

# HIV CRIMINALIZATION AGAINST IMMIGRANTS IN CALIFORNIA

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# EXECUTIVE SUMMARY

HIV criminalization is a term used to describe statutes that either criminalize otherwise legal conduct or that increase the penalties for illegal conduct based upon a person's HIV-positive status. California has four HIV-specific criminal laws, and one non-HIV-specific criminal law that criminalizes exposure to any communicable disease. Having contact with the criminal system can have a particularly severe impact on immigrants in the United States, as it can be grounds for deportation. In California, more than one in four residents are foreign born. Given the large immigrant population in California, Williams Institute researchers analyzed California Criminal Offender Record Information (CORI) data on HIV offenses in California to explore the demographics and experiences of foreign born individuals as compared to their U.S. born counterparts.

## Main Findings:

- Overall, 800 people have come into contact with the California criminal system from 1988 to June 2014 related to that person's HIV-positive status. Among those individuals, 121 (15%) were foreign born.
- Like their U.S. born counterparts, 94% of all HIV-specific incidents in which immigrants had contact with the criminal system were under California's felony offense against solicitation while HIV-positive.
- Eighty-three percent of the immigrants who had contact with the system based on their HIV-positive status were born in Mexico, Central or South America, or the Caribbean.
- While U.S. born people were divided fairly evenly between men and women, immigrants were overwhelmingly men: 88% of foreign born individuals in the group were men. It is likely that transgender people's sex was recorded based on genitalia, and this may indicate that some of the people recorded as men were actually transgender women.
- When reviewing case outcomes for solicitation while HIV-positive by place of birth, patterns emerged based on country and region of birth. Mexican born charging outcomes reflected a very similar pattern to U.S. born charging outcomes. However, South and Central American and Asian born individuals reflected fewer charges for any crime and fewer charges for the HIV-specific felony solicitation offense. Among the foreign born from other countries, there were fewer charges for the felony solicitation while HIV-positive offense, and more charges for non-HIV-specific offenses when compared to their U.S. born counterparts. Given the small numbers, however, more research is needed to see if this pattern reflects real differences or is just due to random variation.
- Thirty-six people, or 30% of foreign born individuals, had some form of a criminal immigration proceeding in their histories. Among those who had immigration proceedings in their records, nine people (25%) had those proceedings initiated immediately after an HIV-specific incident.

Future research beyond the enforcement data may explore whether initial patterns seen by sex and place of birth are perpetuated in other criminal systems or under other offenses. Also, future research that explores the influence of sexual orientation and gender identity as a potential driver to the system and as a potential mediating factor in experiences once in the criminal system will help provide a more nuanced and complete picture of the experiences of people who are criminalized based on their HIV-positive status.



# INTRODUCTION

As noted in prior reports,<sup>1</sup> HIV criminalization is a term used to describe statutes that either criminalize otherwise legal conduct or that increase the penalties for illegal conduct based upon a person’s HIV-positive status. While only one HIV criminalization law can be found in federal law,<sup>2</sup> more than two-thirds of states and territories across the United States have enacted their own HIV criminal laws. Some HIV criminal laws do not require transmission of HIV, and in some states, these laws criminalize conduct that poses a negligible risk of transmission, such as spitting or biting.

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

Table 1. HIV Criminalization Laws in California (2016)

Code Section	Criminalized Conduct	Transmission Required?	Felony/Misdemeanor and Statutory Sentence (if included)
Cal. Penal Code §647f	Solicitation if the person tested positive for HIV in a prior solicitation or other sex offense that resulted in mandatory HIV testing	No	Felony punishable by imprisonment for 16 months or longer
Cal. Health & Safety Code §120291	Consensual sex without a condom in which an HIV-positive person does not disclose their status and has a specific intent to transmit the disease to their sex partner	No	Felony punishable by imprisonment in state prison for three, five, or eight years
Cal. Penal Code §12022.85	Having knowledge that one is HIV-positive while engaging in a nonconsensual sex crime <sup>3</sup>	No	Three year sentence enhancement
Cal. Health & Safety Code §1621.5	Having knowledge that one is HIV-positive while donating blood, tissue, semen or breast milk	No	Felony punishable by imprisonment for two, four, or six years
Cal. Health & Safety Code §120290	Willful exposure to any contagious, infectious, or communicable disease (not HIV-specific)	No	Misdemeanor

