

RESEARCH THAT MATTERS

HIV CRIMINALIZATION IN FLORIDA

Evaluation of
Transmission Risk

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EXECUTIVE SUMMARY

HIV criminalization is a term used to describe laws that criminalize otherwise legal conduct or increase penalties for criminal conduct based on a person's HIV status. Currently, Florida has four HIV-specific criminal laws. Of those, none require actual transmission of HIV or the intent to transmit HIV. All of them are broad enough to cover conduct that cannot, in fact, lead to transmission of the virus. First enacted between 1986 and 1993, these laws predate the development of highly effective strategies for the prevention and treatment of HIV.

This report applies what we know today about the transmission and treatment of HIV to the specific types of conduct criminalized by Florida's HIV criminal laws. It also considers some ways in which research suggests that HIV criminal laws may undermine efforts to prevent the transmission of HIV. Rather than considering all aspects of these laws, this report focuses on their public health implications, namely their impact on the prevention and treatment of HIV.

Using criminal history record information (CHRI) data from the Criminal Justice Information Services at the Florida Department of Law Enforcement, we also estimate the number of convictions under each of the state's HIV criminal laws.

KEY FINDINGS

- From 1986 to 2017, there were 266 convictions¹ under Florida's HIV criminal laws; approximately 8 convictions per year. Of those convictions:
 - 100% did not require actual transmission of HIV;
 - 100% did not require the intent to transmit HIV;
 - And none required conduct that could actually transmit HIV.
- Approximately 57% of these 266 convictions (56.8%) arose in the context of sex work-related offenses. Most likely there was no physical contact at the time of arrest for these offenses, let alone contact that could transmit the virus.
- Thirty-three percent of these 266 convictions (33.5%) involved consensual sexual conduct that could include forms of sex with very low likelihoods of transmitting the virus, including oral sex, vaginal or anal intercourse with a condom; or sex with a person with HIV (PWH) whose viral load was suppressed by effective medications and who could not, therefore, transmit the virus to a sexual partner.
- Only nine percent (9.4%) of these convictions under a Florida statute that imposes a penalty enhancement for PWH if they are found guilty on an underlying sex offense or other crime enumerated by the statute. The most recent of these convictions was in 2013.

¹ For the purposes of this report, "conviction" includes those who were coded in any of the following categories in the CHRI data: guilty/convicted, adjudication withheld, and pre-trial diversion. See FLA. STAT. ANN. § 775.0877(1). While more specific breakdowns between each of these categories for each crime is included in the relevant section below, almost 90% (89%) of these were categorized as "guilty/convicted."

- Based on the CHRI data, Florida's HIV-specific crime related to organ, blood, and tissue donations has only led to one arrest. That one arrest resulted in a conviction over a decade ago, in 2008. This law now runs counter to the goals of a federal law passed in 2013 (the Federal HIV Organ Policy Equity (HOPE) Act), does nothing to protect the blood supply, and is likely putting PWH in Florida at risk by limiting their opportunity for a matching organ donor.

Further, the state's HIV criminal laws may undermine the state's public health efforts by deterring people from seeking HIV testing and treatment, stigmatizing PWH, and disproportionately affecting the communities most impacted by HIV, including people of color, women, LGBTQ people, and the formerly incarcerated.

- Some studies suggest that laws criminalizing the conduct of PWH may create a disincentive for those most at risk for HIV from getting tested, from disclosing their HIV-status to potential partners and health care providers, and from consistently accessing medical care.
- HIV criminal laws further stigmatize Floridians with HIV. Research has shown that when people with HIV experience stigma, they have poorer health outcomes and are less likely to consistently engage in their own medical care and in public health efforts.
- Florida's HIV criminal laws impact the very populations that Florida is trying to engage to combat HIV in the state, including people of color, women, youth, and LGBTQ people. Prior research has shown that HIV-related sex work prosecutions disproportionately impact women and people of color. In addition, youth, transgender people, and other LGBTQ people are disproportionately represented among sex workers. These are precisely the groups that Florida currently seeks to engage in its statewide strategic plan to combat HIV.

There have been significant medical advances related to HIV since Florida's HIV criminal laws were first passed. Modernizing these laws would support Florida's current efforts to prevent HIV in the state.

INTRODUCTION

HIV criminalization is a term used to describe laws that criminalize otherwise legal conduct, or increase penalties for criminal conduct, based on a person’s HIV status. Currently, Florida has four HIV-specific criminal laws (See Table 1). After providing a summary of what we know about HIV and its treatment and prevention today, this report will analyze each of these laws to determine the risk that the specific conduct covered by each statute poses of transmitting HIV.

Table 1. HIV Criminalization Laws in Florida (2019)

CODE SECTION	YEAR ENACTED	CRIMINALIZED CONDUCT	FELONY/MISDEMEANOR AND STATUTORY SENTENCE
FLA. STAT. ANN §381.0041(11)(B)	1986	Donation of blood, plasma, organs, skin, or other human tissue by a person who knows they have HIV and who has been informed that they could transmit the virus by such a donation.	Third degree felony punishable by a term of imprisonment not exceeding 5 years and a fine of up to \$5,000 on the first offense
FLA. STAT. ANN.§ 796.08(5)	1986	An offense of prostitution or offering to commit prostitution; or procuring another for prostitution by engaging in sexual activity in a manner likely to transmit HIV; after a previous positive HIV test, where the person had been informed that they could transmit HIV through sexual activity.	Third degree felony punishable by a term of imprisonment not exceeding 5 years and a fine of up to \$5,000 on the first offense
FLA. STAT. ANN. § 384.24(2)	1986	Sexual intercourse when the person knows that they are HIV-positive and has been informed that it is communicable through sexual intercourse, unless the person discloses their HIV status prior to sexual intercourse.	Third degree felony punishable by a term of imprisonment not exceeding 5 years and a fine of up to \$5,000 on the first offense
FLA. STAT. ANNS 775.0877	1993	Transmission of body fluids during any of the following (or an attempt of any of the following) after a previous HIV positive test was in the criminal record from a first offense for any of the following: sexual battery; incest; lewd & lascivious conduct on a person younger than 16; assault; aggravated assault; battery; aggravated battery; abuse or aggravated abuse of a child, elderly or disabled person; sex work; donation of blood, plasma, organs, skin, or other human tissue; or sexual performance by a person under the age of 18, unless the person exposed to the virus knew that the there was a risk of transmission and voluntarily consented.	Third degree felony punishable by a term of imprisonment not 5 years and a fine of up to \$5,000 on the first offense

In addition, we provide estimates of the number of convictions under each of the four statutes. For these estimates, we use data from criminal history record information (CHRI) from the Criminal Justice Information Services at the Florida Department of Law Enforcement. CHRI data record any contacts an individual has had with the criminal system, beginning at arrest through conviction and sentencing.² The time period that these data cover is from 1986 (when the first law was implemented) through year-end 2017 (the most recent available data at the time the data were requested by Williams Institute researchers).

² In estimating the number of “convictions” for each crime, we include those outcomes that are coded in CHRI data as pleaded guilty, convicted by a judge or jury, had adjudication withheld who qualified for pre-trial diversion. Office of the State Attorney, 17th Judicial Circuit, Broward County, Fla., Felony Pre-Trial Intervention, OFFICE OF THE STATE ATTY. (Dec. 14, 2016) <http://www.sao17.state.fl.us/felony-pti.html>. We understand that this may overestimate the number of people who actually engaged in the conduct prohibited by the statutes. For example, people may be convicted in error, or plead guilty or enter a diversion program for a variety of reasons. NAT’L ASSN. OF CRIMINAL DEFENSE LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 10, (2018), <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf>. “Exoneration research has revealed one of the most tragic aspects of the criminal justice system: The pressure defendants face to plead guilty can even cause innocent people to plead guilty. Of the 354 individuals exonerated by DNA analysis, 11% had pled guilty to crimes they did not commit.” *DNA Exonerations in the United States*, INNOCENCE PROJECT, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (last visited Feb. 8, 2018). Conversely, for other reasons, including possible inadvertent errors in, or omissions from, the dataset, it is possible that the numbers provided here underreport the total number of convictions under Florida’s HIV criminalization laws.

HIV TRANSMISSION, TREATMENT, AND PREVENTION

Florida's HIV criminal statutes were enacted at a time when little was known about HIV and there was widespread fear of the disease. Three of Florida's four HIV statutes were enacted in 1986, just two years after the virus itself was identified as the cause of AIDS and one year after the first effective HIV test was developed.³ At that time, almost everyone known to have HIV was dying. During this period, widespread stigma and fear led to the implementation of policies and practices that excluded PWH from public life. One example that received national attention: in Florida in 1986, three brothers with HIV were banned from attending DeSoto County schools and were only allowed to attend after a court order.⁴

Today, after three decades of experience with and research on HIV, we have a greater understanding of how hard it is to transmit HIV, even without medical or other precautions to prevent transmission. We now have effective treatments that allow PWH to lead full, healthy lives, with little risk of transmitting the virus to others. Further, advances in prevention such as PrEP (pre-exposure prophylaxis) and PEP (post-exposure prophylaxis) can dramatically reduce the risk of contracting HIV.

TRANSMISSION

Today, we know much more about how HIV is and is not transmitted than was understood in the 1980s and early 1990s.⁵ HIV is not spread through saliva, tears, or sweat or by shaking hands, sharing toilets, sharing dishes, or kissing; it does not survive long outside the human body; it cannot reproduce outside a human host; and it decays on exposure to air.⁶ The possibility of HIV transmission between adults outside the context of sexual activity, contaminated needles, and blood transfusion is essentially zero.⁷

HIV can be spread only if blood, semen, pre-seminal fluid, rectal fluids, vaginal fluids, or breast milk of a PWH comes into direct contact with the mucous membranes or bloodstream of a person without HIV—and even if such contact occurs, transmission is usually quite rare.⁸ Even without viral suppression (achieved through treatment) or the use of medication by HIV negative persons to prevent transmission, the riskiest sexual exposure, receptive anal intercourse, carries an average HIV transmission efficiency in the range of 1 per 100 sex acts. Insertive anal intercourse carries an approximately 0.11% risk, and vaginal intercourse is less risky still. Needle sharing to inject drugs

³ A *Timeline of HIV and AIDS*, HIV.gov (2019), <https://www.hiv.gov/hiv-basics/overview/history/hiv-and-aids-timeline>.

⁴ Billy Cox, *Remembering the Rays: A Story of Intolerance, Acceptance and Dignity*, HERALD-TRIBUNE (Sarasota, Fla.) (Sep. 4, 2007, 4:33 AM), <https://www.heraldtribune.com/article/LK/20070909/News/605231058/SH/>.

⁵ Y. Tony Yang & Kristen Underhill, *Rethinking Criminalization of HIV Exposure - Lessons from California's New Legislation*, 378 NEW ENG. J. MED. 1174 (2018), available at <https://doi.org/10.1056/NEJMp1716981>.

⁶ U.S. CENTERS FOR DISEASE CONTROL & PREVENTION, OCCUPATIONAL HIV TRANSMISSION AND PREVENTION AMONG HEALTH CARE WORKERS 1 (2015), <https://www.cdc.gov/hiv/pdf/workplace/cdc-hiv-healthcareworkers.pdf> ("Health care workers who are exposed to a needlestick involving HIV-infected blood at work have a 0.23% risk of becoming infected," and the "[r]isk of exposure due to splashes with bodily fluids is thought to be near zero even if the fluids are overtly bloody").

⁷ *HIV Transmission*, CDC.gov (Aug. 6, 2019), <https://www.cdc.gov/hiv/basics/transmission.html>.

