Turning the Law into a Tool Rather than a Barrier to the Use of Administrative Data for Evidence Based Policy

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Abstract: "The law" is too often viewed as an impenetrable barrier to the use of administrative data to create and evaluate evidence based policy. There are various reasons for this, including the complexities of the various laws governing the matter, organizational and societal cultural issues, a lack of adequate legal expertise, and a failure to leverage possible political support. The emerging political consensus on the importance of the use of administrative data, the growing interest among funders, and emerging efforts to create resources for lawyers working in this field together provide a foundation for a fundamental shift in attitude about and use of "the law" so that it becomes an essential tool rather than a barrier to these efforts.

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In 1984, Charles Murray published his critique of the social policies adopted as part of Lyndon Johnson's Great Society (Murray 1984,2015). While Murray's conclusions about how to address the social needs of American citizens were controversial, he observed that those constructing social policies in the 1960s had little data or even practical experience to draw on. In an introduction to a 2015 reprinting of his book he writes:

> For someone born in the decades since then, it is hard to realize the degree to which planners of the Great Society were starting from scratch…The reaction when the programs didn't work was bewilderment and confusion…I hope my narrative conveys how little social policy planners understood what they were up against. They had a limited body of historical examples of government social programs to draw upon, [and] assumptions about the nature of poverty and disadvantage that were compassionate but empirically dubious…(Murray 2015, xv).

Today there is nearly boundless information and data available to policy makers and it is difficult to argue, "the data simply don't exist". Administrative data should be an essential tool in implementing and augmenting the core functions of government. For example, administrative data can be used to determine whether government-funded interventions work as intended (Liebman, this volume); to

improve government operations and processes at federal agencies such as the Census Bureau (O'Hara, this volume) and the Social Security Administration (McNabb, Timmons, Song, and Puckett 2009); to provide the foundation for social sciences research on programs and populations, (Culhane, this volume; Goerge, this volume) and to inform the development of policy.[i]

Government officials of course are not the only ones interested in the productive use of administrative data. Many researchers have turned to administrative data as a virtual laboratory for their work, though the use of such data in research is new enough that there is no consensus yet on even the meaning of phrases such as "administrative data" or "big data" (Connelly, Playford, Gayle, and Dibben, 2016). Citizen advocates increasingly seek data from government, which can lead to clashes over access, and data mining is at the core of the explosive growth of some of the most successful businesses in the world such as Amazon and Facebook.

However, as this paper and others in this volume suggest, administrative data is often not used to its potential, with serious consequences including the following:

- Policymakers who ignore or do not have access to administrative data may be more likely to make decisions based on whim, personal preference or untested assumptions. While such decision making has always been a feature of policy design, the rejection of or unwillingness to test available data, is particularly difficult to rationalize in an era in which society is awash in data;
- Researchers deprived of data cannot empirically test the success or failure of government programs;

- The public is uninformed about whether governmental programs and social policies "work"; and
- Problems of discrimination and inequity in the allocation of resources or the imposition of punishment (as happened in the strengthening of penalties for drug possession) may be exacerbated. Murray (1984) was one of the first to point out that a lack of empiricism can lead to unintended consequences and his caution applies perhaps even more forcefully in a society in which stark differences in political views make achieving consensus on nearly any social policy issue difficult.

In a society in which even the phrase "as American as apple pie" would undoubtedly be construed as a highly political statement, the question is whether agreement within government can be achieved on the benefits that can be derived from the use of administrative data. In fact, over the last decade, perhaps surprisingly, a growing political consensus at the highest levels of government has emerged that the use of administrative data must be accelerated and that data from different sources must be integrated to maximize its utility. For example, the Obama administration urged executive agencies to expand the use of administrative data to create evidence-based policy and evaluation strategies. For example in 2013 the Director of OMB in a memo to federal agency heads wrote "Agencies are encouraged to allocate resources to programs and practices backed by strong evidence of effectiveness while trimming activities that evidence shows are not effective" (Executive Office of the President 2013, 2). The directive went on to state that "proposals should enable agencies and/or researchers to access and utilize relevant

data to answer important questions about program outcomes while fully protecting privacy" and noted that linking "administrative data…can be a valuable resource for program improvement" (Executive Office of the President 2013, 3,6).

