HIV Criminalization in Nevada: Evaluation of Transmission Risk

September 2020

Brad Sears
Luis A. Vasquez

TABLE OF CONTENTS

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, Nevada has two HIV-specific criminal statutes. Of these, neither requires actual transmission of HIV or the intent to transmit HIV. Both are broad enough to cover conduct that cannot, in fact, lead to transmission of the virus. Enacted between 1987 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 Nevada'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.

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

- Some studies suggest that laws criminalizing the conduct of PLWH 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 Nevadans 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.
- Nevada's HIV criminal laws impact the very populations that Nevada is trying to engage to combat HIV in the state, including people of color, women, youth, and LGBTQ people. For example, 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 Nevada currently seeks to engage in its statewide strategic plan to combat HIV.

There have been significant medical advances related to HIV since Nevada's HIV criminal laws were first passed. Modernizing these laws would support Nevada'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, Nevada has two HIV-specific criminal laws, which in turn criminalize three categories of conduct (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 Nevada (2020)

Code Section	Year Enacted	Criminalized Conduct	Felony/Misdemeanor and Statutory Sentence
Nev. Rev. Stat. § 201.358(1)(a)	1987	Engaging in a violation of Nev. Rev. Stat. § 201.354, which criminalizes prostitution and solicitation of same, after testing positive for exposure to HIV and receiving notice of one's result.	Category B felony, 2 to 10 years imprisonment, fine of no more than $10,000, or both fine and imprisonment.
Nev. Rev. Stat. § 201.358(1)(b)	1987	Working as a prostitute in a licensed house of prostitution after testing positive for exposure to HIV and receiving notice of one's result.	Category B felony, 2 to 10 years imprisonment, fine of no more than $10,000, or both fine and imprisonment.
Nev. Rev. Stat. § 201.205	1993	Intentionally, knowingly, or willfully engaging in conduct in a manner that is intended or likely to transmit HIV to another person.	Category B felony, 2 to 10 years imprisonment, fine of no more than $10,000, or both fine and imprisonment.

HIV TRANSMISSION, TREATMENT, AND PREVENTION

Nevada's HIV criminal statutes were enacted at a time when little was known about HIV and there was widespread fear of the disease. The first of Nevada's HIV statutes was enacted in 1987, just three years after the virus itself was identified as the cause of AIDS and two years after the first effective HIV test was developed.[1] 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 PLWH from public life.

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 PLWH 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.[2] 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.[3] The possibility of HIV transmission between adults outside the context of sexual activity, contaminated needles, and blood transfusion is essentially zero.[4]

HIV can be spread only if blood, semen, pre-seminal fluid, rectal fluids, vaginal fluids, or breast milk of a PLWH 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.[5] 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 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.[6] 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."[7] Further, when a PLWH has an undetectable viral load, the risk of transmission to an HIV-

[1] *A Timeline of HIV and AIDS*, HIV.GOV (2019), https://www.hiv.gov/hiv-basics/overview/history/hiv-and-aids-timeline.
[2] 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.
[3] *See, e.g.*, 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").
[4] *HIV Transmission*, CDC.GOV (Aug. 6, 2019), https://www.cdc.gov/hiv/basics/transmission.html.
[5] *See id.*; *HIV Risk Behaviors*, CDC.GOV (Nov. 13, 2019), https://www.cdc.gov/ hiv/risk/estimates/riskbehaviors.html.
[6] *Id.*
[7] *HIV Transmission*, *supra* note 4.

negative person decreases even more.[8] There have been *no* reported cases of transmission of the virus through sex with a PLWH who has a consistently undetectable viral load.[9]

TREATMENT

Both of Nevada'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—the same year that Nevada's first HIV criminal law was enacted.[10] AZT had very limited long-term effectiveness and caused significant side effects.[11] By the time Nevada passed its second 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.[12]

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.[13] 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 when medication is initiated early following HIV infection.[14] Soon after starting ART, the vast majority of PLWH reach an "undetectable" viral load.[15] ART usually involves

---

[8] U.S. CENTERS FOR DISEASE CONTROL & PREVENTION, *Effectiveness of Prevention Strategies to Reduce the Risk of Acquiring or Transmitting HIV*, CDC.GOV (Nov. 12, 2009), https://www.cdc.gov/hiv/risk/estimates/preventionstrategies.html (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.

