

# Intersections of Treatment, Surveillance, and Criminal Law Responses to HIV and COVID-19

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See also Morabia, p. 1175, Landers et al., p. 1180, and the HIV/AIDS and Our World: 1981–2021 section, pp. 1231–1266.

Public health institutions are playing an increasingly central role in everyday life as part of the response to the COVID-19 pandemic (e.g., through stay-at-home orders, contact tracing, and the enforcement of disease control measures by law enforcement). In light of this, we consider how COVID-19 disparities and disease control practices intersect with the response to the more longstanding epidemic of HIV infection in Canada and the United States.

In a series of developments that predate COVID-19, the HIV response has been shaped by advances in antiretroviral treatment that made HIV infection a manageable condition for people with continuous access to high-quality health care. However, the HIV response has also involved the

emergence of novel forms of public health surveillance, sometimes punitive disease control measures, and criminalization measures that have been criticized by people living with HIV and critical public health scholars.<sup>1</sup> Developments in this area include the increased use of novel forms of phylogenetic analysis and molecular surveillance without individual consent or community consultation. In 2020, multiple epidemiological research groups published articles noting that they have begun to use phylogenetic analysis of HIV genetic sequence data (also called “molecular” HIV data) to infer the direction of HIV transmission between two individuals (i.e., to discern if “person A” transmitted HIV to “person B”) with greater precision than was previously

possible.<sup>2</sup> This has raised concerns about how analyses of these data may propel prosecution of alleged HIV transmission or nondisclosure.<sup>3</sup>

In the context of COVID-19, we have also witnessed enhanced collaboration between police and public health as well as an expansion of policing in response to the pandemic. Critical public health scholarship<sup>4</sup> can help make sense of how criminal law, the logics of criminalization, and public health work may be converging in new ways. As critical public health scholars, we argue that critical public health research agendas in this area can have the most impact when they (1) center race and racism, (2) investigate how public health surveillance technologies operate across key HIV disparity groups and across health systems (i.e., on the body, in laboratories, in health departments, and in care settings), and (3) enhance understandings of carceral public health practices.

## RACE AND RACISM

To meaningfully address the convergence of HIV-prevention technologies, public health surveillance, HIV criminalization, and coercive public health measures, it is imperative to foreground how these practices can come to bear in particularly harsh ways on communities of Black and Indigenous people and people of color. Seemingly neutral public health activities, such as outreach informed by molecular surveillance data, may extend the disproportionate and ever-present forms of surveillance and regulation that communities of Black and Indigenous people and people of color already face.<sup>5</sup> In the context of COVID-19, data released by police in multiple jurisdictions show that Black people and people of color are more likely to be targeted by COVID-19

emergency laws than are White people.<sup>6</sup> New forms of racial profiling and targeting linked to COVID-19 disease control reflect entrenched racism in institutions of policing and show how law enforcement can intersect with public health in harmful ways.

Critical public health researchers can support efforts to combat racism by collecting data about racism. Sociologist of science and technology Ruha Benjamin shows how studying systemic racism means shifting the research lens toward powerful institutions that are involved in the production of vulnerability and risk.<sup>7</sup> This approach has been modeled by activists and researchers who call attention to how the science of HIV infection treatment and prevention tools relate to HIV criminal laws. Activists express concerns about how inserting the language of viral “undetectability” into a law can exclude or further disadvantage those who experience structural harms.<sup>8</sup> Studies should call greater attention to how having undetectable HIV serostatus is a privileged position only achievable to those with access to care and basic necessities and should also center the impact of racism in housing instability, food insecurity, lack of transportation, lack of medication and health care access, and inadequate social supports. Critical public health research and advocacy should aim to support efforts to equalize these social determinants of health, which are crucial to helping people living with HIV reach and sustain an undetectable viral load.