On the legislative side, the bipartisan Congressional agreement to create the Commission on Evidence-Based Policymaking showed broad legislative support for the use of data to improve public policy.[ii] There have also been significant national efforts to link researchers to policy makers through the use of administrative data, such as the Actionable Intelligence for Social Policy initiative (Culhane this volume).

However, while the use of administrative data for purposes described in the papers in this volume clearly has increased, this does not mean that the use of data has been maximized nor does it mean that there is a consensus on whether the benefits from using different types of administrative data outweigh its benefits, primarily because of concerns over improper use and intrusions into privacy.

One barrier to the use of administrative data is "the law". This barrier can be articulated in different ways, from "the law won't let me share information" to "the law will punish me if I share information" to "the law is too complicated to figure out how to share information". There are situations in which each of these may be true; however, too often "the law" becomes the default rationale for permitting little or not use of administrative data. However, "the law" does not exist in a vacuum. And so before moving to a the different issues raised when specifically considering the law and administrative data, I consider a number of contextual factors that influence how we think about law.

1. **Some contextual factors for that influence opinions regarding "the law" and administrative data.**

Factors other than the text of "the law" create the context in which legal interpretation occurs. One is culture. Cultural barriers may be organizational. Amy O'Hara (this volume) observes, "It is not typically a legal barrier that curtails sharing and access. Rather, there are cultural and financial impediments affecting the data sources and access paths." She includes among cultural factors long tradition and experience in agencies that simply have not shared administrative data and because of that history are reluctant to begin. This reticence may be reinforced by political calculation that sharing administrative data within government or beyond government may reveal that government is not performing very well and that it is simply better to not provide the public with information that "could be used against us". Some governments may withhold information and data from public disclosure even when the law seems to clearly mandate release, a phenomenon that exists in many countries even as more nations adopt formal freedom on information laws (Banisar 2006).

Beyond organizational culture and history, there are other larger cultural factors at play that can have an impact on the ability of policy makers to gather or use data. One is the ingrained and growing distrust of government. Just as government may not wish to release information to the public, a growing number of citizens may wish to withhold information from the government. This widespread distrust and its causes need not be belabored here but it clearly creates concerns over using administrative data derived from individually identifiable information.

The widespread hacking of governmental and private business databases has undoubtedly exacerbated this distrust; blogs now exist to keep track of data breaches (which provides a common good in informing the public about intrusions into data) but which may also reinforce distrust of those institutions and organizations that collect individual data (Identify Force 2017).[iii]

Another cultural factor is the importance of the principle of privacy as something of deep value in American life, however widely debated the meaning and application of privacy are in political and legal spheres. Privacy as a *legal* concept evolved primarily as a means of limiting government control of or intrusion into the autonomy of the individual, particularly though not exclusively in sexual matters (for an early and a more recent review see Rubenfeld 1989 and Siegel 2014-2015). But it also is a principle that influences individual and group attitudes about the use of data and it is increasingly recognized that individual concerns over invasion of privacy unrelated to law are relevant to whether individuals (and by extension a broader public) are even willing to share information that might generate administrative data sets (Phelps, Nowak, Ferrell 2000). The desire to keep private information *confidential* is also a critical issue: "Confidentiality" as used here refers to the legal duty of an entity holding or with access to information about individuals to assure that information is not available to other parties except when permitted or mandated by law. And as noted above, when confidentiality is breached, it can have a significant impact on public trust.

Another important contextual factor is the technological evolution that has made collecting, storing and mining enormous amounts of individual data possible.

Because the broader discussion about privacy and confidentiality is often informed by the latest news over hacking and the compromise of data held in massive electronic data bases, technology is often seen as a massive threat to privacy. Too often discussions regarding the question "does the law let administrative data be shared" occur without reference to advances of technology which can *allay* concerns over privacy and confidentiality. However, Garfinkle (this volume), while noting the many ways in which individual information can be inappropriately accessed, concludes that advances in technology and research methods will make it possible for researchers to access millions of records from multiple data bases while assuring the security of those records. He concludes, "computer science is up to the task, with a wide range of techniques that have been developed over the past decade that can protect data while unlocking its potential" (see also Szalay, this volume for a discussion of emerging technology). These developments may provide the basis for thinking in a less constrained manner about application of law.

