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## Criminal Laws on Sex Work and HIV Transmission: Mapping the Laws, Considering the Consequences

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**Criminal Laws on Sex Work and HIV Transmission: Mapping the Laws,  
Considering the Consequences**

# CRIMINAL LAWS ON SEX WORK AND HIV TRANSMISSION: MAPPING THE LAWS, CONSIDERING THE CONSEQUENCES

SIENNA BASKIN, AZIZA AHMED, AND ANNA FORBES<sup>†</sup>

## ABSTRACT

Lawmakers historically justify the mobilization of criminal laws on prostitution and HIV as a means of controlling the spread of disease. Over time, however, public health research has conclusively demonstrated that criminal laws on prostitution and HIV significantly impede the ability of sex workers to access services and to live without the stigma and blame associated with being a transmitter of HIV. In turn, mainstream public health approaches to sex work and HIV emphasize decriminalization as a way to improve the lives of sex workers in need of care, treatment, and services. Our current legal system, which criminalizes both prostitution and HIV transmission and exposure, is not in keeping with this decriminalization frame and instead compounds criminal penalties on people charged with prostitution related crimes and undermines HIV efforts.

This Article presents a public health law mapping of U.S. states that mandate HIV testing and criminalize HIV positive sex workers. The mapping demonstrates that laws on HIV transmission and exposure interact with laws on sex work to compound criminal penalties on people charged with prostitution related crimes. In keeping with public health evidence, this Article argues that decriminalization of sex work and HIV transmission and exposure is integral to effectively address the HIV epidemic. The Article seeks to contribute to a growing literature on the necessity of decriminalizing sex work by uncovering how these laws interact to undermine the HIV response.

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#### INTRODUCTION

In 2014, the *Lancet* dedicated a special issue to sex work and HIV.<sup>1</sup> Amongst many findings on sex work, researchers found that the decriminalization of sex work would have a greater effect on the course of the HIV epidemic than any other structural intervention in the modeled countries.<sup>2</sup> The study found that the decriminalization of sex work could “avert[] 33–46% of HIV infections in the next decade.”<sup>3</sup> In keeping with this data and a larger body of public health research, international institutions call to decriminalize sex work as an effective and important means of addressing HIV, as well as increasing sex workers’ health and well-being.<sup>4</sup> For example, in 2012, the Global Commission on HIV and the Law (hosted by the United Nations Development Programme) issued a series of recommendations to country lawmakers to create legal

1. *HIV and Sex Workers*, LANCET (July 23, 2014), <http://www.thelancet.com/series/hiv-and-sex-workers>.

2. Kate Shannon et al., *Global Epidemiology of HIV Among Female Sex Workers: Influence of Structural Determinants*, 385 LANCET 55, 55 (2015).

3. *Id.*

4. See, e.g., GLOBAL COMM’N ON HIV & THE LAW, RISKS, RIGHTS AND HEALTH 10 (2012), <http://www.hivlawcommission.org/resources/report/FinalReport-Risks,Rights&Health-EN.pdf>; OFF. OF THE UNITED NATIONS HIGH COM’R FOR HUM. RTS. & THE JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS, INTERNATIONAL GUIDELINES ON HIV/AIDS AND HUMAN RIGHTS 30 (2006) [hereinafter OHCHR, GUIDELINES], <http://www.ohchr.org/Documents/Publications/HIVAIDSGuidelinesen.pdf>; UNAIDS, TECHNICAL UPDATE: SEX WORK AND HIV/AIDS 8–10 (2002), [http://data.unaids.org/publications/IRC-pub02/jc705-sexwork-tu\\_en.pdf](http://data.unaids.org/publications/IRC-pub02/jc705-sexwork-tu_en.pdf); WORLD HEALTH ORG. ET AL., PREVENTION AND TREATMENT OF HIV AND OTHER SEXUALLY TRANSMITTED INFECTIONS FOR SEX WORKERS IN LOW- AND MIDDLE-INCOME COUNTRIES: RECOMMENDATIONS FOR A PUBLIC HEALTH APPROACH 8 (2012), [http://apps.who.int/iris/bitstream/10665/77745/1/9789241504744\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/77745/1/9789241504744_eng.pdf).

environments that would enable successful public health programs and facilitate a decrease in HIV transmission.<sup>5</sup> Amongst these recommendations was a call to decriminalize all adult consensual sex, including the purchase of sex.<sup>6</sup> The *International Guidelines on HIV/AIDS and Human Rights*, a joint publication of the Joint United Nations Agency on HIV/AIDS and the Office of the High Commission for Human Rights, has also called for the decriminalization of sex work.<sup>7</sup>

Alongside the laws on sex work, in recent years, public health scholars and activists have increasingly focused on the effect that laws that criminalize transmission and exposure to HIV have on the epidemic and on the individuals living with HIV.<sup>8</sup> Public health scholars and advocates see these laws as increasing stigma, having the potential to deter HIV testing (thus not receiving care), and increasing the stigma of living with HIV.<sup>9</sup>

Despite the widespread support for decriminalizing sex work amongst public health and harm-reduction activists, there has been little work done to disentangle the complicated way that the criminal law operates to marginalize and disenfranchise sex workers living with HIV. Focusing on the United States, in which the majority of jurisdictions criminalize both sex work and exposure to HIV,<sup>10</sup> this Article begins to fill this gap in the literature. In keeping with current public health evidence, this Article argues for the decriminalization of sex work and HIV exposure and transmission in order to better address the safety and health needs of sex workers.

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5. See GLOBAL COMM'N ON HIV & THE LAW, *supra* note 4, at 10. Aziza Ahmed was on the Technical Advisory Group to the Global Commission on HIV and the Law.

6. *Id.*

7. OHCHR, GUIDELINES, *supra* note 4, at 30 (“With regard to adult sex work that involves no victimization, criminal law should be reviewed with the aim of decriminalizing, then legally regulating occupational health and safety conditions to protect sex workers and their clients, including support for safe sex during sex work. Criminal law should not impede provision of HIV prevention and care services to sex workers and their clients. Criminal law should ensure that children and adult sex workers who have been trafficked or otherwise coerced into sex work are protected from participation in the sex industry and are not prosecuted for such participation but rather are removed from sex work and provided with medical and psycho-social support services, including those related to HIV.”); see also GLOBAL COMM'N ON HIV & THE LAW, *supra* note 4, at 10; WORLD HEALTH ORG. ET AL., *supra* note 4, at 8.

8. See generally Joanne Csete et al., *Vertical HIV Transmission Should be Excluded from Criminal Prosecution*, 17 REPROD. HEALTH MATTERS 154 (2009); Carol L. Galletly & Steven D. Pinkerton, *Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV*, 10 AIDS & BEHAV. 451 (2006); Ralf Jürgens et al., *Ten Reasons to Oppose the Criminalization of HIV Exposure or Transmission*, 17 REPROD. HEALTH MATTERS 163 (2009); *The Evolution of Global Criminalisation Norms: The Role of the United States*, NAM [hereinafter *Global Norms*], <http://www.aidsmap.com/The-evolution-of-global-criminalisation-norms-the-role-of-the-United-States/page/1442035/> (last visited Nov. 4, 2015).

9. See, e.g., Csete et al., *supra* note 8, at 154; Galletly & Pinkerton, *supra* note 8, at 451; Jürgens et al., *supra* note 8, at 163; *Global Norms*, *supra* note 8.

10. *Global Norms*, *supra* note 8.

Part I of this Article provides a brief history and background on how the criminal law became a mode of intervention for public health with regard to sex work and HIV. Part II of this Article utilizes a public health law mapping method to document laws at the intersection of HIV and criminal law.<sup>11</sup> Our mapping finds that, in some jurisdictions, HIV-positive persons engaging in prostitution can be charged with felony-level crimes with significant penalties attached and that procedural laws in certain states mandate or allow arrested or convicted sex workers to be tested for HIV. Part III of this Article demonstrates how the mandatory testing and punishment of sex workers who are HIV positive violates public health recommendations for addressing the HIV epidemic.

## I. THE CRIMINALIZATION OF SEX WORK AND HIV TRANSMISSION

### A. Criminalization of Sex Work

The vast majority of jurisdictions in the United States criminalize sex work. While the criminal prohibition against prostitution is often thought of as a permanent fixture of the criminal law in the United States, it is relatively recent and inconsistently applied.

In the late 19th and early 20th centuries laws and regulations around prostitution developed across the country with a variety of justifications, including the regulation of women's morality, the prevention of exploitation of women, and the prevention of vagrancy and nuisance.<sup>12</sup> With the advent of governmental and nongovernmental bodies bent on social reform, a special focus on the prevention of sexually transmitted infections (STIs) began to dominate as a goal in regulating prostitution.<sup>13</sup> For example, in 1918, the Chamberlain-Kahn Act gave the federal government broad powers to quarantine individuals with venereal disease.<sup>14</sup>

Today, laws against prostitution vary depending on the jurisdiction. In some states, simply offering to buy or sell sex is considered prostitution.<sup>15</sup> Other states vaguely allude to "sexual conduct," leaving what ac-

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11. This method is adapted from the Public Health Law Research LawAtlas Project. See *Laws, Maps & Data: LawAtlas*, PUB. HEALTH LAW RESEARCH, <http://publichealthlawresearch.org/evidence-and-experts/law-atlas> (last visited Mar. 23, 2016).

12. JESSICA R. PLILEY, *POLICING SEXUALITY: THE MANN ACT AND THE MAKING OF THE FBI* 11–14 (2014).

13. MARK THOMAS CONNELLY, *THE RESPONSE TO PROSTITUTION IN THE PROGRESSIVE ERA 14–16* (1980). In 1913, the influential Bureau of Social Hygiene was incorporated by John D. Rockefeller, Jr. to study and prevent "those social conditions, crimes, and diseases which adversely affect the well-being of society, with special reference to prostitution and the evils associated therewith." *Bureau of Social Hygiene Archives, 1911–1940*, ROCKEFELLER ARCHIVE CTR., <http://www.rockarch.org/collections/rockorgs/bsh.php> (last visited Nov. 4, 2015). In 1913, the American Social Hygiene Association was formed, uniting physicians with social reformers to accomplish similar goals. See Kristin Luker, *Sex, Social Hygiene, and the State: The Double-Edged Sword of Social Reform*, 27 *THEORY & SOCIETY* 601, 609–10 (1998).