## HIV SURVEILLANCE TECHNOLOGY

There is little social science research on how public health surveillance technologies actually operate in practice and the impact such technologies have on

individuals and communities of people living with HIV.<sup>9</sup> One way to address this gap is through critical studies of how public health agencies collect, store, and circulate personal information about one’s HIV status in particular jurisdictions. By studying how surveillance mechanisms produce and circulate knowledge about segments of the population, critical research can hold up for public analysis and scrutiny the technologies that are used to monitor, control, and regulate behaviors, with a focus on groups made marginalized by structural conditions.<sup>10</sup> Findings can also contribute to broader demands for public health practices to be proportionate, informed by scientific evidence, and in-line with human rights principles and the specific needs of different key populations.<sup>11</sup>

In addition to uncovering how public health surveillance infrastructures collect and distribute public health data, critical public health research can advance political movements that aim to mobilize alternative uses of data. For example, Data for Black Lives is consolidating state-level data to examine the disproportionate impact of COVID-19 on Black people in the United States. The group centers an effort to “avoid weaponizing COVID-19 data” by specifying that data “should not be used to surveil, criminalize, cage, and/or deny critical benefits” and should instead inform a reparative stimulus plan and long-term structural change.<sup>12</sup>

In Canada, Indigenous leaders and researchers have emphasized that Indigenous public health responses to COVID-19 must be self-determined and connected to the work of decolonizing health care. Such public health approaches ought to be, per Canadian public health scholars Lisa Richardson and Allison Crawford, “informed by ongoing monitoring of data as governed by appropriate data sovereignty agreements”<sup>13</sup>(pE1100) and a

commitment to redressing colonial health disparities. Yeshimabeit Milner argues that the goal is to “make data a tool for profound social change instead of a weapon of political oppression.”<sup>14</sup> This sentiment is highly relevant to both HIV and COVID-19, although the respective pathogens causing these diseases and how they are managed are fundamentally different from one another.

## CARCERAL PUBLIC HEALTH

We understand “carceral public health practices” as coercive public health interventions that use tools, technologies, and forms of reasoning from the realm of criminal law to respond to public health issues. We discuss this in previous examples related to HIV and COVID-19; however, carceral public health practices are also found in responses to sex work, the opioid crisis, and other areas. Studies examining the convergence of public health and criminal law should be grounded in the experiences and perspectives of people who have been targets of coercive public health interventions.

Such research should also address the specific policy mechanisms and infrastructures that facilitate the expansion of carceral public health apparatuses. Critical studies of carceral public health practices can help to inform community-based responses by advocating the maintenance of transparent, consistent, and clear boundaries between public health and criminal law. This is a pressing issue in the midst of the COVID-19 pandemic, considering that at the outset of the pandemic, health departments in various US and Canadian jurisdictions were sharing identifiable COVID-19 diagnosis information with police forces

under rules newly established under emergency measures.<sup>6</sup> Studies should identify best practices for public health agencies to limit the spread of personal health data to criminal justice system actors and illuminate the harms that emerge when distinctions between public health and criminal law enforcement are blurred.<sup>6</sup>

Researchers can adopt what critical public health scholars have referred to as a “critical social science with public health perspective.”<sup>15</sup> Such an approach seeks opportunities for research that engages with public health to transform public health practice; it seeks to lessen the harmful effects, while contributing to critical social science. This work may begin by identifying public health ally practitioners who understand how public health and criminal law convergences come to bear on the social determinants of health of individuals who are subject to enhanced public health interventions. These ally practitioners may then become research participants or be better positioned to translate critical public health research in their workplaces.

## CONCLUSIONS

We are concerned about how the punitive enforcement of public health measures in some jurisdictions may challenge human rights standards and propel carceral responses similar to those that have emerged in response to HIV.<sup>11</sup> Particularly in light of the expansion of public health during the COVID-19 pandemic, we endorse a research and practice agenda that focuses on the social determinants of health, centers on the human rights of people living with and affected by HIV and other communicable and infectious diseases (particularly those who already experience structural harm), and broadens

knowledge about public health surveillance. Critical HIV public health researchers who are interested in following the changing conditions in the HIV treatment, prevention, and criminalization landscapes can use these lessons to benefit other health issues and communities. We hope that the parameters laid out in this editorial are useful for carrying this work forward.