⁸ See *id.*; *HIV Risk Behaviors*, CDC.gov (Nov. 13, 2019), <https://www.cdc.gov/hiv/risk/estimates/riskbehaviors.html>.

carries a 0.63% risk, and needlestick a 0.23% risk. For other exposures, the risk is so low that—according to the CDC—it is not possible to put a precise number on it.⁹ For example, as the CDC explains, the actual risk of acquiring HIV via blood transfusion is “extremely small because of rigorous testing of the US blood supply.”¹⁰ Further, when a PWH has an undetectable viral load, the risk of transmission to an HIV-negative person decreases even more.¹¹ There have been no reported cases of transmission of the virus through sex with a PWH who has a consistently undetectable viral load.¹²

TREATMENT

All of Florida’s HIV criminal laws were passed when HIV was an untreatable, and almost always fatal, disease. The first drug used to treat HIV, AZT (zidovudine), did not receive FDA approval until 1987—one year after enactment of Florida’s first three HIV statutes.¹³ AZT had very limited long-term effectiveness and caused significant side effects.¹⁴ By the time Florida passed its fourth HIV criminal statute in 1993, AIDS was the leading cause of death in the US for men aged 25 to 44; by 1994 it would go on to be the leading cause of death for all Americans in that age group.¹⁵

Fortunately, the difference between HIV treatment then and now could not be more stark. In 1995, researchers discovered that using multiple antiretroviral drugs in tandem prevents HIV from both reproducing and acquiring resistance to the drugs.¹⁶ This treatment is known as antiretroviral therapy (ART). Recent studies have found that initiating modern ART medication as soon as HIV infection is diagnosed is of great benefit for the patient, resulting in decreased morbidity, especially

⁹ *Id.*

¹⁰ *HIV Transmission*, *supra* note 7.

¹¹ U.S. CENTERS FOR DISEASE CONTROL & PREVENTION, *Effectiveness of Prevention Strategies to Reduce the Risk of Acquiring or Transmitting HIV*, CDC.GOV <https://www.cdc.gov/hiv/risk/estimates/preventionstrategies.html> (last visited Feb. 14, 2020) (ART is 100% effective for preventing sexual transmission of HIV). See also Robert W. Eisinger, Carl W. Dieffenbach, & Anthony S. Fauci, *HIV Viral Load and Transmissibility of HIV Infection: Undetectable Equals Untransmittable*, 321 JAMA 451 (2019), available at <https://doi.org/10.1001/jama.2018.21167>; Pietro Vernazza & Edwin J. Bernard, *HIV is not transmitted under fully suppressive therapy: The Swiss Statement—eight years later*, 14246 SWISS MED. WEEKLY 1 (2016), available at <https://doi.org/10.4414/smw.2016.14246>.

¹² Myron S. Cohen et al., *Antiretroviral Therapy for the Prevention of HIV-1 Transmission*, 375 NEW ENG. J. MED. 830, 830 (Sep. 1, 2016), available at <https://doi.org/10.1056/NEJMoa1600693>.

¹³ Nat’l Inst. of Allergy & Infectious Diseases, *Antiretroviral Drug Discovery and Development*, NIAID.NIH.GOV (Nov. 26, 2018), <https://www.niaid.nih.gov/diseases-conditions/antiretroviral-drug-development>.

¹⁴ Keith Alcom, *Zidovudine (AZY, Retrovir)*, NAM AIDS MAP (2011), <http://www.aidsmap.com/about-hiv/arv-background-information/zidovudine-azt-retrovir> (last visited Aug. 27, 2019); Paul L. Boyer et al., *Analysis of the Zidovudine Resistance Mutations T215Y, M41L, and L210W in HIV-1 Reverse Transcriptase*, 59 ANTIMICROB. AGENTS CHEMOTHER. 7184-7196, 7184-86 (2015), available at <https://doi.org/10.1128/AAC.05069-14>.

¹⁵ *Id.*

¹⁶ Nat’l Inst. of Allergy & Infectious Diseases, *Antiretroviral Drug Discovery and Development*, *supra* note 13; U.S. Dep’t of Health and Human Svcs., *HIV Overview: FDA-Approved HIV Medicines*, AIDSINFO.NIH.GOV, <https://aidsinfo.nih.gov/understanding-hiv-aids/fact-sheets/19/58/fda-approved-hiv-medicines>; Nat’l Inst. of Allergy & Infectious Diseases, *Starting and Staying on Antiretroviral Treatment*, NIAID.NIH.GOV (Nov. 27, 2018), <https://www.niaid.nih.gov/diseases-conditions/starting-antiretroviral-treatment>.

when medication is initiated early in HIV infection.¹⁷ Soon after starting ART, the vast majority of PWH reach an “undetectable” viral load.¹⁸ ART usually involves only once-daily pills¹⁹ and relatively infrequent checkups.²⁰ For most people, ART causes few side effects, if any, and those are generally well tolerated.²¹ Developing resistance to ART is rare,²² and switching to a different combination can once again suppress the virus to undetectable levels.²³ Those who sustain undetectable HIV levels

¹⁷ The Insight Start Group, *Initiation of Antiretroviral Therapy in Early Asymptomatic HIV Infection*, 373 N. ENGL. J. MED. 795 (2015).

¹⁸ Nat'l Inst. of Allergy & Infectious Diseases, *10 Things to Know About HIV Suppression*, NIAID.NIH.GOV (Nov. 14, 2017), <https://www.niaid.nih.gov/news-events/10-things-know-about-hiv-suppression>. Suppression of HIV to undetectable levels means that, while a person will retain latent HIV virus in the body, the virus is controlled. U.S. Dep't of Health and Human Svcs., *HIV Overview: What is a Latent HIV Reservoir?*, AIDSINFO.NIH.GOV (Jul. 3, 2019), <https://aidsinfo.nih.gov/understanding-hiv-aids/fact-sheets/19/93/what-is-a-latent-hiv-reservoir>; Nat'l Inst. of Allergy & Infectious Diseases, *HIV Treatment, the Viral Reservoir, and HIV DNA*, NIAID.NIH.GOV (Nov. 27, 2018), <https://www.niaid.nih.gov/diseases-conditions/hiv-treatment-viral-reservoir-hiv-dna>; U.S. Dep't of Health and Human Svcs., *Guidelines for the Use of Antiretroviral Agents in Adults and Adolescents with HIV: Limitations to Treatment Safety and Efficacy*, AIDSINFO.NIH.GOV (Oct. 17, 2017), <https://aidsinfo.nih.gov/guidelines/html/1/adult-and-adolescent-arv/30/adherence>.

¹⁹ U.S. Dep't of Health and Human Svcs., *Guidelines for the Use of Antiretroviral Agents in Adults and Adolescents with HIV: Limitations to Treatment Safety and Efficacy*, *supra* note 18; Nat'l Inst. of Allergy & Infectious Diseases, *Starting and Staying on Antiretroviral Treatment*, *supra* note 16. Each pill contains all three or four of the antiretroviral medications that person needs. These pills have no special storage or handling requirements. Such once-daily treatment regimens are associated with higher levels of adherence.

²⁰ U.S. Dep't of Health and Human Svcs., *Guidelines for the Use of Antiretroviral Agents in Adults and Adolescents with HIV: Tests for Initial Assessment and Follow-up*, AIDSINFO.NIH.GOV (Dec. 18, 2019), <https://aidsinfo.nih.gov/guidelines/html/1/adult-and-adolescent-arv/3/tests-for-initial-assessment-and-follow-up> (see Table 3); U.S. Dep't of Health and Human Svcs., *Guidelines for the Use of Antiretroviral Agents in Adults and Adolescents with HIV: Plasma HIV-1 RNA (Viral Load) and CD4 Count Monitoring*, AIDSINFO.NIH.GOV (May 1, 2014), <https://aidsinfo.nih.gov/guidelines/html/1/adult-and-adolescent-arv/458/plasma-hiv-1-rna--viral-load--and-cd4-count-monitoring> (hereinafter “HHS, *Viral Load and CD4 Count Monitoring*”); U.S. Dep't of Health and Human Svcs., *Guidelines for the Use of Antiretroviral Agents in Adults and Adolescents with HIV: Limitations to Treatment Safety and Efficacy*, *supra* note 18; U.S. Dep't of Health and Human Svcs., *Guidelines for the Use of Antiretroviral Agents in Adults and Adolescents with HIV: Laboratory Testing for Initial Assessment and Monitoring of Patients with HIV Receiving Antiretroviral Therapy*, AIDSINFO.NIH.GOV (Dec. 18, 2019), <https://aidsinfo.nih.gov/guidelines/html/1/adult-and-adolescent-arv/3/testsfor-initial-assessment-and-follow-up>.

²¹ *HIV Treatment Overview*, HIV.GOV (Mar. 29, 2019), <https://www.hiv.gov/hiv-basics/staying-in-hiv-care/hiv-treatment/hiv-treatment-overview>; U.S. Dep't of Health and Human Svcs., *Guidelines for the Use of Antiretroviral Agents in Adults and Adolescents with HIV: Adverse Effects of Antiretroviral Agents*, AIDSINFO.NIH.GOV (Dec. 18, 2019), <https://aidsinfo.nih.gov/guidelines/html/1/adult-and-adolescent-arv/31/adverse-effects-of-arv>.

²² In almost all cases, resistance to a particular ART regimen develops only if the patient is unable to adhere to the prescribed medications. See, e.g., U.S. Dep't of Health and Human Svcs., *Guidelines for the Use of Antiretroviral Agents in Adults and Adolescents with HIV: Limitations to Treatment Safety and Efficacy*, *supra* note 18. Resistance is rare in people who achieve an undetectable viral load and continue taking ART as directed. Eric J. Arts & Daria J. Hazuda, *HIV-1 Antiretroviral Drug Therapy*, 2 Cold Spring Harbor Perspectives in Med. a007161 (2012), available at <https://doi.org/10.1101/cshperspect.a007161>.

²³ U.S. Dep't of Health and Human Svcs., *HIV Overview: FDA-Approved HIV Medicines*, *supra* note 16. Resistance to multiple drugs is increasingly uncommon, thus it is unlikely that a PWH would be unable to find an alternate therapeutic option and be unable to retain/maintain viral suppression. See U.S. Dep't of Health and Human Svcs., *Guidelines: Drug-Resistance*

because of ART can live a healthy life with a normal life expectancy.²⁴

PREVENTION

An undetectable viral load has significant implications for the risk of transmission: those with an undetectable viral load have virtually no risk of transmitting HIV to an uninfected partner during sex.²⁵ Research conclusively demonstrates that those who maintain an undetectable viral load have effectively zero chance of transmitting HIV to an uninfected partner, even if no other form of prevention is used.²⁶ The US federal government has recognized this principle as “firmly established” by “an overwhelming body of clinical evidence.”²⁷ Today, 64% of all PWH in Florida currently have an undetectable viral load and cannot transmit the virus through sex.²⁸

PREP

ART has also had direct benefits for those who are HIV-negative. For those at risk of contracting HIV, the use of Pre-Exposure Prophylaxis, or PrEP, has provided an extremely effective barrier to contracting HIV. PrEP is a daily, single-pill medication that has been found to reduce the risk of contracting HIV when exposed via sexual contact by approximately 99%— essentially ‘blocking’ a person from acquiring HIV.²⁹ In June 2019, based on a thorough review of the data, the US Preventive Services Task Force granted PrEP a Grade A rating for its effectiveness in preventing HIV.³⁰ In other

Testing, AIDSINFO.NIH.GOV, [HTTPS://AIDSINFO.NIH.GOV/GUIDELINES/HTML/1/ADULT-AND-ADOLESCENT-ARV/6/DRUG-RESISTANCE-TESTING](https://AIDSINFO.NIH.GOV/GUIDELINES/HTML/1/ADULT-AND-ADOLESCENT-ARV/6/DRUG-RESISTANCE-TESTING);

Alison F. Feder et al., *More Effective Drugs Lead to Harder Selective Sweeps in the Evolution of Drug Resistance in HIV-1*, eLife 2016; 5: e10670 (2016), available at <https://doi.org/10.7554/eLife.10670>.

²⁴ U.S. Centers for Disease Control & Prevention, *About HIV/AIDS*, CDC.gov (Dec. 2, 2019), <https://www.cdc.gov/hiv/basics/whatishiv.html>.

