open to "new possibilities, new instantiations, fresh determinations."[518]

For Golder and Fitzpatrick:

> Put crudely, if law, if it is to rule effectively and secure the requisite certainty and predictability in the world beyond, must constantly

[513] Ibid., 70.

[514] In particular, note the advocacy of the anti-criminalisation literature for the continued criminalisation of intentional transmission of HIV as discussed in the following section in light of the role of law and ultimate recalcitrance.

[515] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 79.

[516] Ibid., 79.

[517] Ibid., 77.

[518] Ibid., 79.

> relate to the ever-changing nature of society, the economy, and so forth.[519]

Law in this reading is fundamentally open and less fixed than the vision of a determinate law would have it. It is work buttressing discipline's own epistemological claims, it is a law which is open to knowledge and concepts drawn from the social and human sciences to describe the world which it adopts itself changing and altering its very determinate and static nature. "Law," according to Golder and Fitzpatrick, "has been penetrated by the normalising powers of discipline, whose 'assessing, diagnostic, prognostic, normative judgements concerning the criminal have become lodged in the framework of penal judgment.'"[520] This radical openness of law to those other forms of knowledge external to it is essential for the maintenance of law's ongoing position within the constellation of powers and power relations present. For law to operate it must be subject to power, be it the monarchical sovereignty of pre-modernity or the norm-referenced disciplines or population-focused bio-power.

Law must be open to change in order to remain "the outside that envelops conduct…converting, unknown to anyone, its singularity into that grey monotony of the universal …"[521] What Foucault's position in relation to law then, is a vision of internal instability within the law. This *responsive* law described by Golder and Fitzpatrick, takes into itself from that which is outside itself thus it is unable to ever reach a point of complete stasis.

What Golder and Fitzpatrick's reading of Foucault grants us is first a resurrection of the law into the operation of power in modernity. Beyond this however, they develop the second version of the expulsion thesis – that law remains in modernity, but instrumentally subordinate to powers outside of it – into an expanded re-reading of Foucault on law. This re-reading of Foucault's Law describes a law which is at the one time a fixed and determinate law and at the same time a responsive law. It is a law which is always in-relation to powers outside itself, namely discipline and bio-power in the examples given here, and one where law works to buttress the knowledge and jurisdictional claims of discipline, whilst discipline works to provide law with its content – vocabulary, concepts, knowledge and schemas for

[519] Ibid., 82.

[520] Ibid., 84.

[521] Michel Foucault cited in ibid., 78.

understanding risk, human subjects and behaviour. It is thus both a law subordinated to other powers – be it the jurdico-discursive of the monarchical sovereign or that of discipline and bio-power – whilst at the same time because of this openness to subordination, forever unstable and surpassing unable to be totally controlled by any one power. These are for Golder and Fitzpatrick, each "integrally related dimensions of the very same law, fractured and *ir*resolute though it seems at first to be."[522]

4.5 HIV-Criminalisation Beyond the Expulsion Thesis

The anti-criminalisation literature provides a conceptualisation of law as something that is mechanistic, negative and limited. This conceptualisation of law accords with many of the ways in which Foucault is understood to have described the nature of law, expressed in the 'expulsion thesis' which argues that Foucault expelled law from the operation of power in modernity to be replaced or dominated by those newer powers, discipline and bio-power. Both the expulsion thesis and the anti-criminalisation literature share the view that law is either expelled, is instrumentally subordinated or for the HIV-criminalisation field perhaps more accurately, law *should* be expelled or subordinated to those other more effective forms of power existing today. Thus, the law in both accounts is expelled and in this expulsion is seen as separate and independent from law's other. In our context, the criminal law and public health are rendered separate to one another, anathema to one another, undermining each other's approach and actions in relation to HIV-transmission.

In this section I build upon the insight of Peter Rush who described law's seeming inability to maintain a firm grasp on HIV as a subject of its jurisdiction,[523] an insight which accords with the responsive, shifting nature of law described by Golder and Fitzpatrick who are the other thinkers upon whom I draw. I present a Foucauldian conceptualisation of law as it relates to HIV-transmission offences which draws into itself this "slipperiness" described by Rush not as an anomalous but integral part of its nature.

[522] Ibid., 53.

[523] Peter Rush, 'HIV transmission and the jurisdiction of criminal law' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 74-90.

In the re-reading of Foucault provided by Golder and Fitzpatrick above, we were presented with a more nuanced vision of law and its relationship to its 'other'. It is a vision of the law which in our context builds upon the dominant conceptualisation of the law in the anti-criminalisation literature by highlighting another side of law which is present, but not foregrounded, that body of work. This 'other side' of law is seen in the literature in various ways. It is seen in the denial of an apparatus of public health law, in the adopting of public health concepts and acceptance of public health expert evidence into the criminal law's working and finally the construction of certain persons who live with HIV as 'ultimately recalcitrant subjects' who are accepted by the literature as being properly within the purview of the criminal law. These unacknowledged ways in which the criminal law and public health relate to one another highlight that both the criminal law and public health take their identities "in and through their seeming opposition to one another."[524] Through the application of a neo-Foucauldian jurisprudence given to us by Golder and Fitzpatrick, we come to acknowledge that not only is there a relationship between law and public health, but that each party to this relationship is co-determined and relationally inter-dependent. This wholly inter-dependent and relational nature of public health and law is a far cry from the calls for expulsion or instrumental subordination of the law based on the construction of the criminal law and public health as binary opposites, one undermining the other. I argue that it is thus at both their peril that advocates for public health and advocates for criminal-legal intervention in relation to HIV-transmission, ignore this close and abiding relationship between their two camps. In fact, as I explain in conclusion to this thesis, the risk which is run in too swift a call for the de-criminalisation of HIV-transmission is that the problems which such calls attempt to resolve may well be further ingrained if the relationship between health and law is not understood and taken heed of. Ultimately, recalcitrant subjects for example may well find themselves subject to even harsher penalties for their recalcitrance. And the presence of such recalcitrant subjects, might work to highlight public health's inability to completely 'solve' the problem of onward transmission within the bounds of a public health approach, a finding which will undermine its legitimacy and jurisdiction over the field, despite its significant success in reducing onward transmission in the vast majority of cases.