14. See Chamberlain-Kahn Act, Pub. L. No. 65-193, § 15, 40 Stat. 845, 886 (1918).

15. See, e.g., N.J. STAT. ANN. § 2C:34-1 (2015).

tivities are and are not criminal up to city criminal court judges.<sup>16</sup> Currently, Nevada is the only state to allow for the legal practice of prostitution by delegating this decision largely to its county governments.<sup>17</sup>

How sex workers and others actually experience criminalization has less to do with the substance of the laws than with the policing and prosecutorial practices in their communities. Commercial sex is so diverse and widespread that it becomes virtually impossible to consistently police, resulting in location-specific enforcement priorities, quasi-tolerance of some forms of sex work, and corruption.<sup>18</sup> Criminal laws, especially those that are vague or impossible to enforce universally, are generally unevenly enforced, often with disparate impacts on communities of color and the poor.<sup>19</sup> People who are forced or coerced into engaging in sex work, or who are being exploited by another in sex work, are often more likely to be arrested because they have less control over where and when they work, so they cannot avoid arrest. Whether female, male, cisgender, or transgender, street-based sex workers are at greatest risk of arrest because of the public and exposed nature of their work. In addition, transgender women are frequently falsely profiled and arrested for prostitution, even if they are not engaging in prostitution and never have, due to stereotypes about transgender women always being sex workers.<sup>20</sup>

Arrest itself is an intensely traumatic experience with a risk of police violence, exploitation, and abuse. After arrest, sex workers are commonly held for a period of time during which they can face humiliation, violence, and discriminatory treatment because of the crime for which they were arrested. Sex workers frequently report rape and other forms of sexual violence and harassment at the hands of police and correctional officers.<sup>21</sup> Incarceration can involve potential deprivations of freedom, food, and medications, and it can also lead to eviction, loss of employ-

16. See, e.g., N.Y. PENAL LAW § 230.00 (McKinney 2016).

17. For a discussion on the regulation of prostitution in Nevada, see Barbara G. Brents & Kathryn Hausbeck, *State-Sanctioned Sex: Negotiating Formal and Informal Regulatory Practices in Nevada Brothels*, 44 SOC. PERSP. 307, 312 (2001). Until 2009, indoor prostitution was also legal in Rhode Island. See Lynn Arditi, *Bill Signing Finally Outlaws Indoor Prostitution in R.I.*, PROVIDENCE J. (Nov. 3, 2009, 2:04 PM), [http://cdn.ca9.uscourts.gov/datastore/library/2013/02/26/Coyote\\_prostitution.pdf](http://cdn.ca9.uscourts.gov/datastore/library/2013/02/26/Coyote_prostitution.pdf).

18. Laura Agustín, *Sex and the Limits of Enlightenment: The Irrationality of Legal Regimes to Control Prostitution*, 5 SEXUALITY RES. & SOC. POL'Y 73, 74 (2008).

19. See David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* 187 (1999); CHRISTOPHER HARTNEY & LINH VUONG, Nat'l Council on Crime & Delinquency, *CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE US CRIMINAL JUSTICE SYSTEM 2* (2009), [http://www.nccdglobal.org/sites/default/files/publication\\_pdf/created-equal.pdf](http://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf).

20. See Jordan Flaherty, *Are Police Profiling Transgender Americans?*, AL JAZEERA AMERICA (Oct. 16, 2013, 9:00 PM), <http://america.aljazeera.com/watch/shows/america-tonight/america-tonight-blog/2013/10/16/rise-in-transgenderharassmentviolencebypolicelinkedtoprofilng.html>.

21. *Policing Sex Work*, INCITE!, <http://www.incite-national.org/page/policing-sex-work> (last visited Nov. 3, 2015).

ment, or loss of custody of children.<sup>22</sup> Sex workers who are migrants can also be identified by federal immigration enforcement agencies while incarcerated, leading to the commencement of removal proceedings, with or without counsel.<sup>23</sup> Arrest is costly, and sex workers can incur fines that create more economic pressure to engage in sex work.

After this period of incarceration, sex workers are brought into criminal court for their arraignment where they are formally charged. At this point, in most jurisdictions, the criminal justice system puts enormous pressure on sex workers and others charged with low-level misdemeanor crimes to forgo their rights as criminal defendants for whom the crime must be proved beyond a reasonable doubt and instead to plead guilty.<sup>24</sup> This results in large numbers of low-level arrests that overburden the court system and the constitutionally guaranteed public defense system, which does not have the funding or personnel to take every criminal case to trial. Sex workers who do plead guilty may be incarcerated for up to a year in some jurisdictions or offered an “alternative to incarceration,” such as community service or a rehabilitation program.<sup>25</sup> When their cases result in a criminal conviction, whether or not they do time, sex workers can suffer collateral consequences even after the criminal case is complete. These consequences include limitations on employment options, discrimination by employers, loss of access to public benefits—including public housing—and loss of the right to sue the police if they are victims of police violence.<sup>26</sup> In some states, sex workers who have prior convictions of prostitution and are arrested again are subject to felony charges and mandatory jail time. Longer periods of incar-

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22. See Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*, U.S. DEP’T OF HEALTH & HUM. SERVS. (Dec. 1, 2001), <http://aspe.hhs.gov/basic-report/psychological-impact-incarceration>; see also Ginny Shubert, NAT’L MINORITY AIDS COUNCIL & HOUSING WORKS, MASS INCARCERATION, HOUSING INSTABILITY AND HIV/AIDS: RESEARCH FINDINGS AND POLICY RECOMMENDATIONS 6–7 (2013), [http://wnicap.org/wp-content/uploads/2014/02/Incarceration-Report-FINAL\\_2-6-13.pdf](http://wnicap.org/wp-content/uploads/2014/02/Incarceration-Report-FINAL_2-6-13.pdf).

23. *Immigration Detainers: A Comprehensive Look*, AM. IMMIGR. COUNCIL (Feb. 17, 2010), <http://www.immigrationpolicy.org/just-facts/immigration-detainers-comprehensive-look>. President Obama eliminated the Secure Communities Program, which enabled migrants to be transferred directly to immigration detention from local jails. Memorandum from Jeh Charles Johnson, Sec’y, Dep’t of Homeland Sec. to Thomas S. Winkowski, Acting Dir., Immigration & Customs Enf’t et al. 2 (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf). However, migrants can still be identified in jail and issued notices to appear after their release. *Id.*

24. As part of the trend towards aggressive policing of low-level misdemeanors as part of a “broken-windows” theory of order maintenance, defendants are encouraged to take a disposition at arraignment. K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 295 (2009). In 1992, it was noted that even if all misdemeanor judges spent all their time trying cases, only 2% of misdemeanor arrests could be taken to trial. HARRY I. SUBIN, *THE NEW YORK CITY CRIMINAL COURT: THE CASE FOR ABOLITION* 1, 4 (1992).

25. See, e.g., DARIA MUELLER, CHI. COAL. FOR THE HOMELESS, TREATMENT COURTS AND COURT-AFFILIATED DIVERSION PROJECTS FOR PROSTITUTION IN THE UNITED STATES 5 (2012), [www.issueelab.org/permalink/resource/14135](http://www.issueelab.org/permalink/resource/14135). This report profiles 19 court projects that offer rehabilitation oriented programs to persons arrested for prostitution. *Id.* at 9.

26. Howell, *supra* note 24, at 300-313.



ceration only increase the risks and consequences mentioned above, especially for more vulnerable individuals.

### B. Sex Work and HIV in North America

Existing data suggests that sex workers in the United States face a high burden of HIV. A recent study by Samuel Jenness *et al.* found that fourteen percent of the men and ten percent of the women participating in sexual exchange in New York were HIV-positive.<sup>27</sup> In 2006, twenty-four percent of the street-based, women selling sex who used crack cocaine in Miami were estimated to be living with HIV<sup>28</sup> as were twenty-six percent of male sex workers in Houston in 2007.<sup>29</sup> Among male-to-female transgender sex workers in Boston, one-third were estimated to be living with HIV in 2009.<sup>30</sup>

Criminalization of sex work has been found to be directly counterproductive to public health. Where sex workers are criminalized, they are less able to negotiate safer sex practices with clients and have less access to testing, treatment, and health care in general, making it more likely that sex workers will not know their HIV status or be able to limit their risk. The criminalization of sex work also leads directly to violence against sex workers by customers, strangers, and police, which further increases sex workers' HIV risk.<sup>31</sup> Condoms may be confiscated as evidence of engaging in prostitution justifying arrest.<sup>32</sup>

### C. Criminalization of HIV Transmission and Exposure in the United States

With sex work criminalized in most U.S. jurisdictions, and many sex workers living with HIV, the issue of criminalizing HIV transmission and exposure adds another dimension to the complex criminal law

27. Samuel M. Jenness *et al.*, *Patterns of Exchange Sex and HIV Infection in High-Risk Heterosexual Men and Women*, 88 J. URB. HEALTH 329, 338 (2011).

28. James A. Inciardi *et al.*, *HIV, HBV, and HCV Infections Among Drug-Involved, Inner-City, Street Sex Workers in Miami, Florida*, 10 AIDS & BEHAV. 139, 140 (2006). In one study, female street-based sex workers in Miami "most often reported acute service needs for shelter, fresh water, transportation, crisis intervention, and drug detoxification, as well as long-term needs for mental and physical health care, drug treatment, and legal and employment services." Steven P. Kurtz *et al.*, *Barriers to Health and Social Services for Street-Based Sex Workers*, 16 J. HEALTH CARE FOR POOR & UNDERSERVED 345, 345 (2005).

29. Sandra C. Timpson *et al.*, *Characteristics, Drug Use, and Sex Partners of a Sample of Male Sex Workers*, 33 AM. J. DRUG & ALCOHOL ABUSE 63, 63 (2007).

30. Sari L. Reisner *et al.*, *HIV Risk and Social Networks Among Male-to-Female Transgender Sex Workers in Boston, Massachusetts*, 20 J. ASS'N NURSES IN AIDS CARE 373, 373 (2009).

31. See Anna-Louise Crago *et al.*, *The Police Beat You up, Demand Money and Will Detain You Until You Pay': Police Violence Against Sex Workers in Eleven Countries in Europe and Central Asia*, 12 RES. FOR SEX WORK 3 (2010), [www.nswp.org/resource/research-sex-work-12-sex-work-and-violence](http://www.nswp.org/resource/research-sex-work-12-sex-work-and-violence); JJJ Ass'n & Zi Teng, *Fighting for Our Rights: How Sex Workers in Hong Kong Are Negotiating for More Respect and Protection*, 12 RES. FOR SEX WORK 13 (2010), [www.nswp.org/resource/research-sex-work-12-sex-work-and-violence](http://www.nswp.org/resource/research-sex-work-12-sex-work-and-violence).

32. *Sex Workers at Risk: Condoms as Evidence of Prostitution in Four US Cities*, HUM. RTS. WATCH (July 19, 2012), <https://www.hrw.org/report/2012/07/19/sex-workers-risk/condoms-evidence-prostitution-four-us-cities>.

framework that undermines the health of sex workers. HIV criminalization refers to the use of criminal law to prosecute individuals for transmitting HIV, exposing another person to HIV, or having even protected sex without disclosing HIV status.