Having contact with the criminal system can have a particularly severe impact on immigrants in the United States, as it can be grounds for deportation. Cal. Penal Code § 647f, or felony solicitation while HIV-positive (which makes up the vast majority of HIV criminalization cases in California) would be held as a deportable “crime of

<sup>1</sup> AMIRA HASENBUSH, AYAKO MIYASHITA & BIANCA D.M. WILSON, THE WILLIAMS INST. UNIV. OF CAL. L.A. SCH. OF LAW, HIV CRIMINALIZATION IN CALIFORNIA: PENAL IMPLICATIONS FOR PEOPLE LIVING WITH HIV/AIDS (2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Criminalization-California-Updated-June-2016.pdf>.

<sup>2</sup> 18 U.S.C. § 1122 (2015)(pertaining to the donation or sale of blood or other potentially infectious fluids or tissues).

<sup>3</sup> The statute’s defined underlying predicate crimes are: oral copulation (CAL. PENAL CODE §288A), statutory rape (CAL. PENAL CODE §261.5), sodomy (CAL. PENAL CODE §286), rape (CAL. PENAL CODE §261) and spousal rape (CAL. PENAL CODE §262).

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moral turpitude” in almost all instances.<sup>4</sup> While there have been no published cases regarding California’s other HIV-specific crimes, it is possible that a court could hold that they are also “crimes of moral turpitude”, which could in turn trigger deportation.

Historically, a person living with HIV was barred from immigrating to the United States because of their HIV status. However, in 2010, HIV was removed from the definition of “communicable disease of public health significance,” thus removing its bar to admissibility.<sup>5</sup> Nevertheless, people living with HIV still often face stigma and discrimination in all areas of life, particularly outside the United States. Today, people living with HIV may seek asylum in the United States on the basis of the persecution that they face in their home country because of their health status, but cases granting asylum on that basis still appear to be limited.<sup>6</sup> Nevertheless many immigrants in the United States are living with HIV – whether acquired abroad or domestically.

In California, more than one in four residents (27%) are foreign born. Given the large immigrant population in California, Williams Institute researchers analyzed California Criminal Offender Record Information (CORI) data on HIV offenses in California to explore the demographics and experiences of foreign born individuals as compared to their U.S. born counterparts. CORI data record any contacts an individual may have had with the criminal system, from arrest through sentencing and probation. After obtaining necessary security clearances, Williams Institute researchers accessed the de-identified criminal histories of all individuals who had contact with the criminal system under Cal. Penal Code §647f (solicitation while HIV-positive), Cal. Health & Safety Code §120291 (exposure to HIV with intent to transmit), Cal. Penal Code §12022.85 (sentence enhancement for HIV-positive status in non-consensual sex offenses), and Cal. Health & Safety Code §120290 (misdemeanor exposure to any communicable disease) from the time of their enactment<sup>7</sup> through June 2014.<sup>8</sup> All data were analyzed using Stata version 13.1. Because this is the full population of individuals who had contact with the criminal system under HIV-related laws in California during the selected time period, the data are presented descriptively and statistical hypothesis tests are not used.

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<sup>4</sup> Under the Immigration and Nationality Act, “[a]ny alien who...is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct...is deportable.” 8 U.S.C. § 1227. The Ninth Circuit has affirmed a Board of Immigration Appeals decision holding that solicitation is categorically a crime of moral turpitude. *Rohit v. Holder*, 670 F.3d 1085, 1091 (9th Cir. 2012). If misdemeanor solicitation on its own is categorically a crime of moral turpitude, then solicitation while HIV-positive will also be considered a crime of moral turpitude, since misdemeanor solicitation is a lesser included offense. Since California’s felony solicitation law almost always arises after a person has been previously convicted of misdemeanor solicitation and tested positive for HIV, a conviction under California’s felony solicitation law will by definition be a second or more offense, thus making it a second crime of moral turpitude, and a deportable offense.

<sup>5</sup> Medical Examination of Aliens-Removal of Human Immunodeficiency Virus (HIV) Infection from Definition of Communicable Disease of Public Health Significance, 74 Fed. Reg. 56547, 56562 (Nov. 2, 2009).