²⁵ U.S. Centers for Disease Control & Prevention, *HIV Treatment Can Prevent Sexual Transmission*, CDC.gov (Jul. 2019), <https://www.cdc.gov/hiv/pdf/risk/art/cdc-hiv-tasp-101.pdf>; Nat’l Institute of Allergy and Infectious Diseases, *HIV Undetectable = Untransmittable (U=U), or Treatment as Prevention*, NIAID.NIH.GOV (May 21, 2019), <https://www.niaid.nih.gov/diseases-conditions/treatment-prevention>; U.S. Centers for Disease Control & Prevention, *HIV Treatment as Prevention*, CDC.gov (Nov. 12, 2019), <https://www.cdc.gov/hiv/risk/art/index.html>

²⁶ *Id.*; *U=U Taking Off in 2017*, 4 LANCET HIV e475 (2017), available at [https://doi.org/10.1016/S2352-3018\(17\)30183-2](https://doi.org/10.1016/S2352-3018(17)30183-2).

²⁷ U.S. Dep’t of Health and Human Scvs., *The Science is Clear: With HIV, Undetectable Equals Untransmittable* (Jan. 10, 2019), <https://www.nih.gov/news-events/news-releases/scienceclear-hiv-undetectable-equals-untransmittable>. See also Natn’l Institute of Allergy and Infectious Diseases, *HIV Undetectable = Untransmittable (U=U), or Treatment as Prevention*, *supra* note 25.

²⁸ PowerPoint Presentation by Fla. Dep’t of Health HIV/AIDS Section, *Epidemiology of HIV in Florida, 2018*, slide 70 (Jan. 3, 2020), http://www.floridahealth.gov/diseases-and-conditions/aids/surveillance/_documents/hiv-aids-slide-sets/StateofEpidemic_2018.pptx.

²⁹ U.S. Centers for Disease Control & Prevention, *Pre-Exposure Prophylaxis (PrEP)*, CDC.gov (Dec. 13, 2019), <https://www.cdc.gov/hiv/risk/prep/index.html>; U.S. Dep’t of Health and Human Scvs., *Pre-Exposure Prophylaxis (PrEP)* (Jan. 6, 2020) <https://aidsinfo.nih.gov/understanding-hiv-aids/fact-sheets/20/85/pre-exposure-prophylaxis--prep->.

³⁰ U.S. Preventive Services Task Force, *Final Recommendation Statement: Prevention of Human Immunodeficiency Virus (HIV) Infection: Preexposure Prophylaxis* (Jun. 2019), <https://www.uspreventiveservicestaskforce.org/Page/Document/RecommendationStatementFinal/prevention-of-human-immunodeficiency-virus-hiv-infection-pre-exposure-prophylaxis>.

words, PrEP is a standardized recommended medical practice. PrEP is a critical component of the state of Florida's integrated HIV strategic plan for 2017-2021, which lists among its strategies to reduce HIV infections, "ensuring universal access to and availability of pre-exposure prophylaxis (PrEP)."³¹

PEP

HIV negative individuals who are exposed to HIV may take post-exposure prophylaxis (PEP) to decrease the risk of acquiring HIV. Giving someone ART just after exposure can prevent them from contracting HIV.³² In one study of 100 individuals who took a PEP regimen following a higher-risk sexual exposure, no participant contracted HIV.³³ And in a study of individuals who reported needlestick injuries, PEP using AZT was shown to reduce the risk of HIV infection by 81%.³⁴ It is anticipated that the current protocol, the use of three drugs contemporaneously, would result in even greater protective efficacy.

³¹ FLORIDA DEPARTMENT OF HEALTH HIV/AIDS SECTION, STATE OF FLORIDA INTEGRATED HIV PREVENTION AND CARE PLAN 2017–2021 76 (2016), http://www.floridahealth.gov/diseases-and-conditions/aids/Prevention/_documents/State-of-Florida-Integrated-HIV-Prevention-and-Care-Plan-09-29-16_FINAL-Combined.pdf (see Strategy 1.2.A (Ensure universal access to and availability of pre-exposure prophylaxis (PrEP) and increase awareness of non-occupational post-exposure prophylaxis (nPEP)) under Objective 1.2 (By December 31, 2021, reduce the annual number of newly diagnosed HIV infections in Florida from 4,613 (2014) to 4,004)).

³² U.S. Centers for Disease Control & Prevention, *PEP*, CDC.GOV (Aug. 6, 2019), <https://www.cdc.gov/hiv/basics/pep.html>. E.g., UC Davis Student Health & Counseling Svcs., Post-exposure Prophylaxis (PEP) for HIV, UCDAVIS.EDU, <https://shcs.ucdavis.edu/topics/post-exposureprophylaxis-peg-hiv> (last visited Feb. 14, 2020). See also U.S. CENTERS FOR DISEASE CONTROL & PREVENTION, UPDATED GUIDELINES FOR ANTIRETROVIRAL POSTEXPOSURE PROPHYLAXIS AFTER SEXUAL, INJECTION DRUG USE, OR OTHER NONOCCUPATIONAL EXPOSURE TO HIV—UNITED STATES, 2016 30, <https://www.cdc.gov/hiv/pdf/programresources/cdc-hiv-npep-guidelines.pdf> (2016). E.g., Anthony S. Fauci et al., *Ending the HIV Epidemic: A Plan for the United States*, 321 JAMA 844 (2019), available at <https://doi.org/10.1001/jama.2019.1343>.

³³ Kenneth H. Mayer et al., *Optimal HIV Postexposure Prophylaxis Regimen Completion With Single Tablet Daily Elvitegravir/Cobicistat/Tenofovir Disoproxil Fumarate/Emtricitabine Compared With More Frequent Dosing Regimens*, 75 J. ACQUIR. IMMUNE DEFIC. SYNDR. 535 (2017), available at <https://doi.org/10.1097/QAI.0000000000001440>.

³⁴ Myron S. Cohen et al., *Narrative Review: Antiretroviral Therapy to Prevent the Sexual Transmission of HIV-1*, 146 ANNALS OF INTERNAL MED. 591, n.63 (2007), available at <https://doi.org/10.7326/0003-4819-146-8-200704170-00010>.

APPLICATION OF HIV SCIENCE TO FLORIDA'S HIV CRIMES

This section applies what we know now about HIV and its prevention and treatment to each of Florida's HIV criminal laws. As discussed above, since Florida passed its first HIV criminal laws, HIV has moved from a nearly always fatal disease to a manageable, chronic condition. Further, we know that HIV is much more difficult to transmit than initially thought in the early years of the epidemic, and people who are on medication and achieve an undetectable viral load cannot sexually transmit the virus.

ORGAN AND TISSUE DONATION

Offense

Pursuant to Fla. Stat. Ann. § 381.0041(11)(B), any PWH who knows they have HIV; “who has been informed that he or she may communicate this disease by donating blood, plasma, organs, skin, or other human tissue;” and who makes such a donation, is guilty of a third degree felony.³⁵ This crime does not require actual transmission of HIV; the actual exposure of another person to HIV (or even, for that matter, actual exposure to the donated blood, tissue, or organ); or the intent to transmit HIV to another person.

Transmission Risk

This law was passed in 1986, at a very different time than today. At that time, legislators would have been aware that a number of hemophiliacs in the US were infected with HIV from blood transfusions during the initial years of the epidemic.³⁶ However, in the last twenty years there have been only two known cases of HIV infection through blood, tissue, or organ donation. Testing of blood donors for HIV began in 1985 and was required by the FDA in 1987; even more effective screening procedures were put in place in 1992 and in 1999.³⁷

Today, the FDA requires that all blood that is donated in the United States be screened for HIV.³⁸ HIV screening procedures include serologic testing and mini-pool nucleic acid testing (MP-NAT), which pools six to sixteen samples and screens them together to detect HIV antibodies.³⁹ The accuracy

³⁵ FLA. STAT. ANN. § 381.0041(11)(B)

³⁶ Mark Cichocki, *What Is the Risk of HIV in Hemophiliacs?*, VERYWELLHEALTH.COM (Sep. 7, 2019), <https://www.verywellhealth.com/hemophilia-and-hiv-48852>.

³⁷ U.S. Food & Drug Admin., *HIV/AIDS Historical Time Line 1981-1990*, FDA.GOV (Jan. 5, 2018), <https://www.fda.gov/patients/hiv-timeline-and-history-approvals/hivaids-historical-time-line-1981-1990>

³⁸ U.S. Food & Drug Admin., *Complete List of Donor Screening Assays for Infectious Agents and HIV Diagnostic Assays, Vaccines, Blood & Biologics*, FDA.GOV, http://www.fda.gov/BiologicsBloodVaccines/BloodBloodProducts/ApprovedProducts/LicensedProductsBLAs/BloodDonorScreening/InfectiousDisease/ucm080466.htm#HBsAg_Assays (Apr. 11, 2019) (In addition blood is screened for Hepatitis B and C, Human T-Lymphotropic Virus (HTLV), syphilis, West Nile virus, *Trypanosoma cruzi* (Chagas disease), and cytomegalovirus (CMV)).

³⁹ Steven Kleinman, *Risk of HIV from Blood Transfusion*, UPTODATE.COM (Sep. 6, 2019), <https://www.uptodate.com/contents/>

of current tests leaves almost no room for error. Current tests are able to screen out virtually all blood donations where HIV is present. There is a short period of time, referred to as the “window period,” after a recent transmission, when a person’s level of antigens produced by the virus is not yet detectable; however, this window period is rather narrow (10 – 14 days from onset of infection to first detection using nucleic acid testing). Consequently, there is a very small risk of a donation with HIV entering the blood supply⁴⁰

Current scientific assessments estimate the risk of an HIV-positive blood transfusion in the U.S. blood supply at about one in 1.4 million to one in 2.3 million.⁴¹ Since 2002, there has been only one person the United States who tested positive for HIV due to a blood transfusion.⁴² Health investigators determined that the blood donor in that case did not know he was a PWH at the time of the donation and, in fact, could not have known because he donated the blood during the 10 – 14 day window of time before HIV antibodies can be detected through screening.⁴³ Since this one incident in 2008, there have been no reports of such transmissions for blood transfusions;⁴⁴ there have been no reports of transmission through organ donations since 2009.⁴⁵

In terms of the application of Florida’s HIV criminal law, a donor must know that they have HIV to commit the crime. For a person to know that they have HIV, they must receive positive test results. To receive positive test results, a person must obtain an HIV test after the 10 – 14 day “window period.” Since all HIV-positive blood donations that are outside of the window period will be detected and screened out by standard FDA screening tests at the time of donation, any person who knowingly donates HIV-positive blood poses negligible risk to the blood supply, as their blood will be detected and removed by standard screening tools before entering the blood supply. Therefore, a felony law

[risk-of-hiv-from-blood-transfusion.](#)

⁴⁰ U.S. Centers for Disease Control & Prevention, *Laboratory Testing for the Diagnosis of HIV Infection: Updated Recommendations*, CDC.gov (June 27, 2014), <https://stacks.cdc.gov/view/cdc/23447>.

⁴¹ See Michael P. Busch et al., *A New Strategy for Estimating Risks of Transfusion-Transmitted Viral Infections Based on Rates of Detection of Recently Infected Donors*, 45 *TRANSFUSION* 254 (2005), available at <https://doi.org/10.1111/j.1537-2995.2004.04215.x>; R.Y. Dodd, E.P. Notari IV, and S.L. Stramer, *Current Prevalence and Incidence of Infectious Disease Markers and Estimated Window-Period Risk in the American Red Cross Blood Donor Population*, 42 *TRANSFUSION* 975 (2002), available at <https://doi.org/10.1046/j.1537-2995.2002.00174.x>; D. Michael Strong & Louis Katz, *Blood-Bank Testing for Infectious Diseases: How Safe is Blood Transfusion?*, 8 *TRENDS IN MOLECULAR MED.* 355, 356 (2002), available at [https://doi.org/10.1016/S1471-4914\(02\)02361-4](https://doi.org/10.1016/S1471-4914(02)02361-4); Shimian Zou, et al., *Prevalence, Incidence, and Residual Risk of Human Immunodeficiency Virus and Hepatitis C Virus Infections Among United States Blood Donors Since the Introduction of Nucleic Acid Testing*, 50 *TRANSFUSION* 1495 (2010), available at <https://doi.org/10.1111/j.1537-2995.2010.02622.x>.

