

HIV CRIMINALIZATION IN CALIFORNIA: EVALUATION OF TRANSMISSION RISK

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EXECUTIVE SUMMARY

HIV Criminalization is a term used to describe laws that criminalize otherwise legal conduct or increase penalties for criminal conduct based on a person's HIV-positive status. Currently, California has four HIV-specific criminal laws. Of those, none require actual transmission of HIV. This report analyzed the law, science and implementation of these statutes to determine the risk of transmission of the criminalized acts and the extent to which they are prosecuted. Key findings included:

- From 1988 until June 2014, 379 incidents resulted in convictions for an HIV-specific felony or sentence enhancement. Of those:
 - 100% required no actual transmission of HIV.
 - 98% percent did not require intent to transmit HIV.
 - Only seven incidents – less than two percent – had intent to transmit HIV as an element of the crime.
 - 93% involved no specific allegation of conduct that is likely to have transmitted the virus:
 - Ninety percent of convictions were in solicitation incidents in which it is unknown whether any contact beyond a conversation or an exchange of money was initiated, thus possibly not having any exposure to HIV.
 - Three percent of incidents involved oral sex, a sex act whose transmission risk is estimated as “low” by the CDC.
 - Only seven percent of incidents involved vaginal or anal sex by definition of the crime.
- Laws related to donation of blood, tissue, semen or breast milk do not appear to have ever been enforced. They also do not provide any protection against exposure to or transmission of HIV that is not already provided through standard medical screening and testing procedures.
- Sex work prosecutions disproportionately impact women and people of color in California. Since solicitation by definition includes survival and subsistence sex work, these laws are also likely to disproportionately impact LGBT youth and transgender women of color.
- Among the arrests related to the felony exposure law, for those that resulted in convictions under any offense, 43% had final convictions only under sex work laws and not under the felony exposure law. Though none of the sex workers in this context were ultimately convicted under the exposure felony, it is possible that the exposure felony was used to pressure the workers into plea deals with longer sentences.
- Among the sentence enhancements for nonconsensual sex offenses while living with HIV, 6% were applied in solicitation incidents, and 38% were applied where the predicate offense involved only oral sex.
- Laws that criminalize the conduct of a person who knows that they are HIV-positive may disincentivize testing and work against best public health practices.
- Current HIV criminal laws in California do not address the medical advances that antiretroviral medications and pre-exposure prophylaxis have made in reducing the risk of HIV transmission and extending the quantity and quality of life for people living with HIV. While the laws may have been driven by fear and lack of knowledge when they were first passed, modern medicine and technology have shown that these laws are now outdated and may, in fact, work against best public health practices.



I. INTRODUCTION

HIV Criminalization is a term used to describe laws that criminalize otherwise legal conduct or increase penalties for criminal conduct based on a person’s HIV-positive status. Currently, California has four HIV-specific criminal laws (See Table 1). This report will analyze each of these code sections more deeply to determine exactly what conduct is or is not prohibited as well as the risk that such conduct poses of transmission of HIV. We will also review the enforcement of these laws over time in determining what level of risk is posed by the conduct that is most often criminalized in California.

Table 1. HIV Criminalization Laws in California (2016)

Code Section	Criminalized Conduct	Felony/Misdemeanor and Statutory Sentence
CAL. HEALTH & SAFETY CODE §1621.5	Having knowledge that one is HIV-positive while donating blood, tissue, semen or breast milk	Felony punishable by imprisonment for two, four, or six years
CAL. PENAL CODE §647F	Solicitation if the person tested positive for HIV in a prior solicitation or other sex offense that resulted in mandatory HIV testing	Felony punishable by imprisonment for 16 months or longer
CAL. HEALTH & SAFETY CODE §120291	Anal or vaginal sex without a condom in which an HIV-positive person does not disclose their status and has a specific intent to transmit the disease to their sex partner	Felony punishable by imprisonment in state prison for three, five, or eight years
CAL. PENAL CODE §12022.85	Having knowledge that one is HIV-positive while engaging in a nonconsensual sex crime ¹	Three year sentence enhancement

¹ The statute’s defined underlying predicate crimes are: oral copulation (CAL. PENAL CODE §288A), statutory rape (CAL. PENAL CODE §261.5), sodomy (CAL. PENAL CODE §286), rape (CAL. PENAL CODE §261) and spousal rape (CAL. PENAL CODE §262).



II. CAL. HEALTH & SAFETY CODE §1621.5

A. Blood

1. Offense

“It is a felony punishable by imprisonment...for two, four, or six years, for any person [who knows that they are HIV-positive] to donate blood...to any medical center...whether he or she is a paid or a volunteer donor.”² This does not apply to a person (1) who is mentally incompetent, (2) who self-defers his or her blood at a blood bank or plasma center, i.e., who informs the blood bank or plasma center that their blood should not be used for a transfusion, or (3) who donates his or her blood for purposes of an autologous donation.³ This is a strict liability crime, meaning that the donor’s intent is not considered in charging or convicting a person of the crime – action alone is all that is required for a person to be guilty under this offense. Additionally, transmission is not required to violate this offense; nor is proof of actual HIV exposure to another person.

2. Transmission Risk

The FDA requires that all blood that is donated in the United States be screened for HIV as well as Hepatitis B and C, Human T-Lymphotropic Virus (HTLV), syphilis, West Nile virus, *Trypanosoma cruzi* (Chagas disease), and cytomegalovirus (CMV).⁴ HIV screening procedures in the United States include serologic testing and minipool nucleic acid testing (MP-NAT), which pools six to sixteen samples and screens them together to detect HIV antibodies.⁵ The accuracy of current tests leave almost no room for error and are able to screen out virtually all HIV-positive blood donations that are not in the window period during which a newly infected person does not yet test positive for HIV due to limitations in diagnostic detection. However, because of the window period (10 - 14 days from onset of infection with nucleic acid testing), there is still a very small risk of an HIV-positive donation entering the blood supply.⁶ Current scientific assessments estimate the risk of an HIV-positive blood transfusion in the U.S. blood

² CAL. HEALTH & SAFETY CODE §1621.5(a).