<sup>6</sup> Victoria Neilson, *HIV-Based Persecution in Asylum and Immigration Decisions*, 31 Am. Bar Ass’n Human Rights 8 (2004), available at <http://www.immigrationequality.org/wp-content/uploads/2011/08/HIVBasedPersecute.reprint.pdf>; LAW OF ASYLUM IN THE UNITED STATES § 5:67 (2016), available at Westlaw.

<sup>7</sup> CAL. HEALTH & SAFETY CODE §120290 (misdemeanor exposure to any communicable disease) was limited to the time when HIV-specific offenses were enacted, beginning in 1988.

<sup>8</sup> For a fuller analysis of the entire data set, see HASENBUSH, MIYASHITA & WILSON, *supra* note 1.

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# FINDINGS

## A. Individuals who had HIV-related contact and the number of HIV-specific incidents

Overall, 800 people came into contact with the California criminal justice system from 1988 to June 2014 either under an HIV-specific law or under the misdemeanor exposure law as it related to a person's HIV-positive status. Among those individuals, 121 (15%) were foreign born.<sup>9</sup> These individuals were involved in 156 separate HIV-specific incidents, which made up 13% of the HIV-specific criminal incidents overall. An incident can be defined as one set of circumstances which may give rise to a series of contacts with law enforcement during arrest, charge, conviction, and post-conviction proceedings. Like their U.S. born counterparts, 94% of all HIV-specific incidents in which immigrants had contact with the criminal system were under California's felony offense against solicitation while HIV-positive. Therefore, most findings on HIV-specific criminal offenses in California primarily relate to sex work.

## B. The demographic characteristics and geographic locations of individuals who had HIV-related contact

While there were small differences in the average age of first HIV-related contact with the system between foreign born and U.S. born individuals, (34<sup>10</sup> and 36, respectively), foreign born individuals were older on average than their U.S. born counterparts when having their first lifetime contact with the criminal system in the United States (26 and 22, respectively). While 54% of U.S. born individuals had their first contact of any kind with the criminal system before the age of 21, and 18% before the age of 18, only 29% of foreign born individuals had their first lifetime contact with the criminal system before the age of 21 and 2% had their first contact before age 18. This may be a result of fewer foreign born individuals being present in the United States at younger ages.<sup>11</sup> See Table 2 for further demographic information of the individuals who had HIV-related contact with the criminal system, comparing U.S. born and foreign born individuals.

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<sup>9</sup> Throughout this report, we use "foreign born" or "immigrant" to refer to any individual whose place of birth in their CORI data was recorded as outside the United States. Given the limitations of the data set, we are unable to distinguish among undocumented immigrants, legal permanent residents, temporary visitors, and naturalized citizens.

<sup>10</sup> All whole ages are rounded down to the nearest whole number to reflect the age that the person would identify as, rather than using standard mathematical rounding.

<sup>11</sup> In California, only 5% of the foreign born population is under age 18 and 11% is younger than 25. By comparison, 31% of the native born population is under 18 and 43% is younger than 25. *American Community Survey S0501, 2010-2014 5-Year Estimates Selected Characteristics of the Native and Foreign-Born*, U.S. CENSUS BUREAU, AMERICAN FACTFINDER, available at [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_14\\_5YR\\_S0501&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_5YR_S0501&prodType=table).

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

	Foreign Born	U.S. born
Number of Incidents	156	1017
Number of People <sup>12</sup>	121	678
Age at time of first HIV-specific event		
Oldest	65	71
Youngest	19	14
Mean	34.8	36.3
Standard Deviation	8.9	10.1
Sex		
Female	12%	48%
Male	88%	52%
Race/Ethnicity		
Asian/Pacific Islander	4%	1%
Black	6%	45%
Latino/a	76%	19%
Native American	0%	1%
Other	3%	0%
White	11%	34%
Race/Ethnicity and Sex		
Black Female	2%	24%
Black Male	4%	21%
Latina Female	4%	6%
Latino Male	72%	12%
White Female	3%	17%
White Male	7%	17%