[524] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 60.

The building of this analysis begins where Golder and Fitzpatrick begin also: with the law. The law has been the subject of the vast majority of this thesis. The doctrinal shape of the criminal law and the literature's reaction to it are well documented here already. The law 'itself' and its relationship to other forms of power is also well documented above through the forgoing analysis of Foucault's understanding of power, of the expulsion thesis and the re-reading of Foucault towards a relational, dynamic and surpassing law.

Golder and Fitzpatrick undertake one part of their analysis through the figure of judicial review of disciplinary hearings in prisons, and rely on an exegetical reading of Foucault's own work to make their claims of a revised Foucauldian vision of law. Here, I undertake to similarly review the relationship of public health (albeit more a bio-political technology of power) to law via the making of knowledge claims about the person living with HIV, populations at risk and other such subjects and to review the status and responses to those found to be ultimately unresponsive to public health intervention, termed the "ultimately recalcitrant subject" by Golder and Fitzpatrick. I work to provide this analysis of HIV-related offences and criminal law as a form of application of the re-reading of Foucault provided above. Whilst these are only some of the examples where the neo-Foucauldian jurisprudence can be fruitfully applied to HIV-transmission offences, it is hoped that these worked-examples provide enough justification for the critique of the characterisation of law adopted in the literature and that the lessons of a neo-Foucauldian re-reading of the expulsion thesis can be successfully applied to the strikingly similar reading of law present in the anti-criminalisation literature.

4.5.1 Denial of the Apparatus of Public Health Law

In the case of HIV-related criminal law which is presently before us, the literature describes a situation which differs somewhat from that described by Foucault. Certainly the basic themes are present, a contestation or pushing away of law and legal power for another power, namely that of public health. HIV however, the focus of this thesis, is a relatively recent phenomena. It is something which emerged in an era already marked by the predominance of disciplinary and, perhaps more importantly, bio-political approaches to power.

In relation to the criminal law specifically, the criminal law had emerged as a response to HIV some time after the emergence of the disease and after the establishment of public health approaches to the epidemic. Therefore, rather than criminal law being the primary historical

response to HIV with bio-political public health approaches emerging to displace this (criminal) legal response at a later date, it was, contrary to the historical narrative presented in Foucault's work, the reverse. Because HIV emerged at a time where the disciplines and bio-power were already established as a ruling paradigm, the shift seems to be that it is not the criminal law which is being displaced by public health's bio-political power, but instead that the criminal law is, on the view of the literature, attempting to displace public health. Does this narrative, which reverses the general historical movement from law to discipline Foucault presented, reduce the explanatory power of Foucault's view of law for HIV-related criminal law and the anti-criminalisation debate? No. Foucault's rendering of the law 'itself' and its relationship to other contemporary powers retains strong explanatory power in relation to the HIV-related criminal law. Firstly, through Golder and Fitzpatrick's re-reading of Foucault, it provides for us a vision of law and of law-in-relationship borne out of a conceptualisation of law which is not unlike that which underpins the anti-criminalisation literature. In fact it is one which is strikingly similar. Secondly, a Foucauldian conceptualisation of law is one which also emerges out of a tension and displacement between the powers of law and of discipline/bio-power, a tension which is also central to the anti-criminalisation narrative and its literature. Finally, the implicit characterisation of criminal law as both recent in origin and as attempting to displace public health's hold on the subject of HIV are perhaps not as accurate a reading as one might first believe.

Whilst HIV is a recent phenomenon, there certainly were contagious diseases which were of serious concern prior to the emergence of HIV. Many of these diseases or infections were sexually transmissible and the law had responded in both its administrative and criminal guise with the Contagious Diseases Acts and the landmark criminal case of *R v Clarence*[525] as far back as the 19th century at least. Perhaps because HIV emerged in an era where public health's bio-political responses were well established, it has seemed that criminal responses were late in adapting to HIV-transmission. However, whilst direct legislative responses to HIV did occur some years after the initial outbreak of the virus[526] we can see that criminal law has played a role in previous instances of sexually transmitted infections and that a criminal response is not unique only to HIV.

[525] *R v Clarence* (1888) 22 QB 23.

[526] In NSW the first laws were enacted in 1992: Crimes Act 1900 (NSW) s36. as repealed by Crimes Amendment Act 2007 (NSW) Sch 1, item 9.

Further, the writing of the anti-criminalisation literature is one which consistently regards and constructs law as 'other' to that of public health. This representation works to subtly change the nature of law as it is presented in both the literature and associated debate about HIV-related offences. The literature achieves this by drawing a distinction between public health and criminal legal approaches to HIV, where the law remains tied to state power and constructed as amenable to control. Even with the acknowledgement at some points of the differing rationales for criminal law and public health in the literature, the law and public health are situated in opposition to one another, mutually irreconcilable. We see in fact public health's own state-endorsed legal apparatus left basically invisible in this entire literature apart from the broadest generalist textbooks on public health[527] and one completely uncritical discussion of disclosure and related public health administrative laws in Australia.[528] The literature achieves this binding of the law to the state and state power, by its association with the parliament, official reports, committees, government action[529] and so on and is ability to be subject to law reform, lobbying efforts and advocacy to the central authority of the state.[530] It is a law which becomes rendered as a 'tactic', "instrumentally subordinate to the imperatives of modern power,"[531] that is, to the bio-political power that is public health or otherwise expelled for the good of the very same public health. Public Health activity is of course implicated and supported by this same state power. Apart from funding and other relationships of support or official dialogue,[532] we see in the narrative of Sharleen the most obvious use of the public health system of quarantine, surveillance and control exerted by state power upon the body of a person with HIV.[533]

The first instance of public health's resort to law relates to the very identity of public health. As proposed above in relation to the literature's conceptualisation of law as mechanistic, the

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[527] James Chalmers, *Legal responses to HIV and AIDS* (Hart, 2008). Christopher Reynolds and Genevieve Howse, *Public health law and regulation* (Federation Press, 2004).