³ *Id.*

⁴ U.S. Food & Drug Admin., *Complete List of Donor Screening Assays for Infectious Agents and HIV Diagnostic Assays*, VACCINES, BLOOD & BIOLOGICS, http://www.fda.gov/BiologicsBloodVaccines/BloodBloodProducts/ApprovedProducts/LicensedProductsBLAs/BloodDonorScreening/InfectiousDisease/ucm080466.htm#HBsAg_Assays (last updated May 3, 2016). Additionally, the FDA recently released guidance recommending that all states and U.S. territories either screen blood with a screening test that is still under investigation for Zika or use an FDA-approved pathogen-reduction device for plasma and certain platelet products. U.S. FOOD & DRUG ADMIN., REVISED RECOMMENDATIONS FOR REDUCING THE RISK OF ZIKA VIRUS TRANSMISSION BY BLOOD AND BLOOD COMPONENTS: GUIDANCE FOR INDUSTRY 8 (Aug., 2016), *available at* <http://www.fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/Blood/UCM518213.pdf>.

⁵ Steven Kleinman, *Risk of HIV from Blood Transfusion*, UPTODATE, <https://www.uptodate.com/contents/risk-of-hiv-from-blood-transfusion> (last updated June 16, 2016).

⁶ CTR. FOR DISEASE CONTROL & PREVENTION, LABORATORY TESTING FOR THE DIAGNOSIS OF HIV INFECTION: UPDATED RECOMMENDATIONS 11 (June 27, 2014), *available at* <https://stacks.cdc.gov/view/cdc/23447>.

supply at about one in 1.4 million to one in 2.3 million.⁷ Since 2002, there has been only one person in the United States who has tested positive for HIV due to a transfusion, and that person was put on antiretroviral therapy and maintained at an undetectable viral load as soon as possible.⁸

In order for a person to know that they are HIV-positive, they must receive results of a positive test. In order for a person to receive positive test results, they must be outside of the window period when their infection cannot yet be detected by standard screening tests. Since all HIV-positive blood donations that are outside of the window period can and will be screened out by standard FDA screening tests, any person who knowingly donates HIV-positive blood poses no risk to the blood supply, as their blood will be detected and removed by standard screening tools before entering the blood supply. Therefore, a felony law against knowing HIV-positive blood donations does nothing to protect the blood supply, and such a donation poses no risk of transmission.

3. Enforcement

California Department of Justice Criminal Offender Record Information (CORI) data do not have an offense code for CAL. HEALTH & SAFETY CODE §1621.5. Given that there are over 6,500 offense codes to categorize all of the different crimes that can be committed in California under state and federal law, this implies that CAL. HEALTH & SAFETY CODE §1621.5 has never been enforced.

B. Tissue

1. Offense

“It is a felony punishable by imprisonment...for two, four, or six years, for any person [who knows that they are HIV-positive] to donate...tissue...to any medical center...whether he or she is a paid or a volunteer donor.”⁹ This does not apply to a person who is mentally incompetent.¹⁰ This is a strict liability crime, meaning that the donor’s intent is not considered in charging or convicting a person of the crime – action alone is all that is required for a person to be guilty under this offense. Additionally, neither transmission nor exposure is required to violate this offense.

In 2013, Congress passed the Federal HIV Organ Policy Equity (HOPE) Act, which allows organ donations between HIV-positive donors and HIV-positive recipients who are under the care of approved research institutions that are following the criteria put forth by the Organ Procurement and Transplantation Network.¹¹ The federal definition of “organs” in this context includes vascularized composite allograft,¹² also known as donor tissue. However, based on current scientific advances and NIH protocol, at this time, only kidneys and livers are being used from HIV-positive

⁷ D. Michael Strong & Louis Katz, *Blood-Bank Testing for Infectious Diseases: How Safe is Blood Transfusion?*, 8(7) TRENDS IN MOLECULAR MED. 355, 356 (2002), available at <http://www.sciencedirect.com/science/article/pii/S1471491402023614>; Shimian Zou, et al., *Prevalence, Incidence, and Residual Risk of Human Immunodeficiency Virus and Hepatitis C Virus Infections Among United States Blood Donors Since the Introduction of Nucleic Acid Testing*, 50 TRANSFUSION 1495 (2010), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1537-2995.2010.02622.x/epdf>; R.Y. Dodd, E.P. Notari IV, and S.L. Stramer, *Current Prevalence and Incidence of Infectious Disease Markers and Estimated Window-Period Risk in the American Red Cross Blood Donor Population*, 42 TRANSFUSION 975 (2002), available at <http://onlinelibrary.wiley.com/doi/10.1046/j.1537-2995.2002.00174.x/epdf>; Michael P. Busch, et al., *A New Strategy for Estimating Risks of Transfusion-Transmitted Viral Infections Based on Rates of Detection of Recently Infected Donors*, 45 TRANSFUSION 254 (2005), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1537-2995.2004.04215.x/epdf>.

⁸ *Ctr. for Disease Control & Prevention, HIV Transmission Through Transfusion --- Missouri and Colorado, 2008*, MORBIDITY AND MORTALITY WEEKLY REPORT, <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5941a3.htm> (last updated Oct. 22, 2010).

⁹ CAL. HEALTH & SAFETY CODE §1621.5(a).

¹⁰ *Id.*

¹¹ 42 U.S.C. § 274f-5.

¹² 42 C.F.R. § 121.2.

donors.¹³ In 2016, California amended CAL. HEALTH & SAFETY CODE §1621.5 to come in line with the Federal HOPE Act and permit organ donations between HIV-positive donors and recipients.¹⁴ However, California did not remove the prohibition against tissue donations by HIV-positive donors, which will limit the ability to use HIV-positive tissue donations in the future when biomedical advances achieve the ability to make safe transplants of such tissue.

2. Transmission Risk

Like blood donations, all tissue donors must be screened and tested for HIV prior to transplantation.¹⁵ The highest risk of HIV-positive tissue donations is among donors who are deceased, because such individuals cannot directly answer questions about risk behaviors and profiles.¹⁶ Additionally, it is unclear whether HIV tests have the same effectiveness on cadavers.¹⁷ Among living donors, pre-screening questionnaires and HIV testing eliminate almost all risk of receiving tissue donations from people living with HIV who are outside the window period. While there is a risk of HIV-positive tissue donation during the window period, it is exceedingly small. Additionally, the Organ Procurement and Transplantation Network policy requires informed consent and that prophylaxis be offered (if available) to recipients from donors who are at increased risk for transmission of blood-borne pathogens.¹⁸