[9] 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.

[10] 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.

[11] Keith Alcom, *Zidovudine (AZY, Retrovir)*, NAM AIDSMAP (2011), http://www.aidsmap.com/about-hiv/arv-background-information/zidovudine-azt-retrovir; 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.

[12] *Id.*

[13] Natn'l Inst. of Allergy & Infectious Diseases, *supra* note 10; 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; Natn'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.

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

[15] Natn'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; Natn'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 Scvs., *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.

only once-daily pills[16] and relatively infrequent checkups.[17] For most people, ART causes few side effects, if any, and those are generally well tolerated.[18] Developing resistance to ART is rare,[19] and switching to a different combination can once again suppress the virus to undetectable levels.[20] Those who sustain undetectable HIV levels because of ART can live a healthy life with a normal life expectancy.[21]

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.[22] 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.[23] The U.S. federal government has

---

[16] U.S. Dep't of Health and Human Scvs., *Guidelines for the Use of Antiretroviral Agents in Adults and Adolescents with HIV: Limitations to Treatment Safety and Efficacy*, *supra* note 15; Natn'l Inst. of Allergy & Infectious Diseases, *Starting and Staying on Antiretroviral Treatment*, *supra* note 13. 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.

[17] U.S. Dep't of Health and Human Scvs., *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 Scvs, *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-andadolescent-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 Scvs., *Guidelines for the Use of Antiretroviral Agents in Adults and Adolescents with HIV: Limitations to Treatment Safety and Efficacy*, *supra* note 15; 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.

[18] *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 Scvs., *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.

[19] 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 Scvs.,* Guidelines for the Use of Antiretroviral Agents in Adults and Adolescents with HIV: Limitations to Treatment Safety and Efficacy, *supra* note 15. 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.

[20] U.S. Dep't of Health and Human Svcs., *HIV Overview: FDA-Approved HIV Medicines*, *supra* note 13. Resistance to multiple drugs is increasingly uncommon, thus it is unlikely that a PLWH 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 Testing*, AIDSINFO.NIH.GOV, 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.

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

[22] *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; Natn'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.

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

recognized this principle as "firmly established" by "an overwhelming body of clinical evidence."[24] Today, 34% of all PLWH in Nevada currently have an undetectable viral load and therefore cannot transmit the virus through sex.[25]

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.[26] In June 2019, based on a thorough review of the data, the U.S. Preventive Services Task Force granted PrEP a Grade A rating for its effectiveness in preventing HIV.[27] In other words, PrEP is a standardized recommended medical practice.

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.[28] In one study of 100 individuals who took a PEP regimen following a higher-risk sexual exposure, no participant contracted HIV.[29] And in a study of individuals who reported needlestick injuries, PEP using AZT was shown to reduce the risk of HIV infection by 81%.[30] It is anticipated that the current protocol, the use of three drugs contemporaneously, would result in even greater protective efficacy.

---

[24] 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 22.

[25] *See* Nev. Dept't of Health and Hum. Svcs., *Continuum of Care (2017)*, http://endhivnevada.org/wp-content/uploads/2018/12/Report_Continuum-of-Care-NV-2017.pdf.

[26] 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 Svcs., *Pre-Exposure Prophylaxis (PrEP)* (Jan. 6, 2020) https://aidsinfo.nih.gov/understanding-hiv-aids/fact-sheets/20/85/pre-exposure-prophylaxis--prep-.

[27] 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.

[28] U.S. Centers for Disease Control & Prevention, *PEP*, CDC.GOV (Aug. 6, 2019), https://www.cdc.gov/hiv/basics/pep.html. *E.g.*, UCDavis Student Health & Counseling Svcs., Post-exposure Prophylaxis (PEP) for HIV, UCDAVIS.EDU, https://shcs.ucdavis.edu/topics/post-exposureprophylaxis-pep-hiv (last visited Sept. 8, 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.

[29] 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.

[30] 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.

Both PrEP and PEP are critical components of the state of Nevada's Integrated HIV Prevention and Care Plan 2017–2021, which lists among its top HIV prevention service needs, "awareness and access to PrEP and PEP"[.][31]

[31] INTEGRATED HIV PREVENTION AND CARE PLAN 2017–2021, OFFICE OF HIV/AIDS, NEVADA DIVISION OF PUBLIC AND BEHAVIORAL HEALTH 6 (2016), http://endhivnevada.org/wp-content/uploads/2020/01/Integrated-HIV-Prevention-and-Care-Plan-Final-9-29-16.pdf [hereinafter STATE INTEGRATED PLAN].

