Brian Schrag's Commentary on "Does HIV Affect All? Researchers' Duty to Warn"

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In this case, the human subjects may have given informed consent to participate in the study. It is not so obvious that their consent is voluntary, however. The subjects are HIV+ adults. In exchange for participating in the program for two years, they are provided free medical care, psychological counseling and $50. Those are very powerful incentives for members of this population to participate in the study.

John must decide what to do when he learns that one of his subjects is having unprotected sex with a partner who is unaware of her HIV status and that she has no plans to inform her partner. Several alternatives are open to John: 1) He can do nothing and simply continue his research. 2) He can try very hard to convince the subject to inform her partner. 3) He can alert the subject's partner that he/she may be at risk for AIDS even if that means disclosing the subject's HIV status. 4) He may be able to alert the partner that he/she may be at risk for AIDS without disclosing the subject's HIV status (e.g., by having a third party inform the partner). Of course, there are other intermediate steps he may take that would lead to one of these outcomes.

It is worth noting that this situation could easily be anticipated before the study begins. began. There may be alternatives in the design of the study, particularly with respect to the informed consent process, which might avoid the issue in the first place. More about that later.

The stakeholders in this case include 1) the subject; 2) the subject's partner; 3) society, which may be benefited or harmed depending on whether John's action in dealing with the knowledge of this subject's behavior contributes to the spread or control of AIDS; 4) the HIV+ community and the general society, which may benefit from the results of John's study; 5) the scientific research community and the professional psychological community, whose reputation and capacity to do research may be affected by how John conducts himself.

In New York, unlike some other states, John is not required by law to warn the subject's partner. It is not clear whether he is prohibited by law from disclosing her status to the partner. The provisions of the APA Ethics Code may give conflicting directions by 1) requiring him to respect the autonomy, confidentiality and privacy of his subject, but also 2) allowing him to breach confidentiality for a valid purpose such as to protect others from harm and indeed 3) recognizing a duty to minimize foreseeable harm. One question this review of the APA code raises is whether the subject, in the process of giving her informed consent, has been made aware that John is subject to points 2) and 3) of the professional code. Since the code may provide for breaching her confidence, she may not be fully informed unless she is made aware of that fact.

There is a general point to be made with respect to the relative weight of an individual's moral obligations, professional moral obligations and the law. What happens when they conflict? In that event, which considerations override? In general, we recognize that legal obligations are not always trump. Indeed, moral considerations can be used to critique the law. A law may be immoral, and one might sometimes be morally justified in violating an immoral law on the basis of moral considerations. That is the standard justification for civil disobedience. Thus, state or federal statutes that prohibit John's disclosure of the HIV status of his subject might conflict with general moral obligation or specific professional obligations. In the case as stated, there do not appear to be any legal constraints on John's actions.

Some moral obligations are incurred in virtue of one's professional status. However, as a professional, one is subject not only to professional obligations but also to the constraints of ordinary morality. It does not follow that professional obligations automatically trump the moral obligations that one has as a human being. The special status of the professions is justified by appeal to general moral considerations such as the welfare of society. Hence one cannot simply invoke the status of the profession to justify overriding such general moral considerations. So, for example, merely because one is a researcher, one is not justified in violating society's general strictures against lying in order to carry out research that involves lying to subjects. In the event of a conflict between general and professional moral obligations, it does not necessarily follow that one's status as a professional excuses one from one's general moral obligations as a human being, or that professional obligations override. The burden of proof is on those who would argue that a particular professional obligation overrides general moral obligations.For general discussion of this issue, see Michael Bayles, Professional Ethics, 2d ed. (Belmont, Calif,: Wadsworth Publishing Company, 1998), Chapters 1-2.

Consider John's situation. He is now in possession of information that a particular, identified person whom he has the capacity to contact is at risk for contracting a fatal disease. Should he simply do nothing and continue his research?

What would we say of an ordinary person not in a professional relation, who is in possession of such information? Conventional morality would argue that persons who are aware of a life-threatening danger to others and who can warn the others without serious harm to themselves, ought to do so. That is so even when there are special relations to the person who presents the threat. Imagine a parent who has been told in confidence by his daughter that she is HIV+, that her husband does not know and that she will not tell him. If it is clear that she refuses to tell him, would we not say that the parent would be morally culpable if he failed to warn the husband that he was at risk? What if the father had promised the daughter never to reveal anything she told him in confidence? Would that fact alter our assessment? Why should the autonomy and confidentiality of the daughter or the value of his promise be viewed as outweighing the life of the husband? Would we really say that the possibility of damaged trust between father and daughter justifies allowing the harm to the husband?