⁴² U.S. Centers for Disease Control & Prevention, *HIV Transmission Through Transfusion—Missouri and Colorado, 2008*, 59 *MMWR* 1335 (2010), available at <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5941a3.htm>.

⁴³ *Id.* See also Blythe Bernhard, *First Case of HIV From Blood Transfusion Traced to Missouri Donor*, *ST. LOUIS POST-DISPATCH* (Oct. 22, 2010), https://www.stltoday.com/news/local/metro/first-case-of-hiv-from-blood-transfusion-traced-to-missouri/article_318e226b-e782-5fc2-8394-28ca274b46ce.html.

⁴⁴ U.S. Centers for Disease Control & Prevention, *HIV Transmission Through Transfusion—Missouri and Colorado, 2008*, *supra* note 42.

⁴⁵ U.S. Centers for Disease Control & Prevention, *HIV Transmitted from a Living Organ Donor—New York City, 2009*, 60 *MMWR* 297, 300 (Mar. 18, 2011), available at <https://www.cdc.gov/mmwr/pdf/wk/mm6010.pdf>.

against knowingly donating HIV-positive blood does little to protect the blood supply.

Additionally, like blood donations, all tissue donors must be screened and tested for HIV prior to transplantation.⁴⁶ While there is a risk of HIV-positive tissue donation during the window period as described above, it is exceedingly small.⁴⁷ Even if tissue is received from a donor with HIV, risk of transmission from transplant varies based on the type of tissue donated. Avascular or relatively avascular tissue donations—donations of tissue that contains limited or no blood vessels or lymphatics, such as the corneas, musculoskeletal tissue and dura matter—have not resulted in HIV transmission.⁴⁸ This may be due, in part, to their avascularity, and in part to tissue processing, which can inactivate HIV.⁴⁹ The few transmission events from tissue donations outside of large organs have been in “vascular tissues, including large marrow containing bone pieces and skin.”⁵⁰ Nevertheless, since the advent of nucleic acid testing (NAT) in 1999, a 20 year period, no HIV transmissions have occurred in musculoskeletal or skin allografts, also known as bone and connective or skin tissue donations.⁵¹

The highest risk of tissue donations containing HIV is among donors who are deceased, because such individuals cannot directly answer questions about risk behaviors and profiles.⁵² Further, it is unclear whether HIV tests have the same effectiveness on cadavers.⁵³ Nonetheless, Florida’s law criminalizing tissue donors with HIV does not further efforts to combat the disease in the context of deceased donors since the law cannot be enforced against them.

⁴⁶ ORGAN PROCUREMENT AND TRANSPLANTATION NETWORK, MEMBER EVALUATION PLAN 9, 38 (2020), https://optn.transplant.hrsa.gov/media/1202/evaluation_plan.pdf.

⁴⁷ Additionally, the Organ Procurement and Transplantation Network policy requires informed consent and that prophylaxis be offered (if available) to recipients from donors who are at increased risk for transmission of blood-borne pathogens. ORGAN PROCUREMENT AND TRANSPLANTATION NETWORK, POLICIES 295 (2020), https://optn.transplant.hrsa.gov/media/1200/optn_policies.pdf.

⁴⁸ R.J. Simonds, *AIDS Testing: A Comprehensive Guide to Technical, Medical, Social, Legal, and Management Issues*, in AIDS TESTING (Gerald Schochetman & J. Richard George, eds., 1994); J.P. Pirnay, et al., *HIV Transmission by Transplantation of Allograft Skin: a Review of the Literature*, 23 BURNS 1 (1997), available at [https://doi.org/10.1016/S0305-4179\(96\)00081-2](https://doi.org/10.1016/S0305-4179(96)00081-2).

⁴⁹ Simonds, *supra* note 48; Pirnay, et al., *supra* note 48 at 2; Ellen Heck, Allen Brown, and Dwight H. Cavanagh, *Nucleic Acid Testing and Tissue Safety: An Eye Bank’s Five-Year Review of HIV and Hepatitis Testing for Donor Corneas*, 32 CORNEA 503, 505 (2013), available at <https://doi.org/10.1097/ICO.0b013e3182653a7a>.

⁵⁰ Simonds, *supra* note 48.

⁵¹ M. Hinsenkamp, et al., *Adverse Reactions and Events Related to Musculoskeletal Allografts: Reviewed by the World Health Organization Project NOTIFY*, 36 INT’L ORTHOPAEDICS 633 (2012), available at <https://doi.org/10.1007/s00264-011-1391-7>; A. Pruss, et al., *Tissue Donation and Virus Safety: More Nucleic Acid Amplification Testing is Needed*, 12 Transplant Infectious Disease 375, 380 (2010), available at <https://doi.org/10.1111/j.1399-3062.2010.00505.x>.

⁵² A. Pruss, et al., *supra* note 51 at 378-79. Nevertheless, the Organ Procurement and Transplantation Network policy requires a review of a deceased donor’s medical and behavioral history and a complete physical examination. See ORGAN PROCUREMENT AND TRANSPLANTATION NETWORK, POLICIES, *supra* note 47 at 22.

⁵³ I. Wilkemeyer, et al., *Comparative Infectious Serology Testing of Pre- and Post-Mortem Blood Samples from Cornea Donors*, 13 CELL & TISSUE BANKING 447 (2012), available at <https://doi.org/10.1007/s10561-012-9326-0>.

Enforcement

Since its enactment in 1986, only one person has been convicted and sentenced under this statute. That conviction was over a decade ago, in 2009. While this statute has no public health benefit, it puts at risk the lives of PWH in Florida by unnecessarily limiting organs available to those who need transplants. This statute makes Florida out of step not only with current medical practice, but federal law. In 2013, Congress passed the Federal HIV Organ Policy Equity (HOPE) Act, which allows organ donations between donors with HIV and recipients with HIV.⁵⁴

Despite the HOPE Act, Florida has not repealed the prohibition against organ and tissue donations by PWH, thereby limiting the ability to use their organs and tissue donations for Florida residents with HIV. Of course, increasing the pool of available organs helps everyone including those not living with HIV. For example, California ended its prohibition on organ and tissue donations by PWH at the request of surgeons so that they could immediately proceed with organ transplants in order to save patients' lives.⁵⁵ Nationally, it has been estimated that HIV criminal laws may be preventing as many as five hundred organs from becoming available every year for recipients.⁵⁶

SEX WITHOUT DISCLOSURE

Offense

Pursuant to Fla. Stat. Ann. § 384.24(2), it is unlawful for a PWH who knows their status “to have sexual intercourse with any other person, unless such other person has been informed of the presence of the sexually transmissible disease and has consented to the sexual intercourse.”⁵⁷ The term “sexual intercourse” includes both heterosexual and homosexual vaginal-penile, oral, and anal sex.⁵⁸ Violation of this statute is a third degree felony punishable by a term of imprisonment up to five years. People who engage in the same conduct in reference to other sexually transmitted infections

⁵⁴ Under the HIV Organ Policy Equity Act, Pub. L. No. 113-51, 127 Stat. 579 (2013), an individual living with HIV can donate an organ to another individual with HIV. As of December 2018, more than 100 such organ transplants had been performed. United Network for Organ Sharing, *100 people transplanted thanks to HOPE Act*, UNOS.ORG (Dec. 20, 2018), <https://unos.org/news/100-peopletransplanted-thanks-to-hope-act/>. Recipients must be under the care of approved research institutions that are following the criteria put forth by the Organ Procurement and Transplantation Network 42 U.S.C. § 274f-5. The federal definition of “organs” in this context includes donor tissue. 42 C.F.R. § 121.2. However, based on current scientific advances and NIH protocol, at this time, only kidneys and livers are being used from HIV-positive donors. U.S. Dep’t of Health & Human Serv., *HOPE Act*, <https://optn.transplant.hrsa.gov/learn/professional-education/hope-act/> (last visited May 5, 2019).

⁵⁵ Alexei Koseff, *California to Allow Transplants Between HIV-infected People*, SACRAMENTO BEE CAPITOL ALERT (May 27, 2016, 11:47AM), <https://www.sacbee.com/news/politics-government/capitol-alert/article80346002.html>

⁵⁶ Nina Bai, *Moving Mountains: A Surgeons Fight to Legalize HIV-to-HIV Organ Transplants*, UCSF.EDU (Jun. 20, 2017), <https://www.ucsf.edu/news/2017/06/407411/moving-mountains-surgeons-fight-legalize-hiv-hiv-organ-transplants> (last visited June 1, 2019).

⁵⁷ The HIV-positive person must know he or she is infected with HIV disease and have been informed that he or she may communicate this disease to another person through sexual intercourse. FL. STAT. ANN § 384.24(2).

⁵⁸ *Debaun v. State*, 213 So.3d 747, 754 (Sup. Ct. Fl., 2017).

(STIs) commit a misdemeanor, rather than a felony.⁵⁹ This HIV crime does not require transmission of HIV or intent to transmit HIV. In addition, the statute criminalizes behavior with very low risk of transmitting the virus, including oral sex.

Transmission Risk

In 1986, when this statute was passed, the first HIV test had been approved just the prior year⁶⁰ and the first of the effective medical treatments for HIV was still almost a decade away.⁶¹ At that time, there was also a lack of knowledge about rates of transmission through “sexual intercourse” and the effect of condom use and ART on reducing the risk of transmission.

In the last 30 years, we have learned that consistent use of condoms reduces the risk of transmission by 63%-80%.⁶² Further, as described more fully above, since 1995, antiretroviral therapy (ART) has enabled people with HIV to suppress their viral loads to undetectable levels, allowing the vast majority to lead long and healthy lives and effectively eliminating the risk of transmitting HIV.⁶³ Today, 64% of all PWH in Florida have an undetectable viral load and cannot transmit the virus through sex.⁶⁴ However, Florida law has not been updated to account for these medical advances.

Further, recent research shows that the risk of HIV transmission through “sexual intercourse” is low even if people are not using condoms or taking medications that reduce risk. The CDC estimates that the per-act risk of transmission varies from close to 0% to a maximum average of 1.38%, depending on the type of “intercourse” (Table 2).⁶⁵ Table 2 does not include acts that carry even less risk of transmission, such as sharing sex toys.⁶⁶

⁵⁹ FL. STAT. ANN §§ 384.24(1), 384.34(1), (5).

⁶⁰ U.S. Food & Drug Admin, *HIV/AIDS Historical Time Line 1981-1990*, FDA.GOV (Jan 5, 2018), <https://www.fda.gov/patients/hiv-timeline-and-history-approvals/hivaids-historical-time-line-1981-1990>.

⁶¹ U.S. Food & Drug Admin, *HIV/AIDS Historical Time Line 1991-1999*, FDA.GOV (Aug. 14, 2018), <https://www.fda.gov/patients/hiv-timeline-and-history-approvals/hivaids-historical-time-line-1991-1999>.

⁶² U.S. Centers for Disease Control & Prevention, *Effectiveness of Prevention Strategies to Reduce the Risk of Acquiring or Transmitting HIV*, *supra* note 11.

⁶³ Myron S. Cohen, et al., *Antiretroviral Therapy for the Prevention of HIV-1 Transmission*, 375 NEW ENG. J. MED. 830, 831 (2016), <https://doi.org/10.1056/NEJMoa1600693>; U.S. Centers for Disease Control & Prevention, *HIV Treatment as Prevention*, *supra* note 25.

⁶⁴ PowerPoint Presentation by Fla. Dep’t of Health HIV/AIDS Section, *supra* note 28 at slide 70.

