



The crime of being positive

In the 1980s, corporations, conservatives, and fear turned HIV-positive people into outlaws

By: Todd Heywood – April 1, 2013

In the late fall of 1988, state lawmakers and representatives from major insurance and pharmaceutical companies were hard at work addressing the looming AIDS crisis for the American Legislative Exchange Council, a conservative-leaning think tank that produces state-based business-friendly model legislation.

The efforts of ALEC's AIDS policy working group were published that year in a 169-page book containing 13 HIV-specific legislative recommendations. Some of those model laws would, after becoming real state laws, go on to effectively criminalize the behavior of people living with HIV and perpetuate a lasting stigma against HIV-positive people. Today, a majority of states have laws on the books that criminalize HIV exposure regardless of whether the virus was transmitted or there was an intention to infect another person with HIV.

ALEC was not alone in trying to find legislative solutions to the HIV epidemic, though its combination of lawmakers and industry insiders was unique. In the late 1980s, federal and state officials across the country were convening special commissions and task forces to address the crisis. These groups — many of which worked in tandem — collectively helped create laws to regulate the conduct of those living with HIV.

The American Independent has reviewed transcripts and reports from some of these task forces in an effort to shed light on the history of HIV-criminalization laws, something that to this day is not widely understood. What these documents demonstrate is that lawmakers and policy experts were responding to an overwhelming fear in America that HIV would impact the broader American population. Underlying many of these legislative actions was a growing fear and perception that HIV-positive people were maliciously, intentionally infecting others.

Nearly two-and-a-half decades later, there is more knowledge about how to treat HIV, as well as increasing evidence that HIV-criminalization laws deter disclosure and may prevent those infected from receiving effective treatment. Now, some of the people involved in creating these laws say they were an overreaction motivated by fear and ignorance and should be revisited.

Corporate-backed response to the AIDS crisis

ALEC's National Working Group on State AIDS Policy marked the first time the organization had used its power gathering of corporate and legislative interests to address a single issue.

“Every half hour in America someone dies of AIDS!” wrote ALEC's then-executive director (and former Denver Bronco) Samuel Brunelli and Florida state representative Frank Messersmith, then ALEC's chairman, in 1989 in their introductory letter published in the AIDS working group's final report. “Yet, despite this terrible toll, we have been unable to implement a coherent public health strategy for dealing with this modern plague. Instead, we have allowed political special interests to paralyze the legislative process and block effective public health measures. This politicization of the public health process is exacting a deadly price.”

One of the pieces of model legislation drafted by the working group was the HIV Assault Act. This model bill created a felony charge if a person knew he or she was infected with HIV while engaging in “intimate contact” with another person (exposing one's bodily fluids to another in a way that could transmit HIV); donating blood, organs, or tissues; or sharing intravenous or intramuscular injection equipment.

Other proposed laws included mandatory reporting of identified persons living with HIV, provisions to quarantine persons with HIV, mandatory HIV testing for insurance coverage, and isolation of HIV-positive prisoners (the latter has been overturned by a federal court in Alabama and repealed in Mississippi but remains on the books in South Carolina). The proposed legislation creating testing and partner-notification programs included provisions for governments to access names-based lists of people infected with HIV. The names-based reporting law was justified, in part, as a tool to identify persons to prosecute under the HIV Assault Act.

A person could be charged under the HIV Assault Act regardless of whether or not he or she infected or intended to infect another with HIV. Additionally, under the law, the burden is on the defendant to prove that the person exposed to HIV consented to whatever action is the focus of the charge while knowing about the defendant's HIV infection.

Today, laws addressing the conduct of persons living with HIV can be broken down into broad categories. There are HIV-specific laws, such as those in Missouri or Michigan, which apply to HIV. And there are general criminal laws, such as in Texas or New York, in which people living with the virus are charged with reckless conduct for anything from sex without HIV disclosure to biting.

When ALEC produced its model HIV Assault Act in 1989, nine states had HIV-specific criminal laws on the books. Today, 32 states and two U.S. territories have laws criminalizing HIV exposure, according to the Center for HIV Law and Policy. Only a handful of laws require intent to transmit the virus, and none requires an actual transmission for criminal prosecution to proceed. Since 2010, HIV-related criminal charges have led to more than 80 prosecutions against people living with HIV in the U.S., according to the LGBT legal advocacy group Lambda Legal.