APPLICATION OF HIV SCIENCE TO NEVADA'S HIV CRIMES

This section applies what we know now about HIV and its prevention and treatment to each of Nevada's HIV criminal laws. As discussed above, since Nevada passed these 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.

PROSTITUTION AND RELATED CRIMES

Offenses

Pursuant to Nev. Rev. Stat. § 201.358(1)(a), a PLWH who knows they have HIV and violates Nev. Rev. Stat. 201.354, which criminalizes "prostitution or solicitation therefor," except in a "licensed house of prostitution[,]" is guilty of a category B felony. Such a felony is punishable by a term of imprisonment up to ten years.[32] Further, a person may be convicted and sentenced separately for a violation of this HIV crime and for the underlying crime of prostitution or solicitation of prostitution. In contrast to this felony, if a person is otherwise charged with a first offense of prostitution or solicitation in Nevada, including when they are infected with another STI, it is a misdemeanor punishable by up to six months' imprisonment and a $1,000 fine.[33] Similarly, convictions for second, third, and subsequent offenses for prostitution and solicitation are considered gross misdemeanors in Nevada, not felonies.[34]

Pursuant to Nev. Rev. Stat. § 201.358(1)(b), a PLWH who knows they have HIV and "works as a prostitute in a licensed house of prostitution" is similarly guilty of a category B felony. As with the crime contained within subsection (a), this felony is also punishable by a term of imprisonment up to ten years.[35]

Nevada law defines prostitution as "engaging in sexual conduct with another person in return for a fee, monetary consideration or other thing of value."[36] A prostitute is defined as someone "who for a fee, monetary consideration or other thing of value engages in sexual intercourse, oral-genital contact or any touching of the sexual organs or other intimate parts of a person for the purpose of arousing or gratifying the sexual desire of either person[,]" while sexual conduct is defined as any of the aforementioned acts included within the definition of "prostitute."[37] In short, the term "sexual conduct" is extremely broad, "allowing prosecutors to charge someone whenever there is conduct that is sexually gratifying to at least one of the people involved.

---

[32] NEV. REV. STAT. § 201.358(1).
[33] NEV. REV. STAT. § 201.354. Upon arrest for an alleged violation of this statute, individuals are required to submit to HIV testing. *See* NEV. REV. STAT. § 201.356. It is after receiving notice of a positive result for HIV exposure—either through this instance of testing required by section 201.356 or any other testing for HIV approved by the State Board of Health—that one becomes "eligible" for prosecution under section 201.358(a) upon violating section 201.354 in the future. *See* NEV. REV. STAT. § 201.358.
[34] NEV. REV. STAT. § 201.354(4)(b)–(c).
[35] NEV. REV. STAT. § 201.358(1).
[36] NEV. REV. STAT. § 201.295.
[37] *Id.*

That means that groping, fondling, and even light touching can be construed as 'sexual conduct' with regard to prostitution."[38]

Nev. Rev. Stat. § 201.358(1)(a) applies more broadly to the "solicitation of" prostitution. A person commits the crime of solicitation for prostitution "if the person offers, agrees, or arranges to provide sexual conduct for a fee."[39] An arrest for solicitation does not require that any sexual conduct take place or even be specified. In other words, "[i]n the case of a criminal solicitation, the speech—asking another to commit a crime—is the punishable act."[40] However, under Clark County regulations, not even speech is required for solicitation; merely a "gesture" indicating an offer is sufficient.[41] Further, it does not matter if the person actually *intended* to engage in prostitution; the crime of solicitation is complete as soon as the *act* of offering or agreeing to engage in prostitution is completed.[42] People are most often arrested for solicitation in Nevada when police officers observe someone having a conversation or are undercover and have the conversation with the person themselves.[43]

Neither subsection of this statute requires 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:

1. Solicitation. The solicitation of prostitution requires no sexual contact; rather, it is an offer, agreement, or arrangement 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 for a law enforcement officer to have directly observed sexual conduct while making an arrest for prostitution.