Foreign born individuals in the sample were more likely to identify as Latino/a than U.S. born individuals (76% versus 19%, respectively), and 83% of the immigrants who had contact with the system based on their HIV-positive status were born in Mexico, Central or South America, or the Caribbean (see Figure 1). There were differences in the sex distribution between foreign born and U.S. born individuals. While U.S. born people were divided fairly evenly between men and women, immigrants with an HIV criminalization incident were overwhelmingly men: 88% of foreign born individuals in the group were men, and 72% were Latino men. In fact, among Latino immigrants, 95% were men, while among U.S. born Latinos, only 67% were men. It is important to note, however, that CORI data do not separately record sex assigned at birth and gender identity. Many transgender women have been housed in men’s prisons throughout the country,<sup>13</sup> and a Los Angeles-based transgender activist reported that local standard police practice “goes by genitalia” and books transgender women as men, regardless of whether they have legally

<sup>12</sup> The total number of people adds up to 799 and not 800, because one person’s place of birth was recorded as unknown.

<sup>13</sup> E.g. CeCe McDonald (see e.g. Kira Brekke, *CeCe McDonald Shares the Struggles of Being a Trans Woman in a Male Prison Facility*, HUFFINGTON POST (May 21, 2014, 2:33 PM EST) [http://www.huffingtonpost.com/2014/05/21/cece-mc-donald-prison\\_n\\_5366778.html](http://www.huffingtonpost.com/2014/05/21/cece-mc-donald-prison_n_5366778.html)), Ashley Diamond (see e.g. Deborah Sontag, *Transgender Woman Cites Attacks and Abuse in Men’s Prison*, N.Y. TIMES (Apr. 5, 2015), <http://www.nytimes.com/2015/04/06/us/ashley-diamond-transgender-inmate-cites-attacks-and-abuse-in-mens-prison.html>), and Passion Star (see e.g. Michael Barajas, *What It’s Like to be a Transgender Woman in a Texas Prison*, HOUSTON PRESS (Apr. 17, 2015, 11:30 AM) <http://www.houstonpress.com/news/what-its-like-to-be-a-transgender-woman-in-a-texas-prison-7373108>).

changed their name and gender.<sup>14</sup> Therefore, it is impossible to identify how many transgender people are in the population. Given this, the people recorded as men were likely a mix of cisgender men and transgender women.<sup>15</sup>

When viewing immigrants based on their place of birth, the majority were born in Mexico (69%) and Central and South America (10%). Asian born immigrants made up 8% of the foreign born individuals. The remaining 12% of immigrants came from Africa, Canada, the Caribbean, Eurasia, Europe, and the Middle East. To view individual countries of birth of immigrants in California who had contact with the criminal system based on their HIV-positive status, see Figure 1.

Figure 1. Place of Birth of Individuals Impacted by HIV Criminalization Laws in California (January 1988 - June 2014)



Overall, slightly over half of all HIV-specific criminal enforcement occurred in Los Angeles County. This was true for both foreign born (59%) and U.S. born (56%) individuals. No meaningful patterns emerged in terms of relationships between immigration status, HIV-specific enforcement, and proportions of immigrants across counties. (See Table 3.) For example, 10% of HIV-specific enforcement against U.S. born people occurred in Sacramento County, while only 3% of HIV-specific enforcement against foreign born people occurred there. On the other hand, 4% of HIV-specific enforcement against U.S. born people occurred in Orange County, while 7% of enforcement against their foreign born counterparts occurred there.

<sup>14</sup> E-mail from Bamby Salcedo, President & CEO, TransLatin@ Coalition, to Amira Hasenbush, Jim Kepner Law and Policy Fellow, The Williams Inst. Univ. of Cal. L.A. Sch. of Law (Sept. 3, 2016, 8:10 PM PST) (on file with author).

<sup>15</sup> For more information about transgender Latina immigrants, see KARLA M. PADRÓN, BAMBY SALCEDO, THE TRANSLATIN@ COALITION, TRANSVISIBLE: TRANSGENDER LATINA IMMIGRANTS IN U.S. SOCIETY (2013), <http://www.chicano.ucla.edu/files/news/transvisiblereport.pdf> (reporting that 84% of TransLatina immigrant respondents reported coming to the U.S. in whole or in part because they were running away from violence).

