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Criminal HIV Exposure Laws: Moving Forward

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The year 2011 marked a quarter of a century since the first criminal HIV exposure laws were enacted. These laws—which typically criminalize undisclosed exposure to HIV through any of a number of sexual activities—have generated considerable commentary in the public health community, most of which has been negative. Two of the more memorable comments on these laws include Australian Justice Michael Kirby’s characterization of a second epidemic that arose in tandem with the HIV pandemic—the proliferation of what he described as “HIL,” or “highly inefficient laws,” among which were laws criminalizing HIV exposure [1]. In the first comprehensive survey and empirical investigation of state HIV exposure laws and associated criminal cases, Lazzarini et al. [2] reviewed classic purposes of criminal laws (deterrence and incapacitation) and upon finding little evidence that the laws achieve either, concluded that the actual purpose of HIV-specific exposure laws was largely symbolic, “rooted in the profound social differences over the acceptability of homosexuality and drug use, and the clash of values that those entail”.

Commentators have identified numerous potential inadvertent negative effects of HIV exposure laws, including, for persons at risk for HIV infection, deterring testing and reinforcing hostility toward persons with HIV (PWH), and for PWH, exacerbating HIV-related stigma and, paradoxically, deterring seropositive status disclosure by greatly increasing the consequences of being known as someone who has HIV [3, 4]. Although scientists have not detected certain hypothesized deleterious influences of the law, high profile prosecutions of persons whose behavior poses little to no risk of transmission [5–7], mounting evidence of the differential enforcement of these laws [8, 9], and the marginalization of many persons most affected by HIV make this unprecedented use of felony-level laws to address what otherwise would be treated as a public health issue truly “wrongheaded” [10].

Conversely, researchers who have examined the impact of HIV exposure laws empirically have found virtually no evidence to support claims that the laws increase sero-positive status disclosure among persons who otherwise would not disclose [4, 11, 12]. Neither do the laws increase condom use or other risk reduction measures among PWH [4, 12]. It appears that Justice Kirby was prescient when he suggested that “out of the melancholy predicament of HIV may even come a better appreciation of the utility and the limitations of the law when human behavior and public health are the law’s concern” [13].

As Lehman and his colleagues at the Centers for Disease Control (CDC) note in this issue of *AIDS and Behavior*, the lack of evidence of any benefit of these laws and their potential for significant harms provides impetus for current calls for the modernization or repeal of these laws [14]. Without demonstrated beneficial effects of the laws, their potential to undermine public health HIV prevention efforts and to further stigmatize and marginalize PWH makes their enactment and enforcement particularly risky [11].

Governmental bodies, professional organizations, and advocacy groups have also come together to express concerns about, and in some cases to outright oppose, the criminalization of HIV exposure. As Lehman and colleagues note, as early as 1988, the Presidential Commission on the Human Immunodeficiency Virus Epidemic urged very circumscribed use of the criminal law to address HIV exposure [14]. The Commission concluded, in part, that the criminal law should only be used when all other public health and civil measures have been exhausted [15]. Twenty-two years later, as Lehman and colleagues also point out, the President’s National HIV/AIDS Prevention Strategy for the United States expressed concern that criminal HIV-specific exposure laws may contribute to HIV-related stigma and discrimination and thus may be antithetical to sound public health practice [14, 16]. In 2011, the National Alliance of State and Territorial AIDS Directors (NASTAD) called for the repeal of laws that criminalize HIV exposure on the grounds that they foster stigma and discrimination and thus undermine the President’s National HIV/AIDS Strategy [17]. Even more recently, the Presidential Advisory Committee on HIV/AIDS (PACHA) published a resolution that unequivocally opposes the current use of the criminal law to address HIV exposure and calls for the review and modernization or repeal of HIV exposure laws [18].