Laws criminalizing HIV transmission and exposure began to appear shortly after the epidemic was identified. By 1986,<sup>33</sup> three states passed HIV laws criminalizing exposure or transmission of HIV (Florida, Tennessee and Washington). In 1989, the American Legislative AIDS Exchange Council (ALEC), an organization of state legislators that believe in limited governments, free markets, and federalism, and often linked to conservative efforts,<sup>34</sup> recommended in a model statute language for an HIV Assault Law.<sup>35</sup> The next year, 22 states had enacted their first law criminalizing HIV transmission or exposure. Nearly eight years after AIDS was first detected, the federal government passed its first piece of legislation on AIDS, the Ryan White Care Act, named after a young boy who died after contracting HIV through a blood transfusion. The 1990 Ryan White Care Act created incentives to criminalize HIV transmission and exposure.<sup>36</sup> The Act stated the following:

The Secretary may not make a grant under section 2641 to a State unless the chief executive officer determines that the criminal laws of the State are adequate to prosecute any HIV infected individual, subject to the condition described in subsection (b), who—(1) makes a donation of blood, semen, or breast milk, if the individual knows that he or she is infected with HIV and intends, through such donation, to expose another HIV [sic] in the event that the donation is utilized; (2) engages in sexual activity if the individual knows that he or she is infected with HIV and intends, through such sexual activity, to expose another to HIV; and (3) injects himself or herself with a hypodermic needle and subsequently provides the needle to another person for purposes of hypodermic injection, if the individual knows that he or she is infected and intends, through the provision of the needle, to expose another to such etiologic agent in the event that the needle is utilized.<sup>37</sup>

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33. See J. Stan Lehman et al., *Prevalence and Public Health Implications of State Laws that Criminalize Potential HIV Exposure in the United States*, 18 AIDS & BEHAV. 997, 998 (2014).

34. Nancy Scola, *Exposing ALEC: How Conservative Backed State Laws Are All Connected*, ATLANTIC (Apr. 14, 2012), <http://www.theatlantic.com/politics/archive/2012/04/exposing-alec-how-conservative-backed-state-laws-are-all-connected/255869/>.

35. MICHAEL TANNER & ALEC NAT'L WORKING GRP. ON STATE AIDS POLICY, *THE POLITICS OF HEALTH: A STATE RESPONSE TO THE AIDS CRISIS 93-94* (1989), <https://www.propublica.org/documents/item/726593-the-politics-of-health-1989>; see also Sergio Hernandez, *Iowa Court Tosses Sentence in HIV Exposure Case*, PROPUBLICA (June 16, 2014, 11:00 AM), <https://www.propublica.org/article/iowa-court-tosses-sentence-in-hiv-exposure-case>.

36. Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. No. 101-381, § 2647, 104 Stat. 576.

37. *Id.* § 2647(a) (emphasis added).

Over time, approximately thirty-three states have criminalized HIV transmission and exposure with varied rates of prosecution.<sup>38</sup> These laws vary from state to state, but some reach widely to include any sexual activity of an HIV-positive person, regardless of risk of exposure or actual transmission, regardless of the consensual nature of the sexual activity, or whether the sexual partner was warned of the HIV risk.<sup>39</sup> In addition, individuals have been prosecuted for HIV transmission and exposure in several states under general assault laws or laws criminalizing the transmission of sexually transmitted infections that are not HIV specific.<sup>40</sup> These laws and prosecutions have been generally decried by advocates for public health, and for the rights of people with HIV/AIDS, as contributing to stigma and discrimination, and as having a negative public health impact.<sup>41</sup> It has been shown that incarceration of HIV-positive people does not prevent the spread of HIV, it merely transfers risk of infections to the prison context while exposing people living with HIV to mistreatment.<sup>42</sup> For sex workers who face prosecution on the grounds of prostitution, the criminalization of HIV transmission and exposure can lead to harsher sentencing and entangle individuals further in the criminal justice system.

## II. PENALIZING SEX WORKERS LIVING WITH HIV

In this part, we will describe how sex workers living with HIV are further penalized for their HIV status, regardless of any actual transmission or risk of transmission they pose. Laws targeting HIV-positive sex workers are sometimes nestled with antiprostitution laws in statutory codes, rather than alongside laws pertaining to HIV. While prostitution is generally considered a minor crime under state law, sex workers who are HIV positive are more likely to be charged and convicted of a felony offense because of the interaction of laws criminalizing HIV exposure, laws criminalizing sex work, and mandatory HIV testing laws.

### A. Methodology

We searched state databases on Westlaw to identify which states criminalize HIV transmission and exposure and criminalize sex work

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38. State-by-State Chart of HIV-Specific Statutes and Prosecutorial Tools, CTR. FOR HIV L. & POL'Y [hereinafter State Chart I], <http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/State%20By%20State%20HIV%20Laws%20Chart%20updated%2010-21-13.pdf> (last updated Oct. 21, 2013).

39. See I RASHIDA RICHARDSON ET AL., THE CTR. FOR HIV LAW & POLICY, ENDING & DEFENDING AGAINST HIV CRIMINALIZATION: A MANUAL FOR ADVOCATES 3-5 (2015).

40. State Chart I, *supra* note 38.

41. See, e.g., Edwin Cameron, *Criminalization of HIV Transmission: Poor Public Health Policy*, 14 HIV/AIDS POL'Y & L. REV. 1, 1, 63 (2009); Jürgens et al., *supra* note 8, at 163.

42. HIV Among Incarcerated Populations, CDC, <http://www.cdc.gov/hiv/group/correctional.html> (last updated July 22, 2015); see also Elizabeth Kantor, *HIV Transmission and Prevention in Prisons*, HIV INSITE (Apr. 2006), <http://hivinsite.ucsf.edu/InSite?page=kb-07-04-13>.

while HIV positive. Further, we looked for statutes that made HIV testing mandatory for people arrested on prostitution charges.<sup>43</sup>

*B. State Laws at the Intersection of Sex Work and HIV*

Laws/ Characteristics	AL	AK	AZ <sup>44</sup>	AR <sup>45</sup>	CA <sup>46</sup>	CO <sup>47</sup>	CT <sup>48</sup>	DE <sup>49</sup>
Statute that Mandate Testing (either criminal or public health)			X	X	X	X	X	X
Prostitution Related Conduct Results in Testing			X	X	X	X	X	X
Testing Upon Charge or Conviction (Mandatory and/or Recommended Test)			X	X	X	X	X	X
Test Result Disclosure								
Person Tested *			X	X	X	X	X	X <sup>50</sup>
Judge/Court/Prosecuting Attorney/ State Agency					X	X	X	X
Person with Whom Defendant			X	X			X <sup>51</sup>	

43. *C.f.* RICHARDSON ET AL., *supra* note 39, at 270–91 (describing a sampling of prosecutions and arrests for HIV exposure in the United States from 2008–2014).

44. ARIZ. REV. STAT. ANN. § 13-1415 (2016).

45. ARK. CODE ANN. §§ 16-82-102, 16-82-101 (2015).

46. CAL. HEALTH & SAFETY CODE §§ 1603.1, 120292, 12022.85 (2016).

47. COLO. REV. STAT. §§ 18-3-415, 18-3-415.5 (2015).

48. CONN. GEN. STAT. § 54-102a (2016).

49. DEL. CODE ANN. tit. 11, § 1345 (2016).

50. And defendant's spouse. *Id.* § 1345(c).

51. Upon request of victim. CONN. GEN. STAT. § 54-102a.

Engaged in a Sexual Act/ Victim								
Medical Personnel/ Public Health Officials			X		X		X	
Available Health Services for Person Tested								
Defendant MUST partake in Services/ Treatment			X				X <sup>52</sup>	
Defendant Offered Serves/ Treatment					X			
Additional Charges/ Penalties upon Positive Test					X	X		

Laws/ Characteristics	DC 53	FL 54	GA 55	HI	ID 56	IL 57	IN 58	IA
Statute that Mandate's Testing (either criminal or public health)	X <sup>59</sup>	X	X		X	X	X	
Prostitution Related Conduct Results in Testing	X	X	X		X	X	X	
Testing Upon Charge or Conviction (Mandatory)	X	X	X		X	X	X	

52. If court orders. *Id.*  
 53. D.C. CODE §§ 22-3901, 22-3902 (2016).  
 54. FLA. STAT. ANN. § 796.08(3) (2015).  
 55. GA. CODE ANN. § 16-6-13.1 (2015).  
 56. IDAHO CODE § 39-604 (2015).  
 57. 720 ILL. COMP. STAT. ANN. 5/11-1.10 (2016).  
 58. IND. CODE ANN. §§ 16-41-8-6, 35-38-1-10.5 (West 2016). IND. CODE ANN. § 35-38-1-9.5 requires a probation officer to obtain HIV information from the state department of health if a defendant is convicted of a "criminal sexual act."  
 59. D.C. CODE § 22-3902 (2016). Testing will only occur at the victim's request. *Id.*

<b>and/or Recommended Testing)</b>								
<b>Test Result Disclosure</b>								
Person Test *	X	X	X <sup>60</sup>			X	X	
Judge/Court/Prosecuting Attorney/State Agency	X	X			X	X <sub>61</sub>	X	
Person with Whom Defendant Engaged in a Sexual Act/Victim	X				X	X <sub>62</sub>	X	
Medical Personnel/Public Health Officials		X						
<b>Available Health Services for Person Tested</b>								
Defendant MUST partake in services/treatment		X						
Defendant is Offered Services/Treatment	X <sup>63</sup>				X <sub>64</sub>			
<b>Additional Charges/Penalties upon Positive Test</b>	X							

<b>Laws/ Characteristics</b>	K S	K Y <sub>65</sub>	L A	M E	M D	M A	M I <sub>66</sub>	MN
<b>Statute that Mandates Testing (either criminal or public health)</b>		X					X	
<b>Prostitution Related Conduct Results in Testing</b>		X					X <sub>67</sub>	

60. And defendant's spouse. GA. CODE ANN. § 16-6-13.1(b) (2015).  
 61. Court has discretion to reveal results to anyone else. 720 ILL. COMP. STAT. ANN. 5/11-1.10.  
 62. 720 ILL. COMP. STAT. ANN. 5/11-1.10.  
 63. Counseling/referrals must be offered. D.C. CODE ANN. § 22-3902(c).  
 64. When the individual is incarcerated. IDAHO CODE § 39-604(6) (2015).  
 65. KY. REV. STAT. ANN. § 438.250 (West 2016).  
 66. MICH. COMP. L. ANN. §§ 333.5114, 333.5129, 791.267 (West 2016).

<b>Testing Upon Charge or Conviction</b> (mandatory and/or Recommended Testing)		X					X	
<b>Test Result Disclosure</b>								
Person Test *							X	
Judge/Court/Prosecuting Attorney/State Agency		X						
Person with whom defendant engaged in a sexual act with/victim								
Medical Personnel/ Public Health Officials		X					X <sup>68</sup>	
<b>Available Health Services for Person Tested</b>								
Defendant MUST Partake in Services/Treatment		X					X <sup>69</sup>	
Defendant is Offered Services/Treatment							X <sup>70</sup>	
<b>Additional Charges/ Penalties upon Positive Test</b>		X <sup>71</sup>						

<b>Laws/ Characteristics</b>	M S	M O (d) <sup>72</sup>	M T	N E <sup>73</sup>	N V <sup>74</sup>	N H	N J	NM <sup>75</sup>
<b>Statute that Mandates Testing</b> (either criminal or public)		X <sup>76</sup>		X <sup>77</sup>	X			X
<b>Prostitution Related Con-</b>		X <sup>78</sup>		X	X			X

67. There is no state law against Prostitution, but mandatory testing statute applies to local ordinances against Prostitution. MICH. COMP. L. ANN. § 333.5129.