Table 3. Distribution Across Counties of HIV-Specific Enforcement, by Immigration Status Among the Ten Counties with the Highest Level of Enforcement

	% of Foreign Born HIV-Specific Criminal Incidents	% of U.S. born HIV-Specific Criminal Incidents
Los Angeles	59%	56%
Sacramento	3%	10%
San Bernardino	5%	5%
Orange	7%	4%
San Francisco	4%	4%
San Diego	5%	3%
Riverside	1%	3%
Alameda	0%	2%
San Joaquin	3%	2%
Tulare	5%	1%

Interestingly, while Alameda County’s residents are 31% foreign born, and the county had over 20 HIV-specific criminal enforcements, none were against foreign born individuals. (See Table 4.) On the other hand, Tulare County, which had 19 HIV-specific criminal incidents, enforced 42% of them against their foreign born residents. Tulare County was the only county where criminal enforcement against foreign born residents was at a higher rate than the overall rate of foreign born residents in the population (23%).

Table 4. Levels of HIV-Specific Enforcement Against Foreign Born Individuals Versus Overall Prevalence of Foreign Born Residents, by County Among the Ten Counties with the Highest Level of Enforcement

	% Foreign Born Among HIV-Specific Criminal Incidents <sup>16</sup>	% Foreign Born Among Residents <sup>17</sup>
California State Total	13%	27%
Los Angeles	14%	35%
Sacramento	5%	20%
San Bernardino	12%	21%
Orange	22%	30%
San Francisco	13%	36%
San Diego	21%	23%
Riverside	3%	22%
Alameda	0%	31%
San Joaquin	18%	23%
Tulare	42%	23%

### C. Differences in Outcomes and Sentencing Based on Place of Birth

Overall, approximately one-third of all HIV-specific criminal incidents resulted in charges for an HIV-specific crime, and slightly under half were released with no charges, regardless of place of birth. Every incident that had charges

<sup>16</sup> Note that this is not a perfect comparison, as percent of incidents is being compared to percent of residents. In percent of incidents, the same individual person may be counted more than once if they had more than one HIV-specific incident. (That double counting may or may not occur within the same county, as people can engage in and be prosecuted for criminal conduct in multiple counties.) On the other hand, percent of residents will only count each person living in the county once.

<sup>17</sup> American Community Survey, *supra* note 11.



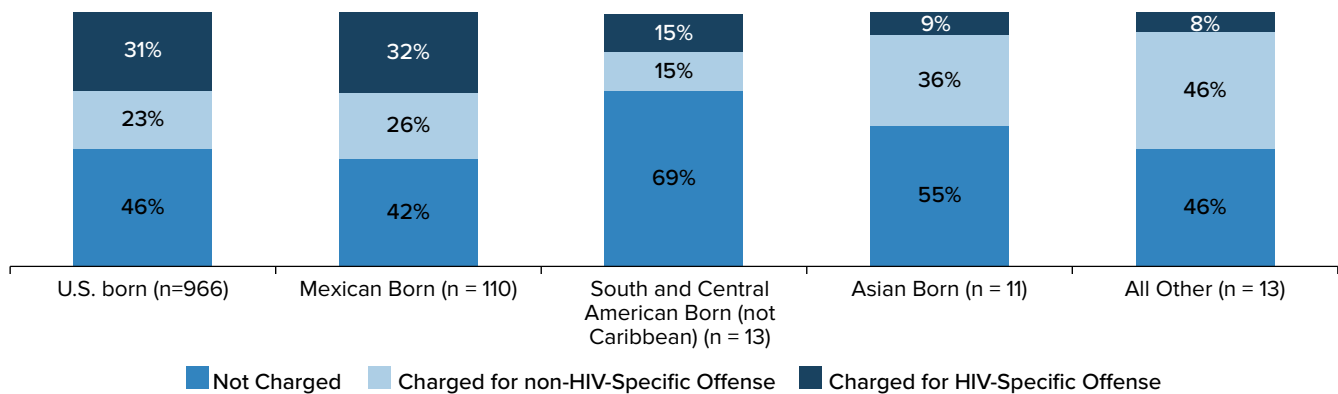
brought for an HIV-specific offense resulted in a conviction.<sup>18</sup> When comparing U.S. born and foreign born, both were equally likely to be released with no charges, and foreign born appeared slightly less likely to be charged with an HIV-specific offense and more likely to be charged with a non-HIV-specific offense, though this difference was small and not statistically significant. (See Table 5.)

