

# HIV CRIMINALIZATION IN CALIFORNIA

Penal Implications for People Living with HIV/AIDS

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DECEMBER 2015



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**CALIFORNIA HIV/AIDS  
RESEARCH PROGRAM**



# EXECUTIVE SUMMARY

## A. INTRODUCTION

HIV criminalization is a term used to describe statutes that either criminalize otherwise legal conduct or that increase the penalties for illegal conduct based upon a person's HIV-positive status. While only one HIV criminalization law can be found in federal law,<sup>1</sup> more than two-thirds of states and territories across the United States have enacted their own HIV criminal laws. Some HIV criminal laws do not require transmission of HIV, and in some states, these laws criminalize conduct that poses a negligible risk of transmission, such as spitting or biting. California has four HIV-specific criminal laws, and one non-HIV-specific criminal law that criminalizes exposure to any communicable disease.

## B. CRIMINAL OFFENDER RECORD INFORMATION DATA

Given the lack of comprehensive data on the use of HIV criminal laws in California, Williams Institute researchers contacted the California Department of Justice and requested access to criminal offender record information (CORI) data. CORI data record any contacts an individual may have with the criminal justice system, from every event beginning at arrest through sentencing, so these data provide a full chronological record of how these laws are being utilized. After obtaining necessary security clearances, Williams Institute researchers were able to access the de-identified criminal history of all individuals who had had contact with the criminal justice system under Cal. Penal Code § 647f (solicitation while HIV-positive), Cal. Health & Safety Code § 120291 (exposure to HIV with intent to transmit), Cal. Penal Code § 12022.85 (sex offense sentence enhancement for HIV-positive status in nonconsensual sex crimes) and Cal. Health & Safety Code § 120290 (misdemeanor exposure to any communicable disease) from the time of their enactment to June 2014.

## C. MAIN FINDINGS

- Overall, 800 people have come into contact<sup>2</sup> with the California criminal justice system from 1988 to June 2014 either under an HIV-related law or under the misdemeanor exposure law as it related to a person's HIV-positive status.
- The vast majority (95%) of all HIV-specific criminal incidents impacted people engaged in sex work or individuals suspected of engaging in sex work.
- An overall high period of enforcement occurred between 1995 and 2004, with interactions peaking in the year 2000, when 70 people had HIV-related criminal contact. In 2013, the most recent full year for which data were analyzed, 17 people had HIV-related criminal contact, the lowest number since 1991.

<sup>1</sup> See 18 U.S.C. § 1122 (2015)(pertaining to the donation or sale of blood or other potentially infectious fluids or tissues).

<sup>2</sup> Throughout the report, we use the phrase "come into contact," because there were many different ways in which an HIV-related offense could come up in someone's criminal history. For example, for some individuals, the original arrest would be under an HIV-related code, while in other instances, the HIV-related code would not come into play until charging or sentencing. Also, some people were arrested or cited under HIV-related codes without any further prosecution under those codes. Therefore, we use "come into contact" to encompass all of the different ways that a person may have fallen under the jurisdiction of the California criminal justice system.

- Nearly half (48%) of all enforcement of HIV criminalization laws occurred in Los Angeles County (547 incidents). Nine percent of the HIV-specific criminal incidents (104 incidents) took place in Sacramento County. By contrast, 37% of people living with HIV/AIDS in California have lived in Los Angeles County, and 3% lived in Sacramento County.
- Black people and Latino/as make up two-thirds (67%) of the people who came into contact with the criminal justice system based on their HIV, although just half (51%) of people living with HIV/AIDS in California are Black and Latino/a.
- Women made up 43% of those who came into contact with the criminal justice system based on their HIV-positive status, but women are less than 13% of the HIV-positive population in California.
  - Black women and White women make up 4% and 3% respectively of the population of people diagnosed with HIV in California, but 21% and 15% respectively of the population of people who had contact with the criminal justice system related to their HIV status.
  - By comparison, White men make up 40% of the population of people diagnosed with HIV in California, but only 16% of those who had contact with the criminal justice system related to their HIV status.
- Overall, 31% of HIV-specific criminal incidents resulted in charges for an HIV-related crime. (Forty-three percent of incidents did not result in any charges, and 26% were charged with non-HIV-specific offenses.)
- Nearly every incident in which HIV-specific charges were brought resulted in a conviction (389 out of 390 incidents), and 91% of convictions were sentenced to immediate confinement.
- The length of sentences varied with the different HIV-related crimes. Those convicted of solicitation while HIV-positive were sentenced to an average of approximately two years, people convicted of exposure to HIV with intent to transmit were sentenced to about four and a half years, and those convicted of the sentence enhancement for being HIV-positive while engaging in a nonconsensual sex act received sentences closer to five and a half years, including the underlying sex offense crime.<sup>3</sup> People living with HIV who were convicted of the misdemeanor exposure law were incarcerated for 45 to 90 days.
- Across all HIV-related crimes, White men were significantly more likely to be released and not charged (in 60% of their HIV-specific criminal incidents) than expected, and Black men (36%), Black women (43%) and White women (39%) were significantly less likely to be released and not charged.
- These charging differentials were even starker among individuals assumed to be engaged in sex work under the solicitation while HIV-positive statute. White men were not charged in 70% of cases, while all others were not charged in 42% of cases. Conversely, in those same incidents, White men were charged with an HIV-related crime 12% of the time, while all others were charged for an HIV-related crime 31% of the time.
- While the average age at the time of arrest for the first HIV-related incident was 37, the range of arrestees was from 14 to 71 years of age.
  - All of the incidents involving people at the youngest end (ages 14 to 18) and oldest end (ages 57 to 71) of the continuum had contact based on the solicitation while HIV-positive statute.

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<sup>3</sup> In many cases, only one sentence was recorded for an entire incident, so the sentence enhancement cannot be disaggregated from the overall sentence that would have also included punishment for the underlying sex offense.

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- Looking more broadly at the ages at which individuals with HIV-related contact first came into contact with the criminal justice system, over half (51%) had their first contact with the criminal justice system before the age of 21.
  - Like criminal law enforcement in general, HIV criminal laws appear to disproportionately impact specific communities.

#### D. RESEARCH, LAW AND POLICY IMPLICATIONS

- Existing estimates of national HIV criminalization rates may be highly underestimated.
- Data point to some race- and sex-based disparities in the application of these laws. However, they do not provide an explanation of the root causes of these disparities. Future research is needed to pinpoint factors leading to these race- and sex-based differences.<sup>4</sup>
  - At the structural level, this includes assessing whether the disparities are a function of direct law enforcement targeting of people of color and women or an unintended consequence of the heightened scrutiny and targeting of sex workers who are disproportionately women and people of color. Future research could also explore whether there are individual or community level norms that play a role in the process of disclosure and behavior in the context of HIV criminalization laws.
- Future research should explore HIV-related criminalization in the context of an individual's broader criminal history and whether a charge of an HIV crime impacts pleas, convictions, or sentences for other crimes.
- Future research could move beyond enforcement data to more accurately capture the impact and consequences of HIV criminalization from the perspective of affected individuals. For example - Are there differences in how HIV status is discussed or treated between law enforcement officers and various subgroups of people in contact under these statutes? How did contact under these laws affect future HIV status disclosure behavior? Utilizing additional methods to study this population may have the added benefit of gaining representation of the distinct experiences of gender and sexual minorities living with HIV.

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<sup>4</sup> CORI data do not record a person's self-reported gender identity, and often are recorded based on the contact officer's assumptions about sex assigned at birth. Therefore, this report cannot distinguish between cisgender and transgender people in the dataset and cannot make claims about the experiences of transgender people with contact under these laws.



# INTRODUCTION

HIV criminalization is a term used to describe statutes that either criminalize otherwise legal conduct or that increase the penalties for illegal conduct based upon a person’s HIV-positive status. While only one HIV criminalization law can be found in federal law,<sup>5</sup> more than two-thirds of states and territories across the United States have enacted their own HIV criminal laws. Some HIV criminal laws do not require transmission of HIV, and in some states, these laws criminalize conduct that poses a negligible risk of transmission, such as spitting or biting.

California has four HIV-specific criminal laws, and one non-HIV-specific criminal law that criminalizes exposure to any communicable disease. None of these laws require actual transmission of HIV. See Table 1 for a summary of HIV Criminalization Laws in California.