[528] David Scamell and Chris ward, 'Public health laws and politics on the issue of HIV transmission, exposure and disclosure' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS (NAPWA), 2009).

[529] Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007).

[530] Sally Cameron, 'HIV, Crime andthe Law in Australia: Options for Policy Reform - a law reform advocacy kit' (Pt AFAO) (February, 2011)(Discussion Paper) <http://www.afao.org.au/library_docs/policy/DP0211_HIV_Crime_and_the_Law.pdf>.

[531] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009). 33.

[532] Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007).

[533] Eurydice Aroney and Tom Morton, 'Shutting Down Sharleen', *ABC Radio National Hindsight*, 21 March, 2010 (Australian Broadcasting Corporation) <http://www.abc.net.au/rn/hindsight/stories/2010/2848373.htm>.

literature's treatment of law draws it and public health into a kind of binary relationship. It is one where each form of power is seen as the opposite of the other, where public health becomes what Foucault called an anti-law. It achieves this framing of the law and public health by measuring law's success (or failure) by the yardstick of public health's aims, achievements and methods. Law in this assessment is seen as a failure, a failure as a communicable disease control measure. This framing of the criminal law in the concepts and schema of public health also does further work for public health and the law. By creating a failed law, a law which cannot achieve against the outcomes demanded (or suitable) for public health, the bio-political power of public health is rendered strengthened and its unique identity buttressed.

Further below, in the discussion of public health's 'recalcitrant subject' we see too the operation of (criminal) law's strategic withdrawal from the terrain ceded to public health and its work in buttressing public health's own jurisdiction. But here, in this most basic of contexts, law is not separate from public health. Public health is replete with law. We can see here the application of Foucault's indictment of discipline's hidden relationship to law and juridical power where in *Discipline and Punish*, he draws back the curtain on the illusion of a non-relationship between law and discipline, of separation where "[a]t the heart of all disciplinary systems functions a small penal mechanism…[which] enjoys a kind of judicial privilege with its own laws, its specific offences, its particular forms of judgement," and which even takes place within "a small-scale model of the court."[534] Golder and Fitzpatrick unpick the characterisation of discipline as separate and unattached to law with their citing of Foucault who held, again in *Discipline and Punish,* that "[i]n appearance, the disciplines constitute nothing more than an infra-law"[535] and that "we are in the society of the teacher-judge, the doctor-judge, the educator-judge, the 'social worker'-judge."[536]

[534] Michel Foucault, *Discipline and Punish* (1978), 177-78. In Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 70.

[535] Michel Foucault, *Discipline and Punish* (1978), 222. Cited in Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 70.

[536] Michel Foucault, *Discipline and Punish* (1978), 304.

4.5.2 The Adoption of Public Health Vocabulary, Concepts, Knowledge and Schemas

In the critique of the expulsion thesis above, we saw Golder and Fitzpatrick describe what they termed law's *responsiveness*.[537] This is a vision of law open to "new possibilities, new instantiations [and] fresh determinations."[538] It is the riposte to a characterisation of the law as only determinate and fixed, a law which is closed-off from the world, a positivist, autonomous and hermetically sealed vision of law. Instead, we saw above in the reformulating of Foucault's vision of law, that law was always and forever in-relationship with other powers and knowledges. In its openness to other powers, law is thus both a law subordinated to those other powers – be it the jurdico-discursive of the monarchical sovereign or that of discipline and bio-power – whilst at the same time because of this very same openness to subordination, forever unstable and surpassing unable to be totally controlled by any one power.

In relation to HIV-related criminal law we see that at the most basic level law itself, particularly now in NSW with the use of criminal offences of a *general* nature rather than HIV-transmission *specific* offences, is clear that law must be open to change. The criminal law was able to in the first instance adapt itself to a law (s33 as it then was) which criminalised HIV-transmission specifically – a harm which up until that point the criminal law had not recognised – but then more importantly revert to a law of general application and push the boundaries of assault law to include the infliction of HIV as a form of bodily harm regarded as grievous in nature. So too, at this basic level does the law remain open to the knowledge and concepts of the discipline of public health. In fact in the case of *Kanengele-Yondjo,* the trial judge in sentencing appealed directly to and accepted the concepts of medical evidence, stigma, population-health and disease-based harm:

> Medical evidence discloses that they will experience depression and anxiety arising from concerns about loss of physical function and potential deterioration in physical appearance; dramatic wasting due to HIV or due to medication side effects; physical disfigurement due to cancer of the face or body; a variety of losses, work, mobility or relationship; and ultimately death and dying issues. There has always

[537] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 77.

[538] Ibid., 79.

> been an enormous amount of stigma associated with having HIV infection and the majority of those infected lead socially isolated lives with ongoing fear of rejection or worse by their partner, families and by their community. Many of those factors are now being experienced by both victims ... Further the risk of the spread of HIV has enormous and dire implications for the health and welfare of the general community and I consider this to be a seriously aggravating factor in these cases.[539]

Further, Weait in the context of the United Kingdom notes that "whereas in 'ordinary' non-fatal offence cases, it is reasonable...that the defendant knows or ought to know, that he is the cause of the harm that has occurred, in HIV transmission cases this is simply not possible [in the normal sense of knowing in orthodox physical assault events]." Simply put, a defendant cannot *know*, nor can an observer *observe*, whether the defendant is the cause of a partner's infection as can be established in more orthodox scenarios based on actions such as a stabbing for example. Weait cites the use of phenotype testing and analysis having been adopted by the UK courts.[540] In the Australian context, an important Victorian case grappled with this self-same issue of scientific evidence of transmission which is so essential to proving causation. The court ruled that the evidence was certainly not reliable enough to provide beyond a reasonable doubt that transmission had in fact occurred between the two parties as alleged. Here the courts are working, albeit not always successfully, to integrate the learning and technology of public health, medicine and HIV-testing into its operation. The importation of techniques and knowledges from the realm of public health into the courtroom again highlights the overriding of the normative separation of law and public health and critiques the view of the law as mechanistic, unable to respond to the 'realities' of the community or to change with the importing of knowledges and technology from outside itself into its working. This overriding of the separation itself then causes extraordinarily difficult issues for criminal law doctrine(s) and thus the ability for the criminal law to maintain its grasp upon HIV. The law relies upon phenotype testing, expert evidence from HIV public