2. Sex acts, whether within or outside of licensed houses of prostitution, that have negligible risks of transmission of the virus. The language of this statute criminalizes oral sex, masturbation, and sex with

[38] *Prostitution or Solicitation*, NEV. DEF. GROUP, https://www.nevadadefensegroup.com/prostitution-or-solicitation/ (last visited Sept. 8, 2020).
[39] Glegola v. State, 871 P.2d 950, 952 (Nev. 1994).
[40] Ford v. State, 262 P.3d 1123, 1130 (Nev. 2011) (analyzing a separate statute criminalizing the pandering of prostitution—which the Nevada Supreme Court characterizes as a form of solicitation) (internal citations omitted).
[41] CLARK COUNTY CODE § 12.08.020 (1987) ("It is unlawful for any person to accost, solicit or invite another in any public place or in or from any building or vehicle by word, gesture, publication or any other means to commit, offer, agree to afford an opportunity to commit an act of prostitution.").
[42] *Glegola*, 871 P.2d at 952.
[43] NEV. DEFENSE GROUP, *supra* note 38.

> 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.[44] 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.

In 1987, when this statute was enacted, the first HIV test had been approved just two years prior,[45] and the first of the effective medical treatments for HIV was still almost a decade away.[46] 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%.[47] 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.[48] Today, 34% of all PLWH in Nevada have an undetectable viral load and cannot transmit the virus through sex.[49] However, Nevada 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).[50] Table 2 does not include acts that carry even less risk of transmission, such as sharing sex toys.[51]

---

[44] U.S. Centers for Disease Control & Prevention, *HIV Risk Reduction Tool: Oral Sex*, CDC.GOV https://wwwn.cdc.gov/hivrisk/transmit/activities/oral_sex.html (last visited Sept. 8, 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 Sept. 8, 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.").

[45] 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.

[46] 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.

[47] U.S. Centers for Disease Control & Prevention, *Effectiveness of Prevention Strategies to Reduce the Risk of Acquiring or Transmitting HIV*, *supra* note 8.

[48] 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 22.

[49] Nev. Dep't of Health and Hum. Svcs., *supra* note 25.

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

[51] *Id.*

Table 2. Average Per-Act Transmission Risk Per Sex Act (without Condom Use and without Treatment)[52]

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, Nevada law criminalizes sexual conduct that is extremely unlikely to transmit the virus. Moreover, the statute criminalizes actions, such as solicitation of prostitution, that involve no sexual conduct and therefore could not ever transmit the virus.

[52] *Id.*

INTENTIONAL TRANSMISSION OF HIV

Offense

Pursuant to Nev. Rev. Stat. § 201.205, it is unlawful for a PLWH who knows their status to "intentionally, knowingly or willfully engage[] in conduct in a manner that is intended or likely to transmit the disease to another person." Violation of this statute is a Category B felony punishable by a term of imprisonment up to ten years.[53] This HIV crime does not require that transmission of HIV actually occur, or one's specific intent to transmit HIV. In addition, the statute's broad language criminalizes behavior with very low risk of transmitting the virus, including oral sex and needle sharing.

Transmission Risk

To the extent that the purpose of this statute is to criminalize sexual conduct in particular, such conduct carries a low to negligible risk of transmission, and the risk is further reduced by the use of ART and/or condoms, as explained above.[54] This statute was passed in 1993 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.

Additionally, to the extent that enforcement of the statute's broad prohibition against "conduct in a manner that is intended or likely to transmit the disease to another person" has and could continue to include prosecution over biting, spitting, and other non-sexual transmissions of bodily fluids, this law criminalizes the transmission of fluids such as sweat, saliva, tears, urine, and feces that cannot transmit HIV.[55]

Similarly, to the extent that this statute's broad prohibition criminalizes needle sharing by PLWH, the law criminalizes behavior with a lower risk of transmitting the virus than originally understood, in particular for those taking ART.

Sharing needles during injection drug use with no other precautions carries an HIV transmission risk of 0.63%. This does not take into consideration consistent use of PrEP (approximately 74-84% reduction in risk for people

---

[53] NEV. REV. STAT. § 201.205.

[54] *CENTERS FOR DISEASE CONTROL & PREVENTION,* Effectiveness of Prevention Strategies to Reduce the Risk of Acquiring or Transmitting HIV, *supra* note 8.