**Table 1. HIV Criminalization Laws in California (2015)**

Code Section	Criminalized Conduct	Transmission Required?	Felony/Misdemeanor and Statutory Sentence (if included)
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	No	Felony punishable by imprisonment for 16 months or longer
Cal. Health & Safety Code § 120291	Consensual 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	No	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 <sup>5</sup>	No	Three year sentence enhancement
Cal. Health & Safety Code § 1621.5	Having knowledge that one is HIV-positive while donating blood, organs, tissue, semen or breast milk	No	Felony punishable by imprisonment for two, four, or six years
Cal. Health & Safety Code § 120290	Willful exposure to any contagious, infectious, or communicable disease (not HIV-specific)	No	Misdemeanor

## A. HISTORY OF HIV CRIMINALIZATION LAWS IN CALIFORNIA

The birth story for HIV criminalization laws is often driven by a narrative tying inception to a federal mandate within the Ryan White Comprehensive AIDS Resources Emergency Act of 1990 (“Ryan White Act”).<sup>7</sup> The Ryan White Act was enacted for the purpose of providing state governments and private nonprofit HIV service providers with federal funding. In its original form, it conditioned states’ receipt of federal funding on the enactment and enforcement of a certified criminal statute under which a person living with HIV could be prosecuted for a number of offenses. These included knowingly donating blood, semen, or breast milk with the intention of exposing another to HIV, knowingly engaging in sexual activity with the intention of exposing another to HIV, or knowingly sharing a used hypodermic needle with the intention of exposing another to HIV.<sup>8</sup>

<sup>5</sup> See 18 U.S.C. § 1122 (2015)(pertaining to the donation or sale of blood or other potentially infectious fluids or tissues).

<sup>6</sup> 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).

<sup>7</sup> Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. No. 101-381, 104 Stat 576 (1990).

<sup>8</sup> *Id.* at §2647.

All but one of California's HIV criminalization laws, however, preceded the enactment of the Ryan White Act. Thus, the federal government's mandate cannot be identified as the impetus for enacting California's HIV criminalization laws.<sup>9</sup> Additionally, in California, the Department of Public Health has had the authority to "quarantine, isolate, inspect, and disinfect persons ... whenever in its judgment the action is necessary to protect the public health," decades prior to the start of the HIV/AIDS epidemic.<sup>10</sup> This authority is entirely discretionary, and Public Health officials who act under it are wholly immune from civil liability.<sup>11</sup> It only requires that a Public Health official have probable cause to believe that a person is infected with a communicable disease.<sup>12</sup>

The only remaining evidence we can garner for why California chose to enact such laws must come from legislative history and what remains in the legislative record. The first of California's HIV criminalization laws established mandatory testing for HIV in instances of occupational exposure and for defendants of various sex crimes, at the request of the victims. These provisions were passed by proposition.<sup>13</sup> The same year, this proposition was followed by the enactment of a law establishing a felony for the donation of blood, organs, tissue, semen or breast milk when a person is aware of their HIV-positive status.<sup>14</sup> It was enacted regardless of the fact that HIV screening was scientifically possible and blood banks had already developed testing procedures to screen blood for evidence of the virus.<sup>15</sup> A companion bill to this donation bill then established (1) mandated HIV testing for individuals convicted of solicitation; (2) a felony offense if a person charged with solicitation had a previous solicitation or sex crime conviction in which a previously mandated HIV test confirmed HIV-positive status;<sup>16</sup> and (3) a three year sentence enhancement for nonconsensual sex crimes.<sup>17</sup>

Finally, ten years after the implementation of these initial HIV criminalization laws, California established the exposure with intent to infect law, which was intended to "hold individuals accountable who knowingly and willfully endanger the lives of others by engaging in actions that pose a significant risk of transmission."<sup>18</sup> The Author of the bill cited several incidents to support the bill. One reflected a situation where an individual living with HIV continued to have sex without a condom with his consensual sexual partner without disclosing his HIV status and was unsuccessfully prosecuted under an assault with a deadly weapon statute.<sup>19</sup> The other incidents involved a number of men who allegedly threatened to infect women after learning of their HIV-positive status.<sup>20</sup> The Author alleged that such conduct could not be successfully prosecuted under existing general criminal statutes, despite the fact that legislative staff were unable to find any California Supreme Court or appellate cases which provide evidence that existing law was somehow inadequate.<sup>21</sup>

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<sup>9</sup> See Ryan White CARE Act Amendments of 2000, Pub. L. No. 106-345, § 301(a), 114 Stat. 1319, 1345 (2000)(removing criminalization requirement of §2647).

<sup>10</sup> CAL. HEALTH AND SAFETY CODE § 120145.

<sup>11</sup> *Jones v. Czapkay*, 182 Cal. App. 2d 192, 205-06 (Cal. Dist. Ct. App. 1960).

<sup>12</sup> *In re King*, 128 Cal. App. 27, 27-28 (Cal. Dist. Ct. App. 1932).

<sup>13</sup> Proposition 96, 1988 Cal.Stat. A-271 to -274 (codified at CAL. HEALTH AND SAFETY CODE § § 199.95-.99 (West 1990)).

<sup>14</sup> 1988 Cal. Legis. Serv. 1154 (West)(codified in CAL. HEALTH AND SAFETY CODE § 1621.5); 1989 Cal. Legis. Serv. 920 (West) (mandated testing of source donors for tissue, sperm and breast milk codified in CAL. HEALTH AND SAFETY CODE § 1644.5).

<sup>15</sup> CENTERS FOR DISEASE CONTROL & PREVENTION (CDC), EVOLUTION OF HIV/AIDS PREVENTION PROGRAMS --- UNITED STATES, 1981-2006 (2006). MMWR MORB MORTAL WKL Y REP. 2006;55(21):597-603 (2006), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5521a4.htm>.

<sup>16</sup> 1988 Cal. Legis. Serv. 1597 (West)(codified in CAL. PENAL CODE §§1202.6 and 647f).

<sup>17</sup> *Id.* (codified in CAL. PENAL CODE § 12022.85).

<sup>18</sup> Sen. Com. On Pub. Safety, Analysis of Sen. Bill No. 705 (1997-1998 Reg. Sess.)

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* (noting lack of Supreme Court and appellate court case law indicating inadequacy; citing several trial court cases involving HIV-positive individuals charged for engaging in unprotected consensual sex under CAL. PENAL CODE § 245, assault with a deadly weapon, from 1991 to 1997).

## B. LEGAL CHALLENGES TO HIV CRIMINALIZATION LAWS IN CALIFORNIA

A search of published or otherwise publicly available case law in California identified only one constitutional challenge to one of California's HIV criminalization laws: a 1998 opinion upholding the sentence enhancement for nonconsensual sex crimes. The decision was decided two years after effective HIV medications became widely available, and before there was a body of evidence about their impact on health outcomes and transmission.

No cases were identified of defendants challenging the misdemeanor exposure statute, the donation statute, or the exposure to HIV with intent to transmit statute. In two criminal cases under the exposure with intent to transmit statute, defendants were successful in getting the courts to dismiss counts related to the statute due to insufficient evidence that the defendant acted with specific intent to infect the victim.<sup>22</sup>

There also has been no constitutional challenge to the solicitation while HIV-positive statute. However, in 1990, defendants in *Love v. Superior Court* challenged the statutory requirement that a person convicted under solicitation be mandated to get tested for HIV. The California Court of Appeals opined that the HIV testing requirements were not an unreasonable search under the Fourth Amendment, finding it constitutional under the "special needs" doctrine of the Fourth Amendment.<sup>23</sup> This doctrine requires the court to find that where a search serves some kind of special governmental need, beyond the normal need for law enforcement, a warrant or some level of individualized suspicion is not necessary to be reasonable.<sup>24</sup> In *Love*, the court weighed the Fourth Amendment interests of persons convicted of solicitation against the "promotion of the government's goal of preventing the spread of AIDS."<sup>25</sup>

Defendants in *Love* also made a due process argument stating that because the predicate violation for solicitation does not require engagement in any sex act or transmission of bodily fluid,<sup>26</sup> there was no reasonable relation between the testing statute's means and ends.<sup>27</sup> The court again disagreed, stating that "[w]hat is relevant is whether and to what extent the group affected by the statute ... are members of a group at high risk for AIDS, and whether and to what extent such persons threaten to transmit the AIDS virus to the general population."<sup>28</sup> Because the language found within the legislative record indicated that sex workers were at higher risk of contracting HIV and high risk in terms of infecting others, the court found no violation of due process.<sup>29</sup>

In 1998, there was an unsuccessful constitutional challenge to the sentence enhancement for nonconsensual sex crimes. In *Guevara v. Superior Court*, the defendant challenged the sentence enhancement for nonconsensual sex crimes arguing that it was unconstitutional on its face because it violated the Eighth Amendment's prohibition against cruel and unusual punishment by punishing a person's HIV "status" rather than their conduct.<sup>30</sup> The court disagreed, because the defendant had to have committed some manner of criminal conduct in order to be punished under this statute.<sup>31</sup> The defendant then alleged that the law was unconstitutional in that the law treated HIV differently from any other disease, thus

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<sup>22</sup> *People v. Malone*, 2009 WL 1508534 (Cal. Ct. App. May 28, 2009); *People v. Hall*, 2007 WL 2121912 (Cal. Ct. App. July 25, 2007).

<sup>23</sup> *Love v. Superior Court*, 226 Cal. App. 3d 736, 746 (Cal. Ct. App. 1990).

<sup>24</sup> *Skinner v. Railway Labor Exec. Assn.*, 489 U.S. 602, 604 (1989).

<sup>25</sup> *Love* at 746.

<sup>26</sup> Solicitation under CAL. PENAL CODE §647(b) is distinct from prostitution (which is defined under CAL. PENAL CODE §647(b) as "any lewd act between persons for money or other consideration"). Solicitation requires only an agreement to engage in prostitution and some act done in furtherance of that agreement.