68. Department of Health engages in partner notification. *Id.*

69. Only if convicted of promoting charges. *Id.*

70. If only arrested/charged. *Id.*

71. Only with knowledge.

72. MO. ANN. STAT. § 191.677 (West 2016).

73. NEB. REV. STAT. § 29-2290 (2016).

74. NEV. REV. STAT. §§ 201.358, 209.385 (2015).

75. N.M. STAT. ANN. § 24-2B-5.1 (2016).

76. Within the discretion of the court. MO. ANN. STAT. § 567.120.

77. Notwithstanding any other provision of law, when a person has been convicted of sexual assault pursuant to sections 28-317 to 28-320, sexual assault of a child in the second or third degree pursuant to section 28-320.01, sexual assault of a child in the first degree pursuant to section 28-319.01, or any other offense under Nebraska law when sexual contact or sexual penetration is an element of the offense, the presiding judge shall, at the request of the victim as part of the sentence of the convicted person when the circumstances of the case demonstrate a possibility of transmission of the human immunodeficiency virus, order the convicted person to submit to a human immunodeficiency virus antibody or antigen test. NEB. REV. STAT. § 29-22.

78. MO. ANN. STAT. § 567.120.

<b>duct Results in Testing</b>								
<b>Testing upon Charge or Conviction</b> (mandatory and/or Recommended Testing)		X <sup>79</sup>		X	X			X
<b>Test Result Disclosure</b>								
Person Test *				X	X			
Judge/Court/Prosecuting Attorney/State Agency		X		X	X			
Person with whom defendant engaged in a sexual act with/victim		X		X				
Medical Personnel/Public Health Officials		X <sup>80</sup>		X <sup>81</sup>				
<b>Available Health Services for Person Tested</b>								
Defendant MUST Partake in Services/ Treatment								
Defendant is offered services/treatment				X <sup>82</sup>				
<b>Additional charges/ penalties upon positive test</b>								

<b>Laws/ Characteristics</b>	NY	NC	ND <sup>83</sup>	OH <sup>84</sup>	OK <sup>85</sup>	OR	PA
<b>Statute that Mandates Testing</b> (either criminal or public)			X	X			
<b>Prostitution Related Conduct Results in Testing</b>				X			
<b>Testing upon Charge or Conviction</b> (mandatory and/or recom-				X			

79. Testing upon arrest. *Id.*

80. The department of health and senior services or local law enforcement agency, victim or others may file a complaint with the prosecuting attorney or circuit attorney of a court of competent jurisdiction alleging that a person has violated a provision of subsection 1 of this section. *Id.* § 191.677.

81. Disclosure to the Department of Health and Human Services. NEB. REV. STAT. § 29-2290.

82. Referred to services/treatment. *Id.*

83. N.D. CENT. CODE § 23-07-07.5 (2015).

84. OHIO REV. CODE ANN. §§ 3701.243, 5120-9-58 (2015).

85. "B. Any person who engages in an act of prostitution with knowledge that they are infected with the human immunodeficiency virus shall be guilty of a felony punishable by imprisonment in the custody of the Department of Corrections for not more than five (5) years..." OKLA. STAT. tit. 21 § 1031 (2016).



mended testing)							
Defendant MAY be tested							
Defendant MUST be tested				X			
<b>Test Result Disclosure</b>							
Person Test *				X			
Judge/Court/Prosecuting Attorney/ State Agency				X			
Person with Whom Defendant Engaged in a Sexual Act With (victim)				X			
Medical Personnel/ Public Health Officials			X	X			
<b>Available Health Services for Person Tested</b>							
Defendant MUST partake in services/ treatment			X <sup>86</sup>	X			
Defendant is offered services/treatment							

<b>Laws/ Characteristics</b>	RI <sup>87</sup>	SC <sup>88</sup>	SD <sup>89</sup>	TN <sup>90</sup>	TX	UT <sup>91</sup>
<b>Statute that Mandates Testing</b> (either criminal or public health)	X	X	X	X		X
<b>Prostitution Related Conduct Results in Testing</b>	X		X	X		X
<b>Testing Upon Charge or Conviction</b> (mandatory and/or recommended testing)	X	X	X	X		X
Defendant MAY be tested						
Defendant MUST be tested	X	X <sup>92</sup>	X	X		X
<b>Test Result Disclosure</b>						

86. N.D. CENT. CODE § 23-07-07(2).  
 87. 42 R.I. GEN LAWS §§ 23-6.3-7, 42-56-37 (2016).  
 88. S.C. CODE ANN. §§ 16-3-740, 44-29-100, 44-29-136 (2016).  
 89. S.D. CODIFIED LAWS §§ 23A-35B-8, 23A-35B-12 (2016).  
 90. TENN. CODE ANN. § 39-13-521 (2016).  
 91. UTAH CODE ANN. § 64-13-36 (West 2015).  
 92. Tested by petition and not prostitution specific. S.C. CODE ANN. § 16-3-740.

Person Tested/ Offender&	X	X	X	X		X
Judge/Court/Prosecuting At- torney/ State Agency		X				X
Person with whom Defendant Engaged in a Sexual Act With/ Victim		X	X <sup>93</sup>			
Medical Personnel/ Public Health Officials						X
<b>Available Health Services for Person Tested</b>						
Defendant Must Partake in Services/Treatment	X <sup>94</sup>	X <sup>95</sup>				X
Defendant is Offered Ser- vices/Treatment	X <sup>96</sup>		X	X		

Laws/ Characteristics	VT	VA 97	WA 98	WV 99	WI	WY
<b>Statute that Mandates Testing</b> (either criminal or public health)		X	X	X		
<b>Prostitution Related Conduct Results in Test- ing</b>		X	X	X		
<b>Testing Upon Charge or Conviction</b>		X	X	X		
Defendant MAY be tested						
Defendant MUST be test- ed		X	X	X		
<b>Test Result Disclosure</b>						
Person Tested/Offender*		X				
Judge/Court/Prosecuting Attorney/State Agency			X <sup>100</sup>	X		
Person with whom De- fendant Engaged in a Sex- ual Act With/ Victim						
Medical Personnel/Public Health Officials		X		X		
<b>Available Health Ser-</b>						

93. Can petition for disclosure. S.D. CODIFIED LAWS §23A-35B-12.

94. "Shall" be treated. 42 R.I. GEN. LAWS §§ 23-6.3-7, 42-56-37 (2016).

95. If deemed appropriate. S.C. CODE ANN. § 44-29-100.

96. 42 R.I. GEN. LAWS §§ 23-6.3-7, 42-56-37.

97. VA. CODE ANN. § 18.2-346.1 (2015).

98. WASH. REV. CODE § 70.24.340 (2016).

99. W. VA. CODE §§ 16-3C-2, 16-3C-3 (2016).

100. Sentencing judge can order the test. WASH. REV. CODE § 70.24.340.

vices for Person Tested						
Defendant MUST partake in Services/Treatment		X <sup>101</sup>	X	X		
Defendant is Offered Services/Treatment						

### C. Discussion of Laws

#### 1. Mandatory HIV Testing of Sex Workers

At least twenty-five states now require that a person charged with, or convicted of, engaging in prostitution undergo testing for HIV, other STIs, or both.<sup>102</sup> States have been found to be authorized to carry out court-imposed mandatory testing for the purpose of detecting, preventing, and deterring the spread of HIV from and within high risk groups.

Court-mandated HIV testing for prostitution-related charges is neither uniform nor always clearly defined in state criminal statutes. This section will describe the range of testing provisions found, which vary in when they are imposed, and in administration and disclosure of results. This section will then examine which constitutional rights are implicated by these factors for sex workers subjected to mandatory testing.

#### 2. When Is Mandatory HIV Testing Imposed?

HIV testing is imposed at various stages in the criminal justice process. At least nine states—Arkansas, Connecticut, Idaho, Michigan, Missouri, Nevada, North Dakota, Ohio, and Tennessee—prescribe testing when someone is merely arrested or charged with a prostitution-related offense, without a criminal conviction.<sup>103</sup> Some states require the judge to impose the test upon arrest, while others allow the judge to exercise discretion in whether or not to impose it.<sup>104</sup> For example, in Arkansas, the judge has discretion to require an individual charged with a prostitution-related crime to be tested if there is “reasonable cause to believe that the person committed the offense.”<sup>105</sup> In Missouri, judges have discretion to mandate testing as a condition to issuing bond only if the defendant has a prior prostitution-related conviction.<sup>106</sup> In other states, judges simply have discretion—they *may* mandate the test—but there are no cases defining or interpreting the scope of judicial discretion for preconviction

101. “[S]hall receive counseling . . .” VA. CODE ANN. § 18.2-346.1(A).

102. See, e.g., CONN. GEN. STAT. § 54-102a(a) (2016) (stating that at the court’s discretion, a venereal examination shall also be administered); see also Section II.B.

103. See *supra* Section II.B.

104. See, e.g., ALASKA STAT. § 18.15.300(a),(c)–(d) (2016); CONN. GEN. STAT. § 54-102a(a); MICH. COMP. LAWS § 333.5129(1) (2016); N.D. CENT. CODE § 23-07.4-01(1) (2015).

105. ARK. CODE ANN. § 16-82-101(b)(1) (2015).

106. MO. REV. STAT. § 567.120 (2016).

testing. In one state, Florida, a defendant may him or herself request that testing be administered by the Department of Health.<sup>107</sup>

At least eighteen states—Arkansas, California, Colorado, Delaware, D.C., Florida, Georgia, Illinois, Kentucky, New Mexico, Ohio, Rhode Island, South Carolina, Tennessee, Utah, Virginia, Washington, and West Virginia—prescribe HIV testing upon a prostitution-related conviction.<sup>108</sup> In some jurisdictions, judges retain discretion in determining whether to mandate an HIV test while the case is still pending.<sup>109</sup> Some states have both arrest and postconviction testing provisions. For instance, Florida allows a person under arrest to request HIV testing but requires HIV testing for a conviction.<sup>110</sup> In Delaware, mandatory testing of someone convicted of prostitution may be stayed if an appeal is filed.<sup>111</sup>

In some states, mandatory testing is triggered when the victim makes a request. In Connecticut, D.C., Ohio, and South Carolina, we find reference to victim requests in the mandatory testing statutes.<sup>112</sup> In Ohio, for example, mandatory testing is imposed if an alleged victim makes a request to the court, even if the defendant is not convicted of prostitution.<sup>113</sup> In D.C.<sup>114</sup> and South Carolina<sup>115</sup>, the testing of a person convicted of prostitution is only mandatory if a victim requests it. Some states allow parties other than victims to request and trigger mandatory testing of the defendant. Such parties may be defined as a “person with whom the defendant engaged in sexual penetration during the course of the crime,”<sup>116</sup> or even more broadly, as “any other person whom the court reasonably believes had contact with the accused in circumstances related to the violation that could have resulted in the transmission to that person of the human immunodeficiency virus.”<sup>117</sup> This latter statute from Ohio could be read to mean that any former client of an accused sex worker could request that the sex worker be forced to have an HIV test.