[55] 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.

who inject drugs)[56] or ART.[57] While the reduction in risk for those who are on ART and have achieved undetectable viral loads has not been quantified, "based on the available indirect data, the risk of HIV transmission between intravenous drug users is thought to be markedly reduced if the HIV-infected person is on effective ART."[58] Three recent studies, published since 2017, show even more promising evidence that adherence to ART and achieving viral suppression reduces the risk of HIV transmission for intravenous drug users.[59]

---

[56] U.S. Centers for Disease Control & Prevention*, Effectiveness of Prevention Strategies to Reduce the Risk of Acquiring or Transmitting HIV*, *supra* note 11; Kachit Choopanya et al., *Antiretroviral Prophylaxis for HIV Infection in Injecting Drug Users in Bangkok, Thailand* (the Bangkok Tenofovir Study): a Randomized, Double-Blind, Placebo-Controlled Phase 3 Trial, 381 Lancet 2083 (2013) (finding that PrEP can reduce HIV transmission in injecting drug users; "an adherence- based analysis, limited to participants coming daily who met adherence criteria (i.e., took study drug 71% of days with no more than 2 consecutive days off study drug) during a 2–3 month period before incident HIV infections occurred, showed a 55.9% (95% CI, 18.8 to 86.0; P 1⁄4 0.11) reduction in HIV risk associated with PrEP. Thus, using Cox regression to analyze adherence data from all participants, we found that as adherence improved, the effectiveness of PrEP increased; from 48.9% overall to 58.0% for participants with at least 75% adherence, and to 83.5% for those with at least 97.5% adherence.").

[57] U.S. Centers for Disease Control & Prevention, *HIV Risk Behaviors*, *supra* note 8. *See also* France Lert and Michel D. Kazatchkine, *Antiretroviral HIV Treatment and Care for Injecting Drug Users: An Evidence-Based Overview,* 18 Int. J. Drug Pol. 5 (2007), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2020510/ (describing the benefits injection drug users can gain from antiretroviral treatment and discussing factors that decrease efficacy).

[58] Jan Albert et al., *Risk of HIV Transmission from Patients on Antiretroviral Therapy: A Position Statement from the Public Health Agency of Sweden and the Swedish Reference Group for Antiretroviral Therapy*, 46 Scand. J. Infect. Dis. 673 (2014), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4196576/ **("**it is reasonable to assume that it provides some risk reduction"). U.S. Centers for Disease Control and Prevention, *Protecting Others*, CdC.GoV (Aug. 9, 2019), https://www.cdc. gov/hiv/basics/livingwithhiv/protecting-others.html ("We don't know whether getting and keeping an undetectable viral load prevents HIV transmission through sharing needles or other injection drug equipment. It very likely reduces the risk, but we don't know by how much."); U.S. Centers for Disease Control & Prevention, *HIV Treatment as Prevention*, *supra* note 26 (In their estimation of risk of transmission w/undetectable viral load, CDC further quantifies risk for those who share syringes/other drug equipment as "unknown, but likely reduced risk").

[59] Daniel J. Escudero et al., *The Risk of HIV Transmission at Each Step of the HIV Care Continuum among People Who Inject Drugs: A Modeling Study*, 17 BWC Public Health 614 (2017) (Estimated that those with suppressed viral load contributed the lowest amount of transmission among new cases among PWID in 2012: "Despite accounting for only 33% of the HIV-infected PWID population, the Undiagnosed were associated with 52.6% (95% simulation interval [95% SI]: 47.1– 57.0%) of total transmission events. The Diagnosed − not on ART population contributed the second-largest proportion of HIV transmissions, with 36.6% (95% SI: 32.2–41.5%). The Unsuppressed population contributed 8.7% (95% SI: 5.6–11. 8%), and Suppressed 2.1% (95% SI: 1.1–3.9%), relatively little of overall transmission."); Bodhan Nosyk et al., *The Relative Impacts of Antiretroviral Therapy and Harm Reduction Intiatives on HIV Incidence in British Columbia, Canada, 1996-2013: A Modeling Study*, 4 Lancet HIV e303 (Finding that ART, in conjunction with harm reduction, averted 3204 HIV incident cases over study period, with simulation estimates finding that ~1,409 were averted due to ART: "ART alone would have reduced HIV incidence by 44% (10% – 67%) as a result of prevention of HIV transmission through needle sharing;" and "we emphasize that our results were based on an assumed, and likely conservative estimate of 50% efficacy of ART in reducing HIV transmission through needle sharing. If the true efficacy of ART in preventing HIV transmission through needle sharing is closer to its efficacy in sexual transmission, ART's impact on incident cases averted may be greater than that of harm reduction services."); Press Release, Natn'l Inst. of Health, *Novel Intervention Halves Rate of Death among People Living with HIV Who Inject Drugs* (Aug. 31, 2018), *available at* https://www.nih.gov/news-events/news-releases/novel- intervention-halves-rate-death-among-people-living-hiv-who-inject-drugs ("The HPTN 074 study was not designed to determine whether the intervention would reduce the rate of HIV infection among injection partners of the participants living with HIV, but rather to determine the feasibility of a larger study that could measure this effect. In HPTN 074, seven injection partners of participants living with HIV who received only the standard of care became infected, while no injection partners of participants living with HIV who received the study intervention became infected. This result is promising, according to the investigators, but because the overall HIV incidence among injection partners was so low, a larger clinical trial to test the effect of the study intervention on HIV transmission among injection drug users would not be feasible.").