Risk of transmission of HIV in a tissue transplant is nearly zero, though it varies based on the type of tissue donated. Avascular or relatively avascular tissue donations – donations of tissue that contains limited or no blood vessels or lymphatics, such as the corneas, musculoskeletal tissue and dura matter – have not resulted in HIV transmission.¹⁹ This may be due, in part, to their avascularity, and in part, to tissue processing, which can inactivate HIV.²⁰ The few transmission events from tissue donations outside of large organs have been in “vascular tissues, including large marrow containing bone pieces and skin.”²¹ Nevertheless, since the advent of nucleic acid testing (NAT), no HIV transmissions have occurred in musculoskeletal or skin allografts, also known as bone and connective or skin tissue donations, in the last 20 years.²²

Like blood donations, in order for a person to knowingly donate HIV-positive tissue, they would have to have received positive test results, which by definition would require that they are outside the window period. Since all HIV-positive intended tissue donors that are outside of the window period can and will be screened out by standard HIV tests, any person who knowingly attempts to donate HIV-positive tissue would be prescreened

¹³ U.S. Dep’t of Health & Human Serv., *Hope Act*, ORGAN PROCUREMENT AND TRANSPLANTATION NETWORK <https://optn.transplant.hrsa.gov/learn/professional-education/hope-act/> (last visited Nov. 22, 2016).

¹⁴ S.B. 1408, 2015-2016 Leg., (Cal. 2016), available at https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB1408.

¹⁵ ORGAN PROCUREMENT AND TRANSPLANTATION NETWORK | UNITED NETWORK FOR ORGAN SHARING, MEMBER EVALUATION PLAN 9, 35 (Sept. 29, 2016), available at https://optn.transplant.hrsa.gov/media/1202/evaluation_plan.pdf.

¹⁶ A. Pruss, et al., *Tissue Donation and Virus Safety: More Nucleic Acid Amplification Testing is Needed*, 12 *TRANSPLANT INFECTIOUS DISEASE* 375, 378-79 (2010), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1399-3062.2010.00505.x/epdf>. Nevertheless, the Organ Procurement and Transplantation Network policy requires a review of a deceased donor’s medical and behavioral history and a complete physical examination. ORGAN PROCUREMENT AND TRANSPLANTATION NETWORK, POLICIES 20 (Nov. 10, 2016), available at https://optn.transplant.hrsa.gov/media/1200/optn_policies.pdf.

¹⁷ I. Wilkemeyer, et al., *Comparative Infectious Serology Testing of Pre- and Post-Mortem Blood Samples from Cornea Donors*, 13 *CELL & TISSUE BANKING* 447 (2012), available at <http://link.springer.com/article/10.1007%2Fs10561-012-9326-0>.

¹⁸ ORGAN PROCUREMENT AND TRANSPLANTATION NETWORK, POLICIES, *supra* note 16 at 197.

¹⁹ R.J. Simonds, AIDS TESTING: A COMPREHENSIVE GUIDE TO TECHNICAL, MEDICAL, SOCIAL, LEGAL, AND MANAGEMENT ISSUES 237 (Gerald Schochetman & J. Richard George, eds., 1994), available at http://link.springer.com/chapter/10.1007/978-1-4612-0867-9_13#page-1; J.P. Pirnay, et al., *HIV Transmission by Transplantation of Allograft Skin: a Review of the Literature*, 23 *BURNS* 1 (1997) available at <http://www.sciencedirect.com/science/article/pii/S0305417996000812>.

²⁰ SIMONDS, *supra* note 19; Pirnay, et al., *supra* note 19 at 2; Ellen Heck, Allen Brown, Dwight H. Cavanagh, *Nucleic Acid Testing and Tissue Safety: An Eye Bank’s Five-Year Review of HIV and Hepatitis Testing for Donor Corneas*, 32 *CORNEA* 503, 505 (2013).

²¹ SIMONDS, *supra* note 19.

²² M. Hinsenkamp, et al., *Adverse Reactions and Events Related to Musculoskeletal Allografts: Reviewed by the World Health Organisation Project NOTIFY*, 36 *INT’L ORTHOPAEDICS* 633 (2012), available at <http://link.springer.com/article/10.1007/s00264-011-1391-7>; Pruss, et al., *supra* note 16 at 380.

and rejected before being able to make a donation. Therefore, standard medical procedures would make it impossible for any living person to intentionally donate HIV-positive tissue. Therefore, a felony law against knowing HIV-positive blood donations does nothing to protect donor tissue recipients, as standard medical procedures are already in place to eliminate such donations.

3. Enforcement

California Department of Justice Criminal Offender Record Information (CORI) data do not have an offense code for CAL. HEALTH & SAFETY CODE §1621.5. Given that there are over 6,500 offense codes to categorize all of the different crimes that can be committed in California under state and federal law, this implies that CAL. HEALTH & SAFETY CODE §1621.5 has never been enforced. Also, since it would be impossible for a living person to intentionally donate HIV-positive tissue without being prescreened and rejected, it would be impossible to prosecute someone for such a donation under this offense.

C. Semen

1. Offense

“It is a felony punishable by imprisonment...for two, four, or six years, for any person [who knows that they are HIV-positive] to donate...semen to any medical center or semen bank that receives semen for purposes of artificial insemination...whether he or she is a paid or a volunteer donor.”²³ This does not apply to a person who is mentally incompetent;²⁴ nor does it apply to an HIV-positive sperm donor who is a known donor to the recipient and whose sperm has been “processed to minimize the infectiousness of the sperm for that specific donation and where informed and mutual consent has occurred.”²⁵ This is a strict liability crime, meaning that the donor’s intent is not considered in charging or convicting a person of the crime – action alone is all that is required for a person to be guilty under this offense. Additionally, neither transmission nor exposure is required to violate this offense.

2. Transmission Risk

When collecting sperm donations that are not directed to sexually intimate partners,²⁶ sperm banks are required to review “relevant medical records” for risk factors for, and clinical evidence of, communicable diseases, including HIV.²⁷ This includes a required physical examination and clinical tests for HIV.²⁸ For anonymous donors, the sperm must be quarantined for six months and the donor retested after six months before the donation is released for use.²⁹

The risk of HIV transmission in anonymous sperm donations is completely eliminated through the use of HIV testing, six-month quarantine and retesting of the donor. The window period in which a person could be HIV-positive and not test positive is generally no longer than 12 weeks using antibody based testing, and much

²³ CAL. HEALTH & SAFETY CODE §1621.5(a).

²⁴ *Id.*

²⁵ CAL. HEALTH & SAFETY CODE §1644.5. A spouse or partner of an HIV-positive sperm donor may consent to use of their partner’s sperm for insemination so long as both partners sign an informed consent, regardless of whether the sperm is processed to reduce the risk of transmission.