The terminology of victim as a reference to clients of sex workers occurs because HIV-testing statutes also often apply to sexual offenses like sexual assault, where there are victims of nonconsensual sex. In Ohio, for example, the governing statute on mandatory HIV testing applies to six “sex offenses”: rape, sexual battery, unlawful sexual conduct

107. FLA. STAT. § 796.08(2) (2016).

108. *See supra* Section II.B.

109. *See, e.g.*, N.M. STAT. ANN. § 30-9-5 (2016).

110. FLA. STAT. § 796.08.

111. *See* DEL. CODE ANN. tit. 11, § 1345(e) (2016).

112. *See* CONN. GEN. STAT. § 54-102a(b) (2016); D.C. CODE § 22-3902(a) (2016); OHIO REV. CODE ANN. § 2907.27(A)(1) (West 2015); S.C. CODE ANN. § 16-3-740(B) (2015).

113. OHIO REV. CODE ANN. § 2907.27(A)(1).

114. D.C. CODE § 22-3902(a) (formerly cited as D.C. CODE § 24-492 (1981)).

115. S.C. CODE ANN. § 16-3-740(B).

116. ARK. CODE ANN. § 16-82-101(c)(1) (2015).

117. OHIO REV. CODE ANN. § 2907.27(B)(1)(a).

with a minor, engaging in prostitution, solicitation or loitering for the purpose of prostitution, and engaging or soliciting for the purpose of prostitution with the knowledge of positive HIV status.<sup>118</sup> However, when the word victim is applied to prostitution charges, it is typically in reference to consensual sex referring instead to the individual who has been exposed to or contracted HIV.

### 3. Which Crimes Trigger Mandatory Testing?

States' mandatory testing provisions are triggered by a variety of crimes. In Idaho, for example, the state may order persons to be tested if they are charged with one of a list of enumerated crimes, including "any crime in which body fluid has likely been transmitted to another."<sup>119</sup>

In the case of prostitution, there is usually no additional requirement that there be an actual risk of exposure, transmission, or even a sexual act. For example, in Kentucky, "a person is guilty of prostitution when he engages or agrees or offers to engage in sexual conduct with another person in return for a fee."<sup>120</sup> This language, common to many state laws against prostitution, requires no sexual act but merely an offer or agreement to engage in a sexual act. However, most states require only an arrest or conviction of prostitution, not any additional proof of possible, potential, or actual exposure to HIV, to impose mandatory testing.<sup>121</sup> Some states reach even wider: in Tennessee, a person will be mandatorily tested if convicted of promoting prostitution, a crime that does not even involve sexual activity with the defendant.<sup>122</sup>

There are a few exceptions. In Michigan, for example, mandatory testing is only required if there is a court determination that there is "reason to believe the violation involved sexual penetration or exposure to a body fluid of the defendant," although the court still has discretion to impose testing without this finding.<sup>123</sup> In South Carolina, testing is only imposed if a "victim" requests it and demonstrates that "there is probable cause that during the commission of the criminal offense there was a risk that body fluids were transmitted from one person to another."<sup>124</sup> In Con-

118. OHIO REV. CODE ANN. § 2907.27(A)(1).

119. IDAHO CODE ANN. § 39-604(4) (2015).

120. KY. REV. STAT. ANN. § 529.020(1) (West 2016).

121. See *supra* Section II.B. An exception is the few states where testing is only mandatory where a "victim" or someone who had sex with the defendant requests the test. See, e.g., ARIZ. REV. STAT. ANN. § 13-1415(B) (2016); OHIO REV. CODE ANN. § 3701.243.

122. TENN. CODE ANN. § 39-13-521(e) (2016); see also UTAH CODE ANN. § 76-10-1311(1) (West 2015).

123. MICH. COMP. LAWS § 333.5129(1), (3) (2016).

124. S.C. CODE ANN. § 16-3-740(B)(2) (2016) (testing certain convicted offenders for Hepatitis B and HIV); see also *State v. Houey*, 651 S.E.2d 314, 318 (S.C. 2007) ("We hold that the State need not show probable cause that an offender has a disease before testing may be ordered pursuant to § 16-3-740(B), provided the statutory requirements have been met.").

necticut, a judge may impose testing only if the violation “involved a sexual act.”<sup>125</sup>

#### 4. How and by Whom Are Mandatory Tests Administered?

States also vary in their schemes to administer HIV tests to suspected or convicted sex workers, demonstrating an entanglement in the law between criminal codes and public health regulation. In fact, some mandatory testing laws are codified within public health statutes intended for prevention of communicable diseases, as opposed to in the penal code.<sup>126</sup> These statutes give judges the authority to distribute educational materials about sexually transmitted diseases, to order testing, and to perform other duties normally associated with medical professionals or governmental health agencies.<sup>127</sup>

Some states require that judges impose the test as part of the sentence or a condition of release, but it appears that the defendant must arrange for the test and pay for it. For example, in Colorado, the court must order the test, and the test must be carried out by “a facility that provides ongoing health care,” but the defendants must pay the costs of the test, and it is unclear whether the defendants must arrange the test themselves, or if the court will order him or her to appear at a certain health facility at a certain time.<sup>128</sup> Delaware vaguely decrees that a person shall be ordered to undergo testing at his or her expense but it does not specify by whom, when, or where.<sup>129</sup> Some states, such as Florida, order that the test be performed “under direction of the Department of Health.”<sup>130</sup> Nevada’s law specifies that the test must be one approved by the State Board of Health but that it also must return results within thirty days.<sup>131</sup> In Washington, where the mandated testing statute is part of public health laws, the local health departments are subject to a mandate to ensure that persons convicted of prostitution are tested within seventy-two hours after a court’s order.<sup>132</sup> Most strikingly, in Utah, if the person being tested is already confined to jail or prison, law enforcement participates directly in administering the test.<sup>133</sup> To comply with the statute, law enforcement must obtain the blood specimen, deliver it to the lab, and develop a “medical file” on the defendant containing the results.<sup>134</sup>

125. CONN. GEN. STAT. § 54-102a(a)–(b) (2016).

126. *See supra* Section II.B.

127. Notably, MICH. COMP. LAWS § 333.5129(2), states that “the judge or magistrate responsible for setting the individual’s conditions of release pending trial shall distribute to the individual the information on venereal disease and HIV infection” and, W. VA. CODE § 16-3C-2(f)(10) (2016), gives the judge to order additional tests if an HIV-related test results in a negative reaction.

128. COLO. REV. STAT. § 18-7-201.5(1)(a), (3)(a) (2015).

129. *See* DEL. CODE ANN. tit. 11, § 1345(a), (d) (2016).

130. FLA. STAT. § 796.08(2) (2016).

131. NEV. REV. STAT. § 201.356(1) (2015).

132. WASH. REV. CODE § 70.24.340(1)(b), (4) (2016).

133. *See* UTAH CODE ANN. § 76-10-1311(2)–(4) (West 2015).

134. *Id.* § 76-10-1311(3)–(5), (8)(a).

What is unclear in the statutes, especially in cases where law enforcement is directly responsible for testing, is whether the accepted standards of care in administering HIV tests are adhered to in the case of mandatory testing, protocols that include risk assessment, consent, pre- and post-counseling, and training on the part of testing personnel.

#### 5. To Whom Are HIV Test Results Disclosed?

Once a test for HIV is performed, a separate issue arises of who has access to the test results. Normally, individuals have a respected privacy interest in their HIV test results that is protected under federal and state HIV and AIDS confidentiality statutes. For example, Florida's confidentiality statute states that all information and records relating to HIV tests conducted by the Public Health Department are treated as strictly confidential, disclosed only to the person tested.<sup>135</sup> Exceptions to strict confidentiality generally require informed written consent by the tested individual or a medical emergency.<sup>136</sup> Some states allow for disclosure to known sexual partners of the person tested.<sup>137</sup> Other states and territories require that people testing HIV positive be reported by name to state health departments for record-keeping purposes.<sup>138</sup> These name-based registries are used to develop estimates of the HIV rates in the state.

However, most states allow broader disclosure of the results of mandatory testing of suspected sex workers. In Georgia, the test result can be disclosed to the defendant's spouse with the defendant's mandated "consent,"<sup>139</sup> and in Michigan, the results are also subject to partner notification.<sup>140</sup> Mandatory partner notification of positive HIV test results may go into effect in other states, even where the HIV test was nonconsensual. In twelve states, the results can also be given to the alleged victim or other indicated person who had sex with the defendant in the course of the crime.<sup>141</sup>

In Virginia, the statute specifically indicates that results from a mandated HIV test are confidential and cannot be admitted to court in a proceeding related to prostitution.<sup>142</sup> But in at least eighteen states, the HIV test result of a person tested under these statutes is also provided to the prosecutorial agency, the court, the local police department, or other

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135. See FLA. STAT. § 384.29(1).

136. See *id.*

137. See, e.g., S.C. CODE ANN. § 16-3-740(B)(3), (C) (2016).

138. See *supra* Section II.B.

139. GA. CODE ANN. § 16-6-13.1(b) (2015).

140. MICH. COMP. LAWS § 333.5129(1) (2016).

141. See *supra* Section II.B.

142. VA. CODE ANN. § 18.2-346.1(C)-(D) (2015). Interestingly, a test for Hepatitis C is also administered by mandate in the same circumstances, and those results can be disclosed to "sheriffs' offices, the state police, local police departments, adult or youth correctional facilities, salaried or volunteer firefighters, paramedics or emergency medical technicians, officers of the court, and regional or local jails" to prevent infection. *Id.* § 18.2-346.1(C).

government actors.<sup>143</sup> It is relevant to note that, where HIV testing is mandated upon arrest, the test and the disclosure of results happen even if the person is found not guilty of prostitution.

This nonconsensual disclosure may facilitate the bringing of further charges or sentences against the defendant. For example, in Florida, the results “shall be made available by the Department of Health to the offender, medical personnel, appropriate state agencies, state attorneys, and courts of appropriate jurisdiction in need of such information in order to enforce the provisions of this chapter” once the defendant is convicted and tested.<sup>144</sup> Likewise, in Tennessee, “For the sole purpose of determining whether there is probable cause to prosecute a person for aggravated prostitution under § 39-13-516, the district attorney general may view the record, notwithstanding subdivision (b)(2).”<sup>145</sup> In California, the District Attorney need not provide a reason, the Department of Health must furnish the results “upon request,” though the results could be used to support further charges.<sup>146</sup>

The protocols for making sure this information at least stays with these designated actors are wide-ranging. In many states, it is unclear whether the test result becomes a part of the public court file. In Tennessee, the District Attorney must file a written request with the court to view the test results.<sup>147</sup> In Nevada, the Department of Health informs the arresting law enforcement agency of the results of the test without informing the defendant.<sup>148</sup> If the test is negative, law enforcement informs the court, and the court informs the defendant.<sup>149</sup> If the result is positive, law enforcement informs the defendant and the court, and the defendant must reappear in court to testify that he or she received those results or risk a bench warrant.<sup>150</sup>

In Illinois, the statute indicates that “the results . . . shall be kept strictly confidential” and must be “personally delivered in a sealed envelope” to the judge for inspection in camera.<sup>151</sup> The judge then has discretion to reveal the results in “the best interests of the victim and the public.”<sup>152</sup> In several states, the public can be informed of a person’s status for the stated reason of informing and protecting the public and any alleged victims from communicable diseases.<sup>153</sup> Where mandated tests

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143. See *supra* Section II.B.