Michael Tanner, who authored ALEC's 1989 book *The Politics of Health: A State Response to the AIDS Crisis*, told *The American Independent* in a phone interview that the AIDS task force was “unique” in the history of ALEC. While the organization often

issued policy books and model legislation, including on health care issues, Tanner said it was the first time ALEC focused its energy on one specific issue. He noted that ALEC has since done so with other issues, like education.

Tanner said ALEC, which brings lawmakers and corporate interests together to hammer out legislative recommendations, came to address the HIV epidemic because of pressure from “private interests.”

Specifically, he recalled that drugmaker Hoffmann-La Roche was a “big mover” and “put up a lot of funding behind publication of the book.”

This pharmaceutical company had the HIV-treating drug zalcitabine (also known as ddC) in clinical trials a couple of years prior. That drug would ultimately win Food and Drug Administration approval in 1992 after three successful trials conducted in cooperation with, among others, the National Cancer Institute.

Hoffmann-La Roche did not respond to multiple interview requests.

The co-chairs of the ALEC working group were J. Brian Munroe of Hoffmann-La Roche and Delaware state Rep. Richard Davis. Representatives from Nationwide Insurance and Alexander Hamilton Life Insurance also served on the AIDS working group.

Michigan state Rep. Susan Grimes Gilbert (formerly known as Susan Grimes Munsell) was tapped to serve on the working group. In a phone interview with the *The American Independent*, she said she was invited because she had previously headed a Michigan GOP task force on AIDS. That task force led to the Michigan legislature creating a law that criminalized the nondisclosure of one’s HIV status. She said she “shared a lot of the background information we had acquired.”

“At that time people were scared to death of [AIDS],” Grimes Gilbert said.

Reagan’s response to AIDS

Other working group members similarly hailed from other HIV task forces and commissions, thus helping to inform the ALEC group. Information garnered at the federal level was particularly influential.

Long criticized for not doing enough about the AIDS epidemic, which exploded onto the American medical scene in June 1981, President Ronald Reagan established the first Presidential Commission on the Human Immunodeficiency Virus Epidemic in 1987.

The first months of the commission, which deliberated for a year, were plagued by public infighting, leading to the resignation of the chair and another member. The final commission included Richard DeVos, co-founder of Amway and frequent donor to social conservative causes; the late Cardinal John O’Connor, who had served as the archbishop of New York and who openly opposed condoms as an HIV-prevention method; and Penny Pullen, a conservative lawmaker from Illinois.

During hearings held by the commission in March 1988 at Vanderbilt University in Nashville, Tenn., the issue of criminalization appeared for the first time in the

commission's records. Polly Gault, the commission's executive director, outlined four areas of discussion for a panel of legal scholars.

"The fourth is some type of federal law, perhaps a withholding of funds, which did or did not encourage states to enact criminal statutes related to the transmission of HIV," Gault told the commission.

Among the five recommendations laid out in one chapter of the commission's final report, released in June 1988, the panel called on states to include strong confidentiality provisions in their HIV laws and to refrain from criminally prosecuting people living with HIV for conduct that "did not involve a scientifically established mode of transmission."

However, none of those recommendations made it into the commission's top 20 recommendations as presented in the final report's executive summary. Instead, the commission opined, "The HIV epidemic has highlighted several ethical considerations and responsibilities, including: ... the responsibility of those who are HIV-infected not to infect others."

Many members of the commission opposed criminalization as the first go-to action to curb the spread of HIV. Commissioners were unanimous in their determination that criminalization should only happen after public health departments had exhausted all legally available public health actions. And two of the three legal experts to testify to commissioners said a criminal law would have little impact on the HIV epidemic.

And yet the transcripts of the final executive sessions of the commission reveal that some commission members were overwhelmingly concerned about those "rare" persons who were "intentionally" transmitting the virus or purposely "engaging in activity that would spread the virus."

References to intentional spread are found throughout the executive session transcripts, such as a discussion on creating public health partner notification laws.

"I'm really concerned that the net effect of this would be that, with regard to intentional spread, which we're all concerned about, that people will be crippled to act until laws are passed," said commissioner Theresa Crenshaw, a sex therapist from California.

The late commissioner Frank Lilly, an openly gay man and a geneticist employed by the Albert Einstein College of Medicine of Yeshiva University in New York, told the commission he was worried about the criminalization proposals in the report.

