

Handout -- Criminal Law 101: Legal Literacy for Non-Lawyer Advocates/HINAC III/2018

TERMS MOST APPLICABLE IN THE CONTEXT OF HIV CRIMINAL LAW REFORM	
TERM	DEFINITION
Act	The conduct, or lack of conduct that is deemed criminal by law.
Actus Reus	The unlawful “physical act” part of a crime
Affirmative Defense	A fact or set of facts other than those alleged by the plaintiff or prosecutor which, if proven by the defendant, defeats or mitigates the legal consequences of the defendant's otherwise unlawful conduct.
Burden of Proof	In a criminal case, the prosecutor has to show beyond a reasonable doubt that the defendant committed every element of the charged crime. Basically, this means that the prosecutor has to fully satisfy the fact-finder (a jury or sometimes a judge) that the facts establish the defendant’s guilt.
Crime	An act committed in violation of the criminal laws of a state, the federal government, or a local jurisdiction in which the guilty party may be punished
Decriminalization	Lessen the penalty/punishment of a particular criminal act but it still remains a crime.
Degree	In criminal law, the term refers to the ranking of crimes by seriousness, with the classification of first degree being the most serious
Elements of a Crime	Crimes can be broken down into elements, which the prosecution must prove beyond a reasonable doubt. Criminal elements are set forth in criminal statutes, or cases in jurisdictions that allow for common-law crimes. With exceptions, every crime has at least three elements: a criminal act, also called actus reus; a criminal intent, also called mens rea; and casual relationship between the two.
Felony	A criminal offense punishable by death or incarceration in a prison facility for at least one year.
Fine	A sanction imposed by a court on a convicted person, stipulating a specific sum of money to be paid to the court.
Infraction	An offense less than a misdemeanor that violates a law, agreement, or set of rules that only results in a warning or a fine.
Law	A body of rules - including constitutions, the common law, administrative orders, ordinances, -- together with the principle of justice commonly applied to their enforcement.
Law - Civil	Disputes between individuals. Action is taken by aggrieved party and if found liable the defendant has to compensate the plaintiff.
Law - Criminal	Wrongs committed against an individual but seen as harmful to society as a whole; Action is taken by government and if found guilty can be punished.
Liability	The person engaged in conduct and his mental state is irrelevant
Mens Rea	The mental state “Guilty mind” part of crime. Nothing to do with motive.
Mens Rea – Levels of	<ul style="list-style-type: none"> ▪ <u>Knowingly</u>: substantially certain the action that causes harm will occur ▪ <u>Negligence</u>: disregarded a risk as an ordinary person would not have ▪ <u>Recklessness</u>: disregarded a substantial and unjustifiable risk of which one was aware ▪ <u>Knowingly</u>: conscious that the act will lead to the result and/or aware it is prohibited ▪ <u>Willfully/Wantonly</u>: maliciously or arrogantly disregarding the known risks to the rights or safety of others. ▪ <u>Malice</u>: Unlawful/deliberate intent to do the act w/o excuse, mitigation or justification ▪ <u>Premeditation</u>: Consciously plans the act and is aware of the result
Misdemeanor	A criminal offense punishable by up to a year in jail and/or a large fine.
Modernization	Narrow an existing criminal law, e.g., by adding requirement for intent, substantial risk of harm, and actual harm resulting, as well as lower penalty and/or shift to public health enforcement framework.
Proportionality	Degree to which the punishment caused by the act, fits the crime and based on one’s mental state, motive, and nature of harm.
Motive	Reason why one committed the act.
Reasonable Mans Test	A person is not criminally liable for remote, unforeseeable, or indirect consequences which a reasonable person would not have foreseen as likely to have flowed from the act. There is a liability for the direct results of the act, but a diminished/no criminal liability for remote, unforeseeable, or indirect consequences
Repeal	To eliminate a statute.
Statute	A law enacted by, or with the authority, or, a legislature.
Subpoena	A formal written writ, issued by a judicial officer demanding a person to appear in court at a specific date and time, to testify or to bring specified materials with them.
Resource for legal terms: https://dictionary.law.com/	