144. FLA. STAT. § 796.08(3) (2016).

145. TENN. CODE ANN. § 39-13-521(e) (West 2016).

146. CAL. PENAL CODE § 1202.6(d) (West 2016).

147. TENN. CODE ANN. § 39-13-521(e).

148. NEV. REV. STAT. § 201.356(2) (2015).

149. *Id.* § 201.356(2)-(3).

150. NEV. REV. STAT. § 201.356(2)-(4).

151. 730 ILL. COMP. STAT. 5/5-5-3(g) (2016).

152. *Id.*

153. See, e.g., 730 ILL. COMP. STAT. 5/5-5-3(g); see also *People v. Adams*, 597 N.E.2d 574, 581 (Ill. 1992).



result in charges of transmission or exposure of HIV, and these charges are part of the public record, a person's HIV status is necessarily made public. This has been found to be permissible even when it results in news media broadcasting the defendant's status.<sup>154</sup>

#### 6. After Testing, What Role Does the Court Play in Treatment or Counseling?

Standard protocols around HIV testing include requirements for pre- and post-test counseling and immediate linkage to treatment services upon receipt of an HIV-positive result. The criminal statutes that mandate HIV testing interact with these requirements in a variety of ways. In eight states with mandated testing of sex workers, there is no mention of providing pre- or post-test counseling, treatment, or referrals in the statutes.<sup>155</sup> While such protocols may be followed as a matter of course when testing is administered by state departments of health or other regulated providers, it is not clear whether such services are further funded or guaranteed to defendants. In ten states, the statute contains a requirement to at least offer services.<sup>156</sup> In five states—Florida, Kentucky, New Mexico, Ohio, and West Virginia—courts are vested with the power to mandate services, treatment, or both.<sup>157</sup> In New Mexico, the court may view the results and “shall sentence any diseased defendant to submit to medical treatment until he is discharged from treatment as noninfectious.”<sup>158</sup>

#### 7. Constitutionality of Mandated Testing

Defendants have argued that taking blood to administer an HIV test mandated by the state is a “search” as understood by the Fourth Amendment because it intrudes upon the defendant's bodily integrity and gathers information in which the defendant has a reasonable expectation of privacy.<sup>159</sup> Thus, it is analogous to a blood alcohol test performed by the state, found to be a search in *Skinner v. Railway Labor Executives' Association*.<sup>160</sup> As the Supreme Court held in *Skinner*,

154. See *In re Application of MULTIMEDIA KSDK, INC.*, 581 N.E.2d 911, 913–14 (Ill. App. Ct. 1991).

155. See ARK. CODE ANN. § 16-82-101 (2015); COLO. REV. STAT. § 18-7-201.5 (2015); CONN. GEN. STAT. § 54-102a (2016); DEL. CODE ANN. tit. 11, § 1345 (2016); GA. CODE ANN. § 16-6-13.1 (2015); NEV. REV. STAT. § 201.356; N.D. CENT. CODE § 23-07-07.5 (2015); UTAH CODE ANN. § 76-10-1312 (West 2015).

156. See CAL. PENAL CODE § 1202.6(d) (West 2016); D.C. CODE § 22-3903(b) (2016); IDAHO CODE ANN. § 39-604(6) (2015); 730 ILL. COMP. STAT. 5/5-5-3(g); MICH. COMP. LAWS § 333.5129(2) (2016); N.M. STAT. ANN. § 24-2B-5.1(B) (2016); 11 R.I. GEN. LAWS § 11-34.1-12(b) (2016); TENN. CODE ANN. § 39-13-521(e) (West 2016); VA. CODE ANN. § 18.2-346.1(A) (2015); WASH. REV. CODE § 70.24.340(4) (2016).

157. See *supra* Section II.B.

158. N.M. STAT. ANN. § 30-9-5. It is unclear how this statute would apply in the case of HIV, where there is no known cure or treatment that results in a patient being “noninfectious.”

159. See, e.g., *State v. Houey*, 651 S.E.2d 314, 316 (S.C. 2007).

160. See *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 616 (1989).

In light of our society's concern for the security of one's person, it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests.<sup>161</sup>

Searches and seizures must be "reasonable" under the Fourth Amendment. Whether a search violates the Fourth Amendment is a question of balancing the intrusion on privacy interests versus the state's interests in doing this search.<sup>162</sup> There are situations beyond the normal scope of law enforcement that warrant an exception to the normal requirements of probable cause for practicality reasons. In these circumstances, where the court is determining if there are "special governmental needs," courts balance the state's need against the scope of the intrusion on the individual.<sup>163</sup> Mandatory HIV-testing requirements have been found constitutional in a variety of circumstances under the exception of "special government needs."<sup>164</sup> State statutes that mandate HIV testing for a person charged with, or convicted of, a crime in which sexual contact is an essential element have been found to be constitutionally valid, even where there is no "probable cause" to believe that the defendant is actually infected with HIV. For example, in *In re J.G., N.S., and J.T.*,<sup>165</sup> the court sought to compel HIV testing for the defendant who was accused of aggravated assault.<sup>166</sup> The New Jersey Superior Court, Appellate Division held that the mandatory testing statute did not violate federal or state search and seizure clauses.<sup>167</sup> In *In re Juveniles A, B, C, D, E*,<sup>168</sup> the Washington Supreme Court held that the statute mandating HIV testing of juvenile sexual offenders did not violate the Fourth Amendment.<sup>169</sup> In California, a statute mandating HIV testing of arrested persons where there is probable cause to believe that a transfer of bodily fluid could have occurred between the accused and a public safety officer was found constitutional when applied to a person who bit a police officer.<sup>170</sup> Although the court recognized that there was no probable cause to believe that the defendant was HIV positive and that the likelihood of HIV transmission by biting was negligible, the court found the application of the statute constitutional because of the special govern-

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161. *Id.*

162. *See Payton v. New York*, 445 U.S. 573, 586-90 (1980).

163. *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665 (1989).

164. *Houey*, 651 S.E.2d at 316.

165. 674 A.2d 625 (N.J. Super. Ct. App. Div. 1996).

166. *Id.* at 627.

167. *Id.* at 626, 634.

168. 847 P.2d 455 (Wash. 1993).

169. *Id.* at 463.

170. *Johnetta v. Mun. Court*, 267 Cal. Rptr. 666, 685 (Cal. Dist. Ct. App. 1990).

ment need.<sup>171</sup> This need was identified as the state's interest in protecting the health and safety of its employees in the line of duty.

Mandatory HIV testing for those arrested for prostitution asks the Fourth Amendment for even more leniency. These searches invade a defendant's bodily integrity and retrieve the most private information without a warrant and without a showing of probable cause that the person has HIV, transmitted HIV, or even engaged in an activity capable of transmitting HIV. These statutes apply where there is no "victim," let alone a protected category of persons like police officers, who may be at risk. However, in the few constitutional challenges to prostitution-related mandated testing statutes, they, too, have been found constitutional.

In *Love v. Superior Court*,<sup>172</sup> the California mandatory-testing statute was challenged under the Fourth Amendment.<sup>173</sup> This statute mandates testing and HIV education upon conviction for prostitution, and the results can be disclosed to the District Attorney.<sup>174</sup> The court identified the special government need by looking outside the statute to other legislative materials identifying HIV as an urgent public health matter, and testing and counseling as one means of stopping its spread.<sup>175</sup> The court took judicial notice of a 1986 publication by the federal Department of Health and Human Services, which advised testing prostitutes and instructing them to discontinue prostitution if HIV positive.<sup>176</sup>

The petitioner in *Love* questioned whether HIV prevention was really the special governmental need served by the testing statute, claiming that, instead, the goal was to collect evidence to be used against the defendant in the future.<sup>177</sup> The California Court of Appeals found that the testing requirement was not a search for evidence because it required an "AIDS prevention education program" to provide "at a minimum" information about the disease and "resources for assistance."<sup>178</sup> Instead, the court categorized it as a public health measure intended to prevent the spread of HIV. The court reasoned that mandatorily testing individuals who are sex workers is needed as a deterrent mechanism to prevent this group from engaging in "acts known to spread the disease."<sup>179</sup> Accordingly, mandatory HIV testing is permissible in California for soliciting to engage in prostitution, even though the crime does not involve sexual contact. This is justified by the argument that such testing addresses the

171. *Id.* at 671, 679, 685.

172. 276 Cal. Rptr. 660 (Cal. Dist. Ct. App. 1990).

173. *Id.* at 662.

174. *Id.* at 663.

175. *Id.* at 663–64.

176. *Id.* at 664 & n.5.

177. *Id.* at 664.

178. *Id.* (quoting CAL. PENAL CODE § 1202.6(d) (1990)).

179. *Id.* (noting petitioners' challenge of the mandatory HIV testing for prostitution-related charges claimed that the statute was a violation of their U.S. constitutional Fourth Amendment rights).

issue of informing "high risk" groups about their status "for their own protection and that of those to whom they could transmit the virus."<sup>180</sup> Although the test reveals private medical information, the court found that the fact that these results are only disclosed to the District Attorney, and only for purposes of bringing higher charges, renders this intrusion minimal.<sup>181</sup> Disclosure of test results to the prosecutor also fulfills the legislature's legitimate aim "to control the spread of AIDS, in part by providing a deterrent to prostitution activity by one who knows he or she is infected with the AIDS virus."<sup>182</sup>

In *People v. Adams*,<sup>183</sup> two women convicted of prostitution filed motions challenging the constitutionality of the Illinois statute requiring them to undergo mandatory testing for HIV.<sup>184</sup> The defendants raised constitutional claims, including "that the statute violated their rights to privacy, to freedom from unreasonable searches and seizures, and to . . . equal protection."<sup>185</sup> They also challenged the testing requirement as a sentence, claiming it was cruel and unusual punishment in violation of the Eighth Amendment.<sup>186</sup> They presented expert witnesses who testified that the criminalization of HIV exposure was an ineffective means of stopping the spread of HIV.<sup>187</sup> The trial court determined that the testing procedure represented an illegal search and seizure.<sup>188</sup> The trial judge found that the personal intrusion required by the testing was unreasonable because the statute did require the state to articulate an "individualized suspicion" that the person was HIV positive before mandating the test and because the state failed to prove that the intended social benefits to the state outweighed the privacy intrusion.<sup>189</sup> The court also found the statute denied the defendants equal protection under the Fourteenth Amendment.<sup>190</sup>

The State appealed, and the Supreme Court of Illinois issued a thorough opinion fatal to the defendants' claims. The court reviewed the history of mandatory testing as applied to sex offenders and IV drug offenders, which had been held to be constitutionally valid.<sup>191</sup> Then, it examined the mandatory testing statute as a means of advancing a special government need of preventing HIV and safeguarding the health of the public by targeting "at risk" populations for testing.<sup>192</sup> While the defendants

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180. *Id.*

181. *See id.* at 664-66.

