
Temple University of the Commonwealth System of Higher Education
Beasley School of Law

Impact of Criminal Law on the Safe Disposal of Used Syringes

Memorandum

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Subject: Criminal Law and Syringe Disposal in California

INTRODUCTION

Disposal of contaminated medical waste has become an important issue in public health policy. Waste generated in the health care system is highly regulated at the state and federal level. Special handling, documentation and chain of custody procedures are required by health facilities to meet these regulations, which impact on their ability to retain their licenses for operation. With the advent of AIDS, hospitals and other health facilities instituted significant safeguards to protect health care workers, housekeeping staff, sanitization workers and waste haulers from needle sticks due to the risk of contracting HIV/AIDS, hepatitis B & C and other blood borne infections. Hospitals implemented strict standard precautions for handling blood-contaminated needles that included destruction and disposal methods and systems.

Over 3 billion syringes are used each year outside health care facilities and deposited in the general waste stream in the United States. While they pose little risk to the general public, they are a source of injury and anxiety to workers in trash disposal, recycling and related activities. Most of these syringe come from people administering medications for conditions

1 Hospitals must meet laws, regulations, and standards from multiple sources including: US EPA, OSHA, State Environmental Protection, HCFA, State Departments of Health, JCAHO and others.

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such as diabetes, but some are attributable to injection drug users (IDUs).\(^3\) IDUs have been estimated to perform as many as one billion injections of illicit drugs each year in the United States. IDUs are thus an important part of the syringe disposal picture, and may become more important as efforts proceed to promote the health goal of a new sterile syringe for every drug injection.\(^4\) Unfortunately, IDUs have tended to be simultaneously given too much blame for the problem of improperly discarded syringes and neglected by community sharps disposal programs. There are only a few systems, most notably syringe exchange programs, that provide for safe disposal of syringes from IDUs, and fear of arrest may be a substantial barrier to IDU participation in safe disposal systems.

A recent qualitative study of IDU and community attitudes toward syringe disposal elicited these comments from IDUs:

“They’d [the police] catch you with a dirty syringe and you’d go to jail for possession, so people ain’t hardly gonna keep ‘em laying around, keep ‘em in a container or whatever.”

“They know they can stop you, and if you come and dispose of them, they got a case there.”

“Chance of going to jail, I’m not going to risk that. That’s me. I got a probation, so I can’t take the chance at all. I’m so scared now. Then I’d have to go back and do all that time.”

This Memorandum assesses how California’s criminal laws relating to drug possession and syringe access could influence the syringe disposal behavior of IDUs. It is part of a larger analysis of community syringe disposal law being conducted by the Academy for Educational Development.

We conclude that, although possession of up to ten syringes may no longer be a crime in certain California cities, the possibility of being arrested or convicted for

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the possession of more than ten syringes, or of syringes not obtained through legal means, could deter IDUs from optimally participating in effective community syringe disposal programs.

This conclusion is based purely on the law as written. Ethnographic research among IDUs has repeatedly found that fear of arrest is a factor in the syringe possession behavior of IDUs. However, an analysis of law “on the books” cannot fully address how law is actually enforced by police and prosecutors, or the perceptions of what the law is among IDUs. Our conclusions about a possible effect are therefore based on the assumption that law is enforced in a way that is consistent with its terms, and that IDUs are aware of the law.

I. The Regulatory Scheme

This Memorandum addresses four domains of law that could influence the syringe disposal behavior of IDUs: drug possession laws, syringe prescription or other syringe-specific laws or regulations, drug paraphernalia laws, and laws and regulations governing syringe exchange programs.

A. Drug Paraphernalia Law


Possession of drug paraphernalia is illegal:

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It is unlawful to possess an opium pipe or any device, contrivance, instrument, or paraphernalia used for unlawfully injecting or smoking (1) a controlled substance specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, specified in subdivision (b) or (e) of Section 11055, or specified in paragraph (2) of subdivision (d) of Section 11055, or (2) a controlled substance which is a narcotic drug classified in Schedule III, IV, or V.