PATHS TO HIV CRIMINALIZATION REFORM*

OPTION 1 – REPEAL – ELIMINATE THE STATUTE	
<p>Pros</p> <ul style="list-style-type: none"> ■ No more legally sanctioned targeting of HIV, whether in criminal or public health framework, reduces stigma ■ Arguably most clearly expresses position that discriminatory laws singling out PLHIV are indefensible and unacceptable in any form 	<p>Cons</p> <ul style="list-style-type: none"> ■ Leaves open the likelihood that prosecutors just use general criminal laws, e.g., aggravated assault, to prosecute PLHIV (something that has happened in TX and NY, for example, and in Canada) ■ Arguing for full repeal may be a more challenging position, especially in more conservative or punitive states
OPTION 2A: MODERNIZATION BY NARROWING EXISTING LAW (e.g., by adding requirement for intent, substantial risk of harm, and actual harm resulting, as well as lower penalty)	
<p>Pros</p> <ul style="list-style-type: none"> ■ Potentially less of a heavy lift if law stays where it is/is modified as it is ■ May be an easier sell to legislators, especially in conservative states <ul style="list-style-type: none"> ■ The “modernization” frame permits a focus on harmonizing the laws with current science so legislators don’t feel like they’re being accused of bigotry and discrimination, even though the laws have <u>never</u> been justified or defensible ■ Retain considerable flexibility and more levers for bargaining/negotiation 	<p>Cons</p> <ul style="list-style-type: none"> ■ Can suggest that underlying law is somehow legitimate and just needs minor revisions/updating ■ Relatedly, can shift focus away from the fact that the laws have <i>always been</i> indefensible and discriminatory ■ Can open door to modifications that are in fact harmful, e.g., “leveling up” to include other specific health conditions
OPTION 2B: MODERNIZATION BY SHIFTING TO PUBLIC HEALTH CIVIL ENFORCEMENT SCHEME	
<p>Pros</p> <ul style="list-style-type: none"> ■ No longer dealing with criminal punishment and collateral consequences ■ Reduces stigma when HIV considered in public health rather than criminal context 	<p>Cons</p> <ul style="list-style-type: none"> ■ Public health and criminal conceptions of risk are not the same ■ Public health schemes generally not concerned with intent to harm, only risk of harm ■ Less robust due process protections relative to criminal law ■ Possibility of civil commitment
OPTION 3: PROSECUTORIAL PRACTICE – Use Prosecutorial discretion to stop HIV criminal prosecutions	
<p>Pros</p> <ul style="list-style-type: none"> ■ Does not require legislative or regulatory overhaul ■ Can build bedrock support for modernization campaigns that may happen down the road ■ HIV criminalization is already on the radar of some professional bodies 	<p>Cons</p> <ul style="list-style-type: none"> ■ There is still a danger of prosecution ■ The laws are still stigmatizing ■ Prosecutor position/orientation can shift with different political administrations
FACTORS TO CONSIDER IN SELECTING A REFORM STRATEGY	
<ul style="list-style-type: none"> ■ Political climate (consider bellwether issues, e.g., safe syringe access) ■ Position of public health and prosecutors and receptiveness to education on the issue ■ Profile of prosecutions (frequency, geographic trends, etc.) ■ Existing public health scheme and practices of public health officials (e.g., are public health restrictions common? What are the procedural protections?) ■ Seeking what may be incremental changes in the law versus the possibility of more dramatic overhaul in the long-term ■ Public attitudes—is a highly visible campaign or an under the radar approach more likely to succeed? 	

*Source: Center for HIV Law and Policy Sourcebook Webinar OCT 11, 2017 <https://www.hivlawandpolicy.org/sourcebook>