

California Considering Prison Condom Distribution

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Advocates argue that prison officials should distribute condoms to prisoners to help prevent HIV infection, yet only Vermont and Mississippi currently have programs allowing condom distribution in state prisons, and Mississippi's limited program is aimed at preventing unwanted pregnancies during conjugal visits rather than prevention of infection from HIV.¹ Distribution of condoms in prisons is "one of the many issues over which legal and public health interests conflict."²

Prison administrators do not allow the distribution of condoms for a variety of reasons. First, sexual activity in prison is a crime in many jurisdictions.³ Prison officials in those jurisdictions believe that allowing condom distribution would thus condone or even promote an illegal and inappropriate activity.⁴ Even though private consensual homosexual conduct may not be a crime, "prison cells are not regarded as places of privacy, so sex between prisoners is illegal."⁵ Prison officials also argue that condoms may be used to "hide drugs or other illegal things that inmates may swallow and later retrieve."⁶

Within the United States, condom distribution has been reported at jails in New York City, San Francisco, Philadelphia,⁷ Washington, D.C., and Los Angeles.⁸ Only two states (Vermont and Mississippi) currently have programs allowing limited condom distribution in state prisons.⁹ Mississippi's program started in 1992 and is aimed primarily at preventing unwanted pregnancies during conjugal visits but has the added benefit of helping prevent infection from HIV.¹⁰ Legislators were concerned that people in prison were starting families and wanted to discourage that because the children would "automatically . . . go on welfare and Medicaid."¹¹ Condom distribution is available at only three prisons in Mississippi and thus applies to only a small number of the 20,000 inmates in state custody.¹² Condoms are distributed at no cost to the inmates, but the

¹ Andy Kanengiser, *Miss., Vt. Give Condoms to Married Inmates*, JACKSON CLARION-LEDGER, June 15, 2005, available at <http://www.clarionledger.com/apps/pbcs.dll/article?AID=/20050615/NEWS01/506150354/1002> (last visited Mar. 14, 2006).

² Elizabeth Kantor, HIV InSite Knowledge Base, *HIV Transmission and Prevention in Prisons* (Apr. 2006), available at <http://hivinsite.ucsf.edu/InSite?page=kb-07-04-13> (last visited May 8, 2006).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Kanengiser, *supra* note 1.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

corrections department verifies marital status.¹³ Vermont’s policy has been in place for more than a decade, and its purpose is specifically to prevent the spread of HIV and other infectious diseases.¹⁴ Vermont corrections officials have not collected any data to show whether or not the program has been successful in preventing the spread of HIV.¹⁵

California is now considering legislation to allow condom distribution in state prisons. A.B. 1677 as amended would add § 5012 to the California Penal Code, to read:

- (a) The Director of Corrections shall allow any nonprofit or public health care agency to distribute sexual barrier protection devices such as condoms and dental dams to inmates. Any agency that distributes those devices shall be subject to all relevant laws and regulations regarding visitors to correctional facilities.
- (b) The distribution of those devices shall not be considered a crime nor shall it be deemed to encourage sexual acts between inmates.
- (c) Possession of a device distributed pursuant to subdivision (a) shall not be used as evidence of illegal activity for purposes of administrative sanctions.
- (d) This section shall be implemented in a manner that protects the health and safety of correctional officers.¹⁶

Note that California would not directly distribute condoms under the proposed legislation but would instead allow a non-profit or public health care agency to distribute them. Because existing regulation “prohibits inmates from participating in illegal sexual acts,”¹⁷ the bill provides a “safe harbor” for those distributing condoms. The bill also provides a safe harbor for inmates possessing condoms. Section (d) of the bill as originally introduced would have required prison officers to “develop a plan for the disposal of used sexual barrier devices that protects the anonymity of inmates and the health of correctional officers,”¹⁸ but such provision was amended to simply provide for the protection of correctional officials.

According to the California bill’s author, any positive economic impact of reducing the spread of HIV through prison condom distribution most likely will not benefit the California Department of Corrections directly because the average duration of incarceration is only two years – “most inmates who become HIV positive while in

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Cal. A.B. 1677 (as amended in Assembly May 27, 2005), *available at* http://info.sen.ca.gov/pub/bill/asm/ab_1651-1700/ab_1677_bill_20050527_amended_asm.html (last visited Mar. 16, 2006).

¹⁷ *Id.*

¹⁸ *Id.*

prison will not develop symptoms until long after they have been released.¹⁹ However, taxpayers will benefit because former inmates often receive subsidized health care and the average cost to Medi-Cal (California's version of Medicaid) to treat HIV-infected patients is \$23,964 per year.²⁰ Therefore, "[o]ver the life of the patient, a single infection can cost the state hundreds of thousands of dollars."²¹ The bill has passed the Assembly, and is currently in the Senate Appropriations Committee.²² The bill has received "strong support from medical, civil rights and law enforcement organizations."²³ An editorial in the N.Y. Times concludes: "The bill deserves to be passed by the State Senate and to be widely emulated. After all, the country needs all the tools it can get in the fight against AIDS."²⁴

May 2006

¹⁹ Cal. Sen. Comm. on Public Safety, Hearing, at 5 (June 28, 2005), *available at* http://info.sen.ca.gov/pub/bill/asm/ab_1651-1700/ab_1677_cfa_20050627_164243_sen_comm.html (last visited Mar. 16, 2006).

²⁰ *Id.*

²¹ *Id.*

²² See A.B. 1677 current bill status *available at* http://info.sen.ca.gov/pub/bill/asm/ab_1651-1700/ab_1677_bill_20051117_status.html (last visited Mar. 16, 2006).

²³ Editorial, *Fighting AIDS Behind Bars*, N.Y. TIMES, June 10, 2005, at A20.

²⁴ *Id.*