²⁶ 21 C.F.R. §1271.90.

²⁷ U.S. FOOD & DRUG ADMIN., GUIDANCE FOR INDUSTRY: ELIGIBILITY DETERMINATION FOR DONORS OF HUMAN CELLS, TISSUES, AND CELLULAR AND TISSUE-BASED PRODUCTS 36 (Aug. 2007), *available at* <http://www.fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/Tissue/UCM091345.pdf>. Among other ineligibilities, men who have had sex with other men in the previous five years are deemed ineligible to donate tissue or sperm. *Id.* at 14.

²⁸ *Id.* at 21-25; 31-32.

²⁹ 21 C.F.R. § 1271.85(d); U.S. FOOD & DRUG ADMIN., GUIDANCE FOR INDUSTRY *supra* note 27 at 37. The six-month quarantine and follow-up testing is not required for directed (i.e. known) sperm donors.

shorter with nucleic acid tests (less than 14 days), which are the standard among donors.³⁰ Retesting after six months will definitely ensure that if the person was HIV-positive but in the window period at the time of depositing their sperm donation, the second test will detect it and prevent use of infected sperm. Among known donors who are not the sexually intimate partner of the recipient, initial screening and testing is still required, but the six month quarantine and re-testing can be waived.³¹ However, like in blood and tissue donations, in order for a person to knowingly make an HIV-positive sperm donation, they would have to have had a previous positive test, which means that they would have been outside the window period and would have tested positive when being screened before their donation. Therefore, there is no risk of transmission from a directed donor who knows that they are HIV-positive.

The only times that all screening requirements are waived is when sperm donations are made between sexually intimate partners.³² In such cases, the assumption is made that the partners are aware of each other's health status and risk of transmission is assessed mutually between the partners, and when there is a known HIV infection, treatment is available to reduce transmission risk.³³ While screening and testing are not required under the law, sexually intimate partners are still always allowed to undergo the same screening and testing as anyone else prior to sperm donation.

3. Enforcement

California Department of Justice Criminal Offender Record Information (CORI) data do not have an offense code for CAL. HEALTH & SAFETY CODE §1621.5. Given that there are over 6,500 offense codes to categorize all of the different crimes that can be committed in California under state and federal law, this implies that CAL. HEALTH & SAFETY CODE §1621.5 has never been enforced.

D. Breast Milk

1. Offense

"It is a felony punishable by imprisonment...for two, four, or six years, for any person [who knows that they are HIV-positive] to donate...breast milk to any medical center or breast milk bank that receives breast milk for purposes of distribution, whether he or she is a paid or a volunteer donor."³⁴ This does not apply to a person who is mentally incompetent.³⁵ This is a strict liability crime, meaning that the donor's intent is not considered in charging or convicting a person of the crime – action alone is all that is required for a person to be guilty under this offense. Additionally, neither transmission nor exposure is required to violate this offense.

2. Transmission Risk

California law already prohibits the use of "human breast milk from donors who test reactive for agents of viral hepatitis (HBV and HCV), HTLV, HIV, or syphilis" in milk banks statewide.³⁶ California follows the "current standards

³⁰ Ctr. for Disease Control & Prevention, *Testing*, ACT AGAINST AIDS, <http://www.cdc.gov/actagainstaids/basics/testing.html> (last updated Oct. 27, 2016).

³¹ CAL. HEALTH & SAFETY CODE § 1644.5(c)(1).

³² 21 C.F.R. § 1271.90.

³³ Sperm washing can "markedly reduce HIV levels prior to insemination." Am. Soc'y for Reprod. Med., *Recommendations for Reducing the Risk of Viral Transmission During Fertility Treatment with the Use of Autologous Gametes: A Committee Opinion*, 99 FERTILITY & STERILITY 340, 342 (2013), available at [https://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Practice_Guidelines/Guidelines_and_Minimum_Standards/Guidelines_for_reducing\(1\).pdf](https://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Practice_Guidelines/Guidelines_and_Minimum_Standards/Guidelines_for_reducing(1).pdf).

³⁴ CAL. HEALTH & SAFETY CODE §1621.5(a).

³⁵ *Id.*

³⁶ CAL. HEALTH & SAFETY CODE § 1644.5(f)

established for the collection, processing, storage, or distribution of human milk by the Human Milk Banking Association of North America.”³⁷ The Human Milk Banking Association of North America (HMBANA) requires donors to undergo blood testing and refuses donations from women who are HIV-positive or who are at risk for HIV or who have sexual partners who are at risk for HIV.³⁸ Additionally, all of the donated milk is pasteurized using the Holder method.³⁹ Pasteurization to 60°C, also known as Holder Pasteurization, inactivates HIV in human breast milk.⁴⁰ Based on these criteria, there is no risk of transmission of HIV from donor breast milk from a milk bank.

3. Enforcement

California Department of Justice Criminal Offender Record Information (CORI) data do not have an offense code for CAL. HEALTH & SAFETY CODE §1621.5. Given that there are over 6,500 offense codes to categorize all of the different crimes that can be committed in California under state and federal law, this implies that CAL. HEALTH & SAFETY CODE §1621.5 has never been enforced. Also, since all HIV-positive women who may seek to donate breast milk would be prescreened and rejected when they tested positive for HIV, there is no way for a person to violate this law in the state of California.

³⁷ CAL. HEALTH & SAFETY CODE § 1648; CAL. WELF. & INST.CODE § 14132.34.

³⁸ HUMAN MILK BANKING ASSOC. OF N. AM., DONATE MILK, <https://www.hmbana.org/donate-milk> (last visited Nov. 23, 2016).

³⁹ HUMAN MILK BANKING ASSOC. OF N. AM., DONOR HUMAN MILK PROCESSING, <https://www.hmbana.org/milk-processing> (last visited Nov. 23, 2016).

⁴⁰ Mark A. Underwood & Jennifer A. Scoble, *Human Milk and Premature Infant: Focus on Use of Pasteurized Donor Human Milk in NICU*, 2 DIET & NUTRITION IN CRITICAL CARE 795, 797 (2015), available at http://link.springer.com/referenceworkentry/10.1007/978-1-4614-7836-2_73.