[539] *Kanengele-Yondjo v R* [2006] NSWCCA 354 (16 November 2006) at 16

[540] Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007), 85-107.

health officials[541] and epidemiological techniques in its attempt to understand HIV within the bounds of the criminal legal doctrine of causation. For Rush, this openness of law is communicated in the lack of fixity to the meaning of HIV, where the meaning of HIV is continually displaced:

> HIV transmission is situated in a plural field of legal signification – disease, drugs, needles, substances, bandits as much as assault, rape, murder and endangerment. What the placement of HIV transmission in criminal legislation illustrates is that criminal law and the criminalisation process unceasingly tries to pin down the meaning of HIV: to fix its meaning. Yet it is continually being displaced by rival traditions in the ordering of criminal law, as much as by references to the social, the medical, the cultural and so on.[542]

This reliance by law on something outside itself is the primary point here. In addition, it is noted that such an attempt to bring within itself public health ways of understanding the law in fact undermines the functioning of the criminal law. Law, at least in relation to HIV-transmission offences, is thus not the complete, self-sufficient entity which the anti-criminalisation literature presents it as being.

Rush again notes this need for the criminal law to make sense of HIV by taking into itself knowledges, vocabulary and concepts to construct its legitimacy:

> in making sense of HIV and its transmission, the discourse of criminal law repeatedly finds itself using a rhetoric that depends for its meaning and legitimacy on other forms of knowledge: whether medical, epidemiological, sociological, or even the general cultural

[541] For example public health physicians testified at the trial of Kanengele-Yondjo: *Kanengele-Yondjo v R* [2006] NSWCCA.

[542] Peter Rush, 'HIV transmission and the jurisdiction of criminal law' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 74-90, 81.

> repertoire of images about drugs, bandits, grim reapers, sexual practices, and so on.[543]

It is this borrowing of what are basically the core epistemological tools with which public health makes 'sense' of HIV which shows again that law and public health exist in a relationship closer and more co-determined than might at first be apparent.

This acceptance of public health knowledge and epistemology into the very courtroom is an example of this open and responsive law described above by Golder and Fitzpatrick as against the expulsion thesis. In relation to HIV-transmission offences this openness of law to public health and other knowledges outside of it highlights again not only the responsiveness of law, but also the work which law performs for public health.

Golder and Fitzpatrick point to the reliance of the powers of discipline and bio-power in their example on the "production of scientific knowledges of 'man'."[544] It is essential for the operation of those powers that social scientific knowledge is operationalised to create knowledge of the individual and of society in order to create and compare (through the exam for example) individuals against the norms by which "we are judged [and] condemned."[545] For public health, phenotype testing and the general conceptualisation of HIV within the accepted medical framework are important (albeit contested) knowledge claims and the figure of the 'population' is the essential element in its epistemology and claim to authoritative knowledge.

In relation to HIV, the formation of populations takes place at the level of those who have been diagnosed and are aware of their HIV status, those who are 'at risk' of HIV transmission and the remainder population known variously as 'the general population' or are invisible and unacknowledged in relation to HIV. Even this most basic enunciation of the HIV-related populations hints at the work which the 'discovery of population' does for public health and

[543] Ibid., 75.

[544] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 62.

[545] Ibid., 63.

the possibilities for intervention which it opens up.[546] For those who work in the field of communicable disease control the formation of the population of those 'at risk' and also those who are 'HIV positive' are key tools in their work to effectively reduce the onward transmission of HIV. The reverse, however, can also be that to identify a certain population as 'at risk' can also place this population, perhaps already vulnerable, in the firing line of stigmatisation or exclusion through fear. The technique of constructing these 'at-risk' populations includes the use of norm creation and comparison of the 'at-risk' population with the parameters of a norm of standard of conduct which can cause characterisation of the target population for intervention as a threat to stability or the social order. What then is the relationship between the concept of 'population' and public health's reliance upon law?

The difficulty of relying upon the concept of 'population' as the foundation for public health's identity and its justification for action is that it lacks, like social scientific knowledge generally, "a transcendent reference point in modernity."[547] Without this transcendent reference point, the concept of population, a completely immanent one, becomes the answer to the problems of the population. For example, the ACON/Positive Life NSW *Risk Reduction Strategy Paper* cited previously, enumerates alternative risk reduction strategies from that of consistent condom use for those for whom condom use will not be an option.[548] The position taken is not one of an individualist approach or that even of the medical model of individual health and risk behaviours, but rather, one based on the idea of population-focused management of HIV transmission. Certainly, utilisation of alternative risk reduction strategies such as withdrawal or sero-sorting presents a greater risk to the individuals involved, however from a population perspective, to reduce the harms associated with activities undertaken by this group of persons devoid of any sense of deference to issues of individual responsibility for harms makes sense. It makes sense to encourage alternative risk reduction strategies for this population. Thus without any alternative to 'population' (epistemologically speaking) for public health, individual enforcement, or responsibility for onward infection can only be understood in the broader context of an entire population's rate of onward transmission. Thus without any transcendent reference point, shifts in the

[546] Nina Glick Schiller, Stephen Crystal and Denver Lewellen, 'Risky business: The cultural construction of AIDS risk groups' (1994) 38(10) *Social Science & Medicine* 1337.

[547] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 63.