<sup>27</sup> *Love* at 746.

<sup>28</sup> *Id.* at 747.

<sup>29</sup> *Id.*

<sup>30</sup> *Guevara v. Superior Court*, 62 Cal. App. 4th 864, 871-74 (1998).

<sup>31</sup> *Id.* at 871.

violating equal protection under the law.<sup>32</sup> The court did not find this argument persuasive even under the highest level of scrutiny, because it found that the government's compelling interest in safety merited this difference in treatment.<sup>33</sup> Finally, the defendant argued that the law treated situations involving female victims differently than situations involving male victims thus violating equal protection on yet another ground.<sup>34</sup> At the time, one of the predicate offenses that could result in the three-year sentence enhancement was "[u]nlawful intercourse with a female under age 18 in violation of Section 261.5,"<sup>35</sup> which has since been changed to "[u]nlawful intercourse with a person under 18 years of age in violation of Section 261.5."<sup>36</sup> The court found the state had a compelling government interest in treating male and female victims differently, as females who acquire HIV may be able to pass it off to their offspring.<sup>37</sup>

Notably, the *Guevara* opinion relied on an assessment of the medical knowledge about HIV/AIDS treatment and transmission that is now almost two decades old. For example, the Court distinguished HIV from all other communicable diseases because HIV was an "inevitably deadly disease. No other communicable diseases pose this same threat to sex crime victim."<sup>38</sup> The federal government website, AIDS.gov, now advises newly infected people that "today HIV is a manageable disease. HIV medications have significantly changed the course of HIV infection since the early days of the epidemic and with the proper care and treatment, you can live a healthy life."<sup>39</sup> Similarly, the Court's gender discrimination analysis rested, in part, on the finding that "one-third to one-half of the babies born to HIV-positive mothers will be born HIV-positive."<sup>40</sup> Notably, in the same year *Guevara* was decided, the Supreme Court noted evidence that there was an 8% chance of transmission if the mother was on effective medications.<sup>41</sup> Today the Centers for Disease Control and Prevention, (CDC) advises, "women with HIV who take antiretroviral medication during pregnancy as recommended can reduce the risk of transmitting HIV to their babies to less than 1%."<sup>42</sup>

### C. MODERNIZATION EFFORTS ACROSS THE UNITED STATES

By some accounts, the United States has a record of having the highest number of HIV-related criminal convictions.<sup>43</sup> In the past few years, there has been an increasing amount of attention on and critique of HIV criminalization laws throughout the country and efforts at legislative reform. In February 2013, the Presidential Advisory Council on HIV/AIDS (PACHA) approved a resolution calling for federal action against HIV criminalization.<sup>44</sup> In May 2013, Congresswomen Barbara Lee (D-Calif.) and Ileana Ros-Lehtinen (R-Fla.), introduced H.R. 1843, the Repeal Existing Policies that Encourage and Allow Legal (REPEAL) HIV Discrimination Act, which would require a review of federal and state laws that impose criminal liabilities on people living with HIV.<sup>45</sup> It encourages state and federal legislators to work together to assess and modernize outdated laws relating to HIV, thus bringing criminal laws in line with the principles embodied by modern nondiscrimination laws.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 872.

<sup>34</sup> *Id.* at 873-874.

<sup>35</sup> CAL. PENAL CODE § 12022.85 (West 1998).

<sup>36</sup> CAL. PENAL CODE § 12022.85 (West 1999).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 872.

<sup>39</sup> AIDS.GOV, NEWLY DIAGNOSED: WHAT YOU NEED TO KNOW (2015), <https://www.aids.gov/hiv-aids-basics/just-diagnosed-with-hiv-aids/overview/newly-diagnosed/>.

<sup>40</sup> *Guevara* at 874.

<sup>41</sup> *Bragdon v. Abbott*, 524 U.S. 624, 626 (1998).

<sup>42</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC), HIV AMONG PREGNANT WOMEN, INFANTS, AND CHILDREN (2015), <http://www.cdc.gov/hiv/group/gender/pregnantwomen/index.html>.

<sup>43</sup> Angela Perone, *From Punitive to Proactive: An Alternative Approach for Responding to HIV Criminalization that Departs from Penalizing Marginalized Communities*, 24 HASTINGS WOMEN'S L. R. 363 (2013).

<sup>44</sup> PRESIDENTIAL ADVISORY COUNCIL ON HIV/AIDS, RESOLUTION ON ENDING FEDERAL & STATE HIV-SPECIFIC CRIMINAL LAWS, PROSECUTIONS, & CIVIL COMMITMENTS (2013), <http://www.hivma.org/uploadedFiles/HIVMA/HomePageContent/PACHA%20Resolution.pdf>.

<sup>45</sup> Repeal Existing Policies that Encourage and Allow Legal HIV Discrimination Act of 2013, H.R. 1843, 114th Cong. (introduced in House May 7, 2013).



In March 2014, the Department of Justice (DOJ) and Centers for Disease Control and Prevention (CDC) published a joint paper reviewing the existing HIV criminal laws throughout the United States and recommended that states, “assess the laws’ alignment with current evidence regarding HIV transmission risk, and consider whether current laws are the best vehicle to achieve their intended purposes.”<sup>46</sup> In July 2014, the Department of Justice released guidance to states on how best to reform HIV-related criminal laws to align with current scientific knowledge.<sup>47</sup> Additionally, the National HIV/AIDS Strategy for the United States, which was recently revised and released in July 2015, stated, “In too many instances, the existence and enforcement of these types of laws run counter to scientific evidence about routes of HIV transmission and effective measures of HIV prevention, and undermine the public health goals of promoting HIV screening and treatment.”<sup>48</sup> These calls are salient given that recent evidence in biomedical intervention studies suggest that individuals living with HIV can prevent transmission of HIV to others through effective treatment, and HIV-negative individuals can avoid acquiring HIV by taking HIV medication as pre-exposure prophylaxis.<sup>49</sup>

Despite these and other statements about the need to address outdated HIV criminalization laws, there is very little empirical evidence of how the laws are being enforced and who the individuals are being most impacted by HIV criminalization. Previous efforts to collect empirical data from law enforcement agencies through Freedom of Information Act requests and traditional legal research<sup>50</sup> have led to several compilations of data documenting the number of individuals who may have been convicted under HIV criminalization laws.<sup>51</sup> These efforts have been limited as they do not reflect statewide population-level data and do not include comprehensive data across the spectrum from arrest through post-conviction events, including sentencing.<sup>52</sup>

Given the lack of comprehensive data on the use of HIV criminal laws in California, Williams Institute researchers contacted the California Department of Justice and requested access to criminal offender record information (CORI) data.<sup>53</sup> CORI data record any contacts an individual may have with the criminal justice system, from every event beginning at arrest through sentencing, so these data provide a full chronological record of how these laws are being utilized. After obtaining necessary security clearances from the California Department of Justice, Williams Institute researchers were able to access the de-identified criminal history of all individuals who had had contact with the criminal justice system under Cal. Penal Code § 647f (solicitation while HIV-positive), Cal. Health & Safety Code § 120291 (exposure to HIV with intent to transmit), Cal. Penal Code § 12022.85 (sex offense sentence enhancement for HIV-positive status in nonconsensual sex crimes) and Cal. Health & Safety Code § 120290 (misdemeanor exposure to any communicable disease) from the time of their enactment through June 2014. We were not provided data on Cal. Health & Safety Code § 1621.5 (blood and other donations while HIV-positive).

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<sup>46</sup> J. Stan Lehman, Meredith H. Carr, Allison J. Nichol, Alberto Ruisanchez, David W. Knight, Anne E. Langford, Simone C. Gray & Jonathan H. Mermin, *Prevalence and Public Health Implications of State Laws that Criminalize Potential HIV Exposure in the United States*, 18 AIDS & BEHAVIOR 997, 1004 (2014).

<sup>47</sup> DEP’T OF JUSTICE, OFFICE OF CIVIL RIGHTS, BEST PRACTICES GUIDE TO REFORM HIV-SPECIFIC CRIMINAL LAWS TO ALIGN WITH SCIENTIFICALLY-SUPPORTED FACTORS (2014), <https://www.aids.gov/federal-resources/national-hiv-aids-strategy/doj-hiv-criminal-law-best-practices-guide.pdf>.

<sup>48</sup> THE WHITE HOUSE OFFICE OF NAT’L AIDS POLICY, NATIONAL HIV/AIDS STRATEGY FOR THE U.S.: UPDATED TO 2020, 42 (2015), <https://www.aids.gov/federal-resources/national-hiv-aids-strategy/nhas-update.pdf>.

<sup>49</sup> CAL. HIV/AIDS RESEARCH PROGRAM POLICY RESEARCH CENTERS, TASP, PEP, AND PrEP: NEW HOPE IN THE FIGHT AGAINST HIV/AIDS (2015), <http://www.californiaaidsresearch.org/files/TasP-PEP-PrEP.pdf>.

<sup>50</sup> Traditional legal research is limited to case law searches, which only provide information on arrests that result in prosecutions which are published or otherwise publicly available cases.