SUMMARY

Nevada'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 NEVADA'S HIV CRIMINALIZATION LAWS ON PUBLIC HEALTH

While the continued enforcement of Nevada'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 PLWH, and 3) impacting vulnerable communities who are most at risk of HIV—the very communities that Nevada 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.[60] One study found higher rates of PLWH 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.[61] Another study found that testing rates remained stable following enactment of an HIV criminal law,[62] but decreased following increased media coverage of HIV criminal exposure prosecutions.[63] 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.[64]

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 PLWH or people who do not have

---

[60] 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.

[61] 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.

[62] 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.

[63] 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/.

[64] 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.

HIV;[65] a few have found that such laws actually *increase* sexual risk behaviors.[66] Similarly, rather than encouraging disclosure, HIV criminal laws may lead PLWH 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.[67] Other studies suggest that such laws may also make PLWH less likely to disclose their HIV status or risk behaviors to health care providers.[68] 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.[69] 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 to negotiate those practices).[70]

HIV CRIMINAL LAWS UNDERMINE PUBLIC HEALTH BY INCREASING HIV STIGMA

HIV criminal laws also undermine Nevada's ability to combat HIV-disease by increasing stigma related to HIV. Nevada'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 prevention,[71] testing,[72] treatment,[73] and linking and retaining PLWH in care.[74] Cited within that plan, the SCSN Client Survey (2015–2016) completed by 177 Nevadans living

---

[65] O'Byrne, *supra* note 64; 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.

[66] 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.

[67] 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.

[68] O'Byrne, *supra* note 64; ERIC MYKHALOVSKIY ET AL., THE PUBLIC HEALTH IMPLICATIONS OF CRIMINALIZING HIV, NON-DISCLOSURE, EXPOSURE, AND TRANSMISSION: REPORT OF AN INTERNATIONAL WORKSHOP (2014), https://www.hivlawandpolicy.org/sites/default/files/Public%20Health%20Implications%20of%20Criminalizing%20HIV%20Non-Disclosure,%20Exposure%20and%20Transmission.pdf.

[69] 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.

[70] *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. 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.*

[71] STATE INTEGRATED PLAN, *supra* note 31, at 6 ("Top HIV prevention service needs identified . . . include . . . reduction of stigma . . . .).

[72] *Id.* at 55, 67 (noting "[o]ngoing stigma and fear related to HIV and HIV testing" and that "[a]ddressing stigma that is a barrier to people to get tested for HIV is a large challenge that is not easily solved.").

[73] *Id.* at 60 (characterizing "[s]tigma related to HIV as a "structural and social barrier" to HIV care services).

[74] *Id.* at 92–93 (noting that "stigma can prevent [PLWH] in underserved populations and high-risk groups from accessing and staying in care").

with HIV found that fear, stigma, and stereotypes associated with HIV were one of the most frequently-mentioned reasons why some PLWH were not in care.[75]

HIV criminalization laws contribute to the stigmatization of PLWH 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.[76] In addition, these laws send the message that PLWH 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.[77] The negative and inaccurate messages conveyed by these laws serve to reinforce discriminatory attitudes and behavior towards PLWH; contribute to PLWH having a negative self-image; and lead PLWH to isolate themselves because they fear discrimination and harassment.[78] All of these are forms of stigma.[79]

