

Criminalization of HIV/AIDS Under California Laws



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Overview

- California Statutes
 - Language of the statute
 - History of the statute
- Decriminalization Efforts
 - Problems with the laws
 - Proposed modifications
- Next Steps
 - Defining Guiding Principles
 - Defining Roles in a Legislative Campaign

General Criminal Statutes

In reviewing published cases, the earliest criminal case addressing unprotected sexual activity involving an HIV-positive individual was in 1988 (attempted murder).

General criminal statutes were in use until 1991, and these cases were most often prosecuted under Penal Code section 245 (assault with a deadly weapon).

CAL. HEALTH AND SAFETY CODE

§ 120290

- Willful exposure of self or another to a contagious, infectious, or communicable disease.
- Enacted in 1939 and no published criminal cases.
- Cited in civil proceedings (indicating a duty to disclose and liability for negligent transmission of HIV)
- Punishment: Misdemeanor

CAL. HEALTH AND SAFETY CODE

§ 120291

- Unprotected sexual activity by one who knows self to be infected by HIV; non-disclosure of HIV-positive status; specific intent to infect the other person with HIV.
- Enacted in 1998 with no published criminal cases. Traditional legal research and FOIA requests indicate there have been 2 convictions under this statute.
- Punishment: Felony punishable by imprisonment in the state prison for three, five, or eight years

CAL. HEALTH AND SAFETY CODE

§ 1621.5

- Knowing donation of blood, body organs, tissue, semen or breast milk by person with AIDS or person who has tested reactive to HIV.
- Enacted in 1988 and no published criminal cases have been found under this provision.
- Punishment: Felony punishable by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for two, four, or six years

CAL. PENAL CODE § 647f

- Sentence enhancement for previous convictions for solicitation and positive HIV test result.
- Enacted in 1988 and 2 published criminal cases.
- Punishment: Felony

CAL. PENAL CODE § 12022.85

- Sentence enhancement for specified violations while HIV-positive
 - rape
 - unlawful intercourse with a person under 18 years of age
 - rape of a spouse
 - sodomy
 - oral copulation
- Enacted in 1988 and 4 published criminal cases.
- Punishment: Three-year sentence enhancement for each violation in addition to the sentence provided for the violation

CAL. PENAL CODE § 12022.8

- Sentence enhancement for infliction of great bodily injury; commission or attempted commission of certain sex offenses; additional punishment
- Enacted in 2010, operative in 2012.
- Punishment: Five-year sentence enhancement for each violation in addition to the sentence provided for the violation

Decriminalization Efforts

Problems with the laws

- Contributes to HIV-related stigma
- Negatively impacts LGBT populations
- All do not follow standard criminal law principles of requiring intent to harm
- Results in disproportionate penalties
- Defeats public health messages about HIV
- Are unsupported by research

Decriminalization Efforts

Proposed modifications

- Maintaining Current Law
- Repealing Laws
 - CAL. HEALTH AND SAFETY CODE § 1621.5
 - CAL. HEALTH AND SAFETY CODE § 120291
 - CAL. PENAL CODE § 647f
 - CAL. PENAL CODE § 12022.85
- Modifying Laws
 - CAL. HEALTH AND SAFETY CODE § 120290
 - CAL. PENAL CODE § 12022.8

Decriminalization Efforts

Code Section	Law	Proposed Action
HS CODE § 1621.5	Blood/organ/semen/breast milk donation	Repeal
HS CODE § 120291	HIV-specific exposure	Repeal
PC § 647f	Solicitation while HIV-positive	Repeal
PC § 12022.85	Sentence enhancement for forcible sex offenses while HIV-positive	Repeal
HS CODE § 120290	Exposure to communicable disease	Modify
PC § 12022.8	Sentence enhancement for infliction of great bodily injury	Modify

Decriminalization Efforts

Modifications to HS Code § 120290

- **Application to all intentional transmission of an infectious or communicable disease if...**
 - Person knows s/he is afflicted with an infectious or communicable disease
 - Person acts with specific intent to transmit the disease
 - Person intentionally engages in conduct that poses a substantial risk of transmission to the other person
 - The other person does not have knowledge of the person's infectious or communicable disease
 - Person has not undertaken or attempted to undertake practical means to prevent transmission; and
 - Person causes infection of the other person