<sup>51</sup> See CTR. FOR HIV LAW & POLICY, ENDING & DEFENDING AGAINST HIV CRIMINALIZATION A MANUAL FOR ADVOCATES: STATE & FEDERAL LAWS & PROSECUTIONS (2015), <http://hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/HIV%20Crim%20Manual%20%28updated%205.4.15%29.pdf>; SERO PROJECT, HIV CRIMINALIZATION (2015), <http://seroproject.com/>; and Sergio Hernandez, *Sex, Lies and HIV: When What You Don’t Tell Your Partner Is a Crime* (2013), <http://www.propublica.org/article/hiv-criminal-transmission>.

<sup>52</sup> See Zita Lazzarini, Carol L. Galletly, Eric Mykhalovskiy, Dini Harsono, Elaine O’Keefe, Merrill Singer, & Robert J. Levine, *Criminalization of HIV Transmission and Exposure: Research and Policy Agenda*, 103 AM. J. PUBLIC HEALTH 1350, 1350-51 (2013) (citing need for more projects that provide data on how these laws are actually enforced).

<sup>53</sup> IRB Exemption was granted under UCLA IRB#15-001233.



# STUDY OVERVIEW

## A. OBJECTIVES

In an effort to address the gap in research about enforcement of HIV criminal laws, the current project sought to understand the following:

Of the individuals who had HIV-related contact with the California criminal justice system:

1. How many had such contact and how many separate incidents did these contacts represent?
2. What were their demographic characteristics and geographic locations?
3. What were the characteristics of each contact, including case outcomes and sentencing information?
4. Is there any preliminary evidence of disproportionate representation of some subgroups?

## B. ANALYSIS APPROACH

The data were cleaned and coded in order to answer this set of exploratory research questions.<sup>54</sup> All data were analyzed using Stata version 13.1.<sup>55</sup> When appropriate, inferential statistics were used to test differences between sample subgroups; however, most data are presented descriptively. The analyses that follow include all individuals and incidents that were HIV-specific at the time of data extraction. Therefore, contacts associated with Cal. Health & Safety Code § 120290, misdemeanor exposure to any communicable disease incidents, that could not be verified to have been related to HIV were dropped from the analysis. We aimed to avoid overestimates by excluding cases that could possibly relate to other communicable diseases. Verification was obtained by using the criminal offense codes in the dataset to determine whether another HIV-specific offense had been identified in the same incident or in the person's criminal history prior to the misdemeanor exposure incident.

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<sup>54</sup> Originally, we received the criminal histories of over 3,000 people who had HIV-related contacts in their records. However, after initial exploratory analysis, it became apparent that the vast majority of the solicitation while positive contacts recorded were actually miscoded offenses. This miscoding happened, because Cal. Penal Code § 647f refers to solicitation while HIV-positive, while Cal. Penal Code § 647(f) refers to public intoxication. In order to determine which records were accurately recorded to reflect solicitation while HIV-positive and not public intoxication, the researchers reviewed all possible offense codes that may have resulted in court-mandated HIV-testing. All individuals who did not have an incident in their criminal history that could have resulted in HIV-testing prior to or simultaneously with the 647f contact in their record were dropped from the analyses.

<sup>55</sup> Any comparisons drawn throughout the report have been found to be statistically significant at the  $p < .05$  level unless otherwise indicated.



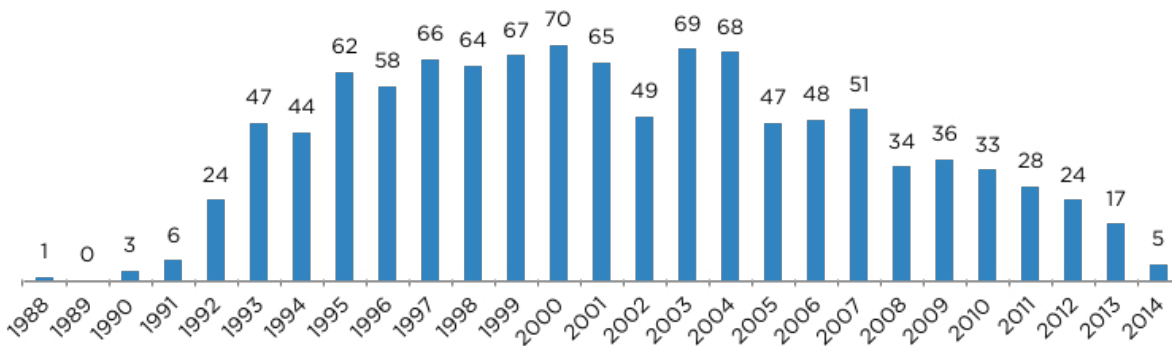
# FINDINGS

## A. INDIVIDUALS WHO HAD HIV-RELATED CONTACT AND THE NUMBER OF SEPARATE HIV-RELATED INCIDENTS

Overall, 800 people have come into contact<sup>56</sup> with the California criminal justice system from 1988 to June 2014 either under an HIV-specific law or under the misdemeanor exposure law as it related to a person's HIV-positive status. These individuals were involved in 1,263 separate HIV-specific incidents. An incident can be defined as one set of circumstances which may give rise to a series of contacts with law enforcement during arrest, charge, conviction, and post-conviction proceedings.

The frequency of enforcement of HIV-related criminal laws has risen and fallen since the laws' passage in 1988.<sup>57</sup> An overall high period of enforcement occurred between 1995 and 2004, with an annual average of 76 criminal incidents related to an average of 64 people living with HIV. Put differently, the interactions peaked in the year 2000, when 70 people had HIV-related criminal contact. Since that time, the number of incidents has progressively declined. In 2013, the most recent full year for which data were analyzed, 17 people had HIV-related criminal contact, the lowest number since 1991. It should be noted, however, that the data were extracted in June 2014, so 2014 data do not include the full year of incidents. See Figure 1 for the number of people who have had contact with the California criminal justice system related to their HIV since 1988.

**Figure 1. Number of People who had Contact with the Criminal Justice System Related to their HIV Status, by Year**



## B. THE DEMOGRAPHIC CHARACTERISTICS AND GEOGRAPHIC LOCATIONS OF INDIVIDUALS WHO HAD HIV-RELATED CONTACT

While the average age at the time of arrest for the first HIV-related incident was 37, the range of arrestees was from 14 to 71 years of age. All of the incidents involving people at the youngest end (ages 14 to 18) and oldest end (ages 57 to 71) of the continuum had contact based on the solicitation while HIV-positive

<sup>56</sup> Throughout the report, we use the phrase “come into contact,” because there were many different ways in which an HIV-related offense could come up in someone’s criminal history. For example, for some individuals, the original arrest would be under an HIV-related code, while in other instances, the HIV-related code would not come into play until charging or sentencing. Also, some people were arrested or cited under HIV-related codes without any further prosecution under those codes. Therefore, we use “come into contact” to encompass all of the different ways that a person may have fallen under the jurisdiction of the California criminal justice system.

<sup>57</sup> The solicitation while HIV-positive statute and nonconsensual sex offense sentence enhancement were passed in 1988. The exposure with intent to transmit statute was passed in 1998. The general misdemeanor exposure to a communicable disease statute was enacted in 1939, but its use against people living with HIV could only be confirmed beginning in 2004.

statute. Looking more broadly at the ages at which individuals with HIV-related contact first came into contact with the criminal justice system, over half (51%) had their first contact with the criminal justice system before the age of 21. See Table 2 for further demographic information of the individuals who had HIV-related contact with the California criminal justice system.

**Table 2. Number of Incidents and Demographics of People Impacted by HIV Criminalization Laws in California (1988-June 2014)**

	Overall	Solicitation while HIV positive	Exposure with intent to transmit	Non-consensual sex offense sentence enhancement	Exposure to a communicable disease (limited to known HIV)
Number of incidents	1,263 <sup>58</sup>	1,195	37	38	8 <sup>59</sup>
Number of people	800	753	30	31	6 <sup>60</sup>
<b>Age at time of first HIV-specific event<sup>61</sup></b>					
Oldest	71	71	56	52	47
Youngest	14	14	19	19	21
Mean	37.0	36.9	35.6	38.3	38.0
Standard Deviation	10.0	10.0	11.6	8.4	10.1
<b>Sex<sup>62</sup></b>					
Female	43%	45%	30%	0%	17%
Male	57%	55%	70%	100%	83%
<b>Race/Ethnicity</b>					
Asian/Pacific Islander	2%	1.5%	0%	6%	0%
Black	39%	41%	33%	26%	17%
Latino/a	27%	27%	30%	23%	33%
Native American	0.9%	0.9%	0%	0%	0%
Other	0.5%	0.4%	3%	0%	0%
White	30%	29%	33%	45%	50%
<b>Race/Ethnicity and Sex</b>					
Black Female	21%	22%	17%	0%	0%
Black Male	19%	19%	17%	26%	17%
Latina Female	6%	6%	7%	0%	0%
Latino Male	21%	21%	23%	23%	33%
White Female	15%	16%	7%	0%	17%
White Male	16%	14%	27%	45%	33%

<sup>58</sup> The sum of the number of incidents in the statute-specific categories does not equal the number of overall incidents, because there were 15 incidents in which more than one HIV-related statute was charged. Therefore, the data presented in the categories of statutes are not mutually exclusive.