III. CAL. PENAL CODE §647F

A. Offense

Under California law, all people convicted of solicitation, as well as those convicted of a variety of other sex offenses, are required to undergo mandatory HIV testing.⁴¹ A misdemeanor charge of solicitation under CAL. PENAL CODE 647(b) becomes a felony if the person has an HIV-positive test result from a prior conviction recorded in their criminal record. Solicitation under California law is defined as soliciting or agreeing (with some act in furtherance) to engage in any “lewd act between persons for money or other consideration.”⁴² By definition, solicitation requires no sexual contact; rather, it is an agreement or request to engage in sex work, and by nature of the challenge of arresting people while they are engaged in sex acts, most people arrested for solicitation are arrested while having a conversation, stepping into a car, or exchanging money – in other words, at a time when no physical contact has occurred.

This is a strict liability crime, meaning that the sex worker’s intent is not considered in charging or convicting a person of the crime – action alone is all that is required for a person to be guilty under this offense. Additionally, neither transmission nor exposure is required to violate this offense; disclosure of one’s status, and use of pre-exposure prophylaxis, condoms or antiretroviral therapy to reduce transmission risk are not considered in the language of the statute. In fact, a person living with HIV convicted under this statute would still be guilty under the law if they were soliciting HIV-positive clients.

B. Transmission Risk

Because solicitation is only a request or an agreement, there is no risk of HIV transmission from solicitation alone. Negotiating, exchanging money, and conversation carry no risk of HIV transmission. Assuming that a person was arrested for solicitation while in the middle of sexual contact, the type of sex act would determine the risk of transmission. The CDC estimates⁴³ the per-act risk of transmission in unprotected sex as follows:

Table 2. Per-Act Transmission Risk in Unprotected Sex Acts

Receptive Anal Intercourse	1.38%
Insertive Anal Intercourse	.11%
Receptive Penile-Vaginal Intercourse	.08%
Insertive Penile-Vaginal Intercourse	.04%
Receptive Oral Intercourse	Low
Insertive Oral Intercourse	Low

⁴¹ CAL. PENAL CODE § 1202.1.

⁴² CAL. PENAL CODE § 647(b).

⁴³ Ctr. for Disease Control & Prevention, *HIV Risk Behaviors*, HIV/AIDS, <http://www.cdc.gov/hiv/risk/estimates/riskbehaviors.html> (last updated Dec. 4, 2015).

These estimates do not consider actions that could be taken to lower the risk of transmission, such as male circumcision in vaginal intercourse (50% reduction), condom use (63 – 80% reduction), consistent use of pre-exposure prophylaxis (90 – 92% reduction), or consistent use of antiretroviral therapy by the sex partner living with HIV (96% reduction).⁴⁴ They also do not consider circumstances that could increase risk of transmission, such as the presence of other sexually transmitted diseases (approximately 2.5 times the risk), acute HIV infection (7.25 times the risk), late-stage HIV infection (5.81 times the risk) and high viral load (increases with higher viral load).⁴⁵

C. Enforcement

Almost all enforcement of HIV-specific crimes in California – 95% – has been in the context of solicitation. From 1988 to June 2014, 753 people had contact with the California criminal system related to felony solicitation, and of them, 222 people were charged with and convicted of 340 felony solicitation offenses.⁴⁶ Based on available data, there is no way to know the exact factual context of a solicitation arrest; i.e. whether it was during sexual contact or prior to any physical contact. However, given the challenges in enforcing solicitation laws outside of public spaces, it is highly likely that the vast majority of these arrests occurred prior to any sexual contact and when there was no risk of HIV transmission.

⁴⁴ Ctr. for Disease Control & Prevention, *Effectiveness of Prevention Strategies to Reduce the Risk of Acquiring or Transmitting HIV*, HIV/AIDS, <http://www.cdc.gov/hiv/risk/estimates/preventionstrategies.html> (last updated Jan. 7, 2016).

⁴⁵ Ctr. for Disease Control & Prevention, *Factors Increasing the Risk of Acquiring or Transmitting HIV*, HIV/AIDS, <http://www.cdc.gov/hiv/risk/estimates/riskfactors.html> (last updated Dec. 4, 2015); Maria J. Wawer, et al., *Rates of HIV-1 Transmission per Coital Act, by Stage of HIV-1 Infection, in Rakai, Uganda*, 191 J. INFECTIOUS DISEASES 1403, 1407 (2005), available at <http://www.jstor.org/stable/pdf/30077377.pdf>. For a more detailed review of the link between viral load and transmission risk, see NAM AIDSMAP, VIRAL LOAD AND SEXUAL TRANSMISSION RISK, <http://www.aidsmap.com/Viral-load-and-sexual-transmission-risk/page/1322782/> (last visited Nov. 23, 2016).

⁴⁶ For a more detailed analysis of HIV criminalization enforcement in California, see AMIRA HASENBUSH, AYAKO MIYASHITA & BIANCA D.M. WILSON, THE WILLIAMS INST. UNIV. OF CAL. L.A. SCH. OF LAW, HIV CRIMINALIZATION IN CALIFORNIA: PENAL IMPLICATIONS FOR PEOPLE LIVING WITH HIV/AIDS (2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Criminalization-California-Updated-June-2016.pdf>.

IV. CAL. HEALTH & SAFETY CODE §120291

A. Offense

It is a felony punishable by incarceration in state prison for three, five or eight years if a person who knows that they are HIV-positive engages in insertive or receptive vaginal or anal intercourse without a condom and (1) they do not disclose their HIV-positive status to their sex partner and (2) they act with the specific intent to transmit the virus to the other person.⁴⁷ “Evidence that the person had knowledge of his or her HIV-positive status, without additional evidence, shall not be sufficient to prove specific intent.”⁴⁸ A violation of this statute does not require transmission of HIV.

B. Transmission Risk

This law was passed in 1998. Since then, antiretroviral therapy has enabled people living with HIV to suppress their viral loads to undetectable levels, reducing the risk of transmission by 96%.⁴⁹ Additionally, in 2012, the United States Food and Drug Administration approved the use of Truvada, a one-pill-per-day preventive treatment for HIV-negative individuals to prevent acquiring HIV.⁵⁰ The efficacy of Truvada in preventing infection has been found to vary based on transmission routes and medication adherence, but has ranged in reducing transmission from 44% among those with low medication adherence⁵¹ to 99% among those who consistently take the pill every day.⁵² The law has not been updated to take into account these biomedical advances.

