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By Aziza Ahmed and Beri Hull

What do you consent to when you have sex with someone? What if the person is a new sexual partner from a night at a bar? What if the person is your spouse or long-term partner? In these two scenarios, people might understand both HIV risk and HIV disclosure differently. Close reflection demonstrates that a purportedly clear set of criminal laws rarely reflects the complexity of sexual interaction.

This article explores how the dynamics of HIV disclosure prior to sex contribute to an ongoing dialogue about disclosure and consent: Does a person have a right to know his or her sex partner’s HIV status? And does an HIV-positive person have the right to not disclose his or her status prior to sex?

Public Health Rationales for Disclosure

Many public health rationales are given for the need to disclose one’s HIV status to sexual partners. The first is prevention. Disclosure is understood to be a key part of this public health objective by motivating people to seek testing upon learning a partner’s HIV status and in changing behavior to prevent the further spread of HIV. Disclosure is also seen as a way for individuals to receive support. As articulated by the World Health Organization in 2002, studies have demonstrated that for some individuals, disclosing their HIV status has led to increased opportunities for social support, improved access to necessary medical care, increased opportunities to discuss and implement HIV risk reduction with partners, and increased opportunities to plan for the future.

While the public health rationales are strong and often people do benefit from disclosing their HIV status, circumstances vary dramatically for individuals who are considering HIV disclosure. In many cases, people do not disclose their HIV status because of fear of rejection, discrimination, violence, and abandonment. In the case of women, many individuals learn about their HIV status through prenatal care services where they are likely to be tested for HIV. Lack of clarity around disclosure laws or the threat of disclosure may also deter people from getting tested. This is particularly true for those in marginalized communities who may fear further discrimination because of HIV.

The U.S. National AIDS Strategy has recognized the emotional challenges that accompany learning one’s HIV status and the social stigmas surrounding disclosure, necessitating both the strengthening of civil rights enforcement for people living with HIV and the need to encourage and promote HIV disclosure. The community from which one comes, the cultural dynamics surrounding disclosure and HIV, and the person’s sex place each HIV-positive person in a unique position—seeing HIV disclosure as either a necessity prior to sexual activity or not.

Criminalization of HIV Transmission, Exposure, and Nondisclosure

The stakes of nondisclosure are high. Legal frameworks that govern disclosure vary according to jurisdiction; however, many impose criminal sanctions for having sex without disclosing one’s HIV status.

For example, the California Health and Safety Code states that “any person who exposes another to HIV by engaging in unprotected sexual activity (anal or vaginal intercourse without a condom), when the infected person knows at the time of the unprotected sex that he or she is...
infected with HIV, has not disclosed his or her HIV-positive status, and acts with the specific intent to infect the other person with HIV, is guilty of a felony.” The law clarifies that “a person’s knowledge of his or her HIV-positive status, without additional evidence, is not sufficient to prove specific intent.”

Michigan law criminalizes nondisclosure, stating that if a person has been diagnosed with HIV and knows that he or she is infected and “engages in sexual penetration with another person without having first informed the other person that he or she has acquired immunodeficiency syndrome or acquired immunodeficiency syndrome related complex or is HIV infected, is guilty of a felony.”

These laws are replicated globally. Kenya’s HIV/AIDS Prevention and Control Act states that “a person who is [HIV positive] and is aware of being infected with HIV or who is carrying and is aware of carrying HIV shall not, knowingly and recklessly, place another person at risk of becoming infected with HIV unless that other person knew that fact and voluntarily accepted the risk of being infected.”

The law of Uganda states that a person “who is and is aware of being infected with HIV and AIDS shall not, knowingly and recklessly, place another person at risk of becoming infected with HIV and AIDS unless that other person knew that fact.” (While it has not been passed into law, the now-notorious Anti-Homosexuality Bill states that a gay, HIV-positive person can be charged with aggravated homosexuality and be sentenced to death.)

These laws have had grave consequences for many people living with HIV, even outside transmission via sex. In fact, many of the prosecutions that occur in the United States on HIV transmission and exposure are based on false information about how HIV is spread, leading to the conviction of people living with HIV for biting and spitting.

**Sexual Rights, Responsibilities, and HIV**

In the context of sexual rights and HIV, a few refrains often emerge: “I have the right not to disclose my HIV status if I take adequate precautions.” Or the other side: “I have the right to know my partner’s HIV status.” Responsibility has also taken on a similar tone for HIV-positive people and HIV-negative people engaged in this conversation: “As an HIV-positive person, you have the responsibility to disclose your HIV status” or “As a person who is not HIV positive, you need to take responsibility over your sexual behavior and ensure condom use.” In reality, all or some of these things may or may not be true at any given moment. A few examples illustrate how this plays out in “real life.”

**Scenario 1:** A woman married at a young age. Her husband has had previous and concurrent relationships, but she has only had sex with him. During labor, she is tested for HIV and found to be HIV positive. Her husband may or may not know his HIV status. A few months later, her husband would like to resume sexual activity with her. She has unprotected sex with her husband, believing that she likely contracted HIV from him. She does not disclose her HIV status.

**Scenario 2:** A male sex worker often has sex with clients without a condom. Since finding out he is HIV positive, he consistently uses condoms (except in violent interactions with clients, in which case he cannot negotiate condom use), and he often steers clients away from penetrative sex that is of higher risk. He does not disclose his HIV status to clients because he is careful. A few clients have asked him his status. When asked, he responds honestly. In these cases, some clients stay and others go.