<sup>59</sup> There were 82 incidents related to the misdemeanor for exposure to a communicable disease, but only eight could be verified as having either involved another HIV-specific offense during the same incident or in an incident in the person's criminal history prior to the misdemeanor exposure incident.

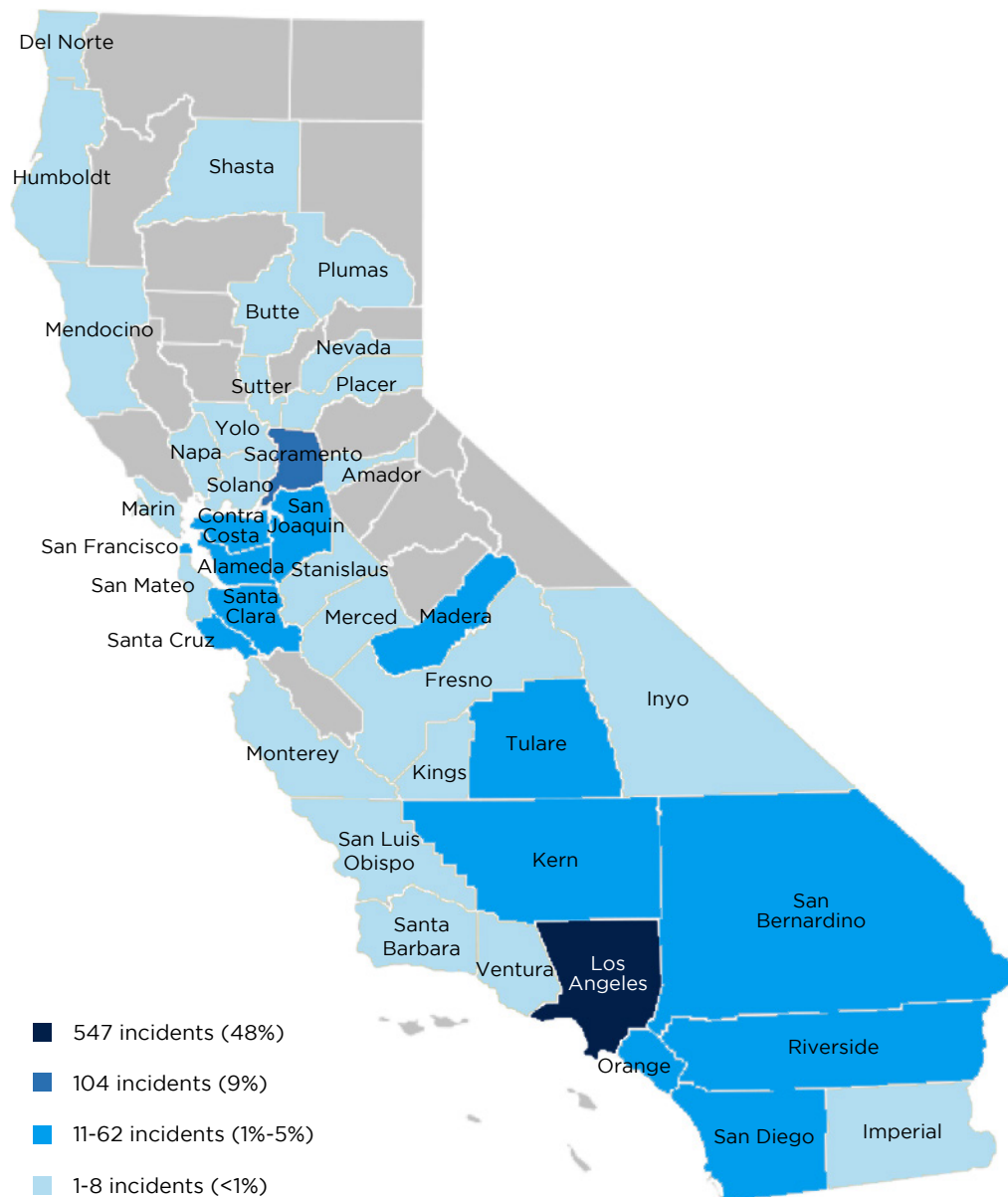
<sup>60</sup> There were 69 people who had come into contact with the criminal justice system under the general misdemeanor for exposure to a communicable disease, but only six could be verified as having been HIV-positive and having had that status recorded in their criminal records.

<sup>61</sup> The age calculations only include the first incident in a person's history of each of the incidents above. For example, if a person was involved in three HIV-specific incidents overall - two solicitation while HIV positive incidents and one exposure with intent to transmit incident - the earliest of the three will be counted in the overall column, the first of the solicitation incidents will be counted in the solicitation column and the exposure with intent to transmit incident will be counted in the exposure with intent to transmit column. The oldest and youngest ages reported were rounded down to the nearest whole number to reflect the age that the individual would identify as at that time.

<sup>62</sup> CORI data do not record a person's self-reported gender identity, and often are recorded based on the contact officer's assumptions about sex assigned at birth. Therefore, this report cannot distinguish between cisgender and transgender people in the dataset and cannot make claims about the experiences of transgender people with contact under these laws.

Based on the HIV-specific criminal incidents in California where the geographic location was identifiable, individuals had HIV-related contact with the criminal justice system in 40 out of the 58 counties in California. Nearly half (48% or 547 incidents) took place in Los Angeles County. Nine percent of the HIV-specific criminal incidents (104 incidents) took place in Sacramento County. By contrast, 37% of people living with HIV/AIDS in California have lived in Los Angeles County, and 3% lived in Sacramento County.<sup>63</sup> Every other county had five percent or lower of the overall incidents in the state. See Figure 2 indicating counties where HIV criminalization laws have been enforced and Table 3 comparing where HIV criminal laws have been enforced with HIV prevalence by county.

**Figure 2. California Counties Where HIV Criminal Laws Have Been Enforced**



<sup>63</sup> CAL. DEP'T. OF PUBLIC HEALTH, OFFICE OF AIDS, HIV/AIDS SURVEILLANCE SECTION, CALIFORNIA HIV/AIDS CASES BY COUNTY CUMULATIVE AS OF DECEMBER 31, 2013 (2013), <https://www.cdph.ca.gov/data/statistics/Documents/HIVSurveillanceReport2013dxBy2014yrenddata.pdf>.

**Table 3. California Counties Where HIV Criminal Laws Have Been Enforced Compared with HIV Prevalence Rates by County**

County	Enforcement (1988-June 2014)	HIV Prevalence (March 1983-December 2014) <sup>64</sup>
Los Angeles	48%	37%
Sacramento	9%	3%
Kern	5%	1%
San Bernardino	5%	3%
Madera	4%	0.1%
Orange	4%	5%
San Francisco	4%	16%
Riverside	3%	4%
San Diego	3%	10%
San Joaquin	2%	1%
Alameda	2%	5%

### C. CHARACTERISTICS OF EACH CONTACT, INCLUDING CASE OUTCOMES AND SENTENCING INFORMATION

The vast majority (94%) of individuals coming into HIV-related contact with the criminal justice system in California had such contact related to the felony solicitation law. The other statutes were very rarely used by comparison.

Outcomes of the HIV-specific criminal incidents in California were divided into three categories: (1) not charged for any crime,<sup>65</sup> (2) charged for a non-HIV-related crime and (3) charged for an HIV-related crime. In the incidents categorized as charged for a non-HIV-related crime, the defendant was charged for a crime alleged during the incident in question, but not one of the HIV-related crimes, e.g. for solicitation, but not solicitation while HIV-positive. In the incidents categorized as charged for an HIV-related crime, the defendant was charged for one of the three HIV-specific crimes or the misdemeanor exposure to a communicable disease statute, with the communicable disease in those cases having been HIV. In those incidents, the defendant may or may not have also been charged for other non-HIV-related crimes that were alleged in the same incident. See Table 4 for the number and percent of incidents that resulted in each possible category or outcome for HIV-specific incidents in California.

<sup>64</sup> CAL. DEP'T. OF PUBLIC HEALTH, OFFICE OF AIDS, HIV/AIDS SURVEILLANCE SECTION, CALIFORNIA HIV/AIDS CASES BY COUNTY CUMULATIVE AS OF DECEMBER 31, 2013 (2013), <https://www.cdph.ca.gov/data/statistics/Documents/HIVSurveillanceReport2013dxBy2014yrenddata.pdf>. HIV reporting began in 1983, so prevalence rates are reported from that time forward.

<sup>65</sup> "Not charged" included cases that only involved arrests, cases that were transferred to other jurisdictions, cases in which prosecution was deferred to send the defendants to rehab or work programs and cases that were discharged or dismissed.