[548] Positive Life NSW and AIDS Council of New South Wales (ACON), 'Risk Reduction Strategy Paper: Gay Men's HIV Prevention 2010-2012' <positivelife.org.au/risk-reduction-strategy >.

population *itself*, such as an increase in the practice of sero-sorting in men who have sex with men in Sydney,[549] becomes the *only* reference point for strategies and action. It is a circular logic where public health is called upon to speak with authority from a completely immanent position.[550] In Golder and Fitzpatrick's reading of Foucault, this predicament is resolved with the entrance of law which acts to provide "compensatory justification and authority for the incomplete epistemological project…and its knowledge claims about the individual and society."[551] What of law's role then? How does it achieve this support which Foucault describes as direct or indirect support by the judicial apparatus.[552] In the first way in which the law buttresses public health's knowledge claims, the law works to adopt public health and associated concepts within its own judgements such as those expounded in the summing up in *Kanengele-Yondjo* including the concept of the protection of the population as a rationale for punishment[553] and the use of expert witnesses in relation to that same case drawn from the public health sector.[554]

The law provides compensation for public health's deficit in another important way by working to engage with only the ultimately recalcitrant subject, the person unable to or, more often, refusing to properly comport themselves as against the expectations of public health.

4.5.3 HIV-Transmission's Ultimately Recalcitrant Subjects

A recent paper, *The Australian National Council on AIDS, Hepatitis C and Related Diseases*, outlined what it believed to be the appropriate response to the risk of disease transmission. It held that "punishment under public health or criminal law should be reserved for the most serious cases of culpable behaviour as a last resort."[555] This position is adopted by the

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[549] L. Mao et al, '"Serosorting" in casual anal sex of HIV-negative gay men is noteworthy and is increasing in Sydney, Australia' (2006/05/13) (2006) 20(8) *AIDS* 1204.

[550] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 63.

[551] Ibid., 63.

[552] Michel Foucaul cited in ibid., 63.

[553] Whilst community protection is a trope used historically to justify punishment, it is the fact that the judge, in that case for example, spoke only of protection of the community rather than any sense of retributitve punishment.

[554] Such as senior staff from the Albion Street Centre, Sydney's leading HIV and AIDS clinical service which is co-located with the World Health Organisation Collaborating Centre for Capacity Building and Health Care Worker Trainingin HIV/AIDS Care, Treatment and Support as well as other key public health agencies such as Hepatitis NSW: *Kanengele-Yondjo v R* [2006] NSWCCA.

[555] The fact that the paper admitted that *punishment* of a person could, even conceptually, be an option is concerning for the differential standard of proof and the criminal-law safeguards which would be lost if the administrative law were used to 'punish' those who transmitted HIV such as it is arguably used in relation to Serious Sex Offenders through Continuing Detention Orders and Extended Supervision Orders after head-

majority of the literature.[556] On a practical level, the public health apparatus operates within the jurisdiction of the criminal law and, although very rare, prosecutions have and do continue to occur. At a simple level we can see that criminal law has not yet been expelled. In fact, from the forgoing discussion it seems that the characterisation of the law as being even instrumentally subordinate or separate and hermetically sealed from public health is also an unsustainable characterisation of the literature. The Victorian case of *Neal*[557] is an example of how public health or health agencies are unable to control instances of HIV-transmission from prosecution. In that case, Neale was charged with multiple counts of intentional and attempted transmission of HIV. Through an error on the part of HIV/AIDS service providers, a subpoena for Neale's treatment files led to numerous other files being released to police of those individuals public health authorities had "concerns" in relation to.[558] At least two of these cases were successfully brought to trial against the express wishes of public health authorities involved.[559] The activity of public health therefore is seen to be undertaken within the bounds of a criminal law which public health authorities themselves cannot direct or control. Whilst this might seem like an obvious point, it is an important instance which demonstrates both the criminal-legal context of public health activities but also the tensions present in a situation where public health authorities are unable to instrumentally subordinate law. Clearly, authorities were concerned about these accidently reported cases of transmission, and it was likely that they understood that criminal charges could result from the behaviour documented. It is the status of these ultimately recalcitrant subjects however which is one of the key insights which a neo-Foucauldian jurisprudence assists us in understanding. It is the use and/or acceptance of the criminal law as a "mop-up"[560] strategy for intentional transmission or those who remain non-compliant with public health's bio-

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sentences have been run thus erecting a truly Orwellian non-criminal system of punishment and preventive detention.

[556] For example: Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007), 3. Sally Cameron, 'HIV, Crime andthe Law in Australia: Options for Policy Reform - a law reform advocacy kit' (Pt AFAO) (February, 2011)(Discussion Paper) <http://www.afao.org.au/library_docs/policy/DP0211_HIV_Crime_and_the_Law.pdf>.

[557] Neal (2008) cited in Gina Mitchell and Melissa Woodroffe, 'Criminal Transmission of HIV: A Guide for Legal Practitioners in NSW' HIV/AIDS Legal Centre Inc., 18 April, 2011) 52-3 <www.halc.org.au/downloads/crim_transmission.pdf >.

[558] Ibid., 41.

[559] Ibid., 52.

[560] Peter Rush, 'HIV transmission and the jurisdiction of criminal law' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 74-90, 75.

political or disciplinary interventions which is key to understanding how public health is constituently dependent upon criminal law. The public health authorities can merely "identify and stigmatize abnormality but can not enforce sanctions against it of their own scientific motion."[561] Law here plays a vital role in providing an *enforceable decision*, where the ultimately recalcitrant subject's transgression of the norm comes up against the law.[562] This role that the criminal law plays undermines claims of law's expulsion or instrumental subordination made by the anti-criminalisation literature. The acceptance of the role of criminal law to police the contested boundary of public health's authority – where ultimate recalcitrance challenges public health's authority – is further evidence of the work law performs in concert and for public health.