182. *Id.* at 665.

183. 597 N.E.2d 574 (Ill. 1992).

184. *Id.* at 576.

185. *Id.* at 603.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 579.

190. *Id.* at 576.

191. *Id.* at 607-09.

192. *See id.*

argued that public health experts have shown this to be an ineffective means of curtailing HIV, and that their convictions involved no sexual acts, the court nevertheless claimed that the statute fell under the state's broad police powers to advance public health.<sup>193</sup> Ironically, the court used the urgency of the HIV epidemic as a weapon against the defendants, stating that this interest outweighed the need for a warrant, probable cause, or even any articulable suspicion that the defendants were HIV positive. The language used by the court continually demonized sex workers as spreaders of disease, saying that the state's interest was one of "self defense" against such diseased individuals.<sup>194</sup> Without evidence, it claimed that nonconsensual testing and disclosure would lead to treatment and a slowing of the spread of disease.<sup>195</sup> It also implied that it would be too impractical for a judge to have to articulate an individual suspicion, as there are rarely grounds to suspect someone is infected with HIV beyond their "membership in a high-risk group."<sup>196</sup> The court went further to judge the intrusion of an HIV test to be "relatively slight" in light of the reduced privacy interests of offenders after conviction.<sup>197</sup> The court concluded that the statute did not constitute an unreasonable search and seizure.

### B. Criminalization of Sex Work While HIV Positive

Approximately thirty-two states, two territories, and the federal law currently criminalize either exposure to or transmission of HIV.<sup>198</sup> Fourteen of these jurisdictions specifically criminalize, or have heightened penalties for, persons who are HIV positive and are charged with a prostitution-related offence.<sup>199</sup> These jurisdictions include California, Colorado, Florida, Georgia, Kentucky, Missouri, Nevada, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Utah, and Guam.<sup>200</sup> Sex workers discovered to be HIV positive may also be charged under more general laws that criminalize HIV exposure through sexual activity, even if

193. *Id.* at 609–10.

194. *See id.* at 607; *see also* *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905) ("Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.").

195. *Adams*, 597 N.E.2d at 607.

196. *Id.* at 609.

197. *Id.* at 608.

198. State-by-State Chart of HIV-Specific Statutes and Prosecutorial Tools, CNTR. FOR HIV L. & POL'Y [hereinafter State Chart II], <http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/State%20By%20State%20HIV%20Laws%20Chart%20updated%2010-21-13.pdf> (last updated Oct. 21, 2013).

199. *Id.*

200. *See* CAL. PENAL CODE § 12022.85(a) (West 2016); COLO. REV. STAT. § 18-3-415.5(5)(b) (2015); FLA STAT § 796.08(5) (2016); GA. CODE ANN. § 16-5-60(c) (West 2015); KY. REV. STAT. ANN. § 529.090(2)–(4) (West 2016); MO. REV. STAT. § 567.020(2) (2016); NEV. REV. STAT. § 201.358(b) (2015); OHIO REV. CODE ANN. § 2907.24 (West 2015); OKLA. STAT. tit. 21, § 1031 (2016); 18 PA. CONS. STAT. § 5902(a)(4) (2016); S.C. CODE ANN. § 44-29-145(2) (2016); TENN. CODE ANN. § 39-13-516(a) (2016); UTAH CODE ANN. § 76-10-1309 (West 2015); 9 GUAM CODE ANN. § 28.10(b)(3) (2015).

no prostitution-related HIV exposure offense exists. Additional states where a sex-related HIV exposure crime exists are Arkansas, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Mississippi, New Jersey, North Carolina, North Dakota, Virginia, and Washington.<sup>201</sup> States that have both mandatory testing of sex workers and laws specifically raising penalties for prostitution while HIV positive are California, Colorado, Florida, Georgia, Kentucky, Missouri, Nevada, Ohio, Pennsylvania, Tennessee, and Utah.<sup>202</sup>

### 1. What Are the Elements of Prostitution-While-HIV-Positive Crimes?

In most states, it is enough to offer or agree to engage in sexual conduct to be charged with prostitution. In other states, loitering in a public space with the intent of offering to engage in sexual conduct can result in a prostitution charge. For example, in Pennsylvania, the definition of prostitution includes being “an inmate of a house of prostitution or otherwise engag[ing] in sexual activity as a business; or . . . loiter[ing] in or within view of any public place for the purpose of being hired to engage in sexual activity.”<sup>203</sup> Because of how prostitution is policed, many people arrested for prostitution are arrested either after police observe the individual loitering in an area known for prostitution or after an undercover officer secures an agreement or offer to exchange sexual conduct for a fee.<sup>204</sup> Thus, many arrests for prostitution occur without any sexual conduct occurring.

In some states, the prostitution-while-HIV-positive statute makes explicit that even if there is only an offer to engage in sexual conduct, it is enough to charge the defendant with the HIV exposure crime. For example, in Colorado, while the prostitution statute usually requires some act in furtherance of the agreement or offer to engage in sexual conduct for a fee, the HIV-criminalization statute specifies that “[a]ny person who performs *or offers or agrees to perform* any act of sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse . . . in exchange for money or any other thing of value,” with knowledge of being infected with HIV is guilty of the crime of “prostitution with knowledge of being infected with acquired immune deficiency syndrome.”<sup>205</sup> Similarly, in Florida, one can be convicted of a third-degree felony if one “[c]ommits *or offers to commit* prostitution” with knowledge of one’s HIV positive status.<sup>206</sup> An offer to commit prostitution does not include any sexual contact or any HIV exposure risk. At least eight of the fifteen

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201. State Chart II, *supra* note 198.

202. *See id.*; *supra* Section II.B.

203. 18 PA. CONS. STAT. § 5902(a)(1)–(2).

204. *See, e.g.*, CAL. PENAL CODE § 653.22 (West 2016).

205. COLO. REV. STAT. § 18-7-201.7(1) (2015) (emphasis added).

206. FLA. STAT. § 381.004(5) (2016) (emphasis added).

states that have prostitution-while-HIV-positive crimes explicitly impose liability without sexual contact.<sup>207</sup> One exception is Ohio, where you must actually “engage in sexual activity for hire” to be charged or convicted of prostitution while HIV positive.<sup>208</sup>

In line with the trend of other HIV criminalization statutes, frequently no actual transmission of HIV is required. One state, Tennessee, after defining its crime of “aggravated prostitution” broadly to include “engag[ing] in sexual activity as a business or [being] an inmate in a house of prostitution or loiter[ing] in a public place for the purpose of being hired to engage in sexual activity,” further specifies that “[n]othing in this section shall be construed to require that an infection with HIV has occurred in order for a person to have committed aggravated prostitution.”<sup>209</sup>

Some states also increase penalties for other prostitution-related crimes if the defendant is HIV positive, most often those crimes that penalize clients of sex workers. For example, in Kentucky, a defendant faces the same penalty whether convicted of prostitution or “procuring” another to commit prostitution if he or she is HIV positive and meets the other elements of this crime.<sup>210</sup> In California, a person may be charged with a felony HIV-exposure crime if he or she is HIV positive and faces charges under Section 647(b), a disorderly conduct statute used to penalize both sex workers and clients of sex workers.<sup>211</sup> Clients of sex workers are also liable if HIV positive in states including Colorado,<sup>212</sup> Florida,<sup>213</sup> Kentucky,<sup>214</sup> Oklahoma,<sup>215</sup> and South Carolina,<sup>216</sup> although different

207. See, e.g., GA. CODE ANN. § 16-5-60(c)(3) (West 2015); KY. REV. STAT. ANN. § 529.090(1) (West 2016). California, Colorado, Florida, Missouri, Ohio, Pennsylvania, Tennessee, Utah, Missouri, Oklahoma, and South Carolina’s HIV criminalization statutes also simply require committing “prostitution,” but in these states, either prostitution is not defined in the statute, or soliciting for prostitution is defined separately. See CAL. PENAL CODE § 266h(a); COLO. REV. STAT. § 18-3-415.5(5); FLA. STAT. § 796.08(2)–(3); MO. REV. STAT. § 567.020(1)–(3) (2016); NEV. REV. STAT. § 201.354(1) (2015); OHIO REV. CODE ANN. § 2907.24(A)–(C) (West 2015); OKLA. STAT. tit. 21, § 1028(f) (2016); 18 PA. CONS. STAT. § 5902(a)(1)–(4); S.C. CODE ANN. § 44-29-145(2) (2016); TENN. CODE ANN. § 39-13-511(6) (2016); UTAH CODE ANN. § 76-10-1302(1)(a)–(c) (West 2015).

208. OHIO REV. CODE ANN. § 2907.25(B), (C)(2).

209. TENN. CODE ANN. § 39-13-516(a), (c).

210. KY. REV. STAT. ANN. § 529.090 (West 2016).

211. CAL. PENAL CODE § 647(b) (“Who solicits or who agrees to engage in or who engages in any act of prostitution. A person agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in prostitution. No agreement to engage in an act of prostitution shall constitute a violation of this subdivision unless some act, in addition to the agreement, is done within this state in furtherance of the commission of an act of prostitution by the person agreeing to engage in that act. As used in this subdivision, ‘prostitution’ includes any lewd act between persons for money or other consideration.”); see also State Chart II, *supra* note 198.

212. COLO. REV. STAT. § 18-7-205.7(2).

213. FLA. STAT. 796.08(5)(b) (2016).

214. KY. REV. STAT. ANN. § 529.090.

215. OKLA. STAT. tit. 21, § 1029 (2016).

216. S.C. CODE ANN. § 16-15-90(1)–(11) (2016).

penalties may attach to clients of sex workers than to sex workers.<sup>217</sup> However, in Missouri, Nevada, Ohio, and Oklahoma, only sex workers are liable for the HIV-exposure crime, and clients of sex workers face no similar penalty if HIV positive.<sup>218</sup> In Georgia, clients of sex workers are only liable if they solicit an act of “sodomy” but not if they solicit an act of vaginal sexual intercourse.<sup>219</sup> Interestingly, in Florida, a person who “[p]rocures another for prostitution”—a crime brought against clients of sex workers—must be proven to have not only procured or intended to engage in sexual activity but to actually have “engage[ed] in sexual activity in a manner likely to transmit the human immunodeficiency virus.”<sup>220</sup> Thus, a different and much higher standard for conviction is established for clients of sex workers than for sex workers.

While sex work itself is not a crime for those working in registered brothels in Nevada, sex work while HIV positive by those same individuals is a class B felony.<sup>221</sup> Individuals need not be proven to have engaged in sexual conduct but only to have been employed as a prostitute.<sup>222</sup> In addition, Nevada imposes liability on third-party managers of HIV-positive sex workers. Owners of houses of prostitution that employ a person with knowledge that the person has tested positive for HIV are are civilly, but not criminally, liable for damages if that person does in fact transmit HIV to another.<sup>223</sup>

## 2. Interaction with Mandatory Testing

Ten states have both mandatory testing of sex workers and laws specifically raising penalties for prostitution-while-HIV-positive.<sup>224</sup> Proving that sex workers have knowledge of HIV status, and thus can be charged with the higher crime, could be facilitated by the existence of mandatory testing statutes, and some states explicitly connect the operation of these statutes. In Utah and California, the law provides a mechanism for the outcome of a mandatory test to result in an additional charge against the defendant upon subsequent prostitution arrests.<sup>225</sup> In Califor-

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217. In Colorado, patronizing a sex worker while HIV positive is a class 6 felony, while prostitution while HIV positive is a class 5 felony. COLO. REV. STAT. §§ 18-7-201.7(2), 18-7-205.7(2).