"The one thing that I would like to see done is a further softening on the section of criminalization which I think — I worry about the criminalization section very simply because I think we must do everything possible to keep people from using — acting upon their anger about AIDS by rushing to the district attorney as a first stop," Lilly said.

In a passage specific to HIV criminalization, Lilly moved that the commission insert the word "knowingly" in the criminalization recommendation. The recommendation was adopted with very little discussion.

The commission's recommendations, in combination with the transcripts of the hearings and meetings, show that this body intended for HIV criminal laws to be very narrowly tailored and used only to address the behavior of those persons who were intentionally acting with "malice aforethought" to infect others. However, the recommendations on criminalization never made the commission's executive report, which highlighted the 20 recommendations the commission felt were most important to addressing the HIV crisis. It is unclear why these recommendations did not make the executive report.

As Tanner recalls, the ALEC working group's process of arriving at final recommendations was also "contentious," particularly when legislation proposals were HIV-specific, rather than general health policy recommendations. The contention was a result, in part, of the battling ideology represented on the working group, he said.

"I tried to approach all the issues that came before the task force and came before me, as very narrowly defined, dealing with the facts, trying not to get to be emotional about it," he said.

Tanner said he recalls that former Presidential Commission member Pullen, who testified before the ALEC working group, introduced the model HIV Assault Act during her testimony. Pullen, who now runs the anti-abortion organization Life Advocacy Resource Project in Illinois, declined to comment for this story, saying it was a "25-year-old story."

Tanner said that no notes or transcripts from the ALEC meetings exist, but he said he remembers that the HIV Assault Act was one of the model bills that generated heated debates. But ultimately, it was adopted by a majority vote.

The Michigan example

Even as the Presidential Commission was struggling to come together, some U.S. states were on a parallel track. In the early 1980s, the death toll from AIDS was mounting, and fear ultimately seized the country as the disease spread from a small group of gay men to children undergoing blood transfusions to the beloved Hollywood icon Rock Hudson, who died of AIDS-related complications in 1985. Lawmakers wandered into this environment of fear, creating laws to fight an epidemic of a virus that respected no laws and understood no boundaries.

In Michigan a legislative package updating the state's public health laws was introduced in October 1987 by Michael J. Bennane, a Democratic representative from Detroit.

Included in the package was the language that would become Michigan's HIV disclosure law. It also included legislation, which would become the so-called health threat to others law, that allowed health officials to intervene with those living with HIV using civil court legal proceedings. The legislative package also included legislation that made it a misdemeanor for anyone to disclose someone's HIV testing information — such as if a person had been tested for the virus or what the results of those tests were.

While the "health threat to others" law is less punitive than the felony disclosure law — which can land a person a four-year prison sentence for engaging in sexual penetration, "however slight," without first disclosing his or her HIV-positive status — it has come

under scrutiny in recent years as allegations have surfaced that health departments in the state have used the law to stigmatize pregnant women and others identified as sexual partners of newly diagnosed HIV-positive people.

As Michigan's Democratic proposal languished in committee, Republican lawmakers, then in the minority, created their own AIDS task force to explore the issues of the epidemic and to recommend specific legislative reforms to address the crisis. The group issued its report in February 1988.

"An HIV-infected person who knowingly, or with reckless disregard for the safety of others, exposes another to HIV infection by having sexual contact with him or her without first warning that sexual partner about the infection should be subject to criminal sanctions," was one of the recommendations of the GOP report.

A legislative analysis of the bills from October 1987 outlines possible opposition arguments to the legislation. Copies of draft reports on whether or not to work for repeal of Michigan's felony disclosure law generated by the Michigan Department of Community Health and obtained by the *The American Independent* show the department opposed the law because the issue of intentional infection was a "minor problem." The state GOP House task force came to a similar conclusion.

"In conclusions, the Task Force believes that our compassion and concern for those already afflicted should not blind us to the irresponsible and immoral behavior of a few infected individuals," the Task Force report reads. "Society, through the enactment of its laws, needs to send a clear and unequivocal message to those who would deliberately or recklessly expose others to infection. By establishing a criminal sanction for such behavior, society has placed them on notice that such behavior will not be tolerated."