2. **Beyond culture: Are there ways in which law does create barriers to the use of administrative data?**

While law can be misinterpreted, misunderstood, and be used as the default excuse used by those who simply do not wish to share data, it would be naïve to pretend that law did not create any practical barriers to the use of administrative data. These barriers stem in part from "the law" itself, and from a lack of adequate legal expertise to deal with today's legal, technological and social complexities.

Complexity of the law.

One barrier to the use and integration of administration data is simply the complexity of the multiple laws that affect these issues. In a 2016 white paper (Executive Office of the President 2016) the Office of Management and Budget noted the "patchwork nature" of the various federal and state laws that govern the use of administrative data. OMB's characterization of the "state of the law" is worth quoting at some length:

> Various Federal and state laws govern the use of administrative data in the U.S. on a program-by-program basis. In some cases, statutes authorizing programs permit use of administrative data for only a narrowly prescribed purpose that does not include evidence-building activities. Other authorizing statutes prohibit the development of certain datasets. More often, the patchwork nature of these statutes at both the state and Federal level inadvertently makes matching administrative data and survey data impractical or impossible. (Executive Office of the President 2016, 1).

One of the reasons "the law" in this area is so complicated is because there is so much of it from different sources and from different eras. If the use of administrative data was simply governed by federal l law, the complexities of the legal landscape might be softened, or if each state had only its own statutory scheme differences in the treatment of administrative data could be reconciled within the state. However, federalism plays a significant role in shaping the legal parameters in which data may or may not be shared, with both federal and state governments addressing certain subjects where vast amounts of data is generated. An excellent example of the impact of federalism can be found in the myriad laws governing the

confidentiality (and therefore use) of information generated in health care. The Health Insurance Portability and Accountability Act (HIPAA) of 1996 and the body of administrative regulations establishing federal rules governing protected health information" which became effective in 2005 did not create rules that all states must follow. Rather, the standards established by HIPAA create a floor for protecting health information, which the states may exceed: If state law is *more* protective of privacy than the federal law then the state law prevails.

This can create practical difficulties in determining whether state or federal law is more protective. For example, in the 1999 report of the Surgeon General on mental health, written as various federal proposals on protecting health information were being considered, one can find this passage (U.S. Department of Health and Human Services 1999):

> determining whether a state's mental health law provides more or less protection than a national standard may be difficult in at least some cases. For example, in one state,the law permits disclosures without consent to some but not all types of providers. One of the proposals to establish a national standard would permit disclosures to be made to other providers without the consent of the individual, but would give the individual the opportunity to "opt out" of disclosures to specified providers. In this example, it is difficult to determine whether the state law in question is more or less protective than the proposed national standard. On the one hand, the state law in this example is more restrictive than the reform proposal because it limits the types of providers that can receive information without

consent. On the other hand, it is weaker than the reform proposal because it does not provide the individual with an opportunity to decline permission to disclose to those providers.

The HIPAA rules that were eventually enacted did create this analytic dilemma. These problems are not insurmountable but they require extensive legal analysis, the capacity for which is lacking in many jurisdictions. The problem is exacerbated in providing treatment to people with mental or other health problems and a substance abuse disorder because federal regulations enacted in 1987 create strict provisions for protecting the confidentiality of substance use and alcohol treatment information which are inconsistent with HIPAA and with most state health laws. As a result, a health provider that operates a treatment program for substance use within a larger health system may have to contend with and try and apply at least three different sets of legal rules, including HIPAA, state confidentiality law, and separate rules for substance use. If any patients are HIV positive then a fourth section of law becomes relevant as most states have separate legal rules governing the privacy and confidentiality of information regarding HIV status.

These are not just complications of clinical care of course. Data generated by health care transactions are critically important for developing, implementing and assessing health policy and the myriad laws on the circumstances under which such information can be disclosed will shape the use of such data. In addition, the hodgepodge of rules can create gaps in privacy protection, exacerbating public distrust of the use of data (Hodge 2012).