Table 5. Outcomes of HIV-Specific Incidents in California, by Immigration Status (January 1988-June 2014)

	Foreign Born	U.S. born
Not Charged	45%	44%
Charged for a Non-HIV-Specific Crime	26%	22%
Charged for an HIV-Specific Crime	29%	33%

When reviewing case outcomes for solicitation while HIV-positive<sup>19</sup> by place of birth, however, patterns emerged based on country and region of birth. (See Figure 2.) Mexican born charging outcomes reflected a very similar pattern to U.S. born charging outcomes, both overall and when compared to U.S. born Latinos. However, South and Central American and Asian born individuals reflected fewer charges for any crime and fewer charges for the HIV-specific felony solicitation offense. Among immigrants from other countries,<sup>20</sup> there were fewer charges for the felony solicitation while HIV-positive offense, and more charges for non-HIV-specific offenses when compared to their U.S. born counterparts. This pattern may be understood with more records across other states with high immigrant populations from these areas of the world.

Figure 2. Charging Rates in Solicitation while HIV-Positive Incidents, by Place of Birth



<sup>18</sup> For more information on overall case outcomes for HIV-specific offenses, see HASENBUSH, MIYASHITA & WILSON, *supra* note 1.

<sup>19</sup> Comparisons are limited to felony solicitation incidents, because those incidents made up 95% of all of the HIV-specific criminal incidents, and the underlying offenses tend to be similar and comparable, while underlying offenses for other HIV-specific offenses can vary widely. For example, the three-year sentence enhancement for a committing a nonconsensual sex offense while HIV-positive can range from a statutory oral copulation violation (e.g. between a 17-year-old and a 19-year-old) and forcible rape, making the incidents hard to compare for any statistical purposes.

<sup>20</sup> Foreign born from other countries were from Canada, Cuba, England, Germany, Iran, Kazakhstan, Nigeria, South Africa, the former Soviet Union, and Trinidad and Tobago.

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Felony solicitation while HIV-positive incidents resulted in sentences of 24 months on average. However, sentence length varied based on immigration status. Immigrants were sentenced on average to a nearly seven month shorter sentence than non-immigrants (18.6 months versus 25.2 months, respectively). These sentences were only given to Mexican, South and Central American, and Cuban immigrants. Only one foreign born individual from outside Latin America received charges and a conviction for felony solicitation while HIV-positive, and that incident resulted in a probation sentence with no immediate incarceration. For context, it is important to note that these comparisons were made without taking into account criminal histories, which may have impacted sentence lengths.

#### **D. Immigration impacts of HIV-specific contact with the criminal system**

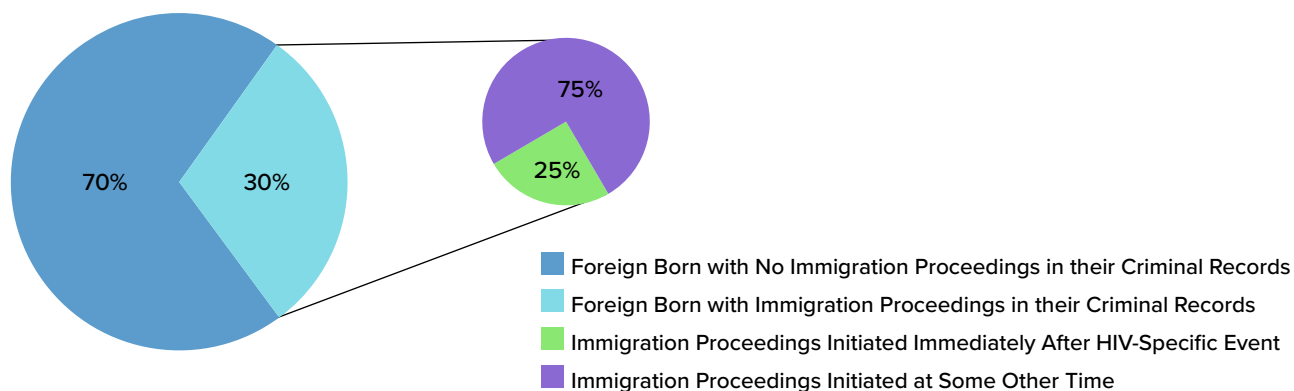
Unlike U.S. born individuals, immigrants who are not naturalized citizens risk deportation if they are convicted of certain crimes. Under the Immigration and Nationality Act, which governs immigration law in the United States, if a person is convicted of two “crimes of moral turpitude,” they become removable, i.e. they can be deported. The Federal Ninth Circuit Court of Appeals, which governs all of California under federal immigration law, has held that solicitation is categorically a crime of moral turpitude.<sup>21</sup> Felony solicitation while HIV-positive by its definition cannot be charged on a first offense, because in order for it to be charged, the person has to have committed a previous offense that resulted in court mandated HIV testing and a positive result must have been recorded in the person’s criminal record. Therefore, a felony solicitation while HIV-positive conviction could automatically become a second crime of moral turpitude offense that could result in deportation. Although courts have not opined on California’s other HIV-specific offenses, it is possible that those could also be construed as crimes of moral turpitude that could trigger deportation.