During debates in both the state House and Senate, lawmakers attempted to reduce the proposed disclosure crime from a felony to a misdemeanor.

In an audio recording of a Senate debate on December 29, 1988, Sen. Jack Faxon, a Democrat from the Detroit area, argued against the felony, saying the law would deter the testing of persons at risk.

"Now we're talking about the incarceration in prison of persons having AIDS so that the disease, instead of being treated, is going to be jailed," he said.

Later in his floor speech, Faxon said, "This one [law] takes on a certain concentration camp mentality. Where you put into prison a certain category of people who are sick. Now the objectives ought to be to education and safe sex and prevention and all the ways that we know about it, but when you put prison terms for people who have the disease and have to go into court and start proving when they found out and who they saw and who they didn't see — I think you're defeating the purposes for which this bill is intended to serve. Senator Kelly's amendment only makes it a misdemeanor. I would think we should not make it a crime, but rather, we should look to what we can do to help people and educate them. I don't think criminal sentences work."

In the end, Michigan's HIV disclosure law went into effect, as a felony, in 1989.

“We were trying to find a middle ground where hopefully someone could reach out to the person — if there was a person out there continuing to spread the virus — and try and stop it,” Grimes Gilbert told *The American Independent*. She would soon after take the recommendations of the Michigan GOP task force to ALEC’s working group.

In 1990, Congress adopted an amendment to the Ryan White Comprehensive AIDS Resources Emergency Act that required states to certify with the secretary of Health and Human Services that legal provisions in each state existed to prosecute individuals with HIV who intentionally spread the virus. The secretary was legally forbidden to distribute the money under the act to states unless they certified the ability to prosecute HIV-positive persons for intentional infection. The act provided the first comprehensive funding strategy to address the AIDS epidemic, including money for care, housing, and prevention efforts.

Rethinking the laws

With the advent of powerful antiretroviral treatments in the mid-1990s and studies that indicate successful treatment with those drugs may make a person less infectious, some of the people involved in creating the laws say it is time to revisit them.

“I think it would be time to go back,” said Colleen Conway-Welch, a former member of the Presidential Commission, in a phone interview. “In fact, it’s probably past time to go back and subject those laws to scientific scrutiny.”

Former ALEC member Tanner agreed.

“I think it was not well understood at the time,” Tanner said. “I think there was a general belief that this was potentially an epidemic that was going to spread into the general population, that was sort of a guaranteed death sentence, that was extremely transmissible — I think the scientific knowledge has changed in the years since those bills were written.”

Tanner left ALEC years ago and is now employed by the Cato Institute, a libertarian public policy think tank in Washington, D.C.

While he stopped short of calling for a repeal of all HIV-specific laws, he did say they needed to be reviewed.

“Some of the criminalization there really needs to be revisited and narrowed,” Tanner said, noting that he would like to revisit the issues and weigh the positives and negatives of transferring the issue out of the criminal arena and into the civil arena. He also said he would surely frame any legislation he was writing now to include an intent to infect.

The movement to reform or repeal the laws is already under way in some states. The leadership of the Iowa Department of Public Health has recently announced it is backing activists trying to change that state’s law.

And recently the Associated Press reported that a Des Moines lawmaker is planning to introduce a bill that would reduce penalties for people with HIV who have sex without disclosing their disease.

In Michigan the health department is currently concluding a review of the state's law, while activists in the Grand Rapids area have begun to meet informally to develop a coalition to drive repeal of the law. In Missouri activists and representatives of the state health department have begun meeting to chart a path toward repeal of that state's law.

On the federal level, the Obama administration's 2010 National HIV/AIDS Strategy encouraged states to revisit their laws and directed the Department of Justice to prepare technical assistance for states. A DOJ spokesperson said in an email that no state has asked for assistance yet. And yet early in 2013 the Presidential Advisory Council on HIV/AIDS adopted a resolution condemning HIV criminalization and calling for repeal of the laws.

U.S. Rep. Barbara Lee, a California Democrat, introduced the REPEAL HIV Discrimination Act in 2011. The bill never got a hearing and died when the 112th congressional session ended in January. The legislation had 40 co-sponsors, all Democrats.

Former Michigan Republican lawmaker Grimes Gilbert said she too is on the repeal bandwagon.

"I think it is time to repeal the [felony] law," she said. "In fact, I don't do this very often, but I am willing to lobby for that change."