Considerations for Modernized Criminal HIV Laws and Assessment of Legal Protections Against Release of Identified HIV Surveillance Data for Law Enforcement

In November 2018, the Centers for Disease Control and Prevention distributed guidance to funded agencies under its Integrated HIV Surveillance and Prevention Programs Initiative to support the implementation of the program's third strategy: HIV transmission cluster investigation and outbreak response efforts. Cluster detection seeks to identify persons infected with HIV (diagnosed and undiagnosed) who are linked to infections in single or related sexual and injection drug networks. Identifying expanding clusters allows public health personnel to intervene directly where active HIV transmissions occur.

However, in the context of HIV infection where most US states have enacted criminal exposure laws, these efforts have sparked concerns about the protection of HIV surveillance data from court order or subpoena for law enforcement purposes. The Centers for Disease Control and Prevention calls for funded agencies to evaluate relevant confidentiality laws to ensure that these are sufficient to protect the confidentiality of HIV surveillance data from use by law enforcement.

We present four often overlooked factors about the criminalization of HIV exposure and HIV surveillance data protections that should be considered in statutory assessments. (*Am J Public Health*. Published online ahead of print September 19, 2019: e1–e4. doi:10.2105/AJPH.2019.305284)

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In November 2018, the Centers for Disease Control and Prevention (CDC) distributed guidance to funded agencies under its Integrated HIV Surveillance and Prevention Programs Initiative to support the effective and ethical implementation of the program's third strategy: HIV transmission cluster investigation and outbreak response efforts.[1] The goal of cluster detection is to identify persons infected with HIV, both diagnosed and undiagnosed, who are linked to infections in single or related sexual and injection drug networks. Identifying expanding clusters allows public health personnel to intervene directly where active HIV transmissions are occurring. However, in the context of HIV infection where 34 US states have enacted HIV-specific criminal exposure laws,[2] efforts to identify and respond to transmission clusters have sparked concerns about the protection of health department HIV surveillance data from court order or subpoena for law enforcement purposes.[3]

Anecdotal evidence suggests that health departments receive regular, although infrequent, requests or orders for surveillance data during investigations and prosecutions for HIV exposure or transmission. Prosecutors seek date of HIV-positive diagnosis and confirmation of HIV counseling to demonstrate that a person with HIV knew his or her positive status on a particular date and received prevention information, which satisfies two common statutory requirements. This information alone, however, is not typically sufficient for conviction.[4]

The CDC guidance requires health departments funded under the initiative to engage in three activities underlying effective and ethical cluster detection and response programs; the first and perhaps most important foundational activity is to inform community stakeholders about cluster response efforts and to garner community feedback, support, and potential collaboration in the process. The second and third activities are to assess state confidentiality laws and policies governing funded agencies to ensure that these are sufficient to protect the confidentiality of HIV surveillance data from use by law enforcement. In addition, funded health departments in states that have enacted criminal HIV exposure laws are to consider the scientific accuracy and usefulness of these statutes and potential alternatives to meet HIV prevention objectives. All funded agencies are to carry out their law and policy assessments and to develop strategic action plans for closing gaps in data protections by December 2019.

We present four often overlooked factors about the criminalization of HIV exposure and health department data protections that should be considered in statutory assessments, and thus we address the second and third foundational activities described in the CDC guidance. These activities are, however, informed by the first

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foundational activity, community engagement.

CRIMINALIZATION AND HIV EXPOSURE LAWS

Although careful consideration of state criminal HIV exposure laws is important when a state has enacted a criminal HIV exposure law, it is equally important to recognize that the criminalization of HIV exposure goes well beyond prosecutions under HIV-specific laws. As of 2018, at least 26 US states have prosecuted cases of HIV "exposure" with traditional criminal statutes.[5] Charges have included reckless endangerment, assault, assault with intent to murder, and even attempted homicide (*People v. Odom*, 740 N.W.2d 557, 560 [Mich. Ct. App. 2007]; *Commonwealth v. Smith*, 790 N.E.2d 708, 709 [Mass. App. Ct. 2003]; *State v. Smith*, 621 A.2d 493, 495 [N.J. Super. Ct. App. Div. 1993]; *Ginn v. State*, 667 S.E.2d 712, 713–14 [Ga. Ct. App. 2008]). In some cases, these prosecutions occurred in states that also had an HIV-specific statute.[5] Although this point is contended, the greater prosecutorial burden presented by modernized HIV exposure statutes (e.g., required proof that the defendant intended to infect the partner and, in some cases, proof that the partner was indeed infected[6]) may inadvertently prompt prosecutors to bring cases under traditional crimes, such as reckless endangerment, where they may not need to prove these elements. Protections against orders for release of surveillance data for law enforcement purposes should consider prosecutions under traditional criminal as well as HIV-specific laws.