The CDC estimates⁵³ the per-act risk of transmission in anal and vaginal sex without a condom as follows:

Table 3. Per-Act Transmission Risk in Unprotected Anal and Vaginal Intercourse

Receptive Anal Intercourse	1.38%
Insertive Anal Intercourse	.11%
Receptive Penile-Vaginal Intercourse	.08%
Insertive Penile-Vaginal Intercourse	.04%

These estimates do not consider actions that could be taken to lower the risk of transmission, such as male circumcision in vaginal intercourse (50% reduction), condom use (63 – 80% reduction), consistent use of pre-exposure prophylaxis (90 – 92% reduction), or consistent use of antiretroviral therapy by the sex partner living

⁴⁷ CAL. HEALTH & SAFETY CODE §120291

⁴⁸ *Id.*

⁴⁹ M.S. Cohen, et al., *Antiretroviral Therapy for the Prevention of HIV-1 Transmission*, 375 *New Eng. J. Med.* 830, 831 (2016), available at <http://www.nejm.org/doi/pdf/10.1056/NEJMoa1600693>.

⁵⁰ Press Release, U.S. Food & Drug Admin., FDA Approves First Drug for Reducing the Risk of Sexually Acquired HIV Infection (July 16, 2012) <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm312210.htm>.

⁵¹ Robert M. Grant et al., *Preexposure Chemoprophylaxis for HIV Prevention in Men Who Have Sex with Men*, 363 *NEW ENGL. J. MED.* 2587, 2594 (2010), available at <http://www.nejm.org/doi/full/10.1056/NEJMoa1011205#t=articleTop>.

⁵² Peter L. Anderson, et al., *Emtricitabine-Tenofovir Exposure and Pre-Exposure Prophylaxis Efficacy in Men who have Sex with Men*, 4 *Sci. Translational Med.* 1, 4 (2012), available at <http://stm.sciencemag.org/content/4/151/151ra125>.

⁵³ Ctr. for Disease Control & Prevention, *HIV Risk Behaviors*, *supra* note 43.

with HIV (96% reduction).⁵⁴ They also do not consider circumstances that could increase risk of transmission, such as the presence of other sexually transmitted diseases (approximately 2.5 times the risk), acute HIV infection (7.25 times the risk), late-stage HIV infection (5.81 times the risk) and high viral load (varies based on how high the viral load is).⁵⁵

C. Enforcement

From the time the law was passed until June 2014 (the most recent data analyzed), there were 33 incidents that involved CAL. HEALTH & SAFETY CODE §120291. Of the 33 incidents involving this crime, 10 were dropped with no charges at all, and the remaining 23 incidents resulted in charges under a variety of laws. Of the 23 charged cases, seven resulted in non-HIV-related charges, and 16 resulted in HIV-related charges. Among the non-HIV-related group, five of the seven incidents were charged with and convicted of misdemeanor solicitation. Among the HIV-specific group, five of the 16 incidents were charged with and convicted only of felony solicitation while HIV-positive. None of those ten sex work incidents (five misdemeanor and five felony) resulted in convictions under CAL. HEALTH & SAFETY CODE §120291. Of the remaining 11 HIV-related incidents, three were convictions under CAL. HEALTH & SAFETY CODE §120291 with no other charges, three were convictions under CAL. HEALTH & SAFETY CODE §120290, the misdemeanor exposure law that is applicable to any communicable disease and does not require proof of intent to transmit, and five were convictions under sexual assault laws in conjunction with either the misdemeanor exposure law or the felony exposure with intent to transmit law. (See table 4.)

Table 4. Convictions in Incidents Involving CAL. HEALTH & SAFETY CODE §120291

Convictions for incidents that involved CAL. HEALTH & SAFETY CODE §120291, but did not result in HIV-related charges	
Offense	Number of Incidents
Misdemeanor Solicitation	5
Other/Miscellaneous	2
Total	7
Convictions for incidents that involved CAL. HEALTH & SAFETY CODE §120291, and resulted in HIV-related charges	
Offense	Number of Incidents
Felony Solicitation while HIV-positive	5
Sexual Assault + Exposure with Intent to Transmit HIV	4
Exposure with Intent to Transmit HIV	3
Misdemeanor Exposure to a Communicable Disease	3
Sexual Assault + Misdemeanor Exposure to a Communicable Disease	1
Total	16

⁵⁴ Ctr. for Disease Control & Prevention, *Effectiveness of Prevention Strategies*, *supra* note 44.

⁵⁵ Ctr. for Disease Control & Prevention, *Factors Increasing the Risk*, *supra* note 45; Wawer, et al., *supra* note 45. For a more detailed review of the link between viral load and transmission risk, see NAM AIDSMap, *supra* note 45.

These findings indicate that there have only been seven incidents in the 17 years of data analyzed in which a person was convicted of CAL. HEALTH & SAFETY CODE §120291. Based on the statutory definition of that offense, in these seven incidents, an HIV-positive person engaged in vaginal or anal intercourse without a condom and with intent to transmit the virus. Four of those incidents also resulted in convictions for some form of sexual assault. It is unknown whether the assault itself was used as proof to impute intent to transmit the virus or whether separate evidence was used to prove intent. Among the incidents that involved assault, assuming that there was some higher level of physical force, the risk of HIV transmission may have been higher than what is stated in Table 3 above.⁵⁶ In one of the assault incidents, it is impossible to know based on the offense charged whether the HIV itself was being used as a basis for the assault charge or whether there was a separate sexual assault.

⁵⁶ See section V, *infra* for a more detailed explanation of transmission risk in forced sexual acts.



V. CAL. PENAL CODE §12022.85

A. Offense

There is a three year sentence enhancement for any person who knows that they are HIV-positive when committing any of the following nonconsensual sex offenses: rape,⁵⁷ spousal rape,⁵⁸ unlawful intercourse with a person under 18 years of age (hereinafter “statutory rape”)⁵⁹, sodomy,⁶⁰ or oral copulation.⁶¹ In defining the physical acts that constitute rape, spousal rape and statutory rape, the statute states, “Any sexual penetration, however slight, is sufficient to complete the crime.”⁶² The physical act that constitutes sodomy is defined as, “contact between the penis of one person and the anus of another person. Any sexual penetration, however slight, is sufficient to complete the crime of sodomy.”⁶³ The physical act that constitutes oral copulation is defined as: “copulating the mouth of one person with the sexual organ or anus of another person.”⁶⁴ Additionally, there are different levels of intent and physicality defined in each of the statutes. Rape and spousal rape both require an additional element of lack of consent due to force, fraud, duress, or incapacity. Certain subsections of oral copulation and sodomy also include such elements. However, some subsections of oral copulation and sodomy as well as all subsections of statutory rape are related to the age of the parties involved and impute incapacity to consent on all individuals under the age of 18.