Golder and Fitzpatrick point to a slightly different operation of the law and power external to it such as public health in their example, citing that the law "goes to constitute disciplinary power…by purporting to exercise its supervisory jurisdiction only over the more egregious aberrations, abuses and excesses of disciplinary power."[563] For Golder and Fitzpatrick then, it is law's policing of discipline itself, of its overreaching and excesses which buttresses discipline's authority. In relation to HIV-related law this may well remain true. Oversight of Public Health Orders by tribunals of law is one such measure where law restrains from engaging in adjudication on the merits of administrative orders unless called on to do so. However, more apt in this example in relation to HIV-transmission is ceding of jurisdiction to public health authorities for anything but the most egregious cases of HIV-transmission. As discussed in relation to the case of *Neale* and *Kanengele-Yondjo* above, the law leaves the scene of basically all episodes of HIV-transmission, intervening and adjudicating in only the rarest of cases.[564] This "self-limiting legality"[565] leaves the public health apparatus to engage

[561] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 70.

[562] In particular, note the advocacy of the anti-criminalisation literature for the continued criminalisation of intentional transmission of HIV as discussed in the following section in light of the role of law and ultimate recalcitrance.

[563] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009).

[564] As noted previously, there have been some twenty prosecutions in total have been launched in Australia (Gina Mitchell and Melissa Woodroffe, 'Criminal Transmission of HIV: A Guide for Legal Practitioners in NSW' HIV/AIDS Legal Centre Inc., 18 April, 2011) <www.halc.org.au/downloads/crim_transmission.pdf >.) whilst approximately 1000 episodes of transmission occur each year, with some 20,000 people currently living with HIV in Australia: The Kirby Institute for infection and immunity in society, *HIV, viral hepatitis and sexually transmissible infections in Australia Annual Surveillance Report 2011* (The Kirby Institute, the University of New South Wales, Sydney, NSW, 2011).

[565] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 68.

with and manage episodes of transmission as it sees fit, its jurisdiction left unchallenged, law's absence legitimating public health's control of the field.

> Thus, in confining its legal supervision to the contested periphery¸ the instability at the very core of disciplinary power (the lack of epistemological certitude and authority for its normalising project) is left unquestioned and hence reinforced.[566]

This is not to say however that law could not undertake to intervene in almost all imaginable cases of transmission. With consent not a defence to transmission,[567] you can imagine that almost all cases where the infecting partner was either aware, wilfully blind to the fact or perhaps should have been aware of their HIV positive status could well come before the law for adjudication. It is important, however, that law somehow choose to leave the bulk of the field to public health's supervision and management. It is this choosing not to rule by which law buttresses public health's hold on HIV and works to re-assures its identity as the 'correct' method of dealing with the issues of HIV-transmission. Again, Golder and Fitzpatrick in relation to the disciplines and law in their own example of the supervision of courts (law) over disciplinary hearing in prisons, speak of the relationship between "law and disciplinary power serv[ing] to constitute the other and natural and necessary."[568] This relationship also does work for law's own position, as Golder and Fitzpatrick say of law's supervisory jurisdiction over that of discipline, "by submitting itself to the…rule of law (however attenuated and tangential this oversight actually proves to be in practice) disciplinary power helps consolidate law's claim to rule without the law actually being called upon to make good on its promise of being able to do, and rule over, anything."[569]

However, law is called upon to rule in relation to a certain class of subjects, named by Golder and Fitzpatrick as those exhibiting "sheer insubordination"[570] to the disciplining or bio-political moulding of their subjectivity. Here, subjects who continue to transmit HIV despite

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[566] Ibid., 64.

[567] Gina Mitchell and Melissa Woodroffe, 'Criminal Transmission of HIV: A Guide for Legal Practitioners in NSW' HIV/AIDS Legal Centre Inc., 18 April, 2011) 32 <www.halc.org.au/downloads/crim_transmission.pdf >.

[568] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 66.

[569] Ibid., 67.

[570] Ibid., 67.

the best efforts of the public health apparatus are examples of a failure of that system's ability to deal with ultimate recalcitrance. In reality hundreds of people are infected with HIV each year in Australia.[571] This failure, this escaping of subjects from the effective control of public health was rendered by Foucault in this way: "in the…language of bio-power: 'It is not that life has been totally integrated into techniques that govern and administer it; it constantly escapes them'."[572] It is here with these figures of Neale, Kanengele-Yondjo or others where the public health's "suasive claims"[573] yield to the "enforceable determination of the law."[574]

When one looks to the factuality of HIV transmission prosecutions in Australia, in any of the jurisdictions, what has occurred can hardly be described as a 'criminalisation of HIV' or even a 'criminalisation of HIV transmission'. Rather, the prosecutions which have been mounted are for the most egregious violations of a person's trust with repeated intentional removal of a condom during sexual intercourse whilst knowing of HIV infection,[575] having unprotected sexual intercourse whilst knowingly being HIV positive,[576] not using condoms whilst being both aware of HIV positive status as well as being under a Public Health Order requiring the Defendant to use condoms[577] or 35 offences of attempting to and deliberately infecting other with HIV whilst being a person of concern to health authorities.[578] Yet, some in the anti-criminalisation literature worry that prosecutions for HIV transmission and their attendant media coverage compromise operations of the public health apparatus.[579] To this Scammel and Ward conclude that whilst there is no evidence that can be produced directly, the evidence from the institution of other non-voluntary legal regimes (such as disclosure regimes) is that such legislative approaches (versus the voluntary engagement paradigm of

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[571] The Kirby Institute for infection and immunity in society, *HIV, viral hepatitis and sexually transmissible infections in Australia Annual Surveillance Report 2011* (The Kirby Institute, the University of New South Wales, Sydney, NSW, 2011).

[572] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 64.

[573] Ibid., 67.

[574] Ibid., 67.

[575] *Kanengele-Yondjo v R* [2006] NSWCCA.

[576] *Mutemeri v Cheesman* (1998) 100 AcrimR 397 at 400.utermi v Cheesman (1998) 100 A Crim R 397

[577] See 'Kuoth 2007' cited in Gina Mitchell and Melissa Woodroffe, 'Criminal Transmission of HIV: A Guide for Legal Practitioners in NSW' HIV/AIDS Legal Centre Inc., 18 April, 2011) 51-2 <www.halc.org.au/downloads/crim_transmission.pdf >.

[578] Neal (2008) cited in ibid., 52-3.