Interpretation of the law

In its 2016 white paper, OMB (Executive Office of the President, 1) noted that the "ambiguity, or lack of explicit authority (to use data), can lead to a variety of interpretations about permitted uses, ranging from conservative conclusions that a particular use is not allowable to the establishment of conflicting requirements." Federal and state agencies wish to avoid liability and public embarrassment. This risk averseness is often understandable, is not restricted to public agencies and is as much a function of organizational culture as it is a function of articulated strategies for identifying and minimizing risks (Bozeman and Kingsley 1998). If law is ambiguous, or subject to multiple interpretations, it is not surprising that agency counsel (and their clients) may retreat to the most conservative stance possible. In an environment lately dominated by stories about the hacking of secure databases, and given the imperative to protect privacy, it is easy to understand why some jurisdictions may ask, "why run the risk" even if the severity of the risk has not been assessed.

The law simply prohibits certain uses

While most applicable laws permit at least some disclosure of administrative data, some laws simply do not permit the creation or use of databases that would provide good administrative data for more than the most limited purposes. For example, a major economic and societal issue is the impact of investments in workforce development. Data exist to study the issue, particularly at a state level (Hollenbeck and Huang, 2017). However, the federal Workforce Investment Act (WIA) cannot be used to create a "national database of personally identifiable information unless it is for program management activities".[iv] Whether a national

database for purposes beyond program management activities would be valuable is a separate question, but once a federal or state law imposes strict prohibitions on the use of data it is difficult to reverse or modify those prohibitions.

Many jurisdictions lack the legal and related capacity to fully analyze and address critical issues in the use of administrative data

There are multiple issues that must be addressed to responsibly use administrative data, from creating a governance structure to assuring that data in fact can be integrated to legal analyses necessary to assure that the law is being applied appropriately. This requires a set of technical skills and capacity that government sometimes simply lacks.

A 2011 analysis (Johnson, Oliff, and Williams) found that beginning in 2008, when the impact of the Great Recession was being sharply felt, 46 states and the District of Columbia made sharp cuts to state services. While not all states cut every service, the majority of states made cuts to health care, to education, and to services for the elderly and disabled. These reductions resulted in the elimination of more than 400,000 state government jobs during the same period, and all of those jobs have not been restored. The sectors in which cuts occurred (social services, education, health) are sectors that generate enormous amounts of administrative data. However, if the workforce that administers these programs is under pressure because of layoffs, pay freezes and other factors, it is unlikely that responding to requests for administrative data will be a high priority. Nor is it likely that as workforces are being reduced, states will invest heavily in the technical capacity required to make the use of administrative data possible.

Legal expertise is essential to this enterprise. However, attorneys are not immune from reductions in state or federal workforce. Nor are they immune from other economic realities. It is often difficult for government to compete for the type of highly specialized expertise (attorneys, data scientists) necessary to make the use of integrated administrative data a reality. While it is difficult for a variety of reasons to precisely measure the differences in salary between public and private sector attorneys, a 2014 study estimated that on average lawyers for public agencies make 50 percent less than those in private practice, with the differential being much greater for those lawyers considered the most qualified (Winston, Karpilow and Burk 2014). In addition, most law students learn little about the issues involved in handling the complex analyses and related work (creation of a governance structure, creation of data use agreements, etc) that are required. This situation is changing, as noted below, and there are certainly many highly accomplished attorneys in federal, state and local government. However, most policy makers would agree that there is too little expertise in this particular area. The combination of limited expertise and risk averseness means that in many jurisdictions a commitment to expanding the use of administrative data never gets to the granular legal analysis necessary to overcome legal barriers.

3. Thinking systemically about law as a tool rather than a barrier

The discussion above identifies several issues affecting the use of law, including cultural and political factors, ambiguity in law, and insufficient technical expertise. The rest of the paper reflects on strategies, some practical, some perhaps quixotic, for each.

Cultural issues and the need to reconcile competing versions of the "truths" about administrative data

Some of the issues characterized as cultural above can be resolved, for example, leadership can change organizational culture. Other issues however, such as the distrust of government and other institutions appear to be part of the landscape for the foreseeable future.