⁶⁵ U.S. Centers for Disease Control & Prevention, *HIV Risk Behaviors*, CDC.gov (Nov. 13, 2019), <https://www.cdc.gov/hiv/risk/estimates/riskbehaviors.html>.

⁶⁶ *Id.*

Table 2. Average Per-Act Transmission Risk Per Sex Act (without Condom Use and without Treatment)⁶⁷

SEX ACT	AVERAGE PER ACT TRANSMISSION RISK
Receptive anal intercourse	1.38%
Insertive anal intercourse	0.11%
Receptive penile-vaginal intercourse	0.08%
Insertive penile-vaginal intercourse	0.04%
Receptive oral intercourse	Low
Insertive oral intercourse	Low

Based on medical developments and research over the past thirty years, Florida law criminalizes sexual conduct that is extremely unlikely to transmit the virus.

Enforcement

From the time this law was passed in 1986 to the end of 2017, there have been a total of 89 convictions under this statute, or approximately 3 convictions per year.⁶⁸ It is impossible to determine from the CHRI data the factual circumstances of each conviction.

PROSTITUTION AND RELATED CRIMES

Offense

Pursuant to Fla. Stat. Ann. § 796.08(5), a PWH who knows they have HIV and “(a) Commits or offers to commit prostitution; or (b) Procures another for prostitution by engaging in sexual activity in a manner likely to transmit” HIV “commits criminal transmission of [HIV], a felony of the third degree.”⁶⁹ Further, a person may be convicted and sentenced separately for a violation of this HIV crime and for the underlying crime of prostitution or procurement of prostitution. In contrast to this felony, if a person is otherwise charged with prostitution in Florida, including when they are infected with another STI, it is considered a misdemeanor.⁷⁰

Florida law defines prostitution as “the giving or receiving of the body for sexual activity for hire.”⁷¹ Sexual activity is defined as “oral, anal, or vaginal penetration by, or union with, the sexual organ of another; anal or vaginal penetration of another by any other object; or the handling or fondling of the sexual organ of another for the purpose of masturbation.”⁷²

⁶⁷ *Id.*

⁶⁸ This includes 77 times in which the defendant pled guilty or was convicted by a judge or jury, 10 adjudications withheld, and 2 pretrial diversions.

⁶⁹ FLA. STAT. ANN. § 796.08(5).

⁷⁰ FLA. STAT. ANN. §§ 796.07(4)(a), 796.08(4).

⁷¹ FLA. STAT. ANN. § 796.07(1)(a).

⁷² FLA. STAT. ANN. § 796.07(1)(d).

This crime does not require an intent to transmit HIV, actual transmission, or even behavior that could result in transmission of the virus. Further, the statute does not take into account disclosure of one's HIV status or any efforts by the defendant to reduce the risk of transmitting the virus, including the use of condoms or ART.

Transmission Risk

There are a number of ways in which this statute, by the breadth of the conduct that it covers, criminalizes behavior that cannot actually transmit HIV:

- **Offering.** “Offering to commit prostitution” requires no sexual contact; rather, it is an agreement or request to engage in sex work. Due to the challenge of arresting people while they are actually engaged in sex acts, the vast majority of people arrested for solicitation are arrested while having a conversation, stepping into a car, or exchanging money—in other words, at a time when no physical contact has occurred and when it is often unknown whether safer sex practices will be used. It would be an unusual circumstance where a law enforcement officer directly observed sexual conduct in making an arrest for prostitution.
- **Procurement.** In the context of other Florida statutes related to prostitution,⁷³ “procurement for prostitution” has been interpreted by Florida courts to mean “pimping,” or selling the sexual services of a sex worker to a third party, including inducing a person to perform sex acts for money or otherwise arranging for this to occur.⁷⁴ Under this definition of “procure,” the phrase “by engaging in sexual activity in a manner likely to transmit the human immunodeficiency virus” would mean that the procurer arranged for prostitution, including acts that could transmit HIV. The crime of procurement, therefore, does not require any sexual contact to have occurred; it also does not consider whether safer sex practices would have been used had the contact occurred.
- **Sex acts that have negligible risks of transmission of the virus.** This statute criminalizes oral sex, masturbation, and sex with objects such as a sex toy. These types of sexual behavior have never been associated with HIV transmission. In fact, they are recommended by the CDC as safer sex practices.⁷⁵

⁷³ *Register v. State*, 715 So.2d 274, 278 (Dist. Ct. App. 1st, 1998) (interpreting the definition of “procure” in the context of FLA. STAT. ANN. § 796.07, concerning the procurement of minors). This court stated that “The Florida Legislature has classified as a felony the act of procuring for prostitution anyone under age 18. This designation is consistent with the intent to proscribe the commercial exploitation of children induced to engage in sexual activity with others for the financial benefit of the procurer pimp.” The court refused to extend its interpretation to a situation in which a person offered a person money to perform a sex act (on its own, solicitation), and the person agreed to perform the sex act for that consideration. *Id.* See also *Kobel v. State*, 745 So.2d 979 (Dist. Ct. App. 4th, 1999) (“The term ‘procurement’ connotes a pecuniary gain from the exploitation of another.... [I]n the context of prostitution, the word ‘procure’ must be given its specialized meaning, which is to ‘obtain as a prostitute for another,’ connoting a commercial motive.”). While there have been no cases interpreting the word “procure” in the context of FLA. STAT. ANN. § 796.08(5), it is highly likely that these interpretations would be the relevant rule in such a case.

⁷⁴ See *Register v. State*, 715 So.2d 274, 278 (Dist. Ct. App. 1st, 1998) (describing the legislature’s intent).

⁷⁵ U.S. Centers for Disease Control & Prevention, *HIV Risk Reduction Tool: Oral Sex*, CDC.GOV <https://wwwn.cdc.gov/hivrisk/>

Assuming the relatively rarer circumstance in which a person is arrested for prostitution while in the middle of sexual contact, the type of sex act would determine the risk of transmission. As explained above, sexual conduct carries a low to negligible risk of transmission, and the risk is further reduced by the use of ART and/or condoms.⁷⁶

Like the statute described above that criminalizes people with HIV who engage in sexual conduct outside of sex work, this statute was passed in 1986 and does not reflect medical advances that have occurred over the past 30 years or current knowledge about the impact of safer sex practices on transmission rates. Moreover, the statute criminalizes actions, such as “offers” and “procurement” of prostitution that involve no sexual conduct and could not transmit the virus.

Enforcement

Between 1986 and year-end 2017, there were 151 convictions under this statute, or approximately five convictions per year.⁷⁷ Based on the CHRI data, there is no way to know the facts underlying a prostitution arrest (e.g., whether it was prior to any physical contact, or for procurement of prostitution). However, given the challenges in enforcing prostitution laws outside of public spaces, it is highly likely that most of these arrests occurred prior to any sexual contact, when there was no risk of HIV transmission.

ADDITIONAL FELONY WITH CONCURRENT SEX CRIME OR OTHER CRIMES

Offense

Fla. Stat. Ann. § 775.0877 imposes an additional felony charge for people with HIV who commit other crimes that “involve transmission of body fluids from one person to another.”⁷⁸ The statute requires that a mandatory HIV test be given to all people who are convicted of one of the enumerated crimes in which there was a transmission of body fluids.⁷⁹ If the person tests positive and then commits a second or subsequent listed offense, he or she also “commits criminal transmission of HIV, a felony of

[transmit/activities/oral_sex.html](#) (last visited Feb. 14, 2020) (“There’s little to no risk of transmitting HIV through oral sex. What you can do: Choosing activities with little to no risk like oral sex instead of higher-risk activities like anal sex can lower your chances of transmitting HIV.”); U.S. Centers for Disease Control & Prevention, *HIV Risk Reduction Tool: Touching*, CDC.gov, <https://wwwn.cdc.gov/hivrisk/transmit/activities/touching.html> (last visited Feb. 14, 2020) (“There’s little to no risk for getting or transmitting HIV from touching...What you can do: Choosing activities with little to no risk like touching instead of higher-risk activities like anal or vaginal sex can lower your chances of getting or transmitting HIV. If you use sex toys, do not share them with your partner, or if you do, always cover it with a new condom, and wash it carefully after each use.”).

⁷⁶ .S. CENTERS FOR DISEASE CONTROL & PREVENTION, Effectiveness of Prevention Strategies to Reduce the Risk of Acquiring or Transmitting HIV, *supra* note 11.

⁷⁷ These “convictions” include 137 instances in which the defendant pled guilty or was convicted by a judge or jury and 14 adjudications withheld.

⁷⁸ FLA. STAT. ANN. § 775.0877.

⁷⁹ FLA. STAT. ANN. § 775.0877(1).

the third degree,” whether or not transmission occurred.⁸⁰ A person may be convicted and sentenced separately for the violation of this HIV crime and for the underlying crime upon which it is based.⁸¹

The underlying enumerated offenses are: sexual battery; incest; lewd or lascivious offenses with a person under 16; assault; aggravated assault; battery; aggravated battery; child abuse; aggravated child abuse; abuse of an elderly person or disabled adult; sexual performance by a person under 18; and sex work.⁸² All related attempt crimes are also included (e.g., attempt to commit sexual battery; attempt to commit incest).⁸³ “Body fluid” under this statute has not been defined or interpreted by any court. Consent of the victim is a defense under this statute if the victim knew that “the offender was infected with HIV, knew that the action being taken could result in transmission of the HIV infection, and consented to the action voluntarily with that knowledge.”

This statute does not require the intent to transmit HIV, the actual transmission of HIV, or even behavior that could transmit the virus. As specifically stated by the statute, actual transmission of HIV is not required to violate this offense.⁸⁴ Moreover, use of condoms or ART to reduce transmission risk is not taken into account by the statute. Further, while the transmission of “body fluids” is required to trigger mandatory HIV testing after the first offense, the statute does not state, nor has a court determined, whether the subsequent offense requires the transmission of body fluids.

Transmission Risk

To the extent the statute broadly includes the transmission of “body fluids,” it criminalizes the transmission of fluids such as sweat, saliva, tears, urine, and feces that cannot transmit HIV.⁸⁵

Even for fluids that can transmit the virus during “sexual intercourse,” the average risk of transmission is low (Table 2 above). As explained above, the risk is further reduced by the use of ART and condoms.

Enforcement

Between the time the statute was passed in 1993 and the end of 2013, there were 25 convictions under this statute in Florida.⁸⁶ We found no convictions for this crime between 2013 and 2017, the last year of CHRI data we collected. The CHRI data do not allow us to determine what the original or subsequent underlying charges were in these cases.

⁸⁰ FLA. STAT. ANN. § 775.0877(3), (5) (Nothing in this section requires that an HIV infection have occurred in order for an offender to have committed criminal transmission of HIV)

⁸¹ FLA. STAT. ANN. § 775.0877(3)

⁸² FLA. STAT. ANN. § 775.0877(1).

⁸³ *Id.*

⁸⁴ FLA. STAT. ANN. § 775.0877(5).

⁸⁵ U.S. Centers for Disease Control & Prevention, *HIV and STD Criminal Laws*, CDC.gov (Jul. 1, 2019), <https://www.cdc.gov/hiv/policies/law/states/exposure.html>; 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 (2014), available at <https://doi.org/10.1007/s10461-014-0724-0>.

⁸⁶ These “convictions” include 24 instances in which the defendant pled guilty or was convicted by a judge or jury and 1 adjudication withheld.

SUMMARY

From 1986 through the end of 2017, there were 250 convictions under Florida's HIV criminal laws—approximately eight convictions per year. Of those, none required intent to transmit HIV as an element of the crime, and none required proof of actual transmission of HIV. Further, it is possible that some of these convictions were not based on behavior that could actually transmit the virus.

Florida's HIV criminal laws were passed in the late 1980s and early 1990s, when little about HIV was known and before effective medications were approved by the FDA. At that time, HIV was accurately seen as fatal for most people. We now know that people with HIV can achieve viral suppression and have life expectancies similar to those who do not have HIV. Additionally, we now know that those with undetectable viral loads cannot transmit the virus through sexual conduct.