[579] Michael Hurley and Samantha Croy, 'The Neal Case: HIV infection, gay men, the media and the law' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (NATIONAL ASSOCIATION OF PEOPLE LIVING WITH HIV/AIDS, 2009) 108-120.

public health campaigns) has no effect upon prevalence of risk behaviours.[580] Further, as they argue has been the experience in the Victorian and South Australian jurisdictions, criminal prosecutions have worked to reduce confidence placed in public health approaches (the authors specifically write public health 'officials'[581] to "effectively manage HIV."[582] They do not present a sustained argument, or reference, for this reported loss of confidence but do note that "whether the net impact of criminal prosecutions on public health has been beneficial or detrimental is not possible to determine."[583]

Foucault argues however that such failure is in fact productive where in relation to his example of prisons says:

> For a century and half the prison had always been offered as its own remedy: the reactivation of the penitentiary techniques as the only means of overcoming their perpetual failure; the realisation of the corrective project as the only method of overcoming the impossibility of implementing it.[584]

In this way, the ultimate recalcitrance of certain subjects is in fact the foundation for public health's ongoing dominance in the field. It is the spur to further work such as a public health response to Sexually Adventurous Men (as they are called) through Risk Reduction Strategy,[585] new national strategies for the decriminalisation of HIV-related offences,[586] and the revision of national HIV strategies to take into account law reform activities as a national priority.[587] The presence and response to the ultimately recalcitrant subject is the "motivation

[580] David Scamell and Chris ward, 'Public health laws and politics on the issue of HIV transmission, exposure and disclosure' ibid.(National Association of People Living with HIV/AIDS (NAPWA)), 58.

[581] Ibid., 58.

[582] Ibid., 58.

[583] Ibid., 58.

[584] Foucault in Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 69.

[585] Positive Life NSW and AIDS Council of New South Wales (ACON), 'Risk Reduction Strategy Paper: Gay Men's HIV Prevention 2010-2012' <positivelife.org.au/risk-reduction-strategy >.

[586] Sally Cameron, 'HIV, Crime andthe Law in Australia: Options for Policy Reform - a law reform advocacy kit' (Pt AFAO) (February, 2011)(Discussion Paper) <http://www.afao.org.au/library_docs/policy/DP0211_HIV_Crime_and_the_Law.pdf>.

[587] Ibid., 13.

for the development of every new network of power."[588] As Golder and Fitzpatrick put it, "recalcitrant provocation constitutes more than a simple 'correction' to disciplinary power [it] is in fact formative of its very being, of the borders of the disciplinary norm itself."[589]

4.6 Conclusion

Thus we see that law and public health rely on one another in a variety of surprising ways unacknowledged in the literature. They are mutually reliant upon one another to buttress each other's identify, they work to mutually co-constitute one another in an interplay which relies upon highlighting difference and upon strategic withdrawal from certain cases of HIV transmission whilst conflicting with public health in relation to those deemed completely recalcitrant. The outcome for law is that it is not rendered the solid, coherent or separate entity which the literature's conceptualisation of it proposes. For the relationship between law and public health, it is seen as one more tight-knit, co-determined and inseparable than is described in the literature. What then does this more nuanced vision of law mean for the anti-criminalisation debate and for the future(s) of engagement with HIV-transmission in Australia?

[588] Foucault in Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 69.

[589] Ibid., 68.

5 Conclusion

5.1 Re-characterising Legal Intervention

We ended the previous chapter seeing that the conceptualisation of law which underlies the anti-criminalisation thesis renders law as a deterministic instrument, mechanistic in application, limited and negative. It was a reading which was repeated in the critical scholarship which read Foucault's own substantive views on the nature and operation of law in modernity in a similar way:

> Foucault, on this reading of him, renders law as an instrument of repression, control and social ordering which is overtaken by more expansive modes of power. Law remains only to perform a residual role of instrument or accessory to such now predominant powers of modernity.[590]

We are reminded of the vision of law as 'tactic', the push to have law subordinated to the predominant power of public health in modernity. We are reminded of the repressive, negative, (criminal) law that says 'no' of the anti-criminalisation scholarship. We are reminded of the relegation of law to the residual role as a "'mop-up' strategy for the exceptional or extreme cases" in the words of Peter Rush.[591] Law is, in this reading of Foucault, and in the case of the anti-criminalisation scholarship, "tied to the sclerotic form of the centralized state apparatus and thoroughly inefficient as a means of surveilling and correcting individual bodies or managing populations."[592] Law in the anti-criminalisation scholarship is understood in a manner in many ways commensurate with the view of law which informs the expulsion thesis in the literature surrounding Foucault and the law. The re-reading of Foucault by Golder and Fitzpatrick presented above however assists us here to render problematic this one-sided reading of law 'itself' and of its relationship to public health. Instead of a law which is simply rendered subordinate to other powers such as public health, we saw above through the lens of a neo-Foucauldian jurisprudence, a relational vision of public health and law where the tensions and differences themselves serve a productive

[590] Ibid. 13.

[591] Peter Rush, 'HIV transmission and the jurisdiction of criminal law' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 74-90. 75.

[592] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009). 14.

purpose in relation to the ongoing establishment of the authority of both the criminal law and of public health. For Rush,

> No single practice or discourse – whether it is the plural traditions of the law of crime, or the no doubt plural traditions of medicine and social policy – has the final say. Although some of them seem to want to have the final say, the criminalisation of HIV transmission indicates that they are essentially contestable in a culture of argument. And this may be a good thing.[593]

But what of the understanding of law 'itself'? Beyond revising the accepted wisdom that law is or should be expelled from the operation of public health, does the revision of the relationship between law and its 'other', public health, have some implications for the vision of law 'itself'?