**Table 3. Outcomes of HIV-Specific Criminal Incidents in California, 1988 - June 2014**

	Overall	Solicitation while HIV positive	Exposure with intent to transmit	Non-consensual sex offense sentence enhancement	Exposure to a communicable disease (limited to known HIV)
<b>Number of Incidents</b>					
Unknown	3	3	0	0	0
Not Charged	547	535	11	1	1
Charged for a non-HIV-specific crime	323	311	10	6	1
Charged for an HIV-specific crime	390	346	16	31	6
Total	1263	1195	37	38	8
<b>Percent of Incidents (among those with known outcomes)</b>					
Not Charged	43%	45%	30%	3%	13%
Charged for a non-HIV-specific crime	26%	26%	27%	16%	13%
Charged for an HIV-specific crime	31%	29%	43%	82%	75% <sup>66</sup>

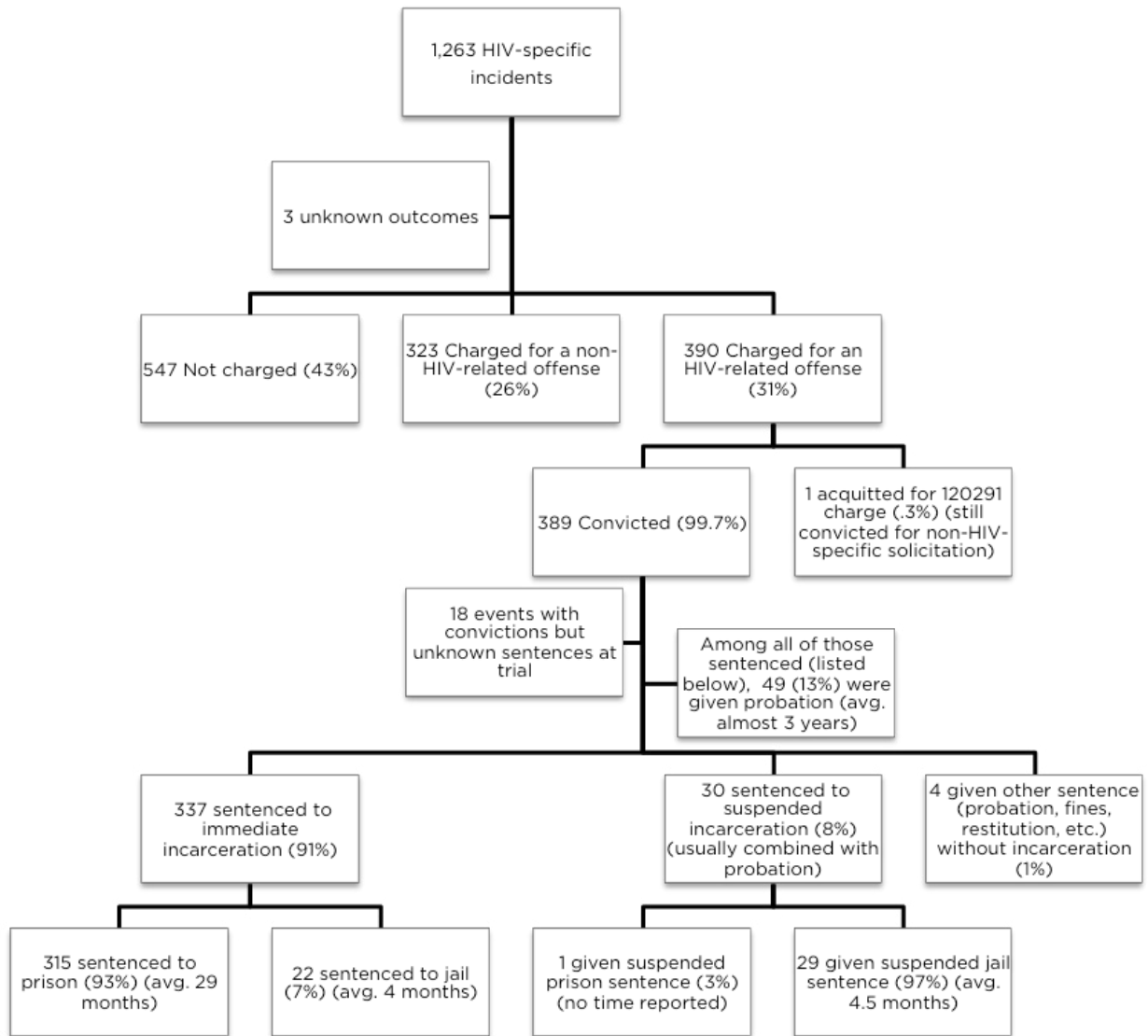
Overall, 43% of HIV-specific incidents did not result in any charges being brought, 26% were charged for a non-HIV-related crime, and 31% were charged with an HIV-related crime. Charging rates for HIV-related offenses were much higher among those incidents that involved allegations of nonconsensual sex offenses.

Nearly every incident in which charges were brought resulted in a conviction (389 out of 390 incidents). Among those with known sentences at the time of conviction, 85% were sent to prison for an average of 29 months, and six percent were sent to jail for an average of four months. Immediate incarceration sentences ranged from one day to 71 years to life.<sup>67</sup> See Figure 3 for outcomes and sentences for HIV-specific convictions in California. Nine percent of all people convicted (and with known sentences) were not sentenced to immediate incarceration. Eight percent of people convicted were given some combination of probation and suspended incarceration sentences that would be enforced if the probation terms were violated. The remaining one percent of people convicted was sentenced to fines, restitution and/or probation without incarceration.

<sup>66</sup> Charging rates among those charged with the exposure to a communicable disease misdemeanor statute may be skewed, because the only incidents that were included in the data set were those that could be confirmed as being related to HIV, which defined the inclusion group as those who were either currently or previously also charged with an HIV-related felony.

<sup>67</sup> In many cases, only one sentence was recorded for an entire incident, in incidents where both HIV-specific and non-HIV-specific charges were brought, the underlying sentences cannot always be disaggregated.

Figure 3. Outcomes and Sentences for HIV-Specific Criminal Incidents and Convictions



Lengths of incarceration varied by the underlying crime. People convicted of solicitation while HIV-positive were sentenced to an average of approximately two years, people convicted of exposure to HIV with intent to transmit were sentenced to about four and a half years, those convicted of the sentence enhancement for being HIV-positive while engaging in a nonconsensual sex act received sentences closer to five and a half years.<sup>68</sup> People living with HIV who were convicted of the misdemeanor exposure law were incarcerated for 45 to 90 days. See Table 5 for sentence lengths by offense under California HIV criminalization laws.

<sup>68</sup> In many cases, only one sentence was recorded for an entire incident, so the sentence enhancement cannot be disaggregated from the overall sentence that would have also included punishment for the underlying sex offense.



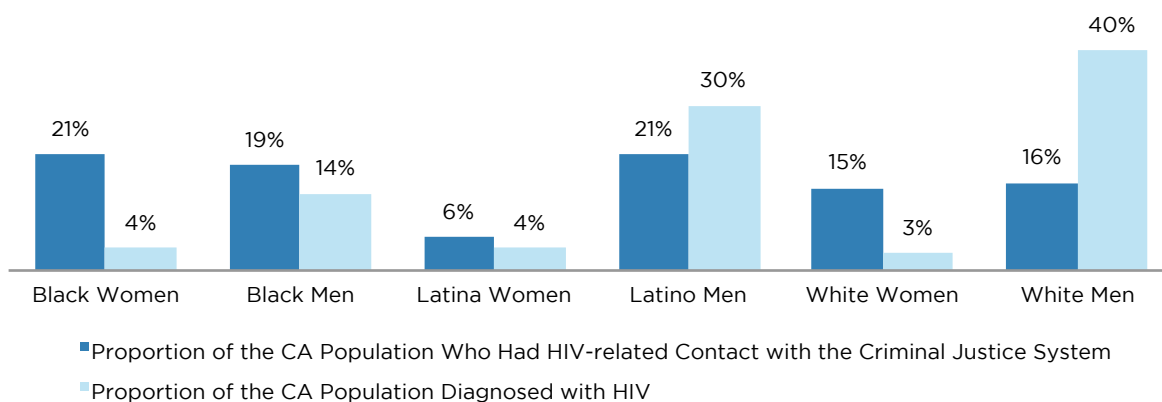
**Table 4. Outcomes of HIV-Specific Criminal Incidents in California, 1988 - June 2014**

	Overall	Solicitation while HIV positive	Exposure with intent to transmit	Non-consensual sex offense sentence enhancement <sup>69</sup>	Exposure to a communicable disease (limited to known HIV)
Median length of incarceration <sup>70</sup>	16 months	16 months	36 months	72 months	3 months
Mean length of incarceration <sup>70</sup>	27.2 months	22.8 months	53.2 months	66.8 months	2.6 months
Standard Deviation	21.7 months	14.9 months	24.3 months	32.5 months	.75 months
Shortest Sentence	1 day	1 day	36 months	6 months	1.5 months
Longest Sentence	852 months to life	300 months to life	96 months	852 months to life	3 months
Number of convictions with known immediate incarceration sentences	337	299	8	27	3

#### D. PRELIMINARY EVIDENCE OF DISPROPORTIONATE REPRESENTATION OF SUBGROUPS

When comparing the overall demographics of the individuals who came in contact with the system based on their HIV status to those diagnosed with HIV in California,<sup>71</sup> patterns emerge that indicate that certain groups of individuals may have been disproportionately affected by the implementation of these laws. For example, White men made up 40% of the population of people diagnosed with HIV in California, but only 16% of those who had contact with the criminal justice system related to their HIV status. On the other hand, Black women and White women made up 4% and 3% respectively of the population of people diagnosed with HIV in California, but 21% and 15% respectively of the population of people who had contact with the criminal justice system related to their HIV status. See Figure 4 for a comparison between HIV prevalence data in California and individuals who had HIV-related contact with the California criminal justice system.