THE IMPACT OF FLORIDA'S HIV CRIMINALIZATION LAWS ON PUBLIC HEALTH

While the continued enforcement of Florida's HIV-specific criminal laws does little to prevent HIV transmissions, these laws may undermine the state's public health efforts by: 1) deterring people from seeking HIV testing and treatment, 2) stigmatizing PWH, and 3) impacting vulnerable communities who are most at risk of HIV—the very communities that Florida seeks to engage in its fight against the epidemic.

HIV CRIMINAL LAWS MAY DETER TESTING, DISCLOSURE, AND OTHER HIV PREVENTION STRATEGIES

Rather than contributing to efforts to stop HIV transmissions, HIV criminalization laws may undermine HIV prevention strategies. Some research shows that HIV criminal laws have no public health benefits, while other studies suggest they have a negative impact. For example, some research, summarized below, suggests that HIV criminalization laws may discourage individuals from getting tested and knowing their HIV-status, since laws require knowledge of one's status in order to be convicted. This can undermine prevention efforts since those who do not know their status are more likely than those who do to transmit the virus and are estimated to account for one-third of all new transmissions.⁸⁷ One study found higher rates of PWH who don't know their positive status in states with laws criminalizing HIV exposure, suggesting that such laws may be disincentivizing testing among those most at risk.⁸⁸ Another study found that testing rates remained stable following enactment of an HIV criminal law,⁸⁹ but decreased following increased media coverage of HIV criminal exposure prosecutions.⁹⁰ While more systematic reviews have found that HIV criminalization laws have little impact on testing rates for people in general, they may lead those from the highest risk groups to avoid testing altogether, only to test anonymously, or to have more anonymous sexual encounters.⁹¹

Further, HIV criminalization laws may undermine HIV prevention strategies in other ways. Most studies have found that HIV criminal laws do not impact sexual risk behaviors for either PWH or

⁸⁷ Jacek Skarbinski et al., *Human Immunodeficiency Virus Transmission at Each Step of the Care Continuum in the United States*, 175 JAMA INTERNAL MED. 588 (2015), available at <https://doi.org/10.1001/jamainternmed.2014.8180>.

⁸⁸ Pratha Sah et al., *HIV Criminalization Exacerbates Subpar Diagnosis and Treatment Across the United States: Response to the 'Association of HIV Diagnosis Rates and Laws Criminalizing HIV Exposure in the United States'*, 31 AIDS 2437 (2017), available at <https://doi.org/10.1097/QAD.0000000000001636>.

⁸⁹ Patricia Sweeney et al., *Association of HIV Diagnosis Rates and Laws Criminalizing HIV Exposure in the United States*, 31 AIDS 1483-1488 (2017), available at <https://doi.org/10.1097/QAD.0000000000001501>.

⁹⁰ Sun Goo Lee, *Criminal Law and HIV Testing: Empirical Analysis of How At-Risk Individuals Respond to Law*, 14 YALE J. HEALTH POL'Y L. & ETHICS 194, iv (2014), available at <https://digitalcommons.law.yale.edu/yjhple/vol14/iss1/4/>.

⁹¹ Dini Harsono et al., *Criminalization of HIV Exposure: A Review of Empirical Studies in the United States*, 21 AIDS BEHAV. 27 (2017), available at <https://doi.org/10.1007/s10461-016-1540-5>; Patrick O'Byrne, Alyssa Bryan, and Marie Roy, *HIV Criminal Prosecutions and Public Health: An Examination of the Empirical Research*, 39 MED. HUMANIT. 85 (2013), available at <https://doi.org/10.1136/medhum-2013-010366>.

people who do not have HIV;⁹² a few have found that such laws increase sexual risk behaviors.⁹³ Similarly, rather than encouraging disclosure, HIV criminal laws may lead PWH to hide their status from sexual partners out of fear of criminal prosecution, including that a partner may later falsely claim they did not reveal their HIV-status.⁹⁴ Other studies suggest that such laws may also make PWH less likely to disclose their HIV status or risk behaviors to health care providers.⁹⁵ For HIV service providers, these laws can shift the focus from having open conversations and providing crucial prevention information toward discussions of legal, rather than health, consequences.⁹⁶ Finally, by criminalizing sex work, in particular, with much harsher penalties, HIV criminal laws may discourage sex workers from seeking health care services including testing and treatment (for fear of criminal liability) or from negotiating safer sex practices with clients (for fear of being picked up by law enforcement while having longer conversations with clients).⁹⁷

HIV CRIMINAL LAWS UNDERMINE PUBLIC HEALTH BY INCREASING HIV STIGMA

HIV criminal laws also undermine Florida's ability to combat HIV-disease by increasing stigma related to HIV. Florida's current five year plan for combating HIV in the state identifies HIV stigma as a key barrier to reaching the state's goals in combatting HIV including in testing,⁹⁸ treatment,⁹⁹ linking PWH

⁹² O'Byrne, *supra* note 91; Scott Burris et al., *Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial*, 39 ARIZ. STATE LAW J. 467 (2007), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=977274.

⁹³ Keith J. Hovath et al., *Men Who have Sex with Men Who Believe that Their State has a HIV Criminal Law Report Higher Condomless Anal Sex than Those Who are Unsure of the Law in Their State*, 21 AIDS BEHAV. 51 (2017), available at <https://doi.org/10.1007/s10461-016-1286-0>.

⁹⁴ Carol L. Galletly & Stephen D. Pinkerton, *Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV*, 10 AIDS BEHAV. 451 (2006), available at <https://doi.org/10.1007/s10461-006-9117-3>.

⁹⁵ O'Byrne, *supra* note 91; Eric Mykhalovskiy et al., *The Public Health Implications of Criminalizing HIV, Non-Disclosure, Exposure, and Transmission: Report of an International Workshop* (2014), available at <https://www.hivlawandpolicy.org/sites/default/files/Public%20Health%20Implications%20of%20Criminalizing%20HIV%20Non-Disclosure,%20Exposure%20and%20Transmission.pdf>.

⁹⁶ Eric Mykhalovskiy, *The Problem Of "Significant Risk": Exploring The Public Health Impact Of Criminalizing HIV Non-Disclosure*, 73 SOC. SCI. MED. 668 (2011), available at <https://doi.org/10.1016/j.socscimed.2011.06.051>.

⁹⁷ See, e.g., Sienna Baskin et al., *Criminal Laws on Sex Work and HIV Transmission: Mapping the Laws, Considering the Consequences*, 93 DENVER L. REV. 355 (2016); Margaret H. Wurth et al., *Condoms as Evidence of Prostitution in the United States and the Criminalization of Sex Work*, 16 J. INT. AIDS SOC. (2013), available at <https://doi.org/10.7448/IAS.16.1.18626>; CENTER FOR HIV LAW AND POLICY & NATIONAL LGBTQ TASK FORCE, *THE INTERSECTION OF SEX WORK AND HIV CRIMINALIZATION: AN ADVOCATE'S TOOLKIT* (2017), [https://www.hivlawandpolicy.org/sites/default/files/Sex Work HIV Toolkit FINAL R2_0.pdf](https://www.hivlawandpolicy.org/sites/default/files/Sex%20Work%20HIV%20Toolkit%20FINAL%20R2%200.pdf). In some states, possession of a condom is viewed as sufficient evidence of intent to solicit, discouraging the very behavior that would reduce HIV transmission risk. *Id.*

⁹⁸ FLORIDA DEPARTMENT OF HEALTH HIV/AIDS SECTION, STATE OF FLORIDA INTEGRATED HIV PREVENTION AND CARE PLAN 2017-2021, *supra* note 31 at 68 ("Strategy 1.1.C. Reduce stigma in communities and among providers around HIV testing to increase test acceptance and build social norms in high-risk populations to increase health care seeking behavior.").

⁹⁹ See e.g., *id.* at 75 ("Strategy 2.4.B. Increase understanding of viral suppression as a key health indicator Activities: 1) Expand the use of social marketing to educate clients on the importance of viral suppression and its effect on health outcomes 2) Conduct focus groups to determine the best ways to improve access to and use of treatment 3) Promote knowledge of the research detailing the benefits or value of PLWHs starting ART early 4) Develop strategies to address the stigma that prevents PLWHs from adhering to treatment.").

to care,¹⁰⁰ and retaining PWH in care.¹⁰¹ In 2014, 70% of HIV prevention providers in Florida agreed or strongly agreed with the following statement: “Our clients are reluctant to seek services due to stigma and/or fear of disclosing HIV status.”¹⁰²

HIV criminalization laws contribute to the stigmatization of PWH in a number of ways. First, they perpetuate inaccurate beliefs about how HIV is transmitted by criminalizing behavior that cannot transmit the virus. Further, by carrying significant criminal penalties, they convey that the consequences of the disease are much more severe, if not fatal, despite the reality that, for most today, HIV is managed much like other chronic health conditions.¹⁰³ In addition, these laws send the message that PWH are a threat even when engaged in consensual conduct that cannot transmit the virus. This undermines an important public health message created in the earliest days of the AIDS epidemic—that specific types of conduct, not certain types of people, transmit HIV.¹⁰⁴ The negative and inaccurate messages conveyed by these laws serve to reinforce discriminatory attitudes and behavior towards PWH; contribute to PWH having a negative self-image; and lead PWH to isolate themselves because they fear discrimination and harassment.¹⁰⁵ All of these are forms of stigma.¹⁰⁶

As indicated in Florida’s current strategic plan to fight the AIDS epidemic, HIV stigma can impact the behavior of “elected officials/legislators,” “primary care providers,” other “providers,” and the “communities” that surround PWH, leading to inadequate responses to the epidemic.¹⁰⁷ Further, as the research summarized above suggests, when PWH internalize the messages these laws send, they may avoid testing, accessing treatment and other prevention services, and disclosing their status to partners out of for fear of encountering stigma and discrimination.¹⁰⁸ As noted in the State of Florida Integrated HIV Prevention and Care Plan, 2017-2021:

Florida is made up of many diverse populations from a variety of racial and ethnic backgrounds. Certain populations such as MSM (particularly young MSM of color), transgender persons, persons who inject drugs, incarcerated populations, blacks, and

¹⁰⁰ See e.g., *id.* at 73, “Strategy 2.2.C. Reduce barriers to linkage (for example, stigma, structural issues, processes)”

¹⁰¹ See e.g., *id.* at 74, “Strategy 2.3.C. Reduce the barriers to retention in care (for example, stigma, structural issues, transportation, etc.)”

¹⁰² *Id.* at 60 (results from the 2014 Prevention Provider Survey in Florida).

¹⁰³ Matthew Weait, *HIV Stigma and the Criminal Law*, On Health, BIOMEDCENTRAL.COM (Dec. 1, 2016), <https://blogs.biomedcentral.com/on-health/2016/12/01/hiv-stigma-and-the-criminal-law/>; Baskin et al., *supra* note 97; Galletly & Pinkerton, *supra* note 94.

¹⁰⁴ Aziza Ahmed et al., *Criminalising Consensual Sexual Behaviour in the Context of HIV: Consequences, Evidence, and Leadership*, 6 GLOB. PUBLIC HEALTH S357 (2011), available at <https://doi.org/10.1080/17441692.2011.623136>; Weait, *supra* note 103; Galletly & Pinkerton, *supra* note 94.

¹⁰⁵ Ahmed et al., *supra* note 104; Sergio Rueda et al., *Examining the Associations Between HIV-Related Stigma and Health Outcomes in People Living With HIV/AIDS: A Series of Meta-Analyses*, 6 BMJ OPEN (2016), available at <https://doi.org/10.1136/bmjopen-2016-011453>.

¹⁰⁶ *Id.*

¹⁰⁷ FLORIDA DEPARTMENT OF HEALTH HIV/AIDS SECTION, STATE OF FLORIDA INTEGRATED HIV PREVENTION AND CARE PLAN 2017–2021, *supra* note 31 at 61, 60, 68, 76.