Further, as the research summarized above suggests, when PLWH 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.[80] As indicated in Nevada's current strategic plan to fight the AIDS epidemic:

> Stigma against people with HIV, against lesbian, gay, bisexual, transgender, and questioning (LGBTQ) individuals, and against injection drug users are present in Nevada. In communities of color, the stigma can be even more pronounced, often discouraging individuals from knowing their status and seeking treatment.[81]
>
> . . .
>
> Many HIV infected individuals in priority populations experience multiple layers of stigma, and some may have had negative experiences or poor treatment from workers in the HIV or other social service care system that they attribute to this stigma. Such first-hand experiences or even just hearing second-hand about the experiences of others may cause people to avoid seeking services and getting into and staying in care.[82]

---

[75] *Id.* at 138.
[76] Matthew Weait, *HIV Stigma and the Criminal Law,* On Health, BIOMEDCENTERAL.COM (Dec. 1, 2016), https://blogs.biomedcentral.com/on-health/2016/12/01/hiv-stigma-and-the-criminal-law/; Baskin et al., *supra* note 70*;* Galletly & Pinkerton, *supra* note 67.
[77] 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 76; Galletly & Pinkerton, *supra* note 67.
[78] Ahmed et al., *supra* note 77*;* 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.
[79] *Id.*
[80] Galletly and Pinkerton, *supra* note 67; Weait, *supra* note 76.
[81] STATE INTEGRATED PLAN, *supra* note 31, at 58.
[82] *Id.* at 92.

Finally, the link between HIV stigma and worse health outcomes for PLWH 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.[83] 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.[84] By furthering HIV stigma, HIV criminalization laws increase the risk of these adverse outcomes, as well as PLWH's vulnerability to discrimination, harassment, and violence.[85]

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

For Nevada'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

As of 2019, there were approximately 11,769 PLWH in Nevada, among whom the majority were people of color.[86] Although Black people make up only 10.3% of the Nevada population,[87] 34.2% of new infections among Nevadans in 2019 were among Black people.[88]

Due to the concentration of the HIV epidemic among people of color in the state, Nevada's five year plan to combat HIV-disease makes clear that, "[a]cross all priority populations, efforts will continue to emphasize minority populations disproportionately affect by HIV."[89] In addition, the plan notes that "[l]arge racial/ethnic disparities exist within Nevada, especially among Blacks/African Americans. In 2014, the rate of new HIV

---

[83] 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.

[84] Rueda, *supra* note 77*;* 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.

[85] Ahmed et al., *supra* note 77; Galletly and Pinkerton, *supra* note 67; Vanable et al., *supra* note 84; Weait, *supra* note 76.

[86] OFFICE OF HIV/AIDS, NEVADA DIVISION OF PUBLIC AND BEHAVIORAL HEALTH, NEVADA 2019 HIV FAST FACTS 6 (2020) http://dpbh.nv.gov/uploadedFiles/dpbh.nv.gov/content/Programs/HIV-OPHIE/dta/Publications/Nevada-2019-HIV-Fast-Facts.pdf.

[87] U.S. Census Bureau, QuickFacts Nevada, https://www.census.gov/quickfacts/NV (last visited Sept. 8, 2020).

[88] OFFICE OF HIV/AIDS, NEVADA DIVISION OF PUBLIC AND BEHAVIORAL HEALTH, supra note 86, at 4.

[89] STATE INTEGRATED PLAN, *supra* note 31, at 31.

diagnoses among Blacks was over four times that of Whites (43.6 vs. 10.5 per 100,000 population).). . . . Among females, the rate of new diagnoses was 8.4 times higher for Black females than White females."[90] However, Nevada's HIV criminalization laws likely undermine these efforts by disproportionately impacting people of color and women, as suggested by past analyses conducted by the Williams Institute of data from states criminalizing HIV where enforcement data are available, including California.[91]

LGBTQ Communities

The HIV epidemic disproportionately impacts the LGBTQ community. As such, Nevada 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.

An estimated 7,518 men who have sex with men (MSM) have HIV in Nevada,[92] representing 61.3% of all new HIV diagnoses in 2019,[93] although GBT men make up only 5.1% of Nevada's adult male population.[94] While data on the prevalence of HIV among transgender people in Nevada are sparse, one estimate cited in the state's plan found that 127 of the 9,733 adult PLWH in Nevada in 2014 were transgender, representing approximately 1.3% of PLWH in the state[95]—over double the proportion of all adults in Nevada who are transgender.[96]

The scope of Nevada's prostitution laws 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 youth and transgender adults.[97] LGBTQ youth are

---

[90] *Id.* at 5, 25.