**Figure 4. Comparison of HIV Prevalence in California with People who had Contact with the Criminal Justice System in California Related to their HIV Status, by Race/Ethnicity and Sex**



<sup>69</sup> Often sentences are reported for an entire case, and not divided out by each charge. Therefore, sentences for the sex offense enhancement generally include the sentence for the underlying sex crime as well.

<sup>70</sup> Only includes convictions that sentenced the defendant to immediate incarceration in jail or prison (not a suspended sentence). For the purposes of calculating means and medians, the sentences that included a life term were excluded.

<sup>71</sup> Diagnosis data were obtained from the CDC Atlas 2012 data. See CENTERS FOR DISEASE CONTROL & PREVENTION, NCHHSTP ATLAS (2015), <http://gis.cdc.gov/GRASP/NCHHSTPATlas/main.html>. While the CORI data span 1988 to 2014, the population of people living with HIV has increasingly included women and racial minorities over time. Therefore, using 2012 data as a comparator is likely to only underestimate any differential patterns seen towards women and racial/ethnic minorities.

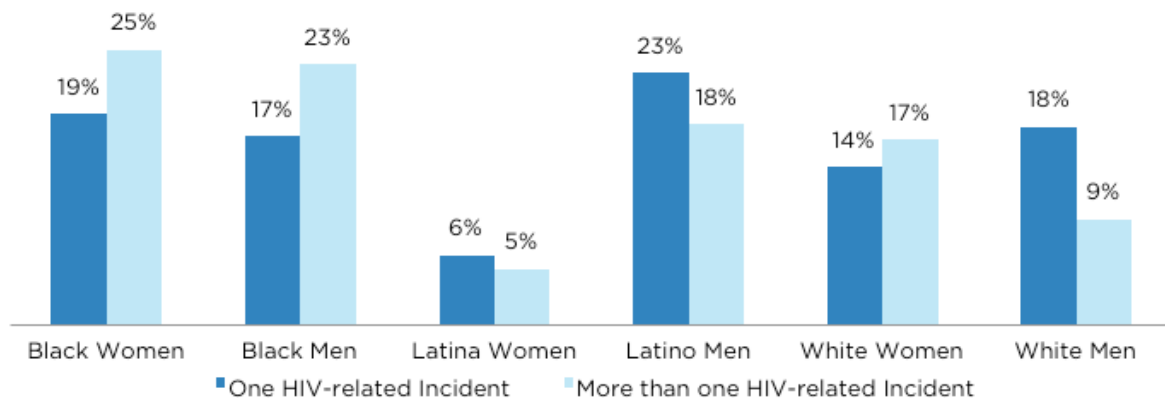
There also appeared to be differential patterns by race/ethnicity and sex when analyzing who came in contact with the system more than once related to their HIV-positive status. The majority of individuals (72%) only had contact with the criminal justice system in one incident related to their HIV. See Table 6 for the number of HIV-specific incidents for each individual among those who had HIV-related contact with the California criminal justice system.

**Table 6. Number of HIV-specific incidents for each individual who had contact with the criminal justice system related to their HIV**

Number of HIV-specific criminal incidents	Number of People	Percent of People
1	578	72%
2	111	14%
3	52	7%
4	31	4%
5 or more	28	4%
<b>Total</b>	<b>800</b>	<b>100%</b>

Black men and Black women were significantly more likely than White men to come into contact with the system repeatedly based on their HIV status.<sup>72</sup> Black men and Black women accounted for 19% and 17% respectively of those who had one incident, but 25% and 23% respectively of those who had multiple incidents. Conversely, White men made up 18% of those who had one HIV-specific criminal incident and only 9% of those who had more than one HIV-specific criminal incident. See Figure 5 for a comparison between those who came into contact with the California criminal justice system, related to their HIV-status, once as opposed to multiple times.

**Figure 5. Comparison of People who Had Contact with the California Criminal Justice System Related to their HIV Status Once vs. Multiple Times, by Race/Ethnicity and Sex**



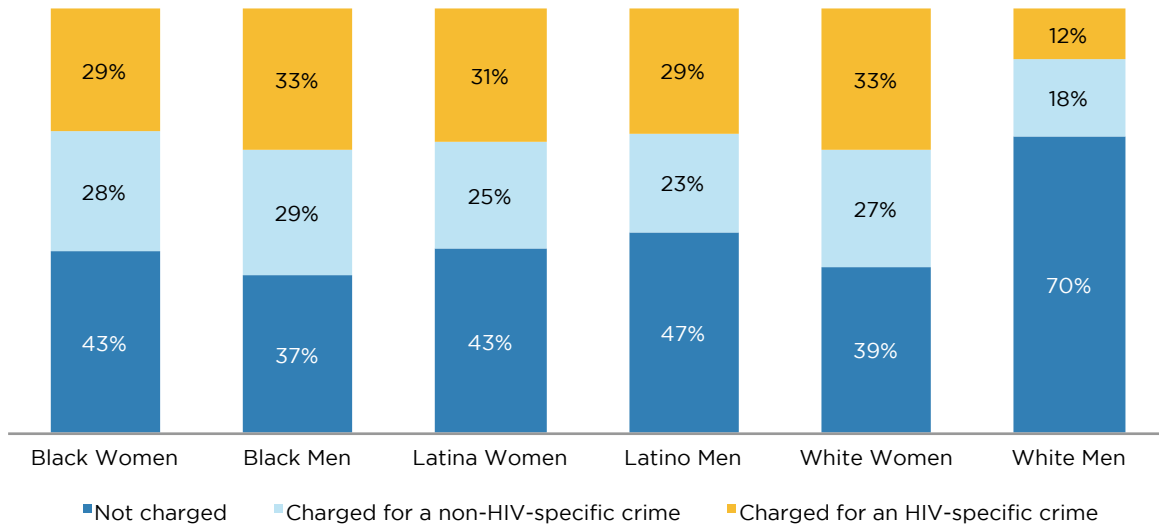
When analyzing case outcomes by race/ethnicity and sex, across all types of charges, White men were significantly more likely to be released and not charged (in 60% of their HIV-specific criminal incidents) than expected, and Black men (36%), Black women (43%) and White women (39%) were significantly less likely to be released and not charged.<sup>73</sup> These charging differentials were even starker among sex workers, or individuals who were assumed to be engaged in sex work under the solicitation while HIV-positive statute. White men were not charged in 70% of cases, while all others were not charged in 37% to 47% of solicitation incidents. This is significantly more frequently than would be expected given the demographic representation of white men in the overall sample, and as compared to the charging rates

<sup>72</sup> The significant associations between race/ethnicity/sex and one versus more than one HIV-specific incident were tested using chi square tests of independence and between group differences were tested using F-test statistic and with Bonferroni post-hoc tests. All reported differences significant at the p<.05 level.

<sup>73</sup> All association tests using chi2 test of independence were significant, p. <.05.

of other racial/ethnic/sex groups.<sup>74</sup> White men were also significantly less likely to be charged with an HIV-related crime in solicitation incidents than expected. White men were charged with an HIV-related crime in 12% of solicitation incidents, while all others were charged 29% to 33% of the time. See Figure 6 for a demographic breakdown of charging rates under California's solicitation while HIV-positive offense.

**Figure 6. Charging Rates in Solicitation while HIV-Positive Incidents, by Race/Ethnicity and Sex**



<sup>74</sup> The racial/ethnic categories of Asian/Pacific Islander, Native American and Other were excluded from comparative analyses because of their small sample sizes.



## LIMITATIONS

This research has several limitations related to the nature of CORI data. CORI relies upon data entered by law enforcement agencies, prosecuting agencies, and criminal courts throughout the state. Because entries are not uniform throughout the records, deciphering the data required a time-intensive process. With some records, making a determination about CORI data required a case-by-case determination which was followed by secondary confirmation by another member of the research staff. To the extent that data remained undecipherable or unclear, they were excluded from analysis.

Another significant limitation to these data was the lack of information regarding sexual orientation and gender minority status. Because sexual orientation and gender identity data are not collected by the California Department of Justice, these data were not a part of CORI data. Given the disproportionate impact HIV infection has on gay and bisexual men and transgender women, this gap in the data is significant.



# RESEARCH, LAW AND POLICY IMPLICATIONS

These CORI data provide a snapshot of how HIV criminalization laws have been enforced in California and further understanding of the ways that a person's HIV-positive status impacts interactions with law enforcement. Data suggest there may be ways in which specific communities, whether defined by geography, race/ethnicity, sex at birth, or sex worker or suspected sex worker status, may or may not be experiencing a disproportionate impact with regard to these laws.