Cal. Health & Safety Code § 11364. Violation of this section is a misdemeanor subject to a fine of $30 to $500, and a term of imprisonment between 30 and 180 days. Cal. Health & Safety Code § 11374. However, an exception is recognized for possession of 10 or fewer hypodermic needles or syringes obtained from an authorized source.

(c) Pursuant to authorization by a county, with respect to all of the territory within the county, or a city, with respect to the territory within the city. subdivision (a) shall not apply to the possession solely for personal use of 10 or fewer hypodermic needles or syringes if acquired from an authorized source.

Cal. Health & Safety Code § 11364. The drug paraphernalia law is also indirectly enforceable against IDUs through the crime of loitering with intent to commit a drug related offence. Among the evidence of intent to commit a drug related offence specified by this law is the possession of drug paraphernalia, specifically including a syringe. The statute states:

(a) It shall be unlawful for any person to loiter in any public place in a manner and under circumstances manifesting the purpose and with the intent to commit an offence specified in Chapter 6 (commencing with Section 11350) and Chapter 6.5 (commencing with Section 11400).

Sales provisions prohibits the operation of "any place of business in which drug paraphernalia is kept, displayed or offered in any manner, sold, furnished, transferred or given away unless such drug paraphernalia is completely and wholly kept, displayed or offered within a separate room or enclosure to which persons under the age of 18 years not accompanied by a parent or legal guardian are excluded." Cal. Health & Safety Code § 11364.5(d) and (e). A second provision states:

(a) Except as authorized by law, any person who delivers, furnishes, or transfers [or] possesses with intent to deliver, furnish, or transfer . . . drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to . . . inject, ingest, inhale, or otherwise introduce into the human body a controlled substance . . . in violation of this division, is guilty of a misdemeanor...

(b) Among circumstances that may be considered in determining whether a person has the requisite intent to engage in drug related activity are that a person:

7 ...possesses narcotic or drug paraphernalia. For the purpose of this paragraph “...drug paraphernalia” means any device, contrivance, instrument, or apparatus designed for...injecting...any controlled substance...


This provision has no specific penalty attached but does put the injection drug user at risk of arrest incident to possession of a syringe.

B. Syringe Prescription Law

Article 9 of chapter 9 of the Pharmacy Act sets out comprehensive rules for the possession and distribution of syringes. Possession of a hypodermic syringe is generally prohibited:

No person shall possess or have under his or her control any hypodermic needle or syringe except when acquired in accordance with this article.


However, the Hypodermic Needles and Syringes Act allows local governments to allow the retail sale of syringes without prescriptions in two circumstances.

(a) Notwithstanding any other provision of law, a pharmacist or physician may, without a prescription or a permit, furnish hypodermic needles and syringes for human use, and a person may, without a prescription or license, obtain hypodermic needles and syringes from a pharmacist or physician for human use, if one of the following requirements is met:

1) The person is known to the furnisher and the furnisher has previously been provided a prescription or other proof of a legitimate medical need requiring a hypodermic needle or syringe to administer a medicine or treatment.

2) Pursuant to authorization by a county, with respect to all of the territory within the county, or a city, with respect to the territory within the city, for the period commencing January 1, 2005, and ending December 31, 2010, a pharmacist may furnish or sell 10 or fewer hypodermic needles or syringes at any one time to a person 18 years of age or older if the pharmacist works for a pharmacy that is
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registered for the Disease Prevention Demonstration Project pursuant to Chapter 13.5 (commencing with Section 121285) of Part 4 of Division 105 of the Health and Safety Code and the pharmacy complies with the provisions of that chapter.

Cal. Bus. & Prof. Code § 4145.8

It is unlawful for persons to obtain and then use or permit to be used a hypodermic needle and/or syringe for any other purpose other than for which is was obtained from a person who has a permit to sell and distribute same.9 Only licensed persons are authorized to sell or furnish syringes. Id. §4141. Other sections address disposal and confiscation of improperly possessed syringes. Id. §§ 4147 - 4148.