Criminal disease exposure statutes sometimes address reportable diseases other than HIV. For example, as of 2018, 13 US states have laws criminalizing undisclosed exposure to viral hepatitis.[7] Other states do not identify specific conditions in criminal exposure laws. Consideration of confidentiality protections should extend to these additional reportable diseases, which may not have the enhanced confidentiality protections historically afforded to HIV-related data.[8]

APPLYING STATUTES

Law enforcement records and court cases related to the criminalization of HIV exposure routinely demonstrate the tendency of frontline police officers, prosecutors, and judges to overestimate the risk of HIV transmission in given situations and to underestimate the effectiveness of prevention methods.[9] Take for example the case of *Weeks v. Scott*, in which an HIV-positive person was convicted of attempted murder for spitting on a prison guard.[10] Furthermore, even in the past decade there have been convictions on the basis of the outdated assumption that HIV infection is an immediately life threatening, if not universally fatal, disease.[11] As for underestimating the effectiveness of prevention measures, convictions have occurred despite evidence that the person with HIV used a condom or engaged only in sexual activities that posed negligible to no risk of HIV transmission.[12]

When assessing criminal exposure laws, it is important to remember that a statute that seems appropriately circumscribed from a public health perspective may lead to an illogical outcome when interpreted or applied by persons who are not well versed in the epidemiology of HIV transmission and prevention. Statutes that include vague or general language about transmission risk may lead to inaccurate risk assessment when applied. For example Alabama's exposure statute, which, along with prohibiting knowing transmission of a sexually transmitted infection, prohibits persons with sexually transmitted infections from "doing any act which will probably or likely transmit such disease" without prior disclosure and partner consent.[13] Another example would be Nevada's statute that prohibits those with HIV from engaging in "conduct that is intended or likely to transmit the disease to another person."[14]

Identifying proscribed behaviors through general references to transmission risk requires those interpreting and applying statutes to make risk assessments that they may not be prepared or trained to make. On the other hand, some statutes, such as Illinois's modernized criminal HIV exposure law, explicitly identify proscribed behavior. The Illinois statute prohibits those with HIV from engaging in unprotected sexual activity without prior disclosure. Intent to transmit the virus is required. Sexual activity is defined as follows:

> Insertive vaginal or anal intercourse on the part of an infected male, receptive consensual vaginal intercourse on the part of an infected woman with a male partner, or receptive consensual anal intercourse on the part of an infected man or woman with a male partner.[15]

Equally important is consideration of the scientific competence of those who will be interpreting statutes related to the confidentiality of health department surveillance data. Often statutes that protect data held by public health departments allow courts to order data to be released in situations demonstrating a "compelling need" for data release as determined by a court official, yet in some cases, these statutes are silent on the risk assessment underlying conclusions about compelling need.[16] This lack of clear direction may contribute to faulty assumptions about risk. By contrast, some state statutes require that risk assessments be consistent with reliable, scientific evidence. For example, California's amended criminal exposure statute requires "a reasonable probability of disease transmission as proven by competent medical or epidemiological evidence."[17]

ENTANGLING PUBLIC HEALTH AND LAW ENFORCEMENT

Concerns about blurring distinctions between public health and criminal law enforcement efforts feature prominently in public health agencies' objections to the criminalization of HIV exposure and orders for data release.[18] Using identified surveillance data against the interest of patients, especially without informing patients that this could be the case, could jeopardize community confidence in public health agencies and compromise the effectiveness of public health efforts. Therefore, it is critical to consider and address the possibility that a statute may inadvertently increase demand for public health surveillance data by implying that these data are legally relevant.