What changes in the moral landscape if we consider John's situation instead of the father's? One might argue that as a professional and a researcher, John has promised to maintain the confidentiality of his sources. Why should his promise of confidentiality trump the welfare of the partner? It is true that if he violates his subject's confidence in this instance he has done her harm. Is that harm greater than the harm to her partner when John knows the partner is at risk and may be the only one able to do something about it? Why should his promise of confidentiality trump concern for the welfare of a partner who may contract (or perhaps already has contracted) a fatal disease? It is not likely that the knowledge John gains by having this subject in the study will outweigh the harm done to the subject's partner if John does not advise him or her of the situation. Since this situation is easily anticipated in doing this study, one might ask whether John was morally justified in offering such a promise in the first place. If not, does that lessen his obligation to keep this promise?

One might argue that unless he honors his confidentiality agreement with this subject, John may not be able to continue the study. That is not likely. There are plenty of others in the study who apparently do not fall into the same situation as this subject. It is unlikely that breaching her confidence will cause the others to bolt unless they are all in her circumstances. John may be required to contact all the others in the study and explain what has happened. Perhaps he should indicate to the other subjects that he is morally obliged to report all similar cases, reassure them that confidentiality will be maintained otherwise and give them a second opportunity to affirm their consent.

One might argue that unless John promises all the participants absolute confidentiality (not qualified confidentiality), at the beginning of the study, he will not be able to gain their consent and hence will not be able to carry out the study. Is that really so? Suppose that he indicates that if he learns they are having unprotected sex with identifiable partners, he will be obliged to alert the partners, if they themselves do not. He pledges to do that in a manner that protects their identity, if possible. Who would consent to be in his study? Those who would still consent may well include: 1) those who are not currently in a relationship; 2) those who have told their partners; 3) those who have not told their partners but would be glad if someone else did. Presumably, some subjects such as the one in this case would not join. But would that really impair the quality of the study? If potential participants were informed of this condition up front, some might bring themselves to inform their partners just so they could participate in the study and get the benefits. It is not obvious that constraining the population in this way would seriously impair his study.

If the restriction on unlimited confidentiality does reduce the amount of knowledge one could glean from a study, does that automatically mean we should consider the loss of knowledge trump and opt for the study with promise of unqualified confidentiality? Not necessarily.

Consider the long-term cost to research if it becomes known that a researcher sat on this information and the partner -- and perhaps other partners in similar situations -- contracted AIDS and died. In that case, one has the irony of a person doing research to prevent illness and death from AIDS but failing to act on information that would prevent actual persons, who do not know they are at risk, from contracting the disease. If that were to become known, would society's trust of researchers increase or decrease? Would potential subjects be more or less likely to participate in research?

This case has parallels, although not exact ones, to the Tuskegee syphilis study. It is true that in that case both subjects and their partners were kept in the dark regarding their condition and prevented from seeking known effective treatment (as well as preventive measures, in the case of sexual partners). What may be relevant to this case is that the loss of credibility of researchers as a result of the Tuskegee case has turned out to be far greater and have far longer lasting effects than any of the researchers imagined at the time.For a discussion of the long-term impact of the Tuskegee study, see James H. Jones, Bad Blood: The Tuskegee Syphilis Experiment (New York: The Free Press, 1993), especially Chapters 13, 14.

One might argue that a research practice of not promising unqualified confidentiality would render a great deal of psychological research impossible to carry out. It seems to me that is claim must be evaluated on a case-by-case basis.

What, then, should John do? All things considered, it seems reasonable to expect that once John becomes aware of the situation, he cannot ignore it. It would be reasonable first to vigorously counsel with the subject and try to persuade her to inform her partner. If it is clear that she will not do so, then John should inform the partner and, as indicated, inform the rest of the subjects in his study of his modified practice of limited confidentiality. In future studies, John and others should build these considerations into the informed consent process used when subjects are enrolled in the study.