Several notable national advocacy groups in the US have dedicated themselves to opposing the criminalization of HIV exposure. The Center for HIV Law and Policy’s Positive Justice Project carries out efforts to catalog criminal HIV exposure laws and subsequent prosecutions, to educate lawmakers, and to provide attorneys with the materials and technical support needed to successfully counter arrests and prosecutions [19]. Organizers of SERO, a network of people with HIV and allies who describe their mission as “fight[ing] for freedom from stigma and injustice,” have, among other things, created compelling documentaries on the experiences of persons who have been prosecuted for undisclosed exposure to HIV—in several cases, prosecuted despite the fact that the activities they engaged in posed little or no risk of HIV transmission [7]. Several international organizations assist in efforts to end the criminalization of HIV exposure in the US, most notably the HIV Justice Network, which is arguably the most comprehensive collection of HIV exposure law-related information in the world [20], and the Global Network of People Living with HIV’s (GNP+) Global Criminalisation Scan [21], which along with collections

authored by the Positive Justice Project [19], represent two of the most reliable lists of US HIV exposure-related court cases available.

Still, despite over a quarter of a century of largely critical commentaries, advocacy work, and empirical studies on the criminalization of HIV exposure, we have yet to see a state repeal an HIV exposure law for public health or social justice purposes or amend a law to conform to the narrow circumstances outlined by advisory groups (e.g. WHO [22]; UNAIDS [23]) and summarized by Lehman et al. [14]: that is, the criminal law should be applied only when all other measures have been exhausted and/or only in the most extreme cases, when an individual acts with intent to harm another. It may be time for us to shift our attention away from the inadequacies of the laws toward a better understanding the structures, politics, and beliefs that sustain these laws and drive their continued enforcement.

In Fig. 1, Lehman et al. [14] trace legislative activity pertaining to HIV-exposure laws noting when the laws were first enacted and when they were subsequently amended, if applicable. For instance, in 2012, Illinois lawmakers amended their HIV exposure statute to remove references to low risk sexual activities and to require that specific intent (i.e. actual intent to harm the sex partner) become an essential element of the crime [§720 ILCS 5/12-5.01; (amended in 2012 by P.A. 97-1046)] [24]. The resulting law is much closer to the narrowed circumstances recommended by commentators, with the exception that criminal justice authorities are given access to arrestees' medical records upon reasonable suspicion that the crime has been committed. On the other hand, in 2011, Tennessee's legislature increased the consequences of being convicted of aggravated prostitution (prostitution while HIV-positive), from requiring registration on the general sex offender registry to registration as a violent sex offender [Tenn. Code Ann. § 40-39-202; (amended by Tenn. Pub. Acts 1075, 2012)] [25]. Similarly, Florida amended their HIV exposure law in 1997 to increase the penalty for undisclosed exposure to HIV [Fla. Stat. § 384.34 (2013); (amended by 1997 Fla. Laws ch. 37, 1997)] [26]. Regardless of how we evaluate these amendments from a public health standpoint, understanding what prompted lawmakers to revisit their HIV exposure laws and why the amendments took the forms that they did could help us better understand the circumstances that allowed the issue of HIV exposure to reach the legislative agenda and which arguments or experiences or forms of evidence were most persuasive to lawmakers.

In the last 28 years a large number of very bright individuals, working alone and in collaboration, have compiled an impressive literature outlining the defects in US HIV-specific exposure laws. They have pointed out the often "wrongheaded" reasoning leading to the use of the criminal law to address nondisclosed exposure to HIV. Important advocacy work has also been done on the issue, which has both driven and been driven by empirical research on the impact of these laws. It is hoped that this collective work is moving us toward the goals of the current Presidential Strategy—namely, to ensure that our laws are consistent with sound public health practice. Still, after more than 25 years one has to wonder if researchers and advocates might be simply "preaching to the choir." We seem to have been able to convince each other that change is necessary. We appear to have been less successful convincing those who actually make and enforce the laws. Perhaps we need to

better understand their perspectives on the criminalization of HIV exposure and their reservations about change.

Ironically, working to learn more about those who appear to support the criminalization of HIV exposure, even if their support is passive acceptance, and learning more about the systems and contexts within which they work, may require of us the same suspension of judgment that was required of those facing HIV for the first time, what Charles Black described as “humane imagination,” [27] “the ability to comprehend, however dimly, how life is lived [or beliefs are rationalized] by people very different from our ourselves” [28]. We may not like the systems within which HIV exposure laws exist and are enforced. We may vehemently disagree with some supporters. Still, dedicating time to better understanding, from as neutral a perspective as possible, the systems and beliefs that allow the criminalization of HIV exposure in the US to endure may bring us one step closer to change.

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