These data greatly underscore what remains unknown about the enforcement of HIV criminalization laws. One of the original estimates of the impact of HIV criminalization nationally counted a little over 300 cases over a period of 15 years.<sup>75</sup> More recently, a journalist compiled a database after identifying 1,352 records covering 19 states' HIV criminalization laws since 2003, only a handful of which were California cases.<sup>76</sup> The fact that California has had 1,263 incidents alone is an indication that existing estimates of national HIV criminalization rates may be highly underestimated. It may be worthwhile to evaluate whether other states have similar data sets that would be available for similar research purposes in order to calculate a more precise national estimate.

Enforcement data in California also highlight a gap in the body of research examining HIV criminalization laws. The central rationales for HIV criminal laws are to deter "bad actors" who willfully transmit HIV and to aid public health goals of controlling the spread of the disease. In the case of California, the majority of individuals who are affected by HIV criminalization laws are affected on the basis of the felony solicitation offense. It is unclear whether sex workers are disproportionately implicated in the transmission of HIV, intentionally or unintentionally, and, therefore, whether the statute is effectively deterring this highly impacted subpopulation. Currently, most research attempting to link these laws to HIV outcomes has not focused on individuals engaged in or those suspected to be engaged in sex work.<sup>77</sup>

Future lines of inquiry include analysis of offenders' entire criminal history, to better understand incidents involving HIV-related criminalization in the context of other criminal incidents. This will help to gain an understanding of the context in which these observed incident rates are occurring. Efforts to identify and evaluate further disparities in lengths of sentences should be contemplated, including analysis which may reveal any existing correlations between known HIV-positive status and the length of sentences after such knowledge is gained by players within the criminal justice system and demographic trends, if any.

In order to better understand the impacts of these laws and the population disparities we observed, future research could move beyond law enforcement and sentencing rates. In particular, it would be useful to understand how people who have been arrested under these statutes have experienced that process of law enforcement contact and the mental health, emotional, and structural consequences of those experiences. Both quantitative and qualitative studies with those that have had interactions with the California criminal justice system on HIV-related offenses would be useful in exploring these questions.

<sup>75</sup> Zita Lazzarini, Sarah Bray, & Scott Burris, *Evaluating the Impact of Criminal Laws on HIV Risk Behavior*, 30 J. L. MED. & ETHICS 239, 245 (2002).

<sup>76</sup> Hernandez, *supra* note at 51. Available at <http://www.propublica.org/article/how-we-built-our-hiv-crime-data-set>.

<sup>77</sup> CTR. FOR INTERDISCIPLINARY RESEARCH ON AIDS AT YALE UNIVERSITY, CRIMINALIZATION OF HIV NON-DISCLOSURE, EXPOSURE & TRANSMISSION WORKING GROUP, RESOLUTION: CALLING FOR RESEARCH ON THE IMPACT OF THE CRIMINALIZATION OF HIV EXPOSURE ON WOMEN (2015), available upon request; *but see* Carol L. Galletly & Zita Lazzarini, *Charges for Criminal Exposure to HIV and Aggravated Prostitution Filed in the Nashville, Tennessee Prosecutorial Region 2000-2010*, 17 AIDS & BEHAVIOR 2624 (2013).

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The use of these additional methods would also offer the added benefit of gaining representation of the distinct experiences of gender and sexual minorities living with HIV who have engaged with California's criminal justice system since we do not otherwise have sufficient data to determine to what degree LGBT populations are impacted by these laws. We do know that other research and policy organizations have taken note of disparities in the policing of LGBT communities<sup>78</sup> and the policing of transgender women<sup>79</sup> especially. So this type of research would be useful in adding dimension to what we already know.

Though the data point to some race- and sex-based disparities in the application of these laws, the data do not provide an explanation of the root cause of these disparities. For example, the disparities could be a function of existing disproportional rates in different racial groups engagement in solicitation,<sup>80</sup> vulnerability of sex workers to law enforcement surveillance (compared to other forms of sexual activity), and/or problems with the use of discretion within policing and prosecution of crimes. Further, while there are no reliable data on demographics of sex workers in California, it is understood that sex work is a female-dominated profession, and therefore a combination of the sex-specific nature of this field of work and the high likelihood of sex workers being targeted by police may explain the trends of over representation of women affected under these laws. Future research is needed to better pinpoint the factors leading to these race and sex differences in interactions under these laws. Identifying the root cause(s) would then lead to data-informed policy interventions. Such interventions may include evaluating and augmenting police and prosecutors' knowledge regarding HIV. An example of this kind of effective collaboration involves a former state-wide law enforcement practice involving the use of possession of condoms as evidence of solicitation. In San Francisco, the District Attorney enacted a department-wide policy stating that condoms would no longer be used as evidence of prostitution.<sup>81</sup> This would make it so individuals would not have to choose between protecting their health and the health of others and the risk of being arrested as a result of carrying condoms. The policy was, in essence, a way to recognize that public health messaging around HIV should be relevant in the context of the criminal justice system.

Because the majority of prosecutions in the data came under the felony solicitation statute, we look to Cal. Penal Code § 647f to determine whether there are possible law and policy implications stemming from these data. In particular, we note that many advocates for the rights of those living with HIV have indicated that the Penal Code should be challenged. The differential prosecution rates based on race and sex among solicitation while positive incidents may indeed imply a possibly viable Equal Protection challenge to Cal. Penal Code § 647f. However, it is useful to note that previous challenges to criminal penalties, including the death penalty, based on disparate impacts by race and sex have withstood Constitutional challenges.<sup>82</sup> There is nothing in the data to suggest that a legal challenge to Cal. Penal Code § 647f is more likely to succeed as a result of these data given that all previous legal arguments used to challenge HIV criminalization statutes have been overruled by state courts, including allegations that these laws were violating the Fourth Amendment by permitting an unreasonable search, violating due process, violating the Eighth Amendment right to be free from cruel and unusual punishment and violating Equal Protection under the law.

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<sup>78</sup> See Catherine Hanssens, Aisha C. Moodie-Mills, Andrea J. Ritchie, Dean Spade, and Urvashi Vaid, *A Roadmap for Change: Federal Policy Recommendations for Addressing the Criminalization of LGBT People and People Living with HIV*, New York: Center for Gender & Sexuality Law at Columbia Law School (2014).

<sup>79</sup> See FRANK H. GALVAN, MOHSEN BAZARGAN, INTERACTIONS OF LATINA TRANSGENDER WOMEN WITH LAW ENFORCEMENT (2012), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Galvan-Bazargan-Interactions-April-2012.pdf>.

<sup>80</sup> See DONNA M. HUGHES, RACE AND PROSTITUTION IN THE UNITED STATES *passim* (2005), available at <http://bit.ly/1R6MOzB>; URBAN JUSTICE CENTER, BEHIND CLOSED DOORS: AN ANALYSIS OF INDOOR SEX WORK IN NEW YORK CITY 30 (2005), available at <http://sexworkersproject.org/downloads/BehindClosedDoors.pdf>; URBAN JUSTICE CENTER, REVOLVING DOOR: AN ANALYSIS OF STREET-BASED PROSTITUTION IN NEW YORK CITY 29 (2003), available at <http://sexworkersproject.org/downloads/RevolvingDoor.pdf>.

<sup>81</sup> Seth Hemmelgarn, *Breaking: DA agrees to new condoms policy*. Bay Area Reporter (2013), <http://ebar.com/news/article.php?sec=news&article=68698>.

<sup>82</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987)(finding that absent discriminatory purpose, the disparate impact of capital punishment on Georgia's racial minorities did not violate the Equal Protection Clause).



## CONCLUSION

These data provide insight into the enforcement of HIV criminalization laws in California. Since the inception of these laws, at least 800 Californians have been directly affected by them. Because these data are comprehensive and include basic demographic data, we have gained some ability to describe people living with HIV who have had HIV-related contact with the California criminal justice system. Further analysis of the data may explain the context in which these criminal incidents are occurring and disparities may be observed in the length of sentences. Future research, beyond enforcement data, is needed to understand the observed population disparities and what factors may have led to differences based on race and sex. These data do not provide insight into the lived experiences of those individuals who have come into contact with law enforcement on the basis of HIV criminal laws and the impact (i.e. emotional, mental health, structural consequences) of such interactions. Also, these data do not include information regarding sexual and gender minority status. Thus, utilizing additional methods of research will be useful in advancing research in this field.

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## FUNDERS

This study is funded by the California HIV/AIDS Research Program.

## PARTNERS

We would like to thank the California HIV/AIDS Research Program and the California HIV/AIDS Policy Research Center at UCLA/APLA for their support. A special thanks to Arleen Leibowitz (Co-Principal Investigator), Phil Curtis (Co-Principal Investigator), and Craig Pulsipher. We would also like to thank Vicki Sands, Riza Busadre, Mark Hayward, and Michelle Williams, staff of the California Department of Justice, Umme (Nipa) Warda for her assistance with research data, George (Chip) Cannon, Jr. and Akin Gump, Strauss, Hauer & Feld LLP for their ongoing assistance with legal research and research assistant Hussain Turk. We thank our colleague Lauren Jow from the Williams Institute for her technical and design support.

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## CITATION

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-December-2015.pdf>.

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