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## Sex Crimes That Shouldn't Be

By LAURIE SHRAGE JUNE 1, 2014 7:00 PM

As creatures who are both participants in public life, and individuals with private lives and concerns, we are constantly challenged to balance our own needs and rights against the public good. In many cases, that challenge comes down to weighing the societal benefits of transparency against the need for personal privacy. The most familiar and heated debates of late, of course, involve high-tech government spying without consent from individuals — surveillance that in many cases extended to the unsuspecting person's bedrooms.

The outrage over such intrusions are understandable: Most adults especially value their privacy in sphere of sexual activity and intimacy. We now have several Supreme Court rulings protecting our privacy in this domain, but there is one group of people to whom not all those protections extend: those who are H.I.V.-positive. In many jurisdictions, people who know they are H.I.V.-positive are legally required to disclose this status to potential sexual partners, even when they intend to engage in relatively safe and protected sex. Why do our disclosure policies single out this group, and not, for example, people with other incurable, or possibly fatal, infectious diseases? Why do most policies demand transparency between sexual partners in regard to their H.I.V.-status, but not in regard to past behaviors that may have caused a yet undetected H.I.V. infection, such as intravenous drug use or unprotected sex with partners who do not regularly get tested for sexually transmitted diseases? Switzerland may be the only country whose H.I.V.-disclosure laws mandate the latter kind of information.

While reports of prosecutions and imprisonment of H.I.V. infected persons rarely make headlines, the numbers are significant. This [map](#) from the organization [Aids-Free World](#) gives a global picture of the prevalence of prosecutions. As of April 2012, the United States prosecuted more H.I.V. cases than any other country: 345. Canada, where authorities have brought charges for a mother-to-child transmission and carried out a murder conviction, ranked second, with 96. Canada is notable for its particularly harsh countrywide criminalization policies, which were detailed in this article in Slate last month. That report puts the number of people charged in Canada to date at 146.

Aids-Free World reports on the global scope of the laws:

Laws written ostensibly to deter people living with H.I.V. from intentionally infecting others are over-broadly applied, often along racial lines. H.I.V.-specific regulations defy the rest of a country's jurisprudence. Over 60 countries criminalize the transmission of H.I.V., or the failure to disclose one's H.I.V. status to sex partners, or both. Such comprehensive pronouncements have made it possible to convict hundreds of H.I.V.-positive people for non-criminal behavior ranging from sexual relations that did not

transmit H.I.V. to spitting, which cannot transmit H.I.V. Even in some countries that uphold the universally agreed goal of providing antiretroviral drugs to all who need them, prison sentences loom for people whose adherence to treatment has all but erased the likelihood that they will infect others.

Why do disclosure requirements for sex partners focus only on the harms of acquiring H.I.V. or another sexually transmitted disease, but ignore other kinds of harm, such as the economic or psychological injuries caused by a lack of transparency? Should we be able to bring charges against former sexual partners who failed to disclose their marital status, sex offender status, fertility status, or assigned gender? To respect a partner's moral right to sexual autonomy, we probably should disclose these kinds of facts, but when should such moral requirements be translated into legal ones?

Failures of disclosure in sexual transactions can cause serious emotional trauma, reputational damage (to women, mostly), unwanted pregnancies, as well as the transmission of disease.

There is no good reason to limit the moral and legal transparency requirements for sexual interactions to H.I.V. disclosure. Nevertheless, we should be careful about equating failures of disclosure with nonconsensual sex. Sex without informed consent is not the same as sex without any form of consent, and therefore these behaviors need to be addressed differently.

Some failures to disclose will cause significant harm and some will not. For instance, people who fail to disclose that they are H.I.V.-positive do not necessarily cause any harm to intimate partners. This is because current treatment can lower a person's viral load to the point where there is virtually no risk of transmission. Also, different sex acts are associated with considerably different chances of transmission, and so we need to know both the viral load and the type of intimate contact in order to determine whether someone's actions posed an unacceptable degree of risk to another. Policy makers appear to believe that H.I.V. disclosure laws are necessary to protect the health of H.I.V.-negative persons. Yet countries that have reduced their H.I.V. infection rates have primarily done so by taking aggressive public health measures, rather than by expanding their policing and criminal prosecution of H.I.V.-positive persons.

The ineffectiveness of H.I.V. disclosure laws, combined with their selective disregard for the privacy of those who are H.I.V.-positive, should force us to reconsider how we've balanced the benefits of transparency and privacy in regard to H.I.V. transmission. When the failure to disclose one's H.I.V. status can be a felony offense (regardless of whether there is an intent to harm or a significant risk of harm), we unfairly single out people who pose little danger to others for potential criminal prosecution, and we intensify the social stigma that people with a manageable health condition face.

People who are H.I.V.-positive have a strong interest in managing their intimate relationships without the oversight of the state. While we each have a moral right to sexual autonomy, the state can protect this right without disregarding the privacy rights of those with sexually transmitted diseases. People can exercise sexual autonomy by not having unprotected sex with their partners, or by seeking information about their partners' recent sexual histories and test results.

Each of us is likely to have different ideas about what information our sexual partners are morally obligated to share, and some will want more transparency than others. We should be wary about using the power of the state to promote transparency in sexual transactions. The dangers this poses to anyone's privacy, in a sphere of life where privacy is highly valued, are just too vast. We have many other options for promoting transparency between intimate partners, such as sex and health education programs that teach people how to negotiate sexual transactions in ways that are effective for protecting their physical and mental health.

Given the facts of H.I.V. transmission, as we now understand them the state has no justification for mandating and enforcing transparency among sexual intimates in regard to H.I.V. status. Simply put, H.I.V. disclosure laws do "more harm than good in terms of [their] impact on public health and human rights," as a [2012 Oslo declaration on H.I.V. criminalization](#) asserts.

There are signs of a movement to repeal these laws. In 2012, the Global Commission on H.I.V. and the Law issued a report with the following recommendation: "Countries must not enact laws that explicitly criminalize H.I.V. transmission, H.I.V. exposure or failure to disclose H.I.V. status. Where such laws exist, they are counterproductive and must be repealed." Last December, Senator Chris Coons, a Democrat from Delaware, introduced the "REPEAL H.I.V. Discrimination Act." But in too many parts of the world, the laws remain.

H.I.V. disclosure laws give too little weight to the interests and rights of those who are H.I.V.-positive, while overvaluing and overestimating the benefits of transparency for society. By repealing these laws, we move in the direction of adopting more just and effective policies for combating the H.I.V. epidemic, while protecting the most fundamental human rights.



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