The determinate law is the dimension of law which is dominant in the anti-criminalisation literature. It is law which "expresses definite content,"[594] always seen to be in its "negative mode of restraint and calculation in its being nothing more than the law that says 'no'."[595] It is the characterisation of the criminal law's function and operation understood by Weait as one which "is not to liberate but to repress, censure and condemn."[596] In the analysis of the conceptualisation of law presented above law is mechanical, negative, limited and determinate. This side of law is well presented throughout this thesis. Law's other dimensions, a law of resistance and responsiveness as Golder and Fitzpatrick term it, is a law which was seen in the various critiques presented against the determinate law of the anti-criminalisation literature. It is most strongly seen as the implication for law's ontology when its relationship of mutual co-constitution with public health was outlined above. Law there was seen to be fundamentally open and less fixed than the vision of a determinate law would have it. It was open to knowledges and discourses of medicine and public health on a

[593] Peter Rush, 'HIV transmission and the jurisdiction of criminal law' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 74-90, 85.

[594] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 72.

[595] Ibid., 72.

[596] Matthew Weait, *Intimacy and responsibility : the criminalisation of HIV transmission* (Routledge-Cavendish, 1st ed, 2007), 200.

practical level in the courtroom opening itself to doctrinal difficulties in relation to establishing the criminal legal concept of causation. This openness to what is outside of itself is something which Rush, in his critical appraisal of the relationship between HIV and criminal law intuited where he said:

> In part, this predicament is because in making sense of HIV and its transmission, the discourse of criminal law repeatedly finds itself using a rhetoric that depends for its meaning and legitimacy on other forms of knowledge: whether medical, epidemiological, sociological, or even the general cultural repertoire of images about drugs, bandits, grim reapers, sexual practices, and so on.[597]

This radical openness of law to those other forms of knowledge external to it is essential for the maintenance of law's ongoing position within the constellation of powers and power relations present at the scene of HIV-transmission. It is, particularly now in NSW with the use of criminal offences of a general nature rather than HIV-transmission specific offences, clear that law must be open to change in order to remain "the outside that envelops conduct…converting, unknown to anyone, its singularity into that grey monotony of the universal …"[598] With the use of these assault and other criminal offences of universal application law must open itself to its outside and respond to the emergence of HIV but also to the new knowledge(s) and understandings of HIV produced by public health, medicine, epidemiology or any of the other forms of knowledge Rush acknowledges law takes into itself to make sense of HIV. For Golder and Fitzpatrick:

> Put crudely, if law, if it is to rule effectively and secure the requisite certainty and predictability in the world beyond, must constantly relate to the ever-changing nature of society, the economy, and so forth.[599]

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[597] Peter Rush, 'HIV transmission and the jurisdiction of criminal law' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 74-90, 75.

[598] Michel Foucault cited in Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 78.

[599] Ibid., 82.

The exploration of this underlying dynamic of law in relation to public health goes some way to answering the call to reconcile how HIV is represented in the criminal law[600] and perhaps coming to understand the story of Sharleen and of Ms A, Ms B and Kanengele-Yondjo. This nuanced vision of law as which is at the same time both a negative, deterministic yet also surpassing and flexible law is the working-out of Rush's observation of an inherently unstable law, constantly being displaced as one being made new again through adoption of elements drawn from outside itself in a dynamic tension.[601] The story of Sharleen, Ms A, Ms B and Kanengele-Yondjo, however, should be a reminder of the human and lived dimension of this tension between criminal law, public health and other powers which work to constitute HIV in NSW today. It is because of that lived reality of HIV, which interfaces with law of any and all varieties, that the critique and working through of law's relationship to public health all the more essential and urgent a process.

We asked at the close of the previous chapter, what this more nuanced vision of law could mean for the anti-criminalisation debate and for the future(s) of engagement with HIV-transmission in Australia?

This literature calls for decriminalisation, which would see criminal law either subordinated to the will of public health or completely expelled from the scene of HIV transmission. What Foucault's position in relation to law opens up is a vision of internal instability within the law itself. This responsive law, taking into itself from that which is outside itself, cannot ever reach a point of complete stasis. It is, as Golder and Fitzpatrick suggest, essential that law remain resistant to the "integration into order."[602] For it is with law's ability to elude control by any other power that law is able to be "responsively (and self-disruptively) open…to the singularity of the other and infinite, unstilled possibilities of the outside,"[603] be it outside the

[600] Peter Rush, 'HIV transmission and the jurisdiction of criminal law' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 74-90, 81.

[601] As established through the reading of Foucault and of HIV respectively in Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009); Peter Rush, 'HIV transmission and the jurisdiction of criminal law' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 74-90, 81.

[602] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 82.

[603] Ibid., 82.

HIV strategy[604] or otherwise. This is a conceptualisation of law which presents problems with programs of rational law reform, such as that proposed by the anti-criminalisation literature.[605] This more nuanced depiction of the law then presents significant implications for both proposed law reform and more generally with any engagement with HIV-related criminal law and public health. It points at reform being directed perhaps away from engagement with law on platforms which presuppose only a determinate law on the one hand and a relationship defined by radical difference and incompatibility on the other such as is presented in the expulsion thesis of HIV-related criminal law. To approach law through the currently hegemonic characterisation of it risks any attempt at reform failing through ignorance of the interconnection between law and public health. Law cannot be critiqued without consequence for public health, a field regarded in the literature as being 'outside' law, where law's work to buttress and legitimise 'public health' itself and its control of HIV transmission is largely ignored.

The revised conceptualisation of law 'itself' and its operation in relation to public health presents us with a determinate *and* responsive law, a law which is separate from public health but which also remains intimately linked and co-determined with it. It is a law which "eludes containment".[606] It is a law which will be, due its radical responsiveness always and forever uncontainable by the powers it draws upon and takes into itself

[604] Sally Cameron and John Rule, 'Outside the HIV strategy: challenges of 'locating' Australian prosecutions for HIV exposure and transmission.' in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia: Legality, Morality and Reality* (National Association of People Living with HIV/AIDS, 2009) 18-30.

[605] Sally Cameron, 'HIV, Crime andthe Law in Australia: Options for Policy Reform - a law reform advocacy kit' (Pt AFAO) (February, 2011)(Discussion Paper) <http://www.afao.org.au/library_docs/policy/DP0211_HIV_Crime_and_the_Law.pdf>.

[606] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009), 82.

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