218. See State Chart II, *supra* note 198.

219. GA. CODE ANN. § 16-5-60(c)(4) (2015).

220. FLA. STAT. 796.08(5)(b) (2016).

221. NEV. REV. STAT. § 201.358(b) (2015).

222. *Id.*

223. *Id.* § 41.1397.

224. California, Colorado, Florida, Georgia, Kentucky, Missouri, Nevada, Ohio, Tennessee, and Utah. See CAL. PENAL CODE § 12022.85(a) (West 2016); COLO. REV. STAT. 18-3-415.5(5)(b) (2015); FLA. STAT. § 796.08(5); GA. CODE ANN. § 16-5-60(c)(3); KY. REV. STAT. ANN. § 529.090(2)-(4) (West 2016); MO. REV. STAT. § 567.020(2) (2016); NEV. REV. STAT. § 201.358(b); OHIO REV. CODE ANN. § 2907.24(2) (West 2015); OKLA. STAT. tit. 21, § 1031(B) (2016); S.C. CODE ANN. § 44-29-145(2) (2016); TENN. CODE ANN. § 39-13-516 (2016); UTAH CODE ANN. § 76-10-1309 (West 2015); *supra* Section II.B.

225. CAL. PENAL CODE § 12022.85(a); UTAH CODE ANN. § 76-10-1309.



nia, the statute provides that if a person charged with prostitution has been previously convicted of that charge,

[A]nd in connection with one or more of those convictions a blood test was administered pursuant to Section 1202.1 or 1202.6 [the mandatory testing provision] with positive test results, of which the defendant was informed, the previous conviction and positive blood test results, of which the defendant was informed, shall be charged in the accusatory pleading. If the previous conviction and informed test results are found to be true by the trier of fact or are admitted by the defendant, the defendant is guilty of a felony.<sup>226</sup>

Thus, the HIV testing results actually form part of the criminal charge against a person subsequently charged with prostitution and create a presumption of knowledge on the defendant's part, giving rise to a felony conviction.

In Utah, HIV positive defendants are eligible for a felony sentence enhancement if they commit prostitution, solicitation, or patronizing and have either actual knowledge of their status or have previously been convicted of prostitution, solicitation, or patronizing.<sup>227</sup> The state may assume that the person was informed of their status through mandatory testing after their first charge. In Nevada, regulated sex workers are required to undergo regular HIV tests by the Board of Health and are given routine notifications of their test results. In this state, even if you are not proven to have actual knowledge of your status, if you were given notice under the statutory scheme, you are deemed to have knowledge and can be charged with prostitution-while-HIV-positive.<sup>228</sup>

In all of the remaining states, there is no automatic upgrade to the prostitution-while-HIV-positive charge upon a second arrest.<sup>229</sup> However, of these eight remaining states, six provide for notice to the District Attorney, other prosecutorial agency, or arresting law enforcement agency when a mandatory test returns a positive result.<sup>230</sup> It is a safe assumption that the results are provided in order to facilitate an enhanced charge the next time the individual is arrested, or even in the instant case. In Colorado, the statute explicitly states that test results are revealed to the District Attorney who "shall keep the results of such . . . test strictly confidential" unless the results of such test indicate the presence of "the hu-

226. CAL. PENAL CODE § 647(f).

227. UTAH CODE ANN. § 76-10-1309.

228. NEV. REV. STAT. § 201.538(1).

229. *See, e.g.*, COLO. REV. STAT. § 18-3-415.5; FLA. STAT. § 775.0877; GA. CODE ANN. § 16-5-60; KY. REV. STAT. ANN. § 529.090; MO. REV. STAT. § 567.020; OHIO REV. CODE ANN. § 2907.24; 18 PA. CONS. STAT. § 5902 (2016); S.C. CODE ANN. § 44-29-80; TENN. CODE ANN. § 39-13-521.

230. COLO. REV. STAT. § 18-3-415.5(2)-(3)(a); FLA. STAT. § 775.0877(2); KY. REV. STAT. ANN. § 529.090(1); NEV. REV. STAT. § 201.356(1)-(2); S.C. CODE ANN. § 44-29-80; TENN. CODE ANN. § 39-13-521(b)(2)(A)-(G).

man immunodeficiency virus (HIV) that causes acquired immune deficiency syndrome” and it is necessary for the purposes of “pleading and proving the mandatory sentencing provisions.”<sup>231</sup>

While it is unclear whether, in California, one can be charged with the prostitution-while-HIV-positive crime upon a first arrest for prostitution, it is clear that this could happen in any other state, as long as knowledge of HIV status (where required) is proven. Mandatory testing and notice of the result is only one way to document that the individual had knowledge of their HIV status.

### 3. What Penalties Are Imposed?

Penalties for committing prostitution-while-HIV-positive vary from state to state, but they generally expand and exceed the penalties normally available for the underlying prostitution-related crime, and in most states they carry a felony-level charge.<sup>232</sup> In Kentucky, committing either prostitution or procuring a prostitute while HIV positive is a class D felony, which carries a possible penalty of five years.<sup>233</sup> In Missouri, the crime of prostitution is raised from a class B Misdemeanor to a class B Felony if the defendant has knowledge of his or her HIV status, raising the possible sentence of incarceration from a term not to exceed six months to between five and fifteen years.<sup>234</sup> In Nevada, prostitution-while-HIV-positive is a class B Felony with a minimum penalty of two years, a \$10,000 fine, or both.<sup>235</sup>

Also, prostitution-while-HIV-positive is categorized under the prostitution statutes, as a degree of prostitution, in only four of the fifteen jurisdictions with prostitution-related HIV exposure crimes. These four are Missouri, Ohio, Pennsylvania, and Utah.<sup>236</sup> In the remaining nine jurisdictions, the HIV-exposure crime is separate from the prostitution statute.<sup>237</sup> This means that the defendant can be charged both with prostitution and with the HIV-exposure crime. For example, in South Carolina, the statute “Penalty for exposing others to Human Immunodeficiency Virus” imposes a felony charge on anyone who has sexual intercourse with another with knowledge of HIV status, including consensual private sexual activity, prostitution, and forced sexual intercourse, or rape.<sup>238</sup>

231. COLO. REV. STAT. § 18-3-415.5(2)-(3)(a).

232. See State Chart II, *supra* note 198.

233. KY. REV. STAT. §§ 532.060(2)(d), 529.090(3).

234. MO. REV. STAT. §§ 558.011(2),(6), 567.020(2).

235. NEV. REV. STAT. § 201.358(b).

236. See MO. REV. STAT. § 567.020; OHIO REV. CODE ANN. § 2907.24 (West 2015); 18 PA. CONS. STAT. § 5902 (2016); UTAH CODE ANN. § 76-10-1309 (West 2015).

237. See, e.g., S.C. CODE ANN. § 44-29-145 (2016).

238. *Id.*

Thus, this crime can be charged alongside the underlying crime of prostitution, increasing the overall penalties possible for this individual.<sup>239</sup>

The 2007 case *People v. Hall*<sup>240</sup> illustrates how charges are compounded. Panchita Hall was approached by an undercover vice officer.<sup>241</sup> After negotiating a price and agreeing on services, the police officer signaled to another police officer to arrest Hall.<sup>242</sup> Hall testified at trial that she contracted HIV when she was raped in 1996.<sup>243</sup> Hall was charged with felony prostitution because she had a prior conviction for prostitution after having tested positive for HIV, and she was also charged with unlawful sex while infected with the HIV virus.<sup>244</sup> Hall was acquitted on the charge of unlawful sex while infected with HIV when the court determined that the State did not prove that Hall intended to infect the undercover officer with HIV.<sup>245</sup> However, Hall was sentenced to three years in prison on the felony prostitution charge.<sup>246</sup> In addition, the trial court sentenced Hall to three additional years as term enhancements.<sup>247</sup> The appellate court affirmed the decision of the trial court.<sup>248</sup>

In addition to incarceration, additional penalties are suggested, or mandated, in some states. For example, in Colorado, the judge may, in sentencing someone for “prostitution with knowledge of being infected with acquired immune deficiency syndrome,” order that such person submit to drug treatment or mental health treatment at their own expense, in addition to any sentence for probation or incarceration.<sup>249</sup> In Tennessee, those convicted of the prostitution-while-HIV-positive charge are required to register on the sex offender registry.<sup>250</sup>

#### CONCLUSION

There is no evidence to suggest that a carceral approach to sex work or to HIV transmission helps to address the HIV epidemic. Nor does a punitive approach address the needs of sex workers vulnerable to contracting HIV, protect the public health, or address the needs of sex workers living with HIV. Instead, it compounds criminal penalties on people charged with prostitution-related crimes and undermines HIV efforts.

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239. See *id.* § 44-29-145 (2014).

240. No. B190199, 2007 WL 2121912 (Cal. Ct. App. July 25, 2007).

241. *Id.* at \*1.

242. *Id.*

243. *Id.* at \*2.

244. See *id.* at \*1.

245. *Id.* at \*3.

246. *Id.*

247. *Id.*

248. *Id.* at \*6.

249. COLO. REV. STAT. § 18-7-201.7(1), (3)(a)–(b) (2015).

250. See TENN. CODE ANN. §§ 39-13-516(a), 40-39-201(b)(5), 40-39-202(20)(A)(iii) (2016); 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 & BEHAV. 2624, 2625 (2013).

Rather than rely on a punitive approach, it is necessary to invest in strategies that actually promote HIV prevention and reduce HIV transmission among sex workers and their sexual partners, while promoting effective treatment and the human rights of sex workers living with HIV. Documented public health experiences demonstrate that, to date, the most effective strategy for increasing consistent condom use and reducing HIV risk among sex workers is community empowerment-based, peer-mediated HIV prevention programming.<sup>251</sup>

Despite this evidence, the possibility of creating comprehensive programs that address the needs of sex workers, and especially sex workers living with HIV, are not possible in our current legal system that primarily aims to prosecute and punish. Effectively curbing the spread of HIV, and ensuring that those living with HIV have adequate access to care and treatment, requires shifting away from criminal law responses to the epidemic.

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251. See, e.g., Andrea Wirtz et al., Johns Hopkins Bloomberg Sch. of Pub. Health, Epidemiology, Address at the XIX International AIDS Conference, Modeling the Impacts of a Comprehensive Community Empowerment-Based, HIV Prevention Intervention for Female Sex Workers in Generalized and Concentrated Epidemics: Infections Averted Among Sex Workers and Adults (July 26, 2012), <http://pag.aids2012.org/Abstracts.aspx?AID=18831>.