C. Syringe Exchange Legislation

California law does not prohibit syringe exchange programs if they are authorized by local governments upon declaration of a local emergency due to a public health crisis.10 Cal. Health & Safety Code §11364.7. provides that:

No public entity, its agents, or employees shall be subject to criminal prosecution for distribution of hypodermic needles or syringes to participants in clean needle

8 Nine counties in California have followed up this legislation by allowing the sale of syringes in pharmacies without a prescription: Contra Costa, Yuba, San Francisco, Marin, Alameda, Los Angeles, West Hollywood, Santa Cruz, and San Mateo.

9 (a) Any person who obtains a hypodermic needle or hypodermic syringe by a false or fraudulent representation or design or by a forged or fictitious name, or contrary to, or in violation of, any of the provisions of this chapter, is guilty of a misdemeanor. (b) Any person who has obtained a hypodermic needle or hypodermic syringe from any person to whom a permit has been issued as provided in Article 9 (commencing with Section 4140) and who uses, or permits or causes, directly or indirectly, the hypodermic needle or hypodermic syringe to be used for any purpose other than that for which it was obtained is guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or both a fine and imprisonment.


10 There are currently 25 syringe exchange programs in place in California.

http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5427a1.htm

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and syringe exchange projects authorized by the public entity pursuant to a declaration of a local emergency due to the existence of a critical local public health crisis.


This section of the code protects government agents and employees from arrest for the unlawful possession and distribution of needles in violation of drug prescription and drug paraphernalia laws. There is no comparable provision protecting the injection drug user who participates in needle exchange programs and are at risk of arrest pursuant to Cal. Health & Safety Code § 11532 and Cal. Bus.& Prof. Code §4140.

D. Drug Possession Laws

The California Controlled Drug Act, Cal. Health and Safety Code § 11350, states:

(a) Except as otherwise provided in this division, every person who possesses (1) any controlled substance specified in subdivision (b) or (c), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in the state prison.

(b) Except as otherwise provided in this division, every person who possesses any controlled substance specified in subdivision (e) of Section 11054 shall be punished by imprisonment in the county jail for not more than one year or in the state prison.

(c) Except as otherwise provided in this division, whenever a person who possesses any of the controlled substances specified in subdivision (a) or (b), the judge may, in addition to any punishment provided for pursuant to subdivision (a) or (b), assess against that person a fine not to exceed seventy dollars ($70) with proceeds of this fine to be used in accordance with Section 1463.23 of the Penal Code. The court shall, however, take into consideration the defendant's ability to pay, and no defendant shall be denied probation because of his or her inability to pay the fine permitted under this subdivision.

(d) Except in unusual cases in which it would not serve the interest of justice to do
so, whenever a court grants probation pursuant to a felony conviction under this
section, in addition to any other conditions of probation which may be imposed,
the following conditions of probation shall be ordered:
(1) For a first offense under this section, a fine of at least one thousand dollars
($1,000) or community service.
(2) For a second or subsequent offense under this section, a fine of at least two
thousand dollars ($2,000) or community service.
(3) If a defendant does not have the ability to pay the minimum fines specified in
paragraphs (1) and (2), community service shall be ordered in lieu of the fine.

The leading California case on the nature and quality of drug possession necessary to
commit a crime is People v. Aguilar 223 Cal App 2d 119, 35 Cal Rptr 516 (2nd Dist., 1963). In
that case, the court held reasoned that, because “conviction for possession of a narcotic requires
evidence of defendant's awareness of the presence of the narcotic or of facts from which such
awareness or knowledge may be inferred,” there was insufficient evidence to sustain a conviction
“where the narcotic was imperceptible to the human eye and its presence, qualitatively and
quantitively, could be detected only with the aid of a forensic chemist and laboratory.” In People
v. Rubacalba, the California Supreme Court reviewed the line of cases that originated with
Aguilar. It emphasized the central importance of the defendant’s intent, quoting Aguilar’s
doctum that “[t]he presence of the narcotic must be reflected in such form as reasonably imputes
knowledge to the defendant.” People v. Rubacalba 6 Cal. 4th 62, 859 P.2d 708, 23 Cal.Rptr.2d

California’s Penal Code also provides for special proceedings in narcotics and drug abuse
cases for suspects who meet all six criteria:

