

Criminalization of HIV Transmission and Exposure: Research and Policy Agenda

More than half of US jurisdictions have laws criminalizing knowing exposure to or transmission of HIV, yet little evidence supports these laws' effectiveness in reducing HIV incidence. These laws may undermine prevention efforts outlined in the US National HIV/AIDS Strategy, in which the United States has invested substantial federal funds.

Future research should include studies of (1) the impact of US HIV exposure laws on public health systems and practices; (2) enforcement of these laws, including arrests, prosecutions, convictions, and sentencing; (3) alternatives to HIV exposure laws; and (4) direct and opportunity costs of enforcement.

Policy efforts to mitigate potential negative impacts of these laws could include developing prosecutorial guidelines, modernized statutes, and model public health policies and protocols. (*Am J Public Health.* 2013;103:1350–1353. doi:10.2105/AJPH.2013.301267)

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ALL US JURISDICTIONS HAVE criminal provisions that can be used to punish knowing exposure to or transmission of HIV to another person. More than half the states have HIV-specific criminal laws, whereas all have traditional criminal provisions. Yet criminal laws have not been shown to be effective in reducing rates of HIV infection. The Center for Interdisciplinary Research on AIDS at Yale University created a multidisciplinary working group to address the legal, public health, and advocacy issues raised by US laws criminalizing HIV exposure or transmission. The working group convened meetings with presentations of current research by members and outside experts, drafted a literature review and annotated bibliography, and, following a year and a half of activities, brought together stakeholders from research, practice, and advocacy to develop this research agenda.¹

BACKGROUND

Characteristics of HIV-specific laws have been described elsewhere.^{2–4} Current laws include both crimes in which HIV status is the only factor distinguishing an act from legal behavior (e.g., consensual sex) and those for which having HIV increases the severity of an existing crime and imposes greater punishment (e.g., prostitution, sexual assault). Although no comprehensive record of HIV-related criminal cases exists, two studies have analyzed US prosecutions over time. The first

spanned 1986–2001² and the second 2008–2011.⁴ Key concerns about the laws identified in the studies included the high proportion of prosecutions and punishment for low- to no-risk activities, severity of sentences, vague language and the possibility of discriminatory enforcement, and broad prosecutorial discretion. Unfortunately, the nature of the samples, which were derived from incomplete records, limited conclusions about implementation or enforcement of the laws.

Since these laws were adopted, scientific understanding of HIV and its transmission has advanced considerably: scientists have established the preventive impact of antiretroviral therapy, and they can now estimate the risk of HIV transmission associated with specific activities more accurately^{5–8} and identify viral strains that different people carry.⁹ HIV-specific criminal laws have not kept pace with these scientific advances.

CONCERNS RAISED BY CRIMINALIZATION OF HIV EXPOSURE

Researchers have identified numerous concerns with HIV-specific statutes and their enforcement.

Lack of Empirical Evidence of Laws' Effectiveness

The criminal law may affect HIV risk behaviors in three primary ways: incapacitation, norm setting, and deterrence. Incapacitation is unlikely to reduce new infections

because relatively few persons are incarcerated for HIV exposure^{2,10} and new infections can occur in prison.¹¹ There is also little evidence to suggest that criminalizing HIV exposure changes social norms: studies have found that persons living in states with and without HIV-specific laws^{10,12} and persons who are aware and unaware of their state's HIV-specific law¹³ do not differ on perceived responsibility for preventing HIV transmission.¹⁰ Evidence that the criminal law produces a deterrent effect—such as prompting persons with HIV to disclose more often or have safer sex with fewer partners—has been mixed. Awareness of a state's HIV-specific law was associated with sooner (but not more frequent) seropositive status disclosure in one study,¹⁴ and fear of prosecution for nondisclosure was associated with seropositive status disclosure in another.¹⁵ Other studies have found no evidence of deterrence,^{10,12} and none have found effects of sufficient magnitude to reduce HIV prevalence at a population level.

Possible Negative Impact on Public Health Efforts

Laws that criminalize HIV exposure may actually undermine public health efforts by, for example, providing a disincentive for persons at risk to be tested (lest individuals become aware of their infection and have to disclose it to sex partners) or by reinforcing discrimination against persons living with HIV (PLHIV) and exacerbating HIV-related stigma. A Canadian study identified

widespread confusion about the meaning of “significant risk” in Canadian law, resulting in widely differing advice about what the law prohibits. Providers also cited the negative impact of criminalization on their efforts to establish counseling relationships with PLHIV that fostered openness about sexual activities and disclosure challenges.¹⁶ Similar subtle effects on the clinician–patient relationship may affect PLHIV’s mental health, adherence to anti-retroviral therapy, or other aspects of wellness, but these have not been well studied.