[91] 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.

[92] OFFICE OF HIV/AIDS, NEVADA DIVISION OF PUBLIC AND BEHAVIORAL HEALTH, supra note 86, at 6.

[93] *Id.* at 4.

[94] Williams Institute, LGBT Demographic Data Interactive (2019), https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT&area=12#about-the-data; KERITH J. CONRON & SHOSHANA K. GOLDBERG, WILLIAMS INST., ADULT LGBT POPULATION IN THE UNITED STATES 2 (2020), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Adult-US-Pop-Jul-2020.pdf.

[95] STATE INTEGRATED PLAN, *supra* note 31, at 24.

[96] 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.

[97] *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

overrepresented in the foster care system,[98] more likely to experience homelessness,[99] and report high levels of subsistence and survival sex.[100] 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.[101] Another study found that transgender youth in New York City were eight times more likely than their cisgender peers to trade sex for shelter.[102] 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.[103]

In addition, transgender people, and transgender people of color in particular, are more likely to report being involved in sex work.[104] Transgender people face severe economic constraints due to family rejection,

---

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.").

[98] *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.

[99] *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.

[100] *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.

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

[102] *Id.*

[103] 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.

[104] 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-

discrimination from educational institutions, and in the labor market, forcing some to resort to underground economies, including sex work, to survive.[105] For example, among respondents to a 2015 survey, over 30% of transgender people reported having been fired, denied a promotion, or denied a job on the basis of their gender identity.[106] In the same survey, approximately 11% of respondents reported having engaged in sex work in their lifetime, including over 62% of Black transgender people and 41% of biracial transgender people.[107]

In the *State of Nevada Integrated HIV Prevention and Care Plan, 2017-2021,* primary goals include reducing HIV-related disparities and new diagnoses "among Nevada's priority populations."[108] Identified among those populations are MSMs,[109] which would include GBT men. The first specific strategy listed under that goal is to "[e]ngage the community in order to find out how to best reach priority populations."[110] Specific ideas for that engagement include community education programs, community listening sessions, peer-to-peer education programs, "peer navigator" programs, "[p]artnerships with trusted organizations, community leaders, and agencies serving priority groups," training more members of priority populations to become service provides for their communities, and deploying "social network strategies."[111]

While Nevada 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.[112]

---

pdfs/icrse_briefing_paper_october2015.pdf.

AMNESTY INTERNATIONAL, *supra* note 97 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.").

[105] James et al., *supra* note 104.

[106] *Id.* at 13.

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

[108] STATE INTEGRATED PLAN, *supra* note 31, at 9.

[109] *Id.* at 31.

[110] *Id.* at 61.

[111] *Id.* at 88–97.

[112] *See* 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 2.

AUTHORS

Brad Sears, JD, Associate Dean of Public Interest at UCLA School of Law & David Sanders Distinguished Scholar of Law and Policy at the Williams Institute

Luis A. Vasquez, JD, Daniel H. Renberg Law Fellow at the Williams Institute

ACKNOWLEDGMENTS

This project was supported by Gilead Sciences, Inc. We would also like to thank Christy Mallory from the Williams Institute, Dr. Kenneth Mayer from the Fenway Institute, Fenway Health, Boston and of the Harvard T.H. Chan School of Public Health, Department of Global Health and Population, Catherine Hanssens and Jada Hicks from the Center for HIV Law and Policy, and Dr. Sheila Salvant Valentine of the Legal Assessment Project of the Office of Policy and Planning, DHAP/NCHHSTP/CDC for their review and feedback on drafts earlier drafts of the sections of this paper summarizing the medical and scientific literature related to HIV.

STATEMENT OF INDEPENDENCE

The Williams Institute is committed to the highest standard of independent inquiry, academic excellence, and rigor. Research findings and conclusions are never altered to accommodate other interests, including those of funders, other organizations, or government bodies and officials.

SUGGESTED CITATION

Sears, B. and Vasquez, L.A. (2020). HIV Criminalization in Nevada: Evaluation of Transmission Risk. Los Angeles, CA: The Williams Institute.