(a) This chapter shall apply whenever a case is before any court upon an accusatory
pleading for a violation of [Health and Safety Code Sections, Business and Professional Code
Sections and Penal Code Sections relating to possession of drugs and drug paraphernalia]...
   (1) The defendant has no conviction for any offense involving controlled substances prior
to the alleged commission of the charged offense.
   (2) The offense charged did not involve a crime of violence or threatened violence.
   (3) There is no evidence of a violation relating to narcotics or restricted dangerous drugs
other than a violation of the sections listed in this subdivision.
   (4) The defendant’s record does not indicate that probation or parole has ever been
revoked without thereafter being completed.
   (5) The defendant’s record does not indicate that he or she has successfully completed or
been terminated from a diversion or deferred entry of judgment pursuant to this chapter
within five years prior to the alleged commission of the charged offense.
   (6) The defendant has no prior felony conviction within five years prior to the alleged
commission of the charged offense. Ca Penal Code
(B) The prosecuting attorney shall review the file and...[I]f defendant is found eligible,
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the prosecuting attorney shall file with the court...a declaration...[and to] defendant and his or her attorney....
(c) All referrals for deferred entry of judgment granted by the court pursuant to this chapter shall be made only to programs that have been certified by the county drug program administrator...or to programs that provide services at not cost to the participant...

Cal. Penal Code § 1000.

The requirements for a defendant to be deferred to a treatment program would be that he or she plead guilty to each charge and waives time for the pronouncement of judgment but if the defendant successfully completes the drug treatment program:

with a positive recommendation of the program authority and the motion of the prosecuting attorney, the court, or probation department, but no sooner than 18 months and no later than three years from the date of the defendant’s referral to the program, the court shall dismiss the charge or charges against the defendant.


II. Analysis

Syringe prescription and paraphernalia law in California make it a crime to possess a syringe without a prescription for drug injection purposes if the local government has not authorized sale of syringes without prescriptions. Moreover, possession of a syringe is evidence of intent to loiter with intent to commit a drug offense and puts IDUs at risk for arrest. Even IDUs taking part in legal SEPs are not clearly protected from these charges. Fear of arrest for a syringe possession could deter an IDU from participating in a safe disposal program.

In cities that allow the sale of syringes without a prescription, there are still some concerns. Law enforcement would have to make judgments on whether to arrest for possession by determining whether the syringe was purchased from an authorized source. This creates confusion and could deter IDUs from taking syringes to safe disposal areas or syringe exchange programs. It also puts the burden on IDUs to prove where the syringes were purchased from. IDUs who purchased some syringes from a pharmacy and some from unauthorized sources would still be subject to arrest, which also deters safe disposal and participation in syringe exchange programs. There is still the issue of possession of more than 10 syringes which could also potentially deter IDUs from these harm reducing activities.
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Drug possession law does make it a crime for possession of a narcotic in a form that is usable and can impute knowledge of possession to the drug user. This could in theory encompass the residue of drug on the barrel of a used syringe, but we could find no cases that stretched the reasoning of California’s leading possession cases so far. Fear of arrest on this ground should not be expected to significantly influence an IDU’s decision to participate in appropriate disposal.

III. How Might California Law Be Changed or Clarified to Remove Disincentives for Proper Syringe Disposal by IDUs?

California has authorized SEPs. To make the new syringe access policy fully effective, however, the legislature or law enforcement officials may wish to take steps to ensure that IDUs are not subject to arrest or prosecution for possession of the residue of drugs left in the barrel of used syringe. This could be accomplished in a number of ways, including

- amending the paraphernalia law to explicitly exclude all syringes, regardless of the source it was purchased from
- amending the controlled drug act to require a minimum specified quantity to ground a possession conviction
- amending the controlled drug act to exclude trace amounts found in syringes
- eliminate syringes from the list of evidence showing intent to commit a drug offense.
- developing standard operating procedures within law enforcement that avoid stops, arrests or prosecutions based on drug residues in syringes
- educating IDUs and law enforcement to appreciate the importance of appropriate syringe disposal and the legality of possessing syringes in the course of disposal activities.

Research among IDUs and law enforcement personnel on their knowledge and attitudes towards the syringe possession rules will be helpful in implementing effective disposal policies.