**Scenario 3:** A woman is living with HIV. Her spouse knows this. They normally engage in protected sex but on occasion have not used condoms. After months of an abusive relationship with her spouse, the woman files for divorce. In retaliation, the man tells the court that she never disclosed her HIV status to him.

In each of the scenarios, the person (or people) living with HIV could be subject to prosecution for nondisclosure in jurisdictions that criminalize HIV transmission, exposure, and/or nondisclosure. Yet, it seems that in each situation the ideas of rights, responsibility, and disclosure are no longer an absolute. These scenarios animate the discussions occurring in the HIV activist community about what laws, if any, are appropriate in the case of HIV transmission.

Many uncertainties emerge: Does a sex worker have a duty to disclose to clients that they are engaging in high-risk sex because he is HIV positive? Or does the responsibility to ask the sex worker’s status lie with the clients? Does a wife who contracts HIV from her partner have a duty to disclose if she finds out her status first? Or was it her partner’s responsibility to exercise safe sex in the relationship? Was it the wife’s responsibility to demand safe sex? What are the power dynamics that exist in relationships that make HIV disclosure complicated and make one partner...
fear another? For lawyers, the big question remains: What should the role of the law be in governing and regulating these sexual behaviors?

Women and Disclosure

There are particular dynamics surrounding women and HIV disclosure. Scenario 3 is based on an analogous case occurring in Quebec, Canada, that was documented by the Canadian *HIV/AIDS Policy & Law Review*. In this case, a woman named D.C. was charged with sexual assault and aggravated assault because she did not tell her boyfriend J.L.P. that she was HIV positive prior to having sex. The case arose when D.C. laid a domestic violence charge on J.L.P., and he retaliated by charging her with assault, claiming that she did not disclose her HIV-positive status to him. She stated that she did disclose and, in fact, after she disclosed her HIV status, the couple went on to have a multiple-year relationship.

Although the fact that the first claim made was that of domestic violence, the courts focused on the use of condoms during the couple’s sexual relationship, despite the fact that J.L.P. never contracted HIV. The judge went on to determine that a condom had not been used because D.C.’s physician reported that she had consulted with the physician about the risk of HIV transmission if condoms break. D.C. was eventually sentenced to one year in prison for sexual assault (for not informing J.L.P. about her HIV-positive status), while the court dropped all abuse charges against J.L.P.

While impossible to know each nuance of the case, there are some very unsettling lessons about this HIV-positive woman’s experience in court. The first lesson: Violence against women living with HIV doesn’t always matter. The court ignored the domestic violence charge against the HIV-positive woman; her life experience and words were entirely discounted in lieu of an accusation of exposure to HIV. The dismissal of violence sets a particularly bad precedent: Where an individual is a victim of rape and where potential transmission may have occurred, the courts may choose to dismiss the experience of violence and focus on the defendant’s exposure to HIV. A second more general lesson: Seeking information about sexual transmission of HIV can be used in court against an HIV-positive person. The woman’s desire to protect her partner and seek information in the event of a condom’s breaking was seen as inherently suspect and was used against her in court.

Marginalized Communities

When thinking through the role of the law in addressing HIV disclosure, it is important to remember that laws are often not applied evenly, leaving some communities subject to ongoing police presence and the interpretation of the laws subject to the biases and misunderstandings of judges, lawyers, and police. This discretionary power has often resulted in the targeting and further marginalization of especially vulnerable groups, including sex workers, members of sexually diverse communities, and racial and ethnic minorities.

When speaking to issues of non-disclosure with regard to sexual transmission, it is sex workers who often bear the brunt of this in the United States. Colorado and Utah, for example, do not criminalize HIV except as “sentence enhancements” to other crimes of “solicitation” and “prostitution” (as well as other sexual offenses).

The California Penal Code mandates HIV testing for individuals convicted of prostitution. For some women, an aggravated charge of prostitution (for example, prostitution while being HIV positive) means being placed on the sex offender registry, which severely limits their ability to live and work or get a job in certain communities.

Perhaps best illustrative of the attitude toward HIV-positive sex workers is the coverage of the case of an HIV-positive sex worker in Knoxville, Tennessee, coined a “walking felony.” Women have also been ar-

rested and charged in Ohio and Florida for sex work while HIV positive.

The ongoing prosecutions of vulnerable groups speak to the need to limit the application of laws that disproportionately target marginalized communities. Criminalization of HIV transmission and exposure laws seem to have accomplished the opposite—marginalizing vulnerable communities further.

Conclusion

HIV positive people live and work in a complicated array of circumstances that may or may not dictate that HIV disclosure is always the most appropriate response. People who are HIV negative might engage in a range of behaviors that require heightened responsibility over their own sexual health and life; however, circumstances such as intimate partner violence may dictate that a person cannot make demands for safe sex.

Intra-relationship power dynamics alongside social and economic realities may determine who is able to disclose and how they are able to disclose or who may ask a person’s status and who might not. The legal regime currently surrounding disclosure of HIV status is not able to consider the nuance of each circumstance in the manner necessary, and, in fact, the consequences of these laws may be undermining larger public health goals.

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