For example, under California's criminal exposure statute, persons who take steps to prevent disease transmission do not violate the law. These risk-reduction strategies include "good faith compliance with a medical treatment regimen for the infectious or communicable disease prescribed by a health officer or physician."[19] Given the virtual elimination of transmission risk achieved by adherence to antiretroviral therapy,[20] most would agree that persons adhering to an antiretroviral regime should be exempt from prosecution. The concern becomes, however, if evidence of reliance on medical advice exempts a person with HIV from prosecution, whether this could suggest that health department surveillance records indicating treatment noncompliance or nonadherence (e.g., irregular viral load test results or elevated viral load results) might become relevant, albeit circumstantial, evidence against a defendant. Perhaps because of this potential for misuse of surveillance data, the California statute goes on to prohibit the subpoena or release of health department surveillance data and reports to establish that an individual intended to infect a partner.[21]

AUTHORITY AND POLITICAL DYNAMICS

The final consideration involves the context in which health departments function. Public health is inherently political in nature. Ultimately, health departments are part of state government and are expected to uphold the laws of their state, including HIV exposure laws when applicable. Resisting a valid court order for data release may leave health department authorities in an ethically and legally untenable position, especially if their administration supports data release to law enforcement. The political administrations in which health department authorities work may also change. In less populous states where the attorney general's office serves as counsel for the health department, a single election can result in significant changes in policy, especially when high-profile and highly contested cases develop. Directors of HIV and sexually transmitted infections health department programs in states where authority in the public health system is decentralized may also face ideological tensions among the state and regional or local agencies. It is important to consider data protection laws in terms of their adequacy across various administrations.

LOOKING FORWARD

The CDC guidance requires funded health departments to create strategic plans to address gaps in data protection and to consider eliminating or modifying potentially counterproductive laws. In light of the considerations we have addressed, health department leaders should consider supporting statutes that expressly limit, or even prohibit entirely, release of surveillance data for law enforcement purposes. The advantages of explicit prohibitions include the fact that they apply to traditional as well as HIV- or other disease-specific offenses, they do not require law enforcement and court officials to assess risk, they disentangle public health and the criminal law, and they entirely remove from health departments the responsibility for resisting release of data in furtherance of the enforcement of state law.

For example, as mentioned, California's disease exposure statute prohibits the subpoena or release of health department surveillance records and reports to establish that an individual intended to infect a partner, and even more broadly, Arizona expressly prohibits court or administrative orders for the release of HIV-related data (although not data related to other communicable diseases) by state, county, and local health departments.[22] Advocates of modernized HIV exposure laws also argue for laws that very clearly outline proscribed behaviors and, by requiring intent to transmit HIV (and in some cases actual transmission) separate efforts to address criminal behavior and to control disease.[7]

The ability of health department staff to actively support legislative changes varies considerably by jurisdiction. Successful advocacy efforts also require circumstances to coalesce that are not under health departments' control, or even purview. Health department leaders' engagement in the first foundational activity in the CDC guidance, community engagement around cluster detection and response efforts, will support the formation of partnerships necessary to address the legislative gaps identified during the assessments required in the second and third foundational activities. Health departments can also play an educational role for state legislators on the scientific advances of HIV prevention and treatment to help inform modernization efforts, if a state chooses to modernize an existing exposure law.

Given the lengthy and somewhat serendipitous process of legislative change, shorter-term strategies to protect sensitive surveillance data may be in order. Health departments may also want to support community partners in crafting and implementing educational interventions to prepare judges to consider subpoenas for health department evidence through a public health lens. Interventions with local law enforcement personnel, especially those investigating alleged cases of HIV exposure, may decrease demand for sensitive health department data from the user end. Interventions with prosecutors, such as the Center for HIV Law and Policy's roundtable discussions with district attorneys, can educate these officials about the drawbacks of HIV exposure cases and thus reduce prosecutions.[23]

Because health department legal counsel play an important gatekeeping role in interpreting state laws and regulations and adjudicating law enforcement requests for HIV surveillance data, there may be an educational opportunity to ensure that legal counsel are taking a limited and protective approach to data release. When it comes to cluster detection data, this engagement with legal counsel must include education on the limitations of these data to provide probative evidence of criminal transmission elements.

Public health efforts to drive down HIV transmission by responding quickly to potential clusters of transmission will be most effective if statutes protecting surveillance data from law enforcement use are first carefully reviewed and strengthened, where necessary, to prevent all of the collateral risks we have outlined. We have presented issues that health departments should consider as they carry out these activities with input from, and in collaboration with, people living with HIV, community and legal

advocates, HIV service providers, and other key stakeholders. As highlighted in the CDC guidance, health departments funded to conduct HIV cluster detection and response should involve the community in assessing data protections and statutes wherever possible to ensure ethical implementation of this strategy. AJPH

CONTRIBUTORS

C. L. Galletly, N. Benbow, and A. Killelea contributed to the research, writing, and revision of the commentary. Z. Lazzarini provided feedback on an earlier draft of the commentary and contributed to its revision. R. Edwards contributed to an early draft and to the development of professional presentations on which the commentary is based.

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CONFLICTS OF INTEREST

The authors declare that they have no conflicts of interest.

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