This is a strict liability crime, meaning that the perpetrator’s intent is not considered in charging or convicting a person of the crime – action alone is all that is required for a person to be guilty under this offense. Additionally, transmission is not required to violate this offense; and use of pre-exposure prophylaxis, condoms or antiretroviral therapy to reduce transmission risk is not considered in the language of the statute. In fact, a 19-year-old HIV-positive person with an undetectable viral load engaging in consensual (though statutorily nonconsensual) oral sex with a condom with a 17-year-old HIV-positive person would still be guilty and subject to a three year sentence enhancement under this law.

B. Transmission Risk

The CDC estimated per-act transmission risk of different sexual acts without a condom is listed in Table 2. However, these estimates do not take into account the increased risk of transmission that can occur during forced sex. Physical trauma from force can create tearing or inflammation that can increase susceptibility to infection.⁶⁵ Additionally if either the perpetrator or the survivor of the sexual assault has another STI at the time of the assault, inflammation from that can also increase risk of HIV infection.⁶⁶ In cases of spousal rape, or intimate partner

⁵⁷ CAL. PENAL CODE § 261.

⁵⁸ CAL. PENAL CODE § 262.

⁵⁹ CAL. PENAL CODE § 261.5.

⁶⁰ CAL. PENAL CODE § 286.

⁶¹ CAL. PENAL CODE § 288a.

⁶² CAL. PENAL CODE § 263.

⁶³ CAL. PENAL CODE § 286.

⁶⁴ CAL. PENAL CODE § 288a.

⁶⁵ Jessica E. Draughon, *Sexual Assault Injuries and Increased Risk of HIV Transmission*, 34 *Advanced Emergency Nursing J.*, 82 (2012), available at http://journals.lww.com/aenjournal/Abstract/2012/01000/Sexual_Assault_Injuries_and_Increased_Risk_of_HIV.12.aspx.

⁶⁶ *Id.*

violence, survivors are more likely to be in environments where they or their partners abuse substances and engage in higher risk sexual behaviors, and forced or coerced sex can occur with more frequency, all of which can continually increase the risk of HIV transmission.⁶⁷

These estimates also do not account for Post Exposure Prophylaxis (PEP), in which the exposed individual can take antiretroviral therapy to reduce the risk of HIV transmission. Although there are no randomized clinical trials, if started within 72 hours and taken for the complete 28 day course, PEP appears to be more than 95% effective in reducing HIV-transmission after sexual exposure.⁶⁸

C. Enforcement

From 1988 until June 2014, 31 individuals were charged with and convicted of 34 incidents that received the HIV-related sentence enhancement in nonconsensual sex offenses. Given the detailed coding in California Criminal Offender Record Information (CORI) data, analysis was able to be completed to determine what specific subsections of the nonconsensual sex crimes offenders were convicted under. In two incidents (6% of convictions), the sentence enhancement was applied to people engaged in solicitation and no other offense, even though under the statute, the sentence enhancement is limited to specific nonconsensual sex offenses that do not include solicitation.⁶⁹ In 13 incidents (38% of convictions), the sentence enhancement was applied to incidents that involved only oral copulation convictions, which is a sex act with one of the lowest risks of transmission of HIV. In 25 incidents (74% of convictions), the sentence enhancement was applied to convictions for offenses that did not have force as an element of the crime, indicating that there may not have been an enhanced risk of transmission in those incidents.⁷⁰

⁶⁷ J. C. Campbell, et al., *The Intersection of Intimate Partner Violence against Women and HIV/AIDS: A Review*, 15 INT'L J. INJURY CONTROL & SAFETY PROMOTION 221 (2008), available at <http://dx.doi.org/10.1080/17457300802423224>.

⁶⁸ Ctr. for Disease Control & Prevention, *PEP*, HIV/AIDS, <http://www.cdc.gov/hiv/basics/pep.html> (last updated July 12, 2016).

⁶⁹ It should be noted that in one of these incidents, the final sentence was only one year in prison, so even though the records show use of that code section, it may not have actually been applied in practice to add the full three years to the sentence.

⁷⁰ Sometimes, people are convicted under lesser-included offenses that are easier to prove rather than the full offense committed. This indicates that even though in 25 incidents, there was no conviction that had force as an element of the offense, some of those offenses may have still involved force in fact, but were not charged under those code sections. However, it is impossible to know if any of those incidents involved force in fact, because even if those incidents resulted in arrests under forcible sex offense code sections, those arrests may have been based on false information or may have been used specifically because of a person's HIV-positive status (e.g. arresting under assault with a deadly weapon, with HIV being used as the "weapon") rather than based on any physical force. Nevertheless, in 17 of the 25 incidents in which force was not an element of the conviction offense, force was also not an element of any of the arresting offenses, indicating that these likely were incidents that did not, in fact, involve physical force.



VI. DISCUSSION

From 1988 until June 2014, 379 incidents⁷¹ resulted in charges for an HIV-specific felony or sentence enhancement. Of those, 12 (3.2%) also involved assault convictions with an element of force, seven (1.8%) had intent to transmit HIV as an element of the crime, and none required proof of actual transmission of HIV. Twenty-six incidents (6.9%) involved vaginal or anal sex by definition of the crime, 13 incidents (3.4%) involved oral sex by definition, and the remaining 340 HIV-specific convictions (89.7%) were solicitation incidents in which it is unknown whether any contact beyond a conversation or an exchange of money was initiated.

These laws were passed in the late 1980s and 1990s. In those times, the full understanding of the extent to which antiretroviral therapy could extend the lives of people living with HIV and prevent transmission was not fully understood. HIV was seen as a death sentence, and thus, extremely high penalties were attached to acts that may have potentially exposed others to the virus.⁷² However, with proper medication adherence, people living with HIV can achieve viral suppression and have life expectancies almost identical to those who are not living with HIV. Additionally, the treatment as prevention paradigm has recognized that those with undetectable viral loads reduce their risk of transmitting HIV to others by 96%.

Criminal laws to prevent HIV exposure or transmission can disincentivize individuals from getting tested and knowing their HIV-status, since all of the laws require knowledge of one's status in order to be convicted. This can actually do more to harm than to help public health, since people who are living with HIV but don't know their status are estimated to account for one-third of new transmissions and are more likely than those who know their status to transmit the virus to others.⁷³

Laws that criminalize donation of HIV-positive blood, tissue, sperm and breast milk are outdated. There are already prohibitions on such donations and screening procedures to prevent people from making such donations in the first place and to identify and remove any accidental donations once they are made. Criminal laws in this context have never been used in California and likely only contribute to HIV exceptionalism and stigma by remaining on the books.