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<sup>21</sup> Rohit v. Holder, 670 F.3d 1085, 1091 (9th Cir. 2012).

It is unclear whether or not California CORI data comprehensively collect immigration-related actions. However, some records contain notes of deportation proceedings in people’s criminal histories. Thirty-six people,<sup>22</sup> or 30% of foreign born individuals, had some form of a criminal immigration proceeding in their histories.<sup>23</sup> These were usually recorded as illegal entries, re-entries or deportation proceedings. We examined whether there was evidence that the HIV-related criminal incident triggered any immigration related actions or proceedings. Among those who had immigration proceedings in their records, nine people (25%) had those proceedings initiated immediately after an HIV-specific incident evidenced by a comparison of dates between incidents.<sup>24</sup> These nine people appear to provide possible evidence of where HIV criminalization was a precursor to subsequent immigration proceedings. (See figure 3.)

Figure 3. Immigration Impacts of HIV-Specific incidents Among Foreign Born



<sup>22</sup> Four native born individuals also had some form of immigration proceeding in their criminal histories. Those individuals are excluded from this analysis under the assumption that they are miscodes. However, there have been cases of American citizens accidentally being deported. See e.g., Esha Bhandari, *Yes, the U.S. Wrongfully Deports Its Own Citizens*, AM. CIVIL LIBERTIES UNION (Apr. 25, 2013, 11:45 AM) <https://www.aclu.org/blog/speakeasy/yes-us-wrongfully-deports-its-own-citizens>. There is no way to tell whether that was the case with these individuals or whether there was a typo in the data.

<sup>23</sup> As a point of comparison, it is estimated that 24% to 29% of California’s foreign born residents are undocumented. This estimate was calculated using estimates from the American Community Survey for the overall number of immigrants in California and the following two estimates of the number of undocumented immigrants in California: Jeffrey S. Passel & D’Vera Cohn, *Chapter 1: State Unauthorized Immigrant Populations*, PEW RESEARCH CENTER (Nov. 18, 2014) <http://www.pewhispanic.org/2014/11/18/chapter-1-state-unauthorized-immigrant-populations/>; Migration Policy Inst., *Profile of the Unauthorized Population: California* (2014) <http://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/CA>.

<sup>24</sup> Immigration proceedings initiated immediately after an HIV-specific incident were coded as such if (1) there was no other criminal incident in the person’s record between the immigration proceeding and the HIV-specific incident and (2) either (a) the immigration proceedings were initiated before the person’s scheduled release date from incarceration based on the length of their recorded sentence or (b) the person was not sentenced to immediate incarceration and the immigration proceeding was initiated within 6 months of the final action related to the HIV-specific incident.

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## RESEARCH, LAW AND POLICY IMPLICATIONS

Previous research analyzed HIV criminalization in California more broadly but did not explore how these laws specifically impact immigrants in California. Immigrants who had contact with the criminal system related to their HIV came from countries all over the world. However, like the overall immigrant population in California, immigrants who had HIV criminalization offenses were primarily from Mexico, Central and South America, and the Caribbean.