Is there a path forward? One issue that can be addressed is the dichotomous, all or nothing way in which concerns regarding the use of data are sometimes articulated: Data can/cannot, should/should not be used because privacy will/will not be respected, data will/will not be used appropriately and law does/does not permit such uses to occur. Whichever side of these conflicting views is dominant in a jurisdiction (and the dominating view may be a function of organizational culture) may drive legal analysis down a particular path.

It should be obvious however that thinking about these issues in dichotomous, either/or terms can have a detrimental impact on application of the "law"; as noted earlier, ambiguities and conflicting legal rules create a strong foundation for retreating to the most conservative legal posture possible. Conversely, a jurisdiction eager to use administrative data as expansively as possible may give short shrift to legitimate fears about abuses of privacy and other social goods.

Given this, it may be useful to use a framework for approaching the legal issues in data sharing that can explicitly identify, address and attempt to accommodate these different world views. One potential framework that might be

considered as a systemic improvement to considering application of the law is "privacy by design" (Cavoukian 2011).[v] Such an approach assures that privacy issues are identified and considered as part of the process of designing the administrative data use effort, rather than being treated as barriers to those efforts or issues to be nodded at rhetorically but not considered systematically. For example, Cavoukian (2011) asserts that privacy concerns must be considered proactively rather than reactively and that privacy is embedded in the structure and processes by which information about individuals may be used by others. As Professor Stranburg (personal communication) has noted, such an approach "attempts the *joint* maximization of the social benefits of all relevant values. Taking privacy-related concerns into account during the design of a data use program prevents zero-sum thinking and minimizes the need for after-the-fact patches for privacy problems associated with a data use program". [vi]

A policy maker or politician with a particular interest in the use of administrative data can shape legal interpretation of ambiguous laws

Explicit interest in data sharing from a politically important person or entity can help shape the manner in which legal issues are resolved. Political will focused on sharing data can cause a lawyer tasked with working on these issues to look for opportunities presented by the applicable laws rather than exercising undue caution at every point where discretion can be used. The OMB directives discussed earlier were an important political statement about the need for federal agencies to use data to achieve evidence based policy.

Political champions also exist at the state and county level. For example, the National Governors Association (NGA) is a bipartisan organization for the nation's governors. In 2016 the NGA published a paper titled "Improving Human Services Programs and Outcomes through Shared Data" (NGA 2016). This is an excellent paper that summarizes the case for data sharing, discusses the importance of balancing data sharing with privacy, and notes the practical difficulties in doing this. The NGA acknowledges that internal opposition may exist and but asserts that Governors can serve as an important corrective:

> "Program staff may be trained that laws such as HIPAA and FERPA prohibit any data sharing. General counsel, which may not know the ins and outs of those and other privacy laws, may adopt a risk adverse stance and advise against data sharing. As with the public, governors can overcome some of that opposition by emphasizing the value of data sharing, with the measures taken to protect privacy." (NGA 2016,10).

Similarly, the National Association of Counties (NACo n.d) maintains websites on data sharing, with specific examples from counties across the United States that have moved forward with data sharing arrangements. Given that the economic burden on counties for administering government programs for people in poverty and other conditions is so significant, one can assume NACo, like the NGA, will increasingly focus on data integration and analysis as a fundamental policy tool. Funding that would strategically link the NGA, NACo and like-minded organizations to individuals and entities with technological, legal and related expertise could help move the political conversation to practical solutions.

Developing needed legal expertise and resources

One of the legal barriers to the use of administrative data is the lack of sufficient legal expertise to address these issues. Few law students learn more than the rudiments of confidentiality and privacy, and even fewer learn about the technological advances that undergird the revolution in "big data". As a result, very few lawyers have been formally trained in or have experience with the legal, cultural and technological issues flowing from confidentiality and privacy law and those that have will have well paid opportunities in the private sector. This is beginning to change as law schools develop curricula and programs to create legal expertise that tech firms and others need. Examples include but are not limited to the Center for Internet and Society at Stanford Law School (http://cyberlaw.stanford.edu), the Information Law Institute at New York University Law School (http://www.law.nyu.edu/centers/ili) and the High Tech Law Institute at Santa Clara (http://law.scu.edu/hightech/). A list of schools including law schools with privacy curricula is maintained at the website of the International Association of Privacy Professionals (https://iapp.org/resources/article/colleges-with-privacy-curricula/).