Criminalizing Low- and No-Risk Activities

Since the 1980s, a disturbing proportion of known arrests for HIV exposure has involved activities that pose little to no transmission risk. In three US studies, approximately 20% to 25% of cases involved spitting, biting, or external exposure to bodily fluids that pose almost no transmission risk.^{2,4,17} Arrests and prosecutions also continue for sexual behaviors in which the risk to the other party is extremely low, including oral sex and receptive anal sex.^{5–7}

Potential for Discriminatory Enforcement

Some commentators are concerned that HIV exposure laws may be applied unfairly. A large proportion of defendants in reported cases from Ontario, Canada (1989–2010) were Black, heterosexual men—raising concerns about discriminatory application of the law.¹⁸ A study in Michigan found substantial perceptions of legal vulnerability among HIV-positive focus group participants, concern that they would be falsely accused of violating HIV exposure laws, and fears that judges would be inclined to convict a defendant known to have HIV.¹⁹

Ethical Concerns

Policies of public health institutions designed to produce social benefits (i.e., reduction in HIV incidence) may, in some cases, override concerns with the self-determination and privacy rights of PLHIV and persons who may be exposed to HIV infection. PLHIV share with others the duty not to harm others as well as to abide by laws; these obligations can conflict with their rights to privacy and self-determination. In many states, the only reliable way for PLHIV to have sex without risk of prosecution is to have incontrovertible proof that HIV disclosure has occurred; producing such evidence is nearly impossible. Persons at risk for HIV infection must decide on a case-by-case basis whether to engage in activities that may expose them to HIV infection. Who is responsible for making sure that the decision to have sex is well informed or that risk is minimized? Should we follow the informed consent model?

How might policy changes around HIV disclosure be achieved, and what types of research data best support change?

POTENTIAL FOR POLICY CHANGE

Successful reform or repeal of HIV-specific criminal statutes requires cooperation of disparate groups with varied agendas, including legislators, bureaucrats, politicians, and advocates for PLHIV. Yet, the types of evidence each group might find most compelling are unknown. Research points to many ways that scientific evidence may influence policy-makers.²⁰ Empirical evidence may be critical for bolstering some arguments for reform. For example, epidemiological evidence that differentiates between high- and

low-risk activities could support changes in the definitions of prohibited behaviors.

RESEARCH QUESTIONS

The following research areas include a broad base of topics, which provide tools to advance evidence-based policymaking and scientific understanding and meet the needs of different constituencies.

Impact on Public Health Practices

Significant public funding currently supports efforts to encourage early testing and treatment of PLHIV.²¹ It is important to determine whether HIV-specific laws and prosecutions undermine these programs and other public health investments.

Further studies should focus on identifying ways that existing HIV-specific laws or prosecutions under general criminal law influence how public health systems or programs operate. Some public health statutes explicitly permit communication between criminal justice and public health authorities about suspected cases of knowing exposure; other states’ policies require individuals to sign an acknowledgment of potential criminal liability as part of counseling following an HIV-positive test.²² We do not know the actual impact on PLHIV or on the relationship between public health workers and PLHIV of knowing or fearing that a clinician might report intimate behavior to law enforcement authorities.

Implementation and Enforcement

Researchers should pursue projects that provide data on how these laws are actually enforced. Ideally, this would include comprehensive data on arrests, prosecutions, convictions,

and sentencing, which should be analyzed for evidence of discrimination as well as the relationship between prosecutors’ decisions to bring HIV-related charges and later plea bargains. Implementation research should also address how science is being used in the courtroom in these cases, regarding both research on transmission risk and the process or markers of transmission.⁹

Alternatives to HIV-Specific Criminal Laws

In 1993 Bayer and Fairchild-Carrino analyzed public health departments’ use of coercive public health measures in response to PLHIV who put others at risk.²³ Although public health personnel use a wide range of tools to prevent HIV infection, little is known about the extent to which they use more coercive public health measures, such as cease and desist orders, to address their most difficult clients. Public health orders have advantages over criminal law in that they can be tailored to address specific problem behaviors and are likely to result in fewer long-term consequences for individuals without diminishing intended public health benefits. Research should document whether and how public health personnel currently use coercive public health measures and, where possible, the effectiveness of these measures.

Measuring Costs of Enforcement

Research should assess the actual costs of enforcing HIV criminal laws. Ideally, measured costs would include costs of surveillance, arrest, pretrial detention, prosecution and defense (funded by the state), and incarceration for these crimes. These costs are resources not available for other public health or law enforcement purposes. Funds currently used to enforce these laws could be used

to provide more case management, primary care, substance abuse, or mental health treatment of PLHIV or to address other locally relevant criminal justice issues, such as gun or gang violence. A study of the cost of enforcement of Massachusetts's syringe possession laws for those convicted in 1 year concluded that funds spent on incarceration alone could have paid for 1629 admissions to drug detoxification programs.²⁴ A similar study of the costs associated with enforcing HIV criminal exposure laws could form the basis for a wider cost-benefit analysis of these laws.