Like their U.S. born counterparts of all ethnicities, the vast majority of immigrants had contact related to California's Penal Code §647f, the felony solicitation while HIV-positive statute. However, the age and sex distributions of immigrants varied from nonimmigrants. Immigrants were older on average when they had their first lifetime contact with the California criminal system. This is likely because immigrants in California in general are older on average than nonimmigrants. Immigrants were also much more likely to be categorized as male than nonimmigrants. While U.S. born individuals were about evenly split between men and women, foreign born individuals were 88% male. This cannot be explained by different demographics among immigrant populations in California, as the overall foreign born population in California is estimated to be slightly more female than male (51.5% versus 48.5%, respectively).<sup>25</sup> While immigrant men from all race/ethnicity groups were more highly represented than women, the greatest sex disparity was seen among immigrant Latinos. Among Black and White immigrants, there were approximately twice as many men as women; however, among Latino immigrants, there were over 17 times as many men as women. One possible explanation may be that many of the people who were categorized as men in the data may have been miscategorized transgender women. CORI data do not distinguish between sex assigned at birth and gender identity, so most people are likely categorized by their assigned sex, genitalia, or whatever sex is on their identification documents. While it is impossible to know whether or how many transgender women were miscounted as men in the data set, it is known that there is a large TransLatina community in California, many of whom moved to the United States in search of a better life and less discrimination and violence than they faced in their home countries.<sup>26</sup>

Charging outcomes between foreign born and U.S. born individuals appeared similar when viewed as a whole. However, when broken down by place of birth, a different pattern emerged. Mexicans were more likely to be treated like U.S. born citizens of all ethnicities. However, South and Central American and Asian CORI records reflected fewer charges for the felony solicitation while HIV-positive offense and more releases with no charges at all. Among immigrants from other places in the world, there were fewer charges for the HIV-specific felony solicitation and more charges for non-HIV-specific offenses when compared to their U.S. born counterparts. While the foreign born groups from outside of Mexico were small, they could reflect a pattern that shows differential treatment based on country of birth. Given the high integration of Mexican Americans, foreign born Mexicans, and Mexican culture throughout California, it might be logical that Mexican born individuals are treated similarly harsh as U.S. born people in their criminal proceedings. However, it is unusual to see that immigrants from other countries outside of Mexico appear to receive more lenient proceedings than Mexican born and U.S. born individuals. It is possible that prosecutors are more discerning when bringing charges against other immigrants because of the severity of immigration-related consequences of criminal prosecution. However, more research is needed both to determine whether this pattern of enforcement appears to exist outside of this small data set, and if so, why such a pattern exists.

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<sup>25</sup> *American Community Survey*, *supra* note 11.

<sup>26</sup> PADRÓN & SALCEDO, *supra* note 13.

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The potential immigration related consequences of criminal offenses can often be more devastating and disruptive to an individual's life than the consequences of the underlying offense. This was recognized in 2010 when the Supreme Court ruled that under the Sixth Amendment constitutional right to assistance of counsel in criminal proceedings, attorneys must advise their noncitizen clients taking a criminal plea of the potential immigration related consequences of such a plea.<sup>27</sup> While only 30% of immigrants in this data set had immigration proceedings recorded in their criminal history, among them, one in four had those proceedings initiated after and HIV-specific incident. This further emphasizes the impact that HIV criminalization can have on the lives of noncitizen immigrants above and beyond the impact on their citizen peers.

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<sup>27</sup> Padilla v. Commonwealth of Kentucky, 559 U.S. 356 (2010).

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## CONCLUSION

California is home to more than ten million immigrants. While HIV criminalization can have a negative impact on the lives of all people living with HIV, the consequences for immigrants can be much harsher and can result in deportation. These data provide insight into the enforcement of HIV criminalization laws against immigrants in California. Since the inception of these laws, at least 121 foreign born Californians have been directly affected by them. Future research beyond the enforcement data may explore whether initial patterns seen by sex and place of birth are perpetuated in other criminal systems or under other offenses. Also, future research that explores the influence of sexual orientation and gender identity as a potential driver to the system and as a potential mediating factor in experiences once in the criminal system will help provide a more nuanced and complete picture of the experiences of people who are criminalized based on their HIV-positive status.

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## ABOUT THE INSTITUTE

The Williams Institute is dedicated to conducting rigorous, independent research on sexual orientation and gender identity law and public policy. A think tank at UCLA Law, the Williams Institute produces high-quality research with real-world relevance and disseminates it to judges, legislators, policymakers, media and the public. These studies can be accessed at the Williams Institute website.

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