There are other efforts to fill the gap in legal expertise beyond the development of law school programs. For example, as noted earlier, the Laura and John Arnold Foundation is funding an effort through the Actionable Intelligence for Social Policy initiative led by Dennis Culhane at the University of Pennsylvania to create toolkits (model data sharing agreements, for example) to provide lawyers with resources that can be used so that a lawyer new to the field does not have to do

everything on her own. These toolkits are publicly available at the AISP website (https://www.aisp.upenn.edu). Expansion of these efforts, perhaps leveraging the interest of NGA and NACo, to create additional toolkits and rosters of attorneys with expertise in this area could fill in the gaps in legal expertise that exist in the public sector. If legal expertise is not increase, efforts to integrate data will continue to founder on well-meaning but often misplaced (and sometimes just incorrect) interpretations of law.

Enabling comprehensive analyses of existing laws in a holistic manner

While it is possible for skilled lawyers to work through the network of sometimes-conflicting laws that have to be negotiated to create a legally sound framework for sharing data, the legal landscape is far more complex than it needs to be. This is primarily because laws designed to protect privacy and create ground rules for disclosure of data were written for specific purposes and (in most cases) long before the explosion of technology that has made the mining of large data sets possible. As noted earlier, there are federal and state laws that affect health information, but there are also separate laws for information on people who are homeless, on workforce incentives, on welfare programs, on education, on justice-related issues, and nearly every other service government provides.

There have been efforts to amend existing laws to make data more available[vii] but those efforts, like most of the law in this area, focus on specific types of data in specific types of situations. There is no national strategy, or many examples of state strategies, to review and analyze laws affecting data sharing comprehensively and systematically. [viii] Such an analysis undoubtedly would reveal

a number of barriers in statutory law that could be addressed comparatively easily; more importantly, such an analysis could lead to the creation of a rational, overarching statutory and regulatory framework that permits enough sharing and integration of data to accomplish important governmental objectives while assuring the protection of individual privacy.

Some important granular issues

In addition to the more systemic approaches just described, a jurisdiction may find it easier to get to the legal outcome it wants by approaching data sharing as an enterprise that requires planning, the development of structure and analyzing legal issues within this larger structural approach. The resources developed by AISP, noted earlier, provide a guide to this approach, as do theoretical frameworks such as Privacy by Design.

First, it is essential that those interested in using data do adequate developmental work. A number of questions should be addressed before considering whether there are legal issues that are relevant. Examples of important issues to address at least in a preliminary manner include:

- Who are the individuals/organizations that have an interest in the use of data? This is an important threshold question that is more difficult to resolve than might appear at first blush: Is there a single agency that wishes to be more opportunistic about the use of its own data, or are there multiple agencies that wish to integrate data? And which agencies or organizations might find this objectionable?

- What specific questions or types of questions does the group wish to address? Is there a question, for example, that the state legislature or county commission wants answered? That creates a very different scenario than a desire to integrate data to assess the outcome of a major policy initiative such as reducing admissions to the tax supported hospital emergency department.
- How quickly would the group like to address these questions? The integration of administrative data involves politics, law, technology, and the marshaling of often-scarce resources. Whatever the goal of the initiative, it will take longer than anticipated and so time necessary for expert legal analysis must be realistically allocated as well.
- What types of data sources would or might provide a resource to address the question(s)? Are these data available? Are there administrative barriers to access? Technological barriers to access?
- If the data are available, does the group have the knowledge to know what types of capacity (human and otherwise) might be necessary to integrate and analyze the data?
- What would success look like?
- And, are there actual or perceived legal barriers to doing any of this?

These questions, developed more clearly elsewhere (AISP 2017, Ostrom 2011[ix]) are simply a framework to provide initial clarity on goals, outcomes, resources and potential barriers before filtering the results through the law. From experience, it is clear that if an inexperienced or overly cautious lawyer is involved in discussions

about data sharing without a framework established by the potential users and sources of such data, the discussions are likely to end with resignation over how the law has yet again defeated efforts at making good policy.