¹⁰⁸ Galletly and Pinkerton, *supra* note 94; Weait, *supra* note 103.

Hispanics continue to bear the highest burden of HIV disease.... Stigma, discrimination, and homophobia still persist and often prevent individuals from accessing routine HIV/STD screening, engaging and remaining in care, and disclosing their HIV status.¹⁰⁹

Finally, the link between HIV stigma and worse health outcomes for PWH is well documented. Stigma has been described as a “fundamental cause of health inequalities,” serving as a significant source of stress while imposing structural, social, material, and even economic disadvantage on those stigmatized, ultimately leading to poorer health.¹¹⁰ More specifically, higher rates of HIV stigma have been linked with depression, worse mental and physical health, more severe HIV symptomology, lower medication adherence, and lower social support.¹¹¹ By furthering HIV stigma, HIV criminalization laws increase the risk of these adverse outcomes, as well as PWH’s vulnerability to discrimination, harassment, and violence.¹¹²

FLORIDA’S HIV CRIMINAL LAWS HAVE A DISPROPORTIONATE IMPACT ON THE POPULATIONS THE STATE MUST ENGAGE TO FIGHT THE EPIDEMIC

For Florida’s HIV prevention efforts to be successful, the state’s public health and medical systems must engage people of color, women, LGBTQ communities, and sex workers. However, these are precisely the groups of people that are disproportionately impacted by the state’s HIV criminal laws. The risk is that the state’s criminal laws alienate these communities and individuals, as opposed to creating the cooperative environment needed to successfully combat HIV-disease.

People of Color and Women

Florida has the third highest HIV rate out of all states (22.1 cases per 100,000 people), over twice that of the national average. Miami and Ft. Lauderdale are among the U.S. cities with the highest HIV

¹⁰⁹ FLORIDA DEPARTMENT OF HEALTH HIV/AIDS SECTION, STATE OF FLORIDA INTEGRATED HIV PREVENTION AND CARE PLAN 2017–2021, *supra* note 31 at 65.

¹¹⁰ Mark L. Hatzenbuehler et al., *Stigma as a Fundamental Cause of Population Health Inequalities*, 103 AM. J. PUBLIC HEALTH 813 (2013), available at <https://doi.org/10.2105/AJPH.2012.301069>; Patrick W. Corrigan, *Structural Stigma in State Legislation*, 56 PSYCHIATR. SERV. 557 (2005), available at <https://doi.org/10.1176/appi.ps.56.5.557>; Jo C. Phelan et al., *Social Conditions as Fundamental Causes of Health Inequalities: Theory, Evidence, and Policy Implications*, 51 J. HEALTH SOC. BEHAV. S28 (2010), available at <https://www.jstor.org/stable/20798314>.

¹¹¹ Rueda, *supra* note 104; C. Logie & T.M. Gadalla, *Meta-Analysis of Health and Demographic Correlates of Stigma Towards People Living With HIV*, 21 AIDS CARE 742 (2009), available at <https://doi.org/10.1080/09540120802511877>; Bulent Turan et al., *How Does Stigma Affect People Living with HIV? The Mediating Roles of Internalized and Anticipated HIV Stigma in the Effects of Perceived Community Stigma on Health and Psychosocial Outcomes*, 21 AIDS BEHAV. 283 (2017), available at <https://doi.org/10.1007/s10461-016-1451-5>; Peter A. Vanable et al., *Impact of HIV-Related Stigma on Health Behaviors and Psychological Adjustment Among HIV-Positive Men and Women*, 10 AIDS BEHAV. 473 (2006), available at <https://doi.org/10.1007/s10461-006-9099-1>.

¹¹² Ahmed et al., *supra* note 104; Galletly and Pinkerton, *supra* note 94; Vanable et al., *supra* note 111; Weait, *supra* note 103.

rates.¹¹³ As of 2018, there were approximately 119,000 PWH in Florida, among whom the vast majority were people of color.¹¹⁴ Although Black people make up only 15% of the Florida population 39% of new infections among Floridians in 2018 were among Black people.¹¹⁵ Although Latinos represent only 25% of Florida's general population, 34% of new infections among Floridians in 2018 were among Latinos.¹¹⁶

Due to the concentration of the HIV epidemic among people of color in the state, one of the primary objectives in Florida's five year plan to combat HIV-disease is to "reduce HIV related health disparities and inequities" by reducing "the annual number of newly diagnosed HIV infections in Florida" for people of color, with specific objectives targeting Black and Latino populations.¹¹⁷ However, Florida's HIV criminalization laws undermine these efforts by disproportionately impacting people of color.

While data from Florida do not allow us to measure the impact of enforcement on Latinos, in Florida, 43% of all arrests for HIV crimes were among Black people. Further, Black adults were far more likely to be convicted of an HIV offense among those charged with an HIV crime. For example, 30% of Black men v. 22% of white men were convicted under the state's HIV exposure statute.¹¹⁸ In terms of sex work, over 60% of Black women, and 42% of Black men who were arrested for an HIV sex work offense were convicted under an HIV statute, compared with 36% of White women and 18% of White men.¹¹⁹ The evidence of the disproportionate impact of HIV criminal laws on people of color is consistent with analysis of data from other states conducted by the Williams Institute, including California.¹²⁰

Further, in Florida women were also disproportionately arrested for HIV-related offenses, largely related to sex work. Women made up 55% of those arrested for HIV offenses and 81% of all HIV sex work arrests,¹²¹ despite accounting for only 27% of all PWH statewide.¹²² Overall, White women accounted for only 4% of all PWH, yet accounted for 53% of all HIV sex work arrests. Similarly, Black

¹¹³ PowerPoint Presentation by Fla. Dep't of Health HIV/AIDS Section, *supra* note 28 at slides 9-10.

¹¹⁴ *Id.* at slide 12.

¹¹⁵ *Id.* at slide 37.

¹¹⁶ *Id.*

¹¹⁷ FLORIDA DEPARTMENT OF HEALTH HIV/AIDS SECTION, STATE OF FLORIDA INTEGRATED HIV PREVENTION AND CARE PLAN 2017-2021, *supra* note 31 at 66 (see Objective 3.1 – Black population, Objective 3.4 – Hispanic/Latino population).

¹¹⁸ *Id.*

¹¹⁹ AMIRA HASENBUSH, HIV CRIMINALIZATION IN FLORIDA: PENAL IMPLICATIONS FOR PEOPLE LIVING WITH HIV, WILLIAMS INSTITUTE (2018), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Criminalization-Florida-Oct-2018.pdf>.

¹²⁰ AMIRA HASENBUSH, HIV CRIMINALIZATION IN CALIFORNIA: PENAL IMPLICATIONS FOR PEOPLE LIVING WITH HIV, WILLIAMS INSTITUTE 17 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Criminalization-California-Updated-June-2016.pdf>. Statistical analyses of data related to HIV crimes in California have shown that Black men were more likely to be arrested for HIV-related offenses than their White counterparts: 17% of HIV-related arrests were of White males, while 22% of HIV-related arrests were of Black males. Additionally, both Black and White women were disproportionately represented in HIV-related arrests when compared to the general population living with HIV.

¹²¹ AMIRA HASENBUSH, HIV CRIMINALIZATION IN FLORIDA: PENAL IMPLICATIONS FOR PEOPLE LIVING WITH HIV, *supra* note 119 at 10.

¹²² *Women Living with an HIV Diagnosis in Florida*, 2018, FLORIDAHEALTH.GOV (Sep. 2019), http://www.floridahealth.gov/diseases-and-conditions/aids/surveillance/_documents/fact-sheet/Women2018.pdf.

women accounted for 28% of HIV sex work arrests, despite representing only 18% of Floridians living with HIV.¹²³

LGBTQ Communities

The HIV epidemic disproportionately impacts the LGBTQ community. As such, Florida has recognized the importance of working closely with LGBTQ communities to combat the disease. Yet, the enforcement of the HIV crime related to commercial sex work, in particular, is likely to disproportionately impact members of LGBTQ communities and undermine cooperative relationships needed to fight HIV.

Over 60,000 men who have sex with men (MSM) have HIV in Florida,¹²⁴ representing 59% of all new HIV diagnoses in 2018,¹²⁵ although GBT men make up only 4.7% of Florida’s adult male population.¹²⁶ While data on the prevalence of HIV among transgender people in Florida are sparse, one estimate holds that between 1,404 and 2,808 transgender adults have HIV, representing approximately 1.2% to 2.4% PWH in the states¹²⁷—double to quadruple the proportion of all adults in Florida who are transgender.¹²⁸

Over 60% of the convictions under Florida’s HIV crimes¹²⁹ are for the HIV crime focused on commercial sex work.¹³⁰ The scope of Florida’s prostitution laws¹³¹ includes survival sex work, such as sex work in exchange for housing or food. As a result, such statutes result in many of the most vulnerable groups being directly targeted for arrest and criminal penalties, including LGBTQ people and women of color. The criminalization of sex work is much more likely to impact LGBTQ populations, particularly LGBTQ

¹²³ AMIRA HASENBUSH, HIV CRIMINALIZATION IN FLORIDA: PENAL IMPLICATIONS FOR PEOPLE LIVING WITH HIV, *supra* note 119 at 10.

¹²⁴ PowerPoint Presentation by Fla. Dep’t of Health HIV/AIDS Section, *supra* note 28 at slide 67.

¹²⁵ *Persons Living with an HIV Diagnosis in Florida*, 2018, FLORIDAHEALTH.GOV (Sep. 2019), http://www.floridahealth.gov/diseases-and-conditions/aids/surveillance/_documents/fact-sheet/FloridaFactsheet_2018.pdf.

¹²⁶ Williams Institute, LGBT Demographic Data Interactive (2019), <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT&area=12#about-the-data>; WILLIAMS INSTITUTE, ADULT LGBT POPULATION IN THE UNITED STATES (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Population-Estimates-March-2019.pdf>.

¹²⁷ LIVING AT RISK: TRANSGENDER WOMEN, HIV, AND HUMAN RIGHTS IN SOUTH FLORIDA, HUMAN RIGHTS WATCH (2018). https://www.hrw.org/sites/default/files/report_pdf/ushiv1118_web2.pdf; PowerPoint Presentation by Fla. Dep’t of Health HIV/AIDS Section, *supra* note 28 at slide 12.

¹²⁸ JODY L. HERMAN, ET AL., AGE OF INDIVIDUALS WHO IDENTIFY AS TRANSGENDER IN THE UNITED STATES, WILLIAMS INSTITUTE (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/TransAgeReport.pdf>

¹²⁹ *Id.*

¹³⁰ FLA. STAT. ANN. § 796.08(5).

¹³¹ Under Florida law, prostitution is defined as “the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses.” FLA. STAT. ANN. § 796.07(1)(A).

youth and transgender adults.¹³² LGBTQ youth are overrepresented in the foster care system,¹³³ more likely to experience homelessness,¹³⁴ and report high levels of subsistence and survival sex.¹³⁵ In one study, among LGBTQ youth, young men were three times as likely as young women to have traded sex for a place to stay, and in general, LGBTQ youth were seven to eight times more likely than heterosexual youth to have done so.¹³⁶ Another study found that transgender youth in New York City were eight times more likely than their cisgender peers to trade sex for shelter.¹³⁷ Further, a national survey of youth in juvenile justice facilities found that LGB youth were much more likely than non-LGB youth to be in juvenile detention on prostitution-related offenses—about double the rate for girls and 10 times the rate for boys.¹³⁸

¹³² See, e.g. Zack Ford, *How LGBT People Would Benefit From The Decriminalization Of Sex Work*, THINKPROGRESS.ORG (Jul. 28, 2015), <https://thinkprogress.org/how-lgbt-people-would-benefit-from-the-decriminalization-of-sex-work-fbb53b44a103/> (“Transgender people and men who have sex with men also account for a significant proportion of sex workers in many states...”). The 2011 National Transgender Discrimination Survey found that 11 percent of respondents had done sex work for income at some point in their lives, compared to just 1 percent of women nationally. Trans people were more likely to have been involved in sex work if they had lost a job due to bias. Natn’t Center for Transgender Equality, *National Transgender Discrimination Survey* (2011). See also AMNESTY INTERNATIONAL POLICY ON STATE OBLIGATIONS TO RESPECT, PROTECT AND FULFILL THE HUMAN RIGHTS OF SEX WORKERS, AMNESTY INTERNATIONAL 5 (2016) (“Sex workers who are lesbian, gay, bisexual, transgender and/or intersex (LGBTI), or who are otherwise seen as transgressing gender or sexuality norms, face intersectional discrimination and marginalization.”).