Decriminalization Efforts

Modifications to HS Code § 120290

- **Carve out**

- Persons who become pregnant while infected with an infectious or communicable disease
- Persons who continue a pregnancy while infected with an infectious or communicable disease
- Persons who decline treatment for an infectious or communicable disease during pregnancy

Decriminalization Efforts

Modifications to HS Code § 120290

- **Definition of “Infectious or communicable disease”**
 - Non-airborne
 - Spread from person to person
 - Determined to have significant, long-term consequences on the physical health or life activities of the person infected

Decriminalization Efforts

Modifications to HS Code § 120290

- **Definition of “Substantial risk of transmission”**
 - Reasonable probability of disease transmission
 - As proven by competent medical or epidemiological evidence
 - Conduct posing a low or negligible risk of transmission does not meet the definition

Decriminalization Efforts

Modifications to HS Code § 120290

- **Definition of “Practical means to prevent transmission”**
 - Any method, device, behavior or activity demonstrated epidemiologically to measurably limit or reduce the risk of transmission.
 - Including but not limited to use of condom, barrier protection, prophylactic device, adherence to a medical treatment regimen for that disease as prescribed by a physician.

Decriminalization Efforts

Modifications to Penal Code § 12022.8

- **Definition of “great bodily injury”**
 - Adding reference to modified HS Code § 120290 to incorporate modernized statute
 - Requiring transmission in order for penalty enhancement to apply

Decriminalization Efforts

Summary of modifications

- Eliminating HIV-specific statutes that are no longer necessary.
- Modifying existing misdemeanor exposure statute to incorporate HIV as another “communicable” disease.
- Requiring consideration of knowledge, intent, conduct that poses a risk of transmission, prevention, and transmission in the exposure statute.
- Closing loophole in GBI statute.

Guiding Principles for Advocacy

- HIV Criminalization is a multifaceted issue and has a broad range of stakeholders, so an advocacy coalition should aim to be diverse and inclusive.
 - Some key stakeholders may be effective messengers to certain legislators or allies.
 - Legislators will be sympathetic to different messaging.

Guiding Principles for Advocacy

- Assess individual and organizational advocates capacity for participation early on.
- This information will help with determining an overall campaign structure, decision making process, leadership structure, and communications strategy.

Guiding Principles for Advocacy

- State coalitions should stay connected to what is going on nationally.
 - Bad provisions or laws in one state can have detrimental effects in other states.
 - It is important for advocacy coalitions to establish guiding principles of a model law and/or legislative non-negotiables early on, so there are no unwanted compromises.

Legislative Non-negotiables to Consider

- A model law **MUST** be based on:
 - Criminal intent to infect.
 - Conduct likely to transmit.
 - Punishment that is proportionate to the harm.
 - No new crimes or increased penalties for any disease.
 - Exclusion of diseases that are airborne/casually transmitted.
- Penalties **MUST** be proportionate to harm.
 - The penalty should be a misdemeanor.

Roles and Responsibilities

- Identify core members of group of Californians to advocate for change
- Identify leaders/coordinators of the group
- Determine decision-making process based on roles
- Identify lobbyists (people who can directly lobby public officials and legislators)
- Identify a Sacramento-based California political consultant

Resources Needed

- **Funding**

Draft a budget

Printed materials

Salary for group leader

Payment to political consultant

Determine who will apply for what funding

- **Additional Resources**

Public relations firm to conduct messaging research

Activities

- Calendar California working group meetings
- Establish roles and responsibilities
- Identify resources needed
- Draft a strategic plan (with political consultant)
 - Include multiple strategies and leaders
 - Education
 - Advocacy
 - Legislation
 - Media/Communications
 - Research

Action Items

Education

- Create talking points focused on public health, legal/due process, harms to PLWH
- Draft “Top Five” fact sheet (informed by scientific evidence)

Advocacy

- Identify primary coalition partners and key stakeholders
- Organize allies and messengers
- Gain cooperation of public health officials in California
- Neutralize opposition

Action Items

Legislation

- Identify a champion legislator to author the bill
- Identify sponsor(s) of the bill
- Train lobbyists
- Start advocating to decision-makers and lobbying legislators
- Secure support from Democratic leadership

Media/Communications

- Obtain an editorial from leading newspaper

Research

- Legislative drafting and research

Next Steps

- Schedule an in-person meeting in both SoCal and NorCal to follow up on next steps
- Schedule a statewide conference call after the in-person meetings