In addition, while lawyers need to be involved early in the process (though what that means will vary depending on the lawyer) and need to understand what their clients are attempting to do, legal objections should not be permitted to end discussions unless a section of law specifically prohibits a proposed action. The role of lawyers in this context (as in most settings) is to find ways to maximize the use of administrative data consistent with available legal exceptions and tools, not to use exaggerated concerns regarding legal risk to derail discussions before they get off the ground. This is why frameworks such as privacy by design may help assure the parties that all important issues are being addressed as part of the process; this is why lawyers should be aware of the advances in technology and analytic methods highlighted in other papers in this volume that can help assure the security of data and individual privacy interests even as millions of individual records are analyzed.

Summary

"The law" is too often viewed as an impenetrable barrier to information sharing. This reflects misunderstanding of the various laws governing the matter, a lack of legal expertise, and a failure to leverage possible political support that inevitably would affect the manner in which lawyers approach these issues. The emerging political consensus on the importance of the use of administrative data, the growing interest among funders, and the early efforts to create resources for lawyers working in this field together provide a foundation for a fundamental shift in

attitude about and use of "the law" so that it becomes an essential tool rather than a barrier to these efforts.

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[i] The use of administrative data to inform research germane to policy development is not a new issue. For a very good discussion from 1998, see Hotz, Goerge, Balzekas and Margolin. 1998.

[ii] The explicit goal of the Evidence-Based Policymaking Commission Act of 2016 (HR. 1831), which passed with bipartisan support and was signed by President Obama is to "focus on the most basic pre-requisite for evidence-based policy: good data." (.http://www.urban.org/urban-wire/everything-you-need-know-about-commission-evidence-based-policymaking). The bill creates a 15 person commission to review federal data sources and make recommendations on the optimal structures for data integration, data security, and use of integrated data for "program evaluation, continuous improvement, policy-relevant research, and cost-benefit analyses." At the state level, the National Conference of State Legislatures has made opening government data for public use, including in combined (that is, integrated) fashion a priority. The Conference maintains a website devoted specifically to this topic, which among other things provides links to state legislation addressing the issue (http://www.ncsl.org/research/telecommunications-and-information-technology/open-data-legislation.aspx).

[iii] These data breaches and by now hundreds of millions people potentially affected are by now almost too numerous to count. One recent summary can be found here: https://www.identityforce.com/blog/2017-data-breaches (accessed 31 May 2017).

[iv] Workforce Investment Act, sec. 504(b).

[v] I am grateful to Professor Katherine Jo Strandburg, Alfred B. Engelberg Professor of Law, NYU Law School, for her suggestion in reviewing earlier drafts of this paper that "privacy by design" has a significant role to play in setting the stage for more granular analysis of legal issues that must be done for the successful use of administrative data.

[vi] Personal communication, Professor Katherine Strandburg January 3rd, 2017.

[vii] A notable recent example was the 2012 amendments to the regulations that implement the Family Educational Rights and Privacy Act (FERPA). The regulations were amended to facilitate expanded use of student information to evaluate the

effectiveness of publicly funded educational programs. The new regulations are at 34 CFR Part 99. For an overview see Fuller and Walker 2013. In addition, the United States Department of Health and Human Services in January 2017 announced a new rule designed to make alcohol and substance abuse treatment records more available to researchers, among other changes. A summary of the provisions and a link to the full regulation can be found at https://www.samhsa.gov/newsroom/press-announcements/201701131200.

[viii] There are recent examples of efforts to comprehensively analyze the interplay between federal and state law, in the preemption analyses conducted after enactment of HIPAA. Because HIPAA set a minimum standard for the confidentiality of protected health information, with more protective state laws applying to particular situations, analyses were conducted in at least some jurisdictions to determine whether state or federal law applied to particular types of transactions. For one of many discussions, see Guthrie 2003.

[ix] Elinor Ostrom's work on institutional analysis and framework development is often cited. While her work is more conceptual than policymakers often like, she poses a set of practical questions that can be applied to the creation of a governance structure for sharing administrative data. For example, she suggests thinking about questions like these before proceeding with analysis of a policy question: Who are the actors? What positions exist on a question? What actions are available to the group and individual decision makers? What are the potential outcomes of those actions? What level of control exists over the choices to be made? What information is available to make decisions? And what are the costs and benefits of the actions and outcomes that are taken? (Ostrom 2011, 12).

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