In the context of solicitation, these laws have disproportionately impacted women and people of color.⁷⁴ Under California law, solicitation includes soliciting or agreeing (with some act in furtherance) to engage in any "lewd act between persons for money **or other consideration** [emphasis added]."⁷⁵ By definition, this includes survival sex work, such as sex work in exchange for housing or food. This is much more likely to impact LGBT youth who are

⁷¹ This number does not add up perfectly to the other numbers in this document, because there were three incidents that had convictions for more than one HIV-specific offense.

⁷² For a fuller discussion of the legislative history and backgrounds of these laws, see HASENBUSH ET AL., *supra* note 46 at 6.

⁷³ Jacek Skarbinski, et al., *Human Immunodeficiency Virus Transmission at Each Step of the Care Continuum in the United States*, 175 JAMA INTERNAL MED. 588 (2015), available at <http://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2130723>.

⁷⁴ See HASENBUSH ET AL., *supra* note 46 at 17-19.

⁷⁵ CAL. PENAL CODE § 647(b).

disproportionately in the foster care system⁷⁶ and homeless,⁷⁷ and have reported high levels of subsistence and survival sex.⁷⁸ Additionally, transgender women, especially transgender women of color have reported extremely high levels of employment discrimination and often are forced to resort to underground economies, including sex work, to survive.⁷⁹ On the other hand, the common police practice of using of condoms as evidence of sex work discourages street-based sex workers and homeless youth from carrying and using a cheap and effective public health tool that can prevent transmission of HIV and other STDs.⁸⁰ Criminalization of both sex work and sex work while HIV-positive can also discourage street-based sex workers from negotiating safer sex practices fully with clients before agreeing to work with them for fear of being picked up by law enforcement while still in talks with clients. Thus, sex work criminalization can actually hinder positive public health messaging and practice.

Ten out of the 23 convictions that had arrests or other contacts related to the felony exposure law with intent to transmit HIV resulted in final convictions only under sex work laws. This demonstrates that in almost half (43%) of charged incidents that were related to the exposure with intent to transmit offense, a sex worker's solicitation was imputed to imply intent to transmit the virus. Though none of the sex workers in this context were ultimately convicted under the exposure with intent to transmit law, it is possible that they took plea agreements with higher sentencing than they would have otherwise had they not been threatened with charges under a crime that they had not committed.

Pre-exposure prophylaxis (PrEP) allows HIV negative individuals to take further steps in addition to condom use to prevent acquiring the virus by adhering to a one-a-day pill, and post-exposure prophylaxis (PEP) has been used to successfully reduce transmission rates for people who realize that they may have been exposed to HIV, be that through an occupational exposure or sexual contact. In the context of sexual assault, California law requires that sexual assault survivors who request HIV test results of their attacker be offered professional counseling to explain the extent to which they may or may not be at risk of HIV transmission as well as "to obtain referrals to appropriate health care and support services."⁸¹ The California HIV PEP after Sexual Assault Task Force in conjunction with The California State Office of AIDS have put out recommendations to help clinicians and first responders assess when to offer and recommend PEP to survivors of sexual assault.⁸² Nevertheless, the consistency of such offerings and availability varied widely by county when the recommendations were written in 2001.

⁷⁶ BIANCA D.M. WILSON, KHUSH COOPER, ANGELIKI KASTANIS & SHEILA NEZHAD, THE WILLIAMS INST. UNIV. OF CAL. L.A. SCH. OF LAW, SEXUAL AND GENDER MINORITY YOUTH IN FOSTER CARE: ASSESSING DISPROPORTIONALITY AND DISPARITIES IN LOS ANGELES (2014), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS_report_final-aug-2014.pdf.

⁷⁷ LAURA E. DURSO & GARY J. GATES, THE WILLIAMS INST. UNIV. OF CAL. L.A. SCH. OF LAW, SERVING OUR YOUTH: FINDINGS FROM A NATIONAL SURVEY OF SERVICE PROVIDERS WORKING WITH LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH WHO ARE HOMELESS OR AT RISK OF BECOMING HOMELESS (2012), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July-2012.pdf>.

⁷⁸ MEREDITH DANK, ET AL., URBAN INST., SURVIVING THE STREETS OF NEW YORK: EXPERIENCES OF LGBTQ YOUTH, YMSM, AND YSWW ENGAGED IN SURVIVAL SEX (2015) http://www.urban.org/research/publication/surviving-streets-new-york-experiences-lgbtq-youth-ymsm-and-ysww-engaged-survival-sex/view/full_report.

⁷⁹ JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY (2011) http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf.

⁸⁰ Megan McLemore, Human Rights Watch, Sex Workers at Risk: Condoms as Evidence of Prostitution in Four US Cities (2012) <https://www.hrw.org/report/2012/07/19/sex-workers-risk/condoms-evidence-prostitution-four-us-cities>.

⁸¹ CAL. PENAL CODE § 1202.1(d).

⁸² JOAN E. MYLES & JOSHUA BAMBERGER, OFFERING HIV PROPHYLAXIS FOLLOWING SEXUAL ASSAULT, RECOMMENDATIONS FOR THE STATE OF CALIFORNIA (2001) <http://www.cdph.ca.gov/programs/aids/Documents/RPT2001HIVPropFollowingSexAssault.pdf>.



VII. CONCLUSION

HIV criminal laws in California do not require any proof of transmission or even of exposure as an element of the crime. In fact, in three out of the four HIV-specific code sections, employment of measures to reduce transmission risk, like condom use or an undetectable viral load are not dealt with in the statutory language. In the fourth law, exposure with intent to transmit, condom use is a defense to the crime, but the law is out-of-date with modern medical science, not acknowledging the possibility of use of antiretroviral medications to suppress viral load in an infected partner or pre-exposure prophylaxis to prevent transmission in an uninfected partner. On the ground, these offenses have been primarily used to criminalize sex workers. Ninety percent of the HIV-specific convictions in California were under the felony solicitation law, which has no elements related to intent, exposure or methods that may have been taken to prevent transmission risk. While the laws may have been driven by fear and lack of knowledge when they were first passed, modern medicine and technology have shown that these laws are now outdated and may, in fact, work against best public health practices.

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