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## CONFLICTS OF INTEREST

There are no potential or actual conflicts of interest to declare.

## REFERENCES

- McClelland A, Guta A, Gagnon M. The rise of molecular HIV surveillance: implications on consent and criminalization. *Crit Public Health*. 2020; 30(4):487–493. <https://doi.org/10.1080/09581596.2019.1582755>
- Taylor BS, Sapién H. Determining the direction of human immunodeficiency virus transmission: benefits and potential harms of taking phylogenetic analysis one step further. *Clin Infect Dis*. 2021; 72(1):38–40. <https://doi.org/10.1093/cid/ciz1248>
- Galletly CL, Benbow N, Killela A, Lazzarini Z, Edwards R. Considerations for modernized criminal HIV laws and assessment of legal protections against release of identified HIV surveillance data for law enforcement. *Am J Public Health*. 2020;109(11):1576–1579. <https://doi.org/10.2105/AJPH.2019.305284>
- Eakin J, Robertson A, Poland B, Coburn D, Edwards R. Towards a critical social science perspective on health promotion research. *Health Promot Int*. 1996;11(2):157–165. <https://doi.org/10.1093/heapro/11.2.157>
- Dunbar A, Jones N. Race, police, and the pandemic: considering the role of race in public health policing. *Ethn Racial Stud*. 2021;44(5):773–782. <https://doi.org/10.1080/01419870.2020.1851381>
- Moldrem S, Hussain MI, McClelland A. Alternatives to sharing COVID-19 data with law enforcement: recommendations for stakeholders. *Health Policy*. 2021;125(2):135–140. <https://doi.org/10.1016/j.healthpol.2020.10.015>
- Abdillahi I, Benjamin R, Cole D, James L. Race-based data, AI, COVID-19 & Black well-being: why data literacy matters during the pandemic and beyond. Presented at: COVID Conversations Symposium. YouTube; May 29–30, June 4–6, 2020.
- Center for HIV Law & Policy. Consensus statement on HIV “treatment as prevention” in criminal law reform. 2017. Available at: <https://www.hivlawandpolicy.org/resources/consensus-statement-hiv-treatment-as-prevention-criminal-law-reform-2017>. Accessed April 13, 2021.
- Moldrem S, Smith AK. Reassessing the ethics of molecular HIV surveillance in the era of cluster detection and response: toward HIV data justice. *Am J Bioeth*. 2020;20(10):10–23. <https://doi.org/10.1080/15265161.2020.1806373>
- French M, Smith G. “Health” surveillance: new modes of monitoring bodies, populations, and politics. *Crit Public Health*. 2013;23(4):383–392. <https://doi.org/10.1080/09581596.2013.838210>
- Mykhalovskiy E, Kazatchkine C, Foreman-Mackey A, et al. Human rights, public health, and COVID-19 in Canada. *Can J Public Health*. 2020;111(6):975–979. <https://doi.org/10.17269/s41997-020-00408-0>
- Data for Black Lives. The impact of COVID-19 on Black communities. 2020. Available at: <https://d4bl.org/covid19-data>. Accessed April 13, 2021.
- Richardson L, Crawford A. COVID-19 and the decolonization of Indigenous public health. *CMaj*. 2020;192(38):E1098–E1100. <https://doi.org/10.1503/cmaj.200852>
- Milner Y. Abolish Big Data. March 4, 2020. Available at: <https://datasociety.net/library/abolish-big-data>. Accessed April 13, 2021.
- Mykhalovskiy E, Frohlich KL, Poland B, Di Ruggiero E, Rock MJ, Comer L. Critical social science with public health: agonism, critique and engagement. *Crit Public Health*. 2019;29(5):522–533. <https://doi.org/10.1080/09581596.2018.1474174>