¹³³ See BIANCA D.M. WILSON, KHUSH COOPER, ANGELIKI KASTANIS & SHELIA NEZHAD, *SEXUAL AND GENDER MINORITY YOUTH IN FOSTER CARE: ASSESSING DISPROPORTIONALITY AND DISPARITIES IN LOS ANGELES*, WILLIAMS INSTITUTE (2014), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS_report_final-aug-2014.pdf; Laura Baams, Bianca D.M. Wilson, Stephen T. Russell, *LGBTQ Youth in Unstable Housing and Foster Care*, 143 PEDIATRICS e20174211 (2019), available at <https://doi.org/10.1542/peds.2017-4211>.

¹³⁴ See SOON KYU CHOI, ET AL., *SERVING OUR YOUTH 2015: THE NEEDS AND EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING YOUTH EXPERIENCING HOMELESSNESS*, WILLIAMS INSTITUTE, TRUE COLORS FUND & THE PALETTE FUND (2015), <https://truecolorsfund.org/wp-content/uploads/2015/05/Serving-Our-Youth-June-2015.pdf>; John Ecker, *Queer, Young, and Homeless: A Review of the Literature*, 37 CHILD YOUTH SERV. 325 (2016), available at <https://doi.org/10.1080/0145935X.2016.1151781>.

¹³⁵ See MEREDITH DANK ET AL., *SURVIVING THE STREETS OF NEW YORK: EXPERIENCES OF LGBTQ YOUTH, YMSM, AND YWSW ENGAGED IN SURVIVAL SEX*, URBAN INSTITUTE (2015), <https://www.urban.org/sites/default/files/publication/42186/2000119-Surviving-the-Streets-of-New-York.pdf>; ANDREW CRAY, KATIE MILLER & LAURA E. DURSO, *THE EXPERIENCES AND UNMET NEEDS OF LGBT HOMELESS YOUTH*, CENTER FOR AMERICAN PROGRESS (2013), <https://www.americanprogress.org/wp-content/uploads/2013/09/LGBTHomelessYouth.pdf>; KERITH CONRON ET AL., *OUR HEALTH MATTERS: MENTAL HEALTH, RISK, AND RESILIENCE AMONG LGBTQ YOUTH OF COLOR WHO LIVE, WORK, OR PLAY IN BOSTON*, FENWAY INSTITUTE (2015), <https://fenwayhealth.org/wp-content/uploads/our-health-matters.pdf>; Robert Garofalo et al., *Overlooked, Misunderstood and At-risk: Exploring the Lives and HIV Risk of Ethnic Minority Male-to-Female Transgender Youth*, 38 J. ADOLESC. HEALTH 230 (2006), <https://doi.org/10.1016/j.jadohealth.2005.03.023>.

¹³⁶ LANCE FREEMAN & DARRICK HAMILTON, *A COUNT OF HOMELESS YOUTH IN NEW YORK CITY: 2007*, EMPIRE STATE COALITION OF YOUTH AND FAMILY SERVICES (2008).

¹³⁷ *Id.*

¹³⁸ WORLD HEALTH ORGANIZATION, *POLICY BRIEF: TRANSGENDER PEOPLE AND HIV* (2015), https://apps.who.int/iris/bitstream/handle/10665/179517/WHO_HIV_2015.17_eng.pdf.

In addition, transgender people, and transgender people of color in particular, are more likely to report being involved in sex work.¹³⁹ Transgender people face severe economic constraints due to family rejection, discrimination from educational institutions, and in the labor market, forcing some to resort to underground economies, including sex work, to survive.¹⁴⁰ For example, among respondents to a 2015 survey, over 30% of transgender Floridians reported having been fired, denied a promotion, or denied a job on the basis of their gender identity,¹⁴¹ and 22% reported being unemployed and 14% were homeless at the time of the survey.¹⁴² In the same survey, approximately 11% reported having engaged in sex work in their lifetime, including over 62% of Black transgender people and 41% of biracial transgender people.¹⁴³

These survey findings are consistent with those from another survey of transgender women in Miami-Dade and Broward Counties conducted by Human Rights Watch that found that 49% of the 125 transgender women surveyed had engaged in transactional sex in the past year; 38% of the 125 had been arrested for it.¹⁴⁴ Broward County notes the connection between limited economic opportunities, sex work, and fighting HIV, in its Integrated HIV Care and Prevention Plan for 2017-2020:

While many individuals living with HIV are able to be employed full-time, there are many others who have difficulty finding and maintaining full-time employment. Part-time and flexible employment do not provide a livable income and this complicates the ability to live in adequate housing. Individuals affected by the lack of employment opportunities also include women (who oftentimes have a need

¹³⁹ SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY, NATIONAL CENTER FOR TRANSGENDER EQUALITY, (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>; Jeffrey H. Herbst, *Estimating HIV Prevalence and Risk Behaviors of Transgender Persons in the United States: A Systematic Review*, 12 AIDS BEHAV. 1 (2008), available at <https://doi.org/10.1007/s10461-007-9299-3>; Don Operario et al., *Sex Work and HIV Status Among Transgender Women: Systematic Review and Meta-Analysis*. 48 J. ACQUIR. IMMUNE DEFIC. SYNDR. 97 (2008), available at <https://doi.org/10.1097/QAI.0b013e31816e3971>. Other laws also affect HIV vulnerability among transgender people. For example, most countries criminalize some or all aspects of sex work. “Sex work is a significant source of income for many transgender women around the world, given their exclusion from other means of income generation. In settings where sex work is illegal, transgender sex workers often bear the brunt of police brutality, and, when complaints against police brutality are lodged, they are often ignored.” WORLD HEALTH ORGANIZATION, UNDERSERVED. OVERPOLICED. INVISIBILIZED. LGBT SEX WORKERS DO MATTER (2015), http://www.sexworkeurope.org/sites/default/files/resource-pdfs/icrse_briefing_paper_october2015.pdf. In addition, a study about HIV and transgender people, commissioned by the World Health Organization, notes, “Sex work is a significant source of income for many transgender women around the world, given their exclusion from other means of income generation. In settings where sex work is illegal, transgender sex workers often bear the brunt of police brutality and, when complaints against police brutality are lodged, they are often ignored.” AMNESTY INTERNATIONAL, *supra* note 132 at 5 (“...whilst the majority of the world’s sex workers are cisgender women, when examined on a per capita basis a larger proportion of the transgender community is involved in sex work compared to the proportion of the population of who is transgender.”).

¹⁴⁰ James et al., *supra* note 139.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Unpublished analyses of US Transgender Survey conducted by Jody L. Herman at The Williams Institute, 2019.

¹⁴⁴ LIVING AT RISK: TRANSGENDER WOMEN, HIV, AND HUMAN RIGHTS IN SOUTH FLORIDA, *supra* note 127.

for affordable, quality childcare), individuals with criminal backgrounds, and individuals who are receiving disability benefits. For the transgender community, this is of particular concern and often members of the transgender community resort to sex work in order to afford their basic needs.¹⁴⁵

In the State of Florida Integrated HIV Prevention and Care Plan, 2017-2021, LGBTQ people are defined as an “at risk community” and a focus for HIV prevention and treatment efforts.¹⁴⁶ The Florida five-year strategic plan sets a goal of reducing the “annual number of newly diagnosed HIV infections” among MSMs.¹⁴⁷ Throughout the strategic plan, Florida calls for working collaboratively with LGBTQ communities in order to combat HIV disease, including by 1) maintaining representation from individuals in these groups, or agencies that work with them, in the state’s HIV prevention efforts; 2) conducting “community engagement activities, town halls, community forums, etc., to identify barriers to service access;” 3) promoting capacity building assistance to increase LGBT-specific providers; 4) conducting relevant cultural competency and cultural diversity training among all AIDS services providers in the state;¹⁴⁸ 5) expanding “the use of drop-in centers and safe spaces for gay, bisexual, other MSM, and transgender individuals, especially for youth and youth of color;” and 6) “strengthening community partnerships of traditional and non-traditional stakeholders.”¹⁴⁹ This cooperation includes several work and advisory groups that consist of members of the community and PWH, such as the Gay Men’s HIV/AIDS Workgroup, the Transgender Community Workgroup, and the Florida Latino AIDS Advisory Group (FLAAG).¹⁵⁰

¹⁴⁵ FLORIDA DEPARTMENT OF HEALTH HIV/AIDS SECTION, STATE OF FLORIDA INTEGRATED HIV PREVENTION AND CARE PLAN 2017–2021, *supra* note 31 at 168 (The criminalization of PWH for doing sex work, in particular transgender women of color, can make an already dangerous situation, even more risky.).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 66 (see Objective 3.2).

¹⁴⁸ *Id.* at 78-80 (see Strategy 3.1.B. “Ensure access to and availability of culturally-appropriate prevention activities”).

¹⁴⁹ *Id.* at 80 (see Strategy 3.2.C. “Reduce barriers to service access and address social determinants that increase risk”).

¹⁵⁰ *Id.* at 92, 416. In its 2017-2021 Integrated HIV Care and Treatment Plan, Tampa-St. Petersburg emphasizes the importance of collaboration with these communities:

Stakeholders and Partners Not Involved in the Planning Process: As stated above, local planning activities are guided by the Updated National HIV/AIDS Strategy and the HIV care continuum. The Updated National HIV/AIDS Strategy states the following: “HIV does not impact all Americans equally.” Looking at this statement from the local level, it still holds true. While anyone can become infected with HIV, the epidemic is concentrated in key populations. Of the groups where HIV is most concentrated, there are three who are not currently actively involved in HIV planning in the Tampa-St. Petersburg EMA. These stakeholders include youth aged 13 to 24 years, with a special emphasis on young gay and bisexual men of color; transgender women, with a special emphasis on Black transgender women; and people who inject drugs. Unique challenges for these three populations include social, economic, and cultural barriers that limit access to prevention and care. Stigma, misinformation about HIV and AIDS, low rates of condom usage, survival sex, and low rates of PrEP utilization are also contributing factors for their disproportionately higher rates of HIV infection ...The Area 5, 6, and 14 HIV Planning Partnership and the West Central Florida Ryan White Care Council will develop strategies to recruit and maintain members from all of these populations in order to develop strategies and interventions that will help improve the outcomes along the HIV care continuum.

While Florida has recognized that that cooperation with LGBTQ individuals and communities is necessary to combat the AIDS epidemic, this cooperation may be undermined by the enforcement of criminal laws that disproportionately stigmatize these very communities.

CONCLUSION

HIV is treatable, preventable, and harder to transmit than was thought in the early years of the epidemic. Further, the criminalization of HIV could be undermining the state's efforts to work cooperatively with the communities most impacted by the AIDS epidemic. The state's HIV criminal laws should be modernized to reflect what is known about HIV today and to conform to the state's current plans to combat HIV.¹⁵¹

¹⁵¹See Kenneth H. Mayer et al., *Addressing HIV Criminalization: Science Confronts Ignorance and Bias*, 21 J. INT. AIDS Soc. e25163 (2018), available at <https://doi.org/10.1002/jia2.25163>; Françoise Barré-Sinoussi et al., *Expert Consensus Statement on the Science of HIV in the Context of Criminal Law*, 21 J. INT. AIDS Soc. e25161 (2018), available at <https://doi.org/10.1002/jia2.25161>; Yang & Underhill, *Rethinking Criminalization*, *supra* note 5.

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