Research Relevant to Ethical Tensions

Empirical data may help resolve many, but not all, ethical tensions arising from HIV exposure laws. For example, epidemiological data showing that spitting and scratching do not transmit HIV infection enable policy rationalization. Research should target empirical data on whether criminalization laws impair the free exchange of information between health care professionals and their clients or promote stigma among PLHIV or those at risk and thus undermine efforts to attain public health goals such as minimizing HIV transmission.

Empirical data will not directly help us resolve questions of values such as those that inform decisions about where we should place primary responsibility for individual protection from sexually transmitted diseases. Such issues would be more satisfactorily addressed through a consensus development process involving relevant stakeholders.

Taking into account these concerns over the implementation and impact of criminalization, what types of policy change might policymakers consider?

POLICY OPTIONS

The US National HIV/AIDS Strategy recommends that states critically review their HIV-specific criminal statutes.²⁵ Joint United Nations Programme on HIV and AIDS guidance states that criminal law should be used only in cases of deliberate and actual HIV transmission.²⁶ US public health professionals, HIV advocates, and legal academics have not reached consensus about the future of HIV-specific laws. Some have argued for repeal of HIV-specific provisions and the use of traditional criminal law only for rare cases of deliberate harm.²⁷ Others might support the amendment of HIV-specific statutes to apply only to behaviors that can actually transmit HIV and cases in which transmission is intended.^{28,29}

A broad-based, harm reduction approach could embrace work on prosecutorial guidelines, modernizing current statutes, public health policies, and procedures as well as other research and educational efforts aimed at reducing harm these laws cause in the United States' diverse policy environments.

Prosecutorial Guidelines

Prosecutorial guidelines do not amend or repeal HIV-specific criminal statutes. Instead, they identify critical issues prosecutors should consider in determining whether a particular individual should be prosecuted under existing laws and how evidence, including scientific evidence, is used. Guidelines could emphasize limiting prosecutions to cases of deliberate and actual transmission. Guidelines can help ensure that laws are applied fairly and reduce the negative consequences to PLHIV. Although we know of no guidelines for prosecutors in the United States, advocates have worked on similar guidance in Ontario, as

have government-advocacy coalitions in England and Wales.³⁰⁻³² A manual for defense attorneys in the United States is also available.⁴

Qualitative research on implementation and enforcement of current laws could guide the drafting of guidelines through a transparent and participatory process involving public health professionals, HIV advocates, PLHIV, and professional organizations of prosecutors as well as experts who can identify best practices. Ultimately, such guidelines could be an example of "policy intervention as harm reduction" if they guide the use of scientific evidence, promote the use of evidence-based assessments of risks of transmission, and increase the likelihood that the laws will be applied fairly.^{30(p18)}

Modernizing Existing Statutes

Guidelines for modernizing HIV-related criminal statutes could assist policymakers who have concerns about existing statutes but do not have a clear plan for law reform. Substantively, guidelines for modernization should provide draft language that clarifies prohibited acts, eliminates liability for no-risk activities, focuses on intentional and actual transmission, and sets high standards for using scientific evidence in efforts to establish transmission and the risk of transmission. The process of drafting guidelines for modernization for the United States should necessarily consider the contextual issues specific to the US HIV epidemic and experience with implementation of the laws and should include input from diverse stakeholders in an open and transparent process.

Model State and Local Policy and Protocols

The National Alliance of State and Territorial AIDS Directors'

study of state health departments found that some health officials misunderstood or mischaracterized criminal HIV exposure laws or were unaware of prosecutions in their state.²² The alliance provides a survey that health departments can use to review or modify HIV-specific criminal provisions in their states³³ and answers to frequently asked questions related to criminalization of HIV exposure.³⁴ The next logical step would be to develop model policies and protocols for state and local public health authorities working with HIV-specific criminal provisions, where those still exist. Guidance on how health department representatives can intervene with justice officials to reduce the use of these laws in situations that pose minimal to no risk of HIV transmission could also be helpful.

CONCLUSIONS

Laws that criminalize HIV exposure or transmission do not reflect our current understanding of HIV transmission. Findings from empirical studies on the impact of these laws suggest that they do not decrease HIV infections or have any other positive public health impacts. Furthermore, significant concerns remain that these laws are often used to punish behavior that poses little or no risk of transmission, that enforcement may be discriminatory, and that they may have negative impacts on public health practice and efforts to reduce HIV infection. The United States needs a focused research agenda to collect evidence useful to policymakers considering revision or repeal of these laws and immediate policy interventions to assist prosecutors, defense attorneys, and public health personnel to interpret and fairly apply the laws